ADVISORY COMMITTEE
ON
APPELLATE RULES

Kansas City, MO
April 16-17, 2009

Agenda for Spring 2009 Meeting of
Advisory Committee on Appellate Rules
April 16-17, 2009
Kansas City, Missouri

I. Introductions

II Approval of Minutes of November 2008 Meeting

III. Report on January 2009 Meeting of Standing Committee

IV. Other Information Items

V. Action Items

A. For final approval

1. Item No. 07-AP-D (amend FRAP 1 to define "state")

2. Item No. 07-AP-D (amend FRAP 29 in light of definition of "state")

3. Item No. 06-04 (amend FRAP 29 to require amicus brief disclosure)

4. Item No. 07-AP-G (amend Form 4 in light of privacy requirements)

VI. Discussion Items

A Item No. 03-09 (FRAP 4(a)(1)(B) & 40(a)(1) – treatment of U.S. officer or employee sued in individual capacity)

B. Item No. 07-AP-E (issues relating to *Bowles v Russell*)

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

D. Item Nos. 08-AP-D, 08-AP-E, & 08-AP-F (possible changes to FRAP 4(a)(4))

E. Item No. 08-AP-G (substantive and style changes to FRAP Form 4)

F. Item No. 08-AP-H ("manufactured finality" and appealability)

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

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

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

VII. Additional Old Business and New Business

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

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

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

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

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

VIII. Schedule Date and Location of Fall 2009 Meeting

IX. Adjournment

Advisory Committee on Appellate Rules
Table of Agenda Items — March 2009

FRAP Item	Proposal	Source	Current Status
01-03	Amend FRAP 26(a)(2) to clarify interaction with "3-day rule" of FRAP 26(c)	Roy H Wepner, Esq	Discussed and retained on agenda 04/01 Referred to Civil Rules Committee 04/02 Draft approved 11/03 for submission to Standing Committee Approved for publication by Standing Committee 06/07 Published for comment 08/07 Revised draft approved 04/08 for submission to Standing Committee Approved by Standing Committee 06/08 Approved by Judicial Conference 09/08 Approved by Supreme Court 03/09
03-09	Amend FRAP 4(a)(1)(B) & 40(a)(1) to clarify treatment of U S officer or employee sued in individual capacity	Solicitor General	Discussed and retained on agenda 11/03, awaiting revised proposal from Department of Justice Tentative draft approved 04/04 Revised draft approved 11/04 for submission to Standing Committee Approved for publication by Standing Committee 06/07 Published for comment 08/07 Discussed and retained on agenda 04/08 FRAP 40(a)(1) amendment approved 11/08 for submission to Standing Committee
05-01	Amend FRAP 21 & 27(c) to conform to Justice for All Act of 2004	Advisory Committee	Discussed and retained on agenda 04/05; awaiting proposal from Department of Justice Discussed and retained on agenda 04/06, Department of Justice will monitor practice under the Act
05-05	Amend FRAP 29(e) to require filing of amicus brief 7 *calendar* days after *service* of principal brief of party supported	Brian Wolfman Public Citizen Litigation Group	Discussed and retained on agenda 04/06; awaiting report from Department of Justice Further consideration deferred pending consideration of items 06-01 and 06-02, 11/06

FRAP Item	Proposal	Source	Current Status
05-06	Amend FRAP 4(a)(4)(B)(ii) to clarify whether appellant must file amended notice of appeal when court, on post-judgment motion, makes favorable or insignificant change to judgment	Hon Pierre N Leval (CA2)	Discussed and retained on agenda 04/06 Draft approved 04/07 for submission to Standing Committee Approved for publication by Standing Committee 06/07 Published for comment 08/07 Approved 04/08 for submission to Standing Committee Approved by Standing Committee 06/08 Approved by Judicial Conference 09/08 Approved by Supreme Court 03/09
06-01	Amend FRAP 26(a) to adopt template proposed by Time-Computation Subcommittee	Standing Committee	Discussed and retained on agenda 04/06 Draft approved 04/07 for submission to Standing Committee Approved for publication by Standing Committee 06/07 Published for comment 08/07 Revised draft approved 04/08 for submission to Standing Committee Approved by Standing Committee 06/08 Approved by Judicial Conference 09/08 Approved by Supreme Court 03/09
06-02	Amend various rules to adjust deadlines to compensate for new time-computation method	Standing Committee	Discussed and retained on agenda 04/06, deadline subcommittee appointed Draft approved 04/07 for submission to Standing Committee Approved for publication by Standing Committee 06/07 Published for comment 08/07 Revised draft approved 04/08 for submission to Standing Committee Approved by Standing Committee 06/08 Approved by Judicial Conference 09/08 Approved by Supreme Court 03/09
06-04	Amend FRAP 29 to require that amicus briefs indicate whether counsel for a party authored brief and to identify persons who contributed monetarily to preparation or submission of brief	Hon Paul R Michel (C J , Fed Cir.) and Hon. Timothy B Dyk (Fed Cir)	Discussed and retained on agenda 11/06 Draft approved 04/07 for submission to Standing Committee Remanded by Standing Committee for consideration of new developments, 06/07 Draft approved 11/07 for submission to Standing Committee Approved for publication by Standing Committee 01/08 Published for comment 08/08

FRAP Item	Proposal	Source	Current Status
06-08	Amend FRAP to provide a rule governing amicus briefs with respect to rehearing en banc	Mark Levy, Esq	Discussed and retained on agenda 11/07 Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08
07-AP-B	Add new FRAP 12 1 concerning the procedure to be followed when a district court is asked for relief that it lacks authority to grant due to a pending appeal.	Civil Rules Committee 1/07	Draft approved 04/07 for submission to Standing Committee Approved for publication by Standing Committee 06/07 Published for comment 08/07 Revised draft approved 04/08 for submission to Standing Committee Approved by Standing Committee 06/08 Approved by Judicial Conference 09/08 Approved by Supreme Court 03/09
07-AP-C	Amend FRAP 4(a)(4)(A) and 22 in light of proposed amendments to Rules 11 of the rules governing 2254 and 2255 proceedings	Criminal Rules Committee 1/07	Draft approved 04/07 for submission to Standing Committee FRAP 22 amendment approved for publication by Standing Committee 06/07 FRAP 22 amendment published for comment 08/07 Revised FRAP 22 draft approved 04/08, contingent on approval of corresponding amendments to the rules for § 2254 and § 2255 proceedings FRAP 22 amendment approved by Standing Committee 06/08 FRAP 22 amendment approved by Judicial Conference 09/08 FRAP 22 amendment approved by Supreme Court 03/09
07-AP-D	Amend FRAP to define the term "state "	Time-computation Subcommittee 3/07	Discussed and retained on agenda 04/07 Tentative draft approved 11/07 Drafts approved 04/08 for submission to Standing Committee Approved for publication by Standing Committee 06/08 Published for comment 08/08
07-AP-E	Consider possible FRAP amendments in response to Bowles v Russell (2007)	Mark Levy, Esq	Discussed and retained on agenda 11/07 Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08
07-AP-G	Amend FRAP Form 4 to conform to privacy requirements	Forms Working Group, chaired by Hon Harvey E Schlesinger	Discussed and retained on agenda 11/07 Draft approved 04/08 for submission to Standing Committee Approved for publication by Standing Committee 06/08 Published for comment 08/08

FRAP Item	Proposal	Source	Current Status
07-AP-H	Consider issues raised by Warren v American Bankers Insurance of Florida, 2007 WL 3151884 (10th Cir 2007), concerning the operation of the separate document rule	Appellate Rules Committee	Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08
07-AP-I	Consider amending FRAP 4(c)(1) to clarify the effect of failure to prepay first-class postage	Hon Diane Wood	Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08
08-AP-A	Amend FRAP 3(d) concerning service of notices of appeal	Hon. Mark R Kravitz	Discussed and retained on agenda 11/08
08-AP-C	Abolish FRAP 26(c)'s three-day rule	Hon Frank H Easterbrook	Discussed and retained on agenda 11/08
08-AP-D	Delete reference to judgment's alteration or amendment from FRAP 4(a)(4)(B)(ii)	Peder K Batalden, Esq	Discussed and retained on agenda 11/08
08-AP-E	Amend FRAP 4(a) so that an original NOA encompasses dispositions of any post-trial motions	Public Citizen Litigation Group	Discussed and retained on agenda 11/08
08-AP-F	Amend FRAP 4(a) so that an original NOA encompasses any post-appeal amendments of the judgment	Members of Seventh Circuit Bar Association	Discussed and retained on agenda 11/08
08-AP-G	Consider substantive and style changes to FRAP Form 4	Appellate Rules Committee	Discussed and retained on agenda 11/08
08-AP-H	Consider issues of "manufactured finality" and appealability	Mark Levy, Esq	Discussed and retained on agenda 11/08
08-AP-I	Consider uses of postjudgment motions	Prof Daniel Meltzer	Discussed and retained on agenda 11/08
08-AP-J	Consider FRAP implications of conflict screening	Committee on Codes of Conduct	Discussed and retained on agenda 11/08
08-AP-K	Consider privacy issues relating to alien registration numbers	Public Resource Org	Discussed and retained on agenda 11/08
08-AP-L	Amend FRAP 6(b)(2)(A)(ii) to remove ambiguity	Reporter	Discussed and retained on agenda 11/08
08-AP-M	Consider FRAP implications of interlocutory appeals in tax cases	Reporter	Discussed and retained on agenda 11/08

FRAP Item	Proposal	Source	Current Status
08-AP-N	Amend FRAP 5 to allow parties to submit an appendix of key documents from the record along with petitions and answers	Peder K. Batalden, Esq.	Awaiting initial discussion
08-AP-O	Amend FRAP 31 to clarify deadlines when multiple appellants or appellees file separate briefs and serve them on different days	Peder K Batalden, Esq.	Awaiting initial discussion
08-AP-P	Amend FRAP 32 to change from double line-spacing to 1 5 line-spacing for briefs	Peder K. Batalden, Esq	Awaiting initial discussion
08-AP-Q	Consider amending FRAP 10(b) to permit the use of digital audio recordings in place of written transcripts	Hon Michael M Baylson	Awaiting initial discussion
08-AP-R	Consider amending FRAP 26 1 (corporate disclosure) and the corresponding requirement in FRAP 29(c)	Hon Frank H Easterbrook	Awaiting initial discussion
09-AP-A	Consider amending FRAP 26 1 (corporate disclosure) and the corresponding requirement in FRAP 29(c)	ABA Council of Appellate Lawyers	Awaiting initial discussion

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
CHAIRS and REPORTERS

March 25, 2009

Honorable Lee H. Rosenthal United States District Judge United States District Court 11535 Bob Casey U.S. Courthouse 515 Rusk Avenue Houston, TX 77002-2600	Prof. Daniel R. Coquillette Boston College Law School 885 Centre Street Newton Centre, MA 02459
Honorable Carl E. Stewart United States Circuit Judge United States Court of Appeals 2299 United States Court House 300 Fannin Street Shreveport, LA 71101-3074	Prof. Catherine T. Struve University of Pennsylvania Law School 3400 Chestnut Street Philadelphia, PA 19104
Honorable Laura Taylor Swain United States District Judge United States District Court Daniel Patrick Moynihan U. S. Courthouse 500 Pearl Street - Suite 755 New York, NY 10007	Professor S. Elizabeth Gibson Burton Craige Professor of Law 5073 Van Hecke-Wettach Hall University of North Carolina at Chapel Hill C.B. #3380 Chapel Hill, NC 27599-3380
Honorable Mark R Kravitz United States District Judge United States District Court Richard C. Lee United States Courthouse 141 Church Street New Haven, CT 06510	Prof. Edward H. Cooper University of Michigan Law School 312 Hutchins Hall Ann Arbor, MI 48109-1215
Honorable Richard C. Tallman United States Circuit Judge United States Court of Appeals Park Place Building, 21st Floor 1200 Sixth Avenue Seattle, WA 98101	Professor Sara Sun Beale Duke University School of Law Science Drive & Towerview Road Box 90360 Durham, NC 27708-0360
Honorable Robert L Hinkle Chief Judge, United States District Court United States Courthouse 111 North Adams Street Tallahassee, FL 32301-7717	Prof. Daniel J. Capra Fordham University School of Law 140 West 62nd Street New York, NY 10023

ADVISORY COMMITTEE ON APPELLATE RULES

Chair:	**Reporter:**
Honorable Carl E. Stewart United States Circuit Judge United States Court of Appeals 2299 United States Court House 300 Fannin Street Shreveport, LA 71101-3074	Professor Catherine T. Struve University of Pennsylvania Law School 3400 Chestnut Street Philadelphia, PA 19104
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Honorable T.S. Ellis III United States District Judge United States District Court Albert V. Bryan United States Courthouse 401 Courthouse Square Alexandria, VA 22314-5799	Honorable Edwin Kneedler (ex officio) Acting Solicitor General U.S Department of Justice 950 Pennsylvania Ave., N.W., Rm 5143 Washington, DC 20530
Honorable Randy J Holland Associate Justice Supreme Court of Delaware 34 The Circle Georgetown, DE 19947	Douglas Letter Appellate Litigation Counsel Civil Division U.S Department of Justice 950 Pennsylvania Ave., N.W., Rm 7513 Washington, DC 20530
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ADVISORY COMMITTEE ON APPELLATE RULES (CONT'D.)

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Advisor: Charles R. Fulbruge III Clerk United States Court of Appeals 207 F. Edward Hebert Federal Building 600 South Maestri Place New Orleans, LA 70130	**Liaison Member:** Honorable Harris L Hartz United States Circuit Judge United States Court of Appeals 201 Third Street, N.W., Suite 1870 Albuquerque, NM 87102
Secretary: Peter G. McCabe Secretary, Committee on Rules of Practice and Procedure Washington, DC 20544	

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Advisory Committee on Appellate Rules

Members	Position	District/Circuit	Start Date	End Da
Carl E. Stewart Chair	C	Fifth Circuit	Member: 2001 Chair: 2005	---- 2009
James Forrest Bennett	ESQ	Missouri	2005	2011
Kermit Edward Bye	C	Eighth Circuit	2005	2011
Thomas S. Ellis III	D	Virginia (Eastern)	2003	2009
Gregory G. Garre*	DOJ	Washington, DC	---	Open
Randy J. Holland	JUST	Delaware	2004	2010
Mark I. Levy	ESQ	Washington, DC	2003	2009
Maureen E. Mahoney	ESQ	Washington, DC	2005	2011
Stephen R. McAllister	ACAD	Kansas	2004	2010
Jeffrey S. Sutton	C	Sixth Circuit	2005	2011
Catherine T. Struve Reporter	ACAD	Pennsylvania	2006	Open

Principal Staff: John K. Rabiej 202-502-1820

* Ex-officio

TAB 1-2

DRAFT

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

I. Introductions

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

Judge Stewart welcomed the meeting participants.

II. Approval of Minutes of April 2008 Meeting

The minutes of the April 2008 meeting were approved.

III. Report on June 2008 Meeting of Standing Committee

Judge Stewart and the Reporter summarized the FRAP-related actions taken by the

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

Standing Committee at its June 2008 meeting. The Standing Committee gave final approval to a number of proposed amendments. Those amendments, which were also approved by the Judicial Conference in September 2008, are currently on track to take effect on December 1, 2009, assuming that the Supreme Court approves them and assuming that Congress takes no contrary action. The set of amendments include the proposed clarifying amendment to FRAP 26(c)'s three-day rule; new FRAP 12.1 (and new Civil Rule 62.1) concerning indicative rulings; an amendment that removes an ambiguity in FRAP 4(a)(4)(B)(ii); an amendment to FRAP 22 that parallels amendments to the habeas and Section 2255 rules; and the package of time-computation amendments. The Reporter noted that the Standing Committee had made a change to the treatment of state holidays in the time-computation rules; had revised the Note to new Rule 12.1; and had decided upon a change to the text of Rule 22 All these changes had been summarized in the Reporter's June 20, 2008 email report to the Advisory Committee.

Judge Rosenthal noted that she and others had met with congressional staffers and had discussed the time-computation project. The staffers indicated their belief that it should not be difficult to secure the passage of legislation to amend the short list of statutes containing time periods that require amendment in the light of the change in time-computation method. The staffers suggested that participants in the rulemaking process return to the Hill in early December 2008 with proposed statutory language; the goal will be to secure legislation that takes effect on the same day as the proposed Rules amendments. Mr. Letter asked whether any of the proposed statutory amendments show signs of being controversial. Judge Rosenthal responded that there have been no signs of controversy.

Judge Rosenthal also noted that there will be a need for local rulemaking activity in order to adjust time periods set by local rules in light of the change in time-computation approach. The Standing Committee plans to communicate on this topic with the chief judges of each district court, and also plans to arrange for the matter to be raised at judges' workshops and conferences.

The Reporter noted that the Standing Committee had approved for publication the proposed amendments to Form 4, Rule 1(b), and Rule 29(a). Those amendments were published for comment in August, along with the proposed amendment to Rule 29(c) (which had previously been approved for publication). So far, the Committee has received one comment in general support of the proposals and two comments critiquing the proposed new Rule 29(c) disclosure requirement. The Washington Legal Foundation (WLF) points out that the proposed requirement that the amicus "identify" all persons who contributed money intended to fund the brief could be read to allow an amicus to say nothing if no such persons exist. However, WLF asserts, the Supreme Court interprets its similarly-worded rule to require, in such instances, a *statement* that no such persons exist. WLF suggests re-drafting the proposed Rule to clarify the point. A member responded that such a clarification might be inserted into the Note. The second comment on the Rule 29(c) proposal comes from Luther Munford, who asks why the rule imposes a disclosure requirement rather than simply setting a conduct rule (as by banning parties from contributing to the preparation of the amicus brief). Mr. Munford will send the Committee a written comment along these lines. Comments are due by February 17, 2009, so the Committee

will be in a position to consider the comments at its spring 2009 meeting.

IV. Other Information Items

Judge Stewart noted that he has not received any further responses to his letter to the chief judges of each circuit concerning circuit-specific briefing requirements. He noted that as new judges are appointed to a circuit, it becomes more likely that the circuit may be willing to re-evaluate its existing local rules. Progress in paring down circuit-specific requirements is likely to be incremental.

Judge Stewart reported that he had written to Judge Jerry Smith to apprise him of the Committee's decision not to proceed with Judge Smith's proposal to amend Rule 35(e) so that the procedure with respect to responses to requests for en banc hearing or rehearing tracks the procedure set by Rule 40(a)(3) with respect to responses to requests for panel rehearing. Likewise, Judge Stewart reported, he had written to Judge Alan Lourie to let him know that the Committee had decided not to proceed with Judge Lourie's proposal to amend Rule 28.1(e) to address abuses of the cross-appeal briefing length limits.

V. Discussion Items

A. Item No. 07-AP-E (issues relating to *Bowles v. Russell* (2007))

Judge Stewart invited the Reporter to present an update on issues relating to the Supreme Court's decision in *Bowles v. Russell*, 127 S. Ct. 2360 (2007).

The most recent Supreme Court case implicating appeal deadlines was *Greenlaw v. United States*, 128 S. Ct. 2559 (2008). Greenlaw had appealed his sentence to the court of appeals and the government had failed to cross-appeal. The court of appeals rejected Greenlaw's challenge, and in addition – raising on its own motion the district court's failure to comply with a statutory mandatory minimum – the court of appeals decided that Greenlaw's sentence must be *increased*. When Greenlaw sought review, the United States confessed error and argued for vacatur and remand; but instead, the Supreme Court ordered full briefing and appointed separate counsel to defend the court of appeals' judgment. Ultimately, the Supreme Court vacated the judgment, holding that absent a government appeal or cross-appeal, the court of appeals should not have increased Greenlaw's sentence. Even assuming that there might be circumstances in which the court of appeals could initiate plain error review, such an approach is not appropriate as to sentencing errors which the government did not pursue. The Supreme Court's opinion in *Greenlaw* does not resolve the nature of the cross-appeal requirement. The *Greenlaw* Court's discussion of the deadlines for appeals and cross-appeals is interesting. As the Court puts it, those deadlines are "unyielding," and they serve the goals of finality and notice. In particular, an appellant such as Greenlaw should be able to rely (in formulating his litigation strategy) on the

fact that the government has decided not to take a cross-appeal.

Meanwhile, the lower courts continue to examine *Bowles*' implications for various types of appeal deadlines. Statutory appeal deadlines – such as Section 2107's 30-day and 60-day deadlines for taking civil appeals – are clearly regarded as jurisdictional. Entirely rule-based appeal deadlines, however, appear to be non-jurisdictional claim-processing rules. Examples include the Appellate Rule 4(b)(1)(A) deadline for appeals by criminal defendants and the Civil Rule 23(f) deadline for appeals from decisions concerning class certification. There is a nascent circuit split concerning hybrid deadlines – i.e., deadlines which are set by rule but which affect a deadline set by statute. One set of hybrid deadlines encompasses the Civil Rules deadlines for making motions that toll the time to appeal under Appellate Rule 4(a)(4). The Sixth Circuit views such tolling-motion deadlines as non-jurisdictional, but the Ninth Circuit disagrees. Most recently, the Eighth Circuit confronted a case in which the district court had purported to grant a defendant's (unopposed) motion for an extension of time to file a Civil Rule 50(b) motion. In its opposition on the merits of the motion (and after the time had run out for making a timely Rule 50(b) motion) the plaintiff raised the timeliness objection, and the district court denied the motion. The Eighth Circuit held that the deadline for making Civil Rule 50(b) motions is non-jurisdictional, but that the objection in this case was properly raised and that the untimely motion did not toll the time to appeal. Nor, in the court's view, could the "unique circumstances" doctrine rescue the appeal, because the court viewed such an application of the doctrine as barred by *Bowles*.

A judge member noted that a circuit split concerning the treatment of appeal deadlines is not desirable. He asked whether a proposal should be made to Congress to enact legislation that would adopt a uniform approach to such deadlines. Another judge member stated that if action is to be taken to adopt such an approach, Congress is better positioned to do so than are the rulemaking committees. This member concurred in the notion that it could be useful to make a recommendation to Congress; he suggested that in the preface to such a proposal one should explain the Committee's reasons for thinking that the matter is not amenable to a rulemaking solution.

It was noted that the *Bowles* issues also affect the other Advisory Committees and that coordination with those Committees will be essential. Judge Rosenthal observed that a legislative proposal, if one were to be formulated, would presumably include two components – first, a list of existing statutory appeal deadlines and a method for determining how to treat them, and second, a method for establishing the treatment of statutory appeal deadlines enacted in the future. She noted that in assessing the desirability of such a proposal, it would be useful to see possible language. Professor Coquillette agreed that sample language would be very useful for purposes of evaluating this possibility. He also noted that in order to be successful any such proposal would need the support of the DOJ. Mr. Letter promised to raise the question with Solicitor General Garre. Judge Rosenthal wondered whether proposed legislation that changes the treatment of existing statutory appeal deadlines would be controversial. Mr. Letter responded that he did not think so. An appellate judge suggested that in drafting proposed statutory

language, it would be advisable to avoid use of the term "jurisdictional." A judge member suggested that it would be worthwhile to consider the Court's reasoning in *Arbaugh v Y&H Corp.*, 546 U.S. 500, 515-16 (2006) (in holding "that the threshold number of employees for application of Title VII is an element of a plaintiff's claim for relief, not a jurisdictional issue," suggesting a clear statement rule for determining when "a threshold limitation on a statute's scope shall count as jurisdictional").

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

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

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

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

A district judge member reported that, after reading the agenda book materials, he made inquiries within his district. He learned that failure to comply with the separate document

requirement is common, particularly in connection with the entry of summary judgment The member suggested that the first step to take is to raise the matter with the district clerks' offices. Judge Rosenthal observed that compliance with the separate document requirement is not difficult. Mr. Letter noted the importance of the separate document requirement in making clear, to practitioners, the point at which the district judge considers the case to be at an end (and thus ripe for appeal)

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

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

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

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

The Reporter noted that researching the practices in state and local facilities is challenging because of the variety of policies and because many institutions' policies do not seem to be memorialized in readily accessible documents. Some institutions provide set, periodic sums to indigent prisoners; some institutions instead state that they will allow indigent inmates a reasonable amount of free postage; some institutions advance money for postage to such inmates and then seek to recoup the money once there is a balance in the inmate's account.

The caselaw appears to recognize that indigent prisoners have a federal constitutional right to some amount of free postage in order to implement the inmate's right of access to the courts. The Supreme Court's 1977 decision in *Bounds v Smith*, 430 U S. 817 (1977), provides authority for this view. However, *Bounds* has been narrowed in some respects by *Lewis v. Casey*, 518 U.S. 343 (1996). The caselaw from the different circuits varies, and the decisions are very fact-specific; however, common themes appear to be that indigent inmates do have a right to some free postage for legal mail – but also that the constitutionally required amount may not be very large.

Mr. Fulbruge noted that roughly 40 percent of the Fifth Circuit's docket consists of cases involving prisoner litigants. A district judge member asked whether the high percentages of inmate filings in the Fifth and Ninth Circuits are atypical. Mr. Fulbruge responded that, nationwide, the percentage of appellants in the courts of appeals who are pro se is roughly 40 per cent, and that most of those pro se litigants are inmates. The Ninth, Fifth and Fourth Circuits have the greatest proportion of inmate litigation, and the Eleventh Circuit has a large share of inmate litigation as well.

Mr. Letter noted that he sympathizes with Judge Wood's original inquiry: the Rule could definitely be written more clearly. A member noted that the Rule's use of the word "inmate" might be misleading, to the extent that the Rule is intended to cover other institutionalized persons such as people in mental institutions; he suggested that a broader term would be "person" rather than "inmate." A judge member agreed that the Rule should be clarified. An attorney member wondered whether it might be useful to take a more global look at the inmate-filing rule, as opposed to treating only the question of postage. Judge Hartz noted that a related but distinct issue is raised by cases such as *United States v. Ceballos-Martinez*, 387 F 3d 1140 (10th Cir. 2004), in which the court of appeals dismissed a prisoner's appeal – even though it was undisputed (and shown by the postmark) that he had deposited his notice of appeal with the prison mail system within the time for filing the appeal – merely because the prisoner had not included a declaration or notarized statement setting forth the date of deposit and stating that first-class postage had been prepaid.

Judge Sutton, Dean McAllister, and Mr. Letter agreed to work with the Reporter to formulate some possible options for the Committee's consideration at the next meeting.

D. Item No. 06-08 (proposed FRAP rule concerning amicus briefs with respect

to rehearing en banc)

Judge Stewart invited the Reporter to summarize the status of the inquiries concerning this item, which concerns Mr. Levy's suggestion that the Committee consider amending the Appellate Rules to clarify the procedure for amicus briefs with respect to rehearing. At the Committee's Spring 2008 meeting there was no consensus on whether a national rule would be desirable, but members did suggest that circuits should consider adopting local rules on the issue Members noted that it would be useful to ask judges in circuits which do not currently have a local rule on point why no such local rule exists. Members also observed that circuits without local rules on the subject are most likely to adopt such rules if attorney groups advocate their adoption.

Accordingly, the Committee's discussion at the Spring 2008 meeting gave rise to a number of lines of inquiry. Mr. Letter raised the issue with the federal appellate chiefs from around the country to see what their experience has been and whether the lack of local rules on the topic seems problematic. Judge Sutton raised the issue with the Sixth Circuit's local rules committee and also contacted some judges in the circuits that do not have a local rule on point to inquire why they do not have one. And Mr. Fulbruge consulted his fellow Circuit Clerks for their input on the practice in their respective circuits.

Mr. Letter reported that the question of amicus filings in connection with rehearing is not much of an issue for the United States Attorney offices; the question is much more likely to arise for the litigating divisions in Main DOJ. He noted that the DOJ does find local rules like those of the Ninth and Eleventh Circuits useful, because they provide needed clarity on whether motions are required in order to file such amicus briefs and on questions of brief length and timing.

Judge Sutton contacted circuit judges in the circuits (First, Second, Fourth, Sixth, and Eighth) which do not currently have a local rule on point. In his conversations with those judges, a number of themes emerged. Judges noted that even without a local rule on point a would-be amicus can always make a motion for leave to file the brief. Most circuits will usually grant such a motion unless the filing would cause a recusal. (The Eighth Circuit, he noted, may be somewhat less receptive and does not always grant leave.) Some judges feel that adopting a local rule would be undesirable because it could encourage amicus filings. And in courts which do not generally allow additional briefing after granting rehearing en banc, permitting amicus filings at that point would create a need to review the court's policy with respect to party filings at that stage as well.

Mr. Fulbruge's survey of the circuit clerks disclosed that some seven of the clerks who responded do not favor the adoption of a national rule. Two clerks see no need for a local rule, but two other clerks feel that it would be useful for circuits to consider adopting one.

Mr. Levy stated that even though the Committee does not seem inclined to adopt a

national rule, it would be useful to encourage the adoption of local rules. Though this would not achieve uniformity, it would bring clarity to an area where questions frequently arise. A judge member observed that judges and practitioners have different perspectives on this issue. He suggested that local rules would be useful, and that the best way to encourage their adoption would be for the suggestions to come from attorney organizations.

Mr. Levy asked whether each circuit has a local rules committee. Judge Stewart stated that each circuit technically does have such a committee, and that he had identified those committees for the purpose of sending them copies of his letter to the chief judges concerning circuit-specific briefing requirements. Mr. Fulbruge noted that the Fifth Circuit's local rules committee is not used as much as those in some other circuits (such as the Seventh Circuit).

A district judge member stated that he opposes the adoption of a national rule, and he also questioned why the Committee should encourage the adoption of local rules on this topic. An attorney member responded that local rules could usefully provide answers to the questions that attorneys commonly have about such briefs (concerning the need for a motion, and concerning length and timing); she wondered whether an appropriate measure might be a letter from the Advisory Committee to the chairs of the circuits' local rulemaking committees

Professor Coquillette observed that, in general, the Standing Committee's policy has been not to encourage local rulemaking as a solution unless there is a good reason for local variation. An appellate judge observed that there are indeed variations in local circuit culture that affect the courts' treatment of amicus briefs in connection with rehearing.

Mr. Fulbruge noted that circuit clerks who oppose adoption of a local rule on this point are concerned that a local rule would encourage amicus filings. Mr. Levy noted that a local rule, if adopted, need not encourage filings; for example, it could state that party consent is not enough and that a motion is required. Mr. Levy observed that one important function of local rules is to instruct practitioners. Mr. Letter agreed that this issue comes up constantly in his practice and that having a local rule would inform practitioners as to what they are supposed to do.

Professor Coquillette asked whether the adoption of local rules on this point would be justified by circuit-to-circuit variation – for example, by variations in the size of the circuit, the circuit's geographical range, and the types of litigation commonly seen in the circuit. Mr. Levy responded that in his view such variation does exist. A district judge member disagreed; he suggested that at most, the Committee might send the minutes of the meeting to the chief judges of each circuit (so as to apprise them of the discussion) but without any recommendation by the Committee. Then, he suggested, practitioners who are interested in the adoption of such local rules can work to seek their adoption. An appellate judge responded that he sees things somewhat differently, since there is already a lot of local variation in briefing practice. The district judge member responded that it is one thing for the Committee to tolerate variation, and another for the Committee to recommend the proliferation of local rules. The appellate judge member responded that his research had brought to light some rather surprising local practices.

For example, some circuits which require a motion for leave send that motion to the original panel – the members of which might be expected to be unreceptive to the arguments of an amicus who wishes to submit a brief in support of rehearing en banc. The appellate judge member agreed, though, that the key factor in the adoption of local rules on this issue will be the support of practitioners who push for the adoption of such rules

Mr. Levy noted that the D.C. Circuit has an active practitioners' committee; he suggested that it would be useful for the Appellate Rules Committee to state that the issue is worth thinking about. A member countered, however, that the recent experience with the issue of local circuit briefing rules weighs against the notion of asking the Chair to write a letter to the chief judges of the circuits; the member noted that such a letter would only be useful if it contained a detailed suggestion, yet if the letter were to contain a detailed suggestion that might make it seem that the Committee is promoting the adoption of local rules on the issue. Professor Coquillette noted that the response in his home circuit indicates that Judge Stewart's letter on local briefing rules has had an effect. Professor Coquillette reviewed some relevant history concerning local rules. Local rules are adopted without the report-and-wait process which is used for the national rules, and thus in 1988 Congress became concerned about the proliferation of local rules because such rules are adopted without congressional oversight. Professor Coquillette observed that on occasions when the Committees have considered an issue important enough for a national rule, the Committees have not been persuaded by the argument that the issue is one treated differently in different circuits due to local legal culture (he cited the example of new Appellate Rule 32.1 concerning unpublished opinions). He also noted that the ABA's Section on Litigation has tended to prefer the adoption of uniform national rules rather than local rules because the need to look at local rules is a burden on practitioners.

An attorney member asked whether – if the Committee were to communicate directly with the local rules advisory committees – that would offend the judges in the relevant circuit. An appellate judge observed that contacting the practitioners who serve on local rules committees may not be particularly useful, because lawyers who are accustomed to practicing in a given circuit are less likely to seek clarification of a circuit's practices than lawyers who practice nationwide. Mr. Levy noted that one relevant national organization would be the American Academy of Appellate Lawyers.

A district judge member expressed opposition to the idea of contacting local rules advisory committees directly; he suggested that, instead, practitioners should be the ones to make such contacts. At most, he stated, he would be willing to support communicating with the chief judges of the circuits, not with the local rules advisory committees. Judge Rosenthal noted that she did not recall any instances in which an Advisory Committee or the Standing Committee communicated directly with local rules advisory committees. She noted that it would be interesting to consider the 1990s experience under the Civil Justice Reform Act. Mr. Levy suggested that perhaps a first letter could be sent to the chief judges of the circuits, and then that letter could be followed by one to the local rules advisory committees. Mr. McCabe questioned whether the AO has a current list of the local rules advisory committee members; Mr. Rabiej

noted that the AO does have a list of the local rules committees for the district courts

An attorney member concurred in the prior observation that practitioners on the local rules advisory committees are unlikely to advocate the adoption of local rules on the issue. He suggested that – given the low probability that a letter from the Committee would lead to the adoption of local rules on the point – if the Committee has an institutional interest in not encouraging the proliferation of local rules, the Committee should take no action.

Mr. Levy moved that the Committee resolve to draft a letter (the specifics of which the Committee could consider at its Spring 2009 meeting) to the chief judges of each circuit advising them of the Committee's discussion and asking them to consider adopting a local rule on amicus briefs with respect to rehearing. He suggested that the letter might include a copy of sample local rules on the subject Mr. Letter seconded the motion. A district judge member stated that he would vote against such a motion because he expected to disagree with what he anticipated Mr. Levy would suggest including in the substance of the letter. Mr. Levy responded that if the motion were to pass, it would be possible to prepare more than one proposed alternative drafts of the letter. The motion failed by a vote of five to three. No further motions were made with respect to this item.

E. Item No. 03-02 (proposed amendment concerning bond for costs on appeal)

Judge Stewart invited the Reporter to introduce the topic of Rule 7 bonds for costs on appeal. The Reporter noted that, at its spring 2008 meeting, the Committee had discussed the pending proposal to amend Rule 7 to address the inclusion of attorney fees among the costs for which a Rule 7 bond can be required. There was consensus that the Committee should seek the views of the Civil Rules Committee concerning the role of appeal bonds in class litigation. Members also expressed interest in seeking the views of knowledgeable practitioners concerning this question.

The input received since then from Judge Kravitz and Professor Cooper has been very helpful. Professor Cooper provided some preliminary observations which underscore the challenges of moving forward with a proposal to address class-action appeals through an amendment to Rule 7. He notes that to the extent that a commentator takes the view that rulemaking action is warranted to respond to perceived problems with the behavior of certain class action objectors, one might question whether the best way to address such behavior is through Rule 7's appeal bond provision. He points out that it is difficult to craft rules that will distinguish accurately between objectors who are raising useful objections and objectors who are not. Professor Cooper has also identified a number of subsidiary issues which would require attention in drafting an amendment to Rule 7. He agrees that any such proposal should be developed in coordination with the Civil Rules Committee. But he also notes that this general topic could pose additional issues for the Civil Rules Committee. This is because the reasoning of *Marek v. Chesny*, 473 U.S. 1 (1985), has played a key role in the lower courts' discussions of

the Appellate Rule 7 issue. In *Marek*, the Supreme Court held that Civil Rule 68's reference to "costs" includes attorney fees where there is statutory authority for the award of attorney fees and the statute in question defines "costs" to include attorney's fees. To the extent that the Committees contemplate revising Appellate Rule 7 to address the treatment of attorney fees as part of Rule 7 "costs," and to the extent that such a revision to Appellate Rule 7 entails the consideration of possible amendments to the Civil Rules, the question may arise whether (and how) to address *Marek*'s treatment of attorney fees as "costs" under Civil Rule 68 And the latter issue would not be uncontroversial. In the event that the Committee wishes to proceed with its consideration of an amendment to Rule 7, Professor Cooper has provided a very helpful list of litigators who have in the past assisted the Civil Rules Committee in its consideration of issues relating to class actions.

An attorney member asked whether there would be any downside if the Committee were to decide not to amend Rule 7. Judge Stewart noted that the Committee had, in a prior year, voted to approve for publication a proposal to amend Rule 7 to exclude attorney fees from the costs for which an appeal bond can be required; that proposal did not, however, focus on the question of class actions. Judge Rosenthal stated that Professor Cooper's comments summarize well the difficulty of attempting to address by rule the role of class action objectors – a question that has become more prominent since the adoption of Civil Rule 23(f) (which authorizes interlocutory appeals by permission from class certification rulings). Another attorney member suggested that the Committee let the matter continue develop through caselaw; crafting a rule amendment would be highly complex and would risk unintended consequences. A district judge member expressed agreement with this view, but also noted that such a disposition should not be taken as intended to discourage the Civil Rules Committee from considering this set of issues in the first instance. The question was posed whether the Appellate Rules Committee would like to ask the Civil Rules Committee to continue to monitor developments in this area. A member responded that such a course of action should be left up to the judgment of the Civil Rules Committee. Another member moved to remove Item 03-02 from the Committee's study agenda. The motion was seconded and passed by voice vote without opposition.

F. Item No. 03-09 (FRAP 4(a)(1)(B) & 40(a)(1) – treatment of U.S. officer or employee sued in individual capacity)

Judge Stewart invited Mr. Letter to introduce the DOJ's revised proposal concerning the possibility of an amendment to address the treatment of litigation involving federal officers or employees. Mr. Letter noted that the DOJ had wished to clarify the treatment of litigation involving federal officers sued in their individual capacity and also to clarify the treatment of litigation involving federal employees. The courts have never clearly explained the distinction between a federal "officer" (as used in Rules 4(a)(1)(B) and 40(a)(1)) and federal employees in general. Civil Rule 12 was amended in 2000 to make clear that the additional time that Rule provides for answers by a United States litigant covers federal officers or employees, including officers or employees sued in their individual capacity for an act or omission occurring in

connection with duties performed on the United States' behalf Some years ago, the DOJ proposed that similar changes be made in Appellate Rule 4(a)(1)(B) and Appellate Rule 40(a)(1) The Committee approved those proposals for publication, but the proposals were held in order to await publication along with other proposals. The result was that the proposals were still under consideration at the time that the Supreme Court decided *Bowles*. In the light of *Bowles*, a problem arises with the proposed amendment to Rule 4(a)(1)(B): Because the amendment to Rule 4(a)(1)(B) would not change the corresponding statutory language (concerning civil appeal deadlines) in 28 U.S.C. § 2107, amending Rule 4(a)(1)(B) would not provide practitioners with the certainty that the amendment was originally designed to achieve. Accordingly, the DOJ has decided to withdraw its proposal to amend Rule 4(a)(1)(B), but the DOJ still feels that it is worthwhile to amend Rule 40(a)(1). Rule 40(a)(1)'s deadlines concerning rehearing petitions are entirely rule-based and therefore *Bowles* creates no problem for the proposed Rule 40(a)(1) amendment. The proposed amendment would bring certainty to the application of Rule 40(a)(1) and would bring that Rule into conformity with the approach taken in Civil Rule 12(a).

A judge member asked why amending Rule 40 would not raise similar *Bowles* issues – i.e., is Rule 40's use of the term "officer" mirrored in a statute? The Reporter responded that 28 U.S.C. § 2101(c), which sets the 90-day period for seeking certiorari review, does not say anything about rehearing petitions, and it is, instead, Supreme Court Rule 13.3 that provides for an extension of the time to seek certiorari when a petition for rehearing is timely filed. This means, the Reporter said, that *Bowles* does not raise the same sort of problem for an amendment to Rule 40(a)(1) that it raises for an amendment to Rule 4(a)(1)(B). The judge member questioned whether it is clear that it would be inappropriate to proceed with the proposed amendment to Rule 4; if the Committee were to make clear what the *Bowles*-related issue is, and if the Supreme Court were nonetheless to approve the amendment to Rule 4, then, the member suggested, litigants could fairly rely upon the amended Rule.

The Committee adjourned its discussion of this item in order to break for lunch. The discussion of this item resumed later in the afternoon, after Solicitor General Garre had joined the meeting. In the meantime, a copy of the proposed language for the Rule 40(a)(1) amendment had been distributed. The language of the proposed amendment was the same as the language that was published for comment in August 2007 except that the members approved the deletion of one sentence in the Note (which in the published version had referred to the concurrent proposed amendment to Rule 4(a)(1)(B)). That sentence is bracketed in the proposal shown here:

Rule 40. Petition for Panel Rehearing

(a) Time to File; Contents; Answer; Action by the Court if Granted.

(1) **Time.** Unless the time is shortened or extended by order or local rule, a petition for panel rehearing may be filed within 14 days after entry of judgment. But in a

civil case, ~~if the United States or its officer or agency is a party, the time within which any party may seek rehearing is 45 days after entry of judgment,~~ unless an order shortens or extends the time~~.~~, the petition may be filed by any party within 45 days after entry of judgment if one of the parties is:

(A) the United States;

(B) a United States agency,

(C) a United States officer or employee sued in an official capacity; or

(D) a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf

* * * * *

Committee Note

Subdivision (a)(1). Rule 40(a)(1) has been amended to make clear that the 45-day period to file a petition for panel rehearing applies in cases in which an officer or employee of the United States is sued in an individual capacity for acts or omissions occurring in connection with duties performed on behalf of the United States. [(A concurrent amendment to Rule 40(a)(1) makes clear that the 45-day period to file a petition for panel rehearing also applies in such cases.)] In such cases, the Solicitor General needs adequate time to review the merits of the panel decision and decide whether to seek rehearing, just as the Solicitor General does when an appeal involves the United States, a United States agency, or a United States officer or employee sued in an official capacity.

The Reporter noted that the Committee should decide whether any further changes to the proposal should be made, and whether republication of the proposal is needed. On the latter point, Mr. Rabiej noted that the criterion for whether to republish a proposal is whether there has been a substantive change in the proposal (compared to the published version); the underlying practical concern is whether republication (and the resulting public comment) would be helpful in the consideration of the proposal. A district judge member stated that republication was not

needed since the Committee had not made a substantive change in the proposed Rule 40 amendment.

The Committee discussed whether to change the proposal's language in response to Chief Judge Easterbrook's comments. Chief Judge Easterbrook states that it is incorrect to use "United States" as an adjective; he would prefer that the Rule use the adjective "federal." It was noted that this is a matter of style, and that adopting Chief Judge Easterbrook's proposed change would render amended Rule 40(a)(1) inconsistent with the language used in restyled Civil Rule 12(a).

The Committee also discussed the Public Citizen Litigation Group's concern that the language in the proposed Rule 4 and Rule 40 amendments could be read to exclude instances when the court of appeals ultimately concludes that the federal officer's or employee's act did not occur "in connection with duties performed on the United States' behalf." Public Citizen argues that the wording should be changed to make clear that the extended time periods' availability turns on the nature of the act as alleged by the plaintiff rather than on the nature of the act as ultimately found by the court. Public Citizen suggests that this could be achieved by changing "an act or omission occurring in connection with" to read "an act or omission alleged to have occurred in connection with." Mr. Letter expressed opposition to Public Citizen's proposed wording change; the time period for rehearing should not turn on the way in which the complaint was framed. The Reporter pointed out that the uncertainty which concerns Public Citizen would presumably be less in connection with Rule 40(a)(1) (compared to the concern over Rule 4(a) and appeal time) because where the question is the time to seek rehearing, there will already be a panel opinion which will indicate the panel's view of the facts. A member noted that Public Citizen's proposed language would diverge from the language used in Civil Rule 12(a).

A motion was made to give final approval to the proposed Rule 40(a)(1) amendment, as published, subject to the deletion of the sentence in the Note that had referred to the concurrent proposed amendment to Rule 4(a)(1)(B). The motion was approved by voice vote without opposition.

After that vote was taken, Mr. Garre asked whether the Committee would be inclined to recommend to Congress that it amend 28 U.S.C. § 2107 so as to permit a corresponding change to Rule 4(a). Judge Rosenthal noted that such a request would require coordination between the rulemaking process and the legislative process.

An appellate judge member asked whether there is any precedent for proposing a rule that would clarify an ambiguity in a statute (as the proposed Rule 4(a) amendment would do). The Reporter noted that there is some loosely analogous past history with Rule 4 and Section 2107; in particular, when the 1991 amendments to Rule 4 went through the rulemaking process, the attention of Congress was called to the desirability of amending Section 2107 in order to make the statute correspond to the 1991 changes in Rule 4(a), and shortly after the 1991 amendments to Rule 4 took effect, Congress did enact a corresponding amendment to Section 2107.

VI. Additional Old Business and New Business

A. Item No. 08-AP-A (proposed FRAP 3(d) amendment concerning service of notices of appeal)

Judge Stewart invited the Reporter to introduce the study item concerning Appellate Rule 3(d). This item was drawn to the Committee's attention by Judge Kravitz, who passed along a suggestion by the Connecticut Bar Association Federal Practice Section's Local Rules Committee ("CBA Local Rules Committee") The CBA Local Rules Committee points out that in a district which permits the notice of appeal to be filed electronically through the CM/ECF system, there is a "discrepancy between FRAP 3(d), which indicates that the District Court Clerk's office will handle service of notices of appeals and the reality that it does not serve civil notices of appeals."

At the present time, not all the district courts which are on CM/ECF for filing permit the notice of appeal to be filed electronically. Moreover, the appellate courts' transition to electronic filing is still in process. The CBA Local Rules Committee is correct that where the CM/ECF system is fully operational there is no need for the clerk to serve paper copies of the notice of appeal. But even in those instances, it would be necessary to have paper copies of the notice for the purpose of serving litigants who are not on the CM/ECF system, and inmate filings would continue to be in paper form. It would also continue to be necessary for the district clerk to notify the court of appeals of district-court filings that post-date the notice of appeal. In the light of the ongoing transition to CM/ECF, it would be reasonable to take a wait-and-see approach to Rule 3(d) at this time. That is particularly true in the light of the Committee's practice of holding proposed amendments until such time as there is a critical mass of them to publish for comment.

Mr. Fulbruge observed that the district courts do not always notify the circuit clerk electronically of the filing of a notice of appeal. An attorney member suggested that, given time, this issue is likely to work itself out. Judge Stewart noted the likelihood that the Committee on Court Administration and Case Management (CACM) will also consider the issue.

By consensus, this item was retained on the study agenda.

B. Item No. 08-AP-C (possible changes to FRAP 26(c)'s "three-day rule")

Judge Stewart invited the Reporter to present the issues relating to the "three-day rule." Rule 26(c) provides that when a deadline is measured after service of a paper on a party, and the paper is served electronically or is not delivered on the date of service, then three days are added at the end of the prescribed period. Rule 26(c) is the subject of a pending amendment that is currently on track to take effect December 1, 2009, and that will clarify the mechanics of the three-day rule. During the time-computation project, comments were received which suggest that the three-day rule should be abolished. Chief Judge Frank Easterbrook observes that the

three-day rule will thwart the time-computation project's expressed preference for periods that are set in multiples of 7 days. And he argues that the three-day rule makes particularly little sense when a paper is served electronically (and thus instantaneously).

The Reporter suggested that the Committee should coordinate its work on this issue with that of the Civil, Criminal and Bankruptcy Rules Committees. She observed that the Committees have been debating the merits of the three-day rule, on and off, since at least the spring of 1999 Some of the concerns that have been expressed over that time seem less weighty now than they once did – for example, the concern that technical glitches will occur in the course of electronic service. Moreover, since the CM/ECF system is set up to require those using it to consent to electronic service, it is less plausible to argue that applying the three-day rule when service is made electronically is important in order to preserve the incentive to consent to electronic service However, another concern has been that if the three-day rule were eliminated parties would engage in the undesirable tactic of serving papers electronically just before a weekend or holiday in order to disadvantage their opponent; the developments noted above do not mitigate that particular concern.

A judge member queried whether a decision to maintain the three-day rule, for the present time, even in cases of electronic service might result in a situation – a few years hence – in which the availability of the extra three days has come to be viewed by practitioners as an entitlement. An attorney member stated that she did not think so, because the extra three days are currently viewed more as a gift than as a right. Another attorney member stated that it makes sense to wait to address this issue until the CM/ECF system matures. Another attorney member agreed that it makes sense to coordinate the Appellate Rules Committee's consideration of this issue with the other Advisory Committees. A motion was made to defer action on this item but to encourage the other Advisory Committees to consider it. The motion was seconded and passed by voice vote without opposition.

C. Item Nos. 08-AP-D, 08-AP-E, & 08-AP-F (possible changes to FRAP 4(a)(4))

Judge Stewart invited the Reporter to summarize the various proposals to amend Rule 4(a)(4). One such proposal comes from Peder Batalden, who points out that under Rule 4(a)(4)(B) the time to appeal from an amended *judgment* runs from the entry of the *order* disposing of the last remaining tolling motion. In some scenarios, he suggests, the judgment might not be issued and entered until well after the entry of the order. One such scenario concerns remittitur: Suppose the court orders a new trial unless the plaintiff agrees to accept a reduced award of damages, and gives the plaintiff 40 days to consider that choice. Another scenario concerns complex injunctive relief: suppose that the court, having entered a judgment containing an injunction, subsequently grants a motion for reconsideration and directs the parties to attempt to agree on the form of an amended judgment that includes narrower relief than the initial judgment. In either of these instances, the time to appeal from the *order* might actually run out before the *amended judgment* is actually issued and entered. These scenarios

apparently would work differently in the Seventh Circuit, because that Circuit has read Civil Rule 58's reference to orders "disposing of a motion" to mean orders "denying a motion" – with the result that a separate document would be required by Civil Rule 58 for orders *granting* motions listed in Civil Rule 58(a)(1) - (5).

To address the problem he identifies, Mr. Batalden suggests that Rule 4(a)(4)(B)(ii) be amended by deleting "or a judgment altered or amended upon such a motion," so that the Rule would read: "A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A) must file a notice of appeal, or an amended notice of appeal--in compliance with Rule 3(c)--within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion." This change would remove the requirement that the notice of appeal challenging the judgment's alteration or amendment be filed within 30 days from entry of the order disposing of the motion. But in the scenarios described above, this change would not remove the incongruity concerning the timing of a notice of appeal challenging the order itself; Rule 4(a)(4)(B)(ii) would still purport to direct that such a notice of appeal be filed within 30 days after entry of the order, even if there is not yet a final and appealable judgment on that 30th day.

The other suggestions come from Public Citizen and from the Seventh Circuit Bar Association. They suggest that Rule 4(a) be amended so that the initial notice of appeal in a civil case encompasses appeals from any subsequent order disposing of a postjudgment motion. It is interesting to note that Rule 4(b)(3)(C) provides that a notice of appeal in a *criminal* case encompasses challenges to subsequent orders disposing of the post-verdict motions listed in Rule 4(b)(3)(A). The contrasting approaches taken in Rules 4(a) and 4(b) date from the same set of 1993 amendments to Rule 4; the minutes from the relevant Committee meeting do not explain the reason for the difference in approaches. As Public Citizen recognizes, one of the questions to be considered in assessing the proposal is whether the appellee would have sufficient notice of the nature of the appeal under a regime which permits the initial notice of appeal to encompass challenges to subsequent dispositions of post-judgment motions.

With respect to the issues raised by Mr. Batalden, an attorney member stated that he had not seen such scenarios in his practice. Another attorney member agreed, but also noted that Rule 4(b)'s approach holds some appeal. A third attorney member stated that he had seen the remittitur scenario in his practice. A judge member suggested that the Committee continue to study the issues. Another judge member noted that even if problems in this area are rare, such problems are very serious when they arise. An attorney member asked whether the three sets of proposals are linked (in the sense that, for example, adopting Public Citizen's proposal would address Mr. Batalden's concerns). The Reporter suggested that the answer to that question would be difficult to predict.

By consensus, these items were retained on the Committee's study agenda. The Reporter was asked to report the substance of the discussion to the Civil Rules Committee.

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

Judge Stewart invited the Reporter to introduce Mr. Levy's suggestion concerning the "manufactured finality" doctrine. This doctrine concerns situations in which the district court dismisses with prejudice fewer than all the plaintiff's claims and the plaintiff then voluntarily dismisses the remaining claims in order to obtain an appealable judgment. 28 U S.C. § 1291 authorizes appeals from final decisions of the district courts, and the Supreme Court has defined final decisions as those that end the litigation on the merits and leave nothing for the court to do but execute the judgment. The policies behind the final judgment rule include the need to conserve appellate resources, avoid piecemeal appeals, and curb the delay that such piecemeal appeals could cause in the district court.

There exist some safety valves that can mitigate the occasional harshness of the final judgment rule. Civil Rule 54(b) permits the district judge to direct entry of a final judgment as to fewer than all claims or parties if the district judge expressly determines that there is no just reason for delay. 28 U.S.C. § 1292(b) permits an interlocutory appeal to be taken if there are both (1) a certification from the district judge that the order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation and (2) permission from the court of appeals.

The manufactured finality doctrine, where it applies, can provide an additional option for seeking an immediate appeal. The circuits take varying approaches to this doctrine. The variations can be briefly summarized by reviewing various points along the spectrum of possible fact situations. Each scenario involves the district court's dismissal of the plaintiff's central claim, followed by the plaintiff's dismissal of the remaining peripheral claims. When the plaintiff dismisses its remaining (peripheral) claims with prejudice, all circuits (except perhaps the Eleventh Circuit) treat the resulting judgment as final and appealable. What if the plaintiff "conditionally" dismisses the peripheral claims with prejudice – i.e., dismisses them on the understanding that the dismissal is with prejudice unless the dismissal of the central claims is reversed on appeal? The Second Circuit treats such a conditional dismissal as creating an appealable judgment, but the Third and Ninth Circuits do not. In situations when the peripheral claims are dismissed without prejudice but the facts are such that those claims can no longer be asserted (for example, due to the statute of limitations), at least three circuits treat the resulting judgment as appealable. In cases where the peripheral claims are dismissed without prejudice and that dismissal completely removes a particular defendant from the suit, the Eighth and Ninth Circuits consider the resulting judgment to be appealable. In other instances when the peripheral claims are dismissed without prejudice, some six circuits treat the resulting judgment as not final and therefore not appealable, but two or more other circuits disagree. The Ninth Circuit has added a further nuance by inquiring whether there was evidence of litigant intent to manipulate the court of appeals' jurisdiction.

There could be a value to achieving a nationally uniform approach to this issue, and one

could make a policy argument in favor of recognizing a judgment as appealable in some of the manufactured-finality scenarios just described. If such a result seems desirable, there is the further question of how best to achieve that result. 28 U.S.C. § 2072(c) provides that rules adopted through the rulemaking process can define when a judgment is final for purposes of appeal. There is also the question of which Committee – Civil or Appellate – is best situated to take the lead in considering such possible solutions.

Mr. Levy noted that this is an area in which clarity is very important. He suggested that 28 U.S.C. § 1292(e), which authorizes the adoption through the rulemaking process of rules permitting interlocutory appeals, could be another source of authority for a rulemaking solution in this area. Mr. Levy suggested that the two Advisory Committees should consider whether Civil Rule 54(b) is intended to occupy the field, or whether Rule 54(b) should not be read to preclude other mechanisms for permitting immediate appeals.

A district judge member stated that he would like to hear more from persons who believe that the status quo is a problem. He stated that the existing framework already provides a means for addressing these issues One existing rule is Civil Rule 54(b). Another relevant rule, he suggested, is Civil Rule 58: where Civil Rule 41 requires the district court's permission for the dismissal of the peripheral claims, the district judge can determine whether the situation warrants a final judgment and whether to issue a judgment under Civil Rule 58. The judge member suggested that, therefore, the problems identified by Mr. Levy should come up only with respect to very early dismissals. The Reporter agreed that where Civil Rule 41 requires district judge approval of the dismissal of the peripheral claims, one can argue that the district court's approval of the dismissal should weigh in favor of the conclusion that the resulting judgment is final and appealable. However, she suggested, there are some cases where, regardless of the district court's view on the matter, the court of appeals has refused to recognize a final judgment.

An attorney member suggested that these issues might more appropriately be tackled by the Civil Rules Committee in the context of the Civil Rules (such as Civil Rule 54(b)). She also wondered whether it is unduly ambitious for the Committee to take on the task of adopting a rule in order to resolve a circuit split concerning the proper interpretation of Section 1291. A judge member agreed that the matter is one for consideration by the Civil Rules Committee; he stated that if he were required at this point to decide whether to take any action on this matter, he would favor doing nothing. He wondered whether the conditional-dismissal branch of the manufactured finality doctrine raises problems similar to those that arise with respect to hypothetical jurisdiction.

A motion was made to communicate the Committee's discussion to the Civil Rules Committee; seek the Civil Rules Committee's input; and continue to study the matter. The motion was seconded and it passed by voice vote without opposition.

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

Judge Stewart invited the Reporter to summarize this item, which relates to a suggestion made by Professor Daniel Meltzer during the June 2008 Standing Committee meeting. During the consideration of the time-computation project, there was some discussion of the timing of postjudgment motions During that discussion, Professor Meltzer noted his impression that some of those involved in trial-level practice had raised concern about superfluous post-trial motions which seek reconsideration of matters already decided. If such concerns exist, he suggested, the Committees might wish to consider whether the Civil Rules are too permissive about when a postjudgment motion can be made, though the Committees should also weigh the need not to unduly foreclose the appropriate uses of post-trial motions.

The Reporter noted that the Civil Rules Committee has primary jurisdiction with respect to the appropriate scope of post-judgment motions, but that it would be useful to be able to convey to the Civil Rules Committee any views that Appellate Rules Committee members might have on this question. An attorney member stated that he makes frequent use of post-judgment motions and he considers them very useful; and he noted that the district court's ruling on the post-judgment motion can inform the court of appeals' review of the issue. A district judge member noted that a meritorious post-judgment motion gives the district judge an opportunity to correct a ruling that may have been made hastily during the heat of trial; this opportunity is especially valuable given that most trials of any length involve hundreds of decisions. An appellate judge member agreed that post-judgment motions give the district judge a salutary opportunity to examine the relevant issue and either correct or otherwise address it.

By consensus, the Committee resolved that the Reporter should convey the substance of the Committee's discussion to Professor Cooper.

F. Item No. 08-AP-J (rules implications of mandatory conflict screening policy)

Judge Stewart invited the Reporter to summarize this item, which concerns the rules implications of the Judicial Conference's Mandatory Conflict Screening Policy. The Judicial Conference Committee on Codes of Conduct has tentatively raised with the Standing Committee three questions which may have implications for practice under Appellate Rule 26.1. Rule 26.1 requires certain disclosures that are designed to help judges determine whether a conflict requires their recusal from hearing an appeal. Such recusal determinations are informed by Canon 3C(1) of the Code of Conduct for United States Judges.

Two of the three questions primarily concern the Bankruptcy and Criminal Rules, respectively. The other question does implicate the Appellate Rules; in particular it implicates the interaction among Appellate Rule 26.1, any local circuit disclosure requirements, and the requirements imposed by the CM/ECF system in those circuits where CM/ECF is already operational. But an inquiry into this question would be premature at this stage for a couple of reasons. First, the Committee on Codes of Conduct has been asked for additional information

concerning some of its questions, and a response from the Committee on Codes of Conduct is expected late this year. Second, the courts of appeals are still in the process of making the transition to CM/ECF, so the question of overlap between disclosures required by prompts in the CM/ECF system and disclosures required by Rule 26.1 is one as to which the facts are still developing.

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

G. Item No. 08-AP-K (privacy rules and alien registration numbers)

Judge Stewart invited the Reporter to introduce this item, which relates to concerns raised by Public.Resource.Org about the presence of social security numbers and alien registration numbers in federal appellate opinions. Public.Resource.Org points out that the inclusion within appellate opinions of social security numbers or alien registration numbers raises privacy concerns, and Public.Resource.Org proposes a number of measures to address this concern. These suggestions have been referred to the Court Administration and Case Management Committee of the Judicial Conference (CACM), which has primary jurisdiction over the Conference's privacy policy. CACM will consider the suggestions at its meeting on December 4-5, 2008.

The Reporter briefly summarized the history of the privacy provisions in Appellate Rule 25(a)(5) and the other sets of Rules. Pursuant to the E-Government Act, the rules were amended in 2007 to include provisions concerning privacy. The privacy Rules are similar to the Judicial Conference's privacy policy. They require the redaction from filings of names of minor children, birth dates, and all but the last four digits of Social Security numbers, taxpayer I.D. numbers, and financial-account numbers; in criminal cases Criminal Rule 49.1 also requires redaction of all but the city and state of an individual's home address. Appellate Rule 25(a)(5) adopts for proceedings in the courts of appeals whatever the privacy rule was that applied below; for proceedings that come directly to the court of appeals, Civil Rule 5.2 governs, except that Criminal Rule 49.1 governs when an extraordinary writ is sought in a criminal case. The rules do not mention alien registration numbers, and it does not appear that they were much discussed in the advisory committee deliberations.

In summarizing Public.Resource.Org's concerns, the Reporter indicated that she would focus on the question of alien registration numbers, because there is consensus that social security numbers should not be included in judicial opinions and because the data provided by Public.Resource.Org do not indicate that the disclosure of social security numbers in judicial opinions is a significant problem. Alien registration numbers are provided to immigrants by the Bureau of Immigration and Customs Enforcement, which uses them for purposes of tracking and identification. It appears that a person's A-number could be used to obtain information about their immigration case (including information that might allow an asylum seeker to be located by one wishing to do him or her harm). A person's A-number might also be used by one wishing to

create false identification documents for a person in the United States illegally. Not only would the existence of such false I.D.s pose a law enforcement problem, but also a false I D might jeopardize the status of the person to whom the A-number was issued (for instance, if the holder of the false I.D. were carrying it when apprehended for the commission of a crime)

Against such privacy concerns, one should balance the possible costs of protecting A-numbers from disclosure in appellate opinions. A blanket requirement for redaction of A-numbers could impose costs on courts that currently include those numbers in their opinions, as well as on attorneys wishing to keep track of their own cases or to research decisions in other cases. Including A-numbers in the court of appeals opinion links that opinion readily to the relevant Board of Immigration Appeals (BIA) decision. And redaction could burden the Clerk's office, particularly in circuits – such as the Ninth – which deal with a huge volume of immigration appeals. Some of the circuit clerks have noted that eliminating the use of A-numbers in connection with immigration appeals could result in a net harm to aliens if the redaction significantly increased the risks of erroneous determinations due to confusion concerning the identity of the alien involved in the appeal. One might also question whether requiring redaction of A-numbers from court of appeals opinions would even render those numbers inaccessible to Internet users. The BIA publishes its precedential decisions on the Internet. If an A-number is listed in an opinion published on the BIA website, then redacting that A-number from the court of appeals opinion would not seem to make that A-number less accessible to Internet users.

There is, however, one category of case in which the BIA currently does appear to redact A-numbers: A quick look at some of the precedential opinions on the BIA's website suggests that the BIA does not include A-numbers when publishing a precedential opinion in an asylum case.

Mr. Fulbruge noted that there is some concern among the Circuit Clerks with respect to the possibility of mis-identification. He noted that a case has been mentioned in which mistaken identity resulted in the wrong person being deported. A district judge member agreed that the concern over confusion and mistaken identity is a real one.

Mr. Rabiej noted that CACM has been collecting issues relating to the E-Government Act. In the future a subcommittee may be formed to consider those issues. Judge Rosenthal observed that these issues concern multiple committees.

Mr. Fulbruge noted that Public.Resource.Org's algorithm appears to have picked up an over-inclusive set of results – i.e., it has picked up not just opinions that list social security numbers or alien numbers but also opinions listing other similarly formatted numbers such as insurance policy numbers. The Reporter noted that Public.Resource.Org's search might be also be underinclusive in some respects (in the sense that it does not appear to pick up "unpublished" opinions that are available on Westlaw).

Solicitor General Garre stated that the DOJ would confer with the relevant federal officials concerning these issues.

By consensus, the Committee resolved to await input from CACM and to retain the item on its study agenda.

H. Item No. 08-AP-G (substantive and style changes to FRAP Form 4)

Judge Stewart invited the Reporter to summarize the questions relating to Form 4 (concerning applications to proceed in forma pauperis). Proposed amendments to Form 4 designed to conform to the new privacy requirements are currently out for comment. In addition, the Committee has expressed interest in considering other possible amendments to Form 4. Meanwhile, in October 2008 the Forms Working Group approved a revised version of Form AO 240 and also approved a newly created form AO 239. Form 239 was created because some judges feel that AO 240 does not request enough detail from non-inmate IFP applicants.

The AO has posted WordPerfect and Word-compatible versions of Form 4 on the www.uscourts.gov website. However, Timothy Dole of the AO points out that it could also be helpful to post a text-fillable PDF version on the public judiciary forms page. Many circuits provide an electronic version of Form 4, but not all of those versions are text-fillable. Also, providing a text-fillable version of Form 4 might usefully assist the circuits in employing a form that is up-to-date. For example, as of fall 2008, not all circuits have removed from their forms both the request for full names of minor dependents and the request for the applicant's social security number. It was also noted that some circuits caption their circuit-specific forms with the name of the court of appeals; this contrasts with Form 4, which is captioned with the name of the relevant district court.

Another issue has to do with Question 10 on current Form 4. The Committee has noted that in future it may wish to consider revising that question, which requests the name of any attorney whom the litigant has paid (or will pay) for services in connection with the case, as well as the amount of such payments. In the past, some have argued that these questions seek information that is protected by the attorney-client privilege. Most recently, similar arguments have been made in connection with the Forms Working Group's publication of proposed new Form AO 239.

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

I. Item No. 08-AP-L (possible amendment to FRAP 6(b)(2)(A)(ii))

Judge Stewart invited the Reporter to present the proposal concerning Rule 6(b)(2)(A)(ii). It turns out that Rule 6(b)(2)(A)(ii) contains an ambiguity similar to the ambiguity in Rule 4(a)(4)

that was pointed out in *Sorensen v. City of New York*, 413 F.3d 292 (2d Cir 2005) An amendment designed to remove the Rule 4(a)(4) ambiguity is currently on track to take effect December 1, 2009. The amendment would alter Rule 4(a)(4)(B)(ii) as follows: "A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a ~~judgment altered or amended~~ judgment's alteration or amendment upon such a motion, must file a notice of appeal, or an amended notice of appeal — in compliance with Rule 3(c) — within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion." During the course of research this summer, the Reporter became aware of a similar ambiguity in Rule 6(b)(2)(A)(ii), dealing with the effect of motions under Bankruptcy Rule 8015 on the time to appeal from a judgment, order, or decree of a district court or bankruptcy appellate panel exercising appellate jurisdiction in a bankruptcy case. Rule 6(b)(2)(A)(ii) states that "[a] party intending to challenge an altered or amended judgment, order, or decree must file a notice of appeal or amended notice of appeal within the time prescribed by Rule 4 ... measured from the entry of the order disposing of the motion." Before the 1998 restyling of the FRAP, the comparable subdivision of Rule 6 instead read "A party intending to challenge an alteration or amendment of the judgment, order, or decree shall file an amended notice of appeal ...."

The Reporter suggested that the Committee may wish to consider amending Rule 6(b)(2) for reasons similar to those that led the Committee to propose the pending amendment to Rule 4(a)(4)(B)(ii). She noted that she had benefited from very helpful discussions on this issue with Professor Gibson, the Reporter to the Bankruptcy Rules Committee. A judge member stated that the Committee should ask the Bankruptcy Rules Committee for its views on this question.

By consensus, the Committee determined to seek the views of the Bankruptcy Rules Committee concerning Rule 6(b)(2)(A)(ii).

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

Judge Stewart invited the Reporter to present this item concerning interlocutory appeals in tax cases. The Reporter stated that in the course of research concerning Appellate Rules 13 and 14, she noticed an apparent quirk concerning interlocutory appeals in tax matters. In 1980, the Second Circuit held in *Shapiro v. C.I.R.*, 632 F.2d 170 (2d Cir. 1980), that 28 U.S.C. § 1292(b) does not authorize permissive interlocutory appeals from an order of the Tax Court. In 1986, Congress responded to *Shapiro* by enacting 26 U.S.C. § 7482(a)(2), which adopts for interlocutory appeals from the Tax Court a system similar to Section 1292(b)'s system for interlocutory appeals from the district courts. When applying Section 7482(a)(2), the Tax Court has looked to caselaw interpreting Section 1292(b).

The adoption of Section 7482(a)(2) did not lead to any amendments of the Appellate Rules; thus, it is not entirely clear what Rules govern an interlocutory appeal by permission under Section 7482(a)(2). As of 2008, though, Tax Court Rule 193(a) states in part: "For appeals from interlocutory orders generally, see rules 5 and 14 of the Federal Rules of Appellate Procedure."

This reference is somewhat puzzling, because Rule 14 (with respect to appeals to which it applies) excludes the application of Rule 5. The Reporter therefore wondered whether it might be useful to remove a source of potential confusion by amending Appellate Rule 14 to make clear that Appellate Rule 5 applies to interlocutory tax appeals under Section 7482(a)(2) (with references to the "district court" in Appellate Rule 5 being treated as references to the Tax Court). But before suggesting such a proposal to the Committee, the Reporter thought it best to try to ascertain whether the current framework causes problems in practice. With Judge Stewart's permission, the Reporter made an informal inquiry seeking this information (while emphasizing that she was asking only on her own behalf and that the Committee had not yet considered the issue). That inquiry has not, however, turned up any information yet.

Mr. Letter undertook to make inquiries on this issue with tax litigators within the DOJ. By consensus, the matter was retained on the Committee's study agenda.

K. Discussion of long-range planning issues

Judge Stewart led a discussion of issues relating to long-range planning. There has been a shift in thinking concerning long-range planning; one recent development is that the Chairs of the Advisory Committees are now involved in the long-range planning process. This provides an opportunity to consider, in a coordinated fashion, issues that relate to the work of more than one Committee. The goal is to identify cross-cutting issues with potentially far-reaching consequences; examples include questions relating to electronic filing; immigration appeals; and ongoing changes in the courts. At the most recent Judicial Conference long-range planning meeting (in September), participants assessed the Judicial Conference committees' long-range planning process. Each committee is asked to incorporate long-range planning into their discussions. The notion is to have a short-term plan that is operational and a longer-term plan that is strategic. Judge Stewart expressed confidence that as the Advisory Committee proceeds in its future meetings, it will keep an eye on long-range planning issues.

L. Discussion of draft Best Practices Guide to Using Subcommittees

Judge Stewart introduced the topic of the draft Best Practices Guide to Using Subcommittees, which was included among the agenda book materials. He noted that the Appellate Rules Committee has not made frequent use of formal subcommittees. He observed that the underlying concern is that subcommittees not take on a life of their own.

