ADVISORY COMMITTEE
ON
APPELLATE RULES

Seattle, WA
November 5-6, 2009

Agenda for Fall 2009 Meeting of
Advisory Committee on Appellate Rules
November 5-6, 2009
Seattle, Washington

I. Introductions

II. Approval of Minutes of April 2009 Meeting

III. Report on June 2009 Meeting of Standing Committee

IV. Other Information Items

V. Action Items

A. For publication

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

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. 05-05 (FRAP 29(e) – timing of amicus filing)

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

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-L (FRAP 6(b)(2)(A) / *Sorensen* issue)

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

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

VII. Additional Old Business and New Business

A. Item No. 09-AP-C (matters relating to the Bankruptcy Rules Committee's project to revise Part VIII of the Bankruptcy Rules)

VIII. Schedule Date and Location of Spring 2010 Meeting

IX. Adjournment

ADVISORY COMMITTEE ON APPELLATE RULES

Chair:	Reporter:
Honorable Jeffrey S. Sutton United States Circuit Judge United States Court of Appeals 260 Joseph P. Kinneary United States Courthouse 85 Marconi Boulevard Columbus, OH 43215	Professor Catherine T. Struve University of Pennsylvania Law School 3400 Chestnut Street Philadelphia, PA 19104
Members: James F. Bennett, Esquire Dowd Bennett LLP 7733 Forsyth, Suite 1410 St. Louis, MO 63105	 Honorable Kermit Edward Bye United States Circuit Judge United States Court of Appeals Quentin N. Burdick United States Courthouse - Suite 330 655 First Avenue North Fargo, ND 58102
Honorable Randy J. Holland Associate Justice Supreme Court of Delaware 34 The Circle Georgetown, DE 19947	Honorable Elena Kagan (ex officio) Solicitor General U.S. Department of Justice 950 Pennsylvania Ave., N.W. Room 5143 Washington, DC 20530
Douglas Letter Appellate Litigation Counsel Civil Div., U.S. Department of Justice 950 Pennsylvania Ave., N.W., Rm 7513 Washington, DC 20530	Maureen E. Mahoney, Esquire Latham & Watkins LLP 555 11th Street, N.W., Suite 1000 Washington, DC 20004-1304
  Dean Stephen R. McAllister University of Kansas School of Law 1535 West 15th Street Lawrence, KS 66045	**Advisor:** Leonard Green Clerk United States Court of Appeals 540 Potter Stewart United States Courthouse 100 East Fifth Street Cincinnati, OH 45202

ADVISORY COMMITTEE ON APPELLATE RULES (CONT'D.)

Liaison Member:	Secretary:
Honorable Harris L Hartz United States Circuit Judge United States Court of Appeals 201 Third Street, N.W., Suite 1870 Albuquerque, NM 87102	Peter G. McCabe Secretary, Committee on Rules of Practice and Procedure Washington, DC 20544

ADVISORY COMMITTEE ON APPELLATE RULES

Members	Position	District/Circuit	Start Date	End Date
Jeffrey S. Sutton **Chair**	C	Sixth Circuit	Member: 2005 Chair: 2010	---- 2013
James Forrest Bennett	ESQ	Missouri	2005	2011
Kermit Edward Bye	C	Eighth Circuit	2005	2011
Elena Kagan	DOJ	Washington, DC	2009	-----
Randy J. Holland	JUST	Delaware	2004	2010
Maureen E. Mahoney	ESQ	Washington, DC	2005	2011
Stephen R. McAllister	ACAD	Kansas	2004	2010
Leonard Green	Clerk	Sixth Circuit	2010	2013
Catherine T. Struve **Reporter**	ACAD	Pennsylvania	2006	Open

Principal Staff:

Peter G. McCabe **(202) 502-1800**
John K. Rabiej **(202) 502-1820**

Advisory Committee on Appellate Rules
Table of Agenda Items — October 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 FRAP 40(a)(1) proposal remanded to Advisory Committee 06/09
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

FRAP Item	Proposal	Source	Current Status
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 Revised draft approved 04/09 for submission to Standing Committee Approved by Standing Committee 06/09 Approved by Judicial Conference 09/09
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

FRAP Item	Proposal	Source	Current Status
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 Approved 04/09 for submission to Standing Committee Approved by Standing Committee 06/09 Approved by Judicial Conference 09/09
07-AP-E	Consider possible FRAP amendments in response to Bowles v. Russell (2007).	Mark Levy, Esq.	Discussed and retained on agenda 11/07 Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09
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 Approved 04/09 for submission to Standing Committee Approved by Standing Committee 06/09 Approved by Judicial Conference 09/09
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 Discussed and retained on agenda 04/09
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 Discussed and retained on agenda 04/09

FRAP Item	Proposal	Source	Current Status
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 Discussed and retained on agenda 04/09
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 Discussed and retained on agenda 04/09
08-AP-G	Consider substantive and style changes to FRAP Form 4	Appellate Rules Committee	Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09
08-AP-H	Consider issues of "manufactured finality" and appealability	Mark Levy, Esq.	Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09
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 Discussed and retained on agenda 04/09
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.	Discussed and retained on agenda 04/09
08-AP-P	Amend FRAP 32 to change from double line-spacing to 1.5 line-spacing for briefs	Peder K. Batalden, Esq.	Discussed and retained on agenda 04/09
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	Discussed and retained on agenda 04/09
08-AP-R	Consider amending FRAP 26.1 (corporate disclosure) and the corresponding requirement in FRAP 29(c)	Hon. Frank H. Easterbrook	Discussed and retained on agenda 04/09
09-AP-A	Consider amending FRAP 26.1 (corporate disclosure) and the corresponding requirement in FRAP 29(c)	ABA Council of Appellate Lawyers	Discussed and retained on agenda 04/09
09-AP-B	Amend FRAP 1(b) to include federally recognized Indian tribes within the definition of "state"	Daniel I.S.J. Rey-Bear, Esq.	Discussed and retained on agenda 04/09

FRAP Item	Proposal	Source	Current Status
09-AP-C	Consider possible FRAP amendments in the light of project to revise Part VIII of the Bankruptcy Rules	Bankruptcy Rules Committee	Awaiting initial discussion

II

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Minutes of Spring 2009 Meeting of
Advisory Committee on Appellate Rules
April 16 and 17, 2009
Kansas City, Missouri

I. Introductions

Judge Carl E. Stewart called the meeting of the Advisory Committee on Appellate Rules to order on Thursday, April 16, 2009, at 8:30 a.m. at the Hotel Phillips in Kansas City, Missouri. The following Advisory Committee members were present: Judge Kermit E. Bye, Judge Jeffrey S. Sutton, Justice Randy J. Holland, Dean Stephen R. McAllister, Mr. Mark I. Levy, and Mr. James F. Bennett. Mr. Douglas Letter, Appellate Litigation Counsel, Civil Division, U.S. Department of Justice ("DOJ"), was present representing the Solicitor General. Also present were Judge Harris L. Hartz, liaison from the Standing Committee; Mr. Peter G. McCabe, Secretary to the Standing Committee; Mr. Charles R. Fulbruge III, liaison from the appellate clerks; Mr. John K. Rabiej, Mr. James N. Ishida and Mr. Jeffrey N. Barr from the Administrative Office ("AO"); and Ms. Marie Leary from the Federal Judicial Center ("FJC"). Prof. Catherine T. Struve, the Reporter, took the minutes.

Judge Stewart welcomed the meeting participants. He expressed regret that Maureen Mahoney, Judge Ellis, Judge Rosenthal and Professor Coquillette were unable to be present. Judge Stewart noted the Committee's great appreciation of Judge Rosenthal's work on all the Committee's matters including the package of proposed time-computation legislation that is currently before Congress.

II. Approval of Minutes of November 2008 Meeting

The minutes of the November 2008 meeting were approved subject to the correction of a typographical error on page 11.

III. Report on January 2009 meeting of Standing Committee

Judge Stewart and the Reporter highlighted relevant aspects of the Standing Committee's discussions at its January 2009 meeting. The proposed amendment to Appellate Rule 40(a)(1) had been approved by the Appellate Rules Committee at its fall 2008 meeting. Judge Stewart presented that proposed amendment to the Standing Committee for discussion rather than for

action, in order to provide an opportunity for the new administration to consider the proposal before the presentation of the proposal for final approval by the Standing Committee. Judge Stewart also described to the Standing Committee the Appellate Rules Committee's ongoing work on other matters such as the question of manufactured finality.

