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

I. Introductions

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

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

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

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

Miami and clerked for Judge Fay and then-Justice Rehnquist. Judge Fay noted what a wonderful law clerk Mr. Colson had been.

During the meeting, Judge Sutton thanked Mr. McCabe, Mr. Rabiej, Mr. Ishida, Mr. Barr, and the AO staff for their expert work in preparing for the meeting. Judge Sutton also asked that the minutes reflect the warm toasts given – at the Committee's dinner – by Ms. Mahoney in honor of Justice Holland and by Mr. Bennett in honor of Dean McAllister.

II. Approval of Minutes of April 2010 Meeting

A motion was made and seconded to approve the minutes of the Committee's April 2010 meeting. The motion passed by voice vote without dissent.

III. Report on June 2010 Meeting of Standing Committee

Judge Sutton reported on the Standing Committee's June 2010 meeting. The Standing Committee gave final approval to the proposed amendments to Rules 4 and 40 that clarify the time to appeal or seek rehearing in cases where a United States officer or employee is a party. The amendments include two "safe harbors" that provide the longer appeal or rehearing periods when the United States represents the officer or employee at the time the relevant judgment is entered or when the United States files the appeal or petition for the officer or employee. The Appellate Rules Committee had considered adding a third safe harbor – for cases in which the United States does not represent the officer or employee but pays for his or her representation – but decided not to add that provision. The Standing Committee, after discussion, revised the Committee Notes to the proposals to provide – as an example of cases that fall within neither safe harbor but that qualify for the longer periods – individual-capacity suits in which the United States pays for private counsel for the officer or employee. The Standing Committee's approval of the proposed Rule 4 and 40 amendments is contingent on the coordinated adoption of a legislative amendment to 28 U.S.C. § 2107. Judge Rosenthal reported that the proposed amendment has been mentioned to legislators and staffers and was favorably received.

Judge Sutton noted that he also described to the Standing Committee the Appellate Rules Committee's consideration of possibilities for amending Appellate Rule 28's requirement that briefs contain a statement of the case. Members of the Standing Committee indicated that this issue is worth looking into.

IV. Other Information Items

Judge Sutton invited the Reporter to describe Chief Judge Rader's proposal, on behalf of the judges of the Federal Circuit, that 28 U.S.C. § 46(c) be amended. Chief Judge Rader has proposed that Section 46(c) be amended to include in an en banc court any senior circuit judge "who participated on the original panel, regardless of whether an opinion of the panel has

formally issued." The statute currently provides that a senior judge may participate in an en banc court that is "reviewing a decision of a panel of which such judge was a member."

Section 46 was originally adopted as part of the 1948 Judicial Code. The original provision defined the en banc court to include "all active judges of the circuit." In 1963, Congress amended the statute to provide that a circuit judge who had retired could sit on the en banc court "in the rehearing of a case ... if he sat ... at the original hearing thereof." But in 1978 Congress struck this sentence from the statute. In 1982, Congress again amended the statute; the 1982 amendments provided for large circuits to choose to sit en banc with fewer than all their active judges, and also added the current language concerning participation of senior judges in the en banc court. The history of the 1982 legislation suggests that its drafters were concerned that the 1978 amendments had had the unintended effect of motivating some judges to delay taking senior status in order to be able to sit with the en banc court rehearing an appeal for which the judge participated in the panel decision.

Chief Judge Rader has identified a circuit split between circuits that permit a senior judge to participate in the en banc court when it rehears an appeal on which the judge participated in the initial panel hearing only if a panel decision actually issued, and other circuits that permit such participation on the en banc court even if no panel decision formally issued prior to the rehearing en banc. Chief Judge Rader's letter does not specify which circuits fall on which side of this split. Judging from relevant local rules, circuits requiring a decision to have issued might include the Third, Fourth, Fifth, Eighth, Ninth, Eleventh, and Federal Circuits, while circuits that apparently do not require a decision to have issued include the Second, Sixth, Seventh, Tenth and D.C. Circuits, and perhaps the First Circuit.

An attorney member queried whether the Federal Circuit's proposed language – "participated on the original panel" – would address instances when a case is assigned to a panel but then the court of appeals decides to hear the case en banc as an initial matter. An appellate judge member observed that the current statute's reference to the en banc court "reviewing a decision of a panel of which such judge was a member" is inaccurate because, technically, the en banc court rehears the appeal rather than reviewing the panel decision. An attorney member asked how the statute should treat instances when the senior judge sat (while still an active judge) on a motions panel that resolved a motion in an appeal that later was reheard en banc. An example would be an instance where the now-senior judge participated (as an active judge) on a motions panel that decided a motion to dismiss the appeal for lack of appellate jurisdiction. By consensus, the Committee agreed that it would share the minutes of its discussion of the Federal Circuit's proposal with the Judicial Conference Committee on Court Administration and Case Management.

Judge Sutton invited the Reporter to describe to the Committee Judge Baylson's update concerning Item No. 08-AP-Q. This item concerns the possibility of allowing the use of digital audio recordings in place of written transcripts for purposes of the record on appeal. The Committee discussed this question at its April 2009 meeting, and decided by consensus to retain the suggestion on its study agenda. This summer, Judge Baylson forwarded to the Committee an opinion that he filed following a bench trial in a complex case concerning allegations of racial bias in school redistricting. The opinion points out that the post-trial briefing proceeded entirely

on the basis of digital audiorecordings, without any written transcript. Further filings in the case underscore the cost savings that can result from such an approach. But Judge Baylson's opinion points out that in the event of an appeal, the Appellate Rules have no provision permitting the use of the digital audiorecordings instead of a transcript. An attorney member asked how one would cite the trial record if no transcript existed. The Reporter responded that one could cite particular times in the recordings.

Judge Sutton noted that the Committee is monitoring circuit splits concerning the Appellate Rules. He mentioned the excellent work done by Heather Williams in searching for such circuit splits in the recent caselaw. Although the Committee's role is not necessarily to resolve all circuit splits concerning the Appellate Rules, there sometimes are instances when the Committee can identify a simple fix – for example, an amendment that can remove ambiguity in a Rule.

After lunch on the 7th, Judge Sutton invited Professor Coquillette and the Reporter to make a presentation concerning the Rules Enabling Act and the rulemaking process. The Reporter briefly summarized the history of the Rules Enabling Act ("REA"). Professor Stephen Burbank, she noted, has described the history of that legislation in his seminal article on the topic. The REA was the product of years of work towards a system of uniform rules of procedure for the federal district courts. As enacted in 1934, the REA authorized rulemaking for civil actions in the federal district courts, and allowed for the merger of law and equity practice. The Civil Rules, which took effect in 1938, accomplished that merger. As Professor Stephen Subrin has argued, the Civil Rules can be seen as adopting many of the features of federal equity practice. The Reporter noted that the REA has evolved over time. The original REA identified only two decisionmakers – the Court (which had the task of promulgating the Rules) and Congress (which had the opportunity to prevent the Rules from taking effect). The original REA said little about the procedure for the Rules' promulgation, requiring only that the Rules be reported to Congress and that they not take effect until after the expiration of a waiting period. In 1958, Congress added another layer to the process; legislation enacted in that year required the Judicial Conference of the United States to carry on a continuous study of the Rules' operation and effect, and to recommend periodically amendments to "promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay." In 1988, Congress amended the Enabling Act framework to formally mandate the roles of the Standing Committee and the Advisory Committees, and to increase the transparency and accessibility of the Rules Committees' activities. As initially adopted, the Civil Rules included only a small set of provisions – former Rules 72 to 76 – dealing with the topic of appeals. Work on the Appellate Rules began in the early 1960s, and those Rules took effect in 1968.