It was suggested that the Judicial Conference Executive Committee's concerns may largely be directed at committees other than the rules committees. Some other committees, it was suggested, may rely unduly on subcommittees and not engage in a sufficient degree of independent review of the subcommittee recommendations. This is a particular concern with respect to committees that rely heavily on staff and may lack transparency and public input. It

was suggested that it will be important, in commenting on the draft Guide, to make clear that the rules committees' use of subcommittees has differed from the uses to which a number of other committees have put their subcommittees

Judge Rosenthal suggested that the Committee consider concurring in a recommendation that the AO Director be authorized to act on behalf of the Chief Justice to designate one or more non-committee members to serve on subcommittees. Such instances, she stated, should arise rarely, but in appropriate instances the procedures should not require the Chief Justice personally to make the designation. By consensus, the Committee members resolved to concur in this recommendation.

The Reporter briefly summarized a few additional suggestions on the drafting of the Best Practices Guide. One concerns the draft Guide's alternative statement (at the bottom of page 2) that "[c]ommunication with AO staff should be through the chair." This would alter the way in which the Appellate Rules Committee Reporter has ordinarily worked; under current practice, she communicates directly with the AO staff on various issues, while always making sure to communicate to Judge Stewart any matters of substance arising from those communications. It would be cumbersome if the practices were changed to require all such communications to go through the Chair. This aspect of the draft Best Practices Guide may be a better fit for Judicial Conference committees other than the Rules committees; Judge Rosenthal observed that most Judicial Conference committees, other than the Rules committees, do not have reporters. Another question is what the proposed draft Best Practices Guide means when it states that "[t]he chair of the full committee should sign any committee-related communication to recipients who are not members of the committee." The draft would appear to be targeting communications that are sent on the Committee's behalf – yet "committee-related communication" could be read more broadly than that. One possible way to narrow this broad language might be to refer to "any communication on behalf of the committee or any subcommittee." No Committee members expressed dissent from the idea of conveying the Reporter's suggestions on those points.

VII. Schedule Date and Location of Spring 2009 Meeting

Possible dates for the Committee's Spring 2009 meeting were discussed. One option might be April 16-17, 2009; a possible alternative might be April 2-3, 2009. More details concerning the meeting's date and location will follow.

VIII. Adjournment

Judge Stewart thanked Mr. Rabiej and the AO staff, the Federal Judicial Center, Mr. Fulbruge, and all the Committee members for their work. He expressed appreciation to Solicitor General Garre for joining the meeting. And he noted with regret the fact that Justice Holland had been unable to attend.

The Committee adjourned at 9:50 a.m. on November 14, 2008.

Respectfully submitted,

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Catherine T. Struve
Reporter

TAB 3

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

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ATTENDANCE

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

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

Ronald J. Tenpas, Assistant Attorney General for the Environment and Natural Resources Division, represented the Department of Justice. Professor Daniel J. Meltzer was unable to attend the meeting.

Also participating in the meeting were: Judge Anthony J. Scirica, former chair of the committee; Professor Geoffrey C. Hazard, Jr., consultant to the committee; Judge Patrick E. Higginbotham, former chair of the Advisory Committee on Civil Rules; Judge Vaughn R. Walker, Professor Steven S. Gensler, and Daniel C. Girard, Esquire, current members of the Advisory Committee on Civil Rules; and Professor David A. Schlueter, former reporter to the Advisory Committee on Criminal Rules.

In addition, the committee conducted a panel discussion in which the following distinguished members of the bench and bar participated: Judge Rebecca Love Kourlis; Gregory P. Joseph, Esquire; Joseph D. Garrison, Esquire; Douglas Richards, Esquire; and Paul C. Saunders, Esquire. Dean Charles E. Cantu of St. Mary's Law School greeted the participants and welcomed them to the school.

Providing support to the committee were:

Professor Daniel R. Coquillette	The committee's reporter
Peter G. McCabe	The committee's secretary
John K. Rabiej	Chief, Rules Committee Support Office
James N. Ishida	Senior attorney, Administrative Office
Jeffrey N. Barr	Senior attorney, Administrative Office
Emery Lee	Research Division, Federal Judicial Center
Andrea Kuperman	Judge Rosenthal's rules law clerk

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Carl E. Stewart, Chair
Professor Catherine T. Struve, Reporter
Advisory Committee on Bankruptcy Rules —
Judge Laura Taylor Swain, Chair
Professor S. Elizabeth Gibson, Reporter
Advisory Committee on Civil Rules —
Judge Mark R. Kravitz, Chair
Professor Edward H. Cooper, Reporter
Advisory Committee on Criminal Rules —
Judge Richard C. Tallman, Chair
Professor Sara Sun Beale, Reporter
Advisory Committee on Evidence Rules —
Judge Robert L. Hinkle, Chair

INTRODUCTORY REMARKS

Judge Rosenthal thanked Dean Cantu and St. Mary's Law School for hosting the committee meeting and Becky Adams, Coordinator to the Dean, for her help in planning the meeting, managing transportation, and providing meals and refreshments. She suggested that the committee consider holding more meetings at law schools in the future. She also recognized the outstanding contributions to the rules committees made by Judge Higginbotham and Professor Schlueter, both of whom currently teach at St. Mary's.

Judge Rosenthal thanked Mr. Tenpas for his active and productive involvement in the rules process over the last several years in representing the Department of Justice. She asked him to convey the committee's appreciation back to the many Department executives and career attorneys who have contributed professionally to the work of the committees. In particular, she asked the committee to recognize the important contributions in the last couple of years of James B. Comey, Paul J. McNulty, Robert D. McCallum. Jr., Paul D. Clement, John S. Davis, Alice S. Fisher, Greg Katsas, Benton J. Campbell, Deborah J. Rhodes, Douglas Letter, Ted Hirt, J. Christopher Kohn, Jonathan J. Wroblewski, Elizabeth Shapiro, Stefan Cassella, and Michael J. Elston.

Mr. Tenpas announced that the Department had arranged to have career attorneys support the work of the committees during the transition from the Bush Administration to the Obama Administration.

Judge Rosenthal welcomed Judge Scirica and thanked him for his distinguished leadership as the committee's chair. She also recognized Professor Gibson, professor of law at the University of North Carolina, as the new reporter of the Advisory Committee on Bankruptcy Rules. She noted that the advisory committee will have to move quickly to draft additional changes in the bankruptcy rules if pending legislation is enacted providing bankruptcy judges with authority to modify home mortgages.

Judge Rosenthal reported that all the rules amendments sent by the committee to the Judicial Conference at its September 2008 session had been approved on the consent calendar and are currently pending before the Supreme Court. The majority of the changes, she said, were part of the comprehensive package of time-computation amendments. She pointed to the draft cover letter that will be sent to Congress conveying proposed legislation to amend 29 statutory provisions affecting court proceedings and deadlines. She noted that the Department of Justice and a number of bar associations had also written Congress to support the changes.

She added that the new Congress is largely preoccupied at this point in getting organized, but she and others planned to visit members and their staff in February to

discuss the proposed legislation. She noted that a good deal of background work for the proposal had already been initiated in the last Congress.

Judge Rosenthal explained that the purpose of the proposed legislation is to coordinate the time-computation rules changes with appropriate statutory changes and make them all effective on December 1, 2009. She reported, too, that the committee will initiate efforts to have the courts amend their local rules to take account of the changes in the national rules and statutes. To that end, it will send materials to the chief judges. She suggested that it should not be difficult for the courts to comply, but it will take coordinated efforts to make sure that the task is completed on a timely basis in each court. She added that the chief judges should also be advised of the matter at various judge workshops and meetings and in articles in the judiciary's publications

Judge Scirica reported that Chief Justice Roberts had complimented Judge Rosenthal at the September 2008 Judicial Conference meeting for her extraordinary efforts in securing legislative approval of the new FED. R. EVID. 502. Unfortunately, he said, Judge Rosenthal had not been able to attend the Conference in person because of the hurricane in Houston. But, he noted, the honor from the Chief Justice was greatly deserved and remarked upon by many members of the Conference. Judge Scirica then presented Judge Rosenthal with a framed copy of the legislation enacting Rule 502 signed by the President and a personal card from the President.

Judge Rosenthal noted that the 75th anniversary of the Rules Enabling Act of 1934 will occur on June 19, 2009. She said that she planned to speak with the Chief Justice about holding an appropriate program later in the year to mark the event. One possibility, she said, would be to combine a celebration at the Supreme Court with education programs on the federal rules process featuring prominent law professors.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee without objection by voice vote approved the minutes of the last meeting, held on June 9-10, 2008.

REPORT OF THE ADMINISTRATIVE OFFICE

Legislative Report

Mr. Rabiej reported that the 111th Congress was just getting organized.. The first legislative task for the rules office staff, he said, had been to prepare the cover letters to be sent to Congressional leadership in support of legislation to amend the time deadlines

in 29 statutes. The judiciary hopes that the legislation will take effect on December 1, 2009.

Mr. Rabiej reported that proposed legislation on gang crime would amend FED. R. EVID. 804(b)(6) (the hearsay exception for unavailable witnesses) to codify a decision of the Tenth Circuit and make it explicit that a statement made by a witness who is unavailable because of the party's wrongdoing may be introduced against the party if the party should have reasonably foreseen that its wrongdoing would make the witness unavailable. One version of the legislation would amend the rule directly by statute. But another would only direct the Standing and Evidence Committees to consider the necessity and desirability of amending the rule.

Mr. Rabiej noted that legislation was anticipated in the new Congress to authorize bankruptcy judges to alter certain provisions of a debtor's personal-residence mortgage. If enacted, he said, the legislation would likely require amendments to the bankruptcy rules and forms.

As for legislation that would affect the criminal rules, Mr. Rabiej reported that a bill likely would be introduced once again on behalf of the bail bond industry to prohibit a judge from forfeiting a bond for any condition other than the defendant's failure to appear in court as ordered. In addition, legislation may be introduced in the new Congress to add more provisions to the rules to protect victims' rights

On the civil side, Mr. Rabiej reported that the main legislative focus will be on Senator Kohl's bill to amend FED. R. CIV. P. 26 by imposing certain limitations on protective orders. He said that the legislation had been introduced in the last several Congresses and had been opposed consistently by the Judicial Conference on the grounds that it is unnecessary, impractical, and overly burdensome for both courts and litigants. He noted that Judge Kravitz had testified against the legislation in the 110th Congress, and his written statement had been included in the committee's agenda materials. He added that Senator Kohl was expected to introduce the bill again in the 111th Congress.

Judge Kravitz explained that the legislation had two primary provisions. First, it would prevent judges from entering sealed settlement orders. He pointed out, though, that empirical research conducted for the committee by the Federal Judicial Center had demonstrated that these orders are relatively rare in the federal courts. Thus, the provision would have little practical impact.

The second provision of the legislation, though, would be very troublesome. It would prevent a judge from entering a discovery protective order unless personally assured that the information to be protected by the order does not implicate public health or safety. He pointed out that a judge would have to make particularized findings

attesting to that effect at an early stage in a case – when the judge knows very little about the case, the documents have not been identified, and little help can be expected from the parties

He pointed out that he had been the only witness invited by the House Judiciary Committee to speak against the legislation. His testimony explained that the judiciary opposed the bill because empirical data demonstrates that protective orders typically allow parties to come back to the court to challenge the information produced or ask the judge to lift the order. In addition, protective orders have the beneficial effect of allowing lawyers to exchange information more readily and at much less expense to the parties. Many of the problems targeted by the legislation, he said, appear to have arisen in the state courts, rather than the federal courts. He also reported that he had emphasized at the hearing that Congress had established the Rules Enabling Act process explicitly to allow for an orderly and objective review of the rules. Accordingly, Congress should normally give substantial deference to that thoughtful process.

Judge Kravitz observed that the supporters of the proposed legislation clearly do not fully understand the rules process. Several members of Congress, he said, seemed surprised to discover that the Advisory Committee on Civil Rules had actually held hearings on the proposal, commissioned sound research from the Federal Judicial Center, and reached out to all interest groups. He suggested that the rules committees increase their outreach efforts to Congress. A participant added that the regular turnover of members and staff on Congressional committees results in little institutional memory. He said that several prominent law professors would be willing to help educate staff about the rules process by conducting special seminars for them. Judge Rosenthal added that the 75th anniversary celebration of the Rules Enabling Act would be a good time to have some prestigious academics conduct seminars to educate Congressional staff on the rules process. The programs, she said, should emphasize that the work of the rules committees is transparent, thorough, and careful.

Administrative Report

Mr. Ishida reported that the rules staff has continued to improve and expand the federal rules page on www.uscourts.gov. The digital recordings of the public hearings have now been posted on the site and are available as a podcast. He noted that the website had been attracting favorable attention among bloggers. Mr. McCabe added that the staff has continued to search for historical records of the rules committees. They traveled recently to Hofstra and Michigan law schools to obtain copies of missing records of the Advisory Committee on Bankruptcy Rules from the 1970s and 1980s.

Judge Rosenthal thanked both the advisory committees and the members of the Standing Committee for their helpful comments on the use of subcommittees. She said

that they will be incorporated in the committee's response to the Executive Committee of the Judicial Conference. Judge Scirica explained that the Executive Committee's request had been directed to concerns about the supervision by some committees over their subcommittees. He emphasized that the rules committees' use of subcommittees has always been appropriate and productive.

Judge Rosenthal reported that the newly re-established E-Government Subcommittee, which includes representatives from the Court Administration and Case Management Committee, will address a number of issues that have arisen since the new privacy rules took effect.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Stewart and Professor Struve presented the report of the advisory committee, as set forth in Judge Stewart's memorandum and attachments of December 11, 2008 (Agenda Item 6).

Informational Items

FED. R. APP. P. 40(a)(1)

Judge Stewart reported that the advisory committee had voted to give final approval to proposed amendments to Rule 40(a)(1) (time to file a petition for panel rehearing). The proposed amendments would clarify the applicability of the extended deadline for seeking panel rehearing to cases in which federal officers or employees are parties. At this time Judge Stewart presented the proposed amendments to the Standing Committee for discussion rather than for final approval.

He explained that the proposal was one of two recommended by the Department of Justice and published for comment in 2007. The other would have amended Fed. R. App. P. 4(a)(1) to clarify the applicability of the 30-day and 60-day appeal time limits in cases in which federal officers or employees are parties. The Department, however, later withdrew the second proposal because the Supreme Court's decision in Bowles v. Russell, 551 U.S. 205 (2007), indicated that statutory appeal time limits are jurisdictional. Amending Rule 4's time periods for filing a notice of appeal might raise questions under Bowles because those time periods also appear in 28 U.S.C. § 2107.

Judge Stewart reported that the advisory committee at its November 2008 meeting had voted to proceed with the proposed amendment to Rule 40 because it involves a purely rules-based deadline. But he noted that there was no need to proceed at the January 2009 Standing Committee meeting because the matter could be taken up more

effectively at the June 2009 meeting. This would give the Department of Justice additional time to decide whether to pursue a legislative change of Rule 4's deadlines, rather than a rules amendment. He pointed out that there is no disadvantage in waiting another meeting because the matter will not be presented to the Judicial Conference until its September 2009 session. The advisory committee, he said, hoped to receive additional input from the Department at its April 2009 meeting.

BOWLES V. RUSSELL

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

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

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

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

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

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

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

MANUFACTURED FINALITY

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

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

considerably among the circuits, and many district judges use a variety of devices to get cases to the courts of appeal

Judge Stewart pointed out that there are cases in which everybody – the parties and the trial judge – wants to send a case up to the court of appeals quickly. He suggested that manufactured finality is a real problem, and the circuits have taken very different approaches to dealing with it. Therefore, it may well be appropriate to have national uniformity. To that end, he said, the advisory committee will consider whether the federal rules should provide appropriate avenues for an appeal other than through the certification procedure of FED. R. CIV. P. 54(b) and the interlocutory appeal provisions of 28 U.S.C. § 1292(b).

OTHER MATTERS

Judge Stewart reported that the advisory committee had decided to remove from its active agenda a proposal to amend FED. R. APP. P. 7 (bond for costs on appeal in a civil case) to clarify the scope of the "costs" for which an appeal bond may be required. Professor Struve added that the advisory committee would collaborate with the Advisory Committee on Civil Rules on whether to amend FED. R. APP. P. 4(a)(4) (effect of a motion on a notice of appeal in a civil case) to refine the time and scope of notices of appeal with respect to challenges to the disposition of post-trial motions.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Swain and Professor Gibson presented the report of the advisory committee, as set out in Judge Swain's memorandum and attachments of December 12, 2008 (Agenda Item 9).

Amendments for Publication

FED. R. BANKR. P. 6003

Professor Gibson reported that FED. R. BANKR. P. 6003 (relief immediately after commencement of a case) was adopted in 2007 to address problems typically arising in large chapter 11 cases when a bankruptcy judge is presented with a large stack of motions on the day of filing. The rule imposes a 21-day breathing period before the judge may actually rule on these first-day motions – largely applications to approve the employment of attorneys or other professionals and to sell property of the estate. The delay provides time for a creditors committee to be formed and for the U.S. trustee and the judge to get up to speed on the case.

Some judges and lawyers, she said, have read the rule to prohibit a debtor-in-possession from hiring an attorney during the first 21 days of the case. The current rule permits an exception on a showing of irreparable harm, but some parties resort to claiming irreparable harm in every case. The proposed amendment, she said, would make it clear that although the judge may not issue the order before the 21-day period is over, the judge may issue it later and make it effective retroactively, thereby ratifying the appointment of counsel sought in the motion.

Another, minor change to the rule, she said, would make it clear that even though a judge may not grant the specific kinds of relief enumerated in the rule – such as approving the sale of property – the judge may enter orders relating to that relief, such as establishing the bidding procedures to be used for selling the property.

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

Informational Items

Professor Gibson reported that several of the bankruptcy rules amendments published in August 2008 would implement chapter 15 of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, dealing with cross-border cases. She noted that only two comments had been received, and the advisory committee had canceled the scheduled public hearings.

OFFICIAL FORMS 22A and 22C

Professor Gibson explained that Forms 22A and 22C implement the "means test" provisions of the 2005 Act. The statute, she said, defines "current monthly income" and establishes the means test to determine whether relief for the debtor under chapter 7 should be presumed abusive. Chapter 13 debtors must complete the means test to determine the applicable commitment period during which their projected disposable income must be paid to unsecured creditors.

Under the Act, debtors may subtract from their monthly income certain expenses for themselves and their dependents. In determining these allowances, the forms currently use the terms "household" and "household size." The advisory committee believes, though, that "household" is not correct in light of the statute because it is both over-inclusive and under-inclusive. The Act allows deductions for food, clothing, and certain other items in amounts specified in IRS National Standards and deductions for housing and utilities in the amounts specified in IRS Local Standards. Both the national and local IRS standards are based on "numbers of persons" and "family," rather than "household." Moreover, the IRS bases these numbers on the number of dependents that

the debtor claims for federal income tax purposes. A person in the "household" may not be a "dependent."

Judge Swain explained that the policy of the advisory committee, whenever there are possible conflicting interpretations of the Act, is to allow filers to present their claims as they interpret the statute – and not have them precluded from doing so by restrictive language in the forms. She added that the revised forms focus on dependency without specifically adopting the IRS standard. Thus, Form 22C refers to "exemptions . . . plus the number of any additional dependents." This provides room for a litigant to argue that a member of the debtor's household could be a "dependent" for bankruptcy purposes even without entitling the debtor to an exemption under IRS standards.

Judge Swain stated that the advisory committee had planned to present the revisions to the Standing Committee at the current meeting as an action item. But another technical problem had just been discovered with the forms, and the advisory committee would like to consider making another change and return with the forms for final approval in June 2009. Accordingly, she said, the matter should be considered as an informational item, rather than an action item

NATIONAL GUARD AND RESERVISTS RELIEF ACT

Professor Gibson explained that after the advisory committee meeting, Congress passed the National Guard and Reservists Relief Act, creating a temporary exemption from the means test for reservists and members of the Guard. The statute took effect on December 19, 2008, but it will expire in 2011. Thus, a permanent change to the rules is not advisable. But an amendment to Form 22A (the chapter 7 means test form) and a new Interim Rule 1007-I were approved on an emergency basis by email votes of the advisory committee, the Standing Committee, and the Executive Committee of the Judicial Conference. Thus, they were in place when the Act took effect in December 2008. She added that the interim rule has now been adopted as a local rule by all the courts.

She pointed out that the amendment to Form 22A had been particularly challenging to craft because the statute gives a reservist or member of the Guard a temporary exclusion from the means test only while on active duty or during the first 540 days after release from active duty. Thus, a temporarily excluded debtor may still have to file the means test form later in the case.

PART VIII OF THE BANKRUPTCY RULES

Professor Gibson said that the advisory committee was considering revising Part VIII of the bankruptcy rules governing appeals. Part VIII, she said, had been modeled on the Federal Rules of Appellate Procedure as they existed many years ago. The appellate rules, though, have been revised several times since, and they have also been restyled as a

body. Accordingly, the advisory committee concluded that it was time to take a fresh look at Part VIII and consider: (1) making it more consistent with the current appellate rules; (2) adopting restyling changes; and (3) reorganizing the chapter. She reported that the advisory committee at its October 2008 meeting had considered a comprehensive revision of Part VIII prepared by Eric Brunstad, a very knowledgeable appellate attorney whose term on the advisory committee had just expired.

She added that the committee decided that it would be very helpful to conduct open subcommittee meetings on Part VIII with members of the bench and bar at its next two advisory committee meetings, in March and October 2009. The committee, she said, will invite practitioners, court personnel, and others to address any problems they have encountered with the existing rules and to discuss their practical experience with two sets of appellate rules in cases that are appealed from the district court or bankruptcy appellate panel to the court of appeals. She said that the dialog at the open subcommittee meetings will help inform the advisory committee as to the worth of proceeding with the project.

ZEDAN V. HABASH

Judge Swain reported that Judge Rosenthal had referred to the advisory committee the concurring opinion of Chief Judge Frank Easterbrook in *Zedan v. Habash,* 529 F.3rd 398 (7th Cir. 2008), a case that raised two bankruptcy rules issues. In particular, he questioned whether FED. R. BANKR. P. 7001 (list of adversary proceedings covered by Part VII of the rules) should continue to classify proceedings to object to or revoke a discharge as adversary proceedings, termination of which constitutes a final decision that permits appellate review.

Zedan, she said, was a very unusual case involving a potential objection to discharge brought after the objection to discharge deadline had lapsed, but before a discharge had been entered by the court. Zedan, a creditor, claimed fraud with respect to an asset sale, and he tried to object to or revoke the debtor's discharge. Under the literal language of the Bankruptcy Code and Rules, however, he was barred from either type of relief. An objection to discharge was untimely because the deadline had passed, and an attempt to revoke the discharge was premature because no discharge had been entered. Moreover, even if Zedan had waited until the discharge was entered, an attempt to seek revocation would not have been possible because § 727(d)(1) of the Code requires that the party seeking revocation "not know of such fraud until *after* the granting of such discharge."

Judge Swain said that the advisory committee was considering the matter thoroughly and would consider a potential rules fix. It was also weighing whether the need for relief in this unusual situation outweighs the importance of finality in bankruptcy

cases. One possible amendment, she said, would be to permit an extension of the time for the creditor to file an objection based on newly discovered evidence.

Judge Swain explained that Judge Easterbrook in his concurring opinion had also asked whether objections to discharge should be treated as adversary proceedings or reclassified as contested matters because they are "core proceedings" under the Bankruptcy Code. She noted that the advisory committee had always considered objections to discharge as adversary proceedings, requiring application of the full panoply of the Federal Rules of Civil Procedure. She reported that the committee had conducted a lengthy discussion on the matter at its October 2008 meeting and concluded that it is appropriate to consider certain core proceedings as adversary proceedings, rather than contested matters. Moreover, a judge may deal with unusual problems, such as those arising in *Zedan,* by a variety of devices.

BANKRUPTCY FORMS MODERNIZATION

Judge Swain reported on the advisory committee's project to analyze and modernize all the bankruptcy forms. She said that the committee was undertaking a holistic review of the forms both for substance and for practical usage in today's electronic environment. Among other things, she said, courts and other participants in the bankruptcy system have requested an expanded capacity to manipulate electronically the individual data elements contained on the forms.

She pointed out that the advisory committee had established two subgroups to tackle the project. An analytical group is analyzing for substance all the information contained on all the forms, *i.e.,* what pieces of information are truly needed by each participant, whether any of it is duplicative, and whether the information could be solicited in a more effective manner. At the same time, a technical group is looking at various ways to gather and distribute the information contained on the forms. It is working closely with the special group of judges, clerks of court, and AO staff just convened to design the next generation electronic system to replace CM/ECF.

HOME-MORTGAGE LEGISLATION

Professor Gibson reported that legislation had been introduced in Congress to authorize a bankruptcy judge to modify the terms of a debtor's home mortgage. (Since 1979, the Bankruptcy Code has prohibited modification.) As currently drafted, the legislation would allow a home mortgage to be treated in the same manner as other secured claims, and a bankruptcy judge would be able to "cram down" the mortgage to the current value of the house and allow repayment for up to 40 years. It would also let the judge reset the interest rate at the current market rate for conventional mortgages plus a premium for risk. Other provisions include dispensing with the credit counseling requirements, changing the calculation for chapter 13 eligibility, and requiring that home

owners be given notice of additional bank fees and charges The legislation would be effective on enactment and would apply to mortgages originated before its effective date. The legislation would also require a number of changes to the bankruptcy rules and forms.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Kravitz and Professor Cooper presented the report of the advisory committee, as set out in Judge Kravitz's memorandum and attachments of December 9, 2008 (Agenda Item 5).

Discussion Items

Judge Kravitz reported that a great deal of interest had been expressed by the bench and bar in the published amendments to FED. R. CIV. P. 26 (expert witness disclosures and discovery) and FED. R. CIV. P. 56 (summary judgment). He noted that the public comments had been heavy, and many witnesses had signed up to testify at the three scheduled public hearings. He pointed out that the publication distributed to the bench and bar had asked for comments directed to the specific concerns voiced by Standing Committee members at the June 2008 meeting.

FED. R. CIV. P. 26

Judge Kravitz said that the proposed amendments to Rule 26 had been very well received on the whole, principally because they offer a practical solution to serious discovery problems regarding discovery of expert witness draft reports and attorney-expert communications. The great majority of comments from practicing lawyers, he said, had stated that the amendments will help reduce the costs of discovery without sacrificing any information that litigants truly need. On that point, he emphasized, extending work-product protection to drafts prepared by experts and to certain communications between experts and attorneys will not deprive adversaries of critical information bearing on the merits of their case.

Judge Kravitz noted, though, that opposition to the proposed amendments had been voiced by a group of more than 30 law professors. He suggested that their principal concern is that the amendments would further ratify the role of experts as paid, partisan advocates, rather than independent, learned observers. By way of contrast, experts in other countries are often appointed by the court or selected jointly by the parties.

He noted that the professors argue that by limiting inquiry into discussions between lawyers and their experts, the rule will lead to concealment of huge amounts of relevant information contained in draft reports and communications with experts. But, he said, the practicing bar has told the committee repeatedly that it will not in fact do so

because the information they seek presently does not exist. Practitioners report that lawyers today avoid communications with their testifying experts and discourage draft reports. Therefore, the proposed amendments will not make unavailable information that is currently available. Experience in the New Jersey state courts, moreover, shows that few problems arise in the state systems that prohibit discovery of expert drafts and communications. The practicing lawyers say consistently that juries clearly understand that experts are paid by the parties, and they are not misled at trial.

Judge Kravitz said that the professors are concerned that the amendments would take the rules in a direction inconsistent with *Daubert* and the gate-keeping role that it imposes on the courts to protect the integrity of expert evidence. But, he said, the advisory committee has consulted regularly with judges and lawyers and has been informed that decisions applying *Daubert* really turn on the actual testimony of expert witnesses, not on their communications with attorneys.

Finally, Judge Kravitz noted that the professors claim that the amendments would create an evidentiary privilege that under the Rules Enabling Act must be affirmatively enacted by Congress. He pointed to an excellent memorandum in the agenda book by Andrea Kuperman on work-product protection. The advisory committee, he reported, is convinced that the amendments deal only with work-product protection and do not create a privilege. Essentially, he said, they really only modify a change made by the 1993 amendments to Rule 26. He recommended, though, that it may be advisable to dispel any notion that a privilege is being created by eliminating any reference in the proposed committee note regarding the expectation that the work-product protections provided during pretrial discovery will ordinarily be honored at trial. He suggested that the current language of the note may allow opponents to argue, incorrectly, that a privilege is being created at trial.

Judge Kravitz said that the advisory committee very much appreciated the comments from the law professors, and it had taken all their concerns very seriously. But it concluded that it is vital to the legal process for lawyers to be able to interact freely with their experts without fear of having to disclose all their conversations and drafts to their adversaries. He noted, for example, that a law professor had informed the committee that the amendments will be very beneficial to him as an expert witness because he will now be able to take notes and have candid conversations with attorneys regarding the strengths and weakness of their cases.

A participant suggested that there is a wide gulf between practitioners and the professors on these issues. He attributed the difference to a lack of practical experience on the part of the latter and their focus on theory. He suggested that the professors tend to view experts under the current system as "hired guns." The nub of their opposition is their policy preference for a "truth-seeking" model versus the current "adversary" model. He conceded, though, that there are some cases in the state courts where there is

insufficient monitoring of experts, but there are few problems in practice in the federal courts and in most state courts. Several other participants endorsed these observations.

One member, however, expressed sympathy with the views of the law professors and argued that the proposed amendments are unwise. She suggested that the committee think carefully about whether the amendments in fact would create a privilege, or at least a hybrid between a privilege and a protection. In particular, she objected to the language in the committee note stating that the limitations on discovery of experts' drafts and communications will ordinarily be honored at trial. She suggested that the note should state explicitly that judges have discretion in individual cases to require more disclosure, especially when they suspect sharp practices. She noted, too, that in addition to the law professors, opposition had been expressed to the proposed amendments by the bar of the Eastern District of New York, which had argued for more discovery of communications between experts and attorneys.

Judge Kravitz responded that proposed Rule 26(b)(4)(C) explicitly allows discovery of communications between experts and attorneys if they: (1) relate to the expert's compensation; (2) identify facts or data that the attorney provided and the expert considered; and (3) identify assumptions that the attorney provided and the expert relied upon. He said that the advisory committee had concluded that these three exceptions to the work-product protection of the rule were sufficient.

A lawyer-member added that it is difficult for him to ask an expert to assess the weaknesses of his case because the expert's responses will be discoverable by the other side. For that reason, lawyers often hire two experts – one to testify and one to assess candidly. Other practitioners said that the rule will reduce costs and delays in many ways. Several participants added that juries know well that experts are advocates for the parties, but they believe an expert only if the expert is convincing on the stand.

Another lawyer pointed out that good lawyers regularly enter into stipulations to protect communications with their experts. He explained that experts are often unfamiliar with a case when they are hired. Therefore, they need a lawyer to give them information and directions. In fact, it is not unusual for experts to prepare reports that are not at all helpful – simply because they do not understand the case. This often leads to a sideshow during the discovery process, and potentially at trial. He said that it is important for the rules to specify that these preliminary communications between attorneys and experts are protected in order to allow experts to be educated at the outset of a case without having to risk sideshows from adversaries.

A judge-member stated that it is important for the rules to provide advice and direction to trial judges in this difficult area of discovery law. But, she suggested, the committee note should be amended to eliminate the controversial language on protecting information at trial. Another judge added that removing the note language would also be

advisable because issues at trial are much broader and also involve the rules of relevance. In short, she recommended, the committee should make it clear that discovery is discovery and trial is trial.

A member strongly supported the rule but suggested that the committee be very careful about the scope of its authority. It has clear authority, he said, to decide what information may be discovered, but no authority to create an evidentiary privilege governing what may be introduced at trial. He asked whether the states that have a similar rule, such as New Jersey and Massachusetts, have actually created an evidentiary privilege. Judge Kravitz responded that the advisory committee was convinced that the proposal was a discovery rule only, and it does not create a privilege.

A participant recommended that the committee note be revised to eliminate all language regarding information at trial. He also rejected the charge that experts are merely hired guns, noting that an expert's reputation and credibility are very important. Good experts, he said, value their reputation and are more than just advocates. Of course, they would not be called unless their testimony is helpful to the party calling them.

Another participant concurred and suggested that the concerns of the law professors appear to be less with the Rules Enabling Act than with their vision of experts as independent, learned truth-seekers, rather than paid advocates. He suggested that their opposition is based on theory and not real experience. He said that the best way for lawyers to challenge experts is by good cross-examination.

A member pointed out that there is a genuine risk for lawyers that the work-product protection that governs discovery will not continue to protect them at trial. As a result, he suggested, the amendments may not actually work in practice. Judge Kravitz responded, though, that his understanding is that practitioners believe that if the work-product information is protected during discovery, the remaining risk of disclosure at trial will not be significant enough for them to incur the costs of hiring two sets of experts or to resort to all the other artificial practices that the proposed amendments are designed to avoid. Several members agreed.

Another member suggested a parallel situation between the proposed amendments to Rule 26 and the recent development of FED. R. EVID. 502 (waiver of attorney-client privilege and work-product protection). The evidence rule, too, was devised specifically to allay the fear of lawyers that protection given to documents during discovery in a given case will not carry over to future cases. With Rule 502, the bar argued forcefully that if the protection against waiver does not carry over to future proceedings in the state courts, the rule would be useless as a practical matter in achieving its goal of reducing discovery costs. With the Rule 26 amendments, however, the bar has not suggested that confining the work-product protection to the discovery phase of litigation will undermine the practical value of the rule.

Judge Kravitz suggested that these problems should not occur very often at trial, and it may simply be necessary to let the rule play out in practice. He added that the rule cannot provide 100% protection, but the bar has been telling the committee that the amendments offer a practical solution to difficult and costly problems. Professor Cooper pointed out that the New Jersey state rule deals only with discovery, and the bar in that state has informed the advisory committee that it has caused no problems at trial. The rule's most important effect, they said unequivocally, has been to change the behavior and the very culture of the lawyers in dealing with experts' drafts and communications.

FED. R. CIV. P. 56

Judge Kravitz reported that public reaction to the proposed revision of Rule 56 (summary judgment) had been mixed. The great majority of comments, even those from judges and lawyers criticizing particular aspects of the rule, acknowledge that the revised rule is clearly organized and effectively addresses a number of problems arising in current practice The objections to the rule, he said, fall into three categories.

First, many – but not all – plaintiff's lawyers and law professors criticizing the proposed rule appear to oppose summary judgment in general and are concerned that the revised rule may lead to additional grants of summary judgment. But, he said, research conducted by the Federal Judicial Center demonstrates that the amendments will not produce that result. Opponents also object to the rule's point-counterpoint procedure, claiming that it focuses exclusively on individual facts and obscures inferences, thereby preventing plaintiffs from telling their full story. Judge Kravitz suggested, though, that he – as a judge – looks first to the parties' briefs for a gestalt view of a case and to discover the lawyers' theory of the case. Later, he said, he consults the point-counterpoint to hone in on and confirm specific facts in the record.

Second, many – but not all – members of the defense bar support the point-counterpoint approach. They strongly urge, though, that proposed Rule 56(a) be revised to specify that a judge "must" – rather than "should" – grant summary judgment if there is no genuine dispute as to any material fact and a party is entitled to judgment as a matter of law. The great majority of comments from the defense bar support using "must." In addition, the defense bar would like to have the rule provide sanctions for frivolous opposition to summary judgment.

A member said that the proposed rule will send an important reminder to the courts that they need to grant summary judgment when it is appropriate. Many cases have no material facts in dispute and should not go to a jury. Nevertheless, some judges announce that they will not decide summary-judgment motions until the moment of trial. So the lawyers have to prepare for trial, and their clients bear unnecessary and

unreasonable additional costs. A revised Rule 56 is needed, he said, if only to prod judges into acting on summary-judgment motions.

Third, many judges and some federal practitioners say that the point-counterpoint approach is not an effective procedural device. They recommend that the rule permit local discretion, rather than impose a national procedure. More importantly, many judges informed the committee that they have actually used the point-counterpoint procedure and have found it unsatisfactory for a variety of reasons. First, they say, it is not user-friendly and increases the cost of litigation. Second, they believe that it distracts from the merits of a case and encourages disputes over the statement of facts and motions to strike. Third, they say that the point-counterpoint process results in evasion of the page limitations on the briefs. Fourth, it lets moving parties dictate the facts, and it ignores inferences. Fifth, districts that have adopted the point-counterpoint procedure tend to have generated more paperwork, and the motions take longer to resolve.

Judge Kravitz noted that one lawyer had told the committee that the summary judgment papers in point-counterpoint districts are simply too long and require a good deal of unnecessary work by lawyers in dealing with immaterial facts and responses. Judge Kravitz explained that the advisory committee had struggled to confine the point-counterpoint procedure to essential, material facts and had heard from members of the bar that a numerical limitation should be imposed on the number of facts that a party may include in its statement.

Judge Kravitz said that these are substantial criticisms, especially because they come from people who have used point-counterpoint and have abandoned it. In defense of the proposal, though, he said that the rule allows a judge to opt out of it on a case-by-case basis. Nevertheless, he said, some judges do not want to use the point-counterpoint process in any cases.

Judge Kravitz reported that the advisory committee had initiated the project to revise Rule 56 for two reasons. First, summary-judgment practice around the country varies enormously, even within the same district. The committee concluded that there was substantial value in encouraging more national uniformity in the federal court system for a procedure as vital as summary judgment. Second, he said, summary judgment practice in the federal courts has deviated greatly from the text of the rule, and it is appropriate to update the rule to reflect the actual practice.

Judge Kravitz stated that the advisory committee would like to have the Standing Committee's input on the importance of national uniformity in summary judgment practice. He reported that several members of the bench and bar have told the committee that summary judgment today lies at the very heart of federal civil practice and should be relatively uniform across the federal system. Others, though, have said that local courts should be able to shape the procedure the way they want, in coordination with their local

bars. Moreover, they say, it is relatively easy for lawyers to ascertain what the practice is in each court and adapt to it. Therefore, procedural uniformity may not be very important.

Judge Kravitz said that some commentators have urged that Rule 56 not specify a particular procedural method for pinpointing material, undisputed facts. Judges or courts should be free to adopt the point-counterpoint procedure, but only if they wish. On the other hand, if national uniformity is deemed an important, overriding value, the advisory committee must decide what the national default procedure should be. On that point, the advisory committee believes that the point-counterpoint procedure specified in the published rule is the best approach to take. The local rules of some 20 districts require both parties to prepare summary-judgment motions in a point-counterpoint format, while roughly another third only require the movant to list all undisputed facts in individual paragraphs. Thus, if the advisory committee were to choose another approach, there would still be opposition to the rule from courts that have a point-counterpoint system. Therefore, the threshold question is whether national uniformity is truly needed in Rule 56.

One member argued that uniformity is important, and the advisory committee should continue trying to draft a national rule. But, she said, allowing an opt-out from the national procedure by local rule of court would be a good idea and would make the rule much more acceptable to the courts. Even allowing a broad opt-out would still be a marked improvement over the current rule.

A lawyer-member said that national uniformity is indeed important, but the fact that there is such strong dissent from the proposal by many judges argues for including a broad opt-out provision. He suggested that it would be helpful to have a national procedure specified in the rule, but courts should be allowed to deviate from it broadly.

A judge-member agreed that uniformity is the key question to focus on. She said that the point-counterpoint system works well in her experience, but the committee needs to respect the view of judges and lawyers who claim that it increases costs and disputes. It is hard in the end to be optimistic about achieving national uniformity because each court has developed its own system over time and is comfortable with it.

Another member agreed that uniformity is the critical question, but argued that it simply may not be achievable. The comments and testimony have indicated that the proposed rule will not be as successful as expected. In reality, imposed uniformity is likely to be ephemeral because judges will add their own requirements to whatever any national rule specifies.

Professor Coquillette pointed out that Congress over the years has urged more national uniformity and has expressed concern over the proliferation of local court rules.

The committee's local rules project, he said, had been successful in getting the courts to eliminate local rules that are inconsistent with the national rules. Nevertheless, the project avoided treading in two areas where enormous differences persist among the courts – attorney conduct and summary judgment. Many local rules, he said, are clearly better than the current FED. R CIV. P. 56, but the differences of opinion among the courts are so deep that it is extremely difficult to achieve national uniformity.

He noted that the 1993 amendments to FED. R. CIV. P. 26 allowed individual district courts to opt out of the national disclosure requirements by local rule. Many districts opted out, in whole or in part. There was no uniformity even within many districts. The only way to restore uniformity was to dilute the national rule, a change that itself required considerable effort He suggested that it would be better to have the national rule not specify any particular procedures than to have one that sets forth national procedures but authorizes wholesale opt-outs. Allowing a broad opt-out by local rule, he said, will not promote uniformity.

Judge Kravitz explained that the problem with summary judgment variations among the courts is not only that courts have a fondness for their own local rules and resist change, but it is also that many judges genuinely believe that the proposed national rule will add costs without making meaningful improvements.

Two members recommended that the committee proceed with the point-counterpoint proposal, but another suggested that the rule require that only the moving party state the material, undisputed facts in numbered paragraphs without burdening the opponent with having to respond to each fact in numbered paragraphs. Another member expressed support for the point-counterpoint process, but suggested that the committee impose a limit on the number of facts that may be stated and consider a different system for certain categories of cases.

A participant pointed out that his district had used the point-counterpoint system for more than a decade, but had abandoned it because it was not helpful to judges in resolving summary-judgment motions. They discovered that in reality there are not many disputed facts after discovery. Rather, cases turn largely on inferences drawn from the facts, rather than the facts themselves.

A member related that the point-counterpoint procedure is currently used in his district, and all the judges follow it. But a visiting judge from a district without the procedure has criticized it strongly, and the district court is taking a fresh look at the matter.

Several participants said that they liked the point-counterpoint process because it adds structure to the rule and forces attorneys to focus on the facts, but they recognized that it may add costs. They emphasized that the briefs or memoranda of law, which argue

the inferences drawn from the facts, are more important than the statements of facts themselves. One lawyer-member said that he had practiced in both courts that have the process and those that do not have it, and he has no problem in adapting to the requirements of each court or allowing courts considerable latitude to structure their own process.

Judge Scirica pointed out that the proposed changes in Rule 56 will have to be approved by the Judicial Conference. It is a virtual certainty, he said, that they will be placed on the discussion calendar for a full debate.

Two other members suggested that the key problems are not so much with the mechanics of the procedure, but the fact that some district judges are simply not deciding summary-judgment motions. Judge Kravitz noted that the advisory committee had learned from the Federal Judicial Center's research that summary judgment motions remain undecided until trial in many districts. But that problem will not likely be cured by any rule.

Professor Cooper pointed out that the Federal Judicial Center's research had shown that there is more likelihood that summary-judgment motions will be decided in the point-counterpoint districts. The figures show that more motions are granted in these districts, but largely because a higher percentage of motions are actually ruled on. There simply are more rulings in the point-counterpoint districts. On the other hand, the courts' time to disposition is longer in these districts, in part because it may take more judicial time to resolve summary judgment motions presented in this detailed format. The numbers may not be not reliable, though, because there may be other reasons for delays in some districts, such as heavy caseloads.

Judge Kravitz mentioned that some sentiment had been expressed that the point-counterpoint system may favor defendants and the well-heeled. The advisory committee, he said, had tried to address that perception by allowing an opponent of a summary-judgment motion to concede a particular fact for purposes of the motion only. This provision would save the opponent the expense of having to respond in detail to each and every fact asserted to be undisputed.

Judge Kravitz emphasized that a fundamental principle for the advisory committee has been to produce a rule that does not favor either side. The committee, he said, had succeeded in that objective, despite certain criticisms from both sides. He suggested that the opposition from some plaintiffs' lawyers is really a proxy for their opposition to summary judgment per se. He pointed out that other plaintiffs' lawyers support the proposal, though they favor a cap on the number of facts that may be stated.

A member added that the perception that the point-counterpoint process is favored by defendants and opposed by plaintiffs makes no sense. He suggested that defense

counsel normally want to have as few disputed facts as possible when seeking summary judgment. Plaintiffs, on the other hand, want to raise as many facts as they can.

One participant pointed out that summary judgment is the key event in many federal civil cases, either because it disposes of a case or, if denied, leads to settlement. He emphasized that summary judgment must be seen as interconnected with several other procedural devices specified in the Federal Rules of Civil Procedure – such as Rule 8 (pleading), Rule 12 (defenses), Rule 16 (pretrial management), and Rules 26-37 (disclosures and discovery). The numbering and organization of the rules imply that these are separate stages of litigation, rather than essential components of an interconnected process. He suggested that the committee consider bringing those rules physically closer together, instead of having them spread out as they are now. He also suggested that the committee consider looking at all the rules as a whole and examining how all the parts work together.

He added that faux uniformity may not be a bad idea. There are clear differences among regions, judges, and types of cases. There are also great differences among the bar, both as to the culture of the bar and the quality of individual lawyers. There are differences, too, in the abilities and preferences of individual judges. And it must be recognized that judges have to work hard to grant a motion for summary judgment.

Judge Kravitz reported that the advisory committee had decided to conduct a two-day conference in 2010 at a law school to conduct a holistic review of all these interrelated provisions and how well they work in practice.

FED. R. CIV. P. 45

Judge Kravitz reported that the advisory committee was considering potential revisions to FED. R. CIV. P. 45 (subpoenas). The rule, he said, is long, complicated, and troubling to practitioners. Practical issues have been raised, for example, regarding: whether Rule 45 issues should be decided by the court where the action is pending or the court where a deposition is to be taken or production made; the use of the rule to conduct discovery outside the normal discovery process; the adequacy of the modes of service; use of the rule to force corporate officers to come to trial; and the continuing relevance of the territorial limits of subpoenas, such as the 100-mile radius that dates from 1789. He noted that Judge David G. Campbell's subcommittee will take the lead on this issue, and Professor Richard L. Marcus will serve as the principal Reporter.

Professor Cooper added that the Federal Rules of Appellate Procedure intersect with the Federal Rules of Civil Procedure in several ways, and the advisory committee is working on joint projects with the appellate advisory committee. He noted, for example, the suggestion that FED. R. APP. P. 7 (bond for costs on a civil appeal) include statutory attorney fees as costs on appeal. The civil advisory committee, he said, has been

considering changes to FED. R. CIV. P. 23 (class actions) for several years, and the problem of objectors to class settlements is a long-standing and difficult one. The civil advisory committee would be interested, for example, in whether it is appropriate to require a cost bond for objectors who appeal from approval of a class-action settlement, especially in fee-shifting cases. He added that some appeals by objectors are on solid grounds, but some clearly are not.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Tallman presented the report of the advisory committee, as set forth in his memorandum and attachments of December 15, 2008 (Agenda Item 8).

Informational Items

FED. R. CRIM. P. 32

Judge Tallman reported that the advisory committee is considering a possible revision to FED. R. CRIM. P. 32(h) (notice of possible departure from sentencing guidelines). Under the current rule, a sentencing court must notify the parties if it intends to depart from the sentencing guidelines range on a ground not identified in the pre-sentence report or the parties' submissions. There has been litigation, he said, over whether the rule also applies to variances from the guidelines under *United States v. Booker,* 543 U.S. 220 (2005). Recently, the Supreme Court held in *Irizarry v. United States*, 553 U.S. ___ (2008), that the rule does not apply to variances. So the committee may wish to amend the rule to cover both. Alternatively, though, it may also consider eliminating Rule 32(h) altogether.

Judge Tallman reported that the American Bar Association had approved a resolution to mandate disclosure to the parties of all information used by probation officers in preparing their pre-sentence reports. The proposal is designed to increase transparency, and both the defense and the government argue for greater openness in the sentencing process.

The advisory committee, he said, had discussed the proposal and was concerned that it could compromise sources who give confidential information to probation officers, including victims and cooperating witnesses. It would also impose additional burdens on probation offices and make the process of preparing reports more adversarial than it is now. He explained that the committee was relying heavily on the Federal Judicial Center and the Administrative Office to canvass those district courts currently following a regime similar to the ABA model to ascertain what their practical experience has been. In particular, the staff will explore with the courts whether there is merit to the concerns that

sources will be compromised if all communications to probation officers must be disclosed.

Professor Beale added that there is a relationship between FED R. CRIM. P. 32(h) and the ABA proposal to require disclosure of all materials presented to the probation officer. If more information were disclosed to the parties earlier, more would be on the record at the time of sentencing, and notice of planned departures or variances would not be needed. A member suggested that many judges are concerned that the ABA proposal will add another layer of litigation. Another pointed out that defendants in her district have asked for access to information given to probation officers regarding earlier cases in a defendant's criminal history. That information, though, may reveal information about victims, cooperating witnesses, and other sensitive matters.

FED. R. CRIM. P. 12(b)

Judge Tallman reported that the Supreme Court held in *United States v. Cotton,* 535 U.S. 625 (2002), that omission of an essential element in the indictment does not deprive the court of jurisdiction. Under the current rule, a motion alleging a failure to state an offense can be made at any time. In light of *Cotton,* the advisory committee is exploring an amendment to FED. R. CRIM. P. 12(b) (motions that must be made before trial) to require that a challenge for failure to state an offense, like other defects in an indictment or information, be made before trial. Under FED. R. CRIM. P. 12(e), a party waives the defense or objection if not made on time, but the court may grant relief from the waiver for "good cause shown."

He explained that the proposal raises a number of difficult issues, particularly relating to the breadth of the "good cause" that the defendant must show to obtain relief. Some courts, for example, interpret the rule to require both "good cause" and "prejudice." The requirement to show "good cause" may result in a defendant forfeiting substantial rights merely because of an error of counsel in failing to raise the defect earlier. In addition, the committee is concerned about the relationship between the proposed amendment and cases holding that the Fifth Amendment precludes a court from constructively amending an indictment. He said that the advisory committee had voted 7 to 5 to continue working on the proposed amendment and will consider the issue again at its April 2009 meeting.

TECHNOLOGY

Judge Tallman reported that the advisory committee had formed a technology subcommittee, chaired by Judge Anthony J. Battaglia, to conduct a comprehensive review of all the criminal rules to assess whether amendments are desirable to sanction the use of new technologies. He pointed out that several rules already permit the use of technology, such as the use of video teleconferencing to conduct certain proceedings. But more

amendments may be needed to let judges, lawyers, and law enforcement agents take full advantage of technology in performing their jobs. The subcommittee, he said, was expected to complete its report in time for the advisory committee's April 2009 meeting.

AUTHORITY OF PROBATION OFFICERS TO SEEK AND EXECUTE SEARCH WARRANTS

Judge Tallman reported that the advisory committee was considering a preliminary proposal referred by the Criminal Law Committee that would authorize probation officers (and pretrial services officers) to seek and execute search warrants The proposal, he said, was controversial and would represent a major change of policy for the federal courts. Among other things, it raises questions of separation of powers because probation officers are part of the judiciary. In effect, judiciary employees could be asking a court for a search warrant to obtain evidence that might lead to criminal charges, a decision entrusted to the executive branch. Professor Beale added that the Department of Justice had expressed concern about the proposal because of the possibility of probation officers, who are not law enforcement officers, interfering with investigations and other prosecution efforts.

Judge Tallman pointed out that committee members had expressed concern that seeking and executing search warrants could interfere with the relationship between probation officers and their clients and impede the effectiveness of the officers They were also concerned about the training and safety of probation officers if they will be placed in dangerous situations that may arise when conducting a search.

Judge Tallman reported that he had sent a letter to Judge Julie E. Carnes, chair of the Criminal Law Committee, advising her of the advisory committee's initial concerns and inviting her to participate in the April 2009 meeting. In response, he said, she advised that members of the Criminal Law Committee share some of the same concerns.

VICTIMS' RIGHTS

Judge Tallman reported that the advisory committee was continuing to monitor a number of issues arising under the Crime Victims' Rights Act. He noted that the General Accountability Office had just published a comprehensive report on implementation of the Act, which gave the judiciary a clean bill of health for its efforts. The report also noted that the Act's 72-hour limit on the time for a court of appeals to act on mandamus review appeared to be too short. Professor Beale added that the advisory committee did not pursue amending that particular statutory deadline as part of the judiciary's time-computation legislation because it raised significant policy issues, which were not appropriate for the package of proposed technical changes to accommodate the new time computation rule.

Judge Tallman reported that the advisory committee has been receiving written reports of the regular meetings that the Department of Justice holds with victims' rights

organizations. In addition, he said, the advisory committee anticipates that additional legislative proposals on victims' rights might be introduced in the new Congress.

FED. R. CRIM. P. 12.4

Finally, Judge Tallman reported that the advisory committee had received a request from the Codes of Conduct Committee to consider an amendment to FED. R. CRIM. P. 12.4 (disclosure statement) to require additional disclosures that could help courts screen for potential conflicts of interest. The proposal would assist courts in ascertaining whether an organization, including its subsidiary units or affiliates, that was a victim of a crime is one in which a judge holds an interest

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Hinkle presented the report of the advisory committee, as set forth in his memorandum and attachments of December 1, 2008 (Agenda Item 7).

Amendments for Publication

RESTYLED FED. R. EVID. 501-706

Judge Hinkle reported that the advisory committee had now completed restyling two-thirds of the Federal Rules of Evidence. The final third of the rules, he said, will be more difficult to restyle because it includes the hearsay rules. He pointed out that, for the first time, the committee's reporter, Professor Daniel J. Capra, could not attend a Standing Committee meeting due to a conflict with essential teaching duties. He also regretted that Professor R. Joseph Kimble, the committee's style consultant, could not attend the meeting because of winter snows and transportation difficulties. He said that both will participate in the June 2009 meeting.

Judge Hinkle pointed out that Judge Hartz had discovered a glitch in the restyled draft of FED. R. EVID. 501 (privilege). It could be read to suggest that if testimony relates to both a federal and state claim, only state law will apply. Case law, however, suggests that federal law applies.

The advisory committee, he said, intends no change in the law. Accordingly, it recommends substituting the following language for the last sentence of FED. R. EVID. 501: "But in a civil case, with respect to a claim or defense for which state law supplies the rule of decision, state law governs the claim of privilege." A corresponding change will also be made in FED. R. EVID. 601 (competency to testify).

A member praised the work of the advisory committee, but expressed concern over some of the style conventions, including the use of bullets rather than numbers in some lists, the use of dashes rather than commas, and beginning sentences with "but," "and," or "or." A member pointed out, however, that these conventions are fully consistent with widely accepted contemporary style. Judge Hinkle promised to bring these concerns back to the advisory committee for consideration at its next meeting.

The committee by a vote of 10 to 2 approved the restyled FED. R. EVID. 501-706 for publication, including the substitute language for FED. R. EVID. 501 and 601. The dissenting members explained that their negative votes were motivated solely by what they regard as some inelegant and inappropriate English usage in the restyled rules. Judge Rosenthal added that the committee's action will be subject to an additional, final review of the entire body of restyled evidence rules at the June 2009 committee meeting

Informational Items

Judge Hinkle reported that only one public comment had been received in response to the proposed amendment to FED. R. EVID. 804(b)(3) (hearsay exception for a statement against interest), and the scheduled public hearing had been cancelled because there had been no requests to testify.

He added that the advisory committee was continuing to monitor case law developments in the wake of the Supreme Court's holding in *Crawford v. Washington,* 541 U.S. 36 (2004), that admission of "testimonial" hearsay violates an accused's right to confrontation unless given an opportunity to cross-examine the declarant. He said that case law developments to date suggest that amendments to the hearsay exceptions in the rules may not be necessary.

GUIDELINES ON STANDING ORDERS

Judge Rosenthal reported that Professor Capra had prepared an excellent report on the use of standing orders and general orders in the district courts and bankruptcy courts. In addition, a survey of the courts had been conducted asking judges for their advice in identifying matters that belong in local rules versus those that may be addressed appropriately in standing orders. The survey results, she said, had shown that the courts do not want federal rules to regulate standing order practices, but they do favor the committee distributing guidelines to help them decide what matters should be included in their local rules and standing orders.

To that end, she said, Professor Capra had prepared draft Guidelines For Distinguishing Between Matters Appropriate For Standing Orders and Matters Appropriate for Local Rules and For Posting Standing Orders on a Court's Website.

Judge Rosenthal emphasized that the proposed guidelines were not an attempt by the Standing Committee or the Judicial Conference to dictate particular binding rules that the courts must follow.

Several members endorsed the guidelines and said that they were very well-written and helpful But one expressed reservations about the specific language of Guideline 4 on the grounds that it appears to give too much encouragement to individual judges to deviate from court-wide standing orders. He suggested that it may also be internally inconsistent with Guideline 8, specifying that individual-judge orders may not contravene a court's local rules.

Another member suggested, though, that Guideline 4 had an inappropriately negative tone because it appeared to fault district judges for having orders different from their own district court rules and standing orders. She said that it is perfectly appropriate to accommodate some individual-judge preferences, such as those dealing with courtesy copies of papers and courtroom etiquette. In fact, the committee may not have authority to address the orders of individual judges. She recommended that the guidelines focus on court-wide orders and say nothing about the orders of individual judges.

Judge Rosenthal agreed that the guidelines will be more successful if they are not openly negative as to the preferences of individual judges. But some members cautioned that individual-judge orders can be a serious problem. Some are very beneficial, they said, but others are not. Some, in fact, are contrary to the national rules and may contain matters that should be addressed in local rules, rather than orders. Moreover, the orders of individual judges are not readily accessible, may not be posted on a court's website, and can create a trap for litigants. The point of the proposed guidelines, she said, was not to make judges change their procedures, but to make them aware of the effects of their actions.

Professor Coquillette pointed out that the current standing orders project should be viewed in the context of the local rules project and the 1995 amendments to FED. R. CIV. P. 83. As revised, the rule specifies that no sanction or other disadvantage may be imposed on a party for noncompliance with a procedural requirement unless the requirement has been set forth in a national or local rule or the party has received actual notice of it in the particular case.

Judge Rosenthal explained that there are two kinds of standing orders – court-wide standing orders and the standing orders of individual judges. The committee, she said, can address court-wide standing orders, but an individual judge's ability to include the judge's own preferences, particularly on such matters as courtroom practices, is a much more delicate matter. She said that she agreed with Professor Capra's view that it would be a more successful approach if the committee were to focus on court-wide standing orders.

Judge Rosenthal added that if an order affects lawyers and litigants on a district-wide basis, it should be set forth in a local rule of court. But it is appropriate to let individual judges continue to include variations and innovations in their own standing orders. In addition, she said, judges normally send specific orders and detailed written instructions to the parties at the outset of each case. The parties, thus, receive actual notice of what the judge expects from them. The committee, she said, should not attempt to police the orders of individual judges. Its goal should be simply to provide helpful advice to the courts and urge them to make all orders readily accessible and easily searchable.

Members suggested some specific edits for the guidelines. Judge Rosenthal said that the document would be amended to take account of these concerns and re-circulated to the members after the meeting.

Judge Swain asked whether the committee would like comments from the Advisory Committee on Bankruptcy Rules. Judge Rosenthal responded that comments would be very welcome, and the advisory committee should explore whether any changes in the guidelines would be appropriate for the bankruptcy courts. At this point, though, the focus should be on sending the guidelines to the district courts.

SEALED CASES

Judge Hartz, chair of the Ad Hoc Subcommittee on Sealed Cases, reported that the Federal Judicial Center has been examining all cases filed in the federal courts since 2006 to ascertain for the subcommittee what types of cases are sealed. The Center's initial review has now been largely completed. The results show that many of the sealed cases on the civil docket are filed under the False Claims Act. By statute, they must be sealed until the government decides whether or not to proceed. It often takes a long time for the government to make its decision. Moreover, some of these cases are later dismissed, but not unsealed.

The largest number of sealed cases are on the districts' magistrate-judge dockets, and many of them involve the issuance of warrants. It appears that many were never formally unsealed after the warrants were executed, an indictment filed, and a district-court criminal case opened. Only one bankruptcy case has been identified among the sealed cases. The subcommittee learned later that the courts' CM/ECF case management system now provides an electronic reminder to unseal a filing after a certain period of time has elapsed.

Judge Hartz said that the initial research by the Center for the subcommittee seems to reveal that there are few, if any, systemic problems with sealed cases in the courts. He noted that the procedure in his circuit has been for the court of appeals to carry over the status of a case from the district court. Thus, if a case has been sealed by a district court, it

will remain sealed in the court of appeals, and sometimes the circuit judges are unaware of the sealing. Another judge reported that the court of appeals in her circuit effectively orders that all cases be unsealed at filing but asks the parties to petition the court if they wish to have the cases remain sealed.

PANEL DISCUSSION ON PROBLEMS IN CIVIL LITIGATION

Mr. Joseph chaired the panel discussion and announced that it would focus on the ideas set forth in the draft report on the civil justice system prepared by the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System. He pointed out that the report is not yet final, but would likely be endorsed by the College. It sets forth a series of broad principles and recommendations to improve civil litigation in the federal and state courts, addressing such areas as pleading, discovery, experts, dispositive motions, and judicial management.

Professor Cooper opened the discussion by referring to recent reform efforts by the Advisory Committee on Civil Rules. He noted that the committee had been looking at pleading for years. It has explored fact pleading or substance-specific pleading rules, but it has not been prepared to pursue that path. Recently, the committee has considered reinvigorating motions for a more definite statement under FED. R. CIV. P. 12(e) to support the disposition of motions to dismiss, for judgment on the pleadings, and to strike under FED. R. CIV. P. 12(b), (c), and (f). More ambitiously, a more definite statement might promote more effective pretrial management. The concept was endorsed by the lawyer members of the advisory committee, but all the judges cautioned that it would result in the lawyers filing motions for a more definite statement in every case.

The advisory committee has also made some progress in drafting a set of simplified procedures that include fact pleading and much reduced discovery, but that project has been placed on indefinite hold. The committee's next effort will be to solicit ideas for improving the civil process at a major conference next year with members of the bench and bar.

Professor Cooper said that hope springs eternal for rulemakers in their efforts to make procedural rules "just, speedy, and inexpensive," in the words of FED. R. CIV. P. 1. He noted, for example, a new rule in New South Wales specifies that resolution of cases should be "just, quick, and cheap," parallel to FED. R. CIV. P. 1. The 1848 Field Code had a standard that a complaint should be a statement of the facts constituting a cause of action in ordinary and concise language, without repetition, in such a manner as to enable a person of common understanding to know what is intended. In 1916, Senator Root proclaimed that procedure ought to be based on common intelligence of the farmer, the merchant, and the laborer. There is no reason why a plain, honest man should not be permitted to go into court to tell his story and have the judge be permitted to do justice in that particular case. In 1922, Chief Justice Taft addressed the American Bar Association

and argued that the plan should be to make procedure so simple that it requires no special knowledge to master it. Indeed, a plaintiff should be able to write a letter to the court to make his case.

Professor Cooper pointed out that good rules often do not work in practice, even though they may be sound in principle and expertly crafted. The 1970 amendments to the Federal Rules of Civil Procedure, for example, were good rules, but they do not function as anticipated. There may be a variety of reasons to explain the phenomenon. It may be because the rules are trans-substantive or govern the litigation of topics that are just not well suited to resolution through our adversary dispute system. They may be focused too much on ordinary, traditional litigation. Or perhaps the system is no longer effective for the general run of claims.

The problem, in part, may lie with the lawyers. We may have developed a world of litigators and associates who understand discovery well, but few actual trial lawyers. The fault may be attributable in part to adversary zeal run amok, the structure of law firms, and the realities of hourly billings and law practice as a business. Judicial overload and the lack of judicial resources, too, may be part of the problem. Sound pretrial management is needed, and some pretrial and discovery problems need to be addressed quickly. But the judges may not be available or willing to oversee cases or resolve problems in a timely manner.

Professor Cooper suggested that inertia is a major obstacle to reform, as lawyers generally do not like change. He noted, by way of example, that a bar committee had objected recently to the proposed revision of FED. R. CIV. P. 56 (summary judgment) because the current Rule 56 has a long history of interpretation, and it would be impossible to predict the unintended consequences if the rule were changed. The fear of doing something different, he said, is prevalent.

In addition, the rules committees have been told to make no changes in the rules without first having sound empirical support behind them. As a result, the committees turn regularly to the Federal Judicial Center to provide them with excellent research support. The Center's resources, though, are limited. Its research can identify associations in the data between specific procedures and specific outcomes, but it cannot often prove actual causation. Therefore, it is difficult to predict with certainty the impact that proposed amendments will have.

Finally, Professor Cooper noted that a critical issue for reform of the civil justice system is which body should initiate it. The rules committee process, he said, unlike the legislative process, provides balance and careful discussion and deliberation. But sometimes there is political resistance to certain rules changes based on partisan or financial interests. Note, for example, the opposition to proposed changes in FED. R. CIV. P. 11 (sanctions) and FED. R. CIV. P. 68 (offer of judgment) in the past, and to certain

aspects of proposed FED. R. CIV P. 56 (summary judgment) now. Getting even modest changes through the system can be difficult if certain segments of the bar and their clients oppose them strongly. As a result, the advisory committee treads carefully and strives for consensus, when feasible.

Discovery, for example, has been on its agenda for over 30 years, and there appears to be no end in sight. Notice pleading, for example, has been brought back to the table by the Supreme Court's decision in *Bell Atlantic v. Twombly,* 550 U.S. 554 (2007). The package of notice pleading, discovery, and summary judgment, though, lies at the very heart of the revolutionary 1938 Federal Rules of Civil Procedure. They represent the very soul of the current civil justice system. Therefore, making significant changes in these basic components of the rules – as the proposals of the College and Institute appear to recommend – may have consequences that are profoundly political. As a result, it is natural to ask whether a change of this sort should be made through the Rules Enabling Act process.

Judge Kourlis suggested that the ideas and recommendations embodied in the report are not new. They respond to a pervasive belief that the civil justice system is just too costly and laden with procedures. In many ways, she said, the report's recommendations mirror the proposed Transnational Principles and Rules of Civil Procedure drafted, in part, by the American Law Institute, the new civil rules of the Arizona state courts, and the simplified rules developed a few years ago by the advisory committee.

For some time, she said, there has been a variety of opinions about whether the rules should be substantially revised, merely tweaked, or left untouched. But a great many observers, including legislators, have come to the conclusion that substantial changes in the civil justice system are needed.

She pointed out that the Federal Rules of Civil Procedure cast a long shadow over the civil justice system and set the standard for litigation throughout the nation. The federal rules committees occupy a unique leadership position. Among the states, 23 follow the federal rules closely, and 10 more apply them relatively closely. Eleven states rely on factual pleading, and 4 have hybrid systems.

Judge Kourlis said that lawyers and judges tend to cleave to consensus. But the search to achieve consensus can impede the sort of innovation that is needed. Therefore, the report declares that it is time to answer the growing voice for change. To that end, it is time for the federal system to lead the way. The federal rules committees can take advantage of the expertise of the Federal Judicial Center and the Administrative Office, and they enjoy a great electronic case management and data collection system that can provide the sorts of empirical data that the reform effort requires. State courts, unfortunately, just do not have those resources.

Judge Kourlis emphasized that the report does not advocate wholesale revision of the rules. Rather, it recommends carefully designed pilot projects that can provide critical empirical information on how to reduce costs, increase customer satisfaction, and perhaps increase the number of trials. She said that innovative pilot programs are easier to establish in the state courts than in the federal courts, but the states are not good at collecting data from them.

She recognized that federal law does not readily accommodate pilot programs. Nevertheless, the committee might wish to reexamine FED. R. CIV. P. 83 (local rules) or seek legislation to establish appropriate pilot projects. Clearly, she said, the language and intent of the Rules Enabling Act would support the suggested reform efforts.

She recommended, though, that the courts proceed carefully. The civil justice system is tarnished in the eyes of the public, lawyers, and litigants alike. Some of the criticisms may be unjustified, but some are clearly justified. The plea to rulemakers is that they remember whom they are serving and that their charge is to provide a civil justice system that is as good as they can make it.

Mr. Saunders reported that the drafters of the American College-Institute report had not been constrained by the Rules Enabling Act or by precedent. The group, he said, was composed of trial lawyers and two judges, but no scholars. They were liberated to write on a blank slate. They started by considering the existing civil discovery system and examined a number of proposals for reform made since the federal rules were adopted. But the group was not looking just at the federal system. Its proposals are meant to apply across the board to all systems, federal and state.

Mr. Saunders reported that the participants had read many articles and examined a great deal of data. After doing so, they reached the conclusion that much of the available data are simply counter-intuitive. The 1990 Rand study, for example, showed that there are few problems with civil discovery. But that conclusion clearly did not seem correct to the members of the group. So they asked for more data and administered a survey to all 3,000 fellows of the College and received a good response. One of the first conclusions they drew from the responses was that discovery cannot be considered in a vacuum. Several other parts of the civil rules, such as pleading, intersect with it.

The survey encompassed 13 different areas of civil litigation. In 12, there was widespread agreement among all segments of the bar. Only one area – summary judgment – produced any differences between the responses from lawyers representing plaintiffs and those representing defendants. For that reason, the group refrained from making recommendations regarding summary judgment.

The goal of the group, he said, was only to identify principles – not to write actual rules. It attempted to reach agreement on a set of basic principles that could be applied

across the board to civil litigation. The principles set forth in the report were then adopted unanimously by all 20 members of the task force.

The first principle, he said, is that there should be different sets of rules for different kinds of cases. In essence, "one size does not fit all" in civil litigation Judge Kourlis added that both the task force and the Institute agree that one set of rules cannot handle all kinds of civil cases effectively. Instead, there should be either be separate rules for different kinds of cases or separate protocols within the same set of rules for different kinds of cases.

Mr. Joseph pointed out that the federal rules already sanction deviations from the trans-substantive provisions of the rules. For example, FED. R. CIV. P. 26 exempts certain categories of civil cases from its mandatory disclosure requirements. FED. R. CIV. P. 9 (pleading special matters) imposes separate requirements of particularity for pleading fraud or mistake, and there is a separate set of supplemental rules for admiralty cases. In addition, certain kinds of civil cases, such as social security appeals, are handled very differently by the courts from other cases, even though they are governed by the same civil rules. The report recognizes these differences and recommends that rulemakers create different sets of rules for certain types of cases.

Mr. Richards agreed that it would be constructive to consider adopting specific procedures for different types of cases. He noted that he had argued *Twombly,* and he emphasized that antitrust cases are truly different from other kinds of cases. Nevertheless, the lawyers in that case cited securities cases and other types of cases to the Supreme Court as precedent, assuming – incorrectly – that the concerns and principles discussed in those cases must be applicable in antitrust cases.

Judge Kravitz pointed out that patent lawyers come to him in every case and suggest how they want to handle the case. He works together with them to craft specific procedures for each case. But they are the only category of lawyers to do so. He pointed out that mechanisms currently exist in the Federal Rules of Civil Procedure to have a court fashion special rules, at least on an individual-case basis.

Mr. Saunders reported that the study group agreed that if discovery is to be tailored in different kinds of cases, the specialty bars – such as the patent, admiralty, and employment discrimination bars – should be called upon to fashion the special discovery rules for those types of cases. In a patent case, for example, discovery should focus on the history of the patent and the patent holder's notebooks. Other specialty bars could do the same for their cases. Mr. Garrison added that this concept would include standard document requests and standard interrogatories for the special categories of cases. He said, though, that it is very difficult to get judges to do this under the current rules.

Mr. Joseph pointed out that a defense lawyer's focus is normally on two matters – dismissal and summary judgment. There is a fear of juries that causes many cases to settle if summary judgment is denied. Consideration might be given, he said, to conducting a small mini-trial in appropriate cases to see whether it is worth going forward with the case.