The Reporter noted that the Supreme Court has approved a number of proposed amendments which are currently on track to take effect on December 1, 2009, assuming that Congress takes no contrary action. The 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 also pointed out that the Bankruptcy Rules Committee has begun a review of Part VIII of the Bankruptcy Rules concerning appellate practice. The Bankruptcy Rules Committee has held one mini-conference on the subject in spring 2009 and intends to hold another mini-conference in fall 2009; Judge Swain has invited Professor Struve to attend the fall mini-conference, which will take place in September 2009.

IV. Other Information Items

Judge Stewart noted that the Appellate Rules Committee had discussed at its fall 2008 meeting the draft Best Practices Guide to Using Subcommittees. He observed that the preparation of the draft was occasioned by concerns that subcommittees of some Judicial Conference Committees were taking on a life of their own. Such problems, Judge Stewart noted, had not arisen with subcommittees of the Rules Committees. A judge member asked Judge Stewart about the nature of those concerns; Judge Stewart explained that some subcommittees of other Judicial Conference Committees were dealing with matters involving large monetary amounts or controversial issues, and in some instances there were concerns that the subcommittees were communicating with non-members on issues that the full committee had not yet dealt with. Judge Stewart reported that he had written to Judge Rosenthal to summarize the Appellate Rules Committee's past use of subcommittees and to proffer suggestions on the draft Best Practices Guide; Judge Rosenthal then collected the responses of the Rules Committees and provided them to Chief Judge Scirica. Mr. Rabiej reported that the Judicial Conference Executive Committee has removed from its policy the language explicitly disfavoring the use of subcommittees (though the use of full committees is preferred whenever possible). Judge Stewart stated that the Appellate Rules Committee will continue to comply with Judicial Conference policy concerning the use of subcommittees. Two subcommittees have recently been formed or revived and will involve participation by the Appellate Rules Committee.

The first such subcommittee is the newly reconstituted Privacy Subcommittee. That subcommittee, which had been active in preparing the privacy rules adopted in response to the E-

Government Act, has been revived in order to respond to ongoing privacy concerns. Judge Reena Raggi, a member of the Standing Committee, chairs the Privacy Subcommittee. James Bennett has accepted Judge Stewart's invitation to serve as the Appellate Rules Committee's representative to the Privacy Subcommittee. Judge Stewart noted that the Privacy Subcommittee will provide a framework for considering important privacy issues. Mr. McCabe reported that Senator Lieberman has recently raised concerns about social security numbers appearing in court opinions. Mr. Rabiej stated that this inquiry responds to information provided by Carl Malamud of Public.Resource.Org, and that the Administrative Office is currently analyzing that information. Mr. Rabiej noted that the Administrative Office will investigate the possibility of developing software to search for social security numbers in court filings. He pointed out that Mr. Malamud has also raised concerns with respect to alien registration numbers. Mr. Fulbruge reported that he had shared these developments with some of the appellate clerks, and their consensus is that the local circuit rules put the burden of complying with privacy requirements on the filer. Mr. Fulbruge stated that the appellate clerks do not want to be made responsible for reviewing filings; he noted that such a responsibility would be particularly problematic with respect to handwritten pro se filings and with respect to state-court records that are filed in federal habeas cases. Mr. Fulbruge pointed out that the clerks' offices lack the personnel necessary for such tasks.

The second subcommittee is the newly created Civil / Appellate Subcommittee. This subcommittee will investigate issues of common interest to the Civil and Appellate Rules Committees and will provide a framework for those two Committees to share insights and engage in joint study. Judge Stewart noted that the new Appellate Rule 12.1 and Civil Rule 62.1 exemplify the sort of joint project to be tackled by the new subcommittee. Not all the projects addressed by the subcommittee will necessarily lead to amendments of both sets of Rules. But the subcommittee framework will facilitate communication between the two Committees. Topics that may be considered by the subcommittee include the manufactured finality issue as well as the issues relating to the implications of *Bowles v. Russell*. To represent the Civil Rules Committee, Judge Kravitz has named Judge Steven Colloton, Chief Judge Vaughn Walker, and Peter Keisler as members of the subcommittee. Judge Bye, Maureen Mahoney and Douglas Letter have agreed to serve as the Appellate Rules Committee's representatives on the subcommittee. Judge Colloton will likely serve as the subcommittee's chair. The subcommittee is likely to conduct its deliberations by telephone and email rather than by meeting in person. Professors Cooper and Struve will serve as reporters to the subcommittee.

V. Action Items

A. For final approval

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

Judge Stewart invited the Reporter to present the proposed amendment to Appellate Rule 1(b). New Rule 1(b) would define the term "state," for purposes of the Appellate Rules, to include the District of Columbia and any United States commonwealth or territory. The Committee received two comments relating to this proposed amendment. Mr. Benjamin Butts wrote in support of the proposed Appellate Rules amendments generally, including the proposed new Rule 1(b). After the close of the comment period, the Committee received comments from Mr. Daniel Rey-Bear, who wrote to propose that federally recognized Indian tribes be included within the definition of "state."

The Reporter suggested that the Committee approve the proposed new Rule 1(b) as published and that it add Mr. Rey-Bear's suggestion to the study agenda as a new item. Mr. Rey-Bear's suggestion is thoughtful and important and deserves careful study. The suggestion does not, however, seem amenable to treatment in the context of the proposed new Rule 1(b). Mr. Rey-Bear rightly points out that Native American nations are sovereigns and deserve to be treated with the dignity accorded other sovereigns. That fact, however, does not establish that Indian nations should be encompassed within the definition of "state" for purposes of the Appellate Rules; as a point of comparison, that definition does not encompass foreign nations.

Moreover, before defining "state" to include Native American tribes it would be necessary to consider carefully the effect of such a definition on Rules 22, 26(a), 29, 44 and 46. As to Rule 22, it is not at all clear that one seeking to appeal the denial of a habeas petition brought under the Indian Civil Rights Act (to challenge detention by a Native American tribe) currently must obtain a certificate of appealability ("COA"). To the extent that no COA is currently required for appellants challenging detention by a tribe, including tribes within the term "state" for purposes of Rule 22 would significantly alter current law. As to Rule 26(a), there are technical questions concerning how one would treat tribal holidays for purposes of defining "legal holiday" in the context of Rule 26(a)'s time-computation provisions. Even apart from such technical questions, there is an overarching need for coordination of Rule 26(a)'s time-computation framework with the time-computation provisions in the Civil, Criminal and Bankruptcy Rules; any change to Rule 26(a), thus, must be considered in coordination with the other advisory committees.

Mr. Rey-Bear's comments indicate that the main impetus for his proposal is his view that Native American nations should be treated the same as states for purposes of amicus filings: He proposes that tribes should be entitled under Rule 29(a) to file amicus briefs without obtaining party consent or leave of court, and he also argues that tribes should not be subjected to the new authorship and funding disclosure requirement that was published for comment as proposed new Rule 29(c)(7). These points are well worth considering, but it is unclear that they could be adequately considered in the context of the current Rules amendments; therefore, it seems preferable to consider them as a new item.

Mr. Rey-Bear's proposal concerning the definition of "state" also implicates Rules 44 and 46. As to Rule 44, it would make sense to require notification of a tribe if the legality of that

tribe's laws is challenged in a case. But it is not clear that Rule 44 as currently drafted would fit comfortably with the special issues relating to Native American tribes: For instance, it is not at all clear that all tribes would wish to cast issues concerning the *validity* of a tribal law as issues concerning *constitutionality*. With respect to Rule 46, it may be useful to learn more about the attorney admission rules of different Native American nations before defining those nations as "states" for purposes of admission to practice before the courts of appeals.

Mr. Letter agreed that Mr. Rey-Bear's points deserve serious consideration, but also that such consideration requires close study as well as consultation with many relevant entities. Defining tribes as "states," he noted, might have implications for a variety of areas of law and practice. A member wondered whether an across-the-board definition of Native American tribes as "states" might be too dramatic a change. That member suggested, however, that as to amicus filings Native American tribes should be treated with the same dignity accorded to states. An attorney member agreed that it might be preferable to consider the treatment of Native American tribes on a rule-by-rule basis rather than defining tribes as "states" for purposes of all the rules. That member wondered whether it would be possible to obtain data concerning the frequency with which Native American tribes are denied leave to file amicus briefs. A judge member stated that he did not think that a court would deny a tribe permission to file an amicus brief.