Professor Coquillette provided an erudite and illuminating overview of the history of local rulemaking in the federal courts. The First Circuit, he observed, adopted the earliest published set of local appellate rules, in the early nineteenth century. At the time, the Harvard Law School's faculty included Joseph Story and Simon Greenleaf. The latter was a pioneer in rulemaking. Greenleaf's theory of rulemaking, Professor Coquillette suggested, underpins the current efforts of the Rules Committees. Instead of ex post facto lawmaking, Greenleaf advocated prospective rulemaking. In 1638, Francis Bacon had said that one should make law

from the bottom up: that is, one should articulate prospective rules based on what the courts actually do, and then one should test the resulting rules to see how they work in practice. (Members noted that Professor Coquillette has authored a volume on Francis Bacon's legal philosophy.) The Rules Committees, Professor Coquillette observed, are doing what Bacon recommended in 1638 and Greenleaf did with local rules in the 1830s. Turning his attention to the 20th century, Professor Coquillette shared with the Committee a photograph taken of the Civil Rules Committee at a time when the Committee's Chair was Dean Acheson and its Reporter was Benjamin Kaplan. The work of the Committee received great deference in those days. The dynamics of the rulemaking process have changed since then. Congress is very interested in the rulemaking process, and sometimes it will act in ways that affect that process – either by delegating particular responsibilities to the rulemakers or by enacting legislation that circumvents the REA process. Judge Sutton expressed his appreciation of Professor Coquillette's and the Reporter's presentations.

V. Action Items

a. For publication

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

Judge Sutton invited Ms. Mahoney to introduce this item, which concerns interlocutory appeals from the Tax Court. The goal of the proposal is to amend the Appellate Rules to address this topic. In 1986, Congress enacted a statute, 26 U.S.C. § 7482(a)(2), authorizing interlocutory appeals from the Tax Court by permission. The Appellate Rules, however, were never amended to take account of this statute. Appellate Rule 5 would be the obvious candidate to govern court of appeals procedure in connection with such appeals, but Appellate Rule 14 provides that Appellate Rule 5 does not apply to the review of a Tax Court decision. The proposed amendments would make clear that Appellate Rule 5 governs appeals taken under Section 7482(a)(2). The Committee obtained helpful guidance on the proposals from the Tax Court and the DOJ. The Tax Court, in addition, suggested stylistic amendments to Appellate Rule 24(b) (concerning requests to proceed on appeal in forma pauperis) that would reflect more accurately the nature of the Tax Court as a court rather than an agency.

Ms. Mahoney noted that the Tax Court had reviewed the latest proposals and had suggested two changes to them. The first of those changes concerns proposed Rule 13(a)(4)(A)'s treatment of the procedures governing the record on appeal. The Tax Court points out that its practice is to obtain a transcript of each hearing and to forward that transcript to the court of appeals on request. Thus, the Appellate Rules' provisions concerning the ordering and preparation of the transcript do not seem like a perfect fit for appeals from the Tax Court. The Tax Court suggests commencing proposed Rule 13(a)(4)(A) "Except as otherwise provided under Tax Court rules for the transcript of proceedings, [etc.]." The Tax Court's second suggestion concerns the Committee Note to the proposed amendment to Appellate Rule 24(b); that Note refers to the Tax Court as a "legislative court." The Tax Court suggests deleting "legislative" and referring to the Tax Court simply as a "court." Ms. Mahoney proposed that the Committee adopt both these suggestions.

Judge Sutton noted that the Committee had obtained Professor Kimble's guidance on questions of style. Committee members agreed to adopt Professor Kimble's simplification of the language of proposed Appellate Rules 13(a)(4)(A) and (B) and proposed Appellate Rule 24(b). Committee members discussed carefully Professor Kimble's suggestion that the word "applicable" be deleted from Appellate Rule 14's phrase "References in any applicable rule." An attorney member stated that he favored retaining "applicable" in Rule 14, as a way of underscoring the point that not all of the Appellate Rules apply to appeals from the Tax Court. Two other attorney members and an appellate judge member agreed with this point, noting that the word "applicable" provides a useful alert for readers and that the Rule is clearer with "applicable" than without. For this reason, participants indicated, they viewed this choice as more than one of mere style.

A motion was made to approve for publication the proposed amendments to Appellate Rules 13, 14, and 24, with the Tax Court's changes to proposed Rule 13(a)(4)(A) and the Committee Note to proposed Rule 24, and with Professor Kimble's style changes to proposed Rules 13(a)(4)(A) and (B) and proposed Rule 24(b). The motion was seconded and passed by voice vote without opposition.

ii. Item No. 08-AP-D (FRAP 4(a)(4) – postjudgment motions)

Judge Sutton invited the Reporter to introduce this item, which grows out of Peder Batalden's observation that under Appellate Rule 4(a)(4)(B) the time to appeal from an amended judgment runs from the entry of the order disposing of the last remaining tolling motion. Mr. Batalden notes that in some cases there might be a delay between entry of the order disposing of the tolling motion and entry of the amended judgment that results from that disposition. One example would be an instance where the district court grants a motion for remittitur and gives the plaintiff a long period of time within which to decide whether to accept the remitted amount or to reject the remitted amount and proceed to a new trial. In such an instance, a would-be appellant would need to decide whether to file a protective notice of appeal within 30 days after entry of the order disposing of the tolling motion, or seek an extension of the appeal time from the district judge, or simply wait to file the notice of appeal until after the plaintiff accepts the remitted award. The attractiveness of this third option would depend on whether a separate document is required for the order granting the motion for remittitur.

The Civil / Appellate Subcommittee considered this conundrum and determined that the best way to address it would be to amend Rule 4(a)(4) so that the new appeal time runs from the latest of entry of the order disposing of the last remaining tolling motion or, if a motion's disposition results in alteration or amendment of the judgment, entry of any altered or amended judgment. The Civil / Appellate Subcommittee also considered a possible change to Civil Rule 58(a). Professor Kimble has provided style comments on the proposals. Judge Sutton suggested that the Committee should first discuss the merits of the Rule 4(a)(4) proposal's substance, before proceeding to discuss Professor Kimble's style comments and the Civil Rule 58 proposal.

An appellate judge member voiced support for the proposed amendment to Rule 4(a)(4). An attorney member questioned whether it would be desirable for the rule to use the phrase "if a

motion's disposition results in alteration or amendment of the judgment, entry of any altered or amended judgment." He suggested that there might be instances when a would-be appellant expects the motion's disposition to result in an altered judgment but no such judgment is ever entered. In such a case, the proposed amended rule might provide such a litigant with a false sense of security, and appeal rights might be lost through reliance on the prospect of an amended judgment that never materializes. The attorney member wondered whether it might be better to use the phrase "provides for" rather than the phrase "results in." A judge member wondered whether it would work to say, simply, "alters." The Reporter suggested that some dispositions of tolling motions will not themselves alter the judgment because any ensuing alteration of the judgment would be contingent on the occurrence of a future event.