A member suggested that the central concern being expressed by the panel appeared to be that judges are not taking sufficient charge of their cases, and lawyers are not working together with the court to fashion the direction of each case. Mr. Joseph responded that law firms are conservative by nature. No lawyer wants to try an alternative procedure and be second-guessed after the fact. Lawyers need to be assured that certain procedural alternatives are fully authorized and encouraged. Accordingly, it would be much easier for lawyers to get together and agree if there were specific alternatives set forth in the rules, or recognized protocols that they can rely on. Mr. Saunders added that the task force was unanimous in its conclusion that judges need to be more involved at the outset of each case – much earlier and much more directly than most judges are today.

A member suggested that model procedures could be devised by each specialty bar. Lawyers could then tell the court that they wish to follow the appropriate model in their case. Mr. Joseph agreed that the model procedures could well be developed by the bar itself, rather than through the rules. Mr. Richards added that the key point is that the specialized procedures need to be enshrined somewhere, either in the rules or in authorized models that can be considered by the lawyers and the judges. In either case, it would provide legitimacy for procedural options that should be considered in specific areas of the law.

Mr. Joseph concurred with a member that the task force was in effect asking the rules committees to formalize rules that would sanction different tracks for different kinds of cases. Judge Kourlis pointed out that recent reforms in the United Kingdom have led to protocols that govern disclosure requirements. Each segment of the bar was asked to develop a set of protocols, and if there are no protocols in a given area, the lawyers must follow the standard protocols.

Mr. Richards addressed the second principle in the draft report, which calls for fact-based pleading. He pointed out that there is now some sort of fact pleading in the federal courts as a result of *Bell Atlantic v. Twombly,* holding that a complaint must provide "enough facts to state a claim to relief that is plausible on its face." He said that discovery clearly imposes excessive costs in certain cases, and some cases settle because of the high costs of discovery. The Federal Rules of Civil Procedure, he said, do not deal adequately with the problems of discovery.

But, he said, there is no showing that a systemic problem of that sort exists in antitrust cases. Nevertheless, the Supreme Court in *Twombly* threw out the traditional foundations of the civil rules system in an antitrust case on the theory that the cost of

discovery forces settlement. He said that the underlying debate in *Twombly* was indeed over the costs of discovery, but the Court had no data to support its view. He suggested that a whole myth has been developed by industry and the defense bar that defendants are forced to settle cases that have no merits just because it costs too much to defend them. Antitrust cases, he said, are inherently expensive, but there is no indication at all that frivolous antitrust cases are settled because of attorney fees.

Mr. Saunders reported that some Canadian provinces have developed a procedure in which the bar may ask a court for an "application" and obtain relief very quickly based on affidavits and without full discovery. Accordingly, he said, rather than apply the full panoply of the federal or state procedural rules to each case, exceptions to the federal rules could be carved out for certain types of cases to provide relief quickly.

Mr. Saunders reported that 80% of the respondents in the American College survey agreed that the civil justice system is too expensive, 68% said that civil cases take too long to decide, and 67% said that costs inhibit parties from filing cases. He added that the report states that pleadings should "set forth with particularity all of the material facts that are known to the pleading party to establish the pleading party's claims or affirmative defenses." Discovery would be limited to what is pleaded.

Mr. Garrison replied, however, that employment lawyers would take issue with the College's recommendations. Mr. Richards added that in both antitrust and employment discrimination cases, the plaintiff simply does not know all the facts at the time of filing.

Mr. Saunders explained that the task force had spent a great deal of time discussing discovery, including electronic discovery, and it has two fundamental suggestions to offer to the rules committee. First, the federal rules should retain and slightly modify the existing initial disclosures by eliminating the option for a party merely to identify categories of documents. Rather, a party should be required to turn over all the actual documents reasonably available that support its case.

Second, he said, after the initial disclosures, only limited discovery should be allowed. The existing system of wide-open, unlimited discovery should be ended. Instead, the rules should provide an initial set of discovery limited to producing documents or information that enables a party to prove or disprove a claim or defense. After that, a party should not be entitled to additional discovery unless the parties agree to it or the court approves it on a showing of good cause and proportionality.

This fundamental recommendation of the report, he said, represents a major change from current civil practice. In essence, the task force wants to fundamentally change the current mind set of litigants, under which they seek as much discovery as possible and keep asking for documents and depositions until somebody stops them. The task force, he said, had concluded that the current default in favor of unlimited discovery increases

discovery costs and delays without producing corresponding benefits. Instead, parties should be entitled as a matter of right only to specified, limited disclosures. Additional discovery should be permitted only if there is an agreement among the parties or a court order authorizing it.

One way to achieve this result, he said, would be for the specialty bars, such as the patent and employment discrimination bars, to specify the kinds of discovery and documents that they need and typically receive in a typical case. In addition, the task force identified – without comment and for further consideration – several other ways in which discovery might be limited, such as by changing the definition of "relevance," limiting the persons from whom discovery may be sought, and imposing discovery budgets approved by clients and the court.

Mr. Saunders added that he knew of no case in which a district judge has been reversed for allowing too much discovery. But judges may be reversed for allowing too little. Therefore, the safest course for a judge under the current regime is to allow discovery. That reality has created the mind set of entitlement that has led to the excessive costs and delays caused by discovery.

He reported that the College survey shows that electronic discovery is an extremely costly morass, and some fellows responded that it is killing the civil justice system. He said that it is essential for lawyers and litigants to work together with the court early in a case to decide how much discovery is truly needed and what the appropriate costs of it should be. To that end, perhaps the most important recommendation in the report, he said, is to change the default on discovery.

A member reported that the rules that limit discovery in the Arizona state courts have worked very well. The required disclosures in Arizona are much more elaborate than those in the federal system. But additional discovery is much more limited. Third-party depositions, for example, are not allowed without court approval. Moreover, the state court system has an evaluation committee, and there are empirical data demonstrating the effectiveness of the Arizona regime. In general, cases move through the Arizona state court system quickly and at less cost. The state has also established a complex-case division that has its own discovery rules under which all discovery is stayed until the judge holds an initial conference and determines how much discovery to allow.

Mr. Saunders said that the data from the survey of College fellows show that the costs of litigation must be addressed. Those costs are causing cases to settle that should not be settled on the merits. He said that 83% of the respondents to the survey agreed with this observation, and 55% said that the primary cause of delay in civil cases is the time to complete discovery.

Mr. Garrison said that certain discovery costs can be reduced, but he argued that the College's recommendations are too broad. He offered a range of other, alternative suggestions to improve efficiency and reduce costs. Most importantly, he said, there is a need to improve early judicial case management under FED. R. CIV. P. 16(a) because lawyers simply will not take the initiative on their own. In employment cases, for example, the court should enter a standard protective order at the Rule 16 conference. There could also be model protective orders that would work for most civil cases. The courts could require the plaintiff and defendant bars, or a special task force appointed by the court, to craft standard interrogatories that, once adopted, would not be subject to objections. The process of developing the standards could follow that used by the bar to draft pattern jury instructions.

The court and the bar could also adopt standard discovery requests to produce documents early in the case. They, too, would not be subject to objection. He added that the initial disclosures currently required by FED. R. CIV. P. 26(a) do not work because plaintiffs simply do not obtain the disclosures they need from defendants, and they have to proceed straight to discovery. He suggested that the proposed standard documents should be an alternative to initial disclosure.

He also suggested that a court should conduct a second conference at the end of the initial round of discovery. At that point, no more discovery will be needed in many cases. But if more is required, the judge could refer the case to a magistrate judge to handle the second stage of discovery. Judges could also get rid of the voluminous and duplicative paper produced in discovery by just requiring final documents. Courts could also consider alternate ways to deal with discovery disputes, such as by asking for letters, rather than motions, and holding telephone conferences to resolve disputes.

Mr. Garrison said that electronic discovery is really not that much of an issue for him, as he obtains the electronic information that he needs without difficulty. He cautioned against drafting procedural rules based on experience in heavy commercial litigation. Discovery problems in those cases, he said, are completely different from what occurs in most other cases.

Mr. Richards said, though, that there are indeed major problems with electronic discovery in antitrust cases and other big cases. The participants run search terms against electronic databases and come up with many hits. Then, it takes enormous attorney and paralegal time just to review all the hits. Nevertheless, he said, the College's proposal is not the right way to go. Courts, rather, should focus on the costs in each individual case and manage the discovery in reference to the anticipated costs of the discovery and the benefits it will produce in the case. That goal, he said, could be accomplished in three ways.

First, courts could require that discovery requests be more focused, directed, and limited to key areas. The broad requests seen today are very harmful. Discovery demands should be limited and based on specific details and events.

Second, courts should apply a triage system. Nothing, he said, focuses the mind of a plaintiff's lawyer more than costs. For example, the 7-hour limit on depositions has worked very well. Other kinds of limits, such as on interrogatories and discovery demands, would also work very well. Judges could ask lawyers at the outset of a case how many hits they expect to get on electronic discovery searches and then tailor the request to the anticipated results.

Third, courts could require phased discovery in many cases. At the outset of a case, the lawyers normally know that there really are only a handful of key issues. Resolution of those issues will determine the case as a whole. In antitrust cases, for example, it may be whether there was or was not a conspiracy.

The plaintiffs should be made to focus on the issues they really care about. Unfortunately, though, there now is simultaneous, unlimited discovery on all issues. Plaintiffs want to receive all the key information as quickly and as cheaply as possible, and they should be made to cut to the chase. To that end, phased discovery is the preferred way to go to narrow the scope of discovery. On the other hand, throwing a case out because of defects in the pleadings makes no sense at all.

A participant stated that one problem with phased discovery is that parties are not willing to move quickly to do it. Instead of allowing nine months or so for all discovery in a case, they want nine months for just the first phase of discovery. In addition, with phased discovery, key witnesses may get deposed three separate times, instead of only once. In reality, he said, one side often wants discovery, and the other does not. Mr. Richards agreed as to depositions, but said that it is the documents that are the main causes of unnecessary costs and delays.

Mr. Saunders pointed out that the obligation to preserve electronic information begins on the first day of a case. The parties, however, do not see a judge for some time after that. During the hiatus between filing and issuance of a pretrial order, parties incur large costs just to preserve electronic information before they are relieved of that responsibility by the court. Therefore, judges should take immediate action at the outset of a case to address preservation obligations, and no sanctions should be imposed on the parties other than for bad faith. The current rules, he said, do not adequately address this point.

A member recommended that the advisory committee obtain more information from the state courts in Arizona and Massachusetts to see how well they are controlling discovery. Judge Kravitz agreed to pursue the matter.

NEXT MEETING

The committee agreed to hold the next meeting in Washington, D.C., in June 2009, with the exact date to be set after the members have had a chance to consult their calendars By e-mail, the committee later decided to hold the meeting on Monday and Tuesday, June 1 and 2, 2009.

Respectfully submitted,

Peter G. McCabe
Secretary

TAB 4

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

This report is submitted for the record, and includes the following items for the information of the Conference.

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

The Committee on Rules of Practice and Procedure met on January 12-13, 2009 All members attended, with the exception of Professor Daniel J Meltzer Ronald J Tenpas, Assistant Attorney General, Environment and Natural Resources Division, attended on behalf of the Department of Justice

Representing the advisory rules committees were Judge Carl E. Stewart, chair, and Professor Catherine T Struve, reporter, of the Advisory Committee on Appellate Rules; Judge Laura Taylor Swain, chair, and Professor S. Elizabeth Gibson, reporter, of the Advisory Committee on Bankruptcy Rules, Judge Mark R Kravitz, chair, and Professor Edward H Cooper, reporter, of the Advisory Committee on Civil Rules, Judge Richard C. Tallman, chair, and Professor Sara Sun Beale, reporter, of the Advisory Committee on Criminal Rules, and Judge Robert L. Hinkle, chair of the Advisory Committee on Evidence Rules.

Participating in the meeting were Peter G McCabe, the Committee's Secretary; Professor Daniel R. Coquillette, the Committee's reporter; John K Rabiej, Chief of the Administrative Office's Rules Committee Support Office; James N. Ishida and Jeffrey N. Barr, attorneys in the Office of Judges Programs in the Administrative Office, Emery G. Lee of the Federal Judicial Center; and Professor Geoffrey C Hazard, consultant to the Committee.

FEDERAL RULES OF APPELLATE PROCEDURE

The Advisory Committee on Appellate Rules presented no items for the Committee's action

Informational Items

Proposed amendments to Rules 1 and 29 and Form 4 were published for comment in August 2008 Scheduled public hearings on the amendments were canceled because no one asked to testify The advisory committee will consider written comments submitted on the proposed amendments at its April 2009 meeting

The advisory committee is considering a proposed amendment to Rule 40, which would clarify the applicability of the 45-day period for filing a petition for rehearing in a case that involves a federal officer or employee. The advisory committee initially proposed but decided not to pursue a similar change to Rule 4, because the Supreme Court's decision in *Bowles v Russell*, 551 U S 205 (2007), raised questions about amending a rule to change a time period set by statute (28 U S C. § 2107).

The advisory committee is studying problems that arise when an appeal taken before entry of a judgment that requires a separate document under Civil Rule 58 is followed by a post-judgment motion that is timely only because the court failed to enter the judgment in a separate document The effectiveness of the appeal is suspended until the post-judgment motion is disposed of. The advisory committee concluded that rather than pursuing a rule change, the better way to address these problems is to improve awareness by clerks of court and district judges' chambers of the separate-document requirement. The advisory committee will also explore whether CM/ECF could include a prompt to judges and clerks to have the judgment set out in a separate document.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rule Approved for Publication and Comment

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Rule 6003 with a request that they be published for comment The proposed amendments make clear that a judge may enter certain orders that are effective retroactively notwithstanding the rule's requirement that the relief specified in the rule cannot be entered within 21 days after a petition has been filed The Committee approved the advisory committee's recommendation to publish the proposed amendments for public comment.

Informational Items

Proposed amendments to Bankruptcy Rules 1007, 1014, 1015, 1018, 1019, 4004, 5009, 7001, and 9001, and new Rules 1004.2 and 5012 were published for comment in August 2008 Scheduled public hearings on the amendments were canceled because no one asked to testify. The advisory committee will consider written comments submitted on the proposed amendments at its March 2009 meeting.

On behalf of the Judicial Conference, the Executive Committee in November 2008 approved the recommendation of the Committee to revise Official Form 22A and distribute to the courts Interim Rule 1007-I with a recommendation that it be adopted through a local rule or standing order The changes implement the National Guard and Reservists Debt Relief Act of 2008, which amends the Bankruptcy Code to exempt from means testing for a three-year period certain members of the National Guard and Reservists (Pub L. No 110-438) The Act was enacted on October 20, 2008 Interim Rule 1007-I and the revision to Form 22A took effect on December 19, 2008.

The advisory committee is considering amendments to Official Forms 22A and 22C to clarify certain deductions under the means test for chapter 7 and chapter 11 cases The

amendments substitute "number of persons" and "family size" for "household" and "household size" to reflect more accurately the manner in which the deductions are to be applied and to be consistent with related IRS standards

The advisory committee has embarked on a project to revise and modernize bankruptcy forms As part of this project, the advisory committee is studying the forms' content, ways to make the forms easier to use and more effective to meet the needs of the judiciary and all those involved in resolving bankruptcy matters, and possible approaches to take advantage of technology advances The advisory committee is also reviewing Part VIII of the Bankruptcy Rules, which addresses appeals to district courts and bankruptcy appellate panels, to consider whether the rules should be revised to align them more closely with the Federal Rules of Appellate Procedure A miniconference of judges, lawyers, and academics is scheduled for March 2009 in conjunction with the advisory committee's spring meeting to explore the benefits of, and concerns raised by, such a revision.

FEDERAL RULES OF CIVIL PROCEDURE

The Advisory Committee on Civil Rules presented no items for the Committee's action.

Informational Items

Proposed amendments to Civil Rules 26 and 56 were published for comment in August 2008. Two public hearings on the amendments have been held and another public hearing is scheduled in February The hearings were well attended, and the discussions were robust. The advisory committee will consider the testimony and written comments submitted on the proposed amendments at its April 2009 meeting.

The advisory committee is examining the Rule 26 provisions on experts retained to testify. The American Bar Association has recommended that federal and state discovery rules be amended to prohibit the discovery of draft expert reports and to limit discovery of attorney-

expert communications, without hindering discovery into the expert's opinions and the facts or data used to derive or support them These recommendations are based on experience since Rule 26 was amended in 1993 That experience has shown that discovery of attorney-expert communications and draft expert reports impedes efficient use of experts and results in artificial discovery-avoidance practices and expensive litigation procedures that do not meaningfully contribute to determining the strengths or weaknesses of the expert's opinions Instead, such practices and procedures significantly and unnecessarily increase the costs and delays in civil discovery.

The proposed amendments to Rule 56 are not intended to change the summary-judgment standard or burdens. Instead, they are intended to improve the procedures for presenting and deciding summary-judgment motions, to make the procedures more consistent across the districts, and to close the gap that has developed between the rule text and actual practice. The rule text has not been significantly changed for over 40 years. The district courts have developed local rules with practices and procedures that are inconsistent with the national rule text and with each other The local rule variations, though, do not appear to correspond to different conditions in the districts The fact that there are so many local rules governing summary-judgment motion practice demonstrates the inadequacy of the national rule.

Although there is wide variation in the local rules and individual-judge rules, there are similarities in many of the approaches The advisory committee is considering proposed amendments that draw from many of the current local rules. Under one part of the proposed amendments, unless a judge orders otherwise in the case, a movant would have to include with the motion and brief a "point-counterpoint" statement of facts that are asserted to be undisputed and entitle the movant to summary judgment The respondent, in addition to submitting a brief, would have to address each fact by accepting it, disputing it, or accepting it in part and disputing

it in part (which could be done for purposes of the motion only) The statements are intended to require the parties to identify and focus on the essential issues and provide a more efficient and reliable process for the judge to rule on the motion. The point-counterpoint statement has been used by many courts and judges It also has been used by courts that have subsequently abandoned it Testimony and comments have provided support for a point-counterpoint procedure, but also have pointed to practical difficulties encountered by its use

The proposed point-counterpoint procedure also presents a more fundamental issue The proposed rule authorizes a judge to use a different procedure than point-counterpoint by entering an order in an individual case, but does not authorize different procedures by local rule or standing order. Some of the arguments against the point-counterpoint proposal are framed in terms of local autonomy at the cost of national uniformity. The choice to be made will depend in part on the importance of national uniformity, subject to the case-by-case departures authorized by the published proposal.

The advisory committee also is considering concerns raised by some members of the bar about a word change to Rule 56 that took effect in December 2007 as part of the Style Project That project replaced the inherently ambiguous word "shall" throughout the rules with "must," "may," or "should," deriving the meaning for each rule from both context and court opinions interpreting and applying the rule. Before restyling, Rule 56 had used the word "shall" in stating the standard governing a court's decision to grant summary judgment. The Style Project changed the word to "should," based on case law applying the rule. ("The judgment sought *should* be rendered if [the record shows] that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law ") Although "should" could simply be carried forward from Rule 56 as amended in 2007, many vigorous comments express a strong preference for "must," based in part on a concern that adopting "should" in rule text will lead to

undesirable failures to grant appropriate summary judgments These comments will be the basis for careful reexamination in light of the case law that supports "should "

The advisory committee is planning to hold a major conference in 2010 to investigate growing concerns raised by the bar about pretrial costs, burdens, and delays The conference will examine possible rule and other changes

FEDERAL RULES OF CRIMINAL PROCEDURE

The Advisory Committee on Criminal Rules presented no items for the Committee's action

Informational Items

Proposed amendments to Criminal Rules 5, 12 3, 15, 21, and 32 1 were published for comment in August 2008 Scheduled public hearings on the amendments were canceled The two individuals requesting to testify on the proposed amendments agreed to present their testimony in conjunction with the advisory committee's April 2009 meeting The advisory committee will consider the testimony and written comments submitted on the proposed amendments at the meeting.

The advisory committee is considering proposed amendments to: (1) Rule 12(b)(3), requiring the defendant to raise before trial "a claim that the indictment or information fails to invoke the court's jurisdiction or to state an offense"; (2) Rule 32(c), requiring disclosure to the parties of information on which the probation officer relies in preparing the presentence report; (3) Rule 32(h), requiring the court to notify the parties of *Booker* variances, as well as departures, for reasons not identified in the presentence report or the parties' submissions; and (4) Rule 41, in consultation with the Committee on Criminal Law, authorizing probation and pretrial service officers to apply for and execute searches as part of their efforts to enforce court-ordered supervision conditions. The advisory committee is also reviewing all the criminal rules

to identify any that should be updated in light of new technologies and the nearly universal use of electronic case filing. Additionally, the advisory committee is continuing to study rule changes to conform with case law implementing the Crime Victims' Rights Act and whether further rule changes may be needed in light of possible new legislation

FEDERAL RULES OF EVIDENCE

Rules Approved for Publication and Comment

The Advisory Committee on Evidence Rules submitted proposed amendments to Rules 501-706 with a request that they be published for comment The proposed amendments are the second part of the project to "restyle" the Evidence Rules to make them clearer and easier to read, without changing substantive meaning. The Evidence Rules "restyling" project follows the successful restyling of the Federal Rules of Appellate, Criminal, and Civil Procedure. The Committee approved the advisory committee's recommendation to publish the proposed amendments to Rules 501-706 and to delay publishing them until all the Evidence Rules have been restyled, which should occur by June 2009

Informational Items

The advisory committee continues to monitor cases applying the Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 34 (2004), which held that the admission of "testimonial" hearsay violates the accused's right to confrontation unless the accused has an opportunity to cross-examine the declarant

GUIDELINES FOR DISTINGUISHING BETWEEN LOCAL RULES AND STANDING ORDERS

The Committee considered the results of a study submitted by Professor Daniel R Capra, reporter to the Advisory Committee on Evidence Rules, on local rules and standing orders The report describes the inconsistent uses of local rules, standing orders, administrative orders, and

general orders, as well as problems in providing lawyers and litigants with adequate notice of standing, administrative, and general orders and making them accessible The report proposes voluntary guidelines to assist courts in determining whether a particular subject matter should be addressed in a local rule or whether it is appropriate for treatment in a standing order A revised report taking into account suggestions made by several Committee members will be presented for the Committee's consideration at its next meeting

PANEL DISCUSSION ON PROBLEMS IN CIVIL LITIGATION AND POSSIBLE REFORM

Gregory Joseph, Esq , led a discussion on studies and reports from a joint project of the American College of Trial Lawyers and the Institute for the Advancement of the American Legal System on the growing costs and burdens of civil litigation The panel, which included Paul B Saunders, Esq. (chair of the American College of Trial Lawyers Task Force on Discovery), Judge Rebecca Love Kourlis, Executive Director of the Institute, Joseph Garrison, Esq., and J Douglas Richards, Esq., focused on the rising costs of electronic discovery, the public's deepening disenchantment with federal trial practices and procedures, and the flight of litigants from federal court to state court and alternative dispute organizations The results substantiated the Civil Rules Committee's plan to hold a major conference in 2010 with judges, lawyers, and law professors addressing these issues.

JUDICIAL CONFERENCE-APPROVED LEGISLATION

At its September 2008 meeting, the Judicial Conference approved the Committee's recommendation to seek legislation adjusting the time periods in 29 statutory provisions that affect court proceedings to account for the proposed changes in the new time-computation provisions in the federal rules that will take effect on December 1, 2009, assuming that the last stages of the Rules Enabling Act process are successfully completed The Committee is actively

pursuing the legislation and believes that it can be enacted so that its effective date is coordinated with the time-computation rules amendments

LONG-RANGE PLANNING

The Committee was provided a report of the September 2008 meeting of the Judicial Conference's committee chairs involved in long-range planning The Committee is reviewing its long-range goals to determine whether any changes are appropriate

Respectfully submitted,

Lee H Rosenthal

David J. Beck	John G Kester
Douglas R. Cox	William J Maledon
Mark Filip	Daniel J. Meltzer
Ronald M George	Reena Raggi
Marilyn L. Huff	James A Teilborg
Harris L Hartz	Diane P Wood

TAB 5-A1-2

MEMORANDUM

DATE: March 27, 2009

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 07-AP-D

This item would amend FRAP 1 to define "state" and would make a corresponding amendment to FRAP 29(a). The need to define "state" was noted in connection with the time-computation project's treatment of the definition of legal holidays. The existing time computation rules include state holidays within the definition of legal holidays. The proposed amended time-computation rules also will define legal holidays to include certain state holidays.[1] Because some litigation occurs not within states but rather in D.C. or in a commonwealth or territory, state holidays should include commonwealth and territorial holidays. The proposed FRAP 1 amendment is designed to accomplish this The adoption of the proposed definition in Rule 1(b) permits the deletion of the reference to a "Territory, Commonwealth, or the District of Columbia" from Rule 29(a).

Part I of this memo sets forth the FRAP 1(b) and FRAP 29(a) proposals as published. Part II discusses the relevant public comments (which are enclosed). Part III recommends that the Committee approve the proposals as published, and that the Committee add Mr. Rey-Bear's suggestions to the study agenda as a new item.

I. Text of Rules and Committee Notes as published

Rule 1. Scope of Rules; <u>Definition;</u> Title

(a) Scope of Rules.

(1) These rules govern procedure in the United States courts of appeals.

(2) When these rules provide for filing a motion or other document in the district court, the procedure must comply with the practice of the district court.

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[1] The proposed time-computation amendments are currently on track to take effect December 1, 2009, assuming that Congress takes no contrary action.

(b) ~~[Abrogated.]~~ **Definition.** In these rules, 'state' includes the District of Columbia and any United States commonwealth or territory.

(c) **Title.** These rules are to be known as the Federal Rules of Appellate Procedure.

Committee Note

Subdivision (b). New subdivision (b) defines the term "state" to include the District of Columbia and any commonwealth or territory of the United States. Thus, as used in these Rules, "state" includes the District of Columbia, Guam, American Samoa, the U.S. Virgin Islands, the Commonwealth of Puerto Rico, and the Commonwealth of the Northern Mariana Islands.

Rule 29. Brief of an Amicus Curiae

(a) **When Permitted**. The United States or its officer or agency~~;~~ or a state ~~State, Territory, Commonwealth, or the District of Columbia~~ may file an amicus-curiae brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing.

* * * * *

Committee Note

Subdivision (a). New Rule 1(b) defines the term "state" to include "the District of Columbia and any United States commonwealth or territory." That definition renders subdivision (a)'s reference to a "Territory, Commonwealth, or the District of Columbia" redundant. Accordingly, subdivision (a) is amended to refer simply to "[t]he United States or its officer or agency or a state."

* * * * *

II. Summary of Public Comments

In the Committee Report that was posted as part of the materials when the proposal was published for comment, it was noted that the term "state" appears in Rules 22, 44, and 46 as well

as in Rule 29(a). The Report noted the Committee's belief that the adoption of proposed Rule 1(b) would not require any changes in Rules 22, 44 or 46, but the Report invited public comment on the proposed definition's effects on those Rules.

08-AP-001: Benjamin J. Butts. Benjamin J. Butts, of Butts & Marrs in Oklahoma City, Oklahoma, writes to express general support for the proposed amendments to the Appellate Rules.

08-AP-007: Daniel I.S.J. Rey-Bear. Daniel I.S.J. Rey-Bear, a partner at Nordhaus Law Firm, LLP, in Albuquerque, New Mexico, wrote after the close of the comment period to suggest a revision to the proposed amendment to Rule 1(b). He argues that the definition of "state" should also include federally recognized Indian tribes. He points out that Native American tribes, like states, are sovereign governments. That all three branches of the federal government recognize this fact, he suggests, "support[s] classification of federally recognized Indian tribes as 'states' along with the District of Columbia, federal territories, commonwealths, and possessions." He notes the interpretive canon that provides that statutes should be liberally construed in favor of Native American tribes, and he cites court decisions that "have found tribes to qualify as 'territories' under various statutes." He notes that tribes "have greater status than territories."

Mr. Rey-Bear also focuses his arguments on the proposed definition's effect on the operation of Rules 22, 29, 44 and 46. He asserts that it would be appropriate for Rule 22 to apply to habeas proceedings under the Indian Civil Rights Act by petitioners seeking to challenge their detention by an Indian tribe. He argues that Native American tribes should be treated like states for purposes of Rule 29's amicus-filing provisions, and notes that this concern "is the main reason" for his submission of the comment. He points out that "[l]ike states, Indian tribes often find the need to submit amicus briefs in important cases affecting their sovereign interests," and he argues that tribes should not be required to seek party consent or court permission for such filings. Noting the proposed amendment to Rule 29(c), Mr. Rey-Bear argues that treating tribes like states "is especially warranted given the further disclosure requirements that the proposed revision to Rule 29 will impose on nongovernmental amicus briefs." Turning to Rule 44, Mr. Rey-Bear argues that "[i]t would be very appropriate and valuable for Indian tribes to be included in the notice and certification provided for in this Rule." Finally, Mr. Rey-Bear asserts that the inclusion of Indian tribes within Rule 1(b)'s definition would also function appropriately in connection with Rule 46's attorney-admission provision; "tribally licensed attorneys should be entitled to the same eligibility as attorneys who are admitted to practice solely in a territory."

III. Recommendation

I recommend that the Committee approve the proposals as published and that it add Mr. Rey-Bear's suggestions to the agenda as a new item. Mr Rey-Bear's suggestions are thoughtful and significant, but it seems preferable to give them careful consideration as a separate agenda

item rather than seeking to incorporate them into the present amendment.

Mr. Rey-Bear's opening comments point out that Native American tribes are sovereign governments and that they should be treated with the dignity accorded to other sovereigns. This point is correct, but it does not in itself establish that Indian tribes should be included in the definition of "state" for purposes of the Appellate Rules. Foreign nations are also sovereigns, and they are not included within the definition of "state." Thus, it seems to me, excluding tribes from the definition of "state" carries no necessary implication of disrespect to tribes as sovereigns.

Mr. Rey-Bear's points about the practical effects of the definition are significant, and each of the Rules in question merits separate consideration.

Rule 22(b). In prior memos, I suggested that including territories and the District of Columbia within the definition of "state" would not alter the operation of Rule 22(b)'s certificate-of-appealability provision. Cases already exist that treat the District of Columbia, Guam, Puerto Rico and the Virgin Islands as states for purposes of the statutory provisions concerning federal habeas corpus for state prisoners; thus, encompassing these entities within "state" for purposes of Rule 22(b) would accord with current practice. Though the status of American Samoa and the Northern Mariana Islands is less clear, I reasoned that defining "state," for FRAP purposes, to include all these entities should not cause a problem in the application of Appellate Rule 22(b): If, for example, American Samoa is not subject to the federal habeas framework, the question of Rule 22(b)'s applicability to American Samoa will simply never arise.

The analysis differs with respect to Native American tribes. Federal law does authorize habeas petitions by tribal prisoners, but the statutory framework is distinct from that which applies to state prisoners. The statute in question is 25 U.S.C. § 1303, which provides that "[t]he privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe." Section 1303 does not in terms require a petitioner whose claim has been dismissed by the district court to obtain a certificate of appealability in order to appeal. Though I have not yet had an opportunity to research the question, it is not self-evident that a certificate of appealability is required for appeals by petitioners seeking to challenge detention by a tribe. I did find one case which mentioned that the petitioner had obtained a certificate of probable cause (the pre-AEDPA equivalent of a certificate of appealability). See Wetsit v. Stafne, 44 F.3d 823, 825 (9th Cir. 1995). But on a quick search I have not found any cases requiring a certificate of appealability. Moreover, it is difficult to see how the COA requirement in 28 U.S.C. § 2253(c) could coherently apply to petitions by prisoners held by tribes. Section 2253(c) permits the grant of a COA "only if the applicant has made a substantial showing of the denial of a constitutional right." As Mr. Rey-Bear points out, the provisions in the Bill of Rights do not constrain Native American tribes, and therefore a claim by one held by a tribe would typically assert, not a constitutional violation, but rather a statutory violation. Admittedly, the statutory violation in

question would ordinarily be one that is grounded in a provision of the Indian Civil Rights Act, and the ICRA guarantees by statute a number of rights similar to those guaranteed (as against state and federal government actors) by the Constitution's Bill of Rights. Nonetheless, it is far from clear that the COA requirement set by Section 2253(c) and reflected in Rule 22 applies to petitions by those held by Native American tribes. It would seem advisable to determine – in coordination with the Criminal Rules Committee – whether petitioners seeking to challenge detention by a tribe currently must obtain a certificate of appealability in order to appeal a district court judgment dismissing the petition. If they do not, then the inclusion of tribes within the definition of "state" for purposes of Rule 22 would alter current practice.

Rule 26(a). Though Mr. Rey-Bear does not address Rule 26(a), it makes sense to consider that Rule when assessing the effects of including tribes within the definition of "state." For forward-counted periods, Rule 26(a)(6)(C)[2] includes within the definition of "legal holiday" a "day declared a holiday by the state where either of the following is located: the district court that rendered the challenged judgment or order, or the circuit clerk's principal office." It could be argued that for reasons similar to those that prompt the inclusion of state holidays within the definition of legal holiday, tribal holidays too should be included. More consideration of this possibility would be necessary, however, to understand how such a provision would work. Rule 26(a)'s definition focuses on the location of the district court or the circuit clerk's principal office; what connection to a Native American tribe would satisfy that locational trigger? Would the test be whether the office in question lies within the boundaries of a reservation of a federally recognized tribe? Or would the test be broader than that? Might it include, for example, lands that otherwise constitute "Indian country," for instance because they are within a "dependent Indian communit[y]"?[3] Under either of these tests, the recognition of a particular tribe's holidays for purposes of Rule 26(a)'s legal holiday provision would seem to exclude many or all of the tribes that have no tribal lands. Another question about Rule 26(a) concerns coordination with the time-computation rules found in the Civil, Criminal and Bankruptcy Rules. It would be undesirable for the Appellate Rules' time-computation provision to work differently from the provisions in those sets of rules – yet none of those sets of rules (as they will read assuming that

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[2] My discussion in the text focuses on Rule 26 as it will read effective December 1, 2009, absent contrary action by Congress. Current Rule 26(a) includes a substantially similar provision incorporating state holidays, *except* that the current provision applies to both forward-counted and backward-counted periods.

[3] 18 U.S.C. § 1151 provides: "Except as otherwise provided in sections 1154 and 1156 of this title, the term 'Indian country', as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same."

the pending amendments take effect on December 1, 2009) explicitly defines "legal holiday" to include tribal holidays. Any such change in Rule 26(a)'s definition should await coordinated consideration by the four Advisory Committees.

Rule 29. Mr. Rey-Bear's central concern relates to Rule 29, and it seems very worthwhile to consider the change that he proposes – namely, an amendment that would add federally recognized Indian tribes to the list of entities that need not seek party consent or court permission in order to file an amicus brief. It should be noted that, in this regard, the amendments as published will simply maintain current law. That is to say, under current law, Rule 29(a) lists the entities that may file amicus briefs without court permission or party consent: "The United States or its officer or agency, or a State, Territory, Commonwealth, or the District of Columbia." Under the proposed amendments, the list will be the same: Rule 29(a) will list – as the entities that may file amicus briefs without court permission or party consent – "[t]he United States or its officer or agency, or a state," and Rule 1(b) will define "state" to "include[] the District of Columbia and any United States commonwealth or territory." Therefore, the question whether to add Native American tribes to the list of exempt filers might be seen as a step beyond the scope of the published amendments. On the other hand, as Mr. Rey-Bear points out, the published amendment to Rule 29(c), by imposing a disclosure requirement and applying that requirement to entities not exempted under Rule 29(a), does alter the obligations of non-exempt amici, including federally recognized tribes.

Though it is worthwhile to consider Mr. Rey-Bear's proposed change, the proposal deserves more extensive consideration than may be possible within the time frame contemplated for the published amendments. It seems possible that the Committee might wish to consider and seek comment on the inclusion within Rule 29(a)'s set of exempt filers of the 562 federally recognized Indian tribes or Alaska Native entities.

Rule 44. Mr. Rey-Bear's suggestion concerning Rule 44 also merits serious consideration. His core concern – that tribes ought to receive the same notification as the state and federal governments do when the validity of a statute is at issue – is a reasonable one. At least two questions seem to warrant further consideration. One concerns the advisability of coordination, on this question, with the Civil Rules Committee.[4] Another concerns the applicability of Rule 44's current language in the context of tribal legislation. Though I cannot presume to speak for Indian tribes, I would think that they might find such a notification provision important whenever the *validity* of a tribal law is challenged in litigation, whether or not the challenge is a *constitutional* one. Indeed, one might also question whether all Indian tribes would consider it wise to support the adoption of a notification requirement that is premised (as currently drafted) on the notion that the challenge is *constitutional* in nature. Indian tribes may in at least some instances consider it important to emphasize that a particular limitation on tribal authority is not constitutional but rather is set by federal common law and thus can be altered by Congress. *See generally United States v. Lara*, 541 U.S. 193, 196 (2004) (holding that "Congress has the

[4] Civil Rule 5.1 contains provisions similar to those in Appellate Rule 44.

constitutional power to relax restrictions that the political branches have, over time, placed on the exercise of a tribe's inherent legal authority").

Rule 46. Mr. Rey-Bear's suggestion concerning Rule 46 is likewise worth considering, but that consideration might benefit from additional research. As Mr. Rey-Bear notes, a large number of tribes currently have tribal courts. According to the federal government, at least 175 of the federally recognized Indian tribes in the lower 48 states have "a formal tribal court."[5] Mr. Rey-Bear states that tribal courts "typically provide for admission to practice by attorneys based in large part on documented prior admission and good standing before the highest court or bar of a state or the District of Columbia." If that is the case with respect to all tribes, then it would seem that including tribes within the definition of "state" for purposes of Rule 46 would not have any practical effect. Although Mr. Rey-Bear also argues that Indian tribes should be treated with respect equivalent to that accorded states and territories, that principle – with which I agree – does not necessarily establish that admission to practice before a tribe's highest court should qualify an attorney for admission to practice before a federal court of appeals. After all, foreign nations are treated the same as Indian tribes for purposes of current Rule 46, and the fact that admission to practice in a foreign nation does not qualify an attorney for admission to practice in a federal court of appeals should not be taken as a sign of disrespect to the nation in question.

* * *

In sum, Mr. Rey-Bear has made a number of important suggestions. These suggestions deserve careful study on a schedule that permits their full evaluation. I therefore recommend that the Committee add Mr. Rey-Bear's proposals to its study agenda and that the Committee approve the amendments as published.

Encls.

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[5] Steven W. Perry, Census of Tribal Justice Agencies in Indian Country, 2002, at iii (December 2005), available at http://www.ojp.usdoj.gov/bjs/pub/pdf/ctjaic02.pdf. I say "at least" because the survey report states that 314 of the 341 federally recognized tribes in the lower 48 states participated in the survey, and thus the numbers in the report may be slightly lower than the actual numbers for all 341 tribes.

08-AP-001

08-CV-004

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September 22, 2008

Mr. Peter G. McCabe
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Washington DC, 20544

Dear Mr. McCabe:

I support the proposed amendments to the Federal Rules of Appellate and Civil Procedure. I do not practice bankruptcy or criminal law and accordingly have no opinion about those proposed changes.

Very truly yours,

BUTTS & MARRS, P.L.L.C.

Benjamin J. Butts

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March 13, 2009

VIA EMAIL AND FIRST-CLASS MAIL **08-AP-007**

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Rules_Comments@ao.uscourts.gov
Washington, D.C. 20544

Re: Proposed Federal Rule of Appellate Procedure 1(b)

Dear Mr. McCabe·

This letter provides a comment on the proposed revision of the Federal Rules of Appellate Procedure, as stated in the July 29, 2008 revised Report of the Advisory Committee on Appellate Rules. While I recognize that the comment period for this rulemaking ended on February 17, 2009, I only learned of this proposed amendment since then, and so submit my comments now. I hope that the Committee will consider this comment. In particular, I am submitting this comment to propose that new Rule 1(b), which will define the term "state" for purposes of the Appellate Rules. be revised to include federally recognized Indian tribes As explained below, federal law broadly and consistently recognizes that Indian tribes are sovereigns like states, Indian tribes should be treated at least the same as territories, which are already included in the proposed Rule, and Indian tribes should be expressly included in the definition of "state" under the Appellate Rules.

Federal Law Recognizes that Indian Tribes are Sovereigns like States.

The commerce clause of the Unites States Constitution recognizes Indian tribes as sovereign entities alongside the states. U.S. Const. art. I, § 8, cl. 3. And each branch of the federal government likewise recognizes that Indian tribes are sovereign governments. For example, the U S. Supreme Court has consistently recognized that Indian tribes are "domestic dependent nations," *Cherokee Nation v Georgia*, 30 U.S. 1, 17 (1831), with "retained sovereignty," *United States v Wheeler*, 435 U.S. 313, 328 (1978), and the "capacity of a separate sovereign." *United States v Lara*, 541 U.S. 193, 210 (2004). Moreover, Indian tribal sovereignty is inherent and pre-constitutional, it inheres in Indian tribes themselves, and it does not flow from the United States Constitution or from any delegation of federal authority. *Wheeler*, 435 U.S. at 322-23; *Talton v. Mayes*, 163 U.S. 376, 380-84 (1896); *Worcester v Georgia*, 31 U.S. (6 Pet.) 515, 581 (1832).

Congress also recognizes tribes as sovereign governments. Numerous examples abound in Title 25 of the United States Code, which wholly concerns Indians, including the recognition of tribal powers of self-government in the Indian Civil Rights Act, 25 U.S C. §§ 1301-1303. Congress also has recognized the status of tribal governments more generally, such as the requirement that "[e]ach agency . develop an effective process to permit elected officers of State, local, and *tribal governments* . . . to provide meaningful and timely input in the development of regulatory proposals containing significant Federal intergovernmental mandates." 2 U.S.C. § 1534(a) (emphasis added).

The executive branch also recognizes that Indian tribes constitute sovereign governments. For example, Executive Order 13175 entirely mandates "Consultation and Coordination with Indian Tribal *Governments*." 65 Fed. Reg. 67,249 (Nov. 6, 2000) (emphasis added). And Executive Order 13,336 specifically reaffirmed "the unique political and legal relationship of the Federal Government with tribal governments" and that '[t]his Administration is committed to continuing to work with these Federally recognized tribal governments on a government-to-government basis . . ." 69 Fed. Reg. 25,295 (May 5, 2004). Altogether, these judicial decisions, congressional enactments, and executive policy pronouncements support classification of federally recognized Indian tribes as "states" along with the District of Columbia, federal territories, commonwealths, and possessions.

Indian Tribes Should be Treated at Least the Same as Territories.

The current proposed revision to Appellate Rule 1(b) defines "state" to include "the District of Columbia and any United States commonwealth or territory." Whether a given political entity "comes within a given congressional act applicable in terms to a 'territory' depends upon the character and aim of the act." *People of Puerto Rico v Shell Co (Puerto Rico), Ltd*, 302 U.S. 253, 258 (1937). Thus, for a congressional enactment, it is not enough that Congress did not consider the situation at issue; rather, courts must determine whether Congress would have varied the statutory language if Congress had foreseen it. *Id* at 257. Courts addressing this issue accordingly must go beyond the statutory words themselves and consider "the context, the purposes of the law, and the circumstances under which the words were employed." *Id* at 258. Moreover, "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v Blackfeet Tribe*, 471 U.S. 759, 766 (1985)

Under this analysis, both federal and state courts have found tribes to qualify as "territories" under various statutes. *See, e.g., United States ex rel Mackey v Coxe*, 59 U.S. 100, 103-04 (1855) (finding Cherokee Nation to be a territory under federal statute governing recognition of estate administrators); *National Labor Relations Board v. Pueblo of San Juan*,

276 F.3d 1186, 1198 (10th Cir. 2002) (en banc) (treating Indian tribes as states and territories under the National Labor Relations Act); *Tracy v Superior Court of Maricopa County*, 810 P.2d 1030, 1035-46 (Ariz. 1991) (holding that tribes qualify as territories under the Uniform Act to Secure the Attendance of Witnesses); *Jim v CIT Financial Services Corp* , 533 P.2d 751, 752 (N.M. 1975) (holding that tribes constitute territories under the federal full faith and credit statute). Indian tribes therefore should be accorded the same status under proposed Appellate Rule 1(b).

Indeed, the Supreme Court has expressly recognized that Indian tribes have a greater status than territories. *Wheeler*, 435 U.S. at 321-23. Specifically, while Indian tribes retain "'inherent powers of a limited sovereign which has never been extinguished[,]" territorial governments are "'entirely the creation of Congress'" and not "an independent political community like a State, but . . 'an agency of the federal government.'" *Id.* at 321, 322. This distinction readily supports inclusion of Indian tribes within the definition of "state" alongside "territories" under the Appellate Rules.

Indian Tribes Should Be Included in the Definition of "State" under the Appellate Rules.

Each of the references to "state" in the Appellate Rules properly should encompass Indian tribes. As noted in the Advisory Committee report, these references include Appellate Rules 22, 29, 44, and 46 First, Rule 22 concerns federal "habeas corpus proceeding[s] in which the detention complained of arises from process issued by a state court[.]" Fed. R. App P. 22(b)(1). This certainly should encompass Indian tribes, since the Indian Civil Rights Act expressly recognizes that "[t]he privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe." 25 U.S.C. § 1303.

Next, Rule 29 provides that "a State, Territory, Commonwealth, or the District of Columbia may file an amicus-curiae brief without the consent of the parties or leave of the court." Fed. R. App. P. 29(a). The failure to expressly include Indian tribes within the scope of this rule is the main reason for my submission of this comment. Like states, Indian tribes often find the need to submit amicus briefs in important cases affecting their sovereign interests. *See, e g , Amoco Production Co v Watson*, 410 F.3d 722 (D.C. Cir. 2005) (Jicarilla Apache Nation and Southern Ute Indian Tribe, amici curiae); *Independent Petroleum Assoc of America v Dewitt*, 279 F.3d 1036 (D.C. Cir. 2002) (same); *South Dakota v United States Dep't of the Interior*, 69 F.3d 878 (8th Cir. 1995), *cert granted, vacated, & remanded*, 519 U.S. 919 (1996) (Jicarilla Apache Nation, Pueblo of Laguna, and Pueblo of Santa Ana, amici curiae) Unfortunately, because Indian tribes are not expressly included within the terms of Rule 29(a), they must seek consent of parties and obtain leave of the court out of an abundance

of caution, even as they assert that they properly should qualify under the Rule. Imposition of these additional requirements is unwarranted given the sovereign governmental status of Indian tribes. Instead, the classification of Indian tribes along with other governments under the Appellate Rules is especially warranted given the further disclosure requirements that the proposed revision to Rule 29 will impose on nongovernmental amicus briefs.

Next, Rule 44 provides for notice to the court clerk and certification to a state attorney general if a party questions the constitutionality of a state statute in a proceeding in which the state or its agency, officer, or employee is not a party in an official capacity. Fed. R. App P. 44(b). It would be very appropriate and valuable for Indian tribes to be included in the notice and certification provided for in this Rule since the Supreme Court has recognized that federal constitutional proscriptions do not apply to Indian tribes, *Talton*, 163 U.S. at 384; *Santa Clara Pueblo v Martinez*, 436 U.S. 49, 56 & n.7 (1978), and expressly held that analogous claims against Indian tribes under the Indian Civil Rights Act are barred by their sovereign immunity from suit, except for habeas corpus claims as referenced above, *Martinez*, 436 U.S. at 59. Existing Supreme Court authority and the sovereign governmental status of Indian tribes warrants according them the same level of process in this regard as the proposed rule revision would provide to the District of Columbia and federal territories, commonwealths, and possessions.

Finally, Rule 46 provides as follows:

> An attorney is eligible for admission to the bar of a court of appeals if that attorney is of good moral and professional character and is admitted to practice before the Supreme Court of the United States, the highest court of a state, another United States court of appeals, or a United States district court (including the district courts for Guam, the Northern Mariana Islands, and the Virgin Islands).

Fed. R. App. P. 46(a)(1). Indian tribes should be included within the scope of this Rule because the Supreme Court has recognized that "[t]ribal courts play a vital role in tribal self-government . . . and the Federal Government has consistently encouraged their development." *Iowa Mut Ins Co v LaPlante*, 480 U.S. 9, 14-15 (1987); *see also* Indian Tribal Justice Act, 25 U.S.C. §§ 3601-31; Indian Tribal Justice Technical & Legal Assistance Act, 25 U.S.C. §§ 3651-81; Sandra Day O'Connor, *Lessons from the Third Sovereign*, 33 Tulsa L.J. 1 (1997).

In particular, more than 140 Indian tribes currently have tribal courts, which often are structured similar to state courts. Cohen's Handbook of Federal Indian Law (Nell Jessup Newton ed. 2005), § 4.04[3]c][iv], at 265, 270. These tribal courts typically provide for

admission to practice by attorneys based in large part on documented prior admission and good standing before the highest court or the bar of a state or the District of Columbia. *See, e.g.*, Blackfeet Tribal Law & Order Code § 9-10; Cherokee Nation Supreme Court Rule 132; Hopi Indian Tribe Law & Order Code § 1.9.3.2; Jicarilla Apache Nation Code § 2-9-7(A); Nez Perce Tribal Code § 1-1-36(b); Winnebago Tribal Code § 1-402(1). Accordingly, an attorney admitted to practice before the highest court of an Indian tribe is almost necessarily already admitted to practice before the highest court of a state. Therefore, given the status of Indian tribes relevant to territories as discussed above, tribally licensed attorneys should be entitled to the same eligibility as attorneys who are admitted to practice solely in a territory, such as Guam, the Northern Mariana Islands, or the Virgin Islands.

In conclusion, numerous considerations support inclusion of federally recognized Indian tribes within the definition of a "state" in the proposed revision of Appellate Rule 1(b).

Thank for your you attention to this matter.

Very truly yours,

NORDHAUS LAW FIRM, LLP

Daniel I.S.J. Rey-Bear
Board Certified Specialist
Federal Indian Law

cc: John Dossett, National Congress of American Indians
Richard Guest, Native American Rights Fund
Governor John Antonio, Pueblo of Laguna
Governor Bruce Sanchez, Pueblo of Santa Ana
Governor Ruben A. Romero, Pueblo of Taos

TAB 5-A-3

MEMORANDUM

DATE: March 27, 2009

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 06-04

This item would amend FRAP 29(c) to add a disclosure requirement modeled upon that contained in Supreme Court Rule 37.6.[1]

Part I of this memo sets forth the proposal as published. Part II summarizes the comments submitted on the proposal.[2] Part III discusses those comments, and recommends that the Committee consider a few changes based upon them. Part IV illustrates those suggested changes.

I. Text of Rule and Committee Note as published

Rule 29. Brief of an Amicus Curiae

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(c) Contents and Form. An amicus brief must comply with Rule 32. In addition to the requirements of Rule 32, the cover must identify the party or parties supported and indicate

[1] Supreme Court Rule 37.6 reads as follows: "Except for briefs presented on behalf of *amicus curiae* listed in Rule 37.4, a brief filed under this Rule shall indicate whether counsel for a party authored the brief in whole or in part and whether such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief, and shall identify every person other than the *amicus curiae*, its members, or its counsel, who made such a monetary contribution. The disclosure shall be made in the first footnote on the first page of text."

[2] Five of those seven comments are enclosed with this memo. Two comments – by Mr. Butts and Mr. Rey-Bear – are enclosures to the memo on Item No. 07-AP-D.

whether the brief supports affirmance or reversal. ~~If an amicus curiae is a corporation, the brief must include a disclosure statement like that required of parties by Rule 26.1.~~ An amicus brief need not comply with Rule 28, but must include the following:

(1) a table of contents, with page references;

(2) a table of authorities — cases (alphabetically arranged), statutes and other authorities — with references to the pages of the brief where they are cited;

(3) a concise statement of the identity of the amicus curiae, its interest in the case, and the source of its authority to file;

(4) an argument, which may be preceded by a summary and which need not include a statement of the applicable standard of review; ~~and~~

(5) a certificate of compliance, if required by Rule 32(a)(7)~~.~~;

(6) if filed by an amicus curiae that is a corporation, a disclosure statement like that required of parties by Rule 26.1; and

(7) unless filed by an amicus curiae listed in the first sentence of Rule 29(a), a statement that, in the first footnote on the first page:

(A) indicates whether a party's counsel authored the brief in whole or in part;

(B) indicates whether a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and

(C) identifies every person — other than the amicus curiae, its members, or its counsel — who contributed money that was intended to fund preparing or submitting the brief.

* * * * *

Committee Note

Subdivision (c). Two items are added to the numbered list in subdivision (c). The items are added as subdivisions (c)(6) and (c)(7) so as not to alter the numbering of existing items. The disclosure required by subdivision (c)(6) should be placed before the table of contents, while the disclosure required by subdivision (c)(7) should appear in the first footnote on the first page of text.

Subdivision (c)(6). The requirement that corporate amici include a disclosure statement like that required of parties by Rule 26.1 was previously stated in the third sentence of subdivision (c). The requirement has been moved to new subdivision (c)(6) for ease of reference.

Subdivision (c)(7). New subdivision (c)(7) sets certain disclosure requirements for amicus briefs, but exempts from those disclosure requirements entities entitled under subdivision (a) to file an amicus brief without the consent of the parties or leave of court. Subdivision (c)(7) requires amicus briefs to disclose whether counsel for a party authored the brief in whole or in part and whether a party or a party's counsel contributed money with the intention of funding the preparation or submission of the brief. A party's or counsel's payment of general membership dues to an amicus need not be disclosed. Subdivision (c)(7) also requires amicus briefs to identify every other "person" (other than the amicus, its members, or its counsel) who contributed money with the intention of funding the brief's preparation or submission. "Person," as used in subdivision (c)(7), includes artificial persons as well as natural persons.

The disclosure requirement, which is modeled on Supreme Court Rule 37.6, serves to deter counsel from using an amicus brief to circumvent page limits on the parties' briefs. *See Glassroth v Moore*, 347 F.3d 916, 919 (11th Cir. 2003) (noting the majority's suspicion "that amicus briefs are often used as a means of evading the page limitations on a party's briefs"). It also may help judges to assess whether the amicus itself considers the issue important enough to sustain the cost and effort of filing an amicus brief.

It should be noted that coordination between the amicus and the party whose position the amicus supports is desirable, to the extent that it helps to avoid duplicative arguments. This was particularly true prior to the 1998 amendments, when deadlines for amici were the same as those for the party whose position they supported. Now that the filing deadlines are staggered, coordination may not always be essential in order to avoid duplication. In any event, mere coordination — in the sense of sharing drafts of briefs — need not be disclosed under subdivision (c)(7). *Cf.* Robert L. Stern et al., Supreme Court Practice 662 (8th ed. 2002) (Supreme Court Rule 37.6 does not "require disclosure of any coordination and discussion between party counsel and *amici* counsel regarding their respective arguments . . . .").

* * * * *

II. Summary of Public Comments

08-AP-001: Benjamin J. Butts. Benjamin J. Butts, of Butts & Marrs in Oklahoma City, Oklahoma, writes to express general support for the proposed amendments to the Appellate Rules.

08-AP-002: Washington Legal Foundation. Richard A. Samp writes on behalf of the Washington Legal Foundation to suggest that the language of proposed Rule 29(c)(7) should be clarified. As he states, "[w]hile WLF has no objection to the objective of the proposed change, it is concerned by a potential ambiguity in its wording." As published, Rule 29(c)(7)(C) requires the relevant footnote to "identif[y] every person — other than the amicus curiae, its members, or its counsel — who contributed money that was intended to fund preparing or submitting the brief." WLF is concerned that this language could be read in two ways: it could be read to permit the footnote to remain silent on the subject if no such person exists, but it could alternatively be read to require an affirmative statement that no such person exists. WLF asserts that the latter interpretation is the one that the U.S. Supreme Court Clerk's Office has conveyed to Mr. Samp and others in response to inquiries about the meaning of the similar language in Supreme Court Rule 37.6. WLF notes that compliance with the Supreme Court's interpretation of Rule 37.6 does not pose a problem. But WLF expresses concern that different circuits could vary in their interpretations of the language in proposed Appellate Rule 29(c)(7)(C), and that circuit-to-circuit variation on this point could result in "unsuspecting amicus filers ... hav[ing] their briefs bounced." WLF does not take a position concerning whether Rule 29(c)(7)(C) should require an affirmative statement if no such person exists; it merely suggests that the Rule should be drafted so as to make the answer to that question clear. For instance, WLF suggests, proposed Rule 29(c)(7)(C) could be re-drafted to read "~~identifies every~~ indicates whether a person — other than the amicus curiae, its members, or its counsel — ~~who~~ contributed money that was intended to fund preparing or submitting the brief; and, if so, identifies all such persons."

08-AP-003. Chief Judge Frank H. Easterbrook. Chief Judge Easterbrook makes stylistic comments about the proposed new provision in Rule 29(c)(7) and a substantive comment about existing language that would be placed in Rule 29(c)(6).

In proposed Rule 29(c)(7)(A), Chief Judge Easterbrook asserts that "author" is a noun rather than a verb, and he suggests replacing "authored" with "wrote." Chief Judge Easterbrook finds proposed Rule 29(c)(7)(B) wordy and vague. He asks, "[d]oes this language suggest that a cash contribution used to prepare an amicus brief need not be reported if the donor did not 'intend' to support the brief?" He suggests changing Rule 29(c)(7)(B) to read as follows: "indicates whether a party or a party's counsel contributed money ~~that was intended to fund preparing or submitting~~ toward the cost of the brief ..." (Chief Judge Easterbrook does not mention Rule 29(c)(7)(C) specifically, but this comment would seem to apply equally to that

subsection.)

Rule 29(c) currently states that "[i]f an amicus curiae is a corporation, the brief must include a disclosure statement like that required of parties by Rule 26.1 " For ease of reference and to parallel the structure of new Rule 29(c)(7), the proposed amendments would move this statement to a new Rule 29(c)(6) stating that amicus briefs must include, "if filed by an amicus curiae that is a corporation, a disclosure statement like that required of parties by Rule 26.1." Chief Judge Easterbrook suggests that this requirement is both overinclusive (because it covers entities such as municipalities, educational institutions, and prelates) and underinclusive (because it fails to cover entities such as partnerships, trusts and limited liability companies). Chief Judge Easterbrook notes that Rule 26.1's disclosure requirement likewise targets corporate parties, and he argues that both Rules' focus on corporations "needs some attention."

08-AP-004. Luther T. Munford. Luther T. Munford, a partner at Phelps Dunbar LLP in Jackson, Mississippi, suggests a number of changes in the proposed Rule.

Mr. Munford notes that the directive that the Rule 29(c)(7) statement be placed "in the first footnote on the first page" is ambiguous "because typically briefs have a page 'i' as well as a page '1'." And in contrast to Supreme Court briefs, in which page 'i' is the page for the question(s) presented, page 'i' in briefs in the courts of appeals will feature the table of contents (though if a corporate disclosure statement is required it will appear on page i). Mr. Munford suggests directing that the Rule 29(c)(7) statement appear "in a footnote to the Rule 29(c)(3) statement."

More substantively, Mr. Munford takes issue with the proposed Rule's approach. Instead of merely requiring disclosure, Mr. Munford suggests that the Rule "should prohibit parties from authoring or paying for amicus briefs." Merely imposing a disclosure requirement, he argues, "implies that in some circumstances it might be acceptable for a party to contribute to an amicus brief." To implement his preferred approach, Mr. Munford suggests that the required disclosure include a statement "that no counsel for a party authored the brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of the brief." Alternatively, if this prohibition is not adopted, Mr. Munford suggests that the rule "simply require the disclosure of funding sources (and authorship if desired) without any special discussion of party sponsorship."

Mr. Munford acknowledges that his suggestions would cause Rule 29(c)(7) to diverge from Supreme Court Rule 37.6. He suggests that the rulemakers could "give the Supreme Court an explicit choice by sending the Court a 'preferred rule' along with one based on Rule 37.6, and allowing the Supreme Court to choose between them."

08-AP-005. Council of Appellate Lawyers. The Council of Appellate Lawyers (a bench-bar organization that is part of the Appellate Judges Conference of the American Bar Association's Judicial Division) offers detailed suggestions on the proposed amendment.

The Council's comments address the placement of both the corporate disclosure statement and the brief-preparation disclosure statement. As to the corporate disclosure statement, the Council does not appear to disagree with the Committee Note's directive that the statement should be placed before the table of contents. But the Council argues that the guidance on placement should appear in the text of the Rule, not just in the Note. The Council suggests "that the proposed subdivision (c)(6) prescribe the same location for this disclosure, and in substantially the same language, as Rule 28(a)(1) does for a party." As to the disclosure required (in the published Rule) by subdivision (c)(7), the Council argues that the disclosure should appear in the text (not in a footnote) directly after the amicus-interest statement required by Rule 29(c)(3). The Council suggests that the contents of proposed subdivision (c)(7) "could be added to subdivision (c)(3), which would preserve the logical ordering of the brief's contents without disturbing the existing numbering of the subdivisions." For the future, the Council suggests that the Committee consider "revising Rule 29(c) along the lines of Rule 28(b), and then specifying the placement of those contents that are specific to amicus curiae briefs."

The Council suggests expanding the coverage of Rule 26.1's disclosure requirement "to apply to any person filing or moving for permission to file a brief as amicus curiae. Otherwise, a judge may consider a motion for permission to file a brief as amicus curiae without being aware of facts that might cause the judge to consider recusal." If this change is made in Rule 26.1, then the Council also suggests revising Rule 29(c) to refer to "the same disclosure statement" as that required of parties by Rule 26.1 rather than the current wording, which refers to "a disclosure statement like that required of parties by Rule 26.1." The Council is concerned that the current use of the word "like" might be read to permit "some degree of difference" between the amicus's and the party's disclosures.

The Council suggests that in subdivision (c)(7)(A) and (B) "states" should replace "indicates." In subdivision (c)(7)(A), the Council believes further guidance is necessary on the meaning of "authored the brief ... in part." The Council argues that the topic "is too important to be left to a Committee Note." The Council suggests that the text of the Rule incorporate the explanation from the Supreme Court Practice treatise, which states that authorship entails "an active role in writing or rewriting a substantial or important 'part' of the amicus brief, ... something more substantial than editing a few sentences."

The Council suggests that subdivision (c)(7)(A) "might be broadened to read, 'whether a *party or the* party's counsel *or other representative* authored the brief in whole or in part."

The Council asserts that "subdivision (c)(7)(B) is embraced within subdivision (c)(7)(C)," and thus that "the two subdivisions can be merged to require disclosure of whether there was outside funding ... and, if so, to require identification of each person who provided funding."

The Council suggests that the Committee Note cite the current edition of the Supreme Court Practice treatise rather than the prior edition (which was the current edition at the time the

Committee Note was first prepared).

08-AP-006. Steven Finell. Mr. Finell, who chairs the Rules Committee of the ABA's Council of Appellate Lawyers, concurs in the Council's comments and writes separately to add his "personal views ... on policy and draftsmanship."

As to policy, Mr. Finell agrees with Mr. Munford that "it is improper for a party to fund or write any substantial part" of an amicus brief. However, Mr Finell suggests that "prohibition by rule could provoke a legal challenge of the rule, either under the First Amendment or as exceeding the rule-making authority conferred by the Rules Enabling Act." He notes that requiring disclosure is likely to have the same effect, in practice, as a prohibition. He suggests, however, that Rule 29 could be improved by the addition of text that expresses the view in Supreme Court 37.1, which provides: "An *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An *amicus curiae* brief that does not serve this purpose burdens the Court, and its filing is not favored."

As to drafting, Mr. Finell suggests that the Advisory Committee "might [have] done better [by] drafting the proposed disclosure amendments to Rule 29 on a clean slate, rather than following so closely the text of" Supreme Court Rule 37.6. He objects that proposed Rule 29(c)(7) departs from the "established style" of the Appellate Rules. He contrasts the proposed Rule's use of "indicates" with the use of the verb "state" elsewhere in the Appellate Rules. And he contrasts the proposed Rule's use of "authored" with the use of the verb "prepare" elsewhere in the Appellate Rules.

08-AP-007: Daniel I.S.J. Rey-Bear. Daniel I.S.J. Rey-Bear, a partner at Nordhaus Law Firm, LLP, in Albuquerque, New Mexico, wrote after the close of the comment period to suggest a revision to the proposed amendment to Rule 1(b). Mr. Rey-Bear's comments are discussed at more length in connection with the published proposals concerning Rule 1(b) and Rule 29(a). Mr. Rey-Bear states that the main reason for his comments is to advocate the inclusion of federally recognized tribes among the entities authorized, by Rule 29(a), to file amicus briefs without party consent or leave of court. Among other considerations, Mr. Rey-Bear states that "the classification of Indian tribes along with other governments under the Appellate Rules is especially warranted given the further disclosure requirements that the proposed revision to Rule 29 will impose on nongovernmental amicus briefs."

III. Discussion

The comments can be separated into a number of different types, each of which is addressed in a separate section below. Part III.A. recommends that suggestions concerning the substance of the corporate disclosure requirement be placed on the agenda as new items. Part III.B. discusses certain suggestions that would reorient the focus of subdivision (c)(7). Part III.C.

discusses suggestions concerning the placement of the disclosures required by subdivisions (c)(6) and (c)(7). Part III.D. discusses suggestions concerning word choice and similar matters Part III.E. considers the benefits and costs of trying to conform to the language of Supreme Court Rule 37 6 Part III.F. suggests that Mr. Rey-Bear's proposal concerning federally recognized Indian tribes be placed on the Committee's agenda as a new item

A. The substance of Appellate Rule 26.1 and of the corresponding directive in Rule 29(c)

Both Chief Judge Easterbrook and the Council of Appellate Lawyers suggest that the Committee should rethink the scope of Rule 26.1's disclosure requirement. Likewise, they suggest that the Committee make corresponding changes in the part of Rule 29(c) that requires amicus briefs filed by a corporation to include "a disclosure statement like that required of parties by Rule 26.1."

These thoughtful suggestions are well worth considering. However, they would seem to fall outside the scope of the current proposal. The amendment as published proposed no change in the relevant language in Rule 29(c), except that the proposal relocated the language to a new subdivision (c)(6). To assess fully the question of altering the scope of the corporate-disclosure requirement, a new round of consideration and publication would be necessary. Therefore, I suggest that the Committee place these suggestions on its agenda as new items.[3]

B. The choice of a disclosure requirement rather than other measures

Both Luther Munford and Steven Finell suggest substantive changes in the orientation of subdivision (c)(7). Though these suggestions are thoughtful, I recommend that the Committee not implement them.

Mr. Munford argues that there is no legitimate reason for a party to fund or author an

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[3] If the Committee is so inclined, it could also add to its agenda as a new item the Council of Appellate Lawyers' suggestion that the Committee consider "revising Rule 29(c) along the lines of Rule 28(b), and then specifying the placement of those contents that are specific to amicus curiae briefs." The benefits of implementing this suggestion are, however, unclear. Rule 28(b) sets a baseline requirement that the appellee's brief conform to many of the same requirements as the appellant's brief, and then lists exceptions to that requirement. That approach makes sense for the appellee's brief, because the similarities (to the appellant's brief) outnumber the exceptions. But in the case of amicus briefs, the exceptions and distinctions outnumber the similarities. The only subsections of Rule 28(a) that are mirrored precisely in current Rule 29(c) are Rules 28(a)(2) (table of contents), 28(a)(3) (table of authorities) and 28(a)(11) (certificate of compliance).

amicus brief. He therefore suggests inserting language in Rule 29(c) that would ban the practice rather than merely requiring its disclosure. Mr. Finell suggests that inserting such a prohibition might provoke First Amendment or Enabling Act challenges, and he observes that a disclosure requirement is likely, as a practical matter, to accomplish the same goal as prohibition. Without pausing to analyze in detail the weight of First Amendment or Enabling Act issues, it seems reasonable to conclude that in any event a disclosure requirement will deter some party funding and authorship of amicus briefs and, in the event that party funding or authorship does occur, will enable the court to determine what weight the amicus filing should receive.

Mr. Munford is also concerned, relatedly, that acknowledging the possibility of party funding or authorship in the text of the Rule might legitimize the practice. If the Committee does not adopt his proposed prohibition on party funding or authorship, then Mr Munford suggests eliminating any specific references to parties and substituting a more generally worded disclosure requirement along the lines of Texas Rule of Appellate Procedure 11(c).[4] Mr. Munford's goal – to avoid implicit validation of party funding or authorship of amicus briefs – is a worthy one. It might be questioned, however, how many parties or counsel would read the Rule text as such a validation. Moreover, if such a provision does validate the practice, that is likely to be true, no matter what approach is taken in Appellate Rule 29, so long as the disclosure provision in Supreme Court Rule 37.6 remains unchanged. Nor is it clear that one could readily eliminate the reference to parties and their counsel. The two subdivisions (c)(7)(B) and (c)(7)(C) take different approaches. Under (c)(7)(B), monetary contributions by a party or its counsel that are intended to fund the brief's preparation or submission must be disclosed even if the party or lawyer in question is a member of the amicus. By contrast, under (c)(7)(C), monetary contributions by someone other than a party or its counsel that are intended to fund the brief's preparation or submission must be disclosed only if the contributor in question is someone other than the amicus, its members or its counsel. That difference in treatment could not be maintained if the reference to parties were eliminated.[5]

Though Mr. Finell disagrees with Mr. Munford's proposed prohibition, Mr. Finell (quoting Supreme Court Rule 37.1) suggests that the Rule text should stress that amicus filings should "bring[] to the attention of the Court relevant matter not already brought to its attention by the parties," and should warn that amicus filings not fitting this description "burden[] the Court" and are "not favored." The Committee has long been aware of the contents of Supreme Court Rule 37.1. Indeed, the sentiments expressed in that Rule were cited by the Committee as support

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[4] The Texas rule provides: "An amicus curiae brief must ... (c) disclose the source of any fee paid or to be paid for preparing the brief."

[5] For similar reasons, I recommend that the Committee not adopt the suggestion by the Council of Appellate Lawyers that subdivisions (c)(7)(B) and (c)(7)(C) "be merged."

for the 1998 amendment to Rule 29(b).[6] As amended in 1998, Rule 29(b) requires that the motion for leave to file the amicus brief[7] state, inter alia, "why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case." Some circuits have also seen fit to adopt local rules that are similar to Supreme Court Rule 37.1.[8] It is not clear that additional language along these lines is necessary in the text of Appellate Rule 29.

C. The placement of the disclosures required by proposed subdivisions (c)(6) and (c)(7)

Both Luther Munford and the Council of Appellate Lawyers offer suggestions concerning where the disclosures should be placed and how the Rule should express the placement requirement.

Mr. Munford makes a helpful observation concerning the ambiguity in subdivision (c)(7) as published. As he points out, the directive to place the disclosure "in the first footnote on the first page" seems to work better for Supreme Court briefs than for briefs filed in a court of appeals. Mr. Munford's suggested alternative – "in a footnote to the Rule 29(c)(3) statement" – seems like a good choice as a logistical matter and is expressed clearly and concisely.[9] I

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[6] See 1998 Committee Note to Rule 29(b) (quoting Supreme Court Rule 37.1 and explaining that whereas the pre-1998 version of Rule 29(b) "only required the motion to identify the applicant's interest and to generally state the reasons why an amicus brief is desirable," the Rule as amended in 1998 "additionally requires that the motion state the relevance of the matters asserted to the disposition of the case").

[7] Such a motion is required unless all parties have consented to the brief's filing or the amicus is one listed in the first sentence of Rule 29(a).