A motion was made and seconded to place on the agenda the question of amicus filings by Native American tribes and to ask Mr. Letter to make initial inquiries among relevant federal government entities concerning both Rule 29(a)'s provision for filing without party consent or court leave and the provision (to be added to Rule 29(c) by the proposed amendment discussed below) concerning disclosure of amicus-brief authorship and funding. The motion passed by voice vote without opposition. By consensus, Mr. Rey-Bear's proposals concerning Rules 22, 26, 44 and 46 were also placed on the study agenda. Mr. McCabe will write to Mr. Rey-Bear to advise him that the Committee is studying his proposals.

Turning back to the Rule 1(b) proposal as published, a judge member asked why "state" is not capitalized in the proposed amendment. The Reporter stated her belief that this was a style choice on which the Committee had deferred to Professor Kimble.

A motion was made and seconded to approve the proposed new Rule 1(b) as published. The motion passed by voice vote without opposition.

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

The proposed amendment to Rule 29(a) was presented for discussion in connection with the Rule 1(b) amendment discussed above. In the light of Rule 1(b)'s new definition, Rule 29(a) can now refer simply to "a state" rather than to "a State, Territory, Commonwealth, or the District of Columbia."

A judge member asked why Rule 29(a) states that federal officers or agencies may make amicus filings without party consent or court permission but does not include a similar statement concerning *state* officers or agencies. The Reporter responded that she would need to investigate the Rule's history in order to determine the reason for the difference.

A motion was made and seconded to approve the proposed amendment to Rule 29(a) as published. The motion passed by voice vote without opposition.

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

Judge Stewart invited the Reporter to introduce the proposed amendment to Rule 29(c). This amendment would add to Rule 29(c) a disclosure requirement – modeled on Supreme Court Rule 37.6 – concerning the authorship and funding of an amicus brief. This proposed amendment attracted seven sets of comments, from Mr. Butts; Richard Samp on behalf of the Washington Legal Foundation; Chief Judge Frank Easterbrook; Luther Munford; the Council of Appellate Lawyers ("Council") (a bench-bar group within the American Bar Association); Steven Finell (who chairs the Council's rules committee); and Mr. Rey-Bear. The comments raise many thoughtful points, and the Reporter suggested that it might be useful for the Committee to group those points conceptually for the purposes of discussion.

The Reporter noted that both Chief Judge Easterbrook and the Council have made suggestions concerning the existing corporate-disclosure requirements set by Rule 26.1 and by the sentence in Rule 29(c) that directs corporate amici to make a disclosure "like that required of parties by Rule 26.1." The published proposal concerning Rule 29(c) would not alter the substance of those requirements (though as published the proposal would have moved the Rule 29(c) requirement to a new subdivision (c)(6)). That being so, the Reporter suggested that proposals to alter the corporate-disclosure provisions would more appropriately be treated as new agenda items rather than in the context of the proposed authorship and funding disclosure requirement. By consensus, the Committee resolved to treat these suggestions as new agenda items (see the discussion later in these minutes of Item Nos. 08-AP-R & 09-AP-A).

The Reporter next described the Council's proposal that Rule 29(c) be revised to follow the structure of Rule 28(b) – i.e., to set a default directive that amicus briefs conform to Rule 28(a)'s requirements for appellants' briefs and to list the deviations from that default position. The Reporter questioned whether such an approach would be useful for amicus briefs, given that when one compares the contents of appellants' briefs and amicus briefs the distinctions outnumber the similarities. By consensus the Committee determined not to adopt the Council's suggestion on this point.

The Reporter observed that Mr. Munford questions the basic approach taken by the proposed Rule 29(c) amendment. Rather than require disclosure of party funding or authorship of amicus briefs, Mr. Munford suggests, the Rule should ban the practice outright. Mr. Munford

notes that the recent book by Justice Scalia and Bryan Garner states that it is unethical for a party or its counsel "to have any part of funding or preparing [an] amicus brief." Another commenter, however, has questioned whether a ban on party funding or authorship might raise First Amendment or Enabling Act concerns. The Reporter stated that she had not analyzed such issues in detail, because her sense was that the Committee had deliberately chosen the disclosure approach rather than the ban approach. A disclosure requirement, she noted, is likely to deter parties and their counsel from funding or authoring amicus briefs. By consensus, the Committee determined to maintain the disclosure approach rather than adopting a ban.

The Reporter noted that Mr. Munford also has voiced the concern that by specifically mentioning party funding and authorship the disclosure requirement might be seen to legitimize the practice. Mr. Munford suggests that if the Committee is determined to use a disclosure approach it should word the disclosure requirement more generally so as not to mention parties and their counsel in particular. But the Reporter noted that substituting the broader wording suggested by Mr. Munford would prevent the Committee from distinguishing – as the published proposal does – between parties and their counsel and every other person who might author or fund the amicus brief. Under the published proposal, if a party or its counsel contributed money intended to fund the preparation or submission of the brief, disclosure is required whether or not the contributor is a member of the amicus. But contributions by one who is neither a party nor counsel to a party need not be disclosed if the contributor is a member of the amicus. The Reporter also suggested that if mentioning party funding in the disclosure rule has the effect of legitimizing that practice, such an effect has already occurred to some extent due to the existence of Supreme Court Rule 37.6. By consensus, the Committee determined not to make the disclosure's wording more general.

The Reporter next described Mr. Finell's proposal that language be added to Rule 29(c) to warn would-be amici against making redundant arguments. The Reporter noted that when leave to file is needed Rule 29(b) already requires the motion for leave to state why the amicus brief is desirable and relevant. And the Reporter observed that some circuits have local provisions that provide a warning similar to the one proposed by Mr. Finell. By consensus, the Committee decided not to adopt Mr. Finell's suggestion.

The Committee discussed the placement of the authorship and funding disclosure requirement. The published proposal, tracking Supreme Court Rule 37.6, directed that the disclosure be made in "the first footnote on the first page." Both Mr. Munford and the Council question this choice. Mr. Munford suggests that the disclosure instead be placed in a footnote appended to the Rule 29(c)(3) statement. The Council objects to the placement of the disclosure in a footnote and instead suggests that it follow the Rule 29(c)(3) statement in the text. An attorney member agreed that it would work well for the new disclosure to be placed after the Rule 29(c)(3) statement. After further discussion the Committee determined by consensus that the issue of placement could be resolved by moving the authorship and funding disclosure requirements – which had been published as subdivision (c)(7) – up into subdivision (c)(3).

The Committee also made a change in response to an observation by the Washington Legal Foundation concerning the published proposal's requirement that the filer identify "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." The Washington Legal Foundation expressed concern that this wording would not make clear that if there is no such person, the filer must so state. The Committee determined by consensus to reword this subpart to require a statement that "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 each such person."

The Reporter observed that both Chief Judge Easterbrook and Mr. Finell criticize the published rule's use of the term "authored." Chief Judge Easterbrook suggests substituting "wrote," while Mr. Finell suggests substituting "prepared." A member voiced a preference for using "authored" because that is the word used in Supreme Court Rule 37.6. A judge suggested that "authored" seems to reflect the Committee's sense of the appropriate scope of the disclosure requirement. By consensus, the Committee decided to retain "authored."

The Committee discussed a number of other suggestions concerning the proposal's wording and decided not to implement them. These suggestions included the Council's suggestion that additional Rule text be added to define what is meant by "authored ... in part"; the Council's suggestion that the authorship disclosure provision should mention not only a party's counsel but also the party itself or a party's non-counsel representative; suggestions by Mr. Finell and the Council that "states" be substituted for "indicates"; and Chief Judge Easterbrook's suggestion that the language "contributed money that was intended to fund preparing or submitting the brief" be changed to read "contributed money toward the cost of the brief." As to the latter suggestion, it was observed that the intent requirement had not been part of the proposed amendment to Supreme Court Rule 37.6 as originally published, and that the intent requirement had been added to the Supreme Court Rule 37.6 amendment in response to vigorous criticism (during the public comment period) of the original proposal's breadth.

A motion was made and seconded to approve the proposed amendment to Rule 29(c) subject to the changes described above. The motion passed by voice vote without opposition. A clean copy reflecting the revised text and Note of the amendment were distributed to Committee members later in the meeting for their review. The revised text and Note read as follows:

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, and – unless filed by an amicus curiae listed in the first sentence of Rule 29(a) – a statement that:

(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) 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 each such person;

(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).