The attorney member wondered what other types of fact patterns – beyond the remittitur example – would be affected by the proposed amendment. The Reporter suggested that one example could arise in connection with a request for complex injunctive relief. Suppose that the district court enters a judgment that includes an injunction. Suppose further that, in response to a timely tolling motion, the district court enters an order which grants the motion and directs the parties to attempt to agree on a proposed amended judgment embodying a less extensive grant of injunctive relief. And further suppose that it takes the parties longer than 30 days after the entry of the order to agree on the wording of the proposed amended judgment. A participant noted that this example would implicate Civil Rule 65. Another attorney member stated that he had encountered an example relating to attorney fees. Judgment was entered after a jury trial; subsequently, the judge ruled that there was a statutory entitlement to attorney fees (against a non-party attorney), fixed the amount of the fees, and awarded costs, but did not enter a judgment on a separate document or amend the existing judgment to memorialize these rulings. One of the litigants asked the court to set out the fee and cost rulings in a separate document; though more than 30 days elapsed since the issuance of the fee and cost opinion, the court did not act on the request for entry of a judgment on a separate document reflecting the fee and cost awards. The opposing party filed a notice of appeal from the fee and cost opinion, without awaiting the entry of a judgment on a separate document.

Turning to Professor Kimble's style suggestions, the Reporter noted her agreement with Professor Kimble's proposal that the phrase "or, if a motion's disposition results in alteration or amendment of the judgment, entry of any altered or amended judgment" be replaced with "or entry of any altered or amended judgment resulting from such a motion." Beyond this change, Professor Kimble has raised broader concerns with the structure of Rule 4(a)(4). Professor Kimble suggests that the Rule should be revised so that it first defines the term "motion," for purposes of Rule 4(a)(4), to refer to the motions currently listed in Rule 4(a)(4)(A)(i) - (vi). With that definition in place, the remainder of the rule can then refer simply to a "motion" rather than to a "motion listed in Rule 4(a)(4)(A)." Professor Kimble would also prefer to substitute bullet points for the small roman numerals (i) through (vi) in Rule 4(a)(4)(A). Professor Kimble notes that Rule 4(a)(4) is difficult to follow, and he proposes that the Committee consider the possibility of devising a flow chart to illustrate how the Rule works.

The Reporter stated that she sympathizes with Professor Kimble's concerns about Rule 4(a)(4). The basic structure of that Rule, though, remains the same as when it was re-styled in 1998. And the Reporter argued that defining "motion" for purposes of the Rule carries the risk

that a pro se litigant or a less careful lawyer might overlook the definition and simply read the Rule to give tolling effect to all sorts of motions. An attorney member asked whether it would be possible to use a shorthand term other than "motion" – perhaps "tolling motion" – to flag the fact that the reference is not to all motions. The Reporter responded that some courts have criticized the use of the term "tolling motion" because Rule 4(a)(4) re-starts the appeal period from scratch. "Tolling," as used in connection with statutes of limitations, typically refers to stopping the period and then providing only the remaining balance of the period when the time begins to run again.

Professor Coquillette noted that to the extent that Committee members disagree with a suggestion by Professor Kimble, the question will be whether the matter is one of style (in which case the Style Subcommittee has authority) or substance (in which case the substantive concern trumps matters of style).

Committee members voiced a preference for keeping the small roman numerals (i) through (vi) rather than substituting bullet points. It was observed that keeping the numerals facilitates references during oral argument. Committee members did not express enthusiasm for the idea of creating a flow chart to accompany Rule 4(a)(4).

The Committee members by voice vote tentatively approved the proposed amendment to Rule 4(a)(4) as shown in the agenda book memo, with the following style change: The phrase "or, if a motion's disposition results in alteration or amendment of the judgment, entry of any altered or amended judgment" was replaced with "or entry of any altered or amended judgment resulting from such a motion." Some members expressed interest in pursuing further the question whether "resulting from such a motion" is the appropriate choice or whether that language would create a false sense of security in instances where an amended judgment might – but ultimately does not – result from a motion's disposition. The Committee decided to re-visit the language of the proposed amendment the next morning.

The Reporter next summarized the genesis of the proposed amendment to Civil Rule 58(a). This proposal arose from the fact that certain Seventh Circuit cases have read "disposes" in Civil Rule 58(a) to mean "denies," and from the observation that there can be orders that grant a tolling motion without leading to an amended judgment. The proposal would amend Civil Rule 58(a) to state (in substance) that a separate document is not required when an order – without altering or amending the judgment – disposes of one of the listed types of motions.

A judge member predicted that if the Rule 4(a)(4) amendment is adopted, it is likely to render the Civil Rule 58(a) issue less pressing. This member agreed, however, with the suggestion that it might make sense to consult the authors of the relevant Seventh Circuit opinions for their views on the Civil Rule 58(a) question. Judge Sutton undertook to raise this possibility with Judge Kravitz. The Committee concluded its discussion of the proposed amendments to Appellate Rule 4(a)(4) and Civil Rule 58(a) on the first day of the meeting by resolving to revisit these proposals on the following day.

The Committee took these proposals up again on the morning of the 8th. The Reporter distributed copies of the proposed amendment to Rule 4(a)(4) as it was tentatively approved by

the Committee the day before, along with copies of a newer version of Professor Kimble's restyling of the proposal. This newer version, the Reporter observed, helpfully addresses some of the objections raised to the earlier restyling proposal.

Returning to the concern that the proposed Rule's reference to "resulting from such a motion" might create a false sense of security in instances where an amended judgment might – but ultimately does not – result from a motion's disposition, an attorney member conceded that he had had difficulty thinking of an instance in which this uncertainty would actually arise. Another attorney member noted that the Committee is concerned about the possibility that there could be an order that would trigger the time for appeal before the litigants know whether there will be an amended judgment or not. But, this member said, in most of the hypotheticals that she could think of, one may question whether the order in question actually "disposes of" the tolling motion. Suppose, for example, that a party moves for a new trial on the ground that the district court improperly excluded the testimony of the party's expert without holding a *Daubert* hearing, and the judge agrees to hold the *Daubert* hearing in order to determine whether the testimony was properly excluded and states that if it turns out that the testimony should have been admitted then a new trial will be granted. The member suggested that such an order would not really be an order *disposing of* the motion for a new trial because the grant of the new trial in that situation is conditional. Another example is a motion for additional findings under Civil Rule 52(b); the court could grant the motion for additional findings without immediately making the additional findings. Until the court makes the additional findings, it may be unclear whether an amended judgment will result. The member suggested that such an order, standing alone, has not truly disposed of the motion. Participants also noted the habit of some judges of stating that a motion is granted and that an opinion will follow. Usually the opinion follows within days, but not always. If the rulemakers amend Rule 4(a)(4) to provide the entry of an amended judgment as a new starting point for the appeal time, might a litigant be lulled into awaiting an amended judgment that might not come?

The Reporter observed that the question of how to interpret the phrase "disposing of" is a question that also could arise under existing Appellate Rule 4(a)(4) and Civil Rule 58(a). But, participants noted, the question links to the concern about the proposed amendment to Rule 4(a)(4) because in the instances where the judge's ruling on a tolling motion is conditional or tentative, it may be particularly likely that the parties will be unsure whether an amended judgment will result.

Participants considered the possibility of addressing these concerns by including language in the Committee Note to advise litigants that to the extent they have any doubt as to whether there will in future be an amended judgment, they should assume that there will not be such an amendment and they should assume that the earlier possible starting point for appeal time under the proposed Rule 4(a)(4) – namely, entry of the order disposing of the last remaining tolling motion – is the relevant starting point. A participant expressed support for adding such cautionary language. An attorney member wondered whether this advice in the Committee Note would adequately address the situation in which the district judge responds to a Civil Rule 52(b) motion by stating "motion granted, opinion to follow." It might turn out that the judge makes additional findings but does not alter the judgment. Some participants suggested that the number of cases in which this question arises may be relatively small.