[8] See D.C. Circuit Rule 29(a) ("The brief must avoid repetition of facts or legal arguments made in the principal (appellant/petitioner or appellee/respondent) brief and focus on points not made or adequately elaborated upon in the principal brief, although relevant to the issues before this court."); Third Circuit Local Appellate Rule 29.1 (directing amici to "avoid[] any unnecessary repetition or restatement" of arguments made in parties' briefs); and Fifth Circuit Rule 29.2 (stating that amicus briefs "should avoid the repetition of facts or legal arguments contained in the principal brief and should focus on points either not made or not adequately discussed in those briefs").

[9] Professor Kimble questions whether it is desirable to employ a cross-reference when describing the location of the footnote. He offers a possible alternative, though he does not present that alternative as clearly better than Mr. Munford's suggestion: "On 'Rule 29(c)(3) statement,' I hate adding another cross-reference, but I don't see an easy way to avoid it here. Maybe you could merge it into (3): the source of its authority to file, and--unless the amicus

therefore recommend that the Committee consider making this change in the text of the Rule (and a corresponding change in the Note) This proposed change is shown in the proposed revision set forth in Part IV.

Like Mr. Munford, the Council of Appellate Lawyers sees a logical connection between the Rule 29(c)(3) statement and the disclosure required by subdivision (c)(7). However, the Council argues that the latter disclosure should be in the brief's text rather than in a footnote. The Council's objection to placing the disclosure in a footnote is that all other "specified elements of the brief" appear in the text. This does not seem to me to be a persuasive reason to depart from the Supreme Court Rule's choice to place the disclosure in a footnote. The Council also argues that subdivision (c)(7) should be moved up and incorporated as part of subdivision (c)(3). The Council's main reason for this suggestion appears to be that this will "present[] the required elements of the amicus brief in the order in which they typically appear." But, as discussed in the next paragraph, the Council does not suggest moving the subdivision (c)(6) disclosure higher in the list; thus, even if the Council's suggestion concerning the placement of the subdivision (c)(7) requirement were accepted, the list still would not achieve the Council's stated goal of ordering the requirements in the same order in which the items appear in the brief. I thus suggest that the Committee maintain the separate subdivision (c)(7) instead of moving its contents to subdivision (c)(3).

The Council agrees with the Note's statement that the subdivision (c)(6) disclosure should precede the table of contents, but it urges that the Committee place this guidance in the text of the Rule. To accomplish this, the Council suggests that "the proposed subdivision (c)(6)" employ "substantially the same language [concerning location] as Rule 28(a)(1)." That suggestion is somewhat puzzling. Rule 28(a)(1) specifies the placement of the Rule 26.1 disclosure in a party's brief by means of the introductory statement in Rule 28(a): "The appellant's brief must contain ... in the order indicated: (1) a corporate disclosure statement if required by Rule 26.1." In other words, Rule 28(a) specifies that the items be placed in the order in which they are listed in Rule 28(a). But the Council does not suggest that the proposed Rule 29(c)(6) be moved higher in the Rule 29(c) list – as would be necessary if one were to specify the corporate disclosure statement's location using language similar to that in Rule 28(a). Accordingly, if the Committee wishes to implement the Council's suggestion on this point, it becomes necessary to consider other ways of doing so. Subdivision (c)(6) of the proposed revision set forth in Part IV includes bracketed language for that purpose.

D. Details of drafting subdivision (c)(7)

The comments offer a number of thoughtful suggestions for revising proposed subdivision (c)(7).

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curiae is one listed in the first sentence of Rule 29(a)--a footnote to this statement that: I guess that's unwieldy though."

"Authored." Chief Judge Easterbrook states that "[t]he word 'author' is a noun, and nouns do not have past tenses! The word should be 'wrote,' not 'authored' " The published amendment uses the word "authored" because that is the word used in Supreme Court Rule 37.6. Admittedly, the Supreme Court's choice of words might be criticized. As Bryan Garner explains: "author, v t., is becoming standard, though careful writers still avoid it when they can Generally it's a high-falutin substitute for write, compose, publish, or create .. ." Bryan A. Garner, The Oxford Dictionary of American Usage and Style (Oxford University Press, 2000) (online edition).[10] As Chief Judge Easterbrook suggests, in this instance an alternative would be "wrote." Mr. Finell's comments suggest another alternative – "prepared."[11] The question for the Committee is whether the benefit – preferable usage – outweighs the cost – divergence from the Supreme Court rule, with the attendant possibility that readers might think the difference in word choice signals a difference in meaning.[12]

The Council of Appellate Lawyers does not object to the use of "authored" but does argue that additional Rule text should be added to define what is meant by "authored ... in part." The Council tentatively suggests adding language based on the Supreme Court Practice treatise's statement that counsel authors a brief "in part" if he or she "takes an active role [in] writing or [] rewriting a substantial or important 'part' of the amicus brief, ... something more substantial than editing a few sentences." The Council's desire for guidance is understandable, but placing such language in the text of the Rule would lengthen and complicate it. If the Committee wishes to provide additional guidance, such language could be added to the Note. Because the treatise's full discussion may be of interest to the Committee, I quote it here:

> ... Rule 37.6 does not mean to discourage party counsel from soliciting supporting briefs from amici curiae. Nor does the rule require disclosure of any coordination and discussion between party counsel and amici counsel regarding their respective arguments, including the helpful practice of supplying amicus counsel with copies of the party's lower court briefs or drafts of the party's Supreme Court brief or

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[10] Though the use of "author" as a transitive verb is criticized, it is hardly a recent innovation. See, e.g., Webster's New International Dictionary of the English Language (2d ed. 1941) ("author, v.t. 1. To occasion; originate; be author of.").

[11] Mr. Finell asserts that the choice of "authored" rather than "prepared" "depart[s] from the existing style of" the Appellate Rules. It is true that the Appellate Rules do not currently use "author" as a verb. It is interesting to note the use of "authored" in Civil Rule 26(a)(2)(B)(iv), which requires expert reports to set forth "the witness's qualifications, including a list of all publications authored in the previous 10 years."

[12] Professor Kimble views the calculus differently: If there were no applicable precedent in the national Rules, he would find the criticism of "authored" persuasive. But because "authored" appears in restyled Civil Rule 26(a)(2)(B)(iv), Professor Kimble does not object to the use of "authored" in Appellate Rule 29.

> petition. Often some form of consultation and communication is both appropriate and essential if the amicus brief is to be confined, as it should be .. to "relevant matter not already brought to [the Court's] attention by the parties." Moreover, Rule 37 6 does not require disclosure of the fact that party counsel may have reviewed an amicus brief in order to identify inaccuracies and avoid repetition of matter already presented in the party's brief. That such a review may result in advice by party counsel that the amicus counsel rewrite, delete, or add certain matter would not appear to constitute authoring the amicus brief "in whole or in part."
>
> Rule 37.6 certainly requires that disclosure must be made whenever party counsel actually writes or rewrites all or a substantial portion of the amicus brief. Although the rule does not define "in part" authoring, the phrase would seem to include any instance in which party counsel takes an active role in writing or rewriting a substantial or important "part" of the amicus brief, with the word "part" interpreted to mean something more substantial than editing a few sentences. Just how much more constitutes "in part" authoring must depend on the individual situation as well as the common sense and good faith of counsel, with borderline situations being referred to the Clerk's Office for advice.

Eugene Gressman et al., Supreme Court Practice 739 (9th ed. 2007).

Authorship by a party or a non-counsel representative. The Council suggests that subdivision (c)(7)(A) "might be broadened to read, 'whether a *party or the* party's counsel *or other representative* authored the brief in whole or in part." The Council does not explain why it believes this change is desirable. It does not, for example, state that there have been instances in which an individual party or a party's non-lawyer representative authored an amicus brief. In the absence of any assertions that such activities have occurred, it is unclear that a departure from the language of Supreme Court Rule 37.6 is desirable.

"Indicates." Mr. Finell asserts that the use of "indicates" in proposed subdivisions 29(c)(7)(A) and 29(c)(7)(B) departs from usage elsewhere in the Appellate Rules.[13] I disagree. See, e.g., Appellate Rule 27(d)(1)(B) ("there must be a caption that includes the case number, the name of the court, the title of the case, and a brief descriptive title indicating the purpose of the motion and identifying the party or parties for whom it is filed"); Appellate Rule 28(a)(6) (appellant's brief must contain "a statement of the case briefly indicating the nature of the case, the course of proceedings, and the disposition below"); Rule 29(c) (cover of amicus brief "must identify the party or parties supported and indicate whether the brief supports affirmance or

[13] Similarly, the Council of Appellate Lawyers maintains that "'states' is clearer than 'indicates'."

reversal").[14] Retaining "indicate" would not depart from existing usage in the Appellate Rules. Substituting "state" would depart from the language of Supreme Court Rule 37 6.

On the other hand, Professor Kimble finds that "the comments about 'indicate' have merit. 'Indicate' is a weak substitute for 'state.' Properly used, it means something like 'points to ' Smoke indicates fire. If you mean 'state,' I'd say 'state.'"

"Identifies" versus "indicates." The Washington Legal Foundation helpfully identifies an ambiguity in the proposed Rule as drafted: If there are no persons meeting the description set forth in proposed subdivision (c)(7)(C), must the footnote so state or can the footnote simply omit any mention of the subject? WLF asserts that the Supreme Court Clerk's Office takes the view that the footnote must so state. WLF's suggestion that proposed Rule 29(c)(7)(C) be revised to clarify this point is worth considering. Subdivision (c)(7)(C) of the proposed revision set forth in Part IV includes bracketed language that would clarify the matter.

"Intended to fund." Chief Judge Easterbrook objects to the phrase "intended to fund preparing or submitting the brief." Apart from finding the phrase "wordy," he asserts that an "intent" standard is "hard to administer." He suggests saying, instead, "contributed money toward the cost of the brief." One problem with Chief Judge Easterbrook's suggested alternative is that "toward the cost of" may prove no easier to apply than "intended to fund preparing or submitting." Another problem is that "toward the cost of" could be read more broadly than the published language, and would raise problems that the published language was drafted specifically to avoid. This fact is illustrated by Chief Judge Easterbrook's rhetorical question concerning the published language: "Does this language suggest that a cash contribution used to prepare an amicus brief need not be reported if the donor did not 'intend' to support the brief?" In fact, as the Committee is aware, the answer to that question is "yes." Chief Judge Easterbrook's proposed alternative language is similar to the language that the Supreme Court published for comment in spring 2007.[15] As the Committee will recall, the proposed amendment to Supreme Court Rule 37.6 elicited highly critical comments from a group of Supreme Court practitioners and from the National Chamber Litigation Center and National Association of Manufacturers (the "Chamber"). The practitioners argued that the proposed

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[14] See also Appellate Rule 3(c)(2) ("A pro se notice of appeal is considered filed on behalf of the signer and the signer's spouse and minor children (if they are parties), unless the notice clearly indicates otherwise.").

[15] The Supreme Court's published proposal read: "Except for briefs presented on behalf of *amicus curiae* listed in Rule 37.4, a brief filed under this Rule shall indicate whether counsel for a party authored the brief in whole or in part, whether such counsel or a party is a member of the *amicus curiae*, or made a monetary contribution to the preparation or submission of the brief, and shall identify every person or entity, other than the amicus curiae, its members, or its counsel, who made such a monetary contribution ~~to the preparation or submission of the brief~~. The disclosure shall be made in the first footnote on the first page of text."

amendment could deter lawyers from joining organizations for fear that their membership would trigger the disclosure obligation in unrelated litigation, and they also contended that the reference to making "monetary contribution[s] to the preparation or submission of the brief" was ambiguous and might be construed to include general membership dues. The Chamber asserted that the disclosure requirement would chill amicus participation, that compelling disclosure that a party was a member of an amicus would impair the member's First Amendment freedom-of-association rights, and that compelling disclosure of monetary contributions would impair groups' ability to raise funds for amicus filings. Evidently in response to these concerns, the Supreme Court revised its amendment, adopting the language that is quoted in footnote 1 of this memo. The Clerk's Comment to the amended Rule 37.6 stated: "The change would require the disclosure that a party made a monetary contribution to the preparation or submission of an *amicus curiae* brief in the capacity as a member of the entity filing as *amicus curiae*. Such disclosure is limited to monetary contributions that are intended to fund the preparation or submission of the brief; general membership dues in an organization need not be disclosed." In other words, the language to which Chief Judge Easterbrook objects appears to have been adopted by the Supreme Court in direct response to strong expressions of concern about the breadth of the earlier proposed language. I therefore recommend that the Committee retain the reference to intent.

However, Professor Kimble asks whether "intended to fund preparing or submitting the brief" could be shortened to "intended to fund the brief." This style change may be worth considering, though it would constitute a departure from the language of the Supreme Court's rule.

E. Divergence from Supreme Court Rule 37.6

Mr. Finell argues that the Committee should not have attempted to follow the language of Supreme Court Rule 37.6 when drafting proposed Appellate Rule 29(c)(7). Mr. Munford acknowledges the Committee's goal of tracking the wording of the Supreme Court's rule, but he suggests that the rulemakers could "give the Supreme Court an explicit choice by sending the Court a 'preferred rule' along with one based on Rule 37.6, and allowing the Supreme Court to choose between them."

Mr. Finell's suggestion has some force; I suspect that Professor Kimble would agree that if a Supreme Court rule diverges from proper style, the Appellate Rule should follow proper style rather than tracking the Supreme Court rule. Balanced against this view is the argument that tracking the Supreme Court rule's language is useful because it avoids causing litigants to question whether the difference in style betokens a difference in substance. To the extent that it is valuable for the Appellate Rules and Supreme Court Rules to use the same language, Mr. Munford's suggestion is intriguing. It is possible that the Supreme Court could reconsider the approach taken in Supreme Court Rule 37.6 if the Committee were to make a sufficiently good case for taking a different approach. Thus, if the Committee were to feel strongly that aspects of

Supreme Court Rule 37.6 were not optimal, it could consider following Mr Munford's suggestion of providing two alternative versions of the proposed Rule 29 -- one for adoption if the Supreme Court is willing to change Rule 37.6, and the other for adoption if the Supreme Court prefers to retain Rule 37.6 unchanged.

The possible changes shown in Part IV, however, would not require the approach suggested in the preceding paragraph. Though some of the changes shown in Part IV would cause the language of Rule 29(c)(7) to depart somewhat from the language of Supreme Court Rule 37.6, most of the departures would be in language rather than in substance. The proposed change in placement of the disclosure footnote would constitute a small shift from the actual practice in Supreme Court briefing, but that change is warranted by differences in the structure of briefs at the two levels.

F. Proposal concerning Indian tribes

Mr. Rey-Bear's proposals are discussed at greater length in the memo concerning Item No. 07-AP-D (defining "state"). That memo outlines my reasons for suggesting that the Committee add Mr. Rey-Bear's proposals to its study agenda as a new item. Here it suffices to note that placing the proposals on the study agenda as a new item will not only permit the Committee further time to study the questions raised in that memo, but will also permit the Committee to study, as well, whether Indian tribes should be exempted from the new Rule 29(c) disclosure requirement, or whether tribes (like, inter alia, foreign nations) should be covered by that requirement.

IV. Possible revisions to the proposed amendment

The following draft illustrates the following possible changes based upon the discussion in Part III:

- The bracketed language in subdivision (c)(6) is offered as an option in case the Committee agrees with the Council's suggestion (discussed in Part III.C) that the placement of the subdivision (c)(6) disclosure should be addressed in the Rule text (not merely in the Note).

- In the introductory language of subdivision (c)(7), I recommend that the Committee consider choosing the second bracketed option, which would implement Mr. Munford's suggestion concerning the placement of the subdivision (c)(7) disclosure (discussed in Part III.C).

    - Making that change would necessitate a change to the Note's first paragraph, as illustrated by the second bracketed option in that paragraph.

- In subdivision (c)(7)(C), I recommend that the Committee consider adopting the second bracketed option, which would implement the Washington Legal Foundation's suggestion (discussed in Part III.D) that the subdivision use the term "indicates."

  - Making that change would necessitate a change to the first paragraph of the Note to subdivision (c)(7), as illustrated by the second bracketed option in that paragraph.

  - *Possible alternative revision*: As a point of comparison, Appellate Rule 26.1 was amended in 2002 to eliminate a very similar ambiguity. As amended, it now reads: "Any nongovernmental corporate party to a proceeding in a court of appeals must file a statement that identifies any parent corporation and any publicly held corporation that owns 10 % or more of its stock or states that there is no such corporation." This language suggests a possible alternative way to revise subdivision (c)(7)(C): "identifies every person — other than the amicus curiae, its members, or its counsel — who contributed money that was intended to fund [preparing or submitting] the brief, or states that there is no such person."

- "Indicates" in subdivision (c)(7) is bracketed and is followed by a bracketed alternative, "states." The choice between these two terms is discussed in Part III.D.

- "Preparing or submitting" is bracketed where it appears, to reflect Professor Kimble's suggestion that the rule should simply read "intended to fund the brief." This is discussed in Part III.D.

- The last paragraph of the note to subdivision (c)(7) has been updated to cite the latest edition of the Supreme Court Practice treatise.

Rule 29. Brief of an Amicus Curiae

* * * * *

(c) Contents and Form. An amicus brief must comply with Rule 32. In addition to the requirements of Rule 32, the cover must identify the party or parties supported and indicate whether the brief supports affirmance or reversal. ~~If an amicus curiae is a corporation, the brief must include a disclosure statement like that required of parties by Rule 26.1.~~ An amicus brief need not comply with Rule 28, but must include the following:

(1) a table of contents, with page references;

(2) a table of authorities — cases (alphabetically arranged), statutes and other authorities — with references to the pages of the brief where they are cited;

(3) a concise statement of the identity of the amicus curiae, its interest in the case, and the source of its authority to file;

(4) an argument, which may be preceded by a summary and which need not include a statement of the applicable standard of review; ~~and~~

(5) a certificate of compliance, if required by Rule 32(a)(7)~~.~~;

(6) if filed by an amicus curiae that is a corporation, a disclosure statement [– placed before the table of contents –] like that required of parties by Rule 26.1; and

(7) unless filed by an amicus curiae listed in the first sentence of Rule 29(a), a statement that, [in the first footnote on the first page] [in a footnote to the Rule 29(c)(3) statement]:

(A) [indicates] [states] whether a party's counsel authored the brief in whole or in part;

(B) [indicates] [states] whether a party or a party's counsel contributed money that was intended to fund [preparing or submitting] the brief; and

(C) [identifies every person — other than the amicus curiae, its members, or its counsel — who contributed money that was intended to fund [preparing or submitting] the brief [, or states that there is no such person]] [[indicates] [states] whether a person – other than the amicus curiae, its members, or its counsel – contributed money that was intended to fund [preparing or

29 submitting] the brief and, if so, identifies those persons].

30 * * * * *

Committee Note

* * * * *

Subdivision (c). Two items are added to the numbered list in subdivision (c). The items are added as subdivisions (c)(6) and (c)(7) so as not to alter the numbering of existing items. The disclosure required by subdivision (c)(6) should be placed before the table of contents, while the disclosure required by subdivision (c)(7) should appear [in the first footnote on the first page of text] [in a footnote to the Rule 29(c)(3) statement].

Subdivision (c)(6). The requirement that corporate amici include a disclosure statement like that required of parties by Rule 26.1 was previously stated in the third sentence of subdivision (c). The requirement has been moved to new subdivision (c)(6) for ease of reference.

Subdivision (c)(7). New subdivision (c)(7) sets certain disclosure requirements for amicus briefs, but exempts from those disclosure requirements entities entitled under subdivision (a) to file an amicus brief without the consent of the parties or leave of court. Subdivision (c)(7) requires amicus briefs to disclose whether counsel for a party authored the brief in whole or in part and whether a party or a party's counsel contributed money with the intention of funding the preparation or submission of the brief. A party's or counsel's payment of general membership dues to an amicus need not be disclosed. Subdivision (c)(7) also requires amicus briefs to [identify every other "person" (other than the amicus, its members, or its counsel) who contributed money with the intention of funding the brief's preparation or submission] [state whether any other "person" (other than the amicus, its members, or its counsel) contributed money with the intention of funding the brief's preparation or submission, and, if so, to identify all such persons]. "Person," as used in subdivision (c)(7), includes artificial persons as well as natural persons.

The disclosure requirement, which is modeled on Supreme Court Rule 37.6, serves to deter counsel from using an amicus brief to circumvent page limits on the parties' briefs. *See Glassroth v. Moore*, 347 F.3d 916, 919 (11th Cir. 2003) (noting the majority's suspicion "that amicus briefs are often used as a means of evading the page limitations on a party's briefs"). It also may help judges to assess whether the amicus itself considers the issue important enough to sustain the cost and effort of filing an amicus brief.

It should be noted that coordination between the amicus and the party whose position the amicus supports is desirable, to the extent that it helps to avoid duplicative arguments. This was particularly true prior to the 1998 amendments, when deadlines for amici were the same as those for the party whose position they supported. Now that the filing deadlines are staggered, coordination

may not always be essential in order to avoid duplication. In any event, mere coordination — in the sense of sharing drafts of briefs — need not be disclosed under subdivision (c)(7). *Cf* Eugene Gressman et al., Supreme Court Practice 739 (9th ed. 2007) (Supreme Court Rule 37.6 does not "require disclosure of any coordination and discussion between party counsel and amici counsel regarding their respective arguments . . .").

* * * * *

Encls.

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08-AP-002

October 9, 2009

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, DC 20544

Re: Proposed Amendment to Fed.R.App.P 29

Dear Mr. McCabe:

The Washington Legal Foundation (WLF) appreciates the opportunity to comment on your committee's proposed amendments to the Federal Rules of Appellate Procedure. WLF is limiting its comments to the proposed amendment to Rule 29. While WLF has no objection to the objective of the proposed change, it is concerned by a potential ambiguity in its wording.

WLF is a public interest law and policy center that regularly files amicus curiae briefs in both the U.S. Supreme Court and the federal appellate courts. Accordingly, it has a keen interest in any changes in Rule 29, which governs the filing of amicus briefs in the U.S. courts of appeals.

Proposed Rule 29(c)(7)(C) requires most amicus filers to include a footnote that "identifies every person -- other than the amicus curiae, its members, or its counsel -- who contributed money that was intended to fund preparing or submitting the brief." A literal reading of this provision suggests that no statement is required if there is no person who fits the description set forth in the provision. This wording differs substantially from proposed Rules 29(c)(7)(A) and 29(c)(7)(B), which require the footnote to "indicate" whether certain events have occurred. By using the word "identifies" rather than "indicates," proposed Rule 29(c)(7)(C) makes reasonably clear that a mention of the subject matter is required only if there is someone to identify.

However, that is not the interpretation adopted by the Clerk of the U.S. Supreme Court with respect to the substantially identical language contained in Supreme Court Rule 37.6. That rule provides that the opening footnote of an amicus brief "shall identify every person other than the *amicus curiae,* its members, or its counsel, who made . . . a monetary contribution [intended to fund the preparation or submission of the brief]." As is true of proposed Fed.R.App.P. 29(c)(7)(C), the Supreme Court's language suggests that no mention of the subject must be made unless there is a person to be identified. However, the U.S. Supreme Court Clerk's Office has taken the position (in numerous oral statements, including statements to the author of this letter) that the first footnote must address the subject matter of this

provision of Rule 37.6. Thus, according to the Clerk, if no such person exists, the footnote must say so explicitly.

Compliance with Supreme Court Rule 37.6 as so interpreted presents no problem whatsoever. It is easy enough to add a sentence to the opening footnote of every Supreme Court amicus brief that "no person or entity other than the *amicus curiae,* its members or its counsel made a monetary contribution intended to fund the preparation or submission of the brief." But it would be substantially more difficult for regular amicus filers to keep up with the interpretation of proposed Rule 29(c)(7)(C) adopted by each of the 13 U.S. courts of appeals Given the precedent established by the U.S. Supreme Court Clerk's Office, it would be unsurprising if at least one of the 13 appeals courts adopted an interpretation of proposed Rule 29(c)(7)(C) that is similar to the Supreme Court's. The likely result will be that numerous unsuspecting amicus filers will have their briefs bounced (and be required to go to the not-inconsiderable expense of refiling them) because the clerk's office of the appeals court with which they filed adopted an interpretation of proposed Rule 29(c)(7)(C) that cuts against the literal meaning of the words of that rule.

WLF does not have a strong preference regarding which of the two interpretations of proposed Rule 29(c)(7)(C) the Committee intends to adopt. But whichever interpretation is adopted, WLF believes that the Committee should amend the proposed rule to make clear its preference. For example, if the Committee intends an interpretation that mirrors the interpretation of the Supreme Court Clerk's Office, it should revise the language of the proposed rule to read something like, " . . . indicates whether a person -- other than the amicus curiae, its members, or its counsel -- contributed money that was intended to fund preparing or submitting the brief; and, if so, identifies all such persons."

Thank you for your consideration of this matter.

Sincerely,

/s/ Richard A. Samp
Richard A. Samp
Chief Counsel

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To Rules_Comments@ao uscourts gov
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Subject Proposed amendments to Federal Rules of Appellate Procedure

The proposed amendment to Fed. R. App. P 29(c)(6) requires an *amicus curiae* that is "a corporation" to file a disclosure statement "like that required of parties by Rule 26.1 " The idea behind this requirement, I take it, is that knowing the parent corporations and other major investors in an *amicus curiae* will enable the judge to make informed decisions about recusal.

Reading the draft rule led me to wonder what a "corporation" is I supposed that it must be a defined term But a search of the rules shows that it is not defined, either in the text or the commentary This seems to me an important omission, for Rule 26.1 as well as Rule 29.

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

On the other hand, many business entities are not corporations. A limited liability company has "members" rather than stockholders; a limited or general partnership has partners. The identity of these members and partners may be relevant to recusal for the same reason as the identify of principal stockholders (parent corporations or persons who own more than 10% of the corporation's stock). Why are corporations included in Rule 26.1 and Rule 29(c)(6), while LLCs, LPs, business trusts, and other entities that pose the identical recusal problems omitted? This subject needs some attention.

Two observations about style. The draft Rule 29(c)(7)(A) reads: "indicates whether a party's counsel authored the brief in whole or in part". The word "author" is a noun, and nouns do not have past tenses! The word should be "wrote", not "authored".

The next subsection reads: "indicates whether a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief" This is wordy, and the reference to "intent" makes it hard to administer. Does this language suggest that a cash contribution used to prepare an amicus brief need not be reported if the donor did not "intend" to support the brief? Other words in this subsection are surplusage. Why not: "indicates whether a party or a party's counsel contributed money toward the cost of the brief"?

Frank H. Easterbrook

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08-AP-004

December 9, 2008

99999-LTM

Mr. Peter G McCabe
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, D.C 20544

Re: Fed.R App.P. 29(a)(7)

Dear Mr. McCabe:

These changes would improve the rule:

1. Footnote location From a technical point of view, the phrase "first footnote on the first page" is ambiguous because typically briefs have a page "i" as well as a page "1 " This is not a big deal in the Supreme Court rules because "i" is the page for the question presented. But in the appellate brief that page is the table of contents unless a Rule 26.1 certificate is needed. The conference might want to consider saying the statement should be "in a footnote to the Rule 29(c)(3) statement." Not only is that language clearer, but it also puts the footnote on the same page as the statement identifying the amicus' interest in the case, which is a logical place for disclosure of the interest of others.

2. Party participation. As written, the rule lacks clarity of purpose. It is apparently designed to deter parties from funding amicus briefs, but it is a mere disclosure rule, and so it implies that in some circumstances it might be acceptable for a party to contribute to an amicus brief

In my opinion the rule should prohibit parties from authoring or paying for amicus briefs and not just treat the issue as one of disclosure.

This is not a unanimous view. Many good lawyers think it is permissible for a party to help an amicus fund or write an amicus brief so long as the position the amicus takes is sincerely held. The proposed amendment could not have a better pedigree, in that it tracks Supreme Court Rule 37 6. In fact, a new California Rule 8.200 (c)3 and an existing Minnesota Rule 129.03 contain similar language.

But, without independence, the amicus process lacks integrity. Frankly, I cannot imagine a circumstance in which a party could appropriately fund an amicus brief. The very suspicion of such funding has caused at least one judge to express opposition to the filing of any amicus brief. *Ryan v Commodity Futures Trading Comm'n*, 125 F.3d 1062 (7th Cir. 1997)(Posner, J.). *But see* L. Munford, *When Does the Curiae Need an Amicus?*, J App. Practice & Process 279 (1999)(criticizing *Ryan*). There should be no suspicion. Amicus briefs should always be prepared and funded by the amicus or amici and not a party.

To that end, the rule should follow the statement that the Supreme Court clerk's office has urged attorneys to put in amicus briefs to that court. See E. Gressman, K. Geller, S. Shapiro, T. Bishop and E. Hartnett, Supreme Court Practice 516 (9th ed. 2007). Subpart (7) would read as follows:

> (7) Unless filed by an amicus curiae listed in the first sentence of Rule 29(a), a statement in a footnote to the Rule 29(c)(3) statement that:
>
> (A) States that no counsel for a party authored the brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of the brief, and
>
> (B) Identifies every person or entity who made a monetary contribution intended to fund the preparation or submission of the brief, other than the amicus curiae, its members, or its counsel in the pending appeal.

This language spells out the prohibition against party funding for amicus briefs and so removes any inference that such a brief might be allowed. At the same time it retains the general requirement that the identities of other amicus brief sponsors must be disclosed.

3. Pure disclosure. Alternatively, if disclosure is the sole purpose, the rule could, like Texas Rule 11(c), simply require the disclosure of funding sources (and authorship if desired) without any special discussion of party sponsorship. Then there would be no back-handed suggestion that a party might fund an amicus brief, and a degree of redundancy in the rule as published for comment would be eliminated.

My understanding is that those who think the rules should be uniform might oppose these changes on the ground that they depart from Sup. Ct. Rule 37.6. But it is entirely possible that, if the conference adopted a better rule, the Supreme Court might conform its language to the language found in FRAP. In fact, the conference could give the Supreme Court an explicit choice by sending the Court a "preferred rule" along with one based on Rule 37.6, and allowing the Supreme Court to choose between them.

Very truly yours,

PHELPS DUNBAR LLP

Luther T. Munford

LTM tb

08-AP-005

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February 17, 2009

VIA E-MAIL

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Comments on Proposed Amendment of FRAP 29(c)

The Council of Appellate Lawyers offers these comments on the proposed amendment of Rule 29(c) of the Federal Rules of Appellate Procedure, which prescribes the content of briefs by amici curiae. Our comments are technical, concerning the language and structure of the proposed amendment. We do not question the objectives that the proposed disclosure requirements are intended to achieve.

Rule 29(c)(6)

Unlike Rule 28(a) and (b), which govern the contents of the parties' main briefs, Rule 29(c) as now in force does not specify the order of the required or optional contents of a brief amicus curiae. As a result, neither the present Rule 29(c) nor the proposed new subdivision (c)(6) specifies where the "disclosure statement like that required of parties by Rule 26.1" should appear in the brief of an amicus curiae that is a corporation. The proposed Committee Note advises that the corporate disclosure statement "should be placed before the table of contents."

We believe that the placement of the corporate disclosure statement is too important to be left to a Committee Note, which is not always read with the same care as the rules themselves. Indeed, some published editions of the rules do not include the Committee Notes. Therefore, we suggest that the proposed subdivision

(c)(6) prescribe the same location for this disclosure, and in substantially the same language, as Rule 28(a)(1) does for a party.

The Advisory Committee on Appellate Rules (the "Advisory Committee") may wish to consider amending Rule 26.1 to apply to any person filing or moving for permission to file a brief as amicus curiae. Otherwise, a judge may consider a motion for permission to file a brief as amicus curiae without being aware of facts that might cause the judge to consider recusal

If Rule 26.1 is amended to include amici curiae, we suggest revising the proposed subdivision (c)(6) to require inclusion of the "same disclosure statement that is required of parties by Rule 26.1" or, alternatively, the "same disclosure statement that Rule 26.1 requires of parties." The word "like" in the present proposal is ambiguous as to whether some degree of difference may be permissible.

Rule 29(c)(7)

While we respect the precedent of SUP. CT. R. 37.6, we believe that there are technical improvements in draftsmanship that can be made to the proposed new subdivision (c)(7).

First, we suggest that the a more logical placement of the new disclosure statement is immediately following the statement of the amicus's identity and interest, under a prescribed heading such as "Disclosure by Amicus Curiae." We see no reason why this disclosure, unlike all other specified elements of the brief, should be in a footnote. To give the disclosure a prominent, well-defined location, we suggest amending subdivision (c)(3) to require that statement of the amicus's identity and interest to be at the top of the first page following the table of authorities, with the new disclosure statement immediately following. While we understand the Advisory Committee's desire not to disturb the numbering of the present subdivisions, subdivision (c) as now in force presents the required elements of the amicus brief in the order in which they typically appear, even though it does not prescribe the order. The proposed subdivision (c)(7) could be added to subdivision (c)(3), which would preserve the logical ordering of the brief's contents without disturbing the existing numbering of the subdivisions.

Second, we believe that "states" is clearer than "indicates" in subdivisions (c)(7)(A) and (B).

Third, we believe that the body of the rule should provide interpretive guidance on the language "a party's counsel authored the brief ... in part." Read literally, contributing a sentence, or even a word, constitutes authorship of the brief in part. The Committee Note's reference to SUPREME COURT PRACTICE shows that this is not the Advisory Committee's intent, but, again, prescribing the standard for when disclosure is required is too important to be left to a Committee Note. We appreciate the difficulty of defining authorship "in part." Perhaps the rule should include language based on the treatise's interpretation of the Supreme Court's rule, that authorship "in part" is where a party's "counsel takes an active role writing or in rewriting a substantial or important 'part' of the amicus brief, ... something more substantial than editing a few sentences." EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 739 (9th ed. 2007).

Fourth, subdivision (c)(7)(A) might be broadened to read, "whether a *party or the* party's counsel *or other representative* authored the brief in whole or in part."

Fifth, subdivision (c)(7)(B) is embraced within subdivision (c)(7)(C). Therefore, the two subdivisions can be merged to require disclosure of whether there was outside funding for the amicus curiae brief and, if so, to require identification of each person who provided funding.

Committee Note

The Committee Note on subdivision (c)(7) cites ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 662 (8th ed. 2002). The same subject is discussed and updated in the current edition of this treatise: EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 739 (9th ed. 2007).

Future Consideration of Rule 29(c)

At a future time, the Advisory Committee may wish to consider revising Rule 29(c) along the lines of Rule 28(b), and then specifying the placement of those contents that are specific to amicus curiae briefs: the statement prescribed by the present subdivision (c)(3) and the new disclosure requirement of subdivision (c)(7).

About the Council

The Council of Appellate Lawyers is a part of the Appellate Judges Conference of the American Bar Association's Judicial Division. It is the only national bench-bar organization devoted to appellate issues and advocacy. The views expressed here are solely those of the Council, and they have not been endorsed by the Appellate Judges Conference, the Judicial Division, or the American Bar Association.

Respectfully submitted,

Bennett Evan Cooper
Chair, Council of Appellate Lawyers

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08-AP-006

February 17, 2009

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Comments on Proposed Amendment of Fed. R. App. P. 29(c)

Dear Mr. McCabe:

As Chair of the Rules Committee of the American Bar Association's Council of Appellate Lawyers, I participated in the preparation of and co-signed the Council's letter of comment on the proposed amendment of FED. R. APP. P. 29(c). While I agree with every word in the Council's letter, I write separately to express, in addition, my personal views, both on policy and draftsmanship. The views expressed in this letter do not necessarily reflect those of the members or leadership of the Council of Appellate Lawyers, and have not been reviewed or endorsed by anyone other than myself.

Policy

I join with the many appellate lawyers who believe that it is improper for a party to fund or to write any substantial part of an amicus curiae brief, with or without disclosure. The only reason for courts to entertain amicus briefs is to obtain the reasoned analysis and viewpoint of someone other than the parties. That reason disappears where the so-called amicus curiae is merely carrying water for a party.

While I am sympathetic to the position of distinguished appellate advocate Luther T. Munford, that Rule 29 "should prohibit parties from authoring or paying

for amicus briefs,"[1] prohibition by rule could provoke a legal challenge of the rule, either under the First Amendment or as exceeding the rule-making authority conferred by the Rules Enabling Act, which would be an unwelcome distraction.

As a practical matter, enacting the proposed disclosure requirements should largely eliminate the practice, to the extent it exists, of parties writing or funding amicus briefs. I doubt that there are many potential amici curiae or appellate counsel who would be willing to file a brief with that disclosure, or many parties who believe that an amicus brief with that disclosure would do them much good.

Judicial decision-making is based on principles and reasoning, not political considerations of who or how many support a particular outcome. Amicus curiae briefs, therefore, are effective and useful only where they contribute to a reasoned, principled decision. The very first subdivision of the Supreme Court's rule governing amicus curiae briefs, SUP. CT. R. 37.1, provides:

> An *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An *amicus curiae* brief that does not serve this purpose burdens the Court, and its filing is not favored.

FED. R. APP. P. 29 would benefit from expressing a similar sentiment, although not in these words, in the text of the rule.

Draftsmanship

Unlike the Standing Committee, the Advisory Committees, and the Judicial Conference, the Supreme Court does not have substantial experience or expertise in drafting rules of procedure. Several Justices have acknowledged this fact when commenting on the Court's role in the rule-making process under the Rules Enabling Act. In hindsight, the Advisory Committee on Appellate Rules, with the able assistance of the Rules Committee Support Office, might done better drafting the proposed disclosure amendments to Rule 29 on a clean slate, rather than following so closely the text of SUP. CT. R. 37.6. In my opinion, following the Supreme Court's rule too closely is the cause of the several draftsmanship issues raised in the Council of Appellate Lawyers' comment letter.

Another result is that the proposed amendments do not conform to the established style of the Federal Rules of Appellate Procedure. For example:

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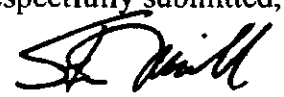
[1]Letter from Luther T. Munford to Peter G. McCabe 1–2 (Dec. 9, 2008), Docket No. 08-AP-004.

- The existing Federal Rules of Appellate Procedure require that various documents "state" (or "must state") specified information. In contrast, the proposed amendments to Rule 29(c)(7)(A) and (B) would provide for a footnote that "indicates whether" specified acts occurred.
- The existing rules write of "preparing" a brief or other document, or use other forms of the verb "prepare." In contrast, the proposed amendments would refer to "authoring" a brief, a usage that irks many careful writers,[2] although it is acknowledged by today's non-prescriptive dictionaries.[3]

These departures from the existing style of the Federal Rules of Appellate Procedure are not improvements. I respectfully suggest reexamination of the language of the proposed amendments anew, without regard to the language of the Supreme Court's comparable rule.

Respectfully submitted,



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[2] *E g.*, Email from the Honorable Frank H. Easterbrook to Rules Comments (Nov. 15, 2008), Docket No. 08-AP-003.

[3] In a further debasement of the English language and the word "author," technologists use the words "authoring" or "authorship" for the purely mechanical, non-creative process of encoding (or "burning") content onto optical data storage media (CDs and DVDs).

TAB 5-A-4

MEMORANDUM

DATE: March 27, 2009

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 07-AP-G

The privacy rules which took effect December 1, 2007[1] require redaction of social security numbers (except for the last four digits) and provide that references to an individual known to be a minor should include only the minor's initials. New Criminal Rule 49.1(a)(5) also requires redaction of individuals' home addresses (so that only the city and state are shown) The published amendments to Appellate Form 4 are designed to conform to the new privacy requirements. (I address in a separate memo Item No. 08-AP-G, which concerns further possible substantive and style changes to Form 4.)

Part I of this memo sets forth the amendment as published. Part II summarizes the public comment. Part III recommends that the Committee adopt the proposed amendment as published.

I. Text of the proposed amendment as published

Form 4. Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis

* * * * *

7. *State the persons who rely on you or your spouse for support.*

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[1] See Civil Rule 5.2, Criminal Rule 49.1, and Bankruptcy Rule 9037. Appellate Rule 25(a)(5) provides:

> Privacy Protection. An appeal in a case whose privacy protection was governed by Federal Rule of Bankruptcy Procedure 9037, Federal Rule of Civil Procedure 5.2, or Federal Rule of Criminal Procedure 49.1 is governed by the same rule on appeal. In all other proceedings, privacy protection is governed by Federal Rule of Civil Procedure 5.2, except that Federal Rule of Criminal Procedure 49.1 governs when an extraordinary writ is sought in a criminal case.

Name [or, if under 18, initials only] Relationship Age

_____ _____ ____

* * * * *

13. *State the ~~address~~ city and state of your legal residence*

_____

Your daytime phone number: (____) _____

Your age: _____ Your years of schooling: _____

~~Your~~ Last four digits of your social-security number: _____

II. Summary of Public Comments

Only one comment addressed the proposed changes to Form 4.

08-AP-001: Benjamin J. Butts. Benjamin J. Butts, of Butts & Marrs in Oklahoma City, Oklahoma, writes to express general support for the proposed amendments to the Appellate Rules.

III. Recommendation

I recommend that the Committee approve the proposal as published.

TAB 6A

MEMORANDUM

DATE: March 27, 2009

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 03-09

At the fall 2008 meeting, the Advisory Committee gave final approval to a proposal that would amend Rule 40(a)(1) to clarify the treatment of litigation involving federal officers or employees. That proposal was not put before the Standing Committee for a vote at the January 2009 meeting; it was noted that the timing for approval would not differ if the proposal were held until the Standing Committee's June 2009 meeting. Waiting until the June 2009 meeting also provides an opportunity for the Department of Justice to discuss, at the Advisory Committee's spring meeting, any additional views of the new administration concerning the proposal. It may be worthwhile to consider, for example, whether a coordinated change in Rules 4 and 40 might be sought through a combination of rulemaking and legislation. Additionally, it may be useful to consider whether the grant of certiorari in *United States ex rel. Eisenstein v. City of New York*, 129 S.Ct. 988 (2009), is relevant to the Committee's consideration of the Rule 4 and 40 proposals.

Part I of this memo sets forth the text of the Rule 40(a)(1) proposal as approved at the fall 2008 meeting (the proposal was not set forth in the agenda materials for the fall 2008 meeting). Part II discusses the issue presented in *Eisenstein*.

I. The proposed Rule 40(a)(1) amendment as approved by the Advisory Committee in fall 2008

The Rule 4(a)(1)(B) and Rule 40(a)(1) amendments were initially proposed by the Department of Justice. At the fall 2008 meeting, the DOJ withdrew its proposal to amend Rule 4(a)(1)(B), citing concerns relating to *Bowles v. Russell*, 551 U.S. 205 (2007).[1] However, the

[1] The concerns relate to the fact that the 30-day and 60-day periods in Rule 4(a)(1)(B) are also set by statute, *see* 28 U.S.C. §§ 2107(a) & (b).

DOJ argued in favor of pressing forward with the Rule 40(a)(1) amendment, which does not raise similar concerns. After discussion, the Committee voted to give final approval to the Rule 40(a)(1) proposal. The Committee deleted from the Note to the Rule 40(a)(1) proposal a reference to the proposed amendment to Rule 4(a)(1)(B). Apart from that, the Committee made no changes to the proposed Rule 40(a)(1) amendment as published. Here is the proposal as approved at the fall 2008 meeting:

Rule 40. Petition for Panel Rehearing

(a) Time to File; Contents; Answer; Action by the Court if Granted.

(1) **Time.** Unless the time is shortened or extended by order or local rule, a petition for panel rehearing may be filed within 14 days after entry of judgment. But in a civil case, ~~if the United States or its officer or agency is a party, the time within which any party may seek rehearing is 45 days after entry of judgment,~~ unless an order shortens or extends the time~~.~~, the petition may be filed by any party within 45 days after entry of judgment if one of the parties is:

(A) the United States;

(B) a United States agency;

(C) a United States officer or employee sued in an official capacity; or

(D) a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf.

* * * * * *

Committee Note

Subdivision (a)(1). Rule 40(a)(1) has been amended to make clear that the 45-day period to file a petition for panel rehearing applies in cases in which an officer or employee of the United States is sued in an individual capacity for acts or omissions occurring in connection with duties performed on behalf of the United States. In such cases, the Solicitor General needs adequate time to review the merits of the panel decision and decide whether to seek rehearing, just as the Solicitor General does when an appeal involves the United States, a United States agency, or a United States officer or employee sued in an official capacity.

II. The grant of certiorari in *Eisenstein*

There is a circuit split on the classification – for purposes of the 30-day and 60-day appeal periods set by Appellate Rule 4(a)(1) and 28 U.S.C. § 2107 – of qui tam actions in which the government has not appeared. Four circuits have held that the 60-day period applies even if the government has chosen not to intervene. *See Rodriguez v. Our Lady of Lourdes Medical Center*, 552 F.3d 297, 302 (3d Cir. 2008); *United States ex rel. Lu v Ou*, 368 F.3d 773, 774-75 (7th Cir. 2004); *United States ex rel. Russell v. Epic Healthcare Management Group*, 193 F.3d 304, 306-08 (5th Cir. 1999); *United States ex rel Haycock v. Hughes Aircraft Co.*, 98 F.3d 1100, 1102 (9th Cir. 1996). But in the Tenth Circuit, the 30-day appeal period applies if the government has chosen not to intervene, unless "other circumstances ... indicate a need for more than the usual 30 days to make the appeal." *United States ex rel Petrofsky v. Van Cott, Bagley, Cornwall, McCarthy*, 588 F.2d 1327, 1329 (10th Cir. 1978) (per curiam), *cert. denied*, 444 U.S. 839 (1979). In August 2008, the Second Circuit held that the 30-day period applies. *See United States ex rel. Eisenstein v City of New York*, 540 F.3d 94, 96 (2d Cir. 2008) ("[W]here the United States has declined to intervene in a False Claims action, the United States is not a party to the action within the meaning of Rule 4(a)(1), and, therefore, a notice of appeal must be filed within 30 days.").

In mid-January, the Supreme Court granted certiorari in *Eisenstein*. See 129 S. Ct. 988 (2009). The question presented reads as follows: "Where the United States elects not to proceed with a qui tam action under the False Claims Act, and the relator instead conducts the action for the United States, must a notice of appeal be filed within the 60-day period provided for in Fed. R. App. P. 4(a)(1)(B), applicable when the United States is a 'party,' or the 30-day period provided for in Fed. R. App. P 4(a)(1)(A)?"

The Court's decision in *Eisenstein* will be of interest to the Committee. To resolve the issue presented in *Eisenstein*, the Court will presumably interpret both Section 2107 and Rule 4(a)(1).[2] Depending on how the Court interprets Section 2107, its decision in *Eisenstein* may provide the Committee with guidance concerning the method for determining that statute's application to other contexts, such as suits involving United States officers or employees

[2] Curiously, the petitioner in *Eisenstein* devotes its argument to the appropriate interpretation of Rule 4(a)(1), and mentions Section 2107 only in the first paragraph of the introductory statement. *See* Brief for Petitioner, *United States ex rel. Eisenstein v. City of New York* (No. 08-660), 2009 WL 507031, at *4.

TAB 6B

MEMORANDUM

DATE: March 27, 2009

TO: Advisory Committee on Appellate Rules

FROM: Catherine T Struve, Reporter

RE: Item No. 07-AP-E

As the Committee has discussed at its recent meetings, the Supreme Court's decision in *Bowles v Russell*, 551 U.S. 205 (2007), has raised a number of questions concerning the nature of appeal deadlines (as well as other litigation deadlines). The Committee directed me to investigate the possibility of proposing legislation that would address such questions.

Part I of this memo considers the status of selected appeal-related deadlines. Part II discusses the fact that *Bowles*-related deadline issues arise in areas affecting other Advisory Committees as well. Part III concludes.

I. Appeal-related provisions

The first spreadsheet enclosed with this memo provides a partial list of appeal-related deadlines that could come within the ambit of the study. The list is not yet comprehensive; I would propose to use the summer months (and the aid of a research assistant) to make the list as complete as possible. But the spreadsheet suffices to suggest the rough outlines of the field.

The spreadsheet currently lists over 60 time periods – in either a statute or a rule – that relate to taking an appeal from a lower court to a court of appeals. The spreadsheet also lists over 60 time periods – in statute or rule – that apply when a person seeks court of appeals review of agency action.

The second spreadsheet provides a list – again, incomplete – of cases that discuss the nature of deadlines listed on the first spreadsheet. The list is likely to include most or all cases that discuss *Bowles*' impact on such deadlines.[1] But the list does not necessarily include all recent caselaw construing such deadlines – for example, it may omit some recent cases that discuss the nature of an appeal deadline without mentioning *Bowles*. And, as the Committee is

[1] In the course of preparing the enclosed list, I searched Westlaw's "SCT" and "CTA" databases for cases containing "Bowles v. Russell." Thus, the list is likely to include appellate cases – available on West as of March 8, 2009 – that discuss *Bowles*' effect on appeal deadlines.

aware, there is a rich body of caselaw that predates *Bowles* and that addresses the nature of various appeal-related deadlines. Some of that caselaw requires reassessment in the light of *Bowles*, but some of that caselaw may still be good law; a comprehensive assessment of appeal deadlines should presumably survey the pre-*Bowles* caselaw as well as the post-*Bowles* caselaw Recent pre-*Bowles* cases may be of particular interest – for example, cases discussing the effects of *Kontrick v Ryan*, 540 U.S. 443 (2004), and *Eberhart v United States*, 546 U.S 12 (2005) (per curiam).

Many of the developments in the caselaw spreadsheet will already be familiar to the Committee. These developments include:

- Cases holding that an appeal deadline set by statute is jurisdictional.[2]
- Cases addressing whether tolling-motion deadlines in civil cases are jurisdictional.[3]
- A case addressing the nature of Rule 4(a)(7)'s 150-day period concerning entry of judgment when a required separate document is not provided.[4]
- Cases concluding that Rule 4(b)(1)(A)'s appeal deadline for criminal defendants is not jurisdictional.[5]
- A case concluding that Civil Rule 23(f)'s deadline for permissive appeals from

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[2] *See, e g., Okemow-King v Shinseki*, 2009 WL 464782, at *1 (Fed. Cir. 2009) (unreported decision) (statutory deadline for taking appeal from decision of Court of Appeals for Veterans Claims is jurisdictional).

[3] *See U S. v. Comprehensive Drug Testing, Inc.*, 513 F.3d 1085, 1101 (9th Cir. 2008) (tolling-motion deadlines are jurisdictional – at least to the extent that such motions are to have tolling effect), reh'ing en banc granted, 545 F.3d 1106 (9th Cir. 2008) (providing that the panel opinion "shall not be cited as precedent by or to any court of the Ninth Circuit"); *Dill v. General American Life Ins. Co.*, 525 F.3d 612, 619 (8th Cir. 2008) (Civil Rule 50(b) deadline is non-jurisdictional, but where opponent objected to the motion's untimeliness before the court decided the motion but after the non-tolled appeal time ran out, appeal must be dismissed for lack of jurisdiction); *National Ecological Foundation v. Alexander*, 496 F.3d 466, 475-76 (6th Cir. 2007) (panel majority holds Civil Rule 59(e) deadline is non-jurisdictional).

[4] *See Comedy Club, Inc. v. Improv West Associates*, 553 F.3d 1277, 1284 (9th Cir. 2009).

[5] *See, e.g., U.S. v. Byfield*, 522 F.3d 400, 403 n.2 (D.C. Cir. 2008); *U.S. v. Frias*, 521 F.3d 229, 234 (2d Cir. 2008); *U.S. v. Mitchell*, 518 F.3d 740, 744 (10th Cir. 2008); *U S. v. Martinez*, 496 F.3d 387, 388 (5th Cir. 2007).

class certification orders is non-jurisdictional [6]

Other cases address issues on which the Committee has not yet focused. Such cases include:

- A case noting the question whether cross-appeal deadlines in civil cases are jurisdictional.[7]

- A case suggesting that *Bowles* has raised a question concerning whether the rule of *Unitherm Food Systems, Inc v. Swift-Eckrich, Inc* , 546 U.S. 394, 405 (2006) – that a litigant "may not challenge the sufficiency of the evidence on appeal on the basis of the District Court's denial of its [Civil] Rule 50(a) motion" unless the litigant renewed that motion under Rule 50(b) – is jurisdictional.[8]

- A case holding that a criminal defendant's failure to enter a *conditional* plea within the meaning of Criminal Rule 11(a)(2)[9] does not deprive the court of appeals of jurisdiction to hear the defendant's appeal.[10]

- A case holding that the 30-day deadline for taking an appeal from a Bankruptcy Appellate Panel to a court of appeals is jurisdictional.

  - This decision – *In re Taumoepeau*, 523 F.3d 1213, 1216 (10th Cir. 2008) –

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[6] *See Gutierrez v. Johnson & Johnson*, 523 F.3d 187, 198 (3d Cir. 2008).

[7] *See Amidon v. Student Ass'n of State University of New York at Albany*, 508 F.3d 94, 106 (2d Cir. 2007)

[8] *See Kelley v. City of Albuquerque*, 542 F.3d 802, 817 n.15 (10th Cir. 2008) ("Rule 50(b) is not grounded in a statute. Accordingly, in a jurisdictional inquiry relating to it, the principles of *Bowles* would seemingly be implicated. However, we need not definitively decide this jurisdictional question – a matter of first impression – here. Therefore, we do not do so.").

[9] Rule 11(a)(2) provides: "With the consent of the court and the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal may then withdraw the plea."

[10] *See U.S. v. Jacobo Castillo*, 496 F.3d 947, 957 (9th Cir. 2007) (en banc) ("Regardless of whether a defendant enters into a conditional plea or an unconditional plea, we retain jurisdiction to hear the appeal. The *preclusive* effect we give to the plea agreement may depend on the nature of the plea and the circumstances in which it is brought to our attention, issues on which we do not express an opinion here.").

is interesting because it cites *Bowles* and Section 2107(a) as authority for the proposition that the deadline for an appeal from the BAP is jurisdictional, but does not mention Section 2107(d) Section 2107(d) provides: "This section shall not apply to bankruptcy matters or other proceedings under Title 11 "[11]

- Cases holding that a particular deadline for seeking review of agency action is jurisdictional [12]

- Cases holding that some other prerequisite for seeking review of agency action is jurisdictional.[13]

- Cases addressing questions of tolling in the administrative-review context.[14]

This overview suggests the complexity of the questions that may arise in the course of the project. An attempt to rationalize deadlines for initiating proceedings in the courts of appeals

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[11] The 1978 bankruptcy act would have deleted what is now Section 2107(d), see Pub. L. No. 95-598, Nov. 6, 1978, § 248, 92 Stat. 2672. But that provision would not have taken effect until April 1984, *see In re Shannon*, 670 F.2d 904, 906 (10th Cir. 1982), and in the meantime the Supreme Court decided the *Northern Pipeline* case, which necessitated a new statutory structure for bankruptcy matters, *see Northern Pipeline Const. Co v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). Though I have not examined the matter in detail, I speculate that the replacement of the 1978 legislation with the 1984 legislation prevented the deletion of what is now Section 2107(d).

[12] *See, e.g., Oja v. Department of Army*, 405 F.3d 1349, 1360 (Fed. Cir. 2005) (5 U.S.C. § 7703(b)(1)); *Ruiz-Martinez v. Mukasey*, 516 F.3d 102, 119 (2d Cir. 2008) (8 U.S.C. § 1252(b)(1)).

[13] *See, e.g , Omari v Holder*, 2009 WL 531688, at *1 (5th Cir. 2009) (in light of *Bowles*, 8 U.S.C. § 1252(d)(1)'s exhaustion requirement is jurisdictional).

[14] *See, e.g., Alaska Wilderness League v. Kempthorne*, 548 F.3d 815, 821-22 (9th Cir. 2008) ("OCSLA's jurisdictional provision provides that a petition for review must be filed with the court within sixty days of any contested action. 43 U.S.C. § 1349(c)(3)..... The statute of limitations was tolled during the administrative appeal process, and the sixty-day period to file a petition for review began to run after the IBLA issued its decision on May 4."); *compare id.* at 840 (Bea, J., dissenting) ("[T]he Supreme Court has made clear that statutorily imposed times to file a notice of appeal (and, by extension, a petition for review) are jurisdictional and are not subject to equitable exceptions. *See Bowles* .... The majority does not claim there are grounds for equitable exceptions to the 60-day rule. Here, as discussed, we lack any statutory basis for 'tolling.'").

will implicate a range of time periods for appeals in civil, criminal and bankruptcy matters. It will also implicate numerous time periods for seeking review of agency determinations. Many of the statutes governing review of agency actions may fall into certain common patterns, and it may turn out to be the case that courts have taken similar approaches to a number of agency-review provisions. In my quick review of the caselaw, for example, I saw a significant number of decisions holding various agency-review deadlines to be jurisdictional. However, there appear to be variations in the treatment of exhaustion requirements and tolling mechanisms. And some statutory provisions have distinctive features.[15] It seems likely, in sum, that the surface commonalities among judicial-review provisions may sometimes mask distinctions that relate to particular regulatory frameworks. Moreover, some statutes that provide for court of appeals review also provide in the same statutory section for district court actions,[16] in such instances, legislation that would affect the deadlines relating to the court of appeals proceedings might also affect the deadlines relating to district court proceedings.

II. Provisions affecting other areas

The third of the enclosed spreadsheets lists some of the cases addressing the nature of deadlines that do not themselves affect either the time to take an appeal or proceedings in the court of appeals – i.e., deadlines that apply in lower-court proceedings and that have no tolling effect. In this context, *Bowles* is one of a number of Supreme Court decisions that may bear upon the question of whether a particular issue is jurisdictional.

Many of the current questions concern statutes of limitations. Here, the Court's recent discussion in *John R. Sand & Gravel* is of interest:

> Most statutes of limitations seek primarily to protect defendants against stale or unduly delayed claims.... Thus, the law typically treats a limitations defense as an affirmative defense that the defendant must raise at the pleadings stage and that is subject to rules of forfeiture and waiver.... Such statutes also typically permit courts to toll the limitations period in light of special equitable considerations....
>
> Some statutes of limitations, however, seek not so much to protect a defendant's case-specific interest in timeliness as to achieve a broader system-related goal, such as facilitating the administration of claims ... , limiting the scope of a governmental waiver of sovereign immunity ... , or promoting

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[15] For example, 45 U.S.C. § 355(f) sets the following time limit for seeking review of a decision by the Railroad Retirement Board: "ninety days after the mailing of notice of such decision to the claimant or other party, or within such further time as the Board may allow."

[16] An example is 5 U.S.C. § 7703.

> judicial efficiency, *see, e g , Bowles* . .. The Court has often read the time limits of these statutes as more absolute, say as requiring a court to decide a timeliness question despite a waiver, or as forbidding a court to consider whether certain equitable considerations warrant extending a limitations period.[17]

As this discussion suggests, the treatment of statute of limitations issues is unlikely to be uniform across fields. In the context of habeas matters, the Supreme Court has held that AEDPA's one-year statute of limitations is non-jurisdictional,[18] and the Court cited that holding with apparent approval in the *John R Sand* passage quoted above, it thus is unsurprising that some lower courts continue to view AEDPA's limitations periods as non-jurisdictional after *Bowles*.[19] As to limitations periods governing suits against the United States, the resolution of questions of first impression may be guided by the Court's 1990 holding that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." Irwin v. Department of Veterans Affairs, 498 U.S. 89, 96 (1990). But in *John R. Sand*, the Court held the Court of Federal Claims 6-year limitation period[20] to be jurisdictional; in so doing, it distinguished *Irwin* by reasoning that the Court of Federal Claims limitations period (and its statutory predecessor) had been "definitive[ly]" interpreted – pre-*Irwin* – to be jurisdictional.[21] One circuit has relied on *John R Sand* in holding the limitations period in the Quiet Title Act[22] jurisdictional.[23]

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[17] *John R Sand & Gravel Co v U.S* , 128 S Ct. 750, 753 (2008).

[18] *See Day v McDonough*, 547 U.S. 198, 209 (2006) (holding that "district courts are permitted, but not obliged, to consider, sua sponte, the timeliness of a state prisoner's habeas petition").

[19] *See, e.g., Waldron-Ramsey v. Pacholke*, 2009 WL 455506, at *2 n.2 (9th Cir. 2009) (Section 2244(d)'s limitations period is subject to equitable tolling); *Diaz v Kelly*, 515 F.3d 149, 153 (2d Cir. 2008) (same); *U.S. v. Petty*, 530 F.3d 361, 364 n.5 (5th Cir. 2008) (Section 2255(f)'s limitations period is non-jurisdictional).

[20] 28 U.S.C. § 2501 provides in part: "Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues."

[21] *See John R. Sand & Gravel Co.*, 128 S. Ct. at 755 ("*Irwin* dealt with a different limitations statute. That statute, while similar to the present statute in language, is unlike the present statute in the key respect that the Court had not previously provided a definitive interpretation.").

[22] 28 U.S.C. § 2409a(g) provides: "Any civil action under this section, except for an action brought by a State, shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or

Another set of questions concerns statutory prerequisites to suit. Cases can be found that treat some statutory exhaustion requirements as non-jurisdictional.[24] Other statutory prerequisites for suit may pose similar questions. For instance, the Supreme Court recently granted certiorari in a case that presents the question whether 17 U S.C. § 411(a)'s statement that "no civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title" poses a jurisdictional bar.[25]

A further set of questions concerns numerical limits on the scope of statutory schemes. In *Arbaugh v Y&H Corp.*, the Supreme Court held that "the numerical qualification contained in Title VII's definition of 'employer'" does not "affect[] federal-court subject-matter jurisdiction" but rather "delineates a substantive ingredient of a Title VII claim for relief" *Arbaugh v. Y&H Corp* , 546 U.S. 500, 503 (2006) The *Arbaugh* Court set the following interpretive presumption: "If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional,... then courts and litigants will be duly instructed and will not be left to wrestle with the issue.... But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character." *Id* at 515-16 It seems likely that courts will apply *Arbaugh*'s approach to other numerical limits.[26]

The jurisdictional / non-jurisdictional question will also arise with respect to statutes and rules that set deadlines for activities that take place during litigation in the lower courts. In bankruptcy proceedings, for example, the question has arisen with respect to a statutory deadline for certain motions to dismiss by the U.S. Trustee.[27] In civil actions, the Supreme Court has

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his predecessor in interest knew or should have known of the claim of the United States."

[23] *See Kingman Reef Atoll Investments, L.L.C. v. U.S.*, 541 F.3d 1189, 1196 (9th Cir. 2008) ("Gravel Co. forecloses KRAI's argument that Irwin created a general rule superceding Block's holding as to the jurisdictional nature of the QTA's twelve-year limitations period.").

[24] *See, e g , Dawson Farms, LLC v. Farm Service Agency*, 504 F.3d 592, 606 (5th Cir. 2007) (reasoning that 7 U.S.C. § 6912(e) "codifies the jurisprudential doctrine of exhaustion and is not jurisdictional").

[25] *See Reed Elsevier, Inc. v. Muchnick*, 2009 WL 498165 (2009) ("The petition for a writ of certiorari is granted limited to the following question: Does 17 U.S.C. §411(a) restrict the subject matter jurisdiction of the federal courts over copyright infringement actions?").

[26] *See, e.g., Thomas v. Miller*, 489 F.3d 293, 297 (6th Cir. 2007) (addressing numerical threshold for applicability of COBRA benefits).

[27] *See In re Ross-Tousey*, 549 F.3d 1148, 1156 (7th Cir. 2008) (holding that deadline set by 7 U.S.C. § 704(b)(2) is non-jurisdictional).

addressed the timing and content requirements for fee applications under the Equal Access to Justice Act.[28] In criminal cases, the lower courts have addressed whether Criminal Rule 35(a)'s 7-day deadline for correcting clear sentencing errors sets a jurisdictional limit.[29]

III. Conclusion

Part I of this memo has illustrated that questions concerning whether a provision is jurisdictional or not may arise in numerous contexts in the courts of appeals. For example, the provision may relate to the timeliness of an appeal from a court; to the timeliness of a petition for review of agency action; or to a prerequisite for appellate review. Part II has demonstrated that similar questions apply to various provisions that affect practice in the district courts and bankruptcy courts. And Parts I and II also make clear that in some instances, a given provision may relate both to practice in trial courts and to practice in the courts of appeals. The treatment of each provision may vary depending on the nature of the interests at stake, the substantive area at issue, the time when the provision was adopted, and the applicability (or not) of an interpretive presumption.

I look forward to obtaining the Committee's further input on the scope and direction of the research. The summer will provide an opportunity for further investigation, as well as a chance for consultation with the Chairs and Reporters of the other Advisory Committees.

Encls.

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[28] *See Scarborough v Principi*, 541 U.S. 401, 406 (2004) (holding that a fee application submitted within the time set by 28 U.S.C. § 2412(d) can later be amended "to cure an initial failure to allege" – as required by the statute – "that the Government's position in the underlying litigation lacked substantial justification").

[29] *See, e.g., U.S. v. Griffin*, 524 F.3d 71, 84 (1st Cir. 2008); *U.S. v. Higgs*, 504 F.3d 456, 464 (3d Cir. 2007).