* * * * *

Committee Note

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Subdivision (c)(3). Subdivision (c)(3) – which already requires a statement of the amicus's identity, interest in the case, and authority to file – is revised to set certain disclosure requirements concerning authorship and funding. Subdivision (c)(3) exempts from the authorship and funding disclosure requirements entities entitled under subdivision (a) to file an amicus brief without the consent of the parties or leave of court. Subdivision (c)(3) 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)(3) also requires amicus briefs to 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)(3), 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)(3). *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 . . . .").

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

Judge Stewart invited the Reporter to present the proposed amendment to Form 4. The amendment will adapt Form 4 so that it conforms to the privacy rules that took effect December

1, 2007. Those rules 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). Only one comment addressed this proposed amendment: As noted above, Mr. Butts expressed general support for all the proposed Appellate Rules amendments. A motion was made and seconded to approve the proposed amendment as published. The motion passed by voice vote without opposition.

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)

Judge Stewart noted that the Appellate Rules Committee at its fall 2008 meeting had given final approval to the proposed amendment to Rule 40(a)(1). The Department of Justice had originally proposed amending both Rule 40(a)(1) and Rule 4(a)(1)(B) to clarify those Rules' treatment of suits involving federal officers or employees. However, the Department withdrew its proposal concerning Rule 4(a)(1)(B) and the Committee did not proceed further with that proposal. Judge Stewart reminded the Committee that he had presented the proposed Rule 40(a)(1) amendment at the January 2009 Standing Committee meeting for discussion rather than final approval, so as to provide the new administration with an opportunity to review the Department's preferences concerning the possibility of coordinating changes to both Rule 4(a)(1)(B) and Rule 40(a)(1).

The Reporter observed that the grant of certiorari in *United States ex rel. Eisenstein v. City of New York*, 129 S. Ct. 988 (2009), was of interest with respect to the interpretation of Rule 4(a)(1)(B) and 28 U.S.C. § 2107. The circuits have split on the classification – for purposes of the 30-day and 60-day appeal periods set by Rule 4(a)(1) and Section 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. But in the Tenth Circuit, the 30-day appeal period ordinarily applies if the government has chosen not to intervene, unless special circumstances exist. And last August the Second Circuit held that the 30-day period applies. The Supreme Court's resolution of this issue in *Eisenstein* may provide some guidance on how best to interpret Section 2107.

Mr. Letter reported that the Solicitor General has been very busy dealing with urgent litigation-related decisions and that he has not yet been able to seek her guidance on the questions relating to Rules 40(a)(1) and 4(a)(1)(B). He promised to try to consult with the Solicitor General and provide input to Judge Stewart and the Committee prior to the June 2009 Standing Committee meeting. The Committee determined by consensus that in the meantime Judge Stewart will seek to place the Rule 40(a)(1) amendment on the Standing Committee's agenda for action at the June meeting.

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

Judge Stewart introduced the Committee's discussion of this item – concerning the implications of *Bowles v. Russell* for appeal deadlines – by noting that the joint Civil / Appellate Subcommittee will consider the matter. Obviously, that does not foreclose discussion by the Appellate Rules Committee; rather, the Committee's discussion can be conveyed to the Subcommittee so as to inform the Subcommittee's work.

Professor Struve noted that *Bowles*-related questions have aroused interest among members of the bar. For example, one practitioner has pointed out to the Reporter that a court of appeals' directive concerning the appropriate choice of time period for filing a rehearing petition (14 or 45 days) may have implications for the timeliness of a subsequent petition for certiorari, and that such a situation could present another context in which the availability of the "unique circumstances" doctrine might become salient.

In preparation for the Committee's discussion the Reporter prepared three spreadsheets. The first spreadsheet lists statutory and rule-based time periods for taking an appeal to the court of appeals from a lower court or for seeking court of appeals review of an agency determination. The second spreadsheet lists some of the cases that analyze such time periods. The third spreadsheet lists statutory provisions concerning non-appellate litigation – such as statutes of limitations, prerequisites to suit, numerical limits on statutory scope, and trial-level litigation deadlines. The Reporter stressed that the spreadsheet lists are exemplary rather than exhaustive; more research would be needed to try to identify all relevant provisions and cases. But one can reach some tentative conclusions based on the current lists. There are many statutory deadlines relating to practice in the courts of appeals. Those deadlines span a wide range in terms of the nature of the interested parties, the type of substantive legal area, the time of the relevant statute's adoption, and the possible applicability of interpretive presumptions. In at least a few instances, a statute contains provisions relating to practice in the trial court as well as the court of appeals, suggesting that a proposed amendment of such a statute should be evaluated with a view to its effects at both levels.

An attorney member asked how big a problem the *Bowles*-related issues are in practice. An appellate judge wondered how many of the case citations to *Bowles* appear in dictum rather than holdings. Another appellate judge echoed this question and suggested that further research might shed light on the frequency with which *Bowles*'s doctrinal implications determine the outcome of an appeal. Another appellate judge suggested that many questions concerning the nature of a statutory deadline can be usefully dealt with by applying a clear statement rule like that stated in *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 515-16 (2006); another line of research might investigate how broadly *Arbaugh* is applied in connection with such questions. He also noted that *Bowles* has raised questions concerning the tolling of certain deadlines and he suggested that it could be useful to provide guidance on such questions. Another focus of research might be the extent to which precedents such as *Becker v. Montgomery*, 532 U.S. 757

(2001), are applied to protect litigants against the loss of rights due to insubstantial defects in the notice of appeal.

An attorney member asked what policies are served by classifying a litigation deadline as jurisdictional. The Reporter responded that the context of the question will influence the answer: If a court is interpreting a statutory deadline, the relevant concerns may include separation-of-powers values, as suggested in *Bowles*. Mr. Letter agreed with this point. Apart from that observation, the Reporter suggested that the jurisdictional / non-jurisdictional choice may also take account of considerations such as the finality of judgments and the value of fairness to parties. An appellate judge observed that in pro se prisoner litigation, the government defendants might fail to brief a timeliness question and it would then fall to the court to raise the timeliness issue sua sponte. The Reporter noted that even non-jurisdictional deadlines might sometimes be raised by the court on its own motion; the Tenth Circuit has provided a thoughtful discussion of this question in *United States v. Mitchell*, 518 F.3d 740 (10th Cir. 2008).

By consensus, the Committee retained this item on its study agenda. Judge Stewart promised that the Reporter would keep the Committee updated on her research concerning *Bowles*-related issues and would also update the Committee on relevant discussions by the joint Civil / Appellate Subcommittee.

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

Judge Stewart summarized the Committee's fall 2008 discussion concerning this item, which relates to Rule 4(c)(1)'s provision for notices of appeal filed by inmates confined in institutions. Judge Diane Wood has suggested to the Committee that Rule 4(c)(1) is not as clear as it might be concerning the prepayment of postage. At the fall 2008 meeting, Judge Sutton, Dean McAllister and Mr. Letter had agreed to work with the Reporter to analyze these questions; in preparation for the spring 2009 meeting, they had listed relevant issues for the Committee's consideration.

The Reporter sketched a number of the issues. One question is whether Rule 4(c)(1) requires prepayment of postage as a condition of timeliness; this question is sometimes treated differently depending on whether the institution does or does not have a legal mail system. It is unclear under current caselaw whether the prepayment requirement (to the extent that it exists) is jurisdictional. But even if such a requirement is jurisdictional it could be changed via rulemaking. Another question is whether Rule 4(c)(1) *should* condition timeliness on the prepayment of postage. Admittedly, a first-class stamp costs little, but on the other hand an inmate may lack any funds to buy the stamp. And an inmate, unlike a free person, lacks the option of filing the notice of appeal in person. Another question is whether it makes sense for prepayment of postage to be treated differently for an institution with a legal mail system than for an institution without one. A further question is whether Rule 4(c)(1) might be amended to

specify circumstances under which the failure to prepay postage might be forgiven. Yet another question is whether the Rule might be amended to respond to *United States v. Ceballos-Martinez*, 387 F.3d 1140 (10th Cir. 2004), in which the court of appeals dismissed a prisoner's appeal because the prisoner had not included a declaration or notarized statement setting forth the date of deposit and stating that first-class postage had been prepaid (even though the postmark demonstrated that the notice of appeal was deposited in the prison mail system within the time for filing the notice). Still another question is whether Rule 4(c)(1)'s use of the term "inmate" appropriately denotes the range of persons who are confined in institutions and who may invoke the rule.

