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

I. Introductions

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

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

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

II. Approval of Minutes of September 2012 Meeting

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

III. Report on January 2013 Meeting of Standing Committee

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

IV. Other Information Items

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

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

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

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

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

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

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

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

VI. Discussion Items

A. Items Proposed for Removal from Agenda

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Items for Further Discussion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VII. New Business

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VIII. Adjournment

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

Respectfully submitted,

Catherine T. Struve
Reporter