Title	Section	Subsection	Nature of deadline	Type	App	Length Unit	Length - Number	Issues / comments
5	7703	(b)(1)	(b)(1) Except as provided in paragraph (2) of this subsection, a petition to review a final order or final decision of the [Merit Systems Protection] Board shall be filed in the United States Court of Appeals for the Federal Circuit Notwithstanding any other provision of law, any petition for review must be filed within 60 days after the date the petitioner received notice of the final order or decision of the Board	Time to seek review of agency action	Y	Day	60	(b)(2) sets 30-day deadline for bringing certain cases in district court
5	7703	(d)	The Director of the Office of Personnel Management may obtain review of any final order or decision of the Board by filing, within 60 days after the date the Director received notice of the final order or decision of the Board, a petition for judicial review in the United States Court of Appeals for the Federal Circuit if the Director determines, in his discretion, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive ...	Time to seek review of agency action	Y	Day	60	
7	9		After the issuance of the order by the Commission, the person against whom it is issued may obtain a review of such order or such other equitable relief as to the court may seem just by filing in the United States court of appeals of the circuit in which the petitioner is doing business, or in the case of an order denying registration, the circuit in which the petitioner's principal place of business listed on petitioner's application for registration is located, a written petition, within fifteen days after the notice of such order is given to the offending person praying that the order of the Commission be set aside A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission and thereupon the Commission shall file in the court the record theretofore made, as provided in section 2112 of Title 28 Upon the filing of the petition the court shall have jurisdiction to affirm, to set aside, or modify the order of the Commission, and the findings of the Commission as to the facts, if supported by the weight of evidence, shall in like manner be conclusive	Time to seek review of agency action	Y	Day	15	
7	18	(e)	Any order of the Commission entered hereunder shall be reviewable on petition of any party aggrieved thereby, by the United States Court of Appeals for any circuit in which a hearing was held, or if no hearing was held, any circuit in which the appellee is located, under the procedure provided in sections 9 and 15 of this title Such appeal shall not be effective unless within 30 days from and after the date of the reparation order the appellant also files with the clerk of the court a bond in double the amount of the reparation awarded against the appellant conditioned upon the payment of the judgment entered by the court, plus interest and costs, including a reasonable attorney's fee for the appellee, if the appellee shall prevail	Time to seek review of agency action	Y	Day	30	see also 7 USC § 9

7	948	(b)(3)(G)	Within 30 days after the publication of any determination made under subparagraph (D), any affected borrower may obtain review of the determination, or any other equitable relief as may be determined appropriate, by the United States court of appeals for the judicial circuit in which the borrower does business by filing a written petition requesting the court to set aside or modify such determination On receipt of such a petition, the clerk of the court shall transmit a copy of the petition to the Governor On receipt of a copy of such a petition from the clerk of the court, the Governor shall file with the court the record on which the determination is based The court shall have jurisdiction to affirm, set aside, or modify the determination	Time to seek review of agency action	Y	Day	30	
7	136n	(b)	In the case of actual controversy as to the validity of any order issued by the Administrator following a public hearing, any person who will be adversely affected by such order and who had been a party to the proceedings may obtain judicial review by filing in the United States court of appeals for the circuit wherein such person resides or has a place of business, within 60 days after the entry of such order, a petition praying that the order be set aside in whole or in part A copy of the petition shall be forthwith transmitted by the clerk of the court to the Administrator or any officer designated by the Administrator for that purpose, and thereupon the Administrator shall file in the court the record of the proceedings on which the Administrator based the Administrator's order, as provided in section 2112 of Title 28 Upon the filing of such petition the court shall have exclusive jurisdiction to affirm or set aside the order complained of in whole or in part.	Time to seek review of agency action	Y	Day	60	FIFRA

7	27d	(c)	(1) Filing of petition for review The Board of Governors of the Federal Reserve System may obtain review of any rule or determination referred to in subsection (a) of this section in the United States Court of Appeals for the District of Columbia Circuit by filing in the court, not later than 60 days after the date of publication of the rule or determination, a written petition requesting that the rule or determination be set aside Any proceeding to challenge any such rule or determination shall be expedited by the court (3) Exclusive jurisdiction On the date of the filing of a petition under paragraph (1), the court shall have jurisdiction, which shall become exclusive on the filing of the materials set forth in paragraph (2), to affirm and enforce or to set aside the rule or determination at issue (5) Judicial stay The filing of a petition by the Board pursuant to paragraph (1) shall operate as a judicial stay, until the date on which the determination of the court is final (including any appeal of the determination) . .	Time to seek review of agency action	Y	Day	60	
8	1189	(c)(1)	Not later than 30 days after publication in the Federal Register of a designation, an amended designation, or a determination in response to a petition for revocation, the designated organization may seek judicial review in the United States Court of Appeals for the District of Columbia Circuit	Time to seek review of agency action	Y	Day	30	
8	1252	(b)(1)	With respect to review of an order of removal under subsection (a)(1) of this section, the following requirements apply (1) Deadline The petition for review must be filed not later than 30 days after the date of the final order of removal	Time to seek review of agency action	Y	Day	30	
8	1252	(d)(1)	A court may review a final order of removal only if-- (1) the alien has exhausted all administrative remedies available to the alien as of right, and (2) another court has not decided the validity of the order, unless the reviewing court finds that the petition presents grounds that could not have been presented in the prior judicial proceeding or that the remedy provided by the prior proceeding was inadequate or ineffective to test the validity of the order		Y			
8	1324b	(i)(1)	In general Not later than 60 days after the entry of such final order, any person aggrieved by such final order may seek a review of such order in the United States court of appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business	Time to seek review of agency action	Y	Day	60	

10	950d	(d)	(a) Interlocutory appeal.--(1) Except as provided in paragraph (2), in a trial by military commission under this chapter, the United States may take an interlocutory appeal to the Court of Military Commission Review of any order or ruling of the military judge that - (A) terminates proceedings of the military commission with respect to a charge or specification, (B) excludes evidence that is substantial proof of a fact material in the proceeding, or (C) relates to a matter under subsection (d), (e), or (f) of section 949d of this title or section 949j(c) of this title (b) Notice of appeal --The United States shall take an appeal of an order or ruling under subsection (a) by filing a notice of appeal with the military judge within five days after the date of such order or ruling (c) Appeal --An appeal under this section shall be forwarded ... directly to the Court of Military Commission Review (d) Appeal from adverse ruling --The United States may appeal an adverse ruling on an appeal under subsection (c) to the United States Court of Appeals for the District of Columbia Circuit by filing a petition for review in the Court of Appeals within 10 days aft	Time to take appeal from court	Y	Day	10	Enacted by Pub.L. 109-366, § 3(a)(1), Oct 17, 2006, 120 Stat 2620.
10	950g	(a)	--(1)(A) Except as provided in subparagraph (B), the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of a final judgment rendered by a military commission (as approved by the convening authority) under this chapter (B) The Court of Appeals may not review the final judgment until all other appeals under this chapter have been waived or exhausted (2) A petition for review must be filed by the accused in the Court of Appeals not later than 20 days after the date on which-- (A) written notice of the final decision of the Court of Military Commission Review is served on the accused or on defense counsel, or (B) the accused submits, in the form prescribed by section 950c of this title, a written notice waiving the right of the accused to review by the Court of Military Commission Review under section 950f of this title.		Y	Day	20	

12	1817	(j)(5)	(5) Any person whose proposed acquisition is disapproved after agency hearings under this subsection may obtain review by the United States court of appeals for the circuit in which the home office of the bank [FN2] to be acquired is located, or the United States Court of Appeals for the District of Columbia Circuit, by filing a notice of appeal in such court within ten days from the date of such order, and simultaneously sending a copy of such notice by registered or certified mail to the appropriate Federal banking agency The appropriate Federal banking agency shall promptly certify and file in such court the record upon which the disapproval was based. The findings of the appropriate Federal banking agency shall be set aside if found to be arbitrary or capricious or if found to violate procedures established by this subsection	Time to seek review of agency action	Y	Day	10	yellow flag on Westlaw - apparently due to proposed legislation
12	1848		Any party aggrieved by an order of the Board under this chapter may obtain a review of such order in the United States Court of Appeals within any circuit wherein such party has its principal place of business or in the Court of Appeals in the District of Columbia, by filing in the court, within thirty days after the entry of the Board's order, a petition praying that the order of the Board be set aside. A copy of such petition shall be forthwith transmitted to the Board by the clerk of the court, and thereupon the Board shall file in the court the record made before the Board, as provided in section 2112 of Title 28 Upon the filing of such petition the court shall have the jurisdiction to affirm, set aside, or modify the order of the Board and to require the Board to take such action with regard to the matter under review as the court deems proper .	Time to seek review of agency action	Y	Day	30	
12	2266	(b)	Any party to the proceeding, or any person required by an order issued under this part to cease and desist from any of the violations or practices stated therein, may obtain a review of any order served under subsection (a) of this section (other than an order issued with the consent of the System institution or the director or officer or other person concerned, or an order issued under section 2265 of this title) by the filing in the court of appeals of the United States for the circuit in which the home office of the institution is located, or in the United States Court of Appeals for the District of Columbia Circuit, within thirty days after the date of service of such order, a written petition praying that the order of the Farm Credit Administration be modified, terminated, or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Farm Credit Administration, and thereupon the Farm Credit Administration shall file in the court the record in the proceeding, as provided in section 2112 of Title 28 Upon the filing of such petition, such court shall have jurisdiction, whic	Time to seek review of agency action	Y	Day	30	
12	4583	(a)	An enterprise that is a party to a proceeding under section 4581 or 4585 of this title may obtain review of any final order issued under such section by filing in the United States Court of Appeals for the District of Columbia Circuit, within 30 days after the date of service of such order, a written petition praying that the order of the Director be modified, terminated, or set aside	Time to seek review of agency action	Y	Day	30	

12	4623	(a)	(a) Jurisdiction (1) Filing of petition An enterprise that is not classified as critically undercapitalized and is the subject of a classification under section 4614 of this title or a discretionary supervisory action taken under this subchapter by the Director (other than action to appoint a conservator under section 4616 or 4617 of this title or action under section 4619 of this title) may obtain review of the classification or action by filing, within 10 days after receiving written notice of the Director's action, a written petition requesting that the classification or action of the Director be modified, terminated, or set aside (2) Place for filing A petition filed pursuant to this subsection shall be filed in the United States Court of Appeals for the District of Columbia Circuit	Time to seek review of agency action	Y	Day	10	
12	4634	(a)	Any party to a proceeding under section 4631 or 4513b, 4636, or 4636a of this title may obtain review of any final order issued under this chapter by filing in the United States Court of Appeals for the District of Columbia Circuit, within 30 days after the date of service of such order, a written petition praying that the order of the Director be modified, terminated, or set aside	Time to seek review of agency action	Y	Day	30	
15	21	(c)	Any person required by such order of the commission, board, or Secretary to cease and desist from any such violation may obtain a review of such order in the court of appeals of the United States for any circuit within which such violation occurred or within which such person resides or carries on business, by filing in the court, within sixty days after the date of the service of such order, a written petition praying that the order of the commission, board, or Secretary be set aside A copy of such petition shall be forthwith transmitted by the clerk of the court to the commission, board, or Secretary, and thereupon the commission, board, or Secretary shall file in the court the record in the proceeding, as provided in section 2112 of Title 28 Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein concurrently with the commission, board, or Secretary until the filing of the record, and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the commission, board, or Secretary, and enforc	Time to seek review of agency action	Y	Day	60	

15	766	(c)	Judicial review of administrative rulemaking of general and national applicability done under this chapter, except that done pursuant to the Emergency Petroleum Allocation Act of 1973 [15 U S C A § 751 et seq], [FN1] may be obtained only by filing a petition for review in the United States Court of Appeals for the District of Columbia within thirty days from the date of promulgation of any such rule, regulation, or order, and judicial review of administrative rulemaking of general, but less than national, applicability done under this chapter, except that done pursuant to the Emergency Petroleum Allocation Act of 1973, [FN1] may be obtained only by filing a petition for review in the United States Court of Appeals for the appropriate circuit within thirty days from the date of promulgation of any such rule, regulation, or order, the appropriate circuit being defined as the circuit which contains the area or the greater part of the area within which the rule, regulation, or order is to have effect	Time to seek review of agency action	Y	Day	30	
15	1710	(a)	Any person, aggrieved by an order or determination of the Secretary issued after a hearing, may obtain a review of such order or determination in the court of appeals of the United States, within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order or determination, a written petition praying that the order or determination of the Secretary be modified or be set aside in whole or in part	Time to seek review of agency action	Y	Day	60	
15	2060	(a)	Not later than 60 days after a consumer product safety rule is promulgated by the Commission, any person adversely affected by such rule, or any consumer or consumer organization, may file a petition with the United States court of appeals for the District of Columbia or for the circuit in which such person, consumer, or organization resides or has his principal place of business for judicial review of such rule	Time to seek review of agency action	Y	Day	60	
15	2060	(g)(2)	Not later than 60 days after the promulgation, by the Commission, of a rule or standard to which this subsection applies, any person adversely affected by such rule or standard may file a petition with the United States Court of Appeals for the District of Columbia Circuit for judicial review of such rule Copies of the petition shall be forthwith transmitted by the clerk of the court to the Commission or other officer designated by it for that purpose and to the Attorney General The record of the proceedings on which the Commission based its rule shall be filed in the court as provided for in section 2112 of Title 28	Time to seek review of agency action	Y	Day	60	

15	57a	(e)(1)(A)	Not later than 60 days after a rule is promulgated under subsection (a)(1)(B) of this section by the Commission, any interested person (including a consumer or consumer organization) may file a petition, in the United States Court of Appeals for the District of Columbia circuit or for the circuit in which such person resides or has his principal place of business, for judicial review of such rule. Copies of the petition shall be forthwith transmitted by the clerk of the court to the Commission or other officer designated by it for that purpose The provisions of section 2112 of Title 28 shall apply to the filing of the rulemaking record of proceedings on which the Commission based its rule and to the transfer of proceedings in the courts of appeals	Time to seek review of agency action	Y	Day	60	
15	717r	(b)	Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28 Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part ...	Time to seek review of agency action	Y	Day	60	
15	77i	(a)	Any person aggrieved by an order of the Commission may obtain a review of such order in the court of appeals of the United States, within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such Court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or be set aside in whole or in part	Time to seek review of agency action	Y	Day	60	
15	78o	(i)(5)(A)	The Board may obtain review of any final regulation described in paragraph (2) in the United States Court of Appeals for the District of Columbia Circuit by filing in such court, not later than 60 days after the date of publication of the final regulation, a written petition requesting that the regulation be set aside .	Time to seek review of agency action	Y	Day	60	

15	80a-42	(a)	Any person or party aggrieved by an order issued by the Commission under this subchapter may obtain a review of such order in the United States court of appeals within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part A copy of such petition shall be forthwith transmitted by the clerk of the court to any member of the Commission or any officer thereof designated by the Commission for that purpose, and thereupon the Commission shall file in the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28 Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record shall be exclusive, to affirm, modify, or set aside such order, in whole or in part	Time to seek review of agency action	Y	Day	60	
15	80b-13	(a)	Any person or party aggrieved by an order issued by the Commission under this subchapter may obtain a review of such order in the United States court of appeals within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith transmitted by the clerk of the court to any member of the Commission, or any officer thereof designated by the Commission for that purpose, and thereupon the Commission shall file in the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record shall be exclusive, to affirm, modify, or set aside such order, in whole or in part	Time to seek review of agency action	Y	Day	60	
16	1536	(n)	Any person, as defined by section 1532(13) of this title, may obtain judicial review, under chapter 7 of Title 5, of any decision of the Endangered Species Committee under subsection (h) of this section in the United States Court of Appeals for (1) any circuit wherein the agency action concerned will be, or is being, carried out, or (2) in any case in which the agency action will be, or is being, carried out outside of any circuit, the District of Columbia, by filing in such court within 90 days after the date of issuance of the decision, a written petition for review	Time to seek review of agency action	Y	Day	90	

16	825l	(b)	Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States Court of Appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28 Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part	Time to seek review of agency action	Y	Day	60	
16	839f	(e)(5)	Suits to challenge the constitutionality of this chapter, or any action thereunder, final actions and decisions taken pursuant to this chapter by the Administrator or the Council, or the implementation of such final actions, whether brought pursuant to this chapter, the Bonneville Project Act [16 U S C.A § 832 et seq], the Act of August 31, 1964 (16 U S C 837-837h), or the Federal Columbia River Transmission System Act (16 U.S C 838 and following), shall be filed in the United States court of appeals for the region Such suits shall be filed within ninety days of the time such action or decision is deemed final, or, if notice of the action is required by this chapter to be published in the Federal Register, within ninety days from such notice, or be barred In the case of a challenge of the plan or programs or amendments thereto, such suit shall be filed within sixty days after publication of a notice of such final action in the Federal Register Such court shall have jurisdiction to hear and determine any suit brought as provided in this section The plan and program, as finally adopted or portions thereof, o	Time to seek review of agency action	Y	Day	90	
18	843	(e)(2)	If the Attorney General denies an application for, or revokes a license, or permit, he shall, upon request by the aggrieved party, promptly hold a hearing to review his denial or revocation In the case of a revocation, the Attorney General may upon a request of the holder stay the effective date of the revocation A hearing under this section shall be at a location convenient to the aggrieved party The Attorney General shall give written notice of his decision to the aggrieved party within a reasonable time after the hearing. The aggrieved party may, within sixty days after receipt of the Secretary's written decision, file a petition with the United States court of appeals for the district in which he resides or has his principal place of business for a judicial review of such denial or revocation, pursuant to sections 701-706 of title 5, United States Code	Time to seek review of agency action	Y	Day	60	

18	3731		In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information or granting a new trial after verdict or judgment, as to any one or more counts, or any part thereof, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution. An appeal by the United States shall lie to a court of appeals from a decision or order of a district court suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding. An appeal by the United States shall lie to a court of appeals from a decision or order, entered by a district court of the United States, granting the release of a person charge The appeal in all such cases shall be taken within thirty days after the decision, judgme	Time to take appeal from court	Y	Day	30	
18	3771	(d)	(d) Enforcement and limitations -- * * * (5) Limitation on relief --In no case shall a failure to afford a right under this chapter provide grounds for a new trial A victim may make a motion to re-open a plea or sentence only if-- (A) the victim has asserted the right to be heard before or during the proceeding at issue and such right was denied, (B) the victim petitions the court of appeals for a writ of mandamus within 10 days; and (C) in the case of a plea, the accused has not pled to the highest offense charged	Time to make a motion or other filing	Y	Day	10	July 27, 2006 legislation added new subsection (b), which does not appear to directly affect this provision's functioning. RA checked and agrees. Subsection (b) does not affect subsection (d). Subsection (b) only affects (d) in that it states that (d)(1), (2) and (3) apply to Habeas Corpus proceedings. Subsection (b) does not alter or limit (d) in any way

18	3771	(d)(3)	(d) Enforcement and limitations -- (1) Rights --The crime victim or the crime victim's lawful representative, and the attorney for the Government may assert the rights described in subsection (a). A person accused of the crime may not obtain any form of relief under this chapter (2) Multiple crime victims -- * * * (3) Motion for relief and writ of mandamus --The rights described in subsection (a) shall be asserted in the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the district court in the district in which the crime occurred The district court shall take up and decide any motion asserting a victim's right forthwith If the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus The court of appeals may issue the writ on the order of a single judge pursuant to circuit rule or the Federal Rules of Appellate Procedure The court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed In no event shall proceedings be stayed or subject to a continuance of more than five days for purposes of enforcing	Time for court to act	Y	Hour	72	July 27, 2006 legislation added new subsection (b), which does not appear to directly affect this provision's functioning. RA checked and agrees. Subsection (b) does not affect subsection (d). Subsection (b) only affects (d) in that it states that (d)(1), (2) and (3) apply to Habeas Corpus proceedings Subsection (b) does not alter or limit (d) in any way
18	2339B	(f)(5)(B)(ii)	(5) Interlocutory appeal -- (A) [authorizes interlocutory appeals regarding District Court orders] (i) authorizing the disclosure of classified information, (ii) imposing sanctions for nondisclosure of classified information; or (iii) refusing a protective order sought by the United States to prevent the disclosure of classified information (B) Expedited consideration.-- (i) In general --An appeal taken pursuant to this paragraph, either before or during trial, shall be expedited by the court of appeals. * * * (iii) Appeals during trial --If an appeal is taken during trial, the trial court shall adjourn the trial until the appeal is resolved, and the court of appeals-- (I) shall hear argument on such appeal not later than 4 days after the adjournment of the trial, * * * (III) shall render its decision not later than 4 days after argument on appeal, and (IV) may dispense with the issuance of a written opinion in rendering its decision	Time for court to act	Y	Day	4	

18	2339B	(f)(5)(B)(ii)	(5) Interlocutory appeal -- (A) [authorizes interlocutory appeals regarding District Court orders] (i) authorizing the disclosure of classified information, (ii) imposing sanctions for nondisclosure of classified information, or (iii) refusing a protective order sought by the United States to prevent the disclosure of classified information. (B) Expedited consideration -- (i) In general --An appeal taken pursuant to this paragraph, either before or during trial, shall be expedited by the court of appeals. (ii) Appeals prior to trial.--If an appeal is of an order made prior to trial, an appeal shall be taken not later than 10 days after the decision or order appealed from, and the trial shall not commence until the appeal is resolved	Time to take appeal from court	Y	Day	10	
20	1412	(f)(3)(B)	If a State educational agency is dissatisfied with the Secretary's final action after a proceeding under subparagraph (A), such agency may, not later than 60 days after notice of such action, file with the United States court of appeals for the circuit in which such State is located a petition for review of that action . .	Time to seek review of agency action	Y	Day	60	
20	1416	(e)(8)(A)	If any State is dissatisfied with the Secretary's action with respect to the eligibility of the State under section 1412 of this title, such State may, not later than 60 days after notice of such action, file with the United States court of appeals for the circuit in which such State is located a petition for review of that action.	Time to seek review of agency action	Y	Day	60	
20	7711	(b)(1)	A local educational agency or a State aggrieved by the Secretary's final decision following an agency proceeding under subsection (a) of this section may, within 30 working days (as determined by the local educational agency or State) after receiving notice of such decision, file with the United States court of appeals for the circuit in which such agency or State is located a petition for review of that action. .	Time to seek review of agency action	Y	Working days	30	
20	7884	(a)(2)(A)	If the affected agency, consortium, or entity is dissatisfied with the Secretary's final action after a proceeding under paragraph (1), the agency, consortium, or entity may, within 60 days after notice of that action, file with the United States court of appeals for the circuit in which the State is located a petition for review of that action	Time to seek review of agency action	Y	Day	60	
20	1234g	(b)	A recipient that desires judicial review of an action described in subsection (a) of this section shall, within 60 days of that action, file with the United States Court of Appeals for the circuit in which that recipient is located, a petition for review of such action	Time to seek review of agency action	Y	Day	60	

20	7217a	(h)(2)	If a State educational agency or local educational agency is dissatisfied with the Secretary's final action after a proceeding under paragraph (1), such agency may, not later than 60 days after notice of such action, file with the United States court of appeals for the circuit in which such State is located a petition for review of that action .	Time to seek review of agency action	Y	Day	60	
21	348	(g)(1)	In a case of actual controversy as to the validity of any order issued under subsection (f) of this section, including any order thereunder with respect to amendment or repeal of a regulation issued under this section, any person who will be adversely affected by such order may obtain judicial review by filing in the United States Court of Appeals for the circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia Circuit, within sixty days after the entry of such order, a petition praying that the order be set aside in whole or in part	Time to seek review of agency action	Y	Day	60	
21	877		All final determinations, findings, and conclusions of the Attorney General under this subchapter shall be final and conclusive decisions of the matters involved, except that any person aggrieved by a final decision of the Attorney General may obtain review of the decision in the United States Court of Appeals for the District of Columbia or for the circuit in which his principal place of business is located upon petition filed with the court and delivered to the Attorney General within thirty days after notice of the decision Findings of fact by the Attorney General, if supported by substantial evidence, shall be conclusive.	Time to seek review of agency action	Y	Day	30	
21	335b	(c)	Any person that is the subject of an adverse decision under subsection (b)(1)(A) of this section may obtain a review of such decision by the United States Court of Appeals for the District of Columbia or for the circuit in which the person resides, by filing in such court (within 60 days following the date the person is notified of the Secretary's decision) a petition requesting that the decision be modified or set aside.	Time to seek review of agency action	Y	Day	60	
21	335c	(d)	Any person that is the subject of an adverse decision under subsection (a) of this section may obtain a review of such decision by the United States Court of Appeals for the District of Columbia or for the circuit in which the person resides, by filing in such court (within 60 days following the date the person is notified of the Secretary's decision) a petition requesting that the decision be modified or set aside	Time to seek review of agency action	Y	Day	60	
26	3310	(a)	Whenever under section 3303(b) or section 3304(c) the Secretary of Labor makes a finding pursuant to which he is required to withhold a certification with respect to a State under such section, such State may, within 60 days after the Governor of the State has been notified of such action, file with the United States court of appeals for the circuit in which such State is located or with the United States Court of Appeals for the District of Columbia, a petition for review of such action	Time to seek review of agency action	Y	Day	60	

26	7482	(a)(2)(A)	(2) Interlocutory orders -- (A) In general --When any judge of the Tax Court includes in an interlocutory order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals may, in its discretion, permit an appeal to be taken from such order, if application is made to it within 10 days after the entry of such order Neither the application for nor the granting of an appeal under this paragraph shall stay proceedings in the Tax Court, unless a stay is ordered by a judge of the Tax Court or by the United States Court of Appeals which has jurisdiction of the appeal or a judge of that court	Time to take appeal from court	Y	Day	10	
26	7483		Review of a decision of the Tax Court shall be obtained by filing a notice of appeal with the clerk of the Tax Court within 90 days after the decision of the Tax Court is entered If a timely notice of appeal is filed by one party, any other party may take an appeal by filing a notice of appeal within 120 days after the decision of the Tax Court is entered.	Time to take appeal from court	Y	Day	90 & 120	see also FRAP 13
26	9041	(a)	Any agency action by the Commission made under the provisions of this chapter shall be subject to review by the United States Court of Appeals for the District of Columbia Circuit upon petition filed in such court within 30 days after the agency action by the Commission for which review is sought	Time to seek review of agency action	Y	Day	30	
28	158	(d)(2)	The appropriate court of appeals shall have jurisdiction of appeals described in the first sentence of subsection (a) if the bankruptcy court, the district court, or the bankruptcy appellate panel involved, acting on its own motion or on the request of a party to the judgment, order, or decree described in such first sentence, or all the appellants and appellees (if any) acting jointly, certify that-- (i) the judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance, (ii) the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions, or (iii) an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken, and if the court of appeals authorizes the direct appeal of the judgment, order, or decree	Time to take appeal from court	Y			see FRBP 8001(f)

28	1292	(b)	(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order	Time to take appeal from court	Y	Day	10	see also 1292(d)(1) & (2) re Court of International Trade and Court of Federal Claims
28	1292	(d)	(d)(1) When the chief judge of the Court of International Trade issues an order under the provisions of section 256(b) of this title, or when any judge of the Court of International Trade, in issuing any other interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order	Time to take appeal from court	Y	Day	10	
28	1292	(d)	(2) When the chief judge of the United States Court of Federal Claims issues an order under section 798(b) of this title, or when any judge of the United States Court of Federal Claims, in issuing an interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order	Time to take appeal from court	Y	Day	10	

28	1453	(c)(1)	(c) Review of remand orders -- (1) In general --Section 1447 shall apply to any removal of a case under this section, except that notwithstanding section 1447(d), a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed if application is made to the court of appeals not less than 7 days after entry of the order (2) Time period for judgment.--If the court of appeals accepts an appeal under paragraph (1), the court shall complete all action on such appeal, including rendering judgment, not later than 60 days after the date on which such appeal was filed, unless an extension is granted under paragraph (3) (3) Extension of time period.--The court of appeals may grant an extension of the 60-day period described in paragraph (2) if-- (A) all parties to the proceeding agree to such extension, for any period of time, or (B) such extension is for good cause shown and in the interests of justice, for a period not to exceed 10 days	Time to take appeal from court	Y	Day	7	
28	1453	(c)(3)	(c) Review of remand orders -- (1) In general --Section 1447 shall apply to any removal of a case under this section, except that notwithstanding section 1447(d), a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed if application is made to the court of appeals not less than 7 days after entry of the order * * * (3) Extension of time period --The court of appeals may grant an extension of the 60-day period described in paragraph (2) if-- (A) all parties to the proceeding agree to such extension, for any period of time, or (B) such extension is for good cause shown and in the interests of justice, for a period not to exceed 10 days (4) Denial of appeal --If a final judgment on the appeal under paragraph (1) is not issued before the end of the period described in paragraph (2), including any extension under paragraph (3), the appeal shall be denied	Time for court to act	Y	Day	10	

28	1826		(a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information In no event shall such confinement exceed eighteen months (b) No person confined pursuant to subsection (a) of this section shall be admitted to bail pending the determination of an appeal taken by him from the order for his confinement if it appears that the appeal is frivolous or taken for delay Any appeal from an order of confinement under this section shall be disposed of as soon as practicable, but not later than thirty days from the filing of such appeal.	Time for court to act	Y	Day	30	
28	2107	(a)	Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree	Time to take appeal from court	Y	Day	30	see also 2107(d) "(d) This section shall not apply to bankruptcy matters or other proceedings under Title 11 "
28	2107	(b)	In any such action, suit or proceeding in which the United States or an officer or agency thereof is a party, the time as to all parties shall be sixty days from such entry	Time to take appeal from court	Y	Day	60	see also 2107(d). "(d) This section shall not apply to bankruptcy matters or other proceedings under Title 11."
28	2107	(c)	"(c) The district court may, upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal, extend the time for appeal upon a showing of excusable neglect or good cause. In addition, if the district court finds-- (1) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry, and (2) that no party would be prejudiced, the district court may, upon motion filed within 180 days after entry of the judgment or order or within 7 days after receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal "	Time to take appeal from court	Y	Day	30	see also 2107(d) "(d) This section shall not apply to bankruptcy matters or other proceedings under Title 11."

28	2107	(c)	"(c) The district court may, upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal, extend the time for appeal upon a showing of excusable neglect or good cause In addition, if the district court finds-- (1) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry, and (2) that no party would be prejudiced, the district court may, upon motion filed within 180 days after entry of the judgment or order or within 7 days after receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal "	Time to take appeal from court	Y	Day	21	see also 2107(d) "(d) This section shall not apply to bankruptcy matters or other proceedings under Title 11 "
28	2107	(c)	"(c) The district court may, upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal, extend the time for appeal upon a showing of excusable neglect or good cause In addition, if the district court finds-- (1) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry, and (2) that no party would be prejudiced, the district court may, upon motion filed within 180 days after entry of the judgment or order or within 7 days after receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal "	Time to take appeal from court	Y	Day	180	see also 2107(d) "(d) This section shall not apply to bankruptcy matters or other proceedings under Title 11 "
28	2107	(c)	"(c) The district court may, upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal, extend the time for appeal upon a showing of excusable neglect or good cause In addition, if the district court finds-- (1) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry, and (2) that no party would be prejudiced, the district court may, upon motion filed within 180 days after entry of the judgment or order or within 7 days after receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal "	Time to take appeal from court	Y	Day	7	see also 2107(d). "(d) This section shall not apply to bankruptcy matters or other proceedings under Title 11."

28	2107	(c)	"(c) The district court may, upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal, extend the time for appeal upon a showing of excusable neglect or good cause. In addition, if the district court finds-- (1) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry, and (2) that no party would be prejudiced, the district court may, upon motion filed within 180 days after entry of the judgment or order or within 7 days after receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal "	Time to take appeal from court	Y	Day	14	see also 2107(d). "(d) This section shall not apply to bankruptcy matters or other proceedings under Title 11 "
28	2112	(a)	(a) The rules prescribed under the authority of section 2072 of this title may provide for the time and manner of filing and the contents of the record in all proceedings instituted in the courts of appeals to enjoin, set aside, suspend, modify, or otherwise review or enforce orders of administrative agencies, boards, commissions, and officers * * * If proceedings are instituted in two or more courts of appeals with respect to the same order, the following shall apply (1) If within ten days after issuance of the order the agency, board, commission, or officer concerned receives, from the persons instituting the proceedings, the petition for review with respect to proceedings in at least two courts of appeals, the agency, board, commission, or officer shall proceed in accordance with paragraph (3) of this subsection If within ten days after the issuance of the order the agency, board, commission, or officer concerned receives, from the persons instituting the proceedings, the petition for review with respect to proceedings in only one court of	Time to seek review of agency action	Y	Day	10	
28	2344		On the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies The action shall be against the United States	Time to seek review of agency action	Y	Day	60	Hobbs Act.
28	2522		Review of a decision of the United States Court of Federal Claims shall be obtained by filing a notice of appeal with the clerk of the Court of Federal Claims within the time and in the manner prescribed for appeals to United States courts of appeals from the United States district courts.	Time to take appeal from court	Y			

29	210	(a)	Any person aggrieved by an order of the Secretary issued under section 208 of this title may obtain a review of such order in the United States Court of Appeals for any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within 60 days after the entry of such order a written petition praying that the order of the Secretary be modified or set aside in whole or in part A copy of such petition shall forthwith be transmitted by the clerk of the court to the Secretary, and thereupon the Secretary shall file in the court the record of the industry committee upon which the order complained of was entered, as provided in section 2112 of Title 28 Upon the filing of such petition such court shall have exclusive jurisdiction to affirm, modify (including provision for the payment of an appropriate minimum wage rate), or set aside such order in whole or in part, so far as it is applicable to the petitioner....	Time to seek review of agency action	Y	Day	60	
29	660	(a)	Any person adversely affected or aggrieved by an order of the Commission issued under subsection (c) of section 659 of this title may obtain a review of such order in any United States court of appeals for the circuit in which the violation is alleged to have occurred or where the employer has its principal office, or in the Court of Appeals for the District of Columbia Circuit, by filing in such court within sixty days following the issuance of such order a written petition praying that the order be modified or set aside	Time to seek review of agency action	Y	Day	60	
29	667	(g)	The State may obtain a review of a decision of the Secretary withdrawing approval of or rejecting its plan by the United States court of appeals for the circuit in which the State is located by filing in such court within thirty days following receipt of notice of such decision a petition to modify or set aside in whole or in part the action of the Secretary	Time to seek review of agency action	Y	Day	30	
29	2937	(a)	(1) Petition With respect to any final order by the Secretary under section 2936 of this title by which the Secretary awards, declines to award, or only conditionally awards, financial assistance under his [FN1] chapter, or any final order of the Secretary under section 2936 of this title with respect to a corrective action or sanction imposed under section 2934 of this title, any party to a proceeding which resulted in such final order may obtain review of such final order in the United States Court of Appeals having jurisdiction over the applicant or recipient of funds involved, by filing a review petition within 30 days after the date of issuance of such final order. (2) Action on petition The clerk of the court shall transmit a copy of the review petition to the Secretary who shall file the record on which the final order was entered as provided in section 2112 of Title 28 The filing of a review petition shall not stay the order of the Secretary, unless the court orders a stay Petitions filed under this subsection shall be heard expeditiously, if possible within 10 days after the date of filing of a reply to the petition	Presumptive time for court to act	Y	Day	10	

29	2937	(a)	(1) Petition With respect to any final order by the Secretary under section 2936 of this title by which the Secretary awards, declines to award, or only conditionally awards, financial assistance under his [FN1] chapter, or any final order of the Secretary under section 2936 of this title with respect to a corrective action or sanction imposed under section 2934 of this title, any party to a proceeding which resulted in such final order may obtain review of such final order in the United States Court of Appeals having jurisdiction over the applicant or recipient of funds involved, by filing a review petition within 30 days after the date of issuance of such final order (2) Action on petition The clerk of the court shall transmit a copy of the review petition to the Secretary who shall file the record on which the final order was entered as provided in section 2112 of Title 28 The filing of a review petition shall not stay the order of the Secretary, unless the court orders a stay Petitions filed under this subsection shall be heard expeditiously, if possible within 10 days after the date of filing of a reply to the petition.	Time to seek review of agency action	Y	Day	30	
30	816	(a)(1)	Any person adversely affected or aggrieved by an order of the Commission issued under this chapter may obtain a review of such order in any United States court of appeals for the circuit in which the violation is alleged to have occurred or in the United States Court of Appeals for the District of Columbia Circuit, by filing in such court within 30 days following the issuance of such order a written petition praying that the order be modified or set aside A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission and to the other parties, and thereupon the Commission shall file in the court the record in the proceeding as provided in section 2112 of Title 28 Upon such filing, the court shall have exclusive jurisdiction of the proceeding and of the questions determined therein, and shall have the power to make and enter upon the pleadings, testimony, and proceedings set forth in such record a decree affirming, modifying, or setting aside, in whole or in part, the order of the Commission and enforcing the same to the extent that such order is affirmed or modifie	Time to seek review of agency action	Y	Day	30	
33	921	(c)	Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States court of appeals for the circuit in which the injury occurred, by filing in such court within sixty days following the issuance of such Board order a written petition praying that the order be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court, to the Board, and to the other parties, and thereupon the Board shall file in the court the record in the proceedings as provided in section 2112 of Title 28. Upon such filing, the court shall have jurisdiction of the proceeding and shall have the power to give a decree affirming, modifying, or setting aside, in whole or in part, the order of the Board and enforcing same to the extent that such order is affirmed or modified .	Time to seek review of agency action	Y	Day	60	

33	988	(a)	The action of the Corporation in denying an application for rehearing or in abrogating or modifying its order shall be final and conclusive thirty days after its approval by the President unless within such thirty-day period a petition for review is filed by a person aggrieved by such action in the United States Court of Appeals for the circuit in which the works to which the order applies are located or in the United States Court of Appeals for the District of Columbia.	Time to seek review of agency action	Y	Day	30	
33	1369	(b)(1)	Review of the Administrator's action (A) in promulgating any standard of performance under section 1316 of this title, (B) in making any determination pursuant to section 1316(b)(1)(C) of this title, (C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 1317 of this title, (D) in making any determination as to a State permit program submitted under section 1342(b) of this title, (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title, (F) in issuing or denying any permit under section 1342 of this title, and (G) in promulgating any individual control strategy under section 1314(l) of this title, may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts business which is directly affected by such action upon application by such person Any such application shall be made within 120 days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if suc	Time to seek review of agency action	Y	Day	120	
38	7292	(a)	After a decision of the United States Court of Appeals for Veterans Claims is entered in a case, any party to the case may obtain a review of the decision with respect to the validity of a decision of the Court on a rule of law or of any statute or regulation (other than a refusal to review the schedule of ratings for disabilities adopted under section 1155 of this title) or any interpretation thereof (other than a determination as to a factual matter) that was relied on by the Court in making the decision Such a review shall be obtained by filing a notice of appeal with the Court of Appeals for Veterans Claims within the time and in the manner prescribed for appeal to United States courts of appeals from United States district courts	Time to take appeal from court	Y			

38	7292	(b)(1)	(b)(1) When a judge or panel of the Court of Appeals for Veterans Claims, in making an order not otherwise appealable under this section, determines that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that there is in fact a disagreement between the appellant and the Secretary with respect to that question of law and that the ultimate termination of the case may be materially advanced by the immediate consideration of that question, the judge or panel shall notify the chief judge of that determination Upon receiving such a notification, the chief judge shall certify that such a question is presented, and any party to the case may then petition the Court of Appeals for the Federal Circuit to decide the question That court may permit an interlocutory appeal to be taken on that question if such a petition is filed with it within 10 days after the certification by the chief judge of the Court of Appeals for Veterans Claims. Neither the application for, nor the granting of, an appeal under this paragraph shall stay proceedin	Time to take appeal from court	Y	Day	10	
39	3663		A person, including the Postal Service, adversely affected or aggrieved by a final order or decision of the Postal Regulatory Commission may, within 30 days after such order or decision becomes final, institute proceedings for review thereof by filing a petition in the United States Court of Appeals for the District of Columbia	Time to seek review of agency action	Y	Day	30	
42	504	(a)	Whenever the Secretary of Labor-- (1) finds that a State law does not include any provision specified in section 503(a) of this title, or (2) makes a finding with respect to a State under subsection (b), (c), (d), (e), (h), (i), or (j) of section 503 of this title, such State may, within 60 days after the Governor of the State has been notified of such action, file with the United States court of appeals for the circuit in which such State is located or with the United States Court of Appeals for the District of Columbia, a petition for review of such action	Time to seek review of agency action	Y	Day	60	
42	2022	(c)(2)	Judicial review of any rule promulgated under this section may be obtained by any interested person only upon such person filing a petition for review within sixty days after such promulgation in the United States court of appeals for the Federal judicial circuit in which such person resides or has his principal place of business. A copy of the petition shall be forthwith transmitted by the clerk of court to the Administrator The Administrator thereupon shall file in the court the written submissions to, and transcript of, the written or oral proceedings on which such rule was based as provided in section 2112 of Title 28. The court shall have jurisdiction to review the rule in accordance with chapter 7 of Title 5 and to grant appropriate relief as provided in such chapter	Time to seek review of agency action	Y	Day	60	

42	6869	(a)	If any applicant is dissatisfied with the Secretary's final action with respect to the application submitted by it under section 6864 of this title, or with a final action under section 6868 of this title, such applicant may, within 60 days after notice of such action, file with the United States court of appeals for the circuit in which the State involved is located a petition for review of that action.. .	Time to seek review of agency action	Y	Day	60	
42	6976	(a)(1)	a petition for review of action of the Administrator in promulgating any regulation, or requirement under this chapter or denying any petition for the promulgation, amendment or repeal of any regulation under this chapter may be filed only in the United States Court of Appeals for the District of Columbia, and such petition shall be filed within ninety days from the date of such promulgation or denial, or after such date if such petition for review is based solely on grounds arising after such ninetieth day	Time to seek review of agency action	Y	Day	90	
42	6976	(b)	Review of the Administrator's action (1) in issuing, denying, modifying, or revoking any permit under section 6925 of this title (or in modifying or revoking any permit which is deemed to have been issued under section 6935(d)(1) of this title), or (2) in granting, denying, or withdrawing authorization or interim authorization under section 6926 of this title, may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts such business upon application by such person Any such application shall be made within ninety days from the date of such issuance, denial, modification, revocation, grant, or withdrawal, or after such date only if such application is based solely on grounds which arose after such ninetieth day.	Time to seek review of agency action	Y	Day	90	
42	7607	(b)(1)	Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise The filing of a petition for reconsideration by the Administrator of any otherwise final rule or action shall not affect the finality of such rule or action for purposes of judicial review nor extend the time within which a petition for judicial review of such rule or action under this section may be filed, and shall not postpone the effectiveness of such rule or action	Time to seek review of agency action	Y	Day	60	

42	300aa-12	(f)	The findings of fact and conclusions of law of the United States Court of Federal Claims on a petition shall be final determinations of the matters involved, except that the Secretary or any petitioner aggrieved by the findings or conclusions of the court may obtain review of the judgment of the court in the United States court of appeals for the Federal Circuit upon petition filed within 60 days of the date of the judgment with such court of appeals within 60 days of the date of entry of the United States Claims Court's [FN1] judgment with such court of appeals.	Time to take appeal from court	Y	Day	60	
42	300aa-32		A petition for review of a regulation under this part may be filed in a court of appeals of the United States within 60 days from the date of the promulgation of the regulation or after such date if such petition is based solely on grounds arising after such 60th day.	Time to seek review of agency action	Y	Day	60	
42	300j-7	(a)	A petition for review of-- (1) actions pertaining to the establishment of national primary drinking water regulations (including maximum contaminant level goals) may be filed only in the United States Court of Appeals for the District of Columbia circuit, and (2) any other final action of the Administrator under this chapter may be filed in the circuit in which the petitioner resides or transacts business which is directly affected by the action Any such petition shall be filed within the 45-day period beginning on the date of the promulgation of the regulation or any other final Agency action with respect to which review is sought or on the date of the determination with respect to which review is sought, and may be filed after the expiration of such 45-day period if the petition is based solely on grounds arising after the expiration of such period. .	Time to seek review of agency action	Y	Day	45	
43	1349	(c)(3)	(1) Any action of the Secretary to approve a leasing program pursuant to section 1344 of this title shall be subject to judicial review only in the United States Court of Appeal [FN1] for the District of Columbia. (2) Any action of the Secretary to approve, require modification of, or disapprove any exploration plan or any development and production plan under this subchapter shall be subject to judicial review only in a United States court of appeals for a circuit in which an affected State is located (3) The judicial review specified in paragraphs (1) and (2) of this subsection shall be available only to a person who (A) participated in the administrative proceedings related to the actions specified in such paragraphs, (B) is adversely affected or aggrieved by such action, (C) files a petition for review of the Secretary's action within sixty days after the date of such action, and (D) promptly transmits copies of the petition to the Secretary and to the Attorney General.	Time to seek review of agency action	Y	Day	60	OCSLA

45	159		First Filing of award The award of a board of arbitration, having been acknowledged as herein provided, shall be filed in the clerk's office of the district court designated in the agreement to arbitrate Second Conclusiveness of award, judgment An award acknowledged and filed as herein provided shall be conclusive on the parties as to the merits and facts of the controversy submitted to arbitration, and unless, within ten days after the filing of the award, a petition to impeach the award, on the grounds hereinafter set forth, shall be filed in the clerk's office of the court in which the award has been filed, the court shall enter judgment on the award, which judgment shall be final and conclusive on the parties * * * Fifth Appeal, record At the expiration of 10 days from the decision of the district court upon the petition filed as aforesaid, final judgment shall be entered in accordance with said decision, unless during said 10 days either party shall appeal therefrom to the court of appeals In such case only such portion of the record shall be transmitted to the appellate court as is nec	Time to take appeal from court	Y	Day	10	
45	355	(f)	Any claimant, or any railway labor organization organized in accordance with the provisions of the Railway Labor Act [45 U.S C A § 151 et seq.], of which claimant is a member, or any base-year employer of the claimant, or any other party aggrieved by a final decision under subsection (c) of this section, may, only after all administrative remedies within the Board will have been availed of and exhausted, obtain a review of any final decision of the Board by filing a petition for review within ninety days after the mailing of notice of such decision to the claimant or other party, or within such further time as the Board may allow, in the United States court of appeals for the circuit in which the claimant or other party resides or will have had his principal place of business or principal executive office, or in the United States Court of Appeals for the Seventh Circuit or in the United States Court of Appeals for the District of Columbia Upon the filing of such petition the court shall have exclusive jurisdiction of the proceeding and of the question determined therein	Time to seek review of agency action	Y	Day	90	
47	402	(c)	Such appeal shall be taken by filing a notice of appeal with the court within thirty days from the date upon which public notice is given of the decision or order complained of Such notice of appeal shall contain a concise statement of the nature of the proceedings as to which the appeal is taken, a concise statement of the reasons on which the appellant intends to rely, separately stated and numbered, and proof of service of a true copy of said notice and statement upon the Commission. Upon filing of such notice, the court shall have jurisdiction of the proceedings and of the questions determined therein and shall have power, by order, directed to the Commission or any other party to the appeal, to grant such temporary relief as it may deem just and proper	Time to seek review of agency action	Y	Day	30	

CIPA	7		(a) An interlocutory appeal by the United States taken before or after the defendant has been placed in jeopardy shall lie to a court of appeals from a decision or order of a district court in a criminal case authorizing the disclosure of classified information, imposing sanctions for nondisclosure of classified information, or refusing a protective order sought by the United States to prevent the disclosure of classified information (b) An appeal taken pursuant to this section either before or during trial shall be expedited by the court of appeals Prior to trial, an appeal shall be taken within ten days after the decision or order appealed from and the trial shall not commence until the appeal is resolved If an appeal is taken during trial, the trial court shall adjourn the trial until the appeal is resolved and the court of appeals (1) shall hear argument on such appeal within four days of the adjournment of the trial, (2) may dispense with written briefs other than the supporting materials previously submitted to the trial court, (3) shall render its decision within four days of argument on appeal, and (4) may dispen	Time to take appeal from court	Y	Day	10	see also 4 day limits
Court of Federal Claims Rule	32		Review of a Court of Federal Claims judgment by the United States Court of Appeals for the Federal Circuit may be obtained by filing with the clerk of the Federal Circuit a notice of appeal (petition for review) within 60 days after the date of the entry of judgment	Time to take appeal from court	Y			
FRAP	4	(a)(1)(A)	In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered	Time to take appeal from court	Y	Day	30	
FRAP	4	(a)(1)(B)	When the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered.	Time to take appeal from court	Y	Day	60	
FRAP	4	(a)(3)	If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later.	Time to take appeal from court	Y	Day	14	

FRAP	4	(a)(4)(A)	(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion (i) for judgment under Rule 50(b), (ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment, (iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58, (iv) to alter or amend the judgment under Rule 59, (v) for a new trial under Rule 59, or (vi) for relief under Rule 60 if the motion is filed no later than 10 days after the judgment is entered	Time to take appeal from court	Y	Day	10	
FRAP	4	(a)(5)	(5) Motion for Extension of Time. (A) The district court may extend the time to file a notice of appeal if (i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires, and (ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause (B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex parte unless the court requires otherwise If the motion is filed after the expiration of the prescribed time, notice must be given to the other parties in accordance with local rules. (C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 10 days after the date when the order granting the motion is entered, whichever is later	Time to take appeal from court	Y	Day	30	
FRAP	4	(a)(5)	(5) Motion for Extension of Time (A) The district court may extend the time to file a notice of appeal if (i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires, and (ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause (B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex parte unless the court requires otherwise If the motion is filed after the expiration of the prescribed time, notice must be given to the other parties in accordance with local rules (C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 10 days after the date when the order granting the motion is entered, whichever is later	Time to take appeal from court	Y	Day	10	

FRAP	4	(a)(6)	(6) Reopening the Time to File an Appeal The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied. (A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry; (B) the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier, and (C) the court finds that no party would be prejudiced	Time to take appeal from court	Y	Day	14	
FRAP	4	(a)(6)	(6) Reopening the Time to File an Appeal The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied (A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry, (B) the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier, and (C) the court finds that no party would be prejudiced	Time to take appeal from court	Y	Day	21	
FRAP	4	(a)(6)	(6) Reopening the Time to File an Appeal The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied (A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry, (B) the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier, and (C) the court finds that no party would be prejudiced	Time to take appeal from court	Y	Day	180	
FRAP	4	(a)(6)	(6) Reopening the Time to File an Appeal The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied (A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry, (B) the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier, and (C) the court finds that no party would be prejudiced	Time to take appeal from court	Y	Day	7	

FRAP	4	(a)(7)	(7) Entry Defined. (A) A judgment or order is entered for purposes of this Rule 4(a) (i) if Federal Rule of Civil Procedure 58(a)(1) does not require a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a), or (ii) if Federal Rule of Civil Procedure 58(a)(1) requires a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a) and when the earlier of these events occurs • the judgment or order is set forth on a separate document, or • 150 days have run from entry of the judgment or order in the civil docket under Federal Rule of Civil Procedure 79(a). (B) A failure to set forth a judgment or order on a separate document when required by Federal Rule of Civil Procedure 58(a)(1) does not affect the validity of an appeal from that judgment or order	Time to take appeal from court	Y	Day	150	
FRAP	4	(b)(1)(A)	In a criminal case, a defendant's notice of appeal must be filed in the district court within 10 days after the later of (i) the entry of either the judgment or the order being appealed, or (ii) the filing of the government's notice of appeal.	Time to take appeal from court	Y	Day	10	
FRAP	4	(b)(1)(B)	When the government is entitled to appeal, its notice of appeal must be filed in the district court within 30 days after the later of (i) the entry of the judgment or order being appealed, or (ii) the filing of a notice of appeal by any defendant.	Time to take appeal from court	Y	Day	30	
FRAP	4	(b)(3)(A)	If a defendant timely makes any of the following motions under the Federal Rules of Criminal Procedure, the notice of appeal from a judgment of conviction must be filed within 10 days after the entry of the order disposing of the last such remaining motion, or within 10 days after the entry of the judgment of conviction, whichever period ends later This provision applies to a timely motion (i) for judgment of acquittal under Rule 29, (ii) for a new trial under Rule 33, but if based on newly discovered evidence, only if the motion is made no later than 10 days after the entry of the judgment, or (iii) for arrest of judgment under Rule 34	Time to take appeal from court	Y	Day	10	
FRAP	4	(b)(4)	(4) Motion for Extension of Time Upon a finding of excusable neglect or good cause, the district court may--before or after the time has expired, with or without motion and notice--extend the time to file a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this Rule 4(b).	Time to take appeal from court	Y	Day	30	

FRAP	4	(c)	(c) Appeal by an Inmate Confined in an Institution. (1) If an inmate confined in an institution files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid (2) If an inmate files the first notice of appeal in a civil case under this Rule 4(c), the 14-day period provided in Rule 4(a)(3) for another party to file a notice of appeal runs from the date when the district court dockets the first notice (3) When a defendant in a criminal case files a notice of appeal under this Rule 4(c), the 30-day period for the government to file its notice of appeal runs from the entry of	Time to take appeal from court	Y			
FRAP	4	(d)	(d) Mistaken Filing in the Court of Appeals If a notice of appeal in either a civil or a criminal case is mistakenly filed in the court of appeals, the clerk of that court must note on the notice the date when it was received and send it to the district clerk The notice is then considered filed in the district court on the date so noted.	Time to take appeal from court	Y			
FRAP	5	(a)(2)	The petition [for permission to appeal] must be filed within the time specified by the statute or rule authorizing the appeal or, if no such time is specified, within the time provided by Rule 4(a) for filing a notice of appeal	Time to take appeal from court	Y			
FRAP	5	(b)(2)	A party may file an answer in opposition or a cross-petition within 7 days after the petition is served	Time to take appeal from court	Y	Day	7	
FRAP	6	(a)	An appeal to a court of appeals from a final judgment, order, or decree of a district court exercising jurisdiction under 28 U S.C. § 1334 is taken as any other civil appeal under these rules	Time to take appeal from court	Y			

FRAP	6	(b)(1)	These rules apply to an appeal to a court of appeals under 28 U S C § 158(d) from a final judgment, order, or decree of a district court or bankruptcy appellate panel exercising appellate jurisdiction under 28 U S C § 158(a) or (b) But there are 3 exceptions (A) Rules 4(a)(4), 4(b), 9, 10, 11, 12(b), 13-20, 22-23, and 24(b) do not apply, (B) the reference in Rule 3(c) to 'Form 1 in the Appendix of Forms' must be read as a reference to Form 5, and (C) when the appeal is from a bankruptcy appellate panel, the term 'district court,' as used in any applicable rule, means 'appellate panel '	Time to take appeal from court	Y			
FRAP	6	(b)(2)(A)(i)	If a timely motion for rehearing under Bankruptcy Rule 8015 is filed, the time to appeal for all parties runs from the entry of the order disposing of the motion .	Time to take appeal from court	Y			
FRAP	13	(a)	(1) Review of a decision of the United States Tax Court is commenced by filing a notice of appeal with the Tax Court clerk within 90 days after the entry of the Tax Court's decision At the time of filing, the appellant must furnish the clerk with enough copies of the notice to enable the clerk to comply with Rule 3(d). If one party files a timely notice of appeal, any other party may file a notice of appeal within 120 days after the Tax Court's decision is entered. (2) If, under Tax Court rules, a party makes a timely motion to vacate or revise the Tax Court's decision, the time to file a notice of appeal runs from the entry of the order disposing of the motion or from the entry of a new decision, whichever is later	Time to take appeal from court	Y	Day	90	see also 120-day deadline
FRAP	15	(d)	Intervention Unless a statute provides another method, a person who wants to intervene in a proceeding under this rule must file a motion for leave to intervene with the circuit clerk and serve a copy on all parties The motion--or other notice of intervention authorized by statute--must be filed within 30 days after the petition for review is filed and must contain a concise statement of the interest of the moving party and the grounds for intervention		Y	Day	30	
FRAP	26	(b)	Extending Time For good cause, the court may extend the time prescribed by these rules or by its order to perform any act, or may permit an act to be done after that time expires. But the court may not extend the time to file (1) a notice of appeal (except as authorized in Rule 4) or a petition for permission to appeal, or (2) a notice of appeal from or a petition to enjoin, set aside, suspend, modify, enforce, or otherwise review an order of an administrative agency, board, commission, or officer of the United States, unless specifically authorized by law	Time to take appeal from court	Y			

FRAP	35	(c)	A petition that an appeal be heard initially en banc must be filed by the date when the appellee's brief is due. A petition for a rehearing en banc must be filed within the time prescribed by Rule 40 for filing a petition for rehearing.		Y			
FRAP	40	(a)(1)	Unless the time is shortened or extended by order or local rule, a petition for panel rehearing may be filed within 14 days after entry of judgment But in a civil case, if the United States or its officer or agency is a party, the time within which any party may seek rehearing is 45 days after entry of judgment, unless an order shortens or extends the time		Y	Day	14	see also 45-day deadline
FRBP	8001	(f)(5)	A petition for permission to appeal in accordance with F. R App. P 5 shall be filed no later than 30 days after a certification has become effective as provided in subdivision (f)(1)	Time to take appeal from court	Y	Day	30	see also 28 USC 158(d)(2) FRBP 8001 sets additional requirements
FRBP	8015		Unless the district court or the bankruptcy appellate panel by local rule or by court order otherwise provides, a motion for rehearing may be filed within 10 days after entry of the judgment of the district court or the bankruptcy appellate panel If a timely motion for rehearing is filed, the time for appeal to the court of appeals for all parties shall run from the entry of the order denying rehearing or the entry of a subsequent judgment	Time to take appeal from court	Y	Day	10	
FRBP	9006	(b)	Enlargement (1) In general Except as provided in paragraphs (2) and (3) of this subdivision, when an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of court, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if the request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect (2) Enlargement not permitted The court may not enlarge the time for taking action under Rules 1007(d), 2003(a) and (d), 7052, 9023, and 9024 (3) Enlargement governed by other rules The court may enlarge the time for taking action under Rules 1006(b)(2), 1017(e), 3002(c), 4003(b), 4004(a), 4007(c), 4008(a), 8002, and 9033, only to the extent and under the conditions stated in those rules In addition, the court may enlarge the time	Time to take appeal from court	Y			see also 9006(c) regarding reduction of time periods

FRCIv P	6	(b)	(1) In General When an act may or must be done within a specified time, the court may, for good cause, extend the time (A) with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires, or (B) on motion made after the time has expired if the party failed to act because of excusable neglect (2) Exceptions A court must not extend the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b), except as those rules allow	Time to take appeal from court	Y			
FRCIv P	23	(f)	A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 10 days after the order is entered An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders	Time to take appeal from court	Y	Day	10	
FRCIv P	50	(b)	If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion No later than 10 days after the entry of judgment--or if the motion addresses a jury issue not decided by a verdict, no later than 10 days after the jury was discharged--the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59 In ruling on the renewed motion, the court may (1) allow judgment on the verdict, if the jury returned a verdict; (2) order a new trial, or (3) direct the entry of judgment as a matter of law	Time to take appeal from court	Y	Day	10	
FRCIv P	50	(d)	Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is rendered must be filed no later than 10 days after the entry of the judgment	Time to take appeal from court	Y	Day	10	
FRCIv P	52	(b)	On a party's motion filed no later than 10 days after the entry of judgment, the court may amend its findings--or make additional findings--and may amend the judgment accordingly The motion may accompany a motion for a new trial under Rule 59	Time to take appeal from court	Y	Day	10	
FRCIv P	59	(b)	A motion for a new trial must be filed no later than 10 days after the entry of judgment	Time to take appeal from court	Y	Day	10	

FRCivP	59	(c)	Time to Serve Affidavits When a motion for a new trial is based on affidavits, they must be filed with the motion The opposing party has 10 days after being served to file opposing affidavits, but that period may be extended for up to 20 days, either by the court for good cause or by the parties' stipulation. The court may permit reply affidavits	Time to take appeal from court	Y			
FRCivP	59	(d)	New Trial on the Court's Initiative or for Reasons Not in the Motion No later than 10 days after the entry of judgment, the court, on its own, may order a new trial for any reason that would justify granting one on a party's motion After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion In either event, the court must specify the reasons in its order.	Time to take appeal from court	Y	Day	10	
FRCivP	59	(e)	Motion to Alter or Amend a Judgment A motion to alter or amend a judgment must be filed no later than 10 days after the entry of the judgment	Time to take appeal from court	Y	Day	10	
FRCrimP	29	(c)	(c) After Jury Verdict or Discharge (1) Time for a Motion A defendant may move for a judgment of acquittal, or renew such a motion, within 7 days after a guilty verdict or after the court discharges the jury, whichever is later	Time to take appeal from court	Y	Day	7	
FRCrimP	33	(b)	(b) Time to File (1) Newly Discovered Evidence Any motion for a new trial grounded on newly discovered evidence must be filed within 3 years after the verdict or finding of guilty. If an appeal is pending, the court may not grant a motion for a new trial until the appellate court remands the case (2) Other Grounds Any motion for a new trial grounded on any reason other than newly discovered evidence must be filed within 7 days after the verdict or finding of guilty.	Time to take appeal from court	Y	Day	7	
FRCrimP	34	(b)	The defendant must move to arrest judgment within 7 days after the court accepts a verdict or finding of guilty, or after a plea of guilty or nolo contendere	Time to take appeal from court	Y	Day	7	

FRCrimP	45	(b)	Extending Time (1) In General When an act must or may be done within a specified period, the court on its own may extend the time, or for good cause may do so on a party's motion made (A) before the originally prescribed or previously extended time expires, or (B) after the time expires if the party failed to act because of excusable neglect. (2) Exception The court may not extend the time to take any action under Rule 35, except as stated in that rule	Time to take appeal from court	Y			

Case name	Court	Year	Cite	Title	Section	Subsection	Quote
Fletcher v U S Postal Service	CAFED	2009	2009 WL 464767, at *1 (unreported decision)	5	7703	(b)(1)	Our review of a Board decision or order is governed by 5 U S C § 7703(b)(1), which provides that "[n]otwithstanding any other provision of law, any petition for review must be filed within 60 days after the date the petitioner received notice of the final order or decision of the board " This filing period is "statutory, mandatory, [and] jurisdictional " Monzo v Dep't of Transportation, 735 F 2d 1335, 1336 (Fed Cir 1984), see also Bowles
Oja v Department of Army	CAFED	2005	405 F 3d 1349, 1360	5	7703	(b)(1)	Compliance with the filing deadline of 5 U S C § 7703(b)(1) is a prerequisite to our exercise of jurisdiction over this case.
Baker v Commodity Futures Trading Commission	CA10	1981	661 F 2d 871, 872	7	9		The time prescribed by law in Section 6(b) of the Act, 7 U S C s 9 (1980), is mandatory and jurisdictional
Kessenich v Commodity Futures Trading Com'n	CADC	1982	684 F 2d 88, 93	7	18	(e)	We conclude that the time for filing a bond must be construed as both jurisdictional and unalterable
Selco Supply Co v U S E P A	CA10	1980	632 F 2d 863	7	136n	(b)	
Magtanong v Gonzales	CA9	2007	494 F 3d 1190, 1191	8	1252	(b)(1)	The provision establishing the 30-day filing period is mandatory and jurisdictional, see Stone v INS, 514 U S 386, 405, 115 S Ct 1537, 131 L Ed 2d 465 (1995), because it is imposed by statute See 8 U S C § 1252(b)(1)
Sankarapillai v Ashcroft	CA7	2003	330 F 3d 1004, 1005-06	8	1252	(b)(1)	The INA specifies that a petition for review "must be filed not later than 30 days after the date of the final order of removal " See INA § 242(b)(1), 8 U S C § 1252(b)(1) (2000) Courts interpreting this provision have found it to be a strict jurisdictional requirement
Ruiz-Martinez v Mukasey	CA2	2008	516 F 3d 102, 119	8	1252	(b)(1)	[W]e lack jurisdiction to entertain (i) any petition for review filed with this Court challenging a final order of removal issued by the BIA, pursuant to 8 U S C § 1252(b)(1), beyond 30 days after the issuance of the order of removal
Bah v Mukasey	CA8	2008	521 F 3d 857, 859	8	1252	(d)(1)	Section 1252(d)(1) provides we may review a final order of removal only if "the alien has exhausted all administrative remedies available to the alien as of right " 8 U S C § 1252(d)(1), Judicial review provisions are jurisdictional in nature and must be construed strictly Stone v INS, 514 U S 386, 405, 115 S Ct 1537, 131 L Ed 2d 465 (1995) Nevertheless, Bah argues we should excuse his failure to exhaust on the grounds of futility. He argues an administrative appeal would be futile, since he has already lost an identical appeal to the AAO But, futility will not excuse a jurisdictional mandate. See Bowles

Omari v Holder	CA5	2009	2009 WL 531688, at *1	8	1252	(d)(1)	Omari alternatively asks that we excuse his failure to exhaust We find both arguments unavailing, allowance of "effective" exhaustion runs contrary to the purposes of § 1252(d), and, at least after the Supreme Court's decision in Bowles v Russell, 551 U S 205, 127 S Ct 2360, 2364-66, 168 L Ed 2d 96 (2007), we do not have the authority to excuse Omari's failure to comply with a statutory jurisdictional mandate
Massis v Mukasey	CA4	2008	549 F 3d 631, 640	8	1252	(d)(1)	Since Bowles, courts of appeals have declined to entertain equitable exceptions to section 1252(d)'s administrative exhaustion requirement. . Under Bowles, Massis may not rely on a "miscarriage of justice" argument to revisit his concession of deportability and circumvent his failure to exhaust administrative remedies Because we may not create an equitable exception to section 1252(d)(1)'s exhaustion requirement, this court lacks jurisdiction to consider whether reckless endangerment constitutes a crime of violence
Grullon v Mukasey	CA2	2007	509 F 3d 107, 112	8	1252	(d)(1)	When an exhaustion requirement is statutory and evinces an intent to constrict the ability of courts to adjudicate a class of cases, the limitation is jurisdictional, rather than mandatory only... We therefore hold that, as regards the requirement that petitioners appeal to the BIA, § 1252(d)(1) is jurisdictional
Mesa Airlines v U S	CA10	1991	951 F 2d 1186, 1189	8	1234b	(i)(1)	Neither the rule governing such appeals, the IRCA, or the regulations thereunder provide for any time extensions. See Fed R App P 15(a), 8 U S C § 1324b(i)(1), 28 C F.R §§ 68 1 et seq Mesa's Petition for Review is therefore DISMISSED for lack of jurisdiction
Rainsong Co v F E R C	CA9	1998	151 F 3d 1231, 1234	16	825l	(b)	We hold that "after the order of the Commission" refers to the date the order is deemed issued Pursuant to the regulation, which we have been shown no cause to believe was unreasonably applied in this case, the order was "issued" on June 13 Rainsong's notice of appeal was filed 63 days after the order was issued and is therefore untimely Accordingly, we do not have jurisdiction of the appeal, and the appeal is DISMISSED
Greenlaw v U S	US	2008	128 S Ct 2559, 2566-67	18	3742	(b)	Even if there might be circumstances in which it would be proper for an appellate court to initiate plain-error review, sentencing errors that the Government refrained from pursuing would not fit the bill Heightening the generally applicable party presentation principle, Congress has provided a dispositive direction regarding sentencing errors that aggrieve the Government. In § 3742(b) Congress designated leading Department of Justice officers as the decisionmakers responsible for determining when Government pursuit of a sentencing appeal is in order Those high officers, Congress recognized, are best equipped to determine where the Government's interest lies
Fry v D E A	CA9	2003	353 F 3d 1041, 1044	21	877		[A] timely filed petition for review under section 877 is a jurisdictional requirement for appellate review

Spivey v Vertrue, Inc	CA7	2008	528 F 3d 982, 985	28	1453	(c)(1)	["less" is "less"]
Estate of Pew v Cardarelli	CA2	2008	527 F 3d 25, 28	28	1453	(c)(1)	["less" is "more"]
I C C v Brotherhood of Locomotive Engineers	US	1987	482 U S 270	28	2344		
NRDC v NRC	CADC	1981	666 F 2d 595, 602	28	2344		
Com of Pa v I C C	CADC	1978	590 F 2d 1187	28	2344		
Carpenter v Department of Transp	CA9	1994	13 F 3d 313, 317	28	2344		
Cosby v Burlington Northern, Inc	CA8	1986	793 F 2d 210, 212	28	2344		Timeliness of a petition seeking review of an order of the ICC 'is a jurisdictional requirement that cannot be modified or waived by this court ' Cartersville Elevator, Inc v ICC, 724 F 2d 668, 672 (8th Cir 1984)
McAdams v U S	CAFED	2009	2009 WL 464743, at * 1 (unreported decision)	28	2522		[P]ursuant to Fed R App P 4(a)(1)(B), an appeal from a final judgment or order of the Court of Federal Claims must be filed with that court within 60 days of the date of entry of the judgment or order. See 28 U S C § 2522, Fed. R.App P 4(a)(1)(B) Because McAdams' appeal is untimely, this court lacks jurisdiction and must dismiss the appeal See Bowles
Midway Indus Contractors, Inc v Occupational Safety & Health Review Com'n	CA7	1980	616 F 2d 346, 347	29	660	(a)	We agree with the other circuits who have addressed this issue and conclude that the time for filing a petition for review is jurisdictional
Felt v Director, Office of Workers' Compensation Programs	CA9	1993	11 F 3d 951, 952-53	33	921	(c)	[A]ll of the other circuits that have confronted this problem have reached the same conclusion The sixty-day filing period is a jurisdictional requirement [W]e have no jurisdiction to hear this case
Okemow-King v Shinseki	CAFED	2009	2009 WL 464782, 1 (unreported decision)	38	7292	(a)	An appeal from a decision of the Court of Appeals for Veterans Claims must be filed within 60 days of entry of judgment See 38 U S C § 7292(a), Fed R App P. 4(a)(1) The time limit for filing a notice of appeal is jurisdictional See Bowles
Northside Sanitary Landfill, Inc v Thomas	CA7	1986	804 F 2d 371, 378	42	6976	(b)	The limitation period set forth in § 6976(b) is jurisdictional
Dressman v Costle	CA6	1985	759 F 2d 548, 553	42	7607	(b)(1)	Section 307(b)(1) of the Act, 42 U S C § 7607(b)(1), requires that petitions for review of a final action of the Administrator be filed with the court of appeals within sixty days after the notice of the rulemaking appears in the Federal Register The statutory deadline for the filing of petitions for review is jurisdictional
HRI, Inc v E P A	CA10	2000	198 F 3d 1224, 1235	42	300j-7	(a)	This 45-day period is jurisdictional

Alaska Wilderness League v Kempthorne	CA9	2008	548 F 3d 815	43	1349	(c)(3)	[majority & dissent debate issues of tolling in agency-review context]
National Black Media Coalition v F C C	CADC	1985	760 F 2d 1297, 1298	47	402	(c)	This time limitation is jurisdictional, and if the present appeal cannot be brought within the terms of the statute, it must be dismissed
Marandola v U S	CAFED	2008	518 F 3d 913	FRAP	4	(a)(1)(B)	[court holds the 60-day period jurisdictional, and rejects argument that it was OK to mail on the last day for filing NOA because the ECF system was down] [T]he ECF system cannot be used for filing a notice of appeal R Fed Cl. Appendix E, 25 Thus, whether or not the ECF system was unavailable on June 8, 2007 is irrelevant because the Marandolas were required to file their notice of appeal in paper form.
Amidon v Student Ass'n of State University of New York at Albany	CA2	2007	508 F 3d 94, 106	FRAP	4	(a)(3)	A cross-appellant must file within (1) 30 days of entry of judgment or (2) 14 days after the filing of the first notice of another party, whichever is later Fed R App P 4(a)(3), see also In re Johns-Manville Corp., 476 F 3d 118, 120 (2d Cir 2007) Even if it remains an open question whether the non-statutory timing requirement for filing a cross-appeal is jurisdictional after Bowles ., we must strictly enforce the time limit if an adverse party invokes it, In re Johns-Manville Corp , 476 F 3d at 121, 123-24, as the defendants have done here
U S v Comprehensive Drug Testing, Inc	CA9	2008	513 F 3d 1085, 1101 NB reh'ing en banc granted, 545 F 3d 1106 (9th Cir Sept 30, 2008)	FRAP	4	(a)(4)	In order to accept the government's argument, we would have to grant the jurisdictional benefit of tolling while denying the tolling rule's jurisdictional significance. We cannot defeat logic or text in this manner If Fed. R App P 4(a)(4) is jurisdictional, the government's motion does not qualify for tolling because it was filed outside the time frame specified in that rule. See Fed R.App P 4(a)(4)(iv), (vi) (permitting tolling for such motions only if they are filed within 10 days of entry of judgment) FN36 If Fed R App P. 4(a)(4) is non jurisdictional, satisfaction of that provision (or forfeiture of a claim that the government failed to satisfy it) would not enable us to ignore the jurisdictional 60-day rule of Fed R App P 4(a)(1)
Comedy Club, Inc v Improv West Associates	CA9	2009	553 F 3d 1277, 1284	FRAP	4	(a)(7)	CCI filed its first notice of appeal of the district court's order compelling arbitration . . well beyond the 180 days allowed by Federal Rule of Appellate Procedure 4(a)(7)(A)(ii) CCI's appeal of the district court's order compelling arbitration is untimely, and we lack jurisdiction to hear the appeal of that issue
Lopez v U S	US	2007	128 S Ct 806	FRAP	4	(b)(1)(A)	Judgment vacated, and case remanded to the United States Court of Appeals for the Eleventh Circuit for further consideration in light of Bowles v Russell, 551 U S ---, 127 S Ct 2360, 168 L Ed 2d 96 (2007)
Mitchell v U S	US	2007	127 S Ct 2973	FRAP	4	(b)(1)(A)	Judgment vacated, and case remanded to the United States Court of Appeals for the Tenth Circuit for further consideration in light of Bowles v Russell, 551 U S ---, 127 S Ct 2360, 168 L Ed 2d 96 (2007)

U S v Byfield	CADC	2008	522 F 3d 400, 403 n 2	FRAP	4	(b)(1)(A)	In light of Bowles, we now hold that Rule 4(b) is not jurisdictional because it was judicially created and has no statutory analogue Other circuits have also adopted this view
U S v Martinez	CA5	2007	496 F 3d 387, 388	FRAP	4	(b)(1)(A)	[T]he analysis in Bowles establishes that the time limit specified in Rule 4(b)(1)(A) is mandatory, but not jurisdictional, because it does not derive from a statute
U S v Frias	CA2	2008	521 F 3d 229, 234	FRAP	4	(b)(1)(A)	Our determination that Rule 4(b) is not jurisdictional does not authorize courts to disregard it when it is raised When the government properly objects to the untimeliness of a defendant's criminal appeal, Rule 4(b) is mandatory and inflexible
U S v Mitchell	CA10	2008	518 F 3d 740, 744	FRAP	4	(b)(1)(A)	This court recently held that, in light of Bowles, Federal Rule of Appellate Procedure 4(b)(1) is a claim-processing rule United States v Garduño, 506 F 3d 1287, 1288-89 (10th Cir 2007) As a result, dismissal of Mitchell's appeal, based on his failure to file a timely notice of appeal, is no longer mandatory and jurisdictional.
U S v Garduno	CA10	2007	506 F 3d 1287, 1291	FRAP	4	(b)(1)(A)	This court joins those circuits in holding that Rules 4(b)(1)(A) and 4(b)(4) are "inflexible claim-processing rule[s]," which, unlike a jurisdictional rule, may be forfeited if not properly raised by the government See Kontrick, 540 U S at 456, 124 S Ct 906 The timeliness requirements of Rules 4(b)(1)(A) and 4(b)(4), however, remain inflexible and "thus assure relief to a party properly raising them " Eberhart, 546 U S at 19, 126 S Ct 403.
Greenlaw v U S	US	2008	128 S Ct 2559, 2569	FRAP	4	(b)(1)(B)	Rule 4(b)(1)(B)(ii) instructs that, when the Government has the right to cross-appeal in a criminal case, its notice " must be filed within 30 days after the filing of a notice of appeal by any defendant " . The filing time for a notice of appeal or cross-appeal, Rule 4(b)(4) states, may be extended "for a period not to exceed 30 days " Rule 26(b) bars any extension . The firm deadlines set by the Appellate Rules advance the interests of the parties and the legal system in fair notice and finality
In re Taumoepeau	CA10	2008	523 F 3d 1213, 1216	FRAP	6	(b)(1)	The timeliness of a notice of appeal is governed by the Federal Rules of Appellate Procedure, which apply to appeals from the BAP just as they do to other appeals taken to this court FN1 In particular, Rule 4(a) specifies that the notice of appeal in civil matters must be filed within 30 days after the judgment or order appealed from is entered, this requirement is "mandatory and jurisdictional " Bowles v. Russell, --- U S ---, 127 S Ct 2360, 2362, 168 L.Ed 2d 96 (2007), see also 28 U S C § 2107(a) (providing the statutory basis for the 30-day time period set forth in Rule 4(a)(1))

Asher v Baxter Intern Inc	CA7	2007	505 F 3d 736, 741	FRCivP	23	(f)	Rule 23(f) was adopted in 1998 as an exercise of the Supreme Court's power under 28 U S C § 1292(e) to authorize interlocutory appeals by promulgating rules under the Rules Enabling Act, 28 U S.C. § 2072 How much time litigants have to take interlocutory appeals is a question for the rulemaking process, which implies that the deadline is not jurisdictional . But jurisdictional or not, the time limit is mandatory-which means that it must be enforced if the litigant that receives its benefit so insists There will be time enough to choose between "jurisdictional" and "claim-processing norm" characterizations if, in some future case, the appellee either consents to a belated appeal or fails to object
Gutierrez v Johnson & Johnson	CA3	2008	523 F 3d 187, 198	FRCivP	23	(f)	[T]he time limit set forth in Rule 23(f) for filing a petition for permission to appeal is closer in nature to the rule-based, claims-processing time limits discussed in Eberhart and Kontrick than it is to the statutorily-based, jurisdictional time limit at issue in Bowles
Dill v General American Life Ins Co	CA8	2008	525 F 3d 612, 619	FRCivP	50	(b)	Dill raised the timeliness issue before the district court reached the merits of the Rule 50(b) motion but too late for General American to take corrective action Because the district court had not ruled, we hold that Dill properly and timely raised the untimeliness defense and that the district court properly dismissed General American's Rule 50(b) motion for lack of jurisdiction As a result, General American's late-filed Rule 50(b) motion did not toll its time for filing its notice of appeal
Kelley v City of Albuquerque	CA10	2008	542 F 3d 802, 817 n 15	FRCivP	50	(b)	Rule 50(b) is not grounded in a statute Accordingly, in a jurisdictional inquiry relating to it, the principles of Bowles would seemingly be implicated However, we need not definitively decide this jurisdictional question-a matter of first impression-here
National Ecological Foundation v Alexander	CA6	2007	496 F 3d 466, 475-76	FRCivP	59	(e)	[N]o principled distinction exists between the rules at issue in Kontrick and Eberhart and the structure created by Federal Rules of Civil Procedure 6(b) and 59(e) Since these rules are indistinguishable from those in Kontrick and Eberhart, we conclude that they are claim-processing rules that provided NEF with a forfeitable affirmative defense
U S v Jacobo Castillo	CA9	2007	496 F 3d 947, 957 (en banc)	FRCrimP	11		Regardless of whether a defendant enters into a conditional plea or an unconditional plea, we retain jurisdiction to hear the appeal The *preclusive effect* we give to the plea agreement may depend on the nature of the plea and the circumstances in which it is brought to our attention, issues on which we do not express an opinion here
U S v Owen	CA2	2009	2009 WL 636008	FRCrimP	33		Although Rule 33 is an "inflexible claim-processing rule," it is not "jurisdictional" and is therefore subject to the time-modification provisions of Rule 45(b) of the Federal Rules of Criminal Procedure
In re Scotia Pacific Co , LLC	CA5	2007	508 F 3d 214, 219	Interim Bankruptcy Rule	8001	(f)	Because the procedure for certification of judgments in bankruptcy cases is a court-promulgated rule and not governed by statute, certification by the district court in this case did not deprive this Court of jurisdiction

Contino v U S	CA2	2008	535 F 3d 124, 126	SDNY local rule			This Court has not yet addressed whether a notice of appeal should be considered timely if a party attempted to file it within the required time-frame, but it was rejected by the clerk for failure to comply with a local rule . The Seventh Circuit, in a criminal case, addressed facts similar to those in the instant matter See United States v Harvey, 516 F 3d 553 (7th Cir 2008). In Harvey, the appellant electronically filed a timely notice of appeal, however, because local rules required that the notice of appeal be filed on paper, the filing was rejected by the clerk's office and the appellant did not file the paper notice of appeal until two months later, well after the deadline*127 had passed See id at 555-56 The Seventh Circuit found that, despite the clerk's rejection of the timely notice, it had jurisdiction to hear the appeal because Fed R Civ P. 5(e) "ensures that any document presented to the clerk in violation of a local rule of form can nonetheless be filed for purposes of satisfying a filing deadline." FN** Id at 556 The reasoning of the Seventh Circuit is persuasive
Sueiro Vazquez v Torregrosa de la Rosa	CA1	2007	494 F 3d 227, 234				Absent more, the submission of a check to the clerk in the amount of the filing fee, even with a legend on the check, is not the functional equivalent of a notice of appeal "Th[e] principle of liberal construction [of Rule 3] does not excuse noncompliance with the Rule " Smith, 502 U S at 248, 112 S Ct 678 The defendants' purported cross-appeal is dismissed

Case name	Court	Year	Cite	Title	Section	Subsection	Quote	Comments
Dawson Farms, LLC v Farm Service Agency	CA5	2007	504 F 3d 592, 606	7	6912	(e)	the reasoning behind the Eighth and Ninth Circuits' analogy between the PLRA and 7 U S C § 6912(e) is persuasive Ace Prop., 440 F 3d at 998. We too have construed PLRA's exhaustion requirement as jurisprudential See Hollingsworth, 260 F 3d at 358 n 2 Therefore, we now join the Eighth and Ninth Circuits in holding that § 6912(e) analogously codifies the jurisprudential doctrine of exhaustion and is not jurisdictional.	
Liadov v Mukasey	CA8	2008	518 F 3d 1003, 1009	8	1158	(d)(5)(A)(iv)	Though the question is not free from doubt, we conclude that Congress did not intend a mandatory directive, therefore, we must examine the BIA's jurisdictional ruling from the familiar perspective of whether it was an abuse of the agency's discretion to resolve procedural issues "not governed by specific statutory commands "	the panel majority then concludes that "the BIA's refusal to self-certify was an unreviewable action committed to the agency's discretion" and "[a]lternatively, if the BIA's order refusing to self-certify is subject to judicial review, we conclude there was no abuse of discretion"
In re Ross-Tousey	CA7	2008	549 F 3d 1148, 1155-56	11	704	(b)(2)	[A]lthough Bowles implies that all statutory time limits may have jurisdictional significance, the Supreme Court's later discussion of statutes of limitations in John R Sand & Gravel Co appears to soften Bowles's implications, at least for run-of-the-mill statutes of limitations and statutory time limits like the one at issue here In this case, although the section 704(b)(2) deadline for UST motions to dismiss has the salutary effect of promoting judicial efficiency, we believe that its primary purpose is to protect possibly cash-strapped debtors from needlessly protracted or delayed bankruptcy proceedings Because section 704(b)(2)'s main purpose is to protect debtors, we believe that its protections, like those of the vast majority of statutory time limits, can be waived by the debtors as well	
Reed Elsevier, Inc v Muchnick	US	2009	2009 WL 498165	17	411	(a)	The petition for a writ of certiorari is granted limited to the following question Does 17 U S C §411(a) restrict the subject matter jurisdiction of the federal courts over copyright infringement actions?	
				26	6234	(c)		
Waldron-Ramsey v Pacholke	CA9	2009	2009 WL 455506, at *2 n 2	28	2244	(d)	The Supreme Court has not explicitly determined whether equitable tolling is allowed by section 2244(d). See Lawrence v Florida, 549 U S. 327, 336, 127 S Ct 1079, 166 L Ed 2d 924 (2007) (assuming but not deciding that equitable tolling applies to section 2244(d)) We have held that it is See Harris, 515 F.3d at 1054 n 4 The Supreme Court did hold, in Bowles v. Russell, 551 U S 205, 127 S Ct 2360, 2366, 168 L Ed.2d 96 (2007), that a habeas petitioner's timely notice of appeal is a prerequisite to federal appellate jurisdiction, and therefore the federal courts are without power to make equitable exceptions to the time limit However, we agree with the Second Circuit that Bowles did not invalidate equitable tolling of the AEDPA statute of limitations.	