The Reporter observed that Rule 4(c)(1)'s inmate-filing provision relates to other provisions: Appellate Rule 25(a)(2)(C), Supreme Court Rule 29.2, and Rule 3(d) of the rules governing habeas and Section 2255 proceedings. To the extent that the Appellate Rules Committee is inclined to proceed with proposals on this topic, consultation with other Advisory Committees seems desirable. The Committee may also wish to consider the question of the project's scope. Should the project encompass other appellate timeliness issues such as delays in an institution's transmittal to an inmate of notice of the entry of a judgment or order? On this point, the Reporter noted that the Rules already address the possibility that a party may fail to learn of the entry of judgment in time to take an appeal, but the existing provisions do not focus on the circumstances of inmates in particular. Another question is whether the project should encompass the timeliness of trial court filings such as tolling motions or complaints.

Mr. Fulbruge described the policy of the Texas Department of Criminal Justice ("TDCJ"). Under that policy, if an inmate is on the "indigent list," the inmate is provided five legal letters per month. If the inmate does not put a stamp on a legal letter, the prison checks to see whether the inmate is on the indigent list and if he is, the prison puts a stamp on the letter, up to the five-letter limit per month (unless there are extraordinary circumstances that justify lifting this limit). Mr. Fulbruge expressed uncertainty as to whether this policy is applied in a uniform fashion by all units within the TDCJ. Mr. Fulbruge noted that if the timeliness of a filing is in question, the Fifth Circuit clerk's office will sometimes request clarification on that point from the district court or the institution.

An appellate judge asked whether the concern that an inmate may lack funds to pay for postage is already addressed by the caselaw indicating that inmates have a constitutional right to some amount of free postage for court filings. Another appellate judge suggested that it might be worth considering a provision that would permit an inmate who lacked the funds for postage to attest that he or she had a constitutional right to have the postage paid by the government. An attorney member suggested that the best course might be to retain the item on the Committee's study agenda so that the issues can percolate further in the courts. Mr. McCabe predicted that in five to ten years most prisons will provide a system that enables inmates to make electronic filings. By consensus, the Committee retained this item on its study agenda and directed the Reporter to monitor relevant developments in the caselaw and in practices relating to electronic filing.

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

Judge Stewart invited the Reporter to introduce these items, which concern Rule 4(a)(4)'s treatment of timing with respect to tolling motions. These issues form one of the topics that will be considered by the joint Civil / Appellate Subcommittee. One of the items was raised by Peder Batalden, who points out that there can sometimes be a time gap between the entry of an order resolving a tolling motion and the entry of an amended judgment pursuant to that order. The other item responds to suggestions by Public Citizen Litigation Group and the Seventh Circuit Bar Association Rules and Practice Committee, who suggest amending Rule 4(a) so that an initial notice of appeal encompasses appeals from any subsequent order disposing of postjudgment motions.

Mr. Batalden's concern is unlikely to arise in the Seventh Circuit, due to caselaw that interprets Civil Rule 58(a)'s reference to orders "disposing of" tolling motions to mean orders *denying* postjudgment motions. Under the Seventh Circuit's reading of Civil Rule 58(a), that Rule requires a separate document for an order *granting* a postjudgment motion. When a court enters an order granting a postjudgment motion and the order contemplates an amendment of the judgment, the court is most unlikely to provide the requisite separate document until the judgment has in fact been amended. Accordingly, in the Seventh Circuit Mr. Batalden's concern is very unlikely to arise. One possible way to address Mr. Batalden's concern, then, would be to amend Civil Rule 58(a) to explicitly adopt the Seventh Circuit's approach in this respect. An attorney member stated that the possible amendment to Civil Rule 58(a) is worth investigating. An appellate judge member suggested that the Seventh Circuit's approach to this question is the right one; he asked whether any circuit has rejected that approach. The Reporter stated that she was not aware of caselaw from other circuits disapproving of the Seventh Circuit's approach.

The Public Citizen and Seventh Circuit Bar Association proposals present a distinct set of issues. A threshold question is whether these proposals should be implemented. If the answer to that question is yes, then there will follow more specific questions concerning implementation. As a possible example, Rule 4(b)(3)(C) states (with respect to criminal appeals) that "[a] valid notice of appeal is effective – without amendment – to appeal from an order disposing of" tolling motions referred to in Rule 4(b)(3)(A). But adapting Rule 4(b)(3)(C)'s approach to the Rule 4(a) context may not be simple, because wording like that in Rule 4(b)(3)(C) could sweep quite broadly in some complex civil cases. Another issue relates to the caselaw that sometimes applies the *expressio unius* canon to interpret narrowly a notice of appeal that references fewer than all the possible orders that might be appealed. Some caselaw reasons that such a notice of appeal – by specifying that the appeal is taken from some orders – excludes the possibility that the appeal is also taken from other orders that are not listed in the notice of appeal. If Rule 4(a) were amended to provide that an initial notice of appeal also effects an appeal from orders subsequently disposing of tolling motions, how should that provision treat an initial notice of appeal that is narrowly drafted to specify only some orders?

On the Public Citizen / Seventh Circuit Bar Association proposals, an attorney member stated that Rule 4(b)'s approach is an appealing one. Another attorney member agreed that simpler procedure is better procedure. But this member also suggested that because the appellant is master of the notice of appeal, the appellant can draft the notice of appeal in a way that limits its scope.

By consensus, the Committee retained these items on its study agenda.

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

Judge Stewart invited the Reporter to introduce this item, which concerns substantive and style changes to Appellate Form 4. Appellate Rule 24 requires an applicant seeking to appeal in forma pauperis ("i.f.p.") to attach an affidavit that "shows in the detail prescribed by Form 4" the party's inability to pay or give security for fees and costs. Supreme Court Rule 39.1 requires a party seeking to proceed i.f.p. in the Supreme Court to use Form 4. As noted above, the Committee earlier in the meeting approved privacy-related amendments to Form 4. Apart from those amendments, the Committee has on its study agenda other possible changes to Form 4. One possibility is that Form 4, like other forms, may be restyled. Another question is whether a short form should be adopted as an alternative to the current (and very detailed) Form 4. And another set of issues concerns whether Questions 10 and 11 in Form 4 might intrude on matters covered by attorney-client privilege or work product immunity or might otherwise raise policy concerns. Question 10 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; Question 11 inquires about payments for non-attorney services in connection with the case.

The Reporter stated that on a preliminary review, it seems that much of the information sought by Questions 10 and 11 is unlikely to be covered by attorney-client privilege. However, it seems possible that – depending on how broadly Question 11 is interpreted – it might request some information concerning investigators or experts that might be covered by work product immunity. There are other questions to investigate, such as the effect on these concerns of the timing of applications for which Form 4 would be employed. Another line of research might investigate the scope of work product protection for pro se litigants (given that many i.f.p. applicants may be proceeding pro se).

The Reporter noted that Questions 10 and 11 might be argued to raise policy concerns as well. One such concern might be that by requiring the applicant to divulge the applicant's compensation arrangement with his or her attorney, Question 10 might give the applicant's opponent information that could provide a strategic advantage in settlement negotiations. Another concern is that by asking about payments to a lawyer in connection with the case, Question 10 could require a pro se litigant to divulge the fact that the litigant has paid a lawyer for discrete services (short of representation) in connection with the case. Such discrete services are sometimes referred to as "unbundled" legal services. The professional-responsibility

implications of the "unbundling" of legal services have been much discussed. 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. To the extent that Question 10 requires an applicant to divulge payments for unbundled legal services, it might offer the applicant's opponent an opportunity to raise objections to the practice.

An attorney member noted the possibility that an i.f.p. litigant's lawyer might be paid by a relative of the litigant. The member also noted that the defendant will often be able to seek discovery concerning attorney fees during the pendency of the litigation in cases where the fees are an element of the plaintiff's claim.

A judge member noted that i.f.p. applications may be made by represented parties. A member suggested that the "unbundling" of legal services is a hot topic in his home state, and he suggested that it is important for the Rules Committee to avoid making a value judgment on this topic. A judge member stated his impression that the trend is to permit "unbundling" so as to promote pro bono work.