Another attorney member wondered whether the rule should peg the newly-started appeal time to the entry of a "newly entered judgment" resulting from a tolling motion rather than to the entry of "any altered or amended judgment" resulting from such a motion. Using the term "newly entered judgment," he suggested, would permit the district judge to protect a party in the sort of Civil Rule 52(b) scenario noted above – where the district judge ultimately renders a new set of findings but does not alter the judgment – by re-entering the judgment. The Reporter observed that this approach would run counter to the caselaw holding that a district court cannot re-start appeal time by re-entering an unchanged judgment. A participant responded, though, that the proposed language would alter such caselaw only in the limited instance where the newly-entered judgment results from a timely tolling motion.

Judge Sutton observed that he had initially thought these questions might be addressed in the Committee Note without altering the text of the proposal. However, given that Committee members had expressed the wish to think more about both the text and the Note, he entertained a motion to withdraw the Committee's tentative approval of the Rule 4(a)(4) proposal in order to provide an opportunity to consider the proposal further. The motion was made and seconded and passed by voice vote without opposition.

VI. Discussion Items

a. Item No. 08-AP-G (substantive and stylistic changes to Form 4)

Judge Sutton provided an update on his inquiries concerning this item, which concerns the information currently requested by Form 4 from applicants seeking to proceed in forma pauperis on appeal. The current Form asks, among other things, whether the applicant has paid or will pay an attorney or other person for services in connection with the case and, if so, how much. Because the Supreme Court employs Form 4 in connection with i.f.p. requests by litigants before the Court, Committee members had expressed interest in learning whether the Supreme Court finds this information about payments to attorneys and others useful in evaluating i.f.p. requests. Judge Sutton reported that he spoke informally to the Supreme Court Clerk's Office, which could not think of any reason why all of this information was necessary. This input confirms that it is worthwhile to consider amending Form 4 to request less information on these topics. The Committee will have a concrete proposal to consider and vote on at the spring 2011 meeting.

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

Judge Sutton invited Mr. Letter to introduce this item, which concerns the doctrines that govern a litigant's attempt to "manufacture" a final judgment – in order to appeal the disposition of one or more claims – by dismissing the remaining claims in a case. Mr. Letter – along with Judge Bye and Ms. Mahoney – represents the Appellate Rules Committee on the Civil / Appellate Subcommittee, which has been considering this item. Mr. Letter observed that this area of law would benefit from clarification but he noted that it is proving challenging to draft a proposal that accomplishes that clarification. The reason is that there are policy choices that

must be made in order to proceed with the drafting process. Mr. Letter reviewed the existing law on manufactured finality. There is general consensus that if the remaining claims are dismissed with prejudice, a final appealable judgment results. The litigant might instead try to employ a "conditional dismissal with prejudice" – dismissing the remaining ("peripheral") claims with prejudice, but reserving the right to revive those claims if the litigant's appeal results in reversal of the dismissal of the non-peripheral claims. Such a conditional dismissal with prejudice produces a final appealable judgment in the Second Circuit but not in the Third and Ninth Circuits. There are further variations in the circuit caselaw concerning the dismissal of the peripheral claims under circumstances that prevent their reassertion, and concerning the dismissal of the peripheral claims without prejudice.

Mr. Letter suggested that the consensus view on dismissals with prejudice is sound: dismissal of the peripheral claims with prejudice should produce a final, appealable judgment. He observed that, conversely, it is hard to make the case for recognizing a final, appealable judgment when the peripheral claims are dismissed without prejudice. Conditional dismissal with prejudice, he suggested, is a closer question: there are good arguments in favor of providing that such dismissals produce an appealable judgment, but there are counter-arguments. For example, some might ask why this situation cannot be dealt with under current Civil Rule 54(b). Mr. Letter observed that judges may well take the view that Civil Rule 54(b) adequately addresses this issue, while practitioners may argue in favor of recognizing conditional dismissal with prejudice as an alternative path to appeal. Practice under Civil Rule 54(b), he observed, can vary by circuit. Mr. Letter noted that the Subcommittee has expressed interest in learning more about the Second Circuit's experience with conditional dismissals with prejudice. He will canvass lawyers in the offices of the United States Attorneys for districts within the Second Circuit to learn their views on how that procedure functions; the Subcommittee also intends to seek the views of judges and clerks from within the Second Circuit on this question.

Mr. Letter observed that in addition to making policy judgments concerning which of these scenarios should result in a final, appealable judgment, it would be necessary to consider whether and how to address additional complexities. For example, should the proposal address scenarios involving counterclaims, or scenarios involving multiple parties, and, if so, how? Another question – as the discussion of Civil Rule 54(b) illustrates – is whether district court approval should be required in order for the dismissal of the peripheral claims to produce an appealable judgment, or whether the joint agreement of the parties should suffice.

Ms. Mahoney noted that the Subcommittee members were in agreement that a dismissal of the peripheral claims with prejudice should produce an appealable judgment, but that beyond that determination, there was as yet no consensus. An appellate judge member noted that it is usually preferable for practices to be nationally uniform; he wondered whether the topic of manufactured finality is one on which judges' views are likely to differ from one locale to another. Judge Rosenthal observed that the Committee might consider asking the Federal Judicial Center to study the impact, within the Second Circuit, of the circuit caselaw providing that conditional dismissals with prejudice produce an appealable judgment. An attorney member noted that practitioners might not wish to rely on this Second Circuit doctrine when practicing in that circuit, given that the Supreme Court (or the Second Circuit itself, sitting en banc) could overrule the relevant precedent. Another attorney member asked whether the manufactured

finality doctrine is salient in criminal as well as civil cases. It was noted that the question does arise in criminal cases, and that the doctrine on the criminal side may be evolving.

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

Judge Sutton reviewed the history of this item, which concerns a proposal that federally recognized Native American tribes be treated the same as states for purposes of the Appellate Rules. The sense of the Committee, he observed, has been that the consideration of this proposal should focus on the treatment of tribes in Appellate Rule 29, which concerns amicus briefs. Proponents argue that tribes should be accorded the same dignity as states and the federal government, which can file amicus briefs without party consent or leave of court.

Judge Sutton observed that the Supreme Court's rule concerning amicus filings – Rule 37 – does not include tribes among the government entities that are permitted to file amicus briefs without party consent or court permission. Dean McAllister's research concerning the history of the Supreme Court's amicus-filing rule indicates that the omission of tribes from that listing may be a byproduct of the rule's history (and specifically of the fact that the Supreme Court first developed this rule at a time when amicus filings by tribes were rare).

As the Committee had requested at its spring 2010 meeting, Judge Sutton consulted the Chief Judges of the Eighth, Ninth, and Tenth Circuits for their views on the amicus-filing question. He asked each Chief Judge for input on two questions – first, how the circuit reacts to the proposal in general, and second, whether the circuit would consider amending its local rules to permit tribes to file amicus briefs without party consent or court permission. Chief Judge Riley has reported that the letter's distribution to three relevant committees elicited only three responses – two that support amending either the Appellate Rules or the circuit's local rules, and one that supports only amending the latter if appropriate. Judge Sutton reported that the other two circuits are in the process of responding to the inquiry. Mr. Letter observed that Chief Judge Kozinski has asked the Ninth Circuit's rules advisory committee to consider the matter.

Judge Sutton noted that the agenda materials included a resolution from the National Congress of American Indians ("NCAI") urging that the Appellate Rules be amended "to treat Indian Tribes in the same manner as states and territories," and a resolution from the Coalition of Bar Associations of Color to the same effect.

Judge Sutton invited Dean McAllister to discuss his research. Dean McAllister noted that he has published the research as an article (see 13 Green Bag 2d 289 (2010)). He reported that he had discussed tribal amicus participation with Supreme Court Deputy Clerk Chris Vasil, who had conferred with the Clerk of the Court, William K. Suter; neither recalled any requests to include tribal amici in the Supreme Court's rule.