Diaz v Kelly	CA2	2008	515 F 3d 149, 153	28	2244	(d)	Although the Court referred to "the jurisdictional significance of the fact that a time limitation is set forth in a statute," id at 2364, it would be an unwarranted extension of Bowles to think that the Court was impliedly rendering equitable tolling inapplicable to limitations periods just because they are set forth in statutes Since a statute of limitations is a defense, see Fed R Civ P 8(c), it has not been regarded as jurisdictional, see Day v McDonough, 547 U S. 198, 205, 126 S Ct 1675, 164 L Ed 2d 376 (2006) (AEDPA limitations period), and has been subject to equitable tolling, see Irwin v. Department of Veterans Affairs, 498 U S 89, 95-96, 111 S Ct 453, 112 L Ed 2d 435 (1990) We think it remains so after Bowles The Supreme Court's recent decision in John R Sand & Gravel Co. v United States, --- U S —, 128 S Ct 750, 169 L Ed 2d 591 (2008), confirms our view	
U S v Petty	CA5	2008	530 F 3d 361, 364 n 5	28	2255	(f)	[T]his circuit does not view the AEDPA limitations period as a jurisdictional bar, but rather as a statute of limitations that functions as an affirmative defense See Fed R Civ P 8(c), Day v McDonough, 547 U S 198, 205, 126 S.Ct 1675, 1681, 164 L Ed 2d 376 (2006) (describing AEDPA limitations period as a "defense" and nonjurisdictional) We read nothing in Bowles that would overturn our prior decisions	
Scarborough v Principi	US	2004	541 U S 401, 406	28	2412	(d)	May a timely fee application, pursuant to § 2412(d), be amended after the 30-day filing period has run to cure an initial failure to allege that the Government's position in the underlying litigation lacked substantial justification? We hold that a curative amendment is permissible and that Scarborough's fee application, as amended, qualifies for consideration and determination on the merits	
John R Sand & Gravel Co v U S	US	2008	128 S Ct 750, 753-54	28	2501		Most statutes of limitations seek primarily to protect defendants against stale or unduly delayed claims Thus, the law typically treats a limitations defense as an affirmative defense that the defendant must raise at the pleadings stage and that is subject to rules of forfeiture and waiver Such statutes also typically permit courts to toll the limitations period in light of special equitable considerations Some statutes of limitations, however, seek not so much to protect a defendant's case-specific interest in timeliness as to achieve a broader system-related goal, such as facilitating the administration of claims , limiting the scope of a governmental waiver of sovereign immunity , or promoting judicial efficiency, see, e g , Bowles The Court has often read the time limits of these statutes as more absolute, say as requiring a court to decide a timeliness question despite a waiver, or as forbidding a court to consider whether certain equitable considerations warrant extending a limitations period See, e g , ibid , see also Arbaugh As convenient shorthand, the Court has sometimes referred to the time limits in such statutes	
Kingman Reef Atoll Investments, L L C v U S	CA9	2008	541 F 3d 1189, 1196	28	2409a	(g)	Gravel Co forecloses KRAI's argument that Irwin created a general rule superceding Block's holding as to the jurisdictional nature of the [Quiet Title Act]'s twelve-year limitations period	

Thomas v Miller	CA6	2007	489 F 3d 293, 297	29	1161	(b)	The first question for our decision is whether the doctrine of equitable estoppel can, in appropriate cases, bar an employer, concededly not meeting COBRA's numerical application threshold, from defending an action under that statute on that basis. We hold, in the wake of the Supreme Court's decision in Arbaugh, 546 U S at 515-16, 126 S Ct 1235, that it can	
Arbaugh v Y&H Corp	US	2006	546 U S 500, 515-16	42	2000e		If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional,FN11 then courts and litigants will be duly instructed and will not be left to wrestle with the issue But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character Applying that readily administrable bright line to this case, we hold that the threshold number of employees for application of Title VII is an element of a plaintiff's claim for relief, not a jurisdictional issue	
U S v Higgs	CA3	2007	504 F 3d 456, 464	FRCrimP	35	(a)	Rule 35's time limitation derives from the limitation set forth by statute, 18 U S C § 3582(c) Cf Bowles, 127 S Ct at 2365 (recognizing that the time limit in Supreme Court Rule 13 1 derives from 28 U S C § 2101(c)) Therefore, we hold that the seven-day time requirement set forth in Rule 35(a) is jurisdictional As a result, the District Court was without jurisdiction to enter its January 24, 2005 order denying Higgs' motion for reduction of sentence.	18 U.S C 3582(c) provides in part "The court may not modify a term of imprisonment once it has been imposed except that-- (1) in any case-- (B) the court may modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure "
U S v Mendoza	CA10	2008	543 F 3d 1186, 1195 n 7	FRCrimP	35	(a)	We do note for such future cases that recent Supreme Court jurisprudence raises the question of whether Rule 35(a)'s time limit is indeed jurisdictional as we held in Green, or is instead a non-jurisdictional claims-processing rule See, e g , Bowles	
U S v Griffin	CA1	2008	524 F 3d 71, 84	FRCrimP	35	(a)	the conclusion that Rule 35(a) is jurisdictional comports with Bowles, because the rule's seven-day time limit derives from a statute- § 3582(c) Although § 3582 does not expressly reference the rule's seven-day limit, the entire rule is incorporated into the statute	
Irwin v Department of Veterans Affairs	US	1990	498 U S 89, 95-96				the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States Congress, of course, may provide otherwise if it wishes to do so	this decision was distinguished in John R Sand The statute at issue in Irwin -- 42 USC 2000e-16(c) -- has since been amended
Khan v U S Dept of Justice	CA2	2007	494 F 3d 255, 258				[the court determines that, at least with respect to non-asylum cases, Bowles does not require it "to re-evaluate our Court's holding in Zhong Guang Sun, which permits the BIA to hear untimely appeals in 'extraordinary or unique circumstances'"]	

TAB 6C

MEMORANDUM

DATE: March 27, 2009

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 07-AP-I

Item No. 07-AP-I concerns Appellate Rule 4(c)(1)'s inmate filing rule. This item arose from an inquiry by Judge Diane Wood, who described "a problem that arose in a recent case on which I sat. The question is what does FRAP 4(c)(1) really require an inmate to do, in order to comply with the 'mailbox' rule of filing a notice of appeal. Our case was Ingram v. Jones .... One interpretation of the third sentence of the rule is that the inmate must somehow show that first-class postage has been prepaid, either by himself or the prison, as of the time when the notice of appeal was put in the prison's mailbox. The other interpretation is that the payment of first-class postage, while required, is not a jurisdictional prerequisite for filing an adequate notice of appeal. Our court has another case, United States v. Craig ... , that took a very narrow approach to this issue. It seemed to me, while working in Ingram, that the rule was not as clear as it could or should be, and so I thought it would benefit from some attention by this committee."

At the Appellate Rules Committee's fall 2008 meeting, the Committee discussed this item and Judge Sutton, Steve McAllister and Doug Letter agreed to work with me to formulate some possible options for the Committee's consideration. The spring meeting provides an opportunity to discuss in more detail which options the Committee may wish to pursue further, so that we can use the summer months to focus on those lines of inquiry. To provide context, the two prior memos on this topic are enclosed. To frame the discussion, this memo surveys possible matters for further inquiry. Questions 1 and 2 below reflect the issues initially raised by Judge Wood's inquiry. The other questions concern related issues that might come within the scope of an expanded project.

1. Does Rule 4(c)(1) require prepayment of postage as a condition of timeliness?

    a. The answer to this question, under current law, may depend on whether the institution in which the inmate is confined has a legal mail system.

        i. As noted in Part II.A. of the March 2008 memo, the Seventh Circuit has held that when the institution has no legal mail system, the third sentence

of Rule 4(c)(1) requires that postage be prepaid. See United States v. Craig, 368 F.3d 738, 740 (7th Cir. 2004).

ii. By contrast, as noted in Part II B of the March 2008 memo, the Seventh and Tenth Circuits have taken the view that if the institution has a legal mail system and the inmate uses that system, prepayment of postage is not required for timeliness. See Ingram v. Jones, 507 F.3d 640, 644 (7th Cir. 2007), and United States v. Ceballos-Martinez, 387 F.3d 1140, 1144 (10th Cir. 2004).

b To the extent that such a requirement exists, is it jurisdictional?

i. As noted in Part II.C. of the March 2008 memo, the answer is unclear under current law. However, that memo also notes that even if such a requirement in Rule 4(c)(1) is jurisdictional, Rule 4(c)(1) can be altered through the rulemaking process

2 *Should* Rule 4(c)(1) require postage prepayment as a condition of timeliness?

a. One possible line of inquiry here concerns the ability of indigent inmates to make use of Rule 4(c)(1). Specifically, should the Rule take account of the possibility that the inmate may lack funds with which to pay the postage?

i. Admittedly, first-class postage for a notice of appeal should be low – i.e., the price of one first-class stamp.

ii. However, the cases indicate that on some occasions an inmate may not even have that amount of money. See, e.g., the case discussed in footnote 26 of the March 2008 memo. This is consistent with the discussion of institutional practices in Part I of the October 2008 memo, which concludes that it may be a common practice to provide indigent inmates with some amount of free postage for legal mail, but also that such free postage is often subject to quite strict limits. And this is also consistent with Part II of the October 2008 memo, which finds that while a number of courts have recognized (or presupposed) a federal constitutional right to some amount of free postage for an indigent inmate's legal mail, the constitutionally required amount can be relatively small. It is not impossible to imagine a situation in which an inmate is provided with a limited allowance for postage, uses that allowance for other filings (e.g., filings in the trial court), and lacks funds with which to mail the notice of appeal. And, obviously, an inmate lacks the alternative (available to other litigants) of filing the notice of appeal in person.

b Another possible line of inquiry would ask whether it makes sense to differentiate, as the Seventh Circuit has, between situations in which the inmate uses the institution's legal mail system and situations in which no such system exists.

c Even if it is thought that, as a general matter, Rule 4(c)(1) should require prepayment of postage, a third question is whether the rule should specify that noncompliance can be forgiven in certain circumstances. Such a specification would be particularly important to the extent that a postage-prepayment requirement in Rule 4(c)(1) turns out to be jurisdictional.

3. Should Rule 4(c)(1) be amended to address the holding in *United States v Ceballos-Martinez*, 387 F.3d 1140 (10th Cir. 2004)?

a. As discussed in Part I.B. of the March 2008 memo, in *Ceballos-Martinez*, the court of appeals dismissed a prisoner's appeal – even though it was undisputed (and shown by the postmark) that he had deposited his notice of appeal with the prison mail system within the time for filing the appeal – merely because the prisoner had not included a declaration or notarized statement setting forth the date of deposit and stating that first-class postage had been prepaid

4. Should Rule 4(c) use a word other than "inmate" to describe those who can benefit from its provisions?

a. The question here (raised during the Committee's fall meeting) might be whether "inmate" in common usage tends to denote criminal detainees and those convicted of crimes, as opposed to other persons confined in an institution.

5. How do possible changes in Rule 4(c) relate to provisions elsewhere in the Rules?

a. *Appellate Rules.* Appellate Rule 25(a)(2)(C) parallels Rule 4(c) by providing a similar provision for filings in the court of appeals. It therefore seems worthwhile to consider those two rules in tandem, although there are functional differences between them that might alter the analysis of specific amendments.

i. There is a cross-reference to Rule 4(c) in Rule 3(d)(2), but the possible changes in Rule 4(c) that are outlined above would not seem to require any changes in Rule 3(d)(2).

b. *Other sets of rules*

i. Supreme Court Rule 29.2 sets out an inmate-filing rule for filings in the Supreme Court. Supreme Court Rule 29.2 is similar but not identical to Appellate Rule 4(c)(1).

ii. The habeas and Section 2255 rules each contain a Rule 3(d), adopted in 2004 and modeled on the Appellate Rules' inmate-filing provisions. These rules provide: "(d) Inmate Filing. A paper filed by an inmate confined in an institution is timely if deposited in the institution's internal mailing system on or before the last day for filing If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid."

6. What is the scope of the project, and how does that affect the need for cooperation with the other Advisory Committees?

a. If amendments of Appellate Rules 4(c) and 25(a)(2)(C) are under consideration, it seems advisable to coordinate that consideration with other Advisory Committees.

i. The Criminal Rules Committee should be consulted to determine whether the proposed changes affect the habeas and Section 2255 rules. The Civil and Bankruptcy Rules Committees may be interested in the inmate-filing issue as well.

b. A more far-reaching project might consider whether to extend the Rules' treatment of inmate filing issues to other questions.

i. One might consider, for example, whether to extend a deadline when a prison delayed transmitting to an inmate the notice of entry of a judgment. Existing rules address the question, but some might argue that they do so in ways that are not tailored to inmates' circumstances in particular.

(1) On civil appeals, see Appellate Rules 4(a)(5) & 4(a)(6); 28 U.S.C. § 2107; and Civil Rule 77(d)(2).

(2) On criminal appeals, see Appellate Rule 4(b)(4) and Criminal Rule 49(c).

ii. One might also consider whether to extend the inmate-filing rule to non-habeas filings by inmates in the trial court.

(1) On tolling motions, see, e.g., U.S. v. Duke, 50 F.3d 571, 575 (8th Cir. 1995) ("[T]he rationale of *Houston* and the new Rule 4(c) applies with equal force to a motion which, under Rule 4(a)(4),

tolls the time for the filing of a notice of appeal ").

(2) On the filing of a civil complaint, compare, e.g , Gonzales v. Wyatt, 157 F 3d 1016, 1020 (5th Cir. 1998) ("[W]hen a pro se prisoner delivers his section 1983 complaint to the prison authorities for forwarding to the clerk of court, the complaint is, for limitations purposes, deemed filed at that time."), with Jackson v. Nicoletti, 875 F.Supp. 1107, 1111 (E.D.Pa. 1994) (refusing to "creat[e] a mailbox rule for pro se prisoner complaints").

* * *

As the discussion above illustrates, when designing a project to review the treatment of inmate filings, it is necessary to make at least tentative choices concerning the project's scope. The Committee's discussion of those choices at the spring meeting will provide us with a good basis on which to proceed further.

Encls.

MEMORANDUM

DATE: March 13, 2008

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 07-AP-I

Judge Diane Wood has asked the Committee to consider whether Appellate Rule 4(c)(1)'s "prison mailbox rule" should be clarified. In particular, Judge Wood suggests that the Committee consider clarifying the Rule's position concerning the prepayment of first-class postage. Questions concerning postage have arisen in two recent Seventh Circuit cases – *United States v. Craig*, 368 F.3d 738 (7th Cir. 2004), discussed in Part II.A of this memo, and *Ingram v Jones*, 507 F.3d 640 (7th Cir. 2007), discussed in Part II.B. Copies of both those decisions are enclosed.

> Rule 4(c)(1) provides:
>
> > If an inmate confined in an institution files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

Several issues arise with respect to the prepayment of postage. First, does the rule require prepayment of postage when the institution has no legal mail system? Second, does the rule require prepayment of postage when the institution has a legal mail system and the inmate uses that system? And third, when the rule requires prepayment of postage, is that requirement jurisdictional?

Part I of this memo provides background on Rule 4(c). Part II discusses the issues noted above. Part III concludes.

I. Background and nature of the "prison mailbox rule"

This section reviews the history and development of the "prison mailbox rule."[1] Rule 4(c) – complemented by Rule 3(d)(2),[2] and paralleled by Rule 25(a)(2)(C)[3] – provides the current incarnation of that rule as it applies to notices of appeal. But before the Rules took special account of prisoner filings, two Supreme Court cases dealt with the challenges that arise when inmates in institutions file appeals or other documents. Part I.A. discusses those two key Supreme Court decisions – *Fallen v United States*[4] and *Houston v. Lack*[5] – and then analyzes the Rules that currently govern inmate filings. Part I.B. reviews the Committee's discussions in 2004 concerning a proposal to amend the Rule.

A. Prior caselaw and the current rules

The Court's 1964 decision in *Fallen* is noteworthy because the concurring opinion prefigures the reasoning of *Houston*. In *Fallen*, the district judge assured the defendant at the time of sentencing on January 15th that he had a right to an appeal. On January 29th -- after the time for appeal had expired -- the clerk of the court received letters from the defendant seeking both a new trial and an appeal. The prisoner had dated the letters January 23 and had mailed them in a single envelope that was not postmarked but showed a government frank. The court of appeals held that both the new trial motion and the notice of appeal were untimely. The Supreme Court reversed. It found "no reason ... to doubt that petitioner's date at the top of the letter was

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[1] Part I.A. of this memo is adapted from § 3950.12 of the forthcoming new edition of Federal Practice and Procedure, Vol. 16A.

[2] Rule 3(d)(2) provides: "If an inmate confined in an institution files a notice of appeal in the manner provided by Rule 4(c), the district clerk must also note the date when the clerk docketed the notice."

[3] Rule 25(a)(2)(C) provides:

> **Inmate filing.** A paper filed by an inmate confined in an institution is timely if deposited in the institution's internal mailing system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

[4] 378 U.S. 139 (1964).

[5] 487 U.S. 266 (1988).

an accurate one and that subsequent delays were not chargeable to him."[6] Reasoning that the "petitioner did all he could under the circumstances," the Court "decline[d] to read the Rules so rigidly as to bar a determination of his appeal on the merits."[7] The four concurring Justices would have reached the same result on a different line of reasoning: "[A] defendant incarcerated in a federal prison and acting without the aid of counsel files his notice of appeal in time, if, within the 10-day period provided by the Rule, he delivers such notice to the prison authorities for forwarding to the clerk of the District Court. In other words, in such a case the jailer is in effect the clerk of the District Court within the meaning of [Criminal] Rule 37."[8]

The Supreme Court revisited the question of inmate filings almost a quarter of a century later, in *Houston v Lack*. Twenty-seven days after entry of the judgment dismissing his pro se habeas petition, Houston deposited a notice of appeal with the prison authorities for mailing to the court. The record did not reveal when the authorities actually mailed the letter, but the prison's mail log could support an inference that Houston gave the wrong P.O. box number for the federal district court. The district clerk stamped the notice "filed" 31 days after entry of judgment – i.e., one day late. Ultimately, the court of appeals dismissed the appeal as untimely.[9]

The Supreme Court reversed. It adopted the reasoning of the concurring opinion in *Fallen* and held that Houston had filed his notice within the 30-day period when, three days before the deadline, he delivered the notice to the prison authorities for forwarding to the district clerk.[10] The Court emphasized the unique difficulties faced by prisoners litigating pro se: They have no choice but to file by mail; they have to trust that the prison authorities will process the mail without delay; they have no ready way to check that the filing timely arrived in the clerk's office; and they lack the option other litigants have of (as a last resort) making a filing in person if the mailed filing does not timely arrive.[11] The dissenters in the *Houston* case agreed that "the Court's rule makes a good deal of sense" and dissented "only because it is not the rule that we have promulgated through congressionally prescribed procedures."[12]

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[6] 378 U.S. at 143-44.

[7] Id. at 144.

[8] Id. (Stewart, J., joined by Clark, Harlan & Brennan, JJ., concurring). The case was decided under what was then Criminal Rule 37(a).

[9] 487 U.S. at 268-69.

[10] Id. at 270.

[11] Id. at 270-72.

[12] Id. at 277 (Scalia, J., joined by Rehnquist, C.J., and O'Connor & Kennedy, JJ., dissenting).

Soon after the *Houston* decision the Supreme Court amended its own rules to incorporate the result it had reached in that case In the 1990 revision of the Supreme Court Rules, Rule 29.2 was amended to provide that a document filed in the Supreme Court "by an inmate confined in an institution" is timely if "deposited in the institution's internal mail system on or before the last day for filing and ... accompanied by a notarized statement or declaration in compliance with 28 U.S.C. §1746" stating the date of deposit and that first-class postage was prepaid.[13]

The *Houston* decision and the revised Supreme Court Rule were in turn the basis for a new Appellate Rule 4(c), added by the 1993 amendments.[14] This subdivision provides that a notice of appeal by an inmate confined in an institution is timely if deposited in the institution's internal mail system, within the prescribed appeal time, for mailing to the court. The 1993 version of Rule 4(c) left undefined the term "internal mail system"; the rulemakers in 1998 amended Rule 4(c) to provide that if the institution has a system designed for legal mail, the inmate must use it in order to have the benefit of Rule 4(c). Adjustments also were made, both in 1993 and 1998, to the time allowed for appeals by other parties, based on the recognition that several days may elapse between deposit in the institution's mail system and actual delivery to

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[13] Supreme Court Rule 29.2 currently provides.

> A document is timely filed if it is received by the Clerk within the time specified for filing; or if it is sent to the Clerk through the United States Postal Service by first-class mail (including express or priority mail), postage prepaid, and bears a postmark, other than a commercial postage meter label, showing that the document was mailed on or before the last day for filing; or if it is delivered on or before the last day for filing to a third-party commercial carrier for delivery to the Clerk within 3 calendar days. If submitted by an inmate confined in an institution, a document is timely filed if it is deposited in the institution's internal mail system on or before the last day for filing and is accompanied by a notarized statement or declaration in compliance with 28 U.S.C. § 1746 setting out the date of deposit and stating that first-class postage has been prepaid. If the postmark is missing or not legible, or if the third-party commercial carrier does not provide the date the document was received by the carrier, the Clerk will require the person who sent the document to submit a notarized statement or declaration in compliance with 28 U.S.C. § 1746 setting out the details of the filing and stating that the filing took place on a particular date within the permitted time.

[14] The version of Rule 4(c) adopted in 1993 read in relevant part: "If an inmate confined in an institution files a notice of appeal in either a civil case or a criminal case, the notice of appeal is timely filed if it is deposited in the institution's internal mail system on or before the last day for filing. Timely filing may be shown by a notarized statement or by a declaration (in compliance with 28 U.S.C. § 1746) setting forth the date of deposit and stating that first-class postage has been prepaid."

the clerk of the district court.[15]

The amended rule is not limited to prisoners; it applies to any "inmate confined in an institution." It applies in both civil and criminal actions. Some courts have held that it is not limited to persons appearing pro se, so long as it is the prisoner, not a lawyer, who is filing the notice of appeal Although the rule in terms applies only to notices of appeal, some courts have extended the *Houston* decision and, later, Rule 4(c), to some other district-court filings as well. Rule 25(a)(2)(C) extends the prison mailbox rule to filings in the court of appeals.

The general rule is that an appellant bears the burden of showing that the appeal is timely, and courts have applied this principle to inmates.[16] Timely filing may be shown by a notarized statement or declaration stating the date of deposit and stating that first-class postage has been prepaid Courts have disagreed on whether the inmate must file this statement or declaration

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[15] Rule 4(c)(2) now provides: "If an inmate files the first notice of appeal in a civil case under this Rule 4(c), the 14-day period provided in Rule 4(a)(3) for another party to file a notice of appeal runs from the date when the district court dockets the first notice." And Rule 4(c)(3) provides: "When a defendant in a criminal case files a notice of appeal under this Rule 4(c), the 30-day period for the government to file its notice of appeal runs from the entry of the judgment or order appealed from or from the district court's docketing of the defendant's notice of appeal, whichever is later."

[16] *See* Grady v. United States, 269 F.3d 913, 916–17 (8th Cir. 2001) (applying Rule 4(c)'s prison mailbox rule to the filing of Section 2255 motions and stating that the movant "bears the ultimate burden of proving his entitlement to benefit from the rule"); Porchia v. Norris, 251 F.3d 1196, 1198 (8th Cir. 2001) ("[A]n appellant must prove that necessary preconditions to the exercise of appellate jurisdiction-including the timely filing of a notice of appeal-have been fulfilled.").

But see Garvey v. Vaughn, 993 F.2d 776, 781 (11th Cir. 1993) ("*Houston* places the burden of proof for the pro se prisoner's date of delivering his document to be filed in court on the prison authorities, who have the ability to establish the correct date through their logs."); Faile v. Upjohn Co., 988 F.2d 985, 989 (9th Cir. 1993) ("When a pro se prisoner alleges that he timely complied with a procedural deadline by submitting a document to prison authorities, the district court must either accept that allegation as correct or make a factual finding to the contrary upon a sufficient evidentiary showing by the opposing party."). In *United States v. Grana*, the court extended *Houston* to delay by prison officials in delivering notice of entry in criminal case to prisoner, and held that government had burden to establish date of delivery. "The prison will be the party with best and perhaps only access to the evidence needed to resolve such questions.... We therefore interpret *Houston* as placing the burden on the prison of establishing the relevant dates. This allocation of the burden of proof provides the proper motivation for prison authorities to keep clear and accurate mail logs, which are so essential to preserving appellate rights." United States v. Grana, 864 F.2d 312, 316-17 (3d Cir. 1989).

with the notice of appeal,[17] or whether it can instead be filed later.[18] Rule 4(c) does not explicitly address the question of timing, stating merely that "[t]imely filing may be shown" by means of the declaration or statement. The 1993 Committee Note ignores this timing question, but the minutes of the spring 1991 Advisory Committee meeting show that the Advisory Committee intended not to require the filing of the statement with the notice [19] The Committee's decision

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[17] In a case where the clerk received the notice of appeal after the time for filing had run out, the Eighth Circuit held that the prisoner's failure to provide proof of timely delivery when he first appealed prevented application of the prison mailbox rule:

> We perceive no good reason to allow an appellant to establish timely filing on remand (the second bite at the apple) when nothing hinders the appellant from proving timely filing when he first appeals. To permit remand for limited fact-finding by a district court when the appellant does not, in the first instance, demonstrate timely filing encourages delay and wasteful use of scarce judicial resources. We acknowledge that remand may be appropriate in the rare case in which the prisoner and the warden present conflicting proof of timeliness, or when other complicated circumstances exist.

Porchia v. Norris, 251 F.3d 1196, 1199 (8th Cir. 2001). But in a thoughtful opinion less than half a year later on behalf of a panel including two of the same judges, Judge Bye held that the statement need not always be filed at the same time as the notice of appeal. *See* Grady v. United States, 269 F.3d 913, 917 (8th Cir. 2001), discussed in the following footnote. A later Eighth Circuit decision applied *Grady*. *See* Sulik v. Taney County, Mo., 316 F.3d 813, 814 (8th Cir. 2003).

[18] Grady v. United States, 269 F.3d 913, 917 (8th Cir. 2001) ("The literal terms of the Rule do not require a prisoner to accompany his motion with proof of timely filing and proper postage. The Rule mandates only that a prisoner submit such proof. While it might be sensible to require prisoners to file their affidavits at the same time they file their motions or notices of appeal, it would be imprudent for a court to graft this new requirement onto Rule 4(c) ...."); Sulik v. Taney County, Mo., 316 F.3d 813, 814 (8th Cir. 2003) ("The prisoner is not required to attach his affidavit or statement to his notice of appeal." But if the prisoner unduly delays filing the statement, the court can give it less weight or even refuse to consider it.); United States v. Ceballos-Martinez, 371 F.3d 713, 716 n.4 (10th Cir. 2004) ("While we note that the text of the rule does not require the prisoner to file this attestation at any particular time, at the very least, the prisoner must file it before we resolve his case. If the prisoner fails to do so, we lack jurisdiction to consider his appeal. Thus, to avoid dismissal of their appeals, *we strongly encourage* all prisoners to include with their notices of appeal a declaration or notarized statement in compliance with Rule 4(c)(1).") (emphasis in original).

[19] The minutes of that meeting explain: "Judge Logan suggested omitting the requirement that a notice of appeal be accompanied by a statement concerning the date of deposit

makes sense, since the declaration or statement would be unnecessary in cases where the clerk's office notes that it has received the notice within the time for filing. Where the notice has not been timely received by the clerk's office, it seems likely that courts will require the statement or declaration described by Rule 4(c)(1), though two circuits have indicated that the statement or declaration need not be provided if the prison has a legal mailing system and the prisoner uses that system.[20]

B. 2004 Advisory Committee discussion concerning Rule 4(c)

Part II of this memo discusses the issues raised by Judge Wood. A different, though related, aspect of practice under the prison mailbox rule was brought to the Committee's attention a few years ago The following excerpt from the minutes of the Committee's spring 2004 meeting provides a summary:

> Prof. Philip A. Pucillo, Assistant Professor of Law at Ave Maria School of Law, has directed the Committee's attention to inconsistencies in the way that the "prison mailbox rule" of Rule 4(c)(1) is applied by the circuits....
>
> The circuits disagree about what should happen when a dispute arises over whether a paper was timely filed and the inmate has not filed the affidavit described in the rule. Some circuits dismiss such cases outright, holding that the appellate court lacks jurisdiction in the absence of evidence of timely filing. Other circuits remand to the district court and order the district court to take evidence on the issue of whether the filing was timely. And still other circuits essentially do their own factfinding - holding, for example, that a postmark on an envelope received by a clerk's office is sufficient evidence of timely filing. Prof. Pucillo has proposed that Rule 4(c)(1) be amended to clarify this issue.
>
> The Committee briefly discussed this suggestion at its November 2003 meeting. The Committee tabled further discussion to give Mr. Letter an

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of the notice in the institutional mailing system. He noted that if the notice is not received by the court within the time for filing, the court may require the appellant to supply such a statement. Judge Logan moved that at page two of the memorandum line 18 be amended by placing a period after 'filing', by striking the words 'and it is accompanied', and by adding in the same place 'Timely filing may be shown', and by adding at the end of the line, 'by a'. Judge Boggs seconded the motion and it carried five to two."

[20] United States v. Ceballos-Martinez, 371 F.3d 713, 717 (10th Cir. 2004) ("If a prison lacks a legal mail system, a prisoner *must* submit a declaration or notarized statement setting forth the notice's date of deposit with prison officials and attest that first-class postage was pre-paid.") (emphasis in original); Ingram v. Jones, 507 F.3d 640, 644 (7th Cir. 2007).

> opportunity to ask the U.S. Attorneys about their experience with this issue and get some sense of whether and how federal prosecutors believe that Rule 4(c)(1) should be amended.
>
> Mr. Letter reported that the U.S. Attorneys have not found that this issue is a problem. In general, when a question arises about the timeliness of a filing by a prisoner, U.S. Attorneys find it easier to respond to the prisoner's filing on the merits than to engage in litigation over timeliness. The Department does not believe that Rule 4(c)(1) needs to be amended.
>
> A member said that he did not think that the problem identified by Prof. Pucillo was serious enough to warrant amending Rule 4(c)(1). Other members agreed.

Minutes of Spring 2004 Meeting of Advisory Committee on Appellate Rules, at 33.

The question of whether the absence of the declaration or statement described in Rule 4(c)(1)'s third sentence dooms an appeal was starkly presented in a case decided just months after the Committee's spring 2004 meeting. As described by Judge Hartz in his dissent from the denial of rehearing en banc:

> The issue addressed in the panel opinion is whether Defendant satisfied the prison mailbox rule by depositing his notice of appeal with the prison mail system by September 25, 2002. It is uncontested that he did; the government does not dispute that the notice of appeal was mailed by the prison in an envelope postmarked September 24, 2002. Nevertheless . . the panel reads "may" in Federal Rule of Appellate Procedure 4(c)(1) to say "must," and dismisses Defendant's appeal because the rule required him to establish compliance with the prison mailbox rule by means of either a declaration in compliance with 28 U.S.C. § 1746 or a notarized statement.

United States v. Ceballos-Martinez, 387 F.3d 1140, 1141 (10th Cir. 2004) (Hartz, J., joined by Briscoe & Lucero, JJ., dissenting from denial of rehearing en banc).[21]

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[21] *See also* United States v. Smith, 182 F.3d 733, 734 n.1 (10th Cir. 1999) ("Although Smith is a pro se inmate purporting to have filed his notice of appeal within the prison's internal mail system on April 20, 1998, we do not apply the *Houston v. Lack* ... pro se prisoner mailbox rule because Smith's declaration of a timely filing did not, as required, 'state that first-class postage has been prepaid.' Fed. R.App. P. 4(c)(1)."). (The Smith court, however, held Smith's appeal timely based on another rationale.)

II. Issues relating to prepayment of postage

Unlike the Supreme Court rule which it resembles, Rule 4(c) has always treated the payment of postage in a different sentence than the one that states under what conditions an inmate's "notice is timely." This raises the question whether prepayment of postage is a condition of timeliness; Part II.A. considers this question.

Since the 1998 amendments, Rule 4(c)(1) has included three sentences: the first stating when an inmate's notice is timely; the second requiring use of a prison's legal mail system if one exists; and the third (which mentions prepayment of postage) stating a way in which "[t]imely filing may be shown." If an inmate falls within and complies with the second sentence, does the third sentence's reference to postage prepayment apply? Part II.B. notes that two circuits (including the Seventh) have answered this question in the negative.

Assuming that Rule 4(c) requires prepayment of postage in at least some circumstances, what are the consequences of failure to comply with that requirement? Is the failure a jurisdictional defect, and thus not subject to waiver? Or is it a violation of an inflexible claim-processing rule, which can be waived by the other party's failure to timely object? Part II.C discusses these possibilities.

A. Does the rule require prepayment of postage when the institution has no legal mail system?

As discussed in Part II.B. below, some courts have held Rule 4(c)(1)'s third sentence inapplicable to filings by inmates in institutions with legal mail systems. But when the institution has no legal mail system, the third sentence is clearly apposite, and the question is whether that sentence imposes a requirement that the inmate prepay the postage at the time he or she deposits the notice in the prison mail system.[22]

The Seventh Circuit has held that it does impose such a requirement. In *United States v. Craig*, the court dismissed an inmate's notice of appeal as untimely because

> [h]is affidavit states that he deposited the notice in the prison mail system on March 20, 2003, but not that he prepaid first-class postage. Rule 4(c)(1) requires

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[22] Part II.A. does not discuss the related but distinct question posed in the *Ceballos-Martinez* case, where the postmark showed the notice actually was mailed by the prison prior to the appeal deadline and the question was whether the inmate's *failure to submit the statement or declaration* described in the third sentence of Rule 4(c)(1) rendered the appeal untimely. Judge Hartz's critique of the outcome in *Ceballos-Martinez* is persuasive, but that issue is not the focus of Judge Wood's current suggestion to the Committee and, thus, is not treated in detail in this memo.

> the declaration to state only two things; 50% is not enough. The postage requirement is important: mail bearing a stamp gets going, but an unstamped document may linger. Perhaps that is exactly what happened: Craig may have dropped an unstamped notice of appeal into the prison mail system, and it took a while to get him to add an envelope and stamp (or to debit his prison trust account for one). The mailbox rule countenances *some* delay, but not the additional delay that is inevitable if prisoners try to save 37¢ plus the cost of an envelope.

United States v. Craig, 368 F.3d 738, 740 (7th Cir. 2004) (emphasis in original).[23]

Assuming that Rule 4(c)(1) does require prepayment of postage, the requirement should not be that *the inmate himself or herself* has prepaid the postage, but only that (to quote the Rule) the postage "has been prepaid." In particular, if the prison has a legal obligation to pay the postage for inmates' legal mail,[24] then the Rule should not be read to require prepayment *by the inmate* (as opposed to by the prison).[25]

There will, however, be times when an inmate has no funds and can assert no legal right to have the prison pay the postage.[26] If the lack of postage prevents the notice from timely

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[23] *Cf* Hodges v. Frasier, No. 97-50917, 1999 WL 155667, at *1 (5th Cir. Mar. 10, 1999) (unpublished opinion) ("Hodges failed to file timely objections to the magistrate judge's report and recommendation. The objections were timely mailed but were returned because of insufficient postage.... [T]he 'mailbox rule' does not relieve a prisoner from doing all that he can reasonably do to ensure that the clerk of court receives documents in a timely manner.... Failure to place proper postage on outgoing prison mail does not constitute compliance with this standard.").

[24] *Cf. Ingram*, 507 F.3d at 644 n.7 ("Pursuant to a 1981 consent decree, Stateville is obligated to provide appropriate envelopes and pay for postage for all legal mail of the inmates.").

[25] *See Ingram*, 507 F.3d at 645 ("The statement in Rule 4(c)(1) that 'first-class postage has been prepaid' encompasses the notion that the postage has actually been prepaid, either by the prisoner or by the institution.").

[26] Rush, one of the petitioners in *Ingram*, lacked funds to pay for postage and had not yet secured a loan from the prison at the time he deposited his notice of appeal in the prison mail system. The court, reasoning that "[a]lthough prisoners have right of access to courts, they do not have right to unlimited free postage," held that "[p]ostage was not prepaid at the time of deposit because Rush did not secure his right to an exemption for a loan from the warden." 507 F.3d at 645.

proceeding through the mail,[27] then the current Rule can be read to provide that the inmate's failure to prepay the postage precludes the inmate from showing timely filing

One might argue that this result is correct. As the *Craig* court noted, failure to prepay the postage will add to the delay created by the prison mailbox rule. And as a point of comparison, if a non-incarcerated litigant who chooses to file a notice of appeal by mail fails to prepay the requisite postage, and the notice of appeal arrives after the appeal deadline, the litigant's appeal will be time-barred[28] unless the litigant qualifies for, and convinces the district court to provide, an extension of time on the basis of excusable neglect or good cause.[29]

On the other hand, the inmate's situation is distinguishable from that of the non-incarcerated litigant in two ways: The inmate may lack ways to make money to pay for the postage, and the inmate cannot use the alternative of walking to the courthouse and filing the notice of appeal by hand. *Cf. Houston*, 487 U.S. at 271 ("Other litigants may choose to entrust

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[27] If a postmark dated on or before the deadline for taking an appeal shows that the notice timely proceeded through the mail, then the postmark itself ought to demonstrate that the inmate qualifies for the prison mailbox rule. See Part I.B. above, discussing Judge Hartz's argument to that effect in his dissent from the denial of rehearing en banc in *Ceballos-Martinez*.

[28] *See, e.g.*, 16A Federal Practice & Procedure § 3949.1 ("Deposit of the notice of appeal in the mail ordinarily is not enough if the notice is not actually received in the clerk's office within the designated time.").

[29] *Ramseur v. Beyer*, though it did not involve a failure to prepay postage, provides a possible analogy:

> Ramseur's notice of appeal was mailed on April 10th, a full six days before the 30-day time period expired. Yet it was not "filed" until April 23rd, thirteen days later. Ramseur asserts that this delay was inexplicable and thus qualifies as excusable neglect. We agree. Because his notice of appeal was filed only seven days late, granting Ramseur an extension does not raise overall fairness concerns. More importantly, the delay was not attributable to counsel's bad faith. Rather, Ramseur's notice of appeal was untimely despite counsel's diligent efforts at compliance. By mailing the notice of appeal on April 10th, Ramseur's counsel reasonably believed that it would be filed within the 30-day time period. Further, counsel, upon learning of the delay, acted expeditiously to cure it, by promptly moving for an extension under Rule 4(a)(5).

Ramseur v. Beyer, 921 F.2d 504, 506 (3d Cir. 1990). Similarly, one can imagine a situation involving the failure to prepay postage that might involve excusable neglect. For example, the litigant might affix what he or she believes to be the correct amount of first-class postage but the actual first-class rate is a few pennies higher, leading the post office to reject the mailing.

their appeals to the vagaries of the mail ... but only the pro se prisoner is forced to do so by his situation.").

B. Does the rule require prepayment of postage when the institution has a legal mail system and the inmate uses that system?

Rule 4(c)(1) mentions prepayment of first-class postage in its third sentence: "Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid." The placement of the reference to postage prepayment in the third sentence – and not elsewhere – in Rule 4(c)(1) raises the question of whether postage prepayment is required when an inmate comes within Rule 4(c)(1)'s *second* sentence by using the prison's legal mail system.

The Seventh Circuit has held that Rule 4(c)(1) does not require postage prepayment when a prisoner uses the prison's legal mail system. In such an instance, the inmate comes within Rule 4(c)(1)'s second sentence, which provides that "[i]f an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule." In *Ingram v. Jones*, 507 F.3d 640 (7th Cir. 2007), Ingram "admittedly failed to affix first-class postage" when he deposited his notice of appeal in the prison's legal mail system. *Id.* at 642. But the court held his appeal timely, reasoning that "he satisfies the second sentence of Rule 4(c)(1) and [thus] receives the benefit of the Rule, without our consideration of the third sentence." *Id.* at 644.

The Tenth Circuit has expressed a similar reading of Rule 4(c)(1):

> The Rule has the following structure. The first sentence establishes the mailbox rule itself (i.e., a notice of appeal is timely filed if given to prison officials prior to the filing deadline). The second sentence is written as a conditional statement, stating that if the prison has a legal mail system, then the prisoner must use it as the means of proving compliance with the mailbox rule. The third sentence applies to those instances where the antecedent of the second sentence is not satisfied (i.e., where there is not a legal mail system).

United States v. Ceballos-Martinez, 387 F.3d 1140, 1144 (10th Cir. 2004).

One might quibble with the *Ceballos-Martinez* court's reasoning, because the court relies in large part on its view of the "structure" of Rule 4(c)(1). A possible problem with relying on the provision's structure is that the third sentence (concerning the declaration or statement) dates from the 1993 amendments, but the second sentence (concerning the legal mail system) was added by the 1998 amendments. Thus, at least as to the period of time between the effective dates of the 1993 and 1998 amendments, the *Ceballos-Martinez* court's "structural" rationale would have been unavailable. A better explanation might be that when an inmate uses an

institution's legal mail system, the system will be designed to provide proof of the date of deposit, and thus Rule 4(c)(1)'s third sentence – which concerns how "[t]imely filing may be shown" – need not come into play since the legal mail log itself will show whether the filing was timely [30]

The *Ingram* court's approach thus seems reasonable; but it is not inevitable that all circuits will adopt this approach. Some circuits may in the future hold that even when the inmate uses the prison's legal mail system, the inmate must submit the declaration or statement showing that postage was prepaid. And even within a circuit that takes *Ingram*'s approach, an inmate might rely on that approach to his or her detriment, if the inmate is mistaken in his or her belief that the relevant prison's system qualifies as a "legal mail" system under Rule 4(c)(1). For these reasons, the Tenth Circuit provided "[a] word of caution" in a decision that post-dates *Ceballos-Martinez*:

> [A]lthough an inmate seeking to take advantage of the mailbox rule must use the prison's legal mail tracking system where one is in place, it would be unwise to rely solely on such a system. If an inmate relying on a prison legal mail system later learns that the prison's tracking system is inadequate to satisfy the mailbox rule, it would be best if an alternative notarized statement or perjury declaration establishing timely filing were already in place. Therefore, although inmates with an available legal mail system should assert in their filings that they did use that legal system, they would be wise, at least for the sake of thoroughness, to also include a notarized statement or perjury declaration attesting to the date of transmission and stating that postage has been prepaid.

Price v. Philpot, 420 F.3d 1158, 1166 (10th Cir. 2005). The *Price* court suggested that the *Ceballos-Martinez* court's view might not persist: "Although dicta in *Ceballos-Martinez* suggests that in this Circuit a notarized statement or perjury declaration is required only in the case of an inmate who does not have access to a legal mail system ... , a future case may hold otherwise." *Price*, 420 F.3d at 1166 n.7.

C. When the rule requires prepayment of postage, is that requirement jurisdictional?

If a court considers postage-prepayment a requisite to timeliness under Rule 4(c)(1), that court might conclude that prepayment of postage under the current Rule 4(c)(1) is a jurisdictional

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[30] *Cf.* United States v. Craig, 368 F.3d 738, 740 (7th Cir. 2004) (noting that use of a prison's legal mail system "provides verification of the date on which the notice was dispatched"); 1998 Committee Note to Appellate Rule 4(c) ("Some institutions have special internal mail systems for handling legal mail; such systems often record the date of deposit of mail by an inmate, the date of delivery of mail to an inmate, etc.").

requirement rather than a non-jurisdictional claim-processing rule.[31] The rulemakers, however, could alter such a result.

Prior to the Supreme Court's decisions in *Kontrick v Ryan*, 540 U.S. 443 (2004), and *Eberhart v. United States*, 546 U.S. 12 (2005) (per curiam), it could have made sense to treat a postage-prepayment requirement set by Rule 4(c)(1)[32] as a jurisdictional prerequisite.[33] After all, if one views the prepayment of postage as critical to the application of the prison mailbox rule, then one views postage prepayment as critical to timely filing of the notice of appeal. And timely filing of the notice was widely considered, prior to *Kontrick* and *Eberhart*, as a jurisdictional requirement. *See, e g , United States v Robinson*, 361 U.S 220, 229 (1960) ("[Criminal] Rule 45(b) says in plain words that '* * * the court may not enlarge * * * the period for taking an appeal.' The courts have uniformly held that the taking of an appeal within the prescribed time is mandatory and jurisdictional.").

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[31] A different possibility is that a court might apply Rule 3(a)(2)'s directive that "[a]n appellant's failure to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for the court of appeals to act as it considers appropriate, including dismissing the appeal." I do not discuss this possibility in the text, because I assume that if a court reads Rule 4(c)(1) to require prepayment of postage as a prerequisite to timely filing under the prison mailbox rule, then such a court would be likely to view prepayment of postage as part of the "timely filing of a notice" rather than as an "other" step that can be excused under Rule 3(a)(2)

[32] This discussion assumes, for purposes of argument, that Rule 4(c)(1) does require prepayment of postage.

[33] For example, the Eighth Circuit's discussion in *Porchia v Norris* suggests such a view:

> The requirements of Rule 4 are mandatory and jurisdictional, and thus we may not lightly overlook a potential timing defect.... In the ordinary case, a party desiring to proceed in federal court bears the burden of establishing the court's jurisdiction....
>
> Porchia has failed to carry his burden in this instance. Porchia has not explained whether his corrections facility has a separate legal mailing system. He has not indicated whether he used such a mailing system, if indeed the prison operates one. He did not attach an affidavit or a notarized statement setting forth the date of deposit into the prison mail system, and attesting that first-class postage has been prepaid.

Porchia v. Norris, 251 F.3d 1196, 1198 (8th Cir. 2001).

As the Committee is aware, *Kontrick* criticized the *Robinson* Court's use of the phrase "mandatory and jurisdictional." "Clarity would be facilitated," the *Kontrick* Court explained, "if courts and litigants used the label 'jurisdictional' not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority." *Kontrick*, 540 U.S. at 454-55 Then, in *Eberhart*, a unanimous Court reinterpreted *Robinson*:

> *Robinson* is correct not because the District Court lacked *subject-matter jurisdiction*, but because district courts must observe the clear limits of the Rules of Criminal Procedure when they are properly invoked.... *Robinson* has created some confusion because of its observation that "courts have uniformly held that the taking of an appeal within the prescribed time is *mandatory and jurisdictional*." ...
>
> As we recognized in *Kontrick*, courts "have more than occasionally used the term 'jurisdictional' to describe emphatic time prescriptions in rules of court." .... The resulting imprecision has obscured the central point of the *Robinson* case-that when the Government objected to a filing untimely under Rule 37, the court's duty to dismiss the appeal was mandatory. The net effect of *Robinson*, viewed through the clarifying lens of *Kontrick*, is to admonish the Government that failure to object to untimely submissions entails forfeiture of the objection, and to admonish defendants that timeliness is of the essence, since the Government is unlikely to miss timeliness defects very often.[34]

More recently still, the Court in *Bowles v. Russell*, 127 S. Ct. 2360 (2007), held that Rule 4(a)(6)'s 14-day time limit on reopening the time to take a civil appeal is mandatory and jurisdictional. The *Bowles* Court focused on the fact that the 14-day time limit is set not only in Rule 4(a)(6) but also in 28 U.S.C.§ 2107(c). The Court cited a string of cases stating that appeal time limits are "mandatory and jurisdictional,"[35] as well as a couple of 19th-century cases viewing statutory appeal time limits as jurisdictional.[36] The majority acknowledged that a number of the cases that characterized appeal time limits as "mandatory and jurisdictional" had relied on *United States v Robinson*, and that it had in recent decisions "questioned *Robinson*'s use of the term 'jurisdictional'"; but the majority maintained that even those recent cases "noted

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[34] *Eberhart*, 546 U.S. at 17-18.

[35] *Bowles*, 127 S. Ct. at 2363-64 (citing *Griggs v. Provident Consumer Disc Co* , 459 U.S. 56, 61 (1982) (per curiam); *Hohn v. United States*, 524 U.S. 236, 247 (1998); *Torres v Oakland Scavenger Co.*, 487 U.S. 312, 314-315 (1988); and *Browder v Director, Dep't of Corrs.*, 434 U.S. 257, 264 (1978)).

[36] *Bowles*, 127 S. Ct. at 2364 (citing *Scarborough v. Pargoud*, 108 U.S. 567, 568 (1883), and *United States v. Curry*, 6 How. 106, 113 (1848)).

the jurisdictional significance of the fact that a time limit is set forth in a statute," and it stated that "[r]egardless of this Court's past careless use of terminology, it is indisputable that time limits for filing a notice of appeal have been treated as jurisdictional in American law for well over a century."[37] The majority thus concluded that "[j]urisdictional treatment of statutory time limits makes good sense... Because Congress decides whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them."[38]

It makes sense for the Committee to consider *Bowles*'s implications for the prison mailbox rule. An initial question might be whether the rulemakers have authority to adopt a rule like Rule 4(c)(1) if – as *Bowles* holds – statutory appeal time limits are jurisdictional. Fortunately, that question has already been answered by the Court's reasoning in *Houston*. Although *Houston* was decided well prior to the *Bowles* decision, the *Houston* Court addressed and rejected the argument that the statutory nature of the Section 2107 civil appeal deadline deprived the Court of authority to adopt a "prison mailbox" rule:

> Respondent stresses that a petition for habeas corpus is a civil action ... and that the timing of the appeal here is thus ... subject to the statutory deadline set out in 28 U.S.C. § 2107. But, as relevant here, § 2107 merely provides:
>
> "[N]o appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree."
>
> The statute thus does not define when a notice of appeal has been "filed" or designate the person with whom it must be filed, and nothing in the statute suggests that, in the unique circumstances of a *pro se* prisoner, it would be inappropriate to conclude that a notice of appeal is "filed" within the meaning of § 2107 at the moment it is delivered to prison officials for forwarding to the clerk of the district court.

Houston, 487 U.S. at 272.

Houston of course concerned the adoption of a judicially-crafted prison mailbox rule, but its reasoning also supports the conclusion that the rulemakers possess authority to adopt such a rule: Section 2107 sets a time limit for filing, but does not define when filing occurs or with whom the notice of appeal must be filed. Thus, the longstanding view that the rulemakers lack

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[37] *See Bowles*, 127 S. Ct. at 2364 & n.2 (discussing *United States v. Robinson*, 361 U.S. 220, 229 (1960); *Kontrick v. Ryan*, 540 U.S. 443 (2004); and *Eberhart v. United States*, 546 U.S. 12 (2005) (per curiam)).

[38] *Bowles*, 127 S. Ct. at 2365.

authority to alter the courts' subject matter jurisdiction (absent a specific statutory delegation of authority for that purpose) poses no obstacle to the adoption of a prison mailbox rule such as Rule 4(c)(1).

Having concluded that Rule 4(c)(1) is valid, it remains for us to ask whether that Rule's requirements are jurisdictional. A number of courts have held, post-*Bowles*, that appeal-time requirements set only by Rule and not by statute are not jurisdictional.[39] A Rule 4(c)(1) postage-prepayment requirement could thus be regarded as a claim-processing rule rather than a jurisdictional requirement. But it is not clear that courts will uniformly adopt the view that all non-statutory, rule-based requirements are for that reason non-jurisdictional.

Some courts have reasoned that when Rule 4 fills in details concerning the nature of the appeal-time deadline in Section 2107, those gap-filling provisions in Rule 4 themselves take on jurisdictional status. Thus, although Rule 4(a)(4)'s tolling provisions are absent from Section 2107, the Ninth Circuit has held that the time limits incorporated by Rule 4(a)(4)(A)'s reference to "timely" tolling motions must be jurisdictional (if Rule 4(a)(4)(A) is actually to be effective in tolling Section 2107's jurisdictional appeal time limits):

> *Bowles* does not specifically discuss Fed. R.App. P. 4(a)(4), the tolling provision relevant here. The government argues that "Rule 4(a) does not incorporate a statutory time limit in its provision of tolling for Rule 59(e) or Rule 60 motions" and therefore that any failure to comply with the rule should be immunized against belated attack. However, although Fed. R.App. P. 4(a)(4) does not contain language from 28 U.S.C. § 2107, which lacks a tolling provision, the Supreme Court's decision in *Bowles* suggests that the same characterization applies: "Today we make clear that the timely filing of a notice of appeal in a civil case is a jurisdictional requirement." *Id.*
>
> And even if *Bowles* did not settle the matter with respect to Fed. R.App. P. 4(a)(4), we could not consider the underlying order granting the Rule 41(g) motion. In order to accept the government's argument, we would have to grant the jurisdictional benefit of tolling while denying the tolling rule's jurisdictional significance. We cannot defeat logic or text in this manner. If Fed. R.App. P. 4(a)(4) is jurisdictional, the government's motion does not qualify for tolling because it was filed outside the time frame specified in that rule. *See* Fed. R.App. P. 4(a)(4)(iv), (vi) (permitting tolling for such motions only if they are filed within 10 days of entry of judgment). If Fed. R.App. P. 4(a)(4) is *non* jurisdictional,

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[39] Examples are the defendant's deadline for taking a criminal appeal under Rule 4(b)(1)(A), *see United States v. Martinez*, 496 F.3d 387, 388 (5th Cir. 2007); *United States v Garduno*, 506 F.3d 1287, 1290-91 (10th Cir. 2007), and Rule 4(b)(4)'s authorization of extensions of criminal appeal time for excusable neglect of good cause, *see Garduno*, 506 F.3d at 1290-91.

> satisfaction of that provision (or forfeiture of a claim that the government failed to satisfy it) would not enable us to ignore the jurisdictional 60-day rule of Fed. R.App. P. 4(a)(1). *See Bowles*, 127 S.Ct at ----, Slip Op. at 8. Under either interpretation of Fed. R.App. P. 4(a)(4), the government's notice of appeal was untimely as to Judge Cooper's underlying order granting the Rule 41(g) motion and must be dismissed for lack of jurisdiction.

United States v Comprehensive Drug Testing, Inc., 513 F 3d 1085, 1100-01 (9th Cir. 2008) (emphasis in original) (footnotes omitted).[40]

Likewise, though the 150-day cap set by Civil Rule 58 and Appellate Rule 4(a)(7)(A)(ii) – for instances when a separate document is required but never provided – does not appear in Section 2107,[41] the Ninth Circuit has reasoned that the cap is jurisdictional:

> 28 U.S.C. § 2107(a) and Federal Rule of Appellate Procedure 4(a)(1) require that a notice of appeal be filed in a civil case "within 30 days after the judgment or order appealed from is entered." Fed. R.App. P. 4(a)(1)(A). Because the district court did not enter judgment on the order to compel arbitration, CCI had 180 days to appeal the order. *See* Fed. R App. P. 4(a)(7)(A)(ii); *see also Bowles v. Russell*, --- U.S. ----, 127 S.Ct. 2360, 2363, 168 L.Ed 2d 96 (2007) (stating that "the taking of an appeal within the prescribed time is mandatory and jurisdictional" (internal quotation marks omitted)).
>
> CCI filed its first notice of appeal of the district court's order compelling arbitration on May 16, 2005, 287 days after the order was entered on August 2, 2004. This is well beyond the 180 days allowed by Federal Rule of Appellate Procedure 4(a)(7)(A)(ii). CCI's appeal of the district court's order compelling arbitration is untimely, and we lack jurisdiction to hear the appeal of that issue.

Comedy Club, Inc v. Improv West Associates, 514 F.3d 833, 841-42 (9th Cir. 2007) (as amended Jan. 23, 2008).

It is thus possible that a court which reads Rule 4(c)(1) to set prepayment of postage as a prerequisite to a timely appeal could conclude, post-*Bowles*, that the postage-prepayment requirement is jurisdictional (at least with respect to civil appeals). That conclusion is not

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[40] By contrast, the Sixth Circuit panel majority in *National Ecological Foundation v. Alexander*, 496 F.3d 466, 476 (6th Cir. 2007), held that "where a party forfeits an objection to the untimeliness of a Rule 59(e) motion, that forfeiture makes the motion 'timely' for the purpose of Rule 4(a)(4)(A)(iv)."

[41] Section 2107 simply sets an appeal deadline of "thirty days after the entry of" the relevant judgment, order or decree; it does not define "entry."

inevitable, however; some courts might instead reason that a requirement set only in Rule 4(c) and not in any statute is not, under *Bowles*, jurisdictional. In any event, because Rule 4(c) constitutes permissible gap-filling by the rulemakers, the rulemakers have authority to alter Rule 4(c)'s requirements. Thus, it would be possible to amend Rule 4(c) to provide that failure to prepay postage is not always fatal to timeliness. For example, the rule might be amended to excuse failure to prepay postage if the inmate has no money with which to pay the postage and no right to require the prison to pay it.

III. Conclusion

Published opinions intepreting Rule 4(c)(1) are relatively rare, most decisions applying the prison mailbox rule are unpublished and nonprecedential. But the caselaw discussed in this memo suggests that courts may disagree about whether Rule 4(c)(1) always requires prepayment of postage as a condition of timely filing under the prison mailbox rule, and, if so, whether that requirement is jurisdictional. A lack of clarity on such matters is undesirable, since failure to comply with a jurisdictional requirement is fatal to an appeal, and even a non-jurisdictional requirement can doom an appeal when an objection is properly raised. If the Committee feels that an amendment to Rule 4(c)(1) is desirable, *Bowles* would appear to pose no barrier to further rulemaking concerning the contours of the prison mailbox rule.

Encls.

MEMORANDUM

DATE: October 20, 2008

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 07-AP-I

At the Committee's April 2008 meeting, members discussed Judge Diane Wood's suggestion that the Committee act to clarify ambiguities in Rule 4(c)'s inmate mailbox rule concerning the prepayment of postage. Relevant questions include whether Rule 4(c)(1) requires prepayment of postage when the institution in question has no legal mail system; whether the answer changes when the institution has a legal mail system and the inmate uses it; and whether, when the Rule requires prepayment of postage, that requirement is jurisdictional. The current rule could be read to require postage prepayment when the institution has no legal mail system. On the other hand, it may be the case that when the institution has a legal mail system and the inmate uses that system, prepayment of postage is not required. Under *Bowles v. Russell*, 127 S. Ct. 2360 (2007), it is possible – though certainly not inevitable – that a court might consider Rule 4(c)(1)'s requirements to be jurisdictional, at least in civil appeals. But 28 U.S.C. § 2107 does not define the filing of a notice of appeal or say with whom it must be filed – and thus the rulemakers' authority to adjust the details of Rule 4(c)(1)'s requirements continues to be clear even after *Bowles*.

During the April 2008 discussion of these questions, it was noted that provisions concerning the timeliness of an appeal should not be ambiguous – especially not when the provisions in question deal with appeals by inmates. Participants in the discussions raised a number of factual questions about institutions' policies concerning legal mail; Part I of this memo sketches answers to some of those questions. Part II briefly considers the extent to which indigent inmates may have a constitutional right to some amount of free postage for legal mail.

I. Institutional policy concerning legal mail

Litigants who might be affected by Rule 4(c)'s inmate-filing provision include inmates in federal and state prisons, pretrial detainees, incarcerated aliens, and inmates in mental

institutions. So far, I have obtained information concerning federal prison policy[1] and the policies that apply in some state and local facilities.

A. Federal prison policy

Federal Bureau of Prisons regulations provide:

> (a) Except as provided in paragraphs (d), (e), (f), and (i) of this section, postage charges are the responsibility of the inmate. The Warden shall ensure that the inmate commissary has postage stamps available for purchase by inmates
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> . . .
>
> (c) Inmate organizations will purchase their own postage.
>
> (d) An inmate who has neither funds nor sufficient postage and who wishes to mail legal mail (includes courts and attorneys) or Administrative Remedy forms will be provided the postage stamps for such mailing. To prevent abuses of this provision, the Warden may impose restrictions on the free legal and administrative remedy mailings.
>
> . . .
>
> (i) Holdovers and pre-trial commitments will be provided a reasonable number of stamps for the mailing of letters at government expense.

28 C.F.R. § 540.21.

From the definitional provisions in this Chapter of the C.F.R., it appears that Section 540.21 applies to all federal penal or correctional institutions[2] and that it governs correspondence by convicted prisoners and detainees of various kinds.[3]

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[1] By the time of the November meeting, I also expect to have information concerning federal policy with respect to alien detainees.

[2] Section 500.1(a) defines the Warden to include, inter alios, "the chief executive officer of a U.S. Penitentiary, Federal Correctional Institution, Medical Center for Federal Prisoners, Federal Prison Camp, Federal Detention Center, Metropolitan Correctional Center, or any federal penal or correctional institution or facility." 28 C.F.R. § 500.1.

[3] Section 500.1(c) provides: "Inmate means all persons in the custody of the Federal Bureau of Prisons or Bureau contract facilities, including persons charged with or convicted of

B. State and local facilities

It was not practicable for me to locate and analyze all the legal provisions governing prisoner mail in state and local facilities throughout the U.S. However, the following are some examples of state and local policies.

Some entities' regulations appear to require that postage be affixed to outgoing mail.[4] Some facilities will periodically provide a set amount of free postage.[5] Other facilities are directed to supply a "reasonable" amount of free postage for legal mail;[6] sometimes such

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offenses against the United States; D.C. Code felony offenders; and persons held as witnesses, detainees, or otherwise." 28 C.F.R. § 500.1(c).

[4] See, e.g., Oregon Admin. R. 291-131-0020(2) ("Outgoing mail, except business mail to department officials in Central Administration sent through the intra-departmental mail system, shall be enclosed in an approved DOC envelope with U.S. postage.").

[5] See, e.g., Wash. Admin. Code 137-48-060(3) ("Indigent inmates shall be authorized to receive postage up to the equivalent to the mailing cost of ten standard first class letters per week. This indigent postage provision shall cover both legal and/or regular letters."); Policies of Lawrence County Jail, South Dakota, available at http://www.lawrence.sd.us/Sheriff/so_corrections.htm (last visited Sept. 14, 2008) ("The jail will provide 1 stamp a day for any out going mail."); Policies of Stearns County Jail, Minnesota, available at http://www.co.stearns.mn.us/3782.htm#mail (last visited Sept. 14, 2008) ("Upon request, indigent inmates may receive three prepaid postcards per week.).

[6] See, e.g., La. Admin Code. tit. 22, pt. I, § 765(E)(5)(b) ("Indigent youth shall have access to the postage necessary to send out approved legal mail on a reasonable basis and the basic supplies necessary to prepare legal documents."); 20 Ill. Admin. Code 525.130(a) ("Offenders with insufficient money in their trust fund accounts to purchase postage shall be permitted to send reasonable amounts of legal mail and mail to clerks of any court or the Illinois Court of Claims, to certified court reporters, to the Administrative Review Board, and to the Prisoner Review Board at State expense if they attach signed money vouchers authorizing deductions of future funds to cover the cost of the postage. The offender's trust fund account shall be restricted for the cost of such postage until paid or the offender is released or discharged, whichever is soonest."); Michigan Admin. Code R. 791.6603(2) ("A prisoner determined to be indigent by department policy shall be loaned a reasonable amount of postage each month, not to exceed the equivalent of 10 first-class mail stamps for letters within the United States of 1 ounce or less. Additional postage shall be loaned to prisoners as necessary to post mail to courts, attorneys, and parties to a lawsuit that is required for pending litigation.").

"reasonable" amounts are subject to upper limits.[7] Florida provides free postage to indigent inmates for legal mail.[8] Some states recoup the cost of free postage from the inmate when funds are available in the inmate's prison account [9] Wisconsin provides inmates with a revolving $200

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[7] The Kansas provision, for example, provides:

> (2) Indigent inmates, as defined by the internal management policies and procedures of the department of corrections, shall receive reasonable amounts of free writing paper, envelopes, and postage for first-class domestic mail weighing one ounce or less, not to exceed four letters per month.
>
> (3) All postage for legal and official mail shall be paid by the inmate, unless the inmate is indigent, as defined by the internal management policies and procedures of the department of corrections. The cost of postage for legal or official mail paid by the facility on behalf of an indigent inmate shall be deducted from the inmate's funds, if available. Credit for postage for legal and official mail shall be extended to indigent inmates under the terms and conditions of the internal management policies and procedures of the department of corrections....

Kansas Admin. Regs. 44-12-601(f).

[8] The Florida provision states:

> The institution shall furnish postage for mail to courts and attorneys and for pleadings to be served upon each of the parties to a lawsuit for those inmates who have insufficient funds to cover the cost of mailing the documents at the time the mail is submitted to the mailroom, but not to exceed payment for the original and two copies except when additional copies are legally required. The inmate shall be responsible for proving that copies in addition to the routine maximum are legally necessary. Submission of unstamped legal mail to the mailroom or mail collection representative by an inmate without sufficient funds shall be deemed to constitute the inmate's request for the institution to provide postage and place a lien on the inmate's account to recover the postage costs when the inmate receives funds.