An appellate judge asked whether Form 4, once it is submitted, is public, and if so, why it should be public. The member wondered whether the court might treat Form 4 as a confidential document that is not provided to the applicant's opponent. Though an attorney member mentioned the usual presumption that court filings are public, it was noted (by analogy) that some filings made in connection with Criminal Justice Act applications do not go into the court file. A judge member suggested that making an applicant's Form 4 responses public seems unduly invasive. One member asked whether i.f.p. applications are ever opposed, and, if so, whether that would weigh in favor of disclosing the Form 4 to the applicant's opponent. An attorney member wondered when the information requested by Questions 10 and 11 would really be material to an i.f.p. determination.

Judge Stewart asked Mr. Fulbruge whether Form 4's contents are kept confidential in the Fifth Circuit. Mr. Fulbruge stated that he did not think that the contents are made available on PACER. An attorney member suggested that this is an area for coordination with the other advisory committees, given that this issue may also arise in the lower courts.

By consensus, the Committee retained this matter on the study agenda.

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

Judge Stewart invited the Reporter to introduce this item, which was raised originally by Mr. Levy and which concerns the viability of "manufactured finality" as a means of securing

appellate review. The topic can be briefly described as follows: If the court dismisses the plaintiff's most important claims ("central claims"), leaving only claims about which the plaintiff cares less ("peripheral claims"), the continued pendency of the peripheral claims means there is no final judgment despite the dismissal of the central claims. If it is not possible to obtain a partial final judgment under Civil Rule 54(b) or to obtain the requisite rulings from both the district court and the court of appeals for a permissive appeal under 28 U.S.C. § 1292(b), can the plaintiff "manufacture" a final judgment by voluntarily dismissing the peripheral claims?

The Reporter noted that the Committee had discussed the variations in circuit caselaw on this question at its fall 2008 meeting. This is a topic on which the work of the Civil / Appellate Subcommittee will be very useful; it will also be important to consult with the Bankruptcy and Criminal Rules Committees. Preliminary discussions with Judge Stewart, Judge Kravitz, and Professor Cooper have identified some possible policy choices. It would make sense – and would generally accord with existing circuit caselaw – to provide that where the plaintiff dismisses the peripheral claims with prejudice, this produces a final judgment that permits appellate review of the central claims. 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 term this dismissal with "de facto prejudice"), 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. Moreover, when 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. 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. By contrast, when the peripheral claims are dismissed without prejudice, it is much less clear that the resulting judgment should be considered final.

The Reporter mentioned that in addition to these broad policy choices, there would also be more specific drafting choices. For instance, there is the question how to specify what events can trigger a conditional dismissal that results in an appealable judgment. There will also be questions concerning how to handle complex cases. And there is a further question whether the rule should recognize discretion in the court of appeals to take up and decide (on the appeal) the merits of the conditionally-dismissed claim as well as the claim on which the appeal was taken (so as to focus the proceedings on remand). As to that last question, Mr. Levy expressed concern that such a reservoir of discretion might prove to be a trap for the unwary appellant, and he suggested that such a concept would need to be carefully thought through.

Mr. Levy stated that if a rule can be drafted to resolve this set of questions, it would perform an important service. He suggested that the dismissal of the peripheral claims with prejudice is the easiest case – that should result in an appealable judgment. In his view the next easiest case is the conditional dismissal with prejudice, and here too, he thinks that the result

should be an appealable judgment; this concept would be administrable because there would be a formal piece of paper memorializing the conditional dismissal with prejudice. By contrast, he is concerned that in the case of a dismissal with "de facto prejudice," there may be uncertainty as to whether the peripheral claim really cannot be reasserted, and that this uncertainty could generate satellite litigation. As to a dismissal of peripheral claims without prejudice, he sees this as falling within the heartland of the matters already addressed by Civil Rule 54(b).

An appellate judge wondered why the Supreme Court has not granted certiorari to resolve these issues. It was suggested that perhaps the posture in which these issues arise would make it unlikely that a party would seek certiorari on this issue.

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

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

Judge Stewart invited the Reporter to introduce this item, which concerns the framework for interlocutory tax appeals. At its fall 2008 meeting, the Committee discussed the fact that Appellate Rules 13 and 14 appear designed to deal only with appeals as of right from Tax Court decisions and not to deal with permissive appeals from Tax Court orders under 26 U.S.C. § 7482(a)(2). The Reporter stated that in the time since the Committee's discussion of this item last fall, she had obtained useful insights from Judge Mark Holmes of the United States Tax Court. Judge Holmes states that this seems like an omission in the Appellate Rules that it would be a good idea to fix, but he also states that the number of cases that would be affected is tiny.

Mr. Letter noted that though the number of affected cases may be small, some of them can present very important issues. Mr. Letter reported that he discussed the question with his colleagues who handle tax appeals, and that those discussions indicate that the problem is worth fixing.

A motion was made and seconded to consider a possible rules amendment to address interlocutory tax appeals. The motion passed by voice vote without opposition.

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

Judge Stewart invited the Reporter to summarize 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. The Committee had discussed this item at its three previous meetings (in fall 2007, spring 2008 and fall 2008). By consensus, the Committee removed this item from its study agenda.

I. 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. Professor Meltzer noted his impression that some of those involved in trial-level practice had raised concern about superfluous post-trial motions, and he asked whether the Committees might wish to consider whether the Civil Rules are too permissive about when a postjudgment motion can be made. 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, the Reporter conveyed the substance of the discussion to Professor Cooper. By consensus, the Committee removed this item from its study agenda.

VII. Additional Old Business and New Business

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

Judge Stewart invited the Reporter to introduce this item, which was suggested to the Committee by Mr. Batalden. Mr. Batalden proposes that Rule 5 be amended to provide for the inclusion (in the appendix to a petition for permission to appeal) of key documents from the district court record. Rule 5(b)(1) requires the petition for permission to appeal to include, among other things, a copy of the challenged order or judgment and any related opinion, as well as any order stating the district court's permission to appeal or stating the district court's findings concerning any preconditions for appeal. Rule 5(c) sets a presumptive limit of 20 pages, excluding (among other things) the orders or judgments specified by Rule 5(b)(1). Rule 5 does not prevent the applicant from including additional record documents as attachments to the petition but such documents would appear to count toward the presumptive length limit.

The Reporter noted that Mr. Batalden pointed out that it may be particularly useful to include record documents with the petition in the context of petitions for permission to appeal under Civil Rule 23(f). The Reporter's memorandum in preparation for the meeting had asked whether the Federal Judicial Center's research on the Class Action Fairness Act (the "CAFA project") might shed light on these issues. In preparation for the meeting, Ms. Leary had consulted with her colleague Thomas Willging and based on that consultation she suggested that the Committee should not delay its consideration of this item for the purpose of seeking further data from the CAFA project. Ms. Leary explained that the focus of the CAFA project is to look at CAFA's effect on trial-level activity, and therefore the project was unlikely to provide a great deal of data that would directly pertain to practice on petitions for permission to appeal. She reported that the project still has about another year of work to go.

Mr. Fulbruge observed that the circuits take varying approaches to the questions raised by Mr. Batalden. Mr. Fulbruge suggested that it is hard to generalize about these approaches and

that they are still developing in the light of the shift to electronic filing. An appellate judge stated that in the Sixth Circuit joint appendices are no longer generally used; rather, the matter proceeds on the basis of the original record as it is available through the CM / ECF system. Another appellate judge suggested that the shift to electronic filing may eventually render this item moot. Mr. Fulbruge agreed that the CM / ECF system generally provides the court of appeals with access to the electronic records filed in the district court. He mentioned, however, that sealed documents can be hard to obtain in electronic form. Mr. Fulbruge also mentioned that handwritten documents require different treatment; but he observed that the court can run paper documents through an optical character recognition ("OCR") system which can render many of them electronically searchable.

An appellate judge noted that though judges may be able to access documents electronically through CM / ECF, some judges may also prefer to have key documents appended to a paper copy of the petition; but he suggested that a wait-and-see approach may be appropriate with respect to this item. Another appellate judge noted that law clerks tend to be particularly comfortable using electronic copies of the record. This judge noted that another question is how to deal with instances when a particular judge wants a paper copy of the documents; in particular, there is the question of who prints the paper copy (the clerk's office or the judge's chambers). Mr. Fulbruge noted that one way to resolve that question is for the clerk's office to send the documents electronically to print on a special printer in chambers. An appellate judge noted that prisoner and other pro se filings present distinct issues. He pointed out that death-penalty habeas cases involving state-court convictions will involve the filing of the paper state-court record. An attorney member asked how much expense the government incurs in printing paper copies of filings; Mr. Fulbruge responded that it can be costly.