It was noted that the question of treating tribes the same as states and the federal government for purposes of Appellate Rule 29(a) will also have implications for the new authorship and funding disclosure requirement that will take effect on December 1, 2010 (absent contrary action by Congress). That requirement – which will be placed in a new subdivision of

Appellate Rule 29(c) – exempts entities that can file amicus briefs without party consent or court leave under Appellate Rule 29(a).

A participant suggested that it would be good to include tribes in Appellate Rule 29(a) as a matter of political symbolism, unless there are arguments that would outweigh that benefit. He stated that the arguments he has heard so far relate to the fact that municipalities are also not included in Appellate Rule 29(a) and that there is a great variation in the size and other characteristics of federally recognized tribes. Mr. Letter stated that even if the question is viewed as merely symbolic, the field of federal-tribal relations is an area where – due to the history – symbolism can be important.

Mr. Letter stressed that the DOJ believes it is important for the tribes themselves to be consulted. An appellate judge member asked why that process of consultation could not be accomplished by the federal executive branch, independent of the Rules Committees. Mr. Letter responded that the Rules Committees, too, are governmental bodies. A participant asked whether it would be appropriate to view the Rules Enabling Act's notice and comment process as providing the framework for such consultation. Mr. Letter argued that it would be good for consultation to occur before the Appellate Rules Committee makes a recommendation. A participant suggested that the question before the Committee is one of policy. Another participant observed that the resolution passed by the NCAI provides a sense of the views of the NCAI's tribal and individual members. Yet another participant noted that one benefit of the notice and comment process is its transparency and the opportunity it provides for all interested commenters to hear others' views as well as expressing their own. Judge Rosenthal noted that should a proposal on this item go out for notice and comment, it would be good to make sure to advise any groups that have written to the Rules Committees about this proposal of any relevant hearing dates and of the deadline for submitting comments.

Judge Sutton noted that federal litigation can involve questions of the validity of tribal laws – questions on which the relevant tribe would wish to be heard as an amicus if the tribe is not a party. An attorney member asked why Rule 29(a) should be amended to include Native American tribes but not municipalities or foreign governments; for example, why should that Rule include a small Native American tribe but not New York City or the British government? Judge Sutton responded that the point about challenges to a law's validity could have more general application; for example, perhaps a proposal could encompass both Native American tribes and municipalities. Dean McAllister argued that the federal government's relations with Indian tribes differ from its relations with municipalities. There are only 564 federally recognized Native American tribes, while the number of municipal governments is far greater.

An attorney member stated opposition to changing Appellate Rule 29(a). Another attorney member argued that if the Rule is to be changed, the amendment should encompass municipalities as well as Native American tribes; this member argued that tribes are not similar to states and that if the amicus-filing rules are to change, the Supreme Court should take the lead. An appellate judge member expressed strong support for amending Rule 29(a) to include Native American tribes. This member reported that two large Native American tribes within the state of Colorado believe the issue to be a very important one. Tribes, this member observed, are sovereign entities; including tribes within Rule 29(a) would not create a slippery slope and, the

member suggested, there is no downside to including them. An attorney member asked the appellate judge member whether the Colorado state rules permit Native American tribes to file amicus briefs without party consent or court leave; the member responded that the Colorado rules require all would-be amici – even the United States – to seek permission. Another appellate judge member asked whether it is burdensome to rule on such motions for leave to file amicus briefs; the appellate judge member from Colorado responded that it is not burdensome to rule on the motions and that she views the question as purely one of sovereignty and dignity. Another appellate judge member expressed agreement with this view; he noted that his home state – North Dakota – has a lot of Indian reservations, and he predicted that including tribes among the entities listed in Rule 29(a) would not create an added burden for the courts of appeals.

An attorney member stated that he had not been able to think of any consequences that would result from including tribes within Rule 29(a); this member asked whether any of the Rules committees have tribal court representatives. A participant responded that the tradition has been not to have designated seats on the Rules Committees, apart from having representatives from the DOJ and from state supreme courts.

An appellate judge member expressed some ambivalence concerning the proposal; but he observed that his circuit – the Eleventh – has cases involving tribal law, and that he leans toward including tribes in Rule 29(a). A district judge member stated that tribes do have a special status. But, he argued, it is important to ensure that the proposed Rule encompasses all entities that have a legitimate claim to special treatment based on sovereign status. He noted that often the relevant government entity would be allowed to intervene. And he observed that appellate judges' views vary concerning the desirability of amicus filings. Some judges on the Seventh Circuit, for example, disfavor amicus filings. An attorney member asked whether that disfavor extends to amicus filings by governmental units; this member suggested that the Committee consider amending Rule 29(a) to encompass all domestic governmental units.

Judge Rosenthal observed that to the extent there was a lack of consensus concerning the proposal, it could be useful for Judge Sutton to present the matter for discussion at the January 2011 meeting of the Standing Committee. Judge Sutton agreed to do so.

d. Item No. 09-AP-C (Bankruptcy Rules Committee's project to revise Part VIII of the Bankruptcy Rules), and Item No. 08-AP-L (FRAP 6(b)(2)(A) / *Sorensen* issue)

Judge Sutton invited the Reporter to summarize the status of these items. The Bankruptcy Rules Committee is working on proposed amendments to Part VIII of the Bankruptcy Rules – governing appeals from the bankruptcy court – and currently plans to seek permission to publish those amendments for comment in summer 2011. The Part VIII project provides a good occasion to consider changes in the Appellate Rules' treatment of bankruptcy appeals. One possible set of amendments would revise Appellate Rule 6(b)(2) (concerning appeals from a district court or bankruptcy appellate panel exercising appellate jurisdiction in a bankruptcy case) to track recent and pending changes to Appellate Rule 4(a)(4). Another

possible amendment would create a new Appellate Rule 6(c) to address direct appeals by permission from a bankruptcy court to a court of appeals. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, which created the direct-appeal mechanism, also provided interim procedures to govern until the promulgation of rules for such appeals. Since 2008 Bankruptcy Rule 8001(f) has set a 30-day time limit for seeking the court of appeals' permission to take a direct appeal. A new Appellate Rule 6(c) could cover other aspects of the appeal process. The sketch provided in the agenda materials addresses what Appellate Rules would apply to such direct appeals; provides that references to the district court in such rules include the bankruptcy court and bankruptcy appellate panel; includes special provisions for the record on appeal (borrowing from the proposed Part VIII Rules' treatment of that topic); and contemplates the possible transmission of the record in electronic form. Publishing such proposals for comment in tandem with the Part VIII project would provide an opportunity to secure comment from the bankruptcy bench and bar. These matters are the subject of ongoing discussions with the Bankruptcy Rules Committee and its Subcommittee on Privacy, Public Access, and Appeals, and will be topics for discussion at the joint meeting that the Bankruptcy Rules Committee and the Appellate Rules Committee will hold in spring 2011.

Judge Rosenthal reported on the discussion at the Bankruptcy Rules Committee's fall meeting. One topic raised at that meeting concerns a fundamental choice: Should the Part VIII rules be self-contained, or should they incorporate by reference relevant provisions of the Appellate Rules? Mr. McCabe noted that Part VII of the Bankruptcy Rules (governing adversary proceedings) incorporates by reference a number of provisions in the Civil Rules. A participant suggested that if it is deemed necessary to have the text of certain Appellate Rules within the Bankruptcy Rules pamphlet for convenient reference, those provisions could be quoted. The relevant portion of the minutes of the Bankruptcy Rules Committee meeting will be shared with the Appellate Rules Committee when available.