33 Fla. Admin. Code. Ann. R. 33-210.102(10)(a).

[9] See, e.g., Wash. Admin. Code 137-48-060(4) ("The department shall recoup any expenditures made by the institution for postage due on incoming mail and/or indigent postage for letters, (as identified in subsection (3) of this section) may be recouped by the institution whenever such indigent inmate has ten dollars or more of disposable income in his/her trust fund account."); 33 Fla. Admin. Code. Ann. R. 33-210.102(10)(b) ("At the time that postage is provided to an inmate for this purpose, the Bureau of Finance and Accounting, Inmate Trust Fund Section, shall place a hold on the inmate's account for the cost of the postage. The cost of

loan to defray the cost of paper, copies and postage for legal mail, the superintendent can raise the $200 limit in cases of "extraordinary need."[10] There are some indications in the caselaw that some institutions, at some points in time, have had policies that did not provide free postage for indigent inmates.[11]

II. Constitutional requirements concerning access to courts

Though the overview in Part I is not complete, the data suggest that it may be a common practice to provide indigent inmates with some amount of free postage for legal mail, but also that such free postage is often subject to quite strict limits. Both of these observations seem

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providing the postage shall be collected from any existing balance in the inmate's trust fund account. If the account balance is insufficient to cover the cost, the account shall be reduced to zero. If costs remain unpaid, a hold will be placed on the inmate's account, subject to priorities of other liens, and all subsequent deposits to the account will be applied against the unpaid costs until the debt has been paid."); 20 Ill. Admin. Code 525.130(a); Kansas Admin. Regs. 44-12-601(f)(3).

[10] Wisconsin Administrative Code § DOC 309.51(1) provides in part:

> Correspondence to courts, attorneys, parties in litigation, the inmate complaint review system under ch. DOC 310 or the parole board may not be denied due to lack of funds, except as limited in this subsection. Inmates without sufficient funds in their general account to pay for paper, photocopy work, or postage may receive a loan from the institution where they reside. No inmate may receive more than $200 annually under this subsection, except that any amount of the debt the inmate repays during the year may be advanced to the inmate again without counting against the $200 loan limit. The $200 loan limit may be exceeded with the superintendent's approval if the inmate demonstrates an extraordinary need, such as a court order requiring submission of specified documents. The institution shall charge any amount advanced under this subsection to the inmate's general account for future repayment....

The Seventh Circuit has held that a Wisconsin inmate who had used up his $200 loan balance and who had sought but not yet received permission to borrow more than the $200 limit did not meet what the court viewed as Rule 4(c)(1)'s requirement that postage be prepaid at the time the notice of appeal is deposited in the prison mail system. Ingram v. Jones, 507 F.3d 640, 645 (7th Cir. 2007).

[11] See, e.g., Smith v. Erickson, 884 F.2d 1108, 1111 (8th Cir. 1989) (reversing dismissal of challenge to Minnesota state prison policy based on conclusion that "the district court erred in dismissing Smith's claim that the no-postage policy was facially unconstitutional").

consistent with my quick survey of relevant federal constitutional doctrine. As discussed below, there is support in the caselaw for the proposition that the Constitution requires the government to provide indigent inmates with some amount of free postage for legal mail – but the caselaw also indicates that the constitutionally required amount of free postage may not be very much.

"[P]risoners have a constitutional right of access to the courts." *Bounds v Smith*, 430 U.S. 817, 821 (1977). The *Bounds* Court stated: "It is indisputable that indigent inmates must be provided at state expense with paper and pen to draft legal documents[,] with notarial services to authenticate them, and with stamps to mail them." *Bounds*, 430 U.S. at 824-25.[12] The Court continued: "This is not to say that economic factors may not be considered, for example, in choosing the methods used to provide meaningful access. But the cost of protecting a constitutional right cannot justify its total denial " *Id.* at 825.

More recently, the Court has defined its ruling in *Bounds* narrowly by requiring "that an inmate alleging a violation of *Bounds* must show actual injury." *Lewis v Casey*, 518 U.S. 343, 349 (1996). As the *Lewis* Court explained: "Because *Bounds* did not create an abstract, freestanding right to a law library or legal assistance, an inmate cannot establish relevant actual injury simply by establishing that his prison's law library or legal assistance program is subpar in some theoretical sense." Instead, the inmate must show how the defect in the prison's program impeded the inmate's access to the courts: "He might show, for example, that a complaint he prepared was dismissed for failure to satisfy some technical requirement which, because of deficiencies in the prison's legal assistance facilities, he could not have known. Or that he had suffered arguably actionable harm that he wished to bring before the courts, but was so stymied by inadequacies of the law library that he was unable even to file a complaint." *Lewis*, 518 U.S. at 351. Moreover, the *Lewis* Court stated that not all types of inmate claims trigger rights of access under *Bounds*: "*Bounds* does not guarantee inmates the wherewithal to transform themselves into litigating engines capable of filing everything from shareholder derivative actions to slip-and-fall claims. The tools it requires to be provided are those that the inmates need in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement. Impairment of any *other* litigating capacity is simply one of the incidental (and perfectly constitutional) consequences of conviction and incarceration." *Lewis*, 518 U S. at 355.

Citing *Lewis v. Casey*, courts have upheld limitations on indigent inmates' ability to proceed in forma pauperis. *See, e.g., Lewis v. Sullivan*, 279 F.3d 526 (7th Cir. 2002) (upholding

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[12] This memo focuses principally on institutional policies concerning the provision of postage to an inmate who has been determined to be indigent. It should be noted that an additional issue concerns the institution's policies for determining who counts as indigent. For example, in his dissent from the affirmance of the dismissal of a complaint raising an access-to-court claim, Judge Murnaghan questioned the reasonableness of a policy that determined inmates' indigency at monthly intervals based on the funds in the inmate's account on the 15th of each month. See White v. White, 886 F.2d 721, 728 (4th Cir. 1989) (Murnaghan, J., dissenting).

the three-strikes provision in the Prison Litigation Reform Act).[13] Litigation over i.f p. status often concerns such questions as whether the litigant will be permitted to proceed without prepaying (or giving security for) fees or costs. One might argue that an inmate's need for assistance in paying postage is qualitatively different from an inmate's need for assistance in paying a filing fee, because the inmate's incarceration *requires* the inmate to file by mail rather than in person (assuming that the option of electronic filing is not available) – and thus the need for postage might be seen to stem from the fact of incarceration. *Cf Lewis v. Sullivan*, 279 F.3d at 530 ("Prisons curtail rights of self-help (and for that matter means of earning income) and have on that account some affirmative duties of protection. ... This is why the right of access to the courts entails some opportunity to do legal research in a prison library (or something equally good); the prison won't let its charges out to use other libraries, so it must make substitute provision, though not necessarily to the prisoner's liking.")

The caselaw varies by circuit and generalizations are tricky because the discussions can be fact-specific. However, it seems fair to say that while a number of courts have recognized (or presupposed) a federal constitutional right to some amount of free postage for an indigent inmate's legal mail, the constitutionally required amount can be relatively small. Cases applying right-of-access principles to prison postage policies include the following (sorted by circuit):

- *Gittens v. Sullivan*, 848 F.2d 389, 390 (2d Cir. 1988) (New York state prison system) (holding that pro se prisoner "was not denied meaningful access to the courts" where the prison "not only provided Gittens with $1.10 per week for stamps, but also provided him with an additional advance of at least $36 for postage for legal mail").
    - Compare *Chandler v Coughlin*, 763 F.2d 110, 115 (2d Cir. 1985): Court of appeals reversed dismissal of complaint challenging New York state regulation providing that "an inmate may send five one-ounce letters per week at state expense but may not accumulate credit for unused postage or send one five-ounce document in a week in which he mails nothing else" and barring the provision of free postage for any legal brief.
    - Apparently, the relevant regulation was revised in response to *Chandler*. The application of the revised version was upheld in *Gittens*, and was then upheld on remand in *Chandler*. *See Chandler v. Coughlin*, 733 F.Supp. 641, 647 (S.D.N.Y. 1990).

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[13] The PLRA's three-strikes provision is contained in 28 U.S.C. § 1915(g), which states: "In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury."

- *Bell-Bey v Williams*, 87 F 3d 832, 839 (6th Cir. 1996) (Michigan state prison system) ("MDOC has fulfilled its affirmative duty to provide indigent prisoners access to the courts. By allotting ten stamps per month, a prisoner may send ten sealed letters without being subject to inspection If a postage loan is needed for a current suit, a prisoner may either submit proof that the mail pertains to pending litigation, or he may wait until the next month's allotment of postage.").

- *Gaines v Lane*, 790 F.2d 1299, 1308 (7th Cir 1986) (assessing prior version of relevant provision concerning Illinois state prison): "The regulations set forth a minimum number of privileged or non-privileged letters which may be sent at state expense. This provision is supplemented by a 'safety valve' provision which permits the additional expenditure of state funds for legal mail when such an expenditure is reasonable. We cannot say that, on its face, this regulation amounts to an unconstitutional impediment on an inmate's access to courts.... Should prison officials abuse these regulations by interpreting them in such a way as to block a prisoner's legitimate access to the courts, the prisoner is not without remedy "

- *Smith v. Erickson*, 884 F.2d 1108, 1111 (8th Cir. 1989) (reversing dismissal of challenge to Minnesota state prison policy based on conclusion that "the district court erred in dismissing Smith's claim that the no-postage policy was facially unconstitutional").

    - *See also Hershberger v. Scaletta*, 33 F.3d 955, 956 (8th Cir. 1994) (Iowa Men's Reformatory): The court of appeals affirmed a judgment which "enjoined the practice of imposing a 50 cent per month service charge on negative balances resulting from purchases of legal postage; enjoined the practice, as currently implemented, of requiring inmates with negative balances over $7.50 to show 'exceptional need;' and ordered the reformatory to provide indigent inmates with at least one free stamp and envelope per week for purposes of legal mail."

    - *Compare Blaise v Fenn*, 48 F.3d 337, 338 (8th Cir. 1995) (Iowa State Penitentiary): Court of appeals affirmed the dismissal of a claim challenging Iowa state policy of providing "a monthly allowance of $7.70 to all inmates regardless of their disciplinary status. Inmates may use this income in any way they wish, including to pay postage for legal mail. Under ISP regulations, if an inmate has no funds, he may charge up to $3.50 in legal expenses to his account as an 'advance' on the next month's pay or allowance.... If an inmate needs further funds for legal expenses, he can obtain approval for debt over $3.50 from the deputy warden with a showing of 'exceptional need.'"

- *King v Atiyeh*, 814 F.2d 565, 568 (9th Cir. 1987): Court of appeals reversed the dismissal of a claim challenging "the policy of the Oregon State Hospital limiting indigent patients to three stamps per week." Liberally construed, plaintiffs' allegation that they "have often found it necessary to communicate with the courts more than three (3) times per

week and often the pleadings need more than twenty (20) cents postage" sufficed to state a claim.

- *Twyman v Crisp*, 584 F 2d 352, 358 (10th Cir. 1978) (Oklahoma state prison): Court of appeals affirmed dismissal of complaint challenging prison's policy that "an inmate must have less than $5.00 in his inmate account to qualify for free postage. He then receives postage for a maximum of two letters per week (eight per month), legal or otherwise. Only if a prisoner has zero in his trust fund will stamps for legal mail (no other type) be provided in excess of the eight."

- *Hoppins v. Wallace*, 751 F.2d 1161, 1162 (11th Cir 1985) (Alabama state prison system) ("[T]he furnishing of two free stamps a week to indigent prisoners is (1) adequate to allow exercise of the right to access to the courts, and (2) adequate to allow a reasonable inmate to conduct reasonable litigation in any court.").

III. Conclusion

The research summarized above provides the basis for two preliminary observations. First, a number of institutions provide a limited amount of postage assistance to indigent inmates who wish to send legal mail. Second, there is some support in the caselaw for the proposition that the Constitution requires some minimal level of assistance for inmates who cannot afford to pay the postage for their legal mail.

However, these observations are necessarily tentative and incomplete. To understand the likely effect of various possible approaches to the inmate-filing provisions in Rule 4(c), it may be useful to engage in further research, for example by contacting organizations which may be able to shed light on the practices of a broader range of state and local prisons and mental institutions around the country.

TAB 6D

MEMORANDUM

DATE: March 27, 2009

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item Nos. 08-AP-D, 08-AP-E, and 08-AP-F

The Appellate Rules Committee has been discussing a number of items that are also of interest to the Civil Rules Committee. The two Committees are moving forward with joint efforts on these items. This memo discusses one such cluster of issues, concerning tolling motions; another memo, on Item No. 08-AP-H, discusses the other set of issues (which relates to "manufactured finality").

The tolling-motion items arise from comments[1] submitted on the amendment to Appellate Rule 4(a)(4)(B)(ii).[2] One comment, from Peder Batalden, points out that under Rule 4(a)(4)(B) the time to appeal from an amended *judgment* runs from the entry of the *order* disposing of the last remaining tolling motion. In some scenarios, Mr. Batalden suggests, the judgment might not be issued and entered until well after the entry of the order. Mr. Batalden suggests that Rule 4(a)(4)(B)(ii) be amended by deleting "or a judgment altered or amended upon such a motion." The other two comments are from Public Citizen Litigation Group ("Public Citizen") and the Seventh Circuit Bar Association Rules and Practice Committee (the "Bar Association"); these two commenters suggest that Rule 4(a) be amended so that the initial notice of appeal in a civil case encompasses appeals from any subsequent order disposing of a postjudgment motion. (Such an approach would parallel that taken in Rule 4(b)(3)(C) for notices of appeal in *criminal* cases.)

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[1] The full text of the comments is available at http://www.uscourts.gov/rules/2007_Appellate_Rules_Comments_Chart.html.

[2] That amendment has been approved by the Supreme Court and will take effect, absent contrary action by Congress, on December 1, 2009. Rule 4(a)(4)(B)(ii) would then read:

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a ~~judgment altered or amended~~ judgment's alteration or amendment upon such a motion, must file a notice of appeal, or an amended notice of appeal — in compliance with Rule 3(c) — within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

Part I of this memo summarizes research[3] and discussions to date concerning Mr. Batalden's suggestion. Part II does the same with respect to the suggestions by Public Citizen and the Bar Association. The memo incorporates insights from Judge Kravitz and Professor Cooper as well as from the Appellate Rules Committee's fall 2008 discussions.

I. The potential time lag between the order and the amended judgment

Mr. Batalden's insight is an astute one: there may indeed be some instances when more than 30 days elapses between the entry of an order disposing of a postjudgment motion and the entry of any amended judgment pursuant to that order. A possible way to fix the problem would be to amend Civil Rule 58 to follow the approach taken by the Seventh Circuit, which has read Civil Rule 58(a)'s reference to orders "disposing of" tolling motions to mean orders *denying* postjudgment motions. *See Kunz v. DeFelice*, 538 F.3d 667, 673 (7th Cir. 2008).

One situation in which Mr. Batalden's concern may arise involves remittitur.[4] Suppose that the district court conditionally grants a new trial unless the plaintiff agrees to accept a reduced award within 40 days from the date of entry of the court's order. Suppose further that as of Day 30 the plaintiff has not decided whether to accept the reduced award. If the plaintiff decides not to accept the reduced award, the case is headed to a new trial; thus, until the plaintiff makes a decision on this issue (or the 40-day time period runs out) there would seem to be no final judgment. In this scenario, the defendant's options appear to be:

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[3] A longer treatment of some points discussed in this memo can be found in the agenda materials for the Appellate Rules Committee's fall 2008 meeting, which are available at http://www.uscourts.gov/rules/Agenda%20Books/Appellate/AP2008-11.pdf.

[4] Another such situation might occur in a case involving a request for complex injunctive relief. Suppose that the district court enters a judgment that includes an injunction. Suppose further that, in response to a timely tolling motion, the district court enters an order which (1) grants the motion and (2) directs the parties to attempt to agree on a proposed amended judgment embodying a less extensive grant of injunctive relief. And further suppose that it takes the parties longer than 30 days after the entry of the order to agree on the wording of the proposed amended judgment. This scenario, however, seems likely to be relatively rare. When the court grants injunctive relief, Civil Rule 58(b)(2)'s directive that "the court must promptly approve the form of the judgment, which the clerk must promptly enter" will apply. And a background principle – reflected in Civil Rule 58 until 2002 – has been that attorney submission of a suggested form of judgment should occur only in rare cases. Moreover, a persuasive argument can be made that in such a situation there is no final and appealable judgment until the parties have submitted, and the court has approved, the wording of the proposed amended judgment. *See, e.g*, *Goff v Nix*, 113 F.3d 887, 889-90 (8th Cir. 1997); *Bradley v. Milliken*, 468 F.2d 902, 902-03 (6th Cir. 1972).

(1) file the notice of appeal by Day 30, and then either withdraw the notice of appeal (if the plaintiff rejects the reduced award) or amend the notice of appeal (if the plaintiff accepts the reduced award and the judgment is amended to reflect the reduced award);

(2) point out the timing problem to the district court and seek an extension of time to file the notice of appeal under Rule 4(a)(5); or

(3) wait to file the notice of appeal until the judgment has become final by virtue of the plaintiff's acceptance of the reduced award.

The risks and benefits of Option 3 depend in part on whether a separate document is required for the order "disposing of" – in this instance, conditionally granting – the new trial motion. If a separate document is required and has not been provided, then the litigant can select Option (3) without concern, because the time to take an appeal from the order has not yet commenced to run. However, if a separate document is not required, Option (3) seems riskier. Granted, even if a separate document is not required a strong argument can be made that choosing Option (3) results in a timely notice: It would make little sense to penalize a litigant for waiting to appeal until there exists an appealable final judgment. But Rule 4(a)(4)(B)(ii) might be read to require a contrary result: "A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment altered or amended upon such a motion, must file a notice of appeal, or an amended notice of appeal--in compliance with Rule 3(c)--within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion."

During the fall 2008 Appellate Rules Committee meeting, one attorney member noted that he had seen this situation arise in his practice. And a judge member noted that even if problems in this area turn out to be rare overall, such problems are very serious when they do arise. However, it is questionable whether Mr. Batalden's proposed amendment would solve the problem. Under Mr. Batalden's proposal, Rule 4(a)(4)(B)(ii) would be amended to read: "A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A)~~, or a judgment altered or amended upon such a motion,~~ must file a notice of appeal, or an amended notice of appeal--in compliance with Rule 3(c)--within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion." This change would remove the requirement that the notice of appeal challenging the judgment's alteration or amendment be filed within 30 days from entry of the order disposing of the motion. But in the scenario described above, this change would not remove the incongruity concerning the timing of a notice of appeal challenging the order itself; Rule 4(a)(4)(B)(ii) would still purport to direct that such a notice of appeal be filed within 30 days after entry of the order, even if there is not yet a final and appealable judgment on that 30th day. Moreover, the proposed change might be undesirable in that it would remove from the Rule text which currently serves to remind would-be appellants of the need to file a notice of appeal that encompasses the amendment or alteration of the judgment (if the appellant wishes to challenge that alteration or amendment).

Discussions with Judge Kravitz and Professor Cooper have identified an alternative possibility. If Civil Rule 58 were amended to expressly require a separate document for orders *granting* tolling motions, then the difficulty described above would be very unlikely to arise.[5] Civil Rule 58(a) currently reads:

> (a) Separate Document. Every judgment and amended judgment must be set out in a separate document, but a separate document is not required for an order disposing of a motion:
>
> (1) for judgment under Rule 50(b);
> (2) to amend or make additional findings under Rule 52(b),
> (3) for attorney's fees under Rule 54;
> (4) for a new trial, or to alter or amend the judgment, under Rule 59; or
> (5) for relief under Rule 60.

Professor Cooper has suggested possible alternatives for revising Rule 58(a):

- "Every judgment and [altered or][6] amended judgment must be set out in a separate document, but a separate document ~~is not required for an order disposing of a motion~~ is required for an order disposing of any of the following motions only if the order directs entry of an altered or amended judgment: * * *."

- "Every judgment and [altered or] amended judgment must be set out in a separate document, but a separate document is not required[7] for an order disposing of ~~a motion~~ any of the following motions without altering or amending the judgment: * * *."

- "Every judgment and [altered or] amended judgment must be set out in a separate document, but a separate document is not required for an order ~~disposing of a motion~~ that -- without amending the judgment -- disposes of a motion: * * *."

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[5] The difficulty would arise only if the district court, when entering the order granting the tolling motion, provides the required separate document even though the order itself contemplates further proceedings with respect to the amendment of the judgment.

[6] The argument for adding "altered or" is that this language would fit with Appellate Rule 4(a)(4)(B)(ii), which refers to alteration as well as amendment of a judgment.

[7] In the options that state when the separate document "is not required," a possible variation might add the proviso "– unless the court directs – ".

II. Expanding the scope of an original notice of appeal to encompass dispositions of postjudgment motions

The possible revision to Civil Rule 58(a) – discussed in Part I of this memo – would address Mr. Batalden's concern but would not address the concerns raised by Public Citizen and the Bar Association. An amendment designed to address the latter concerns would sweep more broadly.

Public Citizen suggests deleting Rule 4(a)(4)(B)(ii) and substituting a provision stating that "the original notice of appeal serves as the appellant's appeal from any order disposing of any post-trial motion." Public Citizen argues that where the appellant has already filed a notice of appeal from the original judgment, it serves no useful purpose to require a new or amended notice of appeal when the appellant also wishes to challenge the disposition of a post-judgment motion. Public Citizen asserts that there are many instances when a notice of appeal does not itself provide clear notice of the precise nature of the issues to be raised on appeal – for example, when a notice of appeal from a final judgment brings up for review issues relating to prior orders that merged into that judgment. In many instances, Public Citizen argues, the appellee instead "is put on notice of the issues on appeal when, shortly after an appeal is filed, the appellant states the issues on a form or in some other filing required by the circuit clerk." Thus, deleting the requirement that appellants file a new or amended notice in order to challenge the disposition of a postjudgment motion "would prevent the inadvertent loss of issues on appeal, without harming appellees or the courts."

The Bar Association reports that participants in a discussion of the proposed Rules amendments in December 2007 doubted whether the proposed amendment to Rule 4(a)(4)(B)(ii) "would have any practical effect because, if there is any chance that the amended judgment could be argued as affecting the appeal, the appealing party always will file an amended notice of appeal." Participants suggested amending Rule 4(a) "to state that any post-appeal amendment to an underlying judgment is automatically incorporated into the scope of the originally filed notice of appeal."

In assessing these proposals it is worthwhile to note Rule 4(b)'s approach with respect to criminal appeals. Rule 4(b)(3)(C) provides, with respect to criminal appeals, that "[a] valid notice of appeal is effective--without amendment--to appeal from an order disposing of any of the motions referred to in Rule 4(b)(3)(A)." The substance of this language.came into the Rule in the 1993 amendments, which added, among other features, the following provision: "Notwithstanding the provisions of Rule 3(c), a valid notice of appeal is effective without amendment to appeal from an order disposing of any of the above motions." Interestingly, the 1993 Committee Note to Rule 4(b) does not explain this addition. Instead, the Committee Note focuses its explanation on the addition of language designed to make clear that certain types of post-verdict motions in criminal cases did not nullify a previously-filed notice of appeal.

The 1993 amendments also added Rule 4(a)'s language specifying that one wishing to

challenge the disposition of a postjudgment motion in a civil case must amend a previously-filed notice of appeal. (Prior to 1993, such an admonition would have been unnecessary as a technical matter, because from 1979 to 1993 Rule 4(a) provided that a tolling motion nullified any previously-filed notice of appeal) As shown in the April 1991 Appellate Rules Committee Minutes, the substance of both these changes was adopted in the course of the same meeting. At that meeting, the Committee decided both (1) to adopt language in Rule 4(a) stating that a challenge to the disposition of a post-judgment motion in a civil case requires a new or amended notice of appeal[8] and (2) to adopt in Rule 4(b) language stating that a previously-filed notice of appeal encompasses the disposition of tolling motions.[9]

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[8] The minutes state in relevant part:

> Judge Keeton asked whether the intent of the motion was to eliminate the requirement of a new notice of appeal. Judge Williams stated that the rule should not add any more requirements as to notices of appeal than those already in Fed. R. App. P. 3. He suggested that the Committee Note make reference to Fed. R. App. P. 3(c) and state that in order to appeal from disposition of a post trial motion a party may need to file a new notice of appeal or amend the original notice.
>
> Judge Keeton suggested a revision of the sentences in question to read as follows:
>
> > An appeal from an order disposing of any of the above motions requires an amendment of the party's previously filed notice of appeal in compliance with Rule 3(c). Any such amended notice of appeal shall be filed within the time prescribed by this Rule 4 measured from the entry of the order disposing of the last of all such motions.

Minutes of the April 17, 1991, Meeting of the Advisory Committee on Federal Rules of Appellate Procedure ("April 1991 Minutes"), at 14-15.

[9] The minutes state in relevant part:

> Judge Logan suggested eliminating the language at lines 33 through 41 of the draft requiring a new notice or amended notice of appeal in order to bring an appeal from denial of a post trial motion. Judge Logan moved, and the motion was seconded by Judge Ripple, substitution of the following language for lines 33 through 41 of the draft:
>
> > Notwithstanding the provision of Rule 3(c), a valid notice of appeal is effective without amendment to appeal from an order disposing of any of the above motions.

April 1991 Minutes at 18.

The April 1991 Minutes do not explain why the Committee decided to take these differing approaches with respect to civil and criminal appeals. One reason might be that members were more concerned about criminal defendants' appeals due to the particularly serious nature of the stakes in criminal cases. Another reason might be that in most criminal cases the potential for confusion (as to what the defendant-appellant is likely to be appealing from) is relatively small; thus, providing that the initial notice of appeal encompasses challenges to subsequent dispositions of tolling motions probably does not make it difficult for the government to discern the nature of the orders being appealed. In complex civil cases, by contrast, there may be multiple postjudgment motions involving various parties, which might make it harder for the appellee to discern, in the first instance, which orders are being appealed if Rule 4(a) were to provide that an initial notice of appeal encompasses challenges to subsequent orders disposing of tolling motions.

Relevant questions, then, include whether current practice under Rule 4(a)(4)(B)(ii) poses undue difficulties for practitioners, and, if so, whether the benefits of a provision directing that an initial notice of appeal be read to encompass any challenges to subsequent dispositions of tolling motions would outweigh the possible downsides of such a provision. As Public Citizen's comments suggest, a key question might be whether, under such a regime, the notice of appeal would provide sufficient information to the appellee, and if not, whether other filings early in the course of the appeal would supply the missing specificity.

If the decision were taken to change Rule 4(a)'s approach so as to provide that an initial notice of appeal encompasses challenges to any subsequent dispositions of post-judgment motions, it would be necessary to consider how to implement that change. It seems unlikely that 28 U.S.C. § 2107(a)'s general requirement that the notice of appeal be filed "within thirty days after the entry of such judgment, order or decree" would pose a barrier to providing that a previously-filed notice of appeal could encompass a later-issued order disposing of a tolling motion; one could read the statutory language as setting an outer time limit, not as requiring that the notice of appeal be filed "after" the entry of the judgment, order or decree. That reading would be consistent with the treatment accorded notices of appeal filed after announcement but before entry of a judgment, see Appellate Rule 4(a)(2).

However, the details of the drafting might be challenging. If one were to simply mirror, in Rule 4(a)(4), the Rule 4(b)(3)(C) language – "A valid notice of appeal is effective--without amendment--to appeal from an order disposing of any of the motions referred to in [Rule 4(a)(4)(A)]" – that language could reach somewhat broadly in complex cases. Also, in the civil-appeal context[10] there is a fair amount of caselaw stating that a notice of appeal that

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[10] Though I have not specifically studied the question, my casual impression is that the "expressio unius" question concerning notices of appeal arises more rarely in the criminal-appeal context. This impression might, however, be mistaken. For examples of decisions addressing this question in the criminal context, *see United States v. Adrian*, 978 F.2d 486, 489 (9th Cir. 1992), *overruled on other grounds by United States v. W.R. Grace*, 526 F.3d 499 (9th Cir. 2008),

enumerates fewer than all the possible issues for appeal fails to encompass the other issues (applying the "expressio unius" canon).[11] Questions might arise whether such a narrowly-drafted notice of appeal should qualify for the new treatment, or whether the fact that it specified only particular orders would prevent it from encompassing the later disposition of the postjudgment motions.

III. Conclusion

At the Appellate Rules Committee's fall 2008 meeting, a member asked whether an amendment addressing Mr. Batalden's concerns would also address the other two commenters' concerns, and vice versa. The answer appears to be no. Though the issues treated in Parts I and II of this memo concern the same general topic – the treatment of challenges to the disposition of post-judgment motions – it is easy to envision an amendment that would address one of those issues without addressing the other. The possible amendment to Civil Rule 58(a) – discussed in Part I – would address Mr. Batalden's concern but would not address the questions raised by Public Citizen and the Bar Association: Even if Civil Rule 58(a) were amended to require a separate document for orders granting tolling motions, that would simply affect the *timing* for filing a notice of appeal from such an order. Public Citizen and the Bar Association suggest eliminating the *requirement* for such a notice of appeal in instances where the would-be appellant has already filed a notice of appeal from the original judgment. Conversely, amending Appellate Rule 4(a) as suggested by Public Citizen and the Bar Association would not fully address Mr. Batalden's timing concern, because a litigant who had not previously filed a notice of appeal from the original judgment – but who wished to challenge the disposition of the tolling motion – would still face the timing question Mr. Batalden describes.

At a higher level of generality, however, commonalities emerge: Both suggestions concern the need to ensure a fair procedure for preserving appellate rights. For that reason, both suggestions merit careful consideration.

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and *United States v. Oberhauser*, 284 F.3d 827, 833 (8th Cir. 2002).

[11] *See, e g , Brooks v. AIG SunAmerica Life Assur. Co.*, 480 F.3d 579, 585 (1st Cir. 2007); *Navani v Shahani*, 496 F.3d 1121 (10th Cir. 2007); *Constructora Andrade Gutierrez, S.A. v. American Intern. Ins. Co of Puerto Rico*, 467 F.3d 38, 44 (1st Cir. 2006); *Parkhill v. Minnesota Mut. Life Ins. Co.*, 286 F.3d 1051, 1058 (8th Cir. 2002). Some cases take a more forgiving approach. *See, e.g., Satterfield v. Johnson*, 434 F.3d 185, 190–91 (3d Cir. 2006); *Nieves-Marquez v. Puerto Rico*, 353 F.3d 108, 122–23 (1st Cir. 2003).

TAB 6E

MEMORANDUM

DATE: March 27, 2009

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 08-AP-G

Appellate Rule 24 requires a party seeking to proceed in forma pauperis ("i.f.p.") in the court of appeals to provide an affidavit that, inter alia, "shows in the detail prescribed by Form 4 ... the party's inability to pay or to give security for fees and costs." Likewise, a party seeking to proceed i.f.p. in the Supreme Court must use Form 4. *See* Supreme Court Rule 39.1. Proposed amendments designed to conform Appellate Form 4 to the privacy rules are discussed elsewhere in this agenda book (see Item 07-AP-G). At the time that it decided to request permission to publish those proposed amendments, the Committee noted that, in the future, it would also consider other changes to Form 4. Those possible changes may include restyling the Form. The Committee may also wish to consider whether to adopt a shorter form (akin to AO Form 240) tailored for use by inmate litigants. And the Committee has noted that it will consider whether to revise Question 10, which requests the name of any attorney whom the litigant has paid (or will pay) for services in connection with the case, as well as the amount of such payments.

This memo provides an update concerning the latter issue. In brief, I suggest that two sets of issues may merit further research. Part I of this memo describes the questions that have been raised about Questions 10 and 11 of Form 4. Part II outlines a plan of research concerning the attorney-client privilege and work product protection implications of those questions. Part III sketches avenues for researching whether – even if not privileged – the information requested in these parts of Form 4 might be such that its disclosure could disadvantage the applicant. Part IV concludes that the summer will provide an opportunity to research the doctrinal questions discussed in Part II and the policy questions noted in Part III.

I. The questions

Questions 10 and 11 of Form 4 were adopted as part of the 1998 amendments. Question 10 reads as follows:

> 10. Have you paid--or will you be paying--an attorney any money for services in connection with this case, including the completion of this form? [ ] Yes [ ] No

If yes, how much? $_____

If yes, state the attorney's name, address, and telephone number.

_____

Question 11 reads:

> 11. Have you paid--or will you be paying--anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?
>
> [ ] Yes [ ] No
>
> If yes, how much? $_____
>
> If yes, state the person's name, address, and telephone number:
>
> _____

Professor Coquillette has noted that the National Association of Criminal Defense Lawyers has argued that questions like Form 4's Question 10 intrude upon the attorney-client privilege. More recently, in connection with the Forms Working Group's publication of proposed new Form AO 239, the Working Group received comments from attorneys in the Pro Se Staff Attorneys Office for the District of Massachusetts, who state:

> [W]e are concerned with the specific information solicited by questions 10 and 11 related to a litigant's payment of money towards the services of an attorney and/or paralegal. These questions single out indigent litigants by requiring them to publically disclose whether legal advice was sought, and if so, from whom. This could have a negative impact on the indigent litigants efforts to prosecute their case - particularly when this information is available to opposing counsel and could be used in formulating litigation strategies. Perhaps a more generic question could be asked instead which would simply ask whether funds have been or will be used in the prosecution of the litigation for costs or attorney's fees.

II. Attorney-client privilege and work product immunity

Questions 10 and 11 require certain disclosures that may reveal facts concerning the litigant's representation. If the litigant has hired a lawyer to perform any services in connection with the case and the lawyer is not representing the litigant pro bono, then Question 10 requires

the litigant to disclose the fact of the retention, the name and contact information of the lawyer, and the payment arrangement Question 11 requires similar information concerning any paid nonlawyer assistant such as a paralegal or typist Depending on the breadth with which Question 11 is interpreted, the question might in some cases elicit additional information concerning the litigant's strategy – for example, it seems possible that Question 11 might be interpreted to cover payments to investigators or expert witnesses

At first glance, a number of these pieces of information do not seem to implicate either attorney-client privilege or work product immunity. With respect to others, the analysis seems less straightforward. This section is designed to note the main issues; detailed analysis of each subpart is left for further research. To take just one example, as to state-law claims or defenses any issues of attorney-client privilege would be governed by state law,[1] and it is possible that the relevant state privilege doctrine might vary from the principles discussed here.

The basic outlines of the attorney-client privilege are well known:

> The privilege applies only if (1) the asserted holder of the privilege is or sought to be come a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

United States v. United Shoe Machinery Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950).

The general contours of work product protection are equally well established.[2] Civil Rule 26(b)(3) provides in part:

> (A) Documents and Tangible Things. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:
>
> (i) they are otherwise discoverable under Rule 26(b)(1); and

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[1] *See* Fed. R. Evid. 501.

[2] As the Committee is aware, proposed Civil Rules amendments published for comment this past year would alter the treatment of expert discovery under Civil Rule 26.

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means

(B) Protection Against Disclosure. If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation

Although Civil Rule 26(b)(3) refers only to "documents and tangible things," the principles recognized in *Hickman v Taylor*, 329 U.S. 495 (1947), also extend to intangibles; thus, a question designed to elicit information that would reveal a lawyer's legal theories or strategy would implicate work product protection even though it did not call for the production of a tangible item. *See, e.g.*, Restatement (Third) of the Law Governing Lawyers § 87(1) ("Work product consists of tangible material or its intangible equivalent in unwritten or oral form, other than underlying facts, prepared by a lawyer for litigation then in progress or in reasonable anticipation of future litigation.").

In many cases, it seems likely that much of the information disclosed by answers to Questions 10 and 11 would be unprotected by attorney-client privilege. As to privilege, Comment (g) to Section 69 of the Restatement summarizes the caselaw as follows:

> g. Client identity, the fact of consultation, fee payment, and similar matters. Courts have sometimes asserted that the attorney-client privilege categorically does not apply to such matters as the following: the identity of a client; the fact that the client consulted the lawyer and the general subject matter of the consultation; the identity of a nonclient who retained or paid the lawyer to represent the client; the details of any retainer agreement; the amount of the agreed-upon fee; and the client's whereabouts. Testimony about such matters normally does not reveal the content of communications from the client. However, admissibility of such testimony should be based on the extent to which it reveals the content of a privileged communication. The privilege applies if the testimony directly or by reasonable inference would reveal the content of a confidential communication. But the privilege does not protect clients or lawyers against revealing a lawyer's knowledge about a client solely on the ground that doing so would incriminate the client or otherwise prejudice the client's interests.

Restatement (Third) of Law Governing Law. § 69 cmt. g. Further research and reflection may reveal circumstances under which Questions 10 or 11 might elicit privileged information, but such circumstances are not immediately apparent. It will be interesting to see whether further research reveals much caselaw directly on point. Much of the caselaw in this general area arose in other contexts: One such context concerns I.R.S. efforts to learn the identity of a client not named in a tax filing by a lawyer; another context concerns government efforts to learn the

identity of persons who pay for the representation of a criminal defendant

The answer may differ with respect to work product protection For example, to the extent that Question 11 is read to encompass payments to investigators or to experts (especially non-testifying experts), it might elicit information that reveals litigation theories and strategy and that therefore qualifies as opinion work product. Obviously, the Civil Rules already require disclosure of such information in various contexts, but to the extent that Question 11 requires disclosure of information not otherwise required under the existing Rules, it could implicate work-product protection concerns. I propose to investigate this question further over the summer The investigation will likely include a number of sub-issues, among them the following:

- What is the interaction between Appellate Form 4 and the forms in use in the district court, and how do questions of timing affect the work-product immunity questions? Form AO 240, the short form sometimes used in the district courts for i.f.p. applications, requires no disclosures along the lines of Form 4's Questions 10 and 11. By contrast, new Form AO 239, the long form recently released for district-court use and modeled on Appellate Form 4, includes Questions 10 and 11. At least in cases in which the district court uses a form such as AO 240, the i.f.p. applicant may not have been required to reveal the information sought by Questions 10 and 11 prior to the application to proceed i.f.p. on appeal.

- What is the frequency with which i.f.p. applications occur in connection with interlocutory appeals? Responses submitted on Form 4 in connection with an appeal after final judgment seem unlikely to reveal much in the way of trial-level litigation strategy, because that strategy will already have unfolded in the district court. However, responses submitted in connection with an interlocutory appeal might reveal litigation strategy in ways that implicate work product protection.

- Does the scope of work product protection available to a pro se litigant differ from that available when the litigant is represented, and if so, how? It seems likely that many if not most of those who apply to appeal i.f.p. are unrepresented, and thus an evaluation of the work-product issue might usefully consider the extent to which Question 11 might affect any work-product immunity that might otherwise be claimed by the unrepresented litigant.

III. Strategic implications of disclosure

Apart from questions of privilege or protection, the disclosures required by Questions 10 and 11 may alter the strategic balance between the litigant seeking i.f.p. status and that litigant's opponent. Two possible issues occur to me in this regard. One concerns the possible strategic advantage an opponent might gain by learning the details of a represented applicant's fee

arrangement with the applicant's lawyer. The other concerns the question of "unbundled" legal services and the debate over "ghost-written" pleadings.

The opponent of a represented litigant might gain strategic advantage by learning the details of the fee arrangement. For example, those details might assist the opponent in strategizing concerning settlement negotiations Such an advantage might be particularly likely to arise to the extent that Question 10 requires the disclosure of the details of a contingent fee arrangement. This reflection raises a subsidiary question: If the litigant has a contingent fee arrangement with the lawyer, how would the litigant answer Question 10? It is not clear exactly how one who has a contingent-fee arrangement would answer the question "how much" "will you be paying" "for services in connection with this case". Of course, in analyzing this question, one might also ask how likely it is that a plaintiff with a contingent-fee arrangement would seek to proceed i.f.p. It seems quite possible that a plaintiff's lawyer who is operating on a contingent fee basis might simply advance the costs of the litigation rather than seeking i.f.p. status for the client.[3] At least occasionally, however, i.f.p. status might be important even if the lawyer can advance the ordinary costs of the appeal; this could be the case, for example, if the party would otherwise be required to post security for costs on appeal and the required amount of security is costly to provide.

The other issue has potentially more sweeping implications: Questions 10 and 11 may in some cases require the disclosure of information that raises questions concerning the practice of "unbundling" legal services. As the ABA's Standing Committee on Ethics and Professional Responsibility has explained, "[l]itigants appearing before a tribunal 'pro se' ... sometimes engage lawyers to assist them in drafting or reviewing documents to be submitted in the proceeding. This is a form of 'unbundling' of legal services, whereby a lawyer performs only specific, limited tasks instead of handling all aspects of a matter." ABA Formal Opinion 07-446, Undisclosed Legal Assistance to Pro Se Litigants (May 5, 2007). I enclose a copy of that opinion because it provides a useful discussion of the question. I have not yet researched the question of unbundling services. On a very quick glance, it seems to me that proponents of unbundling argue that the practice increases access to courts and helps to level the playing field by enabling litigants who could not afford full representation to obtain specific types of episodic legal assistance. Opponents respond that such a practice is deceptive and undesirable because it allows litigants to obtain advantages by seeming to be "pro se" when they are not and because it allows the lawyer to avoid the strictures of Rule 11. If a litigant is using "unbundled" legal services – i.e., appearing pro se but paying a lawyer for advice on some aspects of the action – Question 10 would seem to require the disclosure of that fact. By requiring disclosure, Question 10 would

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[3] On a quick glance, such a course of action appears permissible. For example, Model Rule 1.8(e) provides: "(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that: (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client."

permit the litigant's opponent to raise objections to the practice. Assessing the implications of this insight would require at least a brief survey of the competing views of "unbundled" legal services; I propose to survey that literature over the summer.

IV. Conclusion

The summer will provide an opportunity to investigate further both the privilege and work-product issues noted in Part II and the policy questions noted in Part III. To the extent that this further research suggests disadvantages of requiring the information currently sought by Questions 10 and 11, it will become necessary to consider whether the benefits of requiring that information outweigh the disadvantages. The summer will also provide an opportunity to gather information concerning the nature of any such benefits.[4]

Encl.

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[4] In that regard, it is interesting to note that the committee records do not explain the adoption of Questions 10 and 11 as part of the revised Form 4. The 1998 amendments transformed what had previously been a short and simple form into the detailed questionnaire that exists today. The amendments responded to two factors. One was a request from William Suter, the Clerk of the Supreme Court, who apparently suggested that Form 4 should require more detailed information. The other was the enactment in 1996 of the Prison Litigation Reform Act, which amended 28 U.S.C. § 1915. The committee minutes that address the Form 4 amendments do not specifically discuss Questions 10 and 11. It seems likely that Questions 10 and 11 were not prompted by the PLRA; nothing in Section 1915 (as amended) requires disclosures concerning attorney, paralegal or similar services. It is unclear whether Mr. Suter's request specifically mentioned a need for the information covered by Questions 10 and 11.

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 07-446 **May 5, 2007**

Undisclosed Legal Assistance to Pro Se Litigants

A lawyer may provide legal assistance to litigants appearing before tribunals "pro se" and help them prepare written submissions without disclosing or ensuring the disclosure of the nature or extent of such assistance [1]

Litigants appearing before a tribunal "pro se" (representing themselves, without counsel) sometimes engage lawyers to assist them in drafting or reviewing documents to be submitted in the proceeding. This is a form of "unbundling" of legal services, whereby a lawyer performs only specific, limited tasks instead of handling all aspects of a matter.[2] We discuss in this opinion whether the Model Rules of Professional Conduct at any point require a lawyer so engaged to disclose, or ensure the disclosure of, the fact or extent of such assistance to the tribunal or to adverse parties

State and local ethics committees have reached divergent conclusions on this topic Some have opined that no disclosure is required [3] Others, in contrast, have expressed the view that the identity of the lawyer providing assis-

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1 This opinion is based on the Model Rules of Professional Conduct as amended by the ABA House of Delegates through February 2007 The laws, court rules, regulations, rules of professional conduct and opinions promulgated in individual jurisdictions are controlling

2 Lawyers generally are permitted to limit the scope of their representation of a client pursuant to Rule 1 2(c)

3 Arizona Eth Op 06-03 (July 2006) (Limited Scope Representation, Confidentiality, Coaching, Ghost Writing), Illinois State Bar Ass'n Op 849 (Dec, 9, 1983) (Limiting Scope of Representation), Maine State Bar Eth Op 89 (Aug 31, 1988), Virginia Legal Eth Op 1761 (Jan 6, 2002) (Providing Forms to Pro Se Litigants), Virginia Legal Eth Op 1592 (Sept 14, 1994) (Conflict of Interest, Multiple Representation, Contact with Adverse Party, Representation of Insurance Carrier Against Pro Se Uninsured Motorist, Attorney-Client Relationship), Los Angeles County Bar Ass'n Eth. Op 502 (Nov 4, 1999) (Lawyers' Duties When Preparing Pleadings or Negotiating Settlement for In Pro Per Litigant), Los Angeles County Bar Ass'n Eth Op 483 (Mar. 20, 1995) (Limited Representation of In Pro Per Litigants) *But see* Alaska Eth Op. 93-1 (March 19, 1993) (Preparation of a Client's Legal Pleadings in a Civil Action Without Filing an Entry of Appearance) (lawyer's assistance must be disclosed unless lawyer merely helped client fill out forms designed for pro se litigants), Virginia

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tance must be disclosed on the theory that failure to do so would both be misleading to the court and adversary counsel, and would allow the lawyer to evade responsibility for frivolous litigation under applicable court rules.[4] Interpreting the Model Code of Professional Responsibility, predecessor to the Model Rules, this Committee took a middle ground, stating that disclosure of at least the fact of legal assistance must be made to avoid misleading the court and other parties, but that the lawyer providing the assistance need not be identified.[5]

Whether the lawyer must see to it that the client makes some disclosure to the tribunal (or makes some disclosure independently)[6] depends on whether the fact of assistance is material to the matter, that is, whether the failure to disclose that fact would constitute fraudulent or otherwise dishonest conduct on the part of the client, thereby involving the lawyer in conduct violative of Rules 1 2(d), 3 3(b), 4 1(b), or 8 4(c). In our opinion, the fact that a litigant submitting papers to a tribunal on a pro se basis has received legal assistance behind the scenes is not material to the merits of the litigation. Litigants ordinarily have the right to proceed without representation and may do so without revealing that they have received legal assistance in the absence of a law or rule requiring disclosure. Some ethics committees[7] have raised the concern

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Legal Eth. Op. 1127 (Nov. 21, 1988) (Attorney-client Relationship-Pro Se Litigant Rendering Legal Advice) (failure to disclose that lawyer provided active or substantial assistance, including the drafting of pleadings, may be misrepresentation).

4 Colorado Bar Ass'n Eth. Op. 101 (Jan. 17, 1998) (Unbundled Legal Services) (Addendum added Dec. 16, 2006, noting that Colorado Rules of Professional Conduct amended to state that a lawyer providing limited representation to pro se party involved in court proceeding must provide lawyer's name, address, telephone number and registration number in pleadings), Connecticut Inf. Eth. Op. 98-5 (Jan. 30, 1998) (Duties to the Court Owed by a Lawyer Assisting a Pro Se Litigant), Delaware State Bar Ass'n Committee on Prof'l Eth. Op. 1994-2 (May 6, 1994), Kentucky Bar Ass'n Eth. Op. E-343 (Jan. 1991), New York State Bar Ass'n Committee on Prof'l Eth. Op. 613 (Sept. 24, 1990).

5 ABA Inf. Op. 1414 (June 6, 1978) (Conduct of Lawyer Who Assists Litigant Appearing Pro Se), in FORMAL AND INFORMAL ETHICS OPINIONS. FORMAL OPINIONS 316-348, INFORMAL OPINIONS 1285-1495, at 1414 (ABA 1986). *See also* Florida Bar Ass'n Eth. Op. 79-7 (Reconsideration) (Feb. 15, 2000), Iowa Supreme Court Bd. of Prof'l Eth. & Conduct Op. 96-31 (June 5, 1997) (Ghost Writing Pleadings), Massachusetts Bar Ass'n Eth. Op. 98-1 (May 29, 1998), New Hampshire Bar Association (May 12, 1999) (Unbundled Services Assisting the Pro Se Litigant), Utah 74 (1981), Association of the Bar of the City of New York, Committee on Prof'l & Jud. Eth. Formal Op. 1987-2 (Mar. 23, 1987).

6 We assume a jurisdiction where no law or tribunal rule requires disclosure of such participation, prohibits litigants from employing lawyers (e.g., pro se courts), or otherwise regulates such undisclosed advice or drafting. If there is such a regulation, the boundaries of the lawyer's obligation are beyond the scope of this opinion.

7 *See, e.g.*, Association of the Bar of the City of New York, Committee on Prof'l & Jud. Eth. Formal Op. 1987-2, supra note 5.

that pro se litigants "are the beneficiaries of special treatment," and that their pleadings are held to "less stringent standards than formal pleadings drafted by lawyers."[8] We do not share that concern, and believe that permitting a litigant to file papers that have been prepared with the assistance of counsel without disclosing the nature and extent of such assistance will not secure unwarranted "special treatment" for that litigant or otherwise unfairly prejudice other parties to the proceeding. Indeed, many authorities studying ghostwriting in this context have concluded that if the undisclosed lawyer has provided effective assistance, the fact that a lawyer was involved will be evident to the tribunal. If the assistance has been ineffective, the pro se litigant will not have secured an unfair advantage. As stated by one commentator:

> Practically speaking, ghostwriting is obvious from the face of the legal papers, a fact that prompts objections to ghostwriting in the first place. Thus, where the court sees the higher quality of the pleadings, there is no reason to apply any liberality in construction because liberality is, by definition, only necessary where pleadings are obscure. If the pleading can be clearly understood, but an essential fact or element is missing, neither an attorney-drafted nor a pro se-drafted complaint should survive the motion. A court that refuses to dismiss or enter summary judgment against a non-ghostwritten pro se pleading that lacks essential facts or elements commits reversible error in the same manner as if it refuses to deny such dispositive motions against an attorney-drafted complaint.[9]

Because there is no reasonable concern that a litigant appearing pro se will receive an unfair benefit from a tribunal as a result of behind-the-scenes legal assistance, the nature or extent of such assistance is immaterial and need not be disclosed.

Similarly, we do not believe that nondisclosure of the fact of legal assistance is dishonest so as to be prohibited by Rule 8.4(c). Whether it is dishonest for the lawyer to provide undisclosed assistance to a pro se litigant turns on whether the court would be misled by failure to disclose such assistance. The lawyer is making no statement at all to the forum regarding the nature or

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8 Haines v. Kerner, 404 U.S. 519, 520 (1972). *Compare* ABA Model Code of Judicial Conduct, Rule 2.2, Comment [4] (adopted February 2007) ("It is not a violation of this Rule [requiring impartiality and fairness] for a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard.")

9 Jona Goldschmidt, *In Defense of Ghostwriting*, 29 FORDHAM URB. L.J. 1145, 1157-58 (2002). *See also* Rebecca A. Albrecht, John M. Greacen, Bonnie Rose Hough, & Richard Zorza, *Judicial Techniques for Cases Involving Self-Represented Litigants*, 42 THE JUDGES' JOURNAL 16 (Winter 2003), *also available at* http://www.zorza.net/JudicalTech_JJW03.pdf; American Judicature Society, *Revised Pro Se Policy Recommendations* (March 2002), *available at* http://www.ajs.org/prose/pdfs/Policy%20Recom.pdf.

scope of the representation, and indeed, may be obliged under Rules 1 2[10] and 1 6[11] not to reveal the fact of the representation Absent an affirmative statement by the client, that can be attributed to the lawyer, that the documents were prepared without legal assistance, the lawyer has not been dishonest within the meaning of Rule 8 4(c) For the same reason, we reject the contention that a lawyer who does not appear in the action circumvents court rules requiring the assumption of responsibility for their pleadings [12] Such rules apply only if a lawyer signs the pleading and thereby makes an affirmative statement to the tribunal concerning the matter Where a pro se litigant is assisted, no such duty is assumed

We conclude that there is no prohibition in the Model Rules of Professional Conduct against undisclosed assistance to pro se litigants, as long as the lawyer does not do so in a manner that violates rules that otherwise would apply to the lawyer's conduct Accordingly, ABA Informal Opinion 1414 is superseded.

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10 Rule 1 2(a) and (c) provide "(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1 4, shall consult with the client as to the means by which they are to be pursued A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation A lawyer shall abide by a client's decision whether to settle a matter In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify . (c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent "

11 Rule 1 6(a) provides "(a) A lawyer shall not reveal information relating to the representation of a client unless the client give informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b) "

12 *See, e.g*, FED R CIV P RULE 11

TAB 6f

MEMORANDUM

DATE: March 27, 2009

TO: Advisory Committee on Appellate Rules

FROM: Catherine T Struve, Reporter

RE: Item No. 08-AP-H

At its fall 2008 meeting, the Appellate Rules Committee discussed the possibility of amending the Rules to respond to the circuit split on the viability of "manufactured finality" as a means of securing appellate review. "Manufactured finality" describes instances when the district court dismisses with prejudice fewer than all of the plaintiff's claims and the plaintiff then voluntarily dismisses the remaining claims in the hopes of achieving a final – and thus appealable – judgment.[1] The Appellate Rules Committee noted the importance of seeking the views of the Civil Rules Committee, and the two committees are now proceeding to address the issue jointly.

Part I of this memo briefly reviews the nature of the problem[2]; Part II discusses some possible ways of responding to it. The memo incorporates insights from the Appellate Rules Committee's fall discussion and from discussions since then with Judge Kravitz and Professor Cooper.

I. The "manufactured finality" doctrine

28 U.S.C. § 1291 authorizes appeals from final decisions of the district courts, and the

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[1] See Mark I. Levy, Manufactured Finality, Nat'l L.J., May 5, 2008; Laurie Webb Daniel, Circuit Split Report: Appellate Jurisdiction When Claims Are Voluntarily Dismissed Without Prejudice, The Appellate Advocate, Issue 2, 2008; Mark R. Kravitz, Creating Finality, Nat'l L.J., July 8, 2002, at B9.

A litigant's desire to manufacture finality may also arise from events other than the dismissal of a claim. This might happen, for example, if the court denies a motion to strike a defense that the plaintiff fears will be dispositive, or grants summary judgment on a central fact without dismissing a claim, or denies the plaintiff's motion for summary judgment. (As to the third of these examples, see the *Helm Financial Corporation* case cited in footnote 25.)

[2] A longer treatment of some points discussed in this memo can be found in the agenda materials for the Appellate Rules Committee's fall 2008 meeting, which are available at http://www.uscourts.gov/rules/Agenda%20Books/Appellate/AP2008-11.pdf.

Supreme Court has defined final decisions as those that "end[] the litigation on the merits and leave[] nothing for the court to do but execute the judgment."[3] The policies behind the final judgment rule include the need to conserve appellate resources, avoid piecemeal appeals, and curb the delay that such piecemeal appeals could cause in the district court.

But there are costs to the final judgment rule, and thus both Congress and the rulemakers have adopted certain safety valves. Of most relevance here, 28 U.S C. § 1292(b) permits interlocutory appeals – but only if both the district court and the court of appeals grant permission, and only if the district court certifies both that an immediate appeal "may materially advance the ultimate termination of the litigation" and that the challenged order "involves a controlling question of law as to which there is substantial ground for difference of opinion." Civil Rule 54(b) only requires permission from the district court (not the court of appeals); it permits the district court (in cases involving multiple claims or parties) to "direct entry of a final judgment as to one or more, but fewer than all, claims or parties." However, Rule 54(b) certification is only proper if the district court certifies "that there is no just reason for delay." This determination lies within the district court's discretion.

These safety valves may not always address a litigant's concerns. If the court dismisses the plaintiff's most important claims ("central claims"), leaving only claims about which the plaintiff cares less ("peripheral claims"),[4] the continued pendency of the peripheral claims means there is no final judgment despite the dismissal of the central claims. The district court may not be willing to enter a final judgment on the central claims under Civil Rule 54(b); for example, the district court may not be convinced that there is "no just reason for delay" in entering the final

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[3] See, e.g., Cunningham v. Hamilton County, Ohio, 527 U.S. 198, 204 (1999) (internal quotation marks omitted).

[4] I borrow the terms "peripheral" and "central" from Rebecca A. Cochran, Gaining Appellate Review by "Manufacturing" a Final Judgment Through Voluntary Dismissal of Peripheral Claims, 48 Mercer L. Rev. 979, 982 (1997).

Distinct issues are posed when the district court dismisses the plaintiff's federal-law claims with prejudice and dismisses supplemental state-law claims without prejudice under 28 U.S.C. § 1367(c). See, e.g., Erie County Retirees Ass'n v. County of Erie, Pa., 220 F.3d 193, 202 (3d Cir. 2000) ("While the district court's order in this case did permit appellants to reinstitute their dismissed state law claims, they could do so only in state court, as there would be no basis for the district court to exercise jurisdiction over such a reinstituted action. Thus, we have jurisdiction over this appeal."); Amazon, Inc. v. Dirt Camp, Inc. 273 F.3d 1271, 1275 n.4 (10th Cir. 2001) ("The district court's decision to decline supplemental jurisdiction over the state law claims effectively excluded the remainder of Amazon's suit from federal court through no action of Amazon, and the order is therefore final as to the federal court proceedings."). I do not address these issues in this memo.

judgment.[5] And, similarly, there may not be strong arguments that the order dismissing the central claims "involves a controlling question of law as to which there is substantial ground for difference of opinion" and that "an immediate appeal from the order may materially advance the ultimate termination of the litigation"; even if there are good arguments to this effect, a permissive appeal under Section 1292(b) requires both trial court and appellate court permission.[6] But what if the plaintiff voluntarily dismisses the peripheral claims, thus leaving no claims in the suit? Can the plaintiff thereby "manufacture" a final judgment? It should first be noted that in many instances the plaintiff will need either the consent of all parties who have appeared or court permission in order to dismiss the remaining claims.[7]

Several scenarios might then result. Each scenario involves the district court's dismissal of the plaintiff's central claim, followed by the plaintiff's dismissal of the remaining peripheral claims. The circuits vary in their treatment of these scenarios; what follows is not an exhaustive listing of the caselaw, but rather a survey of representative cases.

Peripheral claims dismissed with prejudice.[8] In this scenario, most courts take the view that there exists a final, appealable judgment [9]

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[5] Even if the district judge is willing to enter a Rule 54(b) judgment, there are some outer limits on the district judge's discretion to do so. See, e.g., Horwitz v. Alloy Automotive Co., 957 F.2d 1431, 1434 (7th Cir. 1992).

[6] For the transcript of a colloquy in which a district judge criticized the Seventh Circuit for its unwillingness to permit interlocutory appeals and Rule 54(b) appeals, see Horwitz v. Alloy Automotive Co., 957 F.2d 1431, 1437-39 (7th Cir. 1992).

[7] The plaintiff may file a notice of dismissal without party consent or court order if the notice is filed "before the opposing party serves either an answer or a motion for summary judgment." Civil Rule 41(a)(1)(A)(i). This might occur, for example, if the plaintiff's most important claims were dismissed on a pre-answer motion to dismiss under Civil Rule 12(b)(6).

Even if all parties consent to the dismissal of the peripheral claims *and* to the plaintiff's attempt to appeal the dismissal of the central claims, it is to be expected that the court of appeals will consider itself bound to raise the question of appellate jurisdiction. See, e.g., Horwitz v. Alloy Automotive Co., 957 F.2d 1431, 1435 (7th Cir. 1992).

[8] Courts of appeals have permitted the plaintiff-appellant (who had previously dismissed peripheral claims without prejudice) to stipulate on appeal that the dismissal of the peripheral claims is with prejudice – thus providing appellate jurisdiction. See, e.g., JTC Petroleum Co. v. Piasa Motor Fuels, Inc., 190 F.3d 775, 776-77 (7th Cir. 1999).

[9] See John's Insulation, Inc. v. L. Addison & Assoc., Inc., 156 F.3d 101, 107 (1st Cir. 1998); Rabbi Jacob Joseph Sch. v. Province of Mendoza, 425 F.3d 207, 210 (2d Cir. 2005);

However, one case from the Eleventh Circuit suggests a different view. In Druhan v. American Mutual Life, 166 F.3d 1324 (11 Cir. 1999), the district court denied plaintiff's motion to remand, holding that her claims were completely preempted by ERISA. The plaintiff then secured a voluntary dismissal of her "ERISA" claim with prejudice. See id. at 1325. The court of appeals held that the order denying remand was unreviewable; it stated both that there was no longer a case or controversy (because the plaintiff herself had requested the dismissal) and that Congress has not authorized appeals from orders denying remand. Id. at 1326. In so holding, the court of appeals recognized the existence of caselaw from other circuits stating "that allowing appeals from voluntary dismissals with prejudice 'furthers the goal of judicial economy by permitting a plaintiff to forgo litigation on the dismissed claims while accepting the risk that if the appeal is unsuccessful, the litigation will end.'" Id. (citing Chappelle v. Beacon Communications Corp., 84 F.3d 652, 654 (2d Cir. 1996)). The *Druhan* majority refused to follow such precedents, reasoning that the decision to adopt such a view "rests in the hands of Congress, which, along with the Constitution, sets the boundaries of this court's jurisdiction." *Id* at 1326. Judge Barkett concurred in the determination that the court of appeals lacked jurisdiction, on the ground that the plaintiff could have continued to press her claim under ERISA, and thus that authorities from other circuits (holding that a voluntary dismissal with prejudice of all remaining claims creates a final judgment) were inapposite See id. at 1327 (Barkett, J., concurring).

More recently, an Eleventh Circuit panel majority held (over a dissent) that *Druhan* (and another similar case) did not govern the question of appealability in a case where the plaintiff suggested that the district court should dismiss its claims with prejudice after the district court issued an order excluding the testimony of plaintiff's expert witness: "Unlike the remand orders at issue in *Druhan* and *Woodard* that concerned only the forum where the cases would be heard, the sanctions order here excluding plaintiff's legal expert was case-dispositive because it foreclosed Fitel from presenting the expert testimony required to prove professional negligence, which was a core element in all of its claims." OFS Fitel, LLC v. Epstein, Becker and Green, P.C., 549 F.3d 1344, 1357 (11th Cir. 2008). The *OFS Fitel* majority viewed *Druhan* as a case in which the plaintiff voluntarily dismissed her claims and was therefore not "adverse" to the judgment; that being so, the *OFS Fitel* court reasoned, the plaintiff could not challenge the judgment by appealing. By contrast, the court viewed the *OFS Fitel* plaintiff as adverse to the judgment and viewed the dismissal as not so much voluntary as invited out of a recognition that the court's prior sanctions order had effectively ended the case. *See OFS Fitel*, 549 F.3d at 1358.

Peripheral claims *conditionally* dismissed with prejudice – i.e., plaintiff dismisses the peripheral claims on the understanding that the dismissal is with prejudice *unless the court of*

Chappelle v. Beacon Communications Corp., 84 F.3d 652, 654 (2d Cir. 1996); Great Rivers Co-op. of Se. Iowa v. Farmland Indus., Inc., 198 F.3d 685, 688 (8th Cir. 1999).

appeals reverses the dismissal of the central claims.[10] In this scenario, the Second Circuit has held that there is a final judgment:

> [W]hen a plaintiff is completely free to relitigate voluntarily dismissed claims, the final judgment rule ordinarily precludes this court from reviewing any adverse determination by the district court in that case. However, where, as here, a plaintiff's ability to reassert a claim is made conditional on obtaining a reversal from this court, the finality rule is not implicated in the same way ... Purdy runs the risk that if his appeal is unsuccessful, his malpractice case comes to an end We therefore hold that a conditional waiver such as Purdy's creates a final judgment.

Purdy v. Zeldes, 337 F.3d 253, 258 (2d Cir. 2003). However, the Third and Ninth Circuits have disagreed.[11]

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[10] Judge Easterbrook has noted the possibility that the principle advocated by the plaintiff in such a case might be viewed as analogous to "the principle that allows a dispositive *issue* to come up, when the plaintiff is willing to stake the entire case on its resolution." First Health Group Corp. v. BCE Emergis Corp., 269 F.3d 800, 802 (7th Cir. 2001). But the *First Health Group* court did not need to decide whether the analogy held, because the plaintiff decided to dismiss the relevant claims unconditionally, thus removing the jurisdictional question. Id.

[11] In the Third Circuit, see Federal Home Loan Mortgage Corp. v. Scottsdale Ins. Co., 316 F.3d 431, 440 (3d Cir. 2003) ("[T]he Consent Judgment preserved Freddie Mac's right to reinstate Counts Two and Three, if we were to reverse and remand the district court's ruling.... The Consent Judgment thus represented an inappropriate attempt to evade § 1291's requirement of finality."). The original order had stated that the relevant counts were "dismissed, without prejudice, subject to the plaintiffs' right to reinstate Counts Two and Three if the March 19th Order should be vacated and this matter remanded for trial by the Third Circuit Court of Appeals based upon the appeal." Id. at 437. After oral argument, Freddie Mac sought and obtained a district-court order dismissing Counts 2 and 3 "with prejudice," and this rendered the judgment final. Id. at 442.

In the Ninth Circuit, see Dannenberg v. Software Toolworks Inc., 16 F.3d 1073, 1076 (9th Cir. 1994) (stating that "stipulations to dismiss claims with the right to reinstate upon reversal ... implicate identical policy concerns" as dismissals without prejudice). See also Cheng v. C.I.R., 878 F.2d 306, 311 (9th Cir. 1989) ("A plaintiff who has alleged several separate claims could conceivably appeal as many times as he has claims if he is willing to stipulate to the dismissal of the claims (contingent upon the affirmance of the lower court's judgment) the court has not yet considered."). The Ninth Circuit later suggested that the presence of a stipulation permitting reinstatement of the peripheral claims in the event that the dismissal of the central claims is reversed on appeal shows intent to circumvent the final judgment rule, and thus indicates that appellate jurisdiction should be disallowed; in making this observation, the court

Peripheral claims dismissed without prejudice, and the statute of limitations has run out on the peripheral claims (or there is some other reason why the peripheral claims cannot be reasserted). This scenario ought to be functionally similar to a dismissal with prejudice. The statute of limitations, if it has run, would bar the plaintiff from reinstating the peripheral claims, assuming that the defendant properly asserts the statute of limitations bar in the future proceeding. Panels in the Second, Third and Tenth Circuits have approved such an approach.[12]

The Fourth Circuit took a somewhat similar approach in GO Computer, Inc. v Microsoft Corp., 508 F.3d 170 (4th Cir. 2007). The *GO Computer* plaintiffs had asserted a number of antitrust claims, including claims for injuries to another company (Lucent). The district court, expressing serious concerns about the factual basis for the claims based on injuries to Lucent, struck the allegations relating to those claims from the complaint. Plaintiff obtained reconsideration of this order by "offer[ing] to voluntarily dismiss its federal claims for continuing antitrust injuries to Lucent, promising not to seek reinstatement of those claims or to file a new complaint raising them." Id. at 174-75. Ultimately, the district court dismissed the other claims on statute of limitations grounds and permitted the voluntary dismissal without prejudice of the claims based on injuries to Lucent. See id. at 175. Oddly, when GO Computer appealed, its first contention on appeal was that the absence of a final judgment deprived the court of appeals of appellate jurisdiction. Taking a "pragmatic" approach to the final judgment rule, the court of appeals held that it had jurisdiction:

> When the district court dismissed some of GO's claims without prejudice, it was utterly finished with GO's case. The claims in question, of course, are those based on injuries to Lucent that GO never had a right to allege .... GO escaped Rule 11 sanctions and won dismissal without prejudice by promising never to raise these claims in federal court again. And even if another district court by some chance did allow GO to file a new complaint for the Lucent claims, that case would be based on distinct facts from this one; in no sense would GO have saved this action by amending this complaint. The district court thus rendered a final judgment, and we have jurisdiction to consider it.

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distinguished plain dismissals without prejudice, which the court said leave the plaintiff exposed to the risk that the peripheral claims will become time-barred. James v. Price Stern Sloan, Inc., 283 F.3d 1064, 1066 (9th Cir. 2002).

[12] See Chappelle v. Beacon Communications Corp., 84 F.3d 652, 654 n.3 (2d Cir. 1996); Fassett v. Delta Kappa Epsilon (New York), 807 F.2d 1150, 1155 (3d Cir. 1986) (alternative holding, over a dissent); Jackson v. Volvo Trucks N. Am., Inc., 462 F.3d 1234, 1238 (10th Cir. 2006). See also Carr v. Grace, 516 F.2d 502, 503 (5th Cir. 1975) ("Under the peculiar circumstances of this case, we have no difficulty in concluding that a dismissal even 'without prejudice' after the statute of limitations has run is a final order for purposes of appeal. The appealability of an order depends on its effect rather than its language."). *Carr* is not directly on point, for present purposes, because in *Carr* the entire case had been dismissed.

GO Computer, 508 F.3d at 176.

Dismissal without prejudice of peripheral claims results in the complete removal of a particular defendant from the suit. In this context, two courts of appeals have held that the dismissal creates a final judgment. The Eighth Circuit panel majority, in so holding, reasoned that cases refusing to permit appeals from the dismissal of a plaintiff's central claim against a defendant where peripheral claims against the same defendant were later dismissed without prejudice "further the well-entrenched policy that bars a plaintiff from splitting its claims against a defendant. But this policy does not extend to requiring a plaintiff to join multiple defendants in a single lawsuit, so the policy is not violated when a plaintiff 'unjoins' multiple defendants through a voluntary dismissal without prejudice." State ex rel. Nixon v. Coeur D'Alene Tribe, 164 F.3d 1102, 1106 (8th Cir. 1999). The Ninth Circuit, reaching a similar conclusion in Duke Energy Trading & Marketing, L.L.C. v. Davis, 267 F.3d 1042 (9th Cir. 2001), felt the need to distinguish Dannenberg v. The Software Toolworks Inc., 16 F.3d 1073 (9th Cir.1994), which the *Duke Energy* court characterized as holding that the court of appeals "did not have jurisdiction under § 1291 over an order granting partial summary judgment where the parties stipulated to the dismissal of the surviving claims without prejudice, subject to the plaintiff's right to reinstate them in the event of reversal on appeal " Duke Energy, 267 F.3d at 1049. The *Duke Energy* court distinguished its ruling in *Dannenberg* on the ground that *Dannenberg* "did not involve the effect of the complete dismissal of a defendant pursuant to Rule 41(a)(1)(i) for appellate jurisdiction purposes." *Duke Energy*, 267 F.3d at 1049.

The peripheral claims are dismissed without prejudice and there is no reason to think that their reassertion would necessarily be barred by the statute of limitations or any other impediment. Panels in the Second,[13] Third,[14] Fifth,[15] Seventh,[16] Tenth[17] and Eleventh[18]

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[13] See Rabbi Jacob Joseph Sch. v. Province of Mendoza, 425 F.3d 207, 210 (2d Cir. 2005); Chappelle v. Beacon Communications Corp., 84 F.3d 652, 654 (2d Cir. 1996).

[14] See LNC Investments LLC v. Republic Nicaragua, 396 F.3d 342, 347 (3d Cir. 2005). See also Morton Int'l, Inc. v. A.E. Staley Mfg. Co., 460 F 3d 470, 477 (3d Cir. 2006).

[15] See Swope v. Columbian Chems. Co., 281 F.3d 185, 192 (5th Cir. 2002).

[16] See Horwitz v. Alloy Auto. Co., 957 F.2d 1431, 1435-36 (7th Cir. 1992).

[17] See Heimann v. Snead, 133 F.3d 767, 769 (10th Cir. 1998). See also Cook v. Rocky Mountain Bank Note Co., 974 F.2d 147, 148 (10th Cir. 1992).