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

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

Judge Stewart invited the Reporter to introduce this item, which arises from Mr. Batalden's question concerning the application of Rule 31's briefing deadlines in appeals in which multiple parties on a side serve and file separate briefs on different days. Rule 31(a) pegs 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. Rule 28.1 takes a similar approach to the timing of briefs in cases involving cross-appeals. 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. In two circuits, local provisions address Mr. Batalden's question. This timing question is not likely to trouble 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.

An attorney member expressed doubt that this question would pose a serious problem: If the attorney is unsure of the deadline, he or she can call the clerk's office to seek clarification. Another attorney agreed; he suggested that Mr. Batalden's question might be worth considering if the Committee decides to undertake a broader set of rules amendments in the future, but that the question is not worth addressing at this time. Another attorney member agreed. This member stated that he had never seen this problem arise in his practice in the courts of appeals; though he has seen a similar question arise in Supreme Court briefing, when the question arises one simply asks the Clerk for clarification.

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

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

Judge Stewart invited the Reporter to introduce this item, which concerns Mr. Batalden's suggestion that Rule 32 be amended to provide for 1.5-spaced briefs rather than double-spaced briefs. At Mr. Levy's suggestion, the Reporter had prepared two samples – one using 1.5 spacing and the other using double spacing. Those samples were circulated among the Committee members during the meeting.

An appellate judge suggested that so long as the briefs are readable, 1.5 spacing could save costs. A member asked why the proposed change should specify 1.5 spacing rather than permitting single spacing. It was suggested, however, that single spacing might make a non-printed brief less readable. Members noted that the double-spacing requirement is a holdover from the time when non-printed briefs were typed as opposed to printed on a computer printer. Mr. Letter asked why the rules should not permit computer-printed briefs to be printed on both sides of the page. An attorney member agreed that double-sided printing should be permitted. An appellate judge member noted that when he prints briefs in his chambers he prints them double-sided. Judge Stewart noted that his law clerks print briefs double-sided. Judge Stewart stressed the importance of ensuring that judges find the briefs readable; if briefs could be presented in a format that is both readable and light-weight, that would be desirable. An appellate judge member observed that the questions of line spacing and single-sided versus double-sided printing have implications at the trial level too.

An appellate judge suggested that the Appellate Rules Committee is likely to be considering possible Rules amendments relating to electronic filings and that the line-spacing and single-sided versus double-sided printing questions might be considered as part of that larger set of possible amendments. This member wondered whether judges may already be able to print their copies of electronically-filed briefs with the exact line spacing and other format choices that they prefer. He also predicted that if the Committee proposes rules that change the current line-spacing or single-sided printing practices without permitting local variations, such proposals would elicit very strong reactions. Mr. Rabiej noted that the development of the current provisions concerning brief fonts proved very controversial. Mr. Letter suggested that the cost

savings of 1.5 spacing and double-sided printing might be significant enough to justify proceeding with a proposal targeting these topics without awaiting a broader set of amendments concerning electronic filing. He pointed out that even with the advent of electronic filing, judges are likely to continue to require parties to submit hard copies.

Mr. Fulbruge observed that if the rules are changed to permit double-sided printing, this will require the Committee to re-consider the question of how the briefs should be bound. If the brief is double-sided, it becomes very important to ensure that the brief lies flat when it is open; he suggested that spiral binding is preferable for this purpose. Mr. Letter noted that if the rules are changed to permit double-sided printing, they should make that practice voluntary rather than mandatory, because older computer printers may not be capable of printing double-sided. An attorney member predicted that views on these questions will be divergent and perhaps irreconcilable; he asked whether this might be an area in which an appropriate interim step might be to permit local variation. Another member stated that raising these issues might produce a very constructive dialogue. Another attorney member emphasized that adopting these reforms would cut the bulk of the files in half. An appellate judge stated that the Eighth Circuit is heading in the direction of using double-sided, spiral-bound briefs; he suggested that this is the best approach and that the sooner it is adopted, the better. Judge Stewart observed that cost containment is a priority, and that making briefs less costly to produce also increases the accessibility of the courts. An attorney member stated that he, personally, prefers reading briefs that are printed single-sided – for example, single-sided briefs are easier to read on airplanes. An appellate judge member predicted that eventually courts will cease to require paper copies, and he stressed that if the only people doing the printing are the judges, and if they can alter the format of electronic briefs to suit their tastes, there will be no need to change the rule.

By consensus, the Committee determined to retain this item on its study agenda.

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

Judge Stewart invited the Reporter to introduce this item, which concerns a suggestion by Judge Michael Baylson that the Appellate Rules Committee consider the possibility of allowing the use of digital audiorecordings in place of written transcripts for the purposes of the record on appeal. Judge Baylson has permitted the use of digital audiorecordings in lieu of written transcripts for the purpose of post-trial motions. Such a practice can save the parties the expense of obtaining a transcript. However, it is likely that a transcript will need to be prepared for purposes of the appeal. Even if a particular circuit were inclined to experiment with the use of audiorecordings in lieu of transcripts, the current Appellate Rules would not fit comfortably with such an experiment. Thus, the Reporter suggested, this topic merits monitoring by the Committee.

An appellate judge member asked whether it is possible to convert a written brief into an audio file. Mr. Fulbruge stated that there is software that can enable one to convert a written

brief into spoken word, but that the software can be finicky. Mr. McCabe provided the Committee with background on the history of audiorecording in federal court proceedings. He observed that discussions concerning transcripts and audiorecordings have been going on for years and that the topic is a controversial one. There is little consensus; views are divergent and strongly held. Mr. Fulbruge noted that views on audiorecordings may evolve as the technology becomes easier to use.

Judge Hartz observed that, for the last 25 years, most appeals in the New Mexico Court of Appeals have been proceeding on the basis of audiorecordings. That court adopted the practice out of frustration with the delays that attended the preparation of transcripts. He noted that the court was very strict with attorneys if they did not accurately quote from the audiorecordings. In his experience, the judges did not have to listen to the audiorecordings very often. On the other hand, he noted, the New Mexico Court of Appeals has more central staff assistance than the federal courts of appeals generally do. It was suggested that the provision of an audiorecorded record can affect the standard of review; for example, when the question is whether a closing argument was inflammatory the answer might be unclear on the face of the transcript but the audiorecording might demonstrate that the argument was not, in fact, inflammatory. An appellate judge member noted that the Kentucky Supreme Court has used audiorecordings in place of transcripts for years, but that court nonetheless states that it employs a deferential standard when reviewing credibility assessments.

Judge Stewart noted that the relevant technology is changing rapidly. He noted that the recent Supreme Court decision in *Scott v. Harris*, 550 U.S. 372 (2007), referred to the videotape evidence that had been entered into the record below. An attorney member supported studying Judge Baylson's suggestion; he noted that obtaining a transcript poses a significant expense (for example, obtaining the transcript for a small four-day trial recently cost $1,200.00).

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

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

Judge Stewart invited the Reporter to introduce this item, which concerns suggestions made by Chief Judge Frank H. Easterbrook and the ABA's Council of Appellate Lawyers as part of their respective comments on the pending proposal to amend Rule 29(c) (discussed earlier in these minutes). These commenters 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."

The ABA's Council of Appellate Lawyers suggests amending Rule 26.1 to cover amicus briefs and amending Rule 29(c) to require provision of the "same disclosure statement" required

by Rule 26.1. This suggestion appears to arise from a view that Rule 29(c)'s current language – "a disclosure statement like that required of parties by Rule 26.1" – is unclear in some way and that the current language 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 (and the Council does not specify) what sort of difference would arise.

An attorney member asked whether a filing by an amicus could cause a recusal. The Reporter observed that a related issue surfaced in the discussions concerning amicus filings in connection with rehearing en banc; in that context, at least one circuit prohibits such filings if they would cause the recusal of a judge. An appellate judge suggested that some recusal issues are to some extent discretionary and perhaps the standard is slightly less stringent with respect to amicus briefs. Another appellate judge noted that though it may be unusual for an amicus filing to trigger a recusal, it is possible – for example, if a judge's relative authors the amicus brief.

Chief Judge Easterbrook argues that the term "corporation" (in Rules 26.1 and 29(c)) is both over- and under-inclusive. On the first point, Chief Judge Easterbrook asserts that some corporations – such as municipal corporations, Harvard University or the Catholic Bishop of Chicago – have no stock and no parent corporations and ought not to be required to make disclosures of the type specified by Rule 26.1. Presumably, the concern about municipal corporations focuses on Rule 29(c), given that Rule 26.1(a) explicitly limits the disclosure requirement to "nongovernmental" corporate parties. 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.