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

Judge Sutton noted that this item concerns a project to consider adjustments in the availability of immediate appellate review for certain types of district-court rulings. The item, he observed, was prompted by the Supreme Court's decision in *Mohawk Industries, Inc. v. Carpenter*, 130 S. Ct. 599 (2009). Judge Sutton stated that the Committee needs to decide the scope of this project. Judge Rosenthal asked whether the DOJ had a view on the question of scope. Mr. Letter suggested that it could be useful to think broadly about appealability, and to encompass topics such as appeals from denials of motions to dismiss founded on official immunity or sovereign immunity. Under current doctrine, an order denying a motion by the United States to dismiss a claim on sovereign immunity grounds is not immediately appealable – though orders denying similar motions by states and foreign governments are immediately appealable.

An attorney member advocated starting with the question of orders rejecting claims of attorney-client privilege. Mr. Letter suggested that the topic of privilege be broadened to encompass the state secrets privilege. Another attorney member suggested that a district court's denial of a claim of state secrets privilege would likely be reviewable either via a permissive

appeal under 28 U.S.C. § 1292(b) or via mandamus. An appellate judge member suggested that to the extent that the *Mohawk Industries* Court invited rulemaking attention to this topic, the invitation seems to focus on attorney-client privilege. Mr. Letter agreed that it makes sense to start with the question of the appealability of privilege rulings, leaving the question of appeals from immunity rulings for treatment in the longer term.

By consensus, the Committee decided to commence by focusing on the question of appeals from privilege rulings, and to seek input on this topic from the Civil, Criminal and Evidence Rules Committees.

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

Judge Sutton invited the Reporter to introduce this item, which concerns the application of Appellate Rule 4(a)(2)'s provision concerning premature notices of appeal. The Supreme Court's decision in *FirsTier* provides general guidance concerning the interpretation of Rule 4(a)(2), but the circuits vary somewhat in their application of the Rule to a range of different factual scenarios. At one end of the spectrum are cases in which the notice of appeal is filed after a decision is announced but before the submission of proposed findings in support of that decision; that was the situation in *FirsTier*, and the case makes clear that such a notice relates forward. Similar to that scenario are cases in which the court announces a disposition contingent on a future event, the notice of appeal is filed, and the contingency later occurs; various circuits have held that such a notice relates forward, but there is contrary precedent from the Seventh Circuit. Then there are the cases in which a court disposes of fewer than all claims or parties, the notice of appeal is filed, and a Civil Rule 54(b) certification is later obtained; some seven circuits have found relation forward in this scenario, but there is contrary precedent in the Eleventh Circuit. In a variation on this theme, there are the cases in which the court disposes of fewer than all claims or parties, the notice of appeal is filed, and the court then disposes of all remaining claims as to all parties; some eight or nine circuits have found relation forward in this scenario, but the Eighth Circuit disagrees. There are other common patterns as well; as to a number of those patterns, there is some degree of consensus among the circuits, but contrary positions also exist.

Judge Sutton observed that if it is possible for the rulemakers to design an elegant solution to this set of problems, it would be worth doing. An attorney member wondered whether the current Rule 4(a)(2)'s treatment of relation forward might instill false confidence among practitioners who lack familiarity with the cases applying Rule 4(a)(2). A district judge member agreed that the current rule might be a trap for the unwary; this member recalled a similar set of issues arising under Illinois Supreme Court Rules 303 and 304. An attorney member expressed support for considering revisions to Rule 4(a)(2), and wondered whether this topic should be considered in tandem with the proposed revisions to Rule 4(a)(4). Another attorney member suggested that it might be useful to consider whether the solution employed with respect to the Illinois Supreme Court rules might be instructive. By consensus, the Committee retained this item on its agenda with a view to considering a more concrete set of proposals at the spring 2011 meeting.

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

Judge Sutton introduced this item, which concerns the possibility of revising Appellate Rule 28(a)'s requirement that a brief include separate statements of the case and of the facts. Some members of the Committee have observed that these requirements have given rise to confusion among practitioners and redundancy in briefs. The Committee discussed this item at its spring 2010 meeting. Judge Sutton, on behalf of the Committee, contacted the ABA Council of Appellate Lawyers and the American Academy of Appellate Lawyers to seek their views on the matter. Judge Sutton circulated to Committee members the response he received from Jerrold Ganzfried and Steven Finell on behalf of the ABA Council of Appellate Lawyers. Judge Sutton observed that the Council has offered to survey appellate practitioners for their views, and he reported that he has spoken with Donald Ayer, the President of the American Academy of Appellate Lawyers, and Mr. Ayer has undertaken to survey the Academy's members.

Judge Sutton noted that the Committee should consider whether to move forward with this item, and, if so, how best to alter Appellate Rule 28's requirements. One option would be to model the revised Rule 28 on the Supreme Court rule (Rule 24(g)) which provides for a single statement in which the lawyer can set forth the facts and procedural history chronologically. Another possibility would be to reverse the order of current Appellate Rules 28(a)(6) and (a)(7) and to delete from current Rule 28(a)(6) the reference to the "course of proceedings."

An attorney member stated that Rule 28(a)(7)'s requirements are straightforward; Rule 28(a)(6), he suggested, would be clearer if it called for a statement identifying the rulings being appealed and the procedural history. It is useful, he argued, to identify the rulings at issue before stating the facts. That allows the reader to know the posture of the case before reading the facts. For example, such a statement could say that the appeal is from the grant of summary judgment in a Title VII case. Mr. Letter noted that even if the Appellate Rules did not require it, he would be likely to include such a statement in his brief. Justice Holland noted that Delaware Supreme Court Rule 14 simply requires "[a] statement of the nature of the proceeding and the judgment or order sought to be reviewed"; such statements, he said, are usually about a page long.

Mr. Letter expressed support for pursuing the project, and suggested that following the Supreme Court's approach might be best. But he stressed that the judges are the audience for briefs, so the key question is what judges prefer. An attorney member agreed that the Committee should pursue the project. This member observed that the trouble with the current Rule is that it specifies the order in which the statements must be set forth and there is no logical place to discuss the opinion below; the logical place for such a discussion, she suggested, would be at the end of the discussion of the facts and procedural history. This member expressed support for modeling the revisions on the Supreme Court's rule, but she agreed with Mr. Letter that it is important to discern what judges would prefer. Another attorney member noted that one difference between Supreme Court briefs and briefs filed in the courts of appeals is that Supreme Court briefs state, up front, the question presented. The statement of issues in a court of appeals brief, he observed, is often not informative. This member reiterated the importance of identifying the ruling that is being appealed.

An appellate judge member agreed that it is useful for the brief to state succinctly what ruling is being appealed. This member observed that Colorado Appellate Rule 28 does not require the brief to divide the statement of the case from the statement of the facts, but in practice litigants often divide the two. Another appellate judge member wondered whether it might make sense to reverse the order of the items required by Rule 28(a)(5) (statement of the issues) and Rule 28(a)(7) (statement of the facts). Another appellate judge member observed that the U.S. Supreme Court requires the questions presented to be the first item in the brief.

An attorney member stated that he likes the Supreme Court's approach because it allows the lawyer to present a more integrated story. In the Eighth Circuit, he noted, Local Rule 28A(i) requires lawyers to include a one-page summary of the case, which forces the advocate to briefly encapsulate his or her whole case. A district judge member expressed a preference for the approach taken by the Illinois state rules, which spell out what the brief must contain and which provide illustrative examples. This member suggested that it would be useful to consider examples of state rules concerning briefs, to see if any states have arrived at a better approach.