[18] In State Treasurer of State of Michigan v. Barry, 168 F.3d 8 (11th Cir. 1999), an Eleventh Circuit panel applied circuit precedent stating that "appellate jurisdiction over a non-final order cannot be created by dismissing the remaining claims without prejudice," id. at 11. A panel member wrote separately to criticize that approach and to advocate en banc

Circuits have concluded that the judgment is not final for appeal purposes in this situation. It should be noted, however, that the Seventh Circuit caselaw on this question is in some disarray.[19]

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reconsideration of it, see id at 21 (Cox, J., specially concurring). The panel majority suggested that its ruling might be limited to cases involving "an appellant (1) who suffered an adverse non-final decision, (2) who subsequently either requested dismissal without prejudice under Rule 41(a)(2), or stipulated to dismissal without prejudice under Rule 41(a)(1), of the remaining claims." Id. at 15 n.10

The Eleventh Circuit subsequently followed *Barry*, observing that *Barry* followed this approach as "1. consistent with 28 U.S.C. § 1291; 2. followed by two other circuits; 3. allowing district courts, not litigants, to control when and what interim orders are appealed; 4. forcing litigants to make hard choices and to evaluate seriously their cases; and 5. circuit precedent for 25 years " Hood v. Plantation Gen. Med. Ctr., Ltd., 251 F.3d 932, 934 (11th Cir. 2001)

In a case decided the same year as *Barry*, the Eleventh Circuit refused to extend *Barry* to a situation in which the plaintiff first voluntarily dismissed certain claims, and the district court only later dismissed all other claims on the merits. In such a situation, the court explained, the danger of manipulation of appellate jurisdiction does not exist, and in addition there would be no opportunity, in such a situation, for the district court to enter a judgment under Civil Rule 54(b). Schoenfeld v. Babbitt, 168 F.3d 1257, 1265-66 (11th Cir. 1999).

[19] A Seventh Circuit panel has narrowly interpreted *Horwitz* (discussed supra note 16), as a case that turned on the court's view of the parties' and the district court's intent: "*Horwitz* did not announce a principle that dismissal of some claims without prejudice deprives a judgment on the merits of all other claims of finality for purposes of appeal. Rather, the court concentrated on the intent of the district court and the parties to bypass the rules." United States v. Kaufmann, 985 F.2d 884, 890-91 (7th Cir. 1993). In *Kaufmann*, the court of appeals had dismissed the defendant's prior appeal from a judgment of conviction on one count because other counts were unresolved. The district court then (on the government's motion) dismissed the other counts without prejudice under Criminal Rule 48. The court of appeals took jurisdiction of this second appeal; it emphasized that its disposition of the prior appeal had explicitly contemplated such a mechanism, and it distinguished *Horwitz* by concluding that in *Kaufmann* that the parties were not attempting to manipulate the court's jurisdiction. *Kaufmann*, 985 F.2d at 891.

On the other hand, a Seventh Circuit panel later followed *Horwitz* after noting the difficulty of reconciling the circuit's divergent precedents: "The recent cases disallowing a sort of manufactured finality like that found in the present lawsuit are consistent with the fundamental policy disfavoring piecemeal appeals. Hence, West's voluntary dismissal without prejudice is under current law insufficient to create a final judgment." West v. Macht, 197 F.3d 1185, 1189-90 (7th Cir. 1999). The *West* court noted a relatively early case, Division 241 Amalgamated Transit Union (AFL-CIO) v. Suscy, 538 F.2d 1264, 1266 (7th Cir. 1976), in which the remaining claims had been voluntarily dismissed without prejudice and the court of appeals

By contrast, panels in the Sixth[20] and Federal[21] Circuits have concluded that a voluntary dismissal of the peripheral claims produces a final judgment. Without explicitly considering the question of jurisdiction, panels in the First[22] and D.C.[23] Circuits have reached the merits of appeals taken after peripheral claims were dismissed without prejudice.

The Eighth Circuit has taken varying approaches to this issue. In Hope v. Klabal, 457 F.3d 784, 789-90 (8th Cir. 2006), the Eighth Circuit panel noted some prior cases in which it had either recharacterized a dismissal without prejudice as a dismissal with prejudice[24] or had

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rejected a challenge to its appellate jurisdiction. The court in *West* noted that "[s]ubsequent cases have, without mentioning *Division 241*, avoided that case's result, though *Division 241* has never been overruled." West, 197 F.3d at 1188.

On still another hand, the Seventh Circuit yet more recently distinguished *West* and followed *Kauffman* in deciding that a prior judgment was final and appealable and thus eligible for res judicata effect. See Hill v. Potter, 352 F.3d 1142 (7th Cir. 2003). The *Hill* court rejected the contention that the prior judgment lacked finality because one of the claims had been voluntarily dismissed without prejudice. The court explained: "[A] litigant is not permitted to obtain an immediate appeal of an interlocutory order by the facile expedient of dismissing one of his claims without prejudice so that he can continue with the case after the appeal is decided.... But, as in United States v. Kaufmann, 985 F.2d 884, 890-91 (7th Cir.1993), and James v. Price Stern Sloan, Inc., 283 F.3d 1064 (9th Cir.2002), that is not the proper characterization of Hill's motion to dismiss his claim of retaliation. The record is clear that the reason for the request to dismiss was to avoid two trials, by joining the claim to the EAS claims that had been dismissed for failure to exhaust, after exhausting those claims." Hill v. Potter, 352 F.3d 1142, 1145 (7th Cir. 2003). As the court's citation to the *James* case suggests, it is possible to read this as endorsing a test that looks to the intent behind the dismissal of the claim without prejudice.

[20] See Hicks v. NLO, Inc., 825 F.2d 118, 120 (6th Cir. 1987).

[21] See Doe v. United States, 513 F.3d 1348, 1354 (Fed. Cir. 2008).

[22] See Rymes Heating Oils, Inc. v. Springfield Terminal R. Co., 358 F.3d 82, 87 (1st Cir. 2004).

[23] See Stewart v. District of Columbia Armory Bd., 863 F.2d 1013, 1016 (D.C. Cir. 1988).

[24] "Following the district court's grant of partial summary judgment, MPB voluntarily dismissed all its remaining claims for the purpose of making the district court's profits ruling final and appealable. If MPB took this action assuming that it could later revive its claims for other relief, it has badly miscalculated. When entered, the district court's profits order did not resolve all of MPB's claims and therefore was not appealable absent a Fed.R.Civ.P. 54(b)

dismissed for lack of a final judgment. However, the court adhered to other circuit caselaw and held that the voluntary dismissal without prejudice created a final judgment.[25]

The Ninth Circuit has injected an "intent" test into the analysis. In James v Price Stern Sloan, Inc., 283 F.3d 1064 (9th Cir. 2002), the court held that the district court's grant of plaintiff's request under Rule 41(a)(2) to dismiss the peripheral claims created a final judgment. The court distinguished cases where the district court had previously refused a Rule 54(b) request, reasoning that in *James* the district court's grant of the Rule 41(a)(2) request evinced a judgment similar to that which a district court would make under Rule 54(b). See id. at 1069. "[W]hen a party that has suffered an adverse partial judgment subsequently dismisses remaining claims without prejudice with the approval of the district court, and the record reveals no evidence of intent to manipulate our appellate jurisdiction, the judgment entered after the district court grants the motion to dismiss is final and appealable under 28 U.S.C. § 1291." Id. at 1070. The Ninth Circuit's intent-to-manipulate test seems somewhat unpredictable in application. For a decision holding – over a dissent – that manipulation foreclosed appellate jurisdiction, see American States Insurance Co. v Dastar Corp., 318 F.3d 881, 891 (9th Cir. 2003) ("[T]he parties appear to have colluded to manufacture appellate jurisdiction by dismissing their indemnity claims after the district court's grant of partial summary judgment.") For a case noting questions

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determination. A Rule 54(b) determination would have been an abuse of the district court's discretion-the rejection of one form of Lanham Act equitable relief, an accounting of profits, should not be appealed until the court has resolved whether MPB is entitled to Lanham Act injunctive relief.... That being so, MPB may not evade the final judgment principle and end-run Rule 54(b) by taking a tongue-in-cheek dismissal of its remaining claims. Those claims must be deemed dismissed with prejudice." Minnesota Pet Breeders, Inc. v. Schell & Kampeter, Inc., 41 F.3d 1242, 1245 (8th Cir. 1994).

The Eighth Circuit has also suggested that the question could be approached from another angle, by reviewing the propriety of the Rule 41(a)(2) dismissal: "[W]hat Farmland presents as a jurisdictional issue is in fact the question whether the district court abused its discretion when it dismissed the remaining claims without prejudice for the purpose of allowing the class to appeal the court's interlocutory summary judgment orders." Great Rivers Co-op. of Se. Iowa v. Farmland Indus., Inc., 198 F.3d 685, 689 (8th Cir. 1999). Accordingly, the court indicated, one response could be to review the propriety of the Rule 41(a)(2) order. (The court did not follow this course in *Great Rivers Co-op*, however, because of the case's "unique procedural posture" with respect to dismissal of claims by a plaintiff class. 198 F.3d at 690.)

[25] In another rather unusual situation, the Eighth Circuit held that it had appellate jurisdiction where the district court had denied summary judgment to the plaintiff on certain claims and the plaintiff had then dismissed all other claims (some with prejudice and some without). (The court reasoned that the denial of summary judgment to the plaintiff "had the effect of terminating any further consideration of the" claims on which the plaintiff had sought summary judgment.) Helm Fin. Corp. v. MNVA R.R., Inc., 212 F.3d 1076, 1080 (8th Cir. 2000).

as to *James*' applicability to a multiple-defendant scenario, *see* Romoland School Dist. v. Inland Empire Energy Center, LLC, 548 F.3d 738, 750 (9th Cir. 2008) ("[T]his case presents such anomalous procedural issues that attempting to fit it within or outside the exception created by *James* – by deciding whether and under what circumstances the principle established in *James* applies to cases involving multiple defendants, for example – is neither necessary nor advisable"). The *Romoland* majority, employing a "pragmatic evaluation of finality," decided to treat the voluntary dismissal of the plaintiffs' claims against a particular defendant (by means of an order that did not state the dismissal was with prejudice) "as being with prejudice." *Id.*

II. Possible rulemaking responses

At the Appellate Rules Committee's fall 2008 meeting, the discussion elicited a variety of perspectives. A judge member questioned whether there is a real need for changes directed toward this issue; an attorney member responded by stressing the importance of clarity and uniformity on the question of appealability. Though members acknowledged statutory authority to engage in rulemaking on these matters,[26] some members expressed diffidence concerning the desirability of such a course, and a strong sense was expressed that it was necessary to seek the views of the Civil Rules Committee.

Since the time of the fall meeting, discussions with Judge Kravitz and Professor Cooper have helped to clarify the issues. Part II.A. below discusses general possibilities for responding to the divergent caselaw on manufactured finality; Part II.B. discusses some of the more specific drafting questions that might arise.

A. General possibilities

In contemplating a possible rulemaking response to manufactured-finality questions, it is useful first to consider the broad contours of such a response. The policy choices in this area vary in difficulty depending on the nature of the dismissal.

Dismissal with prejudice. Where the plaintiff dismisses the peripheral claims with prejudice, the best view is that this produces a final judgment that permits appellate review of the central claims. That conclusion makes sense, since there is no danger of a piecemeal appeal. As

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[26] See 28 U.S.C. § 2072(c) (authorizing the promulgation of rules that "define when a ruling of a district court is final for the purposes of appeal under [28 U.S.C. §] 1291"). See also 28 U.S.C. § 1292(e) ("The Supreme Court may prescribe rules, in accordance with section 2072 of this title, to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under subsection (a), (b), (c), or (d).").

to the peripheral claims, no further litigation will result under any scenario.[27] To the extent that the Eleventh Circuit's decision in *Druhan* indicates that such a dismissal does not create an appealable judgment, the *Druhan* court's reasoning would not bar the adoption of a rule or statute that alters this approach

Dismissal with de facto prejudice. Where the dismissal was nominally without prejudice but a time-bar or other impediment ensures that the peripheral claims can no longer be reasserted, one might argue that it would make sense to treat the dismissal the same as one that is nominally "with prejudice." This, however, seems less important to establish, assuming that the plaintiff can cure any problem by stipulating after the fact that the dismissal is with prejudice; in instances where the peripheral claim clearly cannot be reasserted, such a stipulation provides a way to make clear that the judgment is final. In instances where it is uncertain whether the peripheral claim can or cannot be reasserted, that uncertainty might provide a reason not to treat the dismissal as one with prejudice unless the plaintiff provides a stipulation (or the district court amends the order of dismissal) to that effect.

Conditional dismissal with prejudice. Where the peripheral claims are conditionally dismissed with prejudice, the plaintiff agrees to dismiss the peripheral claims and not to reassert them unless the central claim's dismissal is reversed on appeal. It would probably make sense to provide that this creates a final judgment. If the court of appeals affirms the dismissal of the central claim, the litigation is at an end. If the court of appeals reverses the dismissal of the central claim, the plaintiff can reassert the peripheral claims on remand.[28] But that arguably is efficient, since the litigation will continue in any event with respect to the now-reinstated central claim.[29] And if one pictures the alternative scenario (which would arise if the conditional dismissal with prejudice does not create an appealable judgment), that would be a scenario in which the plaintiff litigates the peripheral claims to final judgment; then appeals the dismissal of

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[27] Because the dismissal of the peripheral claims is voluntary, the plaintiff would be unable to challenge that dismissal on appeal. See, e.g., Chavez v. Illinois State Police, 251 F.3d 612, 628 (7th Cir. 2001); Hicks v. NLO, Inc., 825 F.2d 118, 120 (6th Cir. 1987).

[28] It is worthwhile to explore the possibility of treating the reassertion of the peripheral claims, on remand, as a situation in which the plaintiff is carrying forward those peripheral claims as they were originally asserted in the action – thus avoiding statute of limitations problems.

[29] It is possible to imagine instances when the judgment is reversed on appeal with respect to the central claims but no proceedings are required on remand with respect to those central claims. It may be worthwhile to consider whether resurrection of the peripheral claims should be permitted in that circumstance even though no further district-court proceedings are needed with respect to the central claims.

the central claim;[30] wins reversal of the dismissal of the central claim; and then litigates the central claim on remand. Either way, there may be more than one appeal; so it seems unclear that permitting conditional dismissals with prejudice to create an appealable judgment would be inefficient. It is true that the delay occasioned by the appeal from the central claim's dismissal might disadvantage the defendant, but an outer limit on the disadvantage posed by such delay would be provided by the duration of the appeal (if not by a statute of limitations on the peripheral claims).[31] As to the other concern embodied in the final judgment rule – maintaining the district court's control over the progress of the litigation – one might argue that if the district court approves a conditional dismissal with prejudice, that indicates the district court's view that the proposed appeal will further efficient resolution of the matters in the district court. (Of course, if the district court holds such a view, then in many instances it may be possible for the district court to enter a partial final judgment under Civil Rule 54(b).)

Dismissal without prejudice. When the peripheral claims are dismissed without prejudice, it is much less clear that the resulting judgment should be considered final.[32] Admittedly, the plaintiff runs the risk that the peripheral claims might be time-barred by the time the plaintiff attempts to reassert them; but reassertion (after disposition of the appeal from the dismissal of the central claim) seems in general to be a likely enough scenario that this permutation could be seen as an end run around the constraints of Civil Rule 54(b).[33] Not surprisingly, the circuits are split on this question and I will not attempt to argue here in favor of either side of the split. One thing that can be said is that the Ninth Circuit's approach – which in some instances has injected an inquiry concerning the intent behind the dismissal – may be unpredictable in its application

Resolving these issues would entail difficult choices; and some of the choices would alter practice in a number of circuits. This memo does not attempt to suggest definitively which choices are best; instead, my goal is to sketch some of the relevant questions. Nor does this memo canvass all potentially related issues. For instance, this memo also does not address the related question of appealability that arises when an appellant's remaining claims are dismissed

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[30] This assumes either that the plaintiff either has lost on the peripheral claim or failed to recover as much on the peripheral claim as the plaintiff expects to recover on the central claim.

[31] On the question of limitations periods, see supra note 28.

[32] It would, however, make sense to permit a plaintiff who sought such a dismissal without realizing that it would fail to produce an appealable judgment to stipulate that the dismissal of the peripheral claims is with prejudice, thereby rendering the judgment appealable.

[33] As noted above, the Eighth and Ninth Circuits take the view that a final judgment is created if the claims dismissed without prejudice are against a different defendant than the claims the dismissal of which the plaintiff seeks to appeal. The strength of such a distinction is not entirely clear.

for want of prosecution or as a sanction for failure to comply with court orders, and the appellant seeks to challenge on appeal prior orders dismissing other claims.[34]

B. Logistics and particulars of a rulemaking response

If the decision were taken to amend the Rules to provide for appealability in the event of a conditional dismissal with prejudice,[35] a number of drafting and logistical questions would arise.

Coordination among Advisory Committees. In addition to the joint deliberations by the Civil and Appellate Rules Committees, consultation with other Advisory Committees also makes sense. United States v. Kaufmann, 985 F.2d 884 (7th Cir. 1993) (discussed in note 19) illustrates that similar questions of finality may sometimes arise in criminal cases I lack any intuitions concerning the likelihood of similar questions arising in bankruptcy matters, but consultation with both the Bankruptcy and Criminal Rules Committees would be advisable as deliberations proceed.

Placement of a provision in the Civil Rules. Appellate Rules Committee members have suggested that a provision addressing manufactured finality might fit more comfortably in the Civil Rules than in the Appellate Rules. Professor Cooper notes that such a provision might be added either to Civil Rule 41 or to Civil Rule 54, and that alternatively the provision might be placed in a new Civil Rule 41.1 or a new Civil Rule 54.1. As he notes, the choice among these placements is best made after the nature of the provision is more precisely delineated.

Events that trigger the conditional dismissal. Professor Cooper points out that there will be a drafting choice concerning the triggers for a conditional dismissal: "It would be possible to specify that the right to dismiss on these terms arises only after a 'claim' has been 'dismissed' on motion under Rule 12 or Rule 56. Drafting might instead be more open-ended, all the way down to allowing use of this ploy after any district-court action that can merge in a final judgment and be reviewed on appeal."

Complex cases and dismissal by agreement or court order. Professor Cooper's comments suggest the intricacy of the situations that may require consideration:

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[34] See, e.g., John's Insulation, Inc. v. L. Addison & Assoc., Inc., 156 F.3d 101, 105 (1st Cir. 1998) (adopting the rule that "interlocutory rulings do not merge into a judgment of dismissal for failure to prosecute, and are therefore unappealable").

[35] If such a decision were taken, it presumably would logically entail as well a clarification (to the extent such clarification is necessary) that the *unconditional* dismissal with prejudice of all remaining claims results in an appealable judgment.

> Things become more complex when there is a counterclaim, or more than one plaintiff, or more than one defendant (with different combinations of counterclaims and defendants and plaintiffs), third-party claims, and so on. If we were going to establish finality without court action, I suppose we would be looking for agreement by as many parties as required to establish dismissal with "conditional prejudice" of all claims and all parties. If we decide instead to open it up to achieving finality with the district court's consent, we might fall back closer to Rule 54(b). One out of many possible approaches would be to provide that in determining whether to enter a Rule 54(b) judgment the court may take account of (and approve?) a conditional dismissal with prejudice. That would be relatively clean as to a judgment that, subject to the condition, finally resolves all disputes between at least one identified party-pair. It would be a bit trickier as to different parts of a single "claim" as that term is (more or less) defined for Rule 54(b) purposes, but it would make sense.

Discretion in the court of appeals. Professor Cooper also notes that we should consider "whether the court of appeals should be able to reject the reservation of a right to revive the things dismissed with conditional prejudice." One approach might be to provide that the court of appeals' reversal of the district court's disposition of the central claims triggers an unconditional right to revive the conditionally-dismissed peripheral claims, "even in the unlikely event that reversal does not otherwise lead to remand." But it seems useful to consider whether there might "be circumstances in which -- most likely on arguments made by the appellee -- the court of appeals should be able to reject something conditionally preserved so as to focus proceedings on remand."

III. Conclusion

Though Part II does not exhaust the issues that may arise as the committees consider rulemaking responses to the question of manufactured finality, it sketches possible starting places for the discussion. As the input from Judge Kravitz and Professor Cooper demonstrates, collaboration with the Civil Rules Committee on these questions will be indispensable.

TAB 6G

MEMORANDUM

DATE: March 27, 2009

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 08-AP-M

This memo is designed to provide an update on Item No. 08-AP-M, concerning the procedure for interlocutory tax appeals. Part I summarizes the initial question that gave rise to this item. Part II describes very helpful guidance we have received from Judge Mark Holmes of the United States Tax Court. Part III discusses the current treatment of Tax Court "decisions" and "orders" and considers a possible amendment that could regularize the Appellate Rules' treatment of permissive appeals from Tax Court orders. Part IV concludes.

I. The initial inquiry

In 1980, the Second Circuit held in *Shapiro v. C I.R.*, 632 F.2d 170 (2d Cir. 1980), that 28 U.S.C. § 1292(b) does not authorize permissive interlocutory appeals from an order of the Tax Court.[1] In 1986, Congress responded to *Shapiro*[2] by enacting 26 U.S.C. § 7482(a)(2), which adopts for interlocutory appeals from the Tax Court a system similar to Section 1292(b)'s system for interlocutory appeals from the district courts.[3] Section 7482(a)(2) provides that "[w]hen any judge of the Tax Court includes in an interlocutory order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation," the court of appeals "may, in its discretion, permit an appeal to be taken from such order, if application is made to it within 10 days after the entry of such order." When applying

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[1] The *Shapiro* court explained: "The language of s 1292(b) refers only to orders by a 'district judge' and proceedings in a 'district court,' making no reference to orders of any other court. Moreover, Fed.R.App.P. 5, governing appeals from interlocutory orders under s 1292(b), also refers solely to the 'district court,' and Rule 5 is expressly excluded from application to the Tax Court by Rule 14." *Shapiro*, 632 F.2d at 171.

[2] *See* H. R. Conf. Report No. 99-841, III, 1986 U.S.C.C.A.N. 4075, 4894.

[3] *See generally* Knibb, Fed. Ct. App. Manual § 18:1 (5th ed.).

Section 7482(a)(2), the Tax Court has looked to caselaw interpreting Section 1292(b) [4]

The adoption of Section 7482(a)(2) did not lead to any amendments of the Appellate Rules; thus, it is not entirely clear what Rules govern an interlocutory appeal by permission under Section 7482(a)(2). As of 2009, though, Tax Court Rule 193(a) states in part: "For appeals from interlocutory orders generally, see rules 5 and 14 of the Federal Rules of Appellate Procedure." This reference is somewhat puzzling, because Rule 14 (with respect to appeals to which it applies) excludes the application of Rule 5.

Tax Court Rule 193 explains how to seek the permission of the Tax Court for a permissive interlocutory appeal under Section 7482(a)(2). As Tax Court Rule 193(a) suggests, Appellate Rule 5 would be the obvious candidate to govern court of appeals procedure in connection with such appeals – but Appellate Rule 14 provides that Appellate Rule 5 does not apply to the review of a Tax Court decision. Thus, the question arises whether it might be useful to remove a source of potential confusion by amending Appellate Rule 14 to make clear that Appellate Rule 5 applies to interlocutory tax appeals under Section 7482(a)(2) (with references to the "district court" in Appellate Rule 5 being treated as references to the Tax Court, cf. Appellate Rule 13(d)(1)).

II. Judge Holmes' response

As the Committee discussed last fall, in considering this issue one would want to know whether interlocutory tax appeals occur with regularity or whether (alternatively) interlocutory tax appeals under Section 7482(a)(2) are so rarely seen that it might not be worth fixing this apparent glitch in the Appellate Rules. I had the opportunity to consult Judge Mark V. Holmes, who has served on the U.S. Tax Court since 2003. I asked Judge Holmes about the treatment of interlocutory appeals by permission under Section 7482(a)(2), and also about Tax Court Rule 193(a)'s puzzling reference to Appellate Rules 5 and 14. Here is Judge Holmes' response:

> [T]he short answer to your questions is that you have spotted a flaw in the FRAP that I do think would be a good thing to repair, but that the universe of cases to which it would apply is tiny. There are a reasonable number of these motions every year, but nearly all are frivolous (mine have included interlocutory appeals seeking jury trials or holding my court unconstitutional). There seem to have been a grand total of 3 that we've certified over the years: Rhone-Poulenc v. Comm'r, 249 F.3d 175 (3d Cir. 2001) (where the Circuit Court disagreed and bumped it back to us); Siben v. Comm'r, 930 F.2d 1034 (2d Cir. 1991) (technical but very important question on the calculation of the statute of limitations in a partnership tax proceeding), and Samuels, Kramer & Co. v. Comm'r, 930 F.2d

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[4] *See, e.g., General Signal Corp. & Subsidiaries v. C.I.R.*, 104 T.C. 248, 255 (U.S. Tax Ct. 1995).

975 (2d Cir 1991) (one of a number of cases challenging our special trial judges under the Appointments Clause of the Constitution -- ultimately leading to the Supreme Court case, Freytag v. Comm'r.)

I also asked my clerk to look at our Court's archives and talk to some of our institutional memory and she developed two theories for the odd last sentence in our Tax Court Rule 193 that you spotted.

1) The "please notice" theory - In 1986, after Congress authorized us to issue interlocutory orders with the enactment of section 7482(a)(2), we quickly followed up with Rule 193. The minutes of our Rules Committee (none of whose members are both still with us and remember anything about the topic) record a statement from someone that IRC Section 7482(a)(2) would require the amendment of FRAP 5 and 14, but that since amendments to the Federal Rules are not up to the Tax Court, the issue cannot be resolved by us. Perhaps the last sentence of our Rule 193 was an obviously way too subtle signal.

2) The procedural belt and suspenders theory- Rule 14 deals with appellate review of tax court decisions. Not tax court orders. Section 7482(a)(2)(B) states that "for purposes of subsections (b) and (c), an order described in this paragraph shall be treated as a decision of the Tax Court." So maybe we wanted a cross-reference touching both FRAP 14 (decisions) and FRAP 5 (orders). This is just a wild guess, since, as you noticed, both FRAP 14's exclusion of FRAP 5, and FRAP 5 (or FRAP 13(d)(1)'s exclusion of FRAP 5) would need tinkering to fix the problem

Or maybe we didn't think about it hard enough.

Judge Holmes' input is very valuable. His response confirms the intuition that the Rules have a technical glitch, but also shows that the technical problem is likely to arise only rarely. (Tax Court Rule 193 covers the procedure in the Tax Court for requesting the necessary certification, and there is no need to worry about procedure in the courts of appeals except in cases where the Tax Court grants the certification – an event that Judge Holmes notes is uncommon.)

III. The definition and treatment of "decisions" and "orders" for purposes of Tax Court appeals

The agenda book materials last fall noted that it seemed unclear whether the term "decision" as used in Appellate Rules 13 and 14 extends to interlocutory orders, or whether interlocutory Tax Court orders fall outside the scope of those Rules. Judge Holmes' response to my inquiry likewise highlights the distinction between Tax Court "decisions" and Tax Court

"orders." If Tax Court "orders" are distinct from Tax Court "decisions," then there seems to be a gap in the Appellate Rules' coverage, because Title III limits itself to review of Tax Court "decisions." This part discusses that issue of terminology Part III.A. briefly describes the basic statutory framework. Part III.B. notes the existence of a circuit split on the definition of "decision" as used in the relevant statute. Part III.C. considers the implications – for the Appellate Rules – of the distinction between Tax Court "orders" and Tax Court "decisions." Part III.D. discusses the possibility of amending the Appellate Rules to address the procedure for permissive appeals under Section 7482(a)(2).

A. The statutory framework

28 U.S.C. § 7482(a) provides two avenues for appeals from the tax court – appeals as of right from "decisions of the Tax Court"[5] and permissive appeals from "interlocutory order[s]" of the Tax Court.[6] As to appeals as of right, Section 7482(a)(1) states:

> **In general.** – The United States Courts of Appeals (other than the United States Court of Appeals for the Federal Circuit) shall have exclusive jurisdiction to review the decisions of the Tax Court, except as provided in section 1254 of Title 28 of the United States Code, in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury; and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 1254 of Title 28 of the United States Code.

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[5] Under 26 U.S.C. § 7481(b), certain Tax Court decisions are non-reviewable; that provision states: "Nonreviewable decisions.--The decision of the Tax Court in a proceeding conducted under section 7436(c) or 7463 shall become final upon the expiration of 90 days after the decision is entered." *See also* 14 Mertens Law of Fed. Income Tax'n § 51:10 ("Section 7481(a), which is entitled 'Reviewable decisions,' does not specifically define what constitutes a reviewable Tax Court decision. However, Section 7481(b) does define what Tax Courts decisions are nonreviewable. Thus, by inference, Tax Court decisions are reviewable unless they fall within the statutory category of 'nonreviewable decisions' or are otherwise deemed to be not reviewable by courts" (footnotes omitted).).

[6] Certain kinds of Tax Court orders are made reviewable apart from the avenue provided by Section 7482(a)(2). For example, Section 7482(a)(3) defines certain tax court orders as "decision[s]" for purposes of Section 7482(a): "An order of the Tax Court which is entered under authority of section 6213(a) and which resolves a proceeding to restrain assessment or collection shall be treated as a decision of the Tax Court for purposes of this section and shall be subject to the same review by the United States Court of Appeals as a similar order of a district court." *See generally* 14 Mertens Law of Fed. Income Tax'n § 51:11 (noting that federal tax statutes "specif[y] certain Tax Court orders that are subject to appellate review").

As to permissive appeals, Section 7482(a)(2) states in relevant part:

> **(A) In general.**--When any judge of the Tax Court includes in an interlocutory order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals may, in its discretion, permit an appeal to be taken from such order, if application is made to it within 10 days after the entry of such order. Neither the application for nor the granting of an appeal under this paragraph shall stay proceedings in the Tax Court, unless a stay is ordered by a judge of the Tax Court or by the United States Court of Appeals which has jurisdiction of the appeal or a judge of that court.

B. The circuit split concerning the definition of "decision"

Before discussing the treatment of interlocutory Tax Court "orders," it may be useful to review briefly the scope of the statutory term "decision." There is a three-way circuit split concerning the treatment, under Section 7482(a)(1), of Tax Court determinations of fewer than all the claims in a Tax Court petition. A decade ago, the Appellate Rules Committee noted the circuit split but concluded that it did not require any alteration in the Appellate Rules.

The majority of circuits that have addressed the question require a Civil Rule 54(b) determination from the Tax Court before they will review the Tax Court's disposition of fewer than all claims in the petition. *See New York Football Giants, Inc. v. C.I.R.*, 349 F.3d 102, 106 (3d Cir. 2003); *Nixon v. C.I.R.*, 167 F.3d 920, 920 (5th Cir. 1999) (per curiam) ("[U]nless the Tax Court enters a separate Rule 54(b)-type order indicating that there is no just reason for delaying appellate review of a partially resolved petition, this court lacks jurisdiction to hear an appeal until a final judgment is entered."); *Brookes v. C.I.R.*, 163 F.3d 1124, 1129 (9th Cir. 1998) ("[A]ppellate jurisdiction over Tax Court decisions should be modeled on appellate jurisdiction over district court decisions and require compliance with the standards of Rule 54(b)."); *Shepherd v. C.I.R.*, 147 F.3d 633, 635 (7th Cir. 1998) (noting that employing a different approach for appeals from Tax Court than for appeals from district courts would be undesirable "given the fact that the identical tax disputes can be litigated in either the Tax Court or the district court").

In comparison to the four circuits noted above, two circuits appear stricter and one is more permissive. The Second and Sixth Circuits have stated flatly that they will not review determinations of fewer than all the claims in a petition until the disposition of all the claims. *See Schrader v. C.I.R.*, 916 F.2d 361, 363 (6th Cir. 1990); *Estate of Yaeger v. C.I.R.*, 801 F.2d 96, 98 (2d Cir. 1986) ("[A]ppeal of an order concerning only one of several tax years is premature."). The D.C. Circuit, by contrast, has adopted "[a] bright-line rule that allows an appeal from a denial of jurisdiction over one but not all the separate claims in a petition." *InverWorld, Ltd. v. C.I.R.*, 979 F.2d 868, 873 (D.C. Cir. 1992).

Writing for the *Shepherd* court in 1998, then-Chief Judge Posner stated.

> It is unfortunate that this jurisdictional issue has divided the circuits. The division could easily be ended through the rulemaking process in one of two ways One is for the Tax Court, using its explicit rulemaking power, to adopt a version of Rule 54(b) as a rule of that court. Another is for the Supreme Court to use its rulemaking power to amend the Federal Rules of Appellate Procedure to provide explicitly for appeals from Tax Court decisions that meet the criteria of Rule 54(b). The Rules Enabling Act now expressly provides for rules "defin[ing] when a ruling of a district court is final for the purposes of appeal under section 1291." 28 U.S.C. § 2072(c). We do not read "district court" as a bar to a rule defining the finality of Tax Court rulings, given the symmetry that we have stressed throughout this opinion between the Tax Court in deficiency cases and the district courts in refund cases But any doubt about our reading could of course be speedily dispelled by an amendment, purely technical in character, to section 2072(c).

Shepherd, 147 F.3d at 636.

The spring 1999 minutes of the Appellate Rules Committee reflect a discussion of *Shepherd*'s suggestions. The minutes state in part:

> Chief Judge Richard A. Posner has suggested that either the rules of the Tax Court or FRAP be amended to permit "54(b)-type" appeals from the Tax Court.... At its October 1998 meeting, the Committee reached a consensus that any such "54(b)-type" provision should appear in the rules of the Tax Court rather than in FRAP. But Mr. Letter asked the Committee not to remove this item from its study agenda until he had an opportunity to solicit the views of the Internal Revenue Service and the Tax Court. Mr. Letter reported that he had consulted with the Chief Counsel of the Internal Revenue Service and the Chief Judge of the Tax Court, and both had agreed that this issue should not be addressed by this Committee. A member moved that Item No. 98-08 be removed from the study agenda. The motion was seconded. The motion carried (unanimously).

Minutes of Appellate Rules Committee, April 15 & 16, 1999, at 17.

The Tax Court does not appear to have adopted in its own rules a provision similar to Civil Rule 54(b). Tax Court Rule 1(b) provides in part: "Where in any instance there is no applicable rule of procedure, the Court or the Judge before whom the matter is pending may prescribe the procedure, giving particular weight to the Federal Rules of Civil Procedure to the extent that they are suitably adaptable to govern the matter at hand." Accordingly, a Tax Court Rule amendment would not be necessary in order to permit the Tax Court to issue a Rule 54(b) determination. However, a quick Westlaw search suggests that the Tax Court does not appear to

employ a procedure akin to Rule 54(b).[7]

The trend in the court of appeals caselaw favors the approach of requiring a Rule 54(b) certification from the Tax Court. The Second and Sixth Circuits, which applied the stricter bright-line approach of barring any appeals from Tax Court determinations of fewer than all the claims in a petition, do not appear to have had occasion to apply that approach in any cases that post-date the discussion in *Shepherd* (which first outlined the rationale in favor of the Rule 54(b) approach). The circuit caselaw trend is intriguing in the light of the Westlaw search (noted above) suggesting that the Tax Court does not appear to provide such certifications. Indeed, in the four cases in which the Seventh, Ninth, Fifth and Third Circuits adopted the Rule 54(b) approach, each appeal was dismissed for lack of of a Rule 54(b) certification.[8]

C. The Appellate Rules' applicability to Tax Court "orders"

The circuit split discussed in the preceding section concerns the scope of the term "decision" for purposes of review under Section 7482(a)(1). Whether or not the disposition of fewer than all claims in a petition can constitute a "decision" for purposes of Section 7482(a)(1), it is clear that most interlocutory Tax Court orders can be appealed, if at all, only by permission under Section 7482(a)(2). Hence the question that is the focus of this memo: What Appellate Rules apply to such permissive appeals?

Ever since their adoption, Rules 13 and 14 have referred to Tax Court "decisions." But the Appellate Rules do not define the term "decision."[9] Section 7482(a)(2) provides that "[f]or purposes of [Sections 7482(b) and 7482(c)], an order described in this paragraph shall be treated as a decision of the Tax Court." This statutory provision, adopted in 1986, is evidently designed

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[7] A search of Westlaw's FTX-TCT database for the search terms "rule 54(b)" or "no just reason for delay" did not disclose any Tax Court opinions applying a procedure akin to Rule 54(b).

[8] *New York Football Giants, Inc.*, 349 F.3d at 108 (" ("Here, the Tax Court's order did not dispose of all of petitioner's claims. Nor did the court make any determination that its order dismissing the Giants' claims with respect to FYEs 1996 and 1997 was final, or that there was no just reason to delay an appeal."); *Nixon*, 167 F.3d at 920 ("As there was no Rule 54(b)-type order entered by the Tax Court in this case, the Nixons' appeal is DISMISSED for lack of jurisdiction."); *Brookes*, 163 F.3d at 1129 (dismissing appeal for lack of "compliance with the standards of Rule 54(b)"); *Shepherd*, 147 F.3d at 635 (same).

[9] Even if there were a definition of "decision" for purposes of appeals from courts other than the Tax Court, the discussion in Part III.B. has illustrated that one cannot always assume that terms have the same meaning for purposes of appeals from the Tax Court as they would for purposes of appeals from a district court.

to ensure that permissive appeals under Section 7482(a)(2) are treated like appeals as of right for purposes of Section 7482(b)'s provisions (concerning venue) and Section 7482(c)'s provisions (concerning the courts' powers). But that statutory definition does not settle the question of the meaning of "decision" in the Appellate Rules. If anything, the statutory definition supports the view that (at least by 1986) the terms "decision" and "order" were viewed as distinct. Such a view is also supported by the approach taken in Rule 13. That Rule contemplates that the avenue for review of a "decision" is an appeal as of right, taken by filing a notice of appeal. This view makes sense so long as one considers "decision" to encompass only those Tax Court determinations for which an appeal as of right is permissible

Under that interpretation, Title III of the Appellate Rules (which contains Rules 13 and 14) does not appear to apply to interlocutory orders of the Tax Court that can only be appealed by permission. (On the other hand, Title III could well be read to apply to certain types of Tax Court orders that are treated specially and that are made appealable as of right [10])

The obvious candidate for application to permissive appeals of Tax Court orders would be Appellate Rule 5. That Rule, however, does not apply to such appeals by its own terms; Rule 5 is located in Title II of the Appellate Rules, which is titled "Appeal from a Judgment or Order of a District Court."

D. A possible amendment to address permissive appeals

Title III of the Appellate Rules could be amended to make clear the applicability of Rule 5 to permissive appeals from Tax Court orders. As an example, possible amendments might read as follows:

TITLE III. REVIEW OF A DECISION OR ORDER OF THE UNITED STATES TAX COURT

Rule 13. Review of a Decision of the Tax Court

(a) How Obtained; Time for Filing Notice of Appeal.

(1) Review of a decision of the United States Tax Court is commenced by filing a notice of appeal with the Tax Court clerk within 90 days after the entry of the Tax Court's decision. At the time of filing, the appellant must furnish the clerk with enough

[10] *See supra* note 6.

copies of the notice to enable the clerk to comply with Rule 3(d). If one party files a timely notice of appeal, any other party may file a notice of appeal within 120 days after the Tax Court's decision is entered.

(2) If, under Tax Court rules, a party makes a timely motion to vacate or revise the Tax Court's decision, the time to file a notice of appeal runs from the entry of the order disposing of the motion or from the entry of a new decision, whichever is later.

(b) Notice of Appeal; How Filed. The notice of appeal may be filed either at the Tax Court clerk's office in the District of Columbia or by mail addressed to the clerk. If sent by mail the notice is considered filed on the postmark date, subject to § 7502 of the Internal Revenue Code, as amended, and the applicable regulations.

(c) Contents of the Notice of Appeal; Service; Effect of Filing and Service. Rule 3 prescribes the contents of a notice of appeal, the manner of service, and the effect of its filing and service. Form 2 in the Appendix of Forms is a suggested form of a notice of appeal.

(d) The Record on Appeal; Forwarding; Filing.

(1) An appeal from ~~the~~ a Tax Court decision is governed by the parts of Rules 10, 11, and 12 regarding the record on appeal from a district court, the time and manner of forwarding and filing, and the docketing in the court of appeals. References in those rules and in Rule 3 to the district

court and district clerk are to be read as referring to the Tax Court and its clerk

(2) If an appeal from a Tax Court decision is taken to more than one court of appeals, the original record must be sent to the court named in the first notice of appeal filed. In an appeal to any other court of appeals, the appellant must apply to that other court to make provision for the record

Rule 14. Applicability of Other Rules to the Review of a Tax Court Decision or Order

(a) Appeals as of right. All provisions of these rules, except Rules 4-9, 15-20, and 22-23, apply to the review of a Tax Court decision.

(b) Appeals by permission. An appeal by permission from a Tax Court order is governed by Rule 5, except that Rule 5(d)(1)(B) does not apply to such an appeal. References in Rules 5, 11 and 12(c) to the district court and district clerk are to be read as referring to the Tax Court and its clerk. All provisions of these rules, except Rules 3- 4, 5(d)(1)(B), 6-9, 13, and 22-23, apply to appeals by permission from a Tax Court order.

As can be seen from this example, amendments designed to address the treatment of permissive appeals from the Tax Court would probably affect at least three places in the Appellate Rules: The caption of Title III; Rule 13(d)(1); and Rule 14. The main change would be to Rule 14. Because the example above is sketched for illustrative purposes, I did not conduct an exhaustive review to ensure that the inclusions and exclusions listed in proposed Rule 14(b) are precise. In the example, I excluded Rule 5(d)(1)(B) from applying to appeals from Tax Court orders because I suspect that specific tax provisions address the question of bonds in connection with appeals from the Tax Court.[11]

[11] 26 U.S.C. § 7485(a) requires the provision of a bond before the review of a Tax Court *decision* can stay assessment or collection. 26 U.S.C. § 7482(c)(3) authorizes the court of

IV. Conclusion

Judge Holmes' response – detailed in Part II – confirms that, at least in concept, there exists a gap in the Appellate Rules because those Rules do not address the procedure for seeking the court of appeals' permission to appeal from a Tax Court order under 26 U.S.C. § 7482(a)(2). However, his response also indicates that the courts of appeals are rarely presented with such requests (because the Tax Court only rarely makes the required certification)

Part III.D. shows that, as a matter of broad outlines, it would be a relatively straightforward task to amend the Appellate Rules to cover permissive appeals from Tax Court orders. But Part III.D. also illustrates that the details of such an amendment's implementation might be more complex, due to the need to ensure that the list of applicable or excluded Appellate Rules provisions reflects appropriate judgments concerning the procedures that should apply to such appeals.

As with the Rule 54(b) issue – described in Part III.B. – which the Committee considered a decade ago, so too here one would not wish to proceed without obtaining the views of those who practice in this area concerning the benefits and costs of any possible amendment.

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appeals to require additional "undertakings ... as a condition of or in connection with the review" of a Tax Court decision, and Section 7482(a)(2)(B) includes permissive appeals from Tax Court orders within the scope of Section 7482(c).

TAB 6 H-I

MEMORANDUM

DATE: March 27, 2009

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item Nos. 06-08 and 08-AP-I

This memo summarizes the status of the Committee's discussions on Item Nos. 06-08 and 08-AP-I. The Committee's most recent discussion of each of these items seemed not to evince a consensus in favor of moving forward with a proposal concerning the item; on the other hand, in neither case did the Committee formally vote whether to maintain the item on the study agenda or to remove the item from the agenda. The spring meeting may serve as an opportunity for the Committee to reach a determination on those questions. Parts I and II of this memo provide a brief summary of the Committee's most recent discussions; more detail can be found in the minutes of the Committee's fall 2008 meeting.

I. Item No. 06-08

This item concerns Mark Levy's suggestion that the Committee consider amending the Appellate Rules to clarify the procedure for amicus briefs with respect to rehearing. The Committee discussed this item at its three previous meetings (in fall 2007, spring 2008 and fall 2008). Most recently, at the fall 2008 meeting the Committee discussed research performed by a number of Committee members concerning practice in the various circuits.

Some members expressed support for the idea that it would be useful for circuits to adopt local rules governing the topic. Other participants in the discussion, however, expressed doubt as to the wisdom of the Committee's encouraging the promulgation of such local rules. A motion was made that the Committee resolve to draft a letter (the specifics of which the Committee could consider at its Spring 2009 meeting) to the chief judges of each circuit advising them of the Committee's discussion and asking them to consider adopting a local rule on amicus briefs with respect to rehearing. The motion failed by a vote of five to three. No further motions were made with respect to this item.

II. Item No. 08-AP-I

This item relates to a suggestion made by Professor Daniel Meltzer during the June 2008 Standing Committee meeting Professor Meltzer noted his impression that some of those involved in trial-level practice had raised concern about superfluous post-trial motions which seek reconsideration of matters already decided. If such concerns exist, he suggested, the Committees might wish to consider whether the Civil Rules are too permissive about when a postjudgment motion can be made, though the Committees should also weigh the need not to unduly foreclose the appropriate uses of post-trial motions.

The Appellate Rules Committee's discussion of this question at the fall 2008 meeting revealed support for the view that postjudgment motions serve important functions, and did not reveal support for the view that a change is needed in order to rein in the use of such motions. At the Committee's request, I conveyed the substance of the discussion to Professor Cooper

TAB 7A

MEMORANDUM

DATE: March 27, 2009

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 08-AP-N

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

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

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

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

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

the necessary conditions are met

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

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

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

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

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

TAB 7B

MEMORANDUM

DATE: March 27, 2009

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 08-AP-O

Peder Batalden has submitted the following question concerning the timing of briefs: "Rule 31(a)(1) sets out the time to file briefs, and it sets the deadlines for answer and reply briefs from the service date of the preceding brief. But the Rule makes no provision for the scenario in which multiple appellants or appellees file separate briefs and serve them on different days. Must an appellee facing multiple opening briefs file his answer brief within 30 days of the first-served opening brief, or within 30 days of the last-served opening brief, or at some other time?"

Part I of this memo notes briefly that Mr. Batalden has identified a question on which the national rules are silent. Part II sets forth two relevant local circuit provisions. Part III analyzes considerations that will affect how often the question will arise. Part IV concludes that the frequency with which this issue arises will vary from circuit to circuit.

I. The national rules are silent on this question

Rule 31(a)(1) provides: "The appellant must serve and file a brief within 40 days after the record is filed. The appellee must serve and file a brief within 30 days after the appellant's brief is served. The appellant may serve and file a reply brief within 14 days after service of the appellee's brief but a reply brief must be filed at least 3 days before argument, unless the court, for good cause, allows a later filing." Ever since its adoption, Rule 31(a) has pegged the time for serving and filing the appellee's brief and the appellant's reply brief to the date of service of the previous brief. Rules 28.1(f)(2)-(4) take a similar approach to the timing of briefs in cases involving cross-appeals.[1] The Committee Notes to Rule 28.1 and Rule 31 do not discuss the timing of briefs in an appeal in which there are multiple parties on a side.

II. Two circuits address this question in local provisions

In two circuits, local provisions address Mr. Batalden's question. Eleventh Circuit Rule

[1] Likewise, a similar approach applies to Supreme Court briefing. See Supreme Court Rules 25.2 & 25.3.

31-1(a) provides. "Except as otherwise provided herein, the appellant shall serve and file a brief within 40 days after the date on which the record is deemed filed as provided by 11th Cir. R. 12-1. The appellee shall serve and file a brief within 30 days after service of the brief of the last appellant. The appellant may serve and file a reply brief within 14 days after service of the brief of the last appellee." Federal Circuit Rule 31(a)(4) provides: "A single brief that responds to the briefs of multiple parties must be served and filed within the time prescribed after service of the last of these briefs or, if no such brief is filed, after the time expires for filing the last of these briefs."

III. The scenario will not arise if the court sets the schedule using dates certain or if the multiple parties file a joint brief

This timing question is not likely to vex litigants in circuits where the briefing schedule is set by order, assuming that the scheduling order uses dates certain In circuits where the briefing schedule is not set by order or where the scheduling order does not use dates certain, this timing question will still not arise if the multiple parties on a given side file a joint brief rather than separate briefs.

If multiple appellants file a joint notice of appeal, then Rule 3(b)(2) states that "[t]hey may then proceed on appeal as a single appellant." The 1998 Committee Note to Rule 3 observes that "[a] joint appeal is treated as a single appeal and the joint appellants file a single brief." If, instead, multiple appellants file separate notices of appeal, the court of appeals can consolidate their appeals; in such event, the multiple appellants may file separate briefs. A single appeal can, of course, involve multiple appellees, and those appellees may file separate briefs.

However, even where the national rules appear to permit multiple parties to file multiple briefs, some circuits encourage or require multiple parties on a side to file a single brief.[2] So, for example, Fourth Circuit Rule 28(a) states in part: "One brief shall be permitted per side, including parties permitted to intervene, in all cases consolidated by Court order, unless leave to the contrary is granted upon good cause shown."[3] Ninth Circuit Rule 28-4 states in part: "In a case or consolidated cases involving multiple separately represented appellants or appellees, all parties on a side are encouraged to join in a single brief to the greatest extent practicable." Tenth Circuit Rule 31.3(A) provides in part: "In civil cases involving more than one appellant or appellee, including consolidated cases, all parties on a side (including intervenors) must--to the

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[2] Cf. Appellate Rule 28(i) ("In a case involving more than one appellant or appellee, including consolidated cases, any number of appellants or appellees may join in a brief, and any party may adopt by reference a part of another's brief. Parties may also join in reply briefs.").

[3] See also Fourth Circuit Rule 28(d) ("Motions to file separate briefs are not favored by the Court and are granted only upon a particularized showing of good cause, such as, but not limited to, cases in which the interests of the parties are adverse.").

extent practicable--file a single brief'"[4] The D.C. Circuit Handbook states: "Parties with common interests in consolidated or joint appeals must join in a single brief where feasible. The Court has admonished counsel that it looks with extreme disfavor on the filing of duplicative briefs in consolidated cases. To avoid repetitious arguments, a party may adopt or incorporate by reference all or any part of the brief of another." U.S.Ct. of App. D.C.Cir. Handbook, Part IX.A 2.

IV. Conclusion

In circuits that set the briefing schedule using dates certain, the interpretive question raised by Mr. Batalden will not arise. In other circuits, Mr. Batalden's question will arise if there are multiple parties on a side and those parties file separate briefs on different dates. The degree to which multiple parties on a side are encouraged or required to file joint briefs may vary from circuit to circuit.

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[4] For criminal appeals, Tenth Circuit Rule 31.2 provides in part: "Codefendants in criminal appeals may each file a brief or may join in a single brief."

TAB 7C

MEMORANDUM

DATE: March 27, 2009

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 08-AP-P

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

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

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

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

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

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

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

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

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

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

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

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

TAB 75

MEMORANDUM

DATE: March 27, 2009

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 08-AP-Q

Digital audio recording has been an approved method of making the record of district court proceedings for a decade.[1] Judge Michael Baylson, a member of the Civil Rules Committee, has suggested that the Appellate Rules Committee consider the possibility of allowing the use of digital audio recordings in place of written transcripts for the purposes of the record on appeal. Copies of Judge Baylson's November 2008 letter and its attachment are enclosed.

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

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

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

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

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

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

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

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

Under Appellate Rule 10(a), the record on appeal consists of "(1) the original papers and exhibits filed in the district court; (2) the transcript of proceedings, if any; and (3) a certified copy of the docket entries prepared by the district clerk." Rule 10(b)(1) provides that "[w]ithin 10 days after filing the notice of appeal or entry of an order disposing of the last timely remaining motion of a type specified in Rule 4(a)(4)(A), whichever is later, the appellant must do either of the following: (A) order from the reporter a transcript of such parts of the proceedings not already on file as the appellant considers necessary, subject to a local rule of the court of appeals ... ; or (B) file a certificate stating that no transcript will be ordered."[2] If the appellant orders less than the entire transcript, Rule 10(b)(3) permits the appellee to designate additional parts of the transcript.

Read literally, Appellate Rule 10(b) does not require all appellants to order a transcript. But in reality, the appellant's choices are more constrained, because the appellant must make sure that the record includes all the information that the court of appeals will need in order to assess the appellant's challenges to the relevant ruling(s) below. In some instances the appellant may be able to omit some or all of the transcript. But as one commentator advises, the prudent litigator will "[r]esolve all doubts in favor of inclusion. Aside from costs, there is no reason to exclude anything from the transmitted record that might be useful. For every appeal where the court of

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

appeals complains about over-designation, there are ten where it refuses to consider an argument because appellant failed to include the record needed to support that point "[3] The Rule itself requires the appellant to order a transcript if the appellant is challenging factual findings. Rule 10(b)(2) provides that "[i]f the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant must include in the record a transcript of all evidence relevant to that finding or conclusion." Other types of challenges that will likely require at least portions of the transcript include challenges to jury selection, to evidentiary rulings, or to jury instructions. To put the matter more generally, the evaluation of a challenge to a trial ruling will frequently require the inclusion of the parts of the transcript that show an objection to the challenged ruling, the parts that reflect the ruling itself, and any parts that are relevant to a determination of whether the error (if any) was harmless.

Even when the court of appeals would ordinarily need to consult some or all of the transcript in order to evaluate the appellant's contentions, Rule 10 offers a few ways to avoid providing the transcript itself. Rule 10(d) permits the parties to agree upon "a statement of the case showing how the issues presented by the appeal arose and were decided in the district court." The statement, which is to focus on the matters "essential to the court's resolution of the issues," is reviewed and (if accurate) approved by the district court and is then "certified to the court of appeals as the record on appeal." In some relatively simple cases, Rule 10(d)'s agreed statement could provide a cost-effective way to create the record on appeal; but it appears from anecdotal evidence that this mechanism is relatively rarely used. Rule 10(c) provides a mechanism for reconstructing a statement of the trial-court proceedings "[i]f the transcript of a hearing or trial is unavailable." However, Rule 10(c)'s mechanism appears to be reserved for instances when the transcript is unavailable irrespective of cost;[4] a number of courts have taken the view that the mere fact that the preparation of the transcript would be prohibitively expensive does not justify recourse to Rule 10(c).[5]

In short, under current practice many appellants cannot succeed on appeal unless they ensure that the record on appeal includes at least some portions of the transcript of the proceedings below. There will also sometimes be instances when the appellee needs to designate portions of the transcript that were not ordered by the appellant. The question raised by Judge Baylson is whether litigants can avoid the costs of ordering the transcript by using the digital

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

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

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

audio files instead.

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

There do not yet appear to exist any local circuit rules that address the use of audio files in lieu of transcripts. Some circuits have provisions concerning the provision of electronic versions of the record,[6] but those provisions appear to contemplate that the electronic files in question will be electronic copies of *paper documents* rather than electronic audio files. It nonetheless makes sense to consider whether local rules permitting the use of audio files in lieu of transcripts would be permissible under the existing framework. The Appellate Rules could be read to permit the adoption of local rules authorizing the use of audio files in lieu of the transcript for purposes of the record on appeal, at least in some cases. But there are several ways in which the existing procedures under the Appellate Rules would be a somewhat awkward fit in cases where audio files are used instead of the transcript.

Rule 10(a)'s definition of the record. As noted above, Rule 10(a) defines the record on appeal as "(1) the original papers and exhibits filed in the district court; (2) the transcript of proceedings, if any; and (3) a certified copy of the docket entries prepared by the district clerk." An audio recording of the district court proceeding is not itself a "transcript" or a "paper"; nor would it seem to come within the ordinary meaning of "exhibit." However, for purposes of discussion, this memo will assume that a court of appeals could by local rule clarify that an audio recording of the district court proceeding could be included in the record on appeal.

Rule 10(b)(3)'s statement of issues and counter-designations. Rule 10(b)(1) does not require the appellant to order a transcript; but if the appellant does not order the transcript, Rule 10(b)(1)(B) requires the appellant to "file a certificate stating that no transcript will be ordered." The certificate must be filed within 10 days (or, if the time-computation amendments take effect, 14 days) after the later of the filing of the notice of appeal or the entry of the order disposing of the last tolling motion. A local rule could authorize the appellant to include in the certificate a statement that the appellant intends to rely on the audio recording rather than ordering a

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[6] See, e.g., Fifth Circuit Rule 10.2 ("The district court must furnish the record on appeal to this court in paper form, and in electronic form whenever available. The paper and electronic records on appeals must be consecutively numbered and paginated."); Sixth Circuit Rule 10(a)(1) ("When the record is complete as described in FRAP 11(b)(2), the clerk will compile an electronic record on appeal (ROA) from the district court's electronic record. The ROA will be an electronic file in PDF format or, where the size of the record requires, multiple files."); Sixth Circuit Rule 28(a)(2) ("For cases where there is an electronic record on appeal, in addition to the reference required by 6 Cir. R. 28(a)(1), a brief must refer to the page of the electronic record on appeal for items that appear in that record."); see also the Sixth Circuit Guide to Electronic Filing.

transcript.[7] If the appellant were to do so, then Appellate Rule 10(b)(3) would require the appellant to file and serve on the appellee "a statement of the issues that the appellant intends to present on the appeal." Rule 10(b)(3) is obviously intended to enable the appellee to determine what portions, if any, of the transcript it wishes to order. But if the appellee, too, is comfortable with the idea of relying on the audio recording rather than ordering a transcript, then the parties could simply include all the audio files as part of the record, rather than engaging in the process of designations and counter-designations contemplated by Rule 10(b).

Rule 10(b)(2)'s requirement of "a transcript." Another difficulty is that in cases where the appellant wishes to challenge factual findings, Rule 10(b)(2), read literally, would seem to require a "transcript" rather than permitting the use of audio files: "If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant must include in the record a transcript of all evidence relevant to that finding or conclusion."

Rule 28(e)'s requirement of page citations. The importance of providing specific record citations is well known. If a system were adopted for using audio recordings in lieu of transcripts, it would be possible for the litigant to pinpoint the part of the audio file to which the litigant wishes to direct the court's attention by citing the relevant hour and minute. Such measures could comply with the spirit of Rules 28(a), 28(b) and 28(e). But they would fit awkwardly with the letter of Rule 28(e), which requires citations to the "page" of the appendix or of the document in the original record.

Rule 30's provisions concerning the appendix. Rule 30's provisions concerning the appendix clearly contemplate that the matter to be placed in the appendix will be in paginated form. However, the flexibility provided to the courts of appeals by Rule 30(f) has permitted a great deal of local variation,[8] and it seems likely that the permissible variations could include the use of audio files as part of the original record.

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

[8] Rule 30(f) provides: "The court may, either by rule for all cases or classes of cases or by order in a particular case, dispense with the appendix and permit an appeal to proceed on the original record with any copies of the record, or relevant parts, that the court may order the parties to file."

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

The use of audio files in place of a transcript would have significant advantages, but on the other hand a number of judges and lawyers are likely to prefer using transcripts. The likely variation in preferences on this matter suggests that the use of audio files in lieu of transcripts may, in the near term, be more likely to take hold in district courts than in the courts of appeals.

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

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

It also seems likely that judges' preferences will vary. Some judges may like using audio files, but it is probable that others will not. At the district court level, variation among judges' preferences would not prevent the use of audio files in lieu of transcripts, because any district judge who shares Judge Baylson's receptivity to the use of audio files can permit that use in his or her cases. At the court of appeals level, however, even if some judges are receptive to the use of audio files it seems likely that others on the same court will prefer to have a transcript.

V. Conclusion

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

such a local rule would rest in some tension with some aspects of the Appellate Rules. It therefore seems useful for the Committee to monitor developments in this area, in order to ensure that the Appellate Rules do not impede useful innovations by the courts of appeals

Encl

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA
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November 5, 2008

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

Re: Rules of Appellate Procedure

Dear Cathie:

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

Best regards.

Sincerely yours,

Michael M. Baylson

MMB:lm
enclosure

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

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

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

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

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

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

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

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

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

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

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

The following steps are easily taken:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

BY THE COURT:

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

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

Fax
cc: Herring (mail)
Shore
Goode

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

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

Digital Audio File Electronic Access Pilot Program

NOTICE

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

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

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

MICHAEL E. KUNZ
Clerk of Court

TAB 7E

MEMORANDUM

DATE: March 27, 2009

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

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

Rule 26.1(a) currently provides that "[a]ny nongovernmental corporate party to a proceeding in a court of appeals must file a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation."[1] Rule 29(c) currently states that "[i]f an amicus curiae is a corporation, the brief must include a disclosure statement like that required of parties by Rule 26.1." For ease of reference and to parallel the structure of new Rule 29(c)(7), the proposed amendments would move this statement to a new Rule 29(c)(6) stating that amicus briefs must include, "if filed by an amicus curiae that is a corporation, a disclosure statement like that required of parties by Rule 26.1."

In the comments submitted on the proposal to amend Appellate Rule 29(c), two commenters – Chief Judge Frank H. Easterbrook and the ABA's Council of Appellate Lawyers – suggest that the Committee should rethink the scope of Appellate Rule 26.1's disclosure requirement. They also suggest that the Committee revise the part of Rule 29(c) that requires amicus briefs filed by a corporation to include "a disclosure statement like that required of parties by Rule 26.1."

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

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

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

I. A brief history of disclosure provisions

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

A. National rules

The Supreme Court has had a disclosure rule since 1980; the current rule is Supreme Court Rule 29.6.[2] Appellate Rule 26.1 was adopted in 1989 and was significantly amended in 1998 and 2002. Civil Rule 7.1[3] and Criminal Rule 12.4[4] – both adopted in 2002 – were patterned after Appellate Rule 26.1. Bankruptcy Rule 7007.1[5] – adopted in 2003 – is worded somewhat

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[2] Supreme Court Rule 29.6 states in part: "Every document, except a joint appendix or amicus curiae brief, filed by or on behalf of a nongovernmental corporation shall contain a corporate disclosure statement identifying the parent corporations and listing any publicly held company that owns 10% or more of the corporation's stock. If there is no parent or publicly held company owning 10% or more of the corporation's stock, a notation to this effect shall be included in the document."

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

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

[5] Bankruptcy Rule 7007.1(a) states: "Any corporation that is a party to an adversary proceeding, other than the debtor or a governmental unit, shall file two copies of a statement that

differently than the Appellate Rule. Appellate Rule 29(c)'s corporate-disclosure requirement was added in 1998; the 1998 Committee Note to Rule 29 does not discuss this change.

A preliminary version of what would become Appellate Rule 26 1 was evidently broader than the version that ultimately took effect in 1989. As the Spring 1988 minutes explain.

> Prior to its last meeting the Committee approved and circulated a draft rule to the circuits Ten circuits responded to the draft rule. Five circuits approved of the draft, although three circuits suggested amendments. Five circuits disapproved The principal objection to the circulated draft was the breadth of disclosure required. In light of the response to the circulated draft, the rule approved by the Committee at its last meeting was more narrowly drawn. The Committee decided that the rule it approved represented a minimum requirement which all circuits should meet, and if the circuits want to require additional information they may do so.[6]

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

> The amendment deletes the requirement that a corporate party identify subsidiaries and affiliates that have issued shares to the public. Although several circuit rules require identification of such entities, the Committee believes that such disclosure is unnecessary.
>
> A disclosure statement assists a judge in ascertaining whether or not the judge has an interest that should cause the judge to recuse himself or herself from the case. Given that purpose, disclosure of entities that would not be adversely affected by a decision in the case is unnecessary.
>
> Disclosure of a party's parent corporation is necessary because a judgment against a subsidiary can negatively impact the parent. A judge who owns stock in the parent corporation, therefore, has an interest in litigation involving the subsidiary. The rule requires disclosure of all of a party's parent corporations meaning grandparent and great grandparent corporations as well. For example, if a party is a closely held corporation, the majority shareholder of which is a

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identifies any corporation, other than a governmental unit, that directly or indirectly owns 10% or more of any class of the corporation's equity interests, or states that there are no entities to report under this subdivision."

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

corporation formed by a publicly traded corporation for the purpose of acquiring and holding the shares of the party, the publicly traded grandparent corporation should be disclosed. Conversely, disclosure of a party's subsidiaries or affiliated corporations is ordinarily unnecessary. For example, if a party is a part owner of a corporation in which a judge owns stock, the possibility is quite remote that the judge might be biased by the fact that the judge and the litigant are co-owners of a corporation.

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

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

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

In the process that led to the 2002 amendments, participants discussed the possibility of broadening the disclosure requirements to include non-corporate parties. The proposed amendments to Appellate Rule 26.1 that were published for comment included a provision that would have required non-corporate parties to "file a statement that discloses any information that

may be publicly designated by the Judicial Conference of the United States."[7] Committee minutes reflect that the Codes of Conduct Committee opposed the adoption of such a provision.[8] A number of public comments also opposed this provision, arguing inter alia that any additional requirements not stated in the Rule would be less accessible to lawyers The 2002 amendments, as ultimately adopted, do not include that provision.

During the past year, the Codes of Conduct Committee has tentatively raised with the Standing Committee three questions which may have implications for practice under Appellate Rule 26.1. In particular, one of the questions implicates the interaction among Appellate Rule 26.1, any local circuit disclosure requirements, and the requirements imposed by the CM/ECF system in those circuits where CM/ECF is already operational. The Appellate Rules Committee discussed this inquiry at the fall 2008 meeting, and concluded that it was not yet ripe for consideration. The Codes of Conduct Committee has been asked for clarification on some of its questions, and as of this writing the Advisory Committees are awaiting further word from the Codes of Conduct Committee.

B. Local circuit provisions

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

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

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

The First,[9] Second,[10] Eighth[11] and Ninth[12] Circuits do not appear to impose any significant additional disclosure requirements beyond those set by Appellate Rule 26.1. The Seventh and Federal Circuits impose a few additional disclosure requirements, such as disclosing the names of lawyers involved in the case.[13] The D.C., Third, Fourth, Fifth, Sixth, Tenth and Eleventh Circuits impose much broader disclosure requirements than Appellate Rule 26.1; I will refer to them as the "broad-disclosure circuits."

The broad-disclosure circuits tend to expand the range of entities that must provide disclosure. So, for example, the D.C. Circuit's rule covers "[a] corporation, association, joint venture, partnership, syndicate, or other similar entity appearing as a party or amicus curiae." D.C. Circuit Rule 26.1(a). One portion of the Third Circuit's disclosure rule covers "[e]very party to an appeal." Third Circuit Local Appellate Rule 26.1.1(b). In non-criminal matters, the Fourth Circuit's disclosure requirements cover every "party ... other than the United States or a party proceeding in forma pauperis."[14] Fourth Circuit Rule 26.1(a)(1)(A). In criminal matters, the Fourth Circuit's requirements cover "corporate part[ies]." Fourth Circuit Rule 26.1(a)(1)(B). The Fifth Circuit's "certificate of interested persons" must be furnished for "all private (non-

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

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

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

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

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

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

governmental) parties " Fifth Circuit Rule 28 2 1. The Sixth Circuit's requirement covers "all parties and amici curiae" in non-criminal matters and "all corporate defendants in a criminal case " Sixth Circuit Rule 26.1(a). The Tenth Circuit's "certification of interested parties" must accompany "[e]ach entry of appearance " Tenth Circuit Rule 46.1(D). The Eleventh Circuit requires all parties and amici to file the "certificate of interested parties." Eleventh Circuit Rule 26.1-1

The broad-disclosure circuits also expand the types of disclosures that must be made concerning entities that are not parties to the appeal. Appellate Rule 26.1 requires identification of "any parent corporation" and "any publicly held corporation that owns 10 % or more" of the disclosing corporation's "stock." The D.C. Circuit builds on this approach but broadens it – for example, by referring to "a 10 % or greater ownership interest (such as stock or partnership shares) in the entity." D.C. Circuit Rule 26.1(a).[15] Some circuits take an even broader approach. The Third Circuit requires disclosure of "every publicly owned corporation not a party to the appeal, if any, that has a financial interest in the outcome of the litigation and the nature of that interest." Third Circuit Rule 26.1.1(b). Likewise, in the Fourth Circuit a party must identify "any publicly held corporation, whether or not a party to the present litigation, that has a direct financial interest in the outcome of the litigation by reason of a franchise, lease, other profit sharing agreement, insurance, or indemnity agreement." Fourth Circuit Rule 26.1(a)(2). The Fifth Circuit requires "a complete list of all persons, associations of persons, firms, partnerships, corporations, guarantors, insurers, affiliates, parent corporations, or other legal entities who or which are financially interested in the outcome of the litigation." Fifth Circuit Rule 28.2.1. The Sixth Circuit requires disclosure "[w]henever, by reason of insurance, a franchise agreement, or indemnity agreement, a publicly owned corporation or its affiliate, not a party to the appeal, nor an amicus, has a substantial financial interest in the outcome of litigation." Sixth Circuit Rule 26.1(b)(2). In the Tenth Circuit, "[t]he certificate must list all persons, associations, firms, partnerships, corporations, guarantors, insurers, affiliates, and other legal entities that are financially interested in the outcome of the litigation." Tenth Circuit Rule 46.1(D)(2). And the Eleventh Circuit requires "a complete list of the trial judge(s), all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of the particular case or appeal, including subsidiaries, conglomerates, affiliates and parent corporations, including any publicly held corporation that owns 10% or more of the party's stock, and other identifiable legal entities related to a party." Eleventh Circuit Rule 26.1-1.

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

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

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

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

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

A. Chief Judge Easterbrook's suggestions

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

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

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

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

Chief Judge Easterbrook is correct to point out that both Rule 26.1(a) and Rule 29(c) require disclosures by a corporation even if the corporation does not have stock. His comment could be taken to suggest that one could exempt corporations that do not have stock from the disclosure obligation without losing any information that would be relevant to a judge's recusal decision. To evaluate this suggestion, it is useful to consider how it would be implemented. Presumably one would implement it by redrafting the rules so as not to cover corporations that do

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

Chief Judge Easterbrook's other critique is that the Rules are under-inclusive because they fail to elicit all information that would be relevant to a judge in considering whether to recuse.[16] As noted in Part I.B., the broad-disclosure circuits agree with Chief Judge Easterbrook and have adopted considerably more expansive local disclosure rules. (Interestingly, the Seventh Circuit does not fall in this category.) There would be advantages to a national rule requiring broader disclosure, to the extent that such a rule helped to elicit more information that assisted in recusal decisions. On the other hand, there would be costs to adopting a broader national requirement; for example, depending on how the requirement was drafted, it could be somewhat burdensome for parties and amici to determine and provide the required disclosure. A full exposition of the relevant considerations lies beyond the scope of this memo.

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

The ABA Council of Appellate Lawyers states:

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

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

statement that Rule 26.1 requires of parties." The word "like" in the present proposal is ambiguous as to whether some degree of difference may be permissible.

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

III. Conclusion

The suggestions raised in Part II warrant the Committee's consideration. Of those suggestions, the most significant is Chief Judge Easterbrook's proposal that the Committee consider broadening the scope of the disclosure requirements.[17] But though that proposal is a thoughtful one, it also raises complex issues.

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

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

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

TAB 8

Calendar for September–November 2009 (United States)

September

Su	Mo	Tu	We	Th	Fr	Sa
		1	2	3	4	5
6	7	8	9	10	11	12
13	14	15	16	17	18	19
20	21	22	23	24	25	26
27	28	29	30			

October

Su	Mo	Tu	We	Th	Fr	Sa
				1	2	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29	30	31

November

Su	Mo	Tu	We	Th	Fr	Sa
1	2	3	4	5	6	7
8	9	10	11	12	13	14
15	16	17	18	19	20	21
22	23	24	25	26	27	28
29	30					

Holidays and Observances:

Sep 7 Labor Day
Oct 12 Columbus Day (Most regions)
Nov 11 Veterans Day
Nov 26 Thanksgiving Day

Calendar generated on www.timeanddate.com/calendar