An appellate judge member queried whether the clerk's office typically scrutinizes a brief's statement of the case, for example to discern the nature of the rulings under appeal. Mr. Green responded that his office ordinarily focuses on the information provided in response to Rule 28(a)(4) (the jurisdictional statement). Knowing the nature of the ruling being appealed, he suggested, would not make a difference to the clerk's office unless the office is tracking appeals that concern certain types of issues. Ms. Sellers reported that in the Connecticut appellate courts the staff attorney's office uses information from the statement of the case for final judgment screening and when setting cases for oral argument. It was observed that federal appellate courts may also engage in issues tracking; in this connection, it was noted that the Second Circuit has published for comment a proposed local rule that would expedite appeals from certain types of orders.

Mr. Letter noted that a number of United States Attorneys – for example, those in the Second and Ninth Circuits – always include an introduction in their briefs. Though he did not advocate amending Rule 28 to require such an introduction, he suggested that it might be amended to permit one. Justice Holland noted that briefs submitted to the Delaware Supreme Court often include a "preliminary statement." An appellate judge member stated that judges might not want to make an introduction mandatory; an introduction written by a good lawyer would be useful, but one written by a poor lawyer would not. An attorney member noted that the Rule could limit such an introductory statement to one page.

It was agreed that in preparation for the spring meeting, relevant local circuit rules and state briefing rules would be collected. The agenda materials for the spring meeting will offer a set of options for the Committee's consideration. One option would be modeled on the Supreme Court's rule. Another option would provide for an introductory statement capped at one page. Another approach would retain the requirement of a "statement" but require the brief to discuss within a single "statement" the facts, the proceedings below, and the ruling being appealed.

VII. Additional Old Business and New Business

a. Item No. 10-AP-D (taxing costs under FRAP 39)

Judge Sutton invited the Reporter to introduce this item, which concerns H.R. 5069, the "Fair Payment of Court Fees Act of 2010," a bill introduced by Representative Henry C. "Hank" Johnson, Jr. H.R. 5069 would amend Civil Rule 68 and Appellate Rule 39 in response to concerns raised about the taxation of costs by the Fourth Circuit in the case of *Snyder v. Phelps*. In September 2009, the court of appeals reversed a judgment in Albert Snyder's favor against the Westboro Baptist Church and its members. The judgment had awarded millions in damages on tort claims arising from, inter alia, the Church's "protest" near the funeral of Snyder's son Matthew (a Marine who died in Iraq). The court of appeals reversed the judgment on First Amendment grounds. The opinion and judgment stated nothing about costs; after a timely motion, the court of appeals awarded over $16,000 in costs to the Church. The court of appeals denied Snyder's objections to the bill of costs. Snyder's annual income is $ 43,000 and his counsel was working pro bono. H.R. 5069 would add a new Appellate Rule 39(f), which would provide that the court shall order a waiver of costs if the court determines that the interest of justice justifies such a waiver, and would provide that the "interest of justice" includes the establishment of constitutional or other important precedent. The Supreme Court granted certiorari in *Snyder v. Phelps*, and the case was argued on October 16, 2010.

The Reporter observed that Rule 39(a) sets default rules for the award of appellate costs, but that the court can order otherwise in a given case. The caselaw indicates that the courts of appeals have exercised this discretion, taking into account factors such as misconduct by the winner on appeal; the public importance of the case; the difficulty of the issues; and the limited means of the losing party. The Reporter stated her belief that the existing Rule afforded the court discretion to deny costs in a case such as *Snyder v. Phelps*.

An attorney member wondered whether the practice concerning costs varies by circuit. In the Federal Circuit, he noted, the court of appeals often denies appellate costs to the prevailing party. Another attorney member stated that he had never seen such a large bill for appellate costs. The Reporter responded that the apparent explanation for the size of the bill of costs in *Snyder* was the very large number of pages in the appendix.

By consensus, the Committee decided to study the matter further. It asked Ms. Leary to design a docket search that could provide data concerning the typical amount of appellate costs awarded under Appellate Rule 39.

b. Item No. 10-AP-E (effect of withdrawal of a timely-filed post-judgment motion on the time to appeal in a civil case)

Judge Sutton invited the Reporter to introduce this item, which arises from Howard Bashman's suggestion that the Committee consider issues raised by *Vanderwerf v. Smithkline Beecham Corp.*, 603 F.3d 842 (10th Cir. 2010). In *Vanderwerf*, the district court granted summary judgment dismissing the Vanderwerfs' claims. They timely filed a motion under Civil Rule 59(e). After almost seven months elapsed with no decision on the motion, the Vanderwerfs

withdrew the motion and (on the same day) filed a notice of appeal. A divided panel of the court of appeals dismissed the appeal as untimely. The majority reasoned that Appellate Rule 4(a)(4) "requires entry of an 'order disposing of [the Rule 59] motion' to give the appealing party the benefit of Rule 4(a)(4)(A)(iv)," and that the Vanderwerfs' withdrawal of their motion "leaves the record as if they had never filed the motion in the first place." Judge Lucero dissented, arguing that "[b]ecause the district court did not rule on the motion to alter or amend the judgment, the thirty-day filing deadline has not begun to run."

The Reporter observed that this is, as far as she could determine, the first decision to deny tolling effect to a motion because it was withdrawn. The Second, Seventh and Ninth Circuits have instead reasoned that a motion had tolling effect even though it was withdrawn – though in the Second and Ninth Circuit cases, the district court had in some way assented to the withdrawal of the motion. In an unpublished decision, the Sixth Circuit construed a tolling motion as denied on the date of its withdrawal; in that case, though, the motion was by the appellee rather than the appellant.

The Reporter suggested that if one takes the policy behind Rule 4(a)(4) to be promoting an efficient division of labor between the trial and appellate courts, then one might argue that, in hindsight, this policy is not at issue when a motion is withdrawn – because in hindsight it is clear that the appeal could have proceeded without any impediment from the ultimately-withdrawn motion. But such an argument could also be made as to a motion that is denied, and no one suggests that a motion lacks tolling effect as a result of being denied on its merits. The Reporter acknowledged the *Vanderwerf* majority's concern with the possibility than an appellant might make and then withdraw a tolling motion simply to achieve a unilateral extension of appeal time. But she suggested that this concern could be addressed through means other than denying the motion tolling effect – such as recourse to Civil Rule 11 or to 28 U.S.C. § 1927. In addition, such a concern would suggest denying tolling effect to a withdrawn motion only when the motion was made by the would-be appellant, and not when the motion was made by the appellee – but the text of Rule 4(a)(4) does not indicate any basis for a distinction between motions based on the identity of the movant.

There is textual appeal, the Reporter suggested, to Judge Lucero's argument that under the text of Rule 4(a)(4) the Vanderwerfs' appeal time had not yet begun to run. However, such an interpretation of the Rule could present a different policy concern – namely, that in such instances the appeal time might never start to run. This concern is similar to that which arose prior to 2002 in instances where a judgment was required to be set forth in a separate document and the separate document was not provided. In 2002, the Rules were amended to set an outer limit at which the appeal time would begin to run even if the requisite separate document was never provided. One possible approach in the context of withdrawn motions is that taken by the Sixth Circuit's unpublished opinion – namely, deeming the motion denied as of the date it is withdrawn.

An attorney member stated that she agreed with the *Vanderwerf* majority's reading of Rule 4(a)(4). The Rule, she suggested, cannot reasonably be read to allow a party to give itself a unilateral extension; when the motion is withdrawn, there never is an "order disposing of" a tolling motion. The Reporter asked whether such a reading of Rule 4(a)(4) would also counsel

denying tolling effect to a withdrawn motion when the would-be appellant is someone other than the movant. The member responded that in such a situation the would-be appellant could ask the court not to permit the movant to withdraw the motion. Another attorney member agreed that Rule 4(a)(4) might be read to imply the requirement that an order ultimately be entered with respect to a motion in order for the motion to have tolling effect; this member drew an analogy to the way the language of Civil Rule 50 has been read. An appellate judge member recalled a Georgia state statute that provided that an appeal not decided within six months was deemed denied; he suggested that an analogous approach might be considered for motions not ruled upon by the trial court. Possible formulations were noted – that a motion might be "deemed denied if withdrawn," or "deemed denied because disposed of." A member suggested the possibility of adopting a rule providing that no motion of the types described in Appellate Rule 4(a)(4) can be withdrawn without leave of court. It was noted that such a provision would be placed in the Civil Rules rather than the Appellate Rules.

An attorney member observed that cases raising this issue are likely to be rare. An appellate judge member agreed that there is no need for the Committee to take action with respect to this issue. Another attorney member agreed that there is no urgent need for Committee action, though he observed that under the *Vanderwerf* court's approach it is not clear what a non-movant should do if a movant withdraws a tolling motion. By consensus, the Committee decided to keep this item on the study agenda for the moment, in order to consider further how one might address the latter scenario in the light of the *Vanderwerf* decision.

c. Item No. 10-AP-F (*Comer v. Murphy Oil*, 607 F.3d 1049 (5th Cir. 2010) (en banc))

Judge Sutton invited Mr. Taranto to introduce this item, which concerns Mr. Taranto's suggestion that the Committee consider issues raised by *Comer v. Murphy Oil USA*, 607 F.3d 1049 (5th Cir. 2010) (en banc). Mr. Taranto described the matters at issue in this unusual case. 28 U.S.C. § 46(c) governs the number of votes needed for a court of appeals to decide to hear or rehear a case en banc. 28 U.S.C. § 46(d) governs the number of judges that constitute a quorum for the court of appeals to hear a case (including to hear or rehear a case en banc). In *Comer*, after the panel decision, a majority of the nonrecused active judges on the Fifth Circuit voted to rehear the case en banc, which – under the Circuit's local rules – automatically vacated the panel decision. Subsequently, one of the previously nonrecused active judges recused herself, leading a majority of the remaining nonrecused active judges to conclude that there was no longer a quorum under Section 46(d). That majority concluded that the lack of a quorum left no choice but to dismiss the appeal. The dissenting judges described a number of alternative possibilities. Mr. Taranto suggested an additional possibility unmentioned by any of the judges in *Comer*: Once the en banc court had lost its quorum, why not treat the appeal as if it had just been filed, and assign it to a panel?

Mr. Taranto noted that Appellate Rule 35(a) adopts the "case majority" approach to determining the number of votes needed for a court of appeals to decide to hear or rehear a case en banc; under this approach, disqualified judges are omitted when calculating the number of votes needed to provide a majority. The 2005 Committee Note to Rule 35(a), however, explicitly disclaims any intent to foreclose the possibility that Section 46(d) could be read to require that a majority of the court's active judges be nondisqualified in order for a quorum to exist for the en banc court.

Determining the best approach to a quorum requirement for the en banc court, Mr. Taranto observed, would require a policymaker to balance the risks of aberrant rulings for parties in a particular case against the risk of an aberrant en banc ruling (by an en banc court composed of only a small subset of the circuit's active judges). One question for the Committee, he suggested, is whether there is any interest in addressing through rulemaking the issue of case assignment – and in particular, the procedure to be followed when a case has been taken en banc and then an event deprives the en banc court of a quorum. Another question is whether any changes should be made in Section 46(d), perhaps by means of a legislative proposal. Mr. Taranto noted the Federal Circuit's proposal (discussed earlier in the meeting) for legislation amending Section 46(c).

The Reporter noted that as to the question of Section 46(d)'s quorum requirements, different sized circuits are likely to have differing views. A participant observed that some judges might be wary of any proposal for altering Section 46(d)'s quorum requirement. It was noted that in the Fifth Circuit, the frequency of ties to energy companies tends to lead to a lot of recusals. An attorney member asked whether judges could avoid some of those recusals by choosing to invest through mutual funds rather than directly in specific companies. A participant noted, however, that this expedient would not address all the possible reasons for such recusals.

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

d. Item No. 10-AP-G (intervention on appeal)

Judge Sutton invited the Reporter to introduce this item, which arises from Mr. Letter's observation that the Appellate Rules lack a general provision governing intervention on appeal. As Mr. Letter has pointed out, Appellate Rule 15(d) addresses the topic of intervention in the context of court of appeals review of agency determinations, and Appellate Rule 44 addresses the topic in the context of constitutional challenges to federal or state statutes. But – apart from provisions setting the color of intervenors' briefs – the Appellate Rules contain no provision addressing intervention on appeal more generally. By contrast, Civil Rule 24 treats the question of intervention in the district court.

The Reporter observed that local circuit rules addressing the topic of intervention tend to govern the procedural incidents of intervention rather than providing guidance as to the circumstances under which a court will permit intervention on appeal. The caselaw concerning intervention on appeal tends to draw upon Civil Rule 24 and cases interpreting that Rule. The question of timeliness often looms large for those who seek to intervene on appeal, because a natural question is why the would-be intervenor did not seek intervention earlier when the matter was in the district court. Would-be intervenors must also be prepared to address why participation as an amicus would not suffice to protect their interests. The court of appeals is likely to consider whether existing parties would be prejudiced by intervention. And the court is likely to take care not to allow intervention to be used as an end-run around the time limits for taking an appeal or as a way of broadening the issues on appeal beyond those raised by existing parties. An Appellate Rule addressing intervention on appeal could cover a variety of topics, including the standards and timing requirements for permitting intervention (any such provision would need to be flexible); what entity (the clerk, a single judge or a panel) resolves requests to intervene; disclosure and briefing requirements for intervenors; argument time (if any) for intervenors; and the allocation of appellate costs. The Reporter noted that she had been unable to find any explanation for the Appellate Rules' omission of a general provision concerning intervention on appeal; she speculated that the omission might have arisen from a concern that treating the topic explicitly might encourage belated requests to intervene.

Mr. Letter reported that the question of intervention on appeal arises fairly often for the DOJ. For example, in the Intertanko litigation – which concerned the validity of Washington state tanker regulations – the United States did not intervene in the district court. That decision was typical for the United States: Often the government will decide not to intervene in the district court, although the case implicates federal interests, because the outcome in the district court may turn out to be satisfactory to the government even absent the government's intervention, and because the government has resource constraints. In the Intertanko case, after the district court upheld the state regulations, the United States intervened on appeal in order to argue that the district court's ruling gave insufficient consideration to the federal government's interest in foreign affairs. After the Ninth Circuit affirmed in large part, both Intertanko and the United States sought certiorari, and the Supreme Court granted review. Mr. Letter noted that in

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

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

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

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

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

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

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

VIII. Schedule Date and Location of Fall 2011 Meeting

The Committee had already scheduled its spring 2011 meeting for April 6 and 7, 2011, in San Francisco, California; the second day of the meeting will overlap with the meeting of the Bankruptcy Rules Committee. The Committee discussed possible dates for its fall 2011 meeting and decided to confer further about those possibilities by email.

IX. Adjournment

The Committee adjourned at 10:50 a.m. on October 8, 2010.

Respectfully submitted,

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Catherine T. Struve
Reporter