On the second point, it is true that both Rule 26.1(a) and Rule 29(c) require disclosures by a corporation even if the corporation does not have stock. But the problem with amending the rules to exempt corporations that do not have stock from the disclosure obligation is that such an amendment would create ambiguity when a corporate amicus makes no disclosure. In at least some instances when a corporate entity makes no disclosure, it could be unclear whether the lack of disclosure arises from a lack of anything to disclose or from a failure to comply with the disclosure requirement. Where the filer is the Catholic Bishop of Chicago, it may be clear that the lack of disclosure arises from the absence of anything to disclose. 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.

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. A number of circuits have adopted considerably more expansive local disclosure rules.

There are strong local variations on this point. There have been a number of deliberations on this issue over the past 20 years. It would significantly alter practice in some circuits to expand the range of disclosures required by the Appellate Rules. 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 discussing Chief Judge Easterbrook's proposal.

Mr. McCabe agreed that there is a long history of deliberations on such questions. The current Rules reflect a compromise position of setting a baseline requirement and then allowing the circuits to add further requirements if they see fit. Mr. Rabiej noted that the previous Appellate Rules Committee Reporter had initially drafted a detailed rule, but the Committee on Codes of Conduct argued for a less detailed and narrower rule.

An attorney member observed that it can be time-consuming to comply with this type of disclosure requirement. He noted that if any affiliate of his client has public debt or shares or sells limited partnership units to the general public, he errs on the side of disclosure. He suggested that the current Rule sets a fairly good baseline.

By consensus, the Committee determined to retain this item on its study agenda and to monitor the topic for further developments.

VIII. Schedule Date and Location of Fall 2009 Meeting

The dates of November 5 and 6, 2009, were selected for the Committee's fall 2009 meeting.

IX. Adjournment

During the meeting, Judge Stewart had noted his regret that Judge Ellis and Mr. Levy would be leaving the Committee. Both have provided astounding contributions to the Committee's discussions. At the meeting's conclusion, Judge Stewart thanked all the meeting participants, and expressed deep appreciation to Mr. McCabe, Mr. Rabiej, Mr. Ishida, Mr. Barr and the AO staff for their superb work and attention to detail. Judge Stewart stated that he had greatly enjoyed his work with the Committee.

The Committee adjourned at 10:15 a.m. on April 17, 2009.

Respectfully submitted,

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Catherine T. Struve
Reporter

III

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 1-2, 2009
Washington, D.C.
Draft Minutes

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ATTENDANCE

The Judicial Conference Committee on Rules of Practice and Procedure met in Washington, D.C., on Monday and Tuesday, June 1 and 2, 2009. The following members were present:

Judge Lee H. Rosenthal, Chair
David J. Beck, Esquire
Douglas R. Cox, Esquire
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

Deputy Attorney General David Ogden attended part of the meeting for the Department of Justice. The Department was also represented throughout the meeting by Karyn Temple Claggett, Elizabeth Shapiro, and Ted Hirt.

Also participating were the committee's consultants: Joseph F. Spaniol, Jr.; Professor Geoffrey C. Hazard, Jr.; and Professor R. Joseph Kimble. Professor Nancy J. King, associate reporter to the Advisory Committee on Criminal Rules, participated in part of the meeting by telephone.

Judge Anthony J. Scirica, former chair of the committee and current chair of the Judicial Conference's Executive Committee, participated in portions of the meeting.

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
Henry Wigglesworth	Senior attorney, Administrative Office
Joe Cecil	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
Professor Daniel J. Capra, Reporter

INTRODUCTORY REMARKS

Changes in Committee Membership

Judge Rosenthal noted that several membership changes had taken place since the last meeting. She pointed out that Professor Daniel Meltzer had resigned from the committee to accept an important position in the White House. She emphasized that he had been a superb member and would be sorely missed at committee meetings. She noted, though, that Professor Meltzer had stayed in touch with the committee and would attend its group dinner.

She reported that this was the last official meeting for Judge Hartz and Mr. Beck, whose terms will expire on October 1, 2009. She pointed out that both would be honored at the January 2010 meeting.

In addition, she noted that this was Judge Stewart's last meeting as chair of the Advisory Committee on Appellate Rules. She pointed out that Judge Stewart was truly irreplaceable as a judge, friend, and colleague. She noted that he had been a remarkable chair, and the Chief Justice had extended his term for a year. The new chair, Judge Jeffrey S. Sutton, will represent the advisory committee at the next Standing Committee meeting.

Judge Rosenthal reported, sadly, the recent death of Mark I. Levy, a distinguished attorney member of the Advisory Committee on Appellate Rules. A resolution honoring him had been prepared and would be sent to his widow by Judge Stewart. Judge Rosenthal extended the committee's sympathies and gratitude to his family for his many contributions.

Recent Actions Affecting the Rules

Judge Rosenthal reported that little action at the March 2009 session of the Judicial Conference had directly affected the rules committees, although several items on the Conference's consent calendar indirectly affected the rules. She noted, for example, that the Court Administration and Case Management Committee had recommended that courts provide notice on their dockets of the existence of sealed cases. Also, she said, the Court Administration and Case Management Committee had proposed guidelines for filing and posting transcripts that are designed to safeguard privacy interests, including matters arising during jury voir dire proceedings. She noted that the Standing Committee's privacy subcommittee, chaired by Judge Raggi, would meet to discuss a wide range of privacy and security matters immediately following the committee meeting.

Judge Rosenthal reported that the Supreme Court had approved all the rules recommended by the committee and had sent them to Congress on an expedited basis. She noted that the committee had successfully pursued legislative changes to 28 statutes that specify time limits and would be affected by the time-computation rules. The legislation had just passed both houses of Congress and been enacted into law. The statutory changes will take effect on December 1, 2009, the same time that the new time-computation rules take effect. She added that coordinated efforts were also underway to have all the courts update their local rules by December 1 to harmonize them with the new national time-computation rules.

Judge Rosenthal thanked Judge Thomas W. Thrash, Jr., former committee member, for his assistance in promoting the recent legislation, and Congressman Hank Johnson, who introduced it and was very helpful in shepherding it through Congress. On behalf of the committee, Professor Coquillette expressed special thanks to Judge Rosenthal for leading the concerted and challenging efforts to get the legislation enacted.

On behalf of the Executive Committee, Judge Scirica extended his appreciation to the committee for its excellent work. He noted that the Chief Justice continues to praise Judge Rosenthal for her work, including her impressive legislative accomplishments.

Legislative Report

Judge Rosenthal reported that Judge Kravitz would testify again in Congress on behalf of the Judicial Conference in opposition to the proposed Sunshine in Litigation Act. The legislation, she explained, would impose daunting requirements before a judge could issue a protective order under FED. R. CIV. P. 26(c). The judge would have to first find that the proposed protective order would not affect public health or safety – or if it would, that the protection is needed despite the impact on public health and safety. All of this would occur even before discovery begins.

Judge Kravitz noted that the American Bar Association opposed the legislation, and other bar associations were likely to follow. In addition, he said, the hope is that the Department of Justice would formally oppose the legislation. He pointed out that the bill was well-intentioned in trying to protect public health and safety, but the mechanism it uses to do so was not at all practical. He noted that he was the only witness to be invited by the sponsors to testify against the bill.

Judge Rosenthal explained that the Judicial Conference opposes the legislation it would amend the federal rules outside the Rules Enabling Act process. She noted that empirical evidence demonstrates clearly that judges are doing a good job in dealing with protective orders and in balancing private and public interests. The Sunshine in Litigation Act, though, would impose significant burdens on judges, requiring them to make findings when they have little information on which to base those findings.

Judge Kravitz added that if there is a problem in some cases with protective orders, it arises largely at the state level, not in the federal courts. He noted that there is also little understanding by the legislation's sponsors of how the civil litigation process actually works. The thought, he said, that a federal judge would be able to read through all the documents that could be discovered in order to find a smoking gun is truly misguided.

Mr. Rabiej reported that the Judiciary's implementation of the new privacy rules had been questioned by a special-interest group seeking to make all government information available to the public on the Internet without restrictions and without cost. He noted that the group had discovered that some documents filed by parties and posted on the courts' electronic PACER system contained unredacted social security numbers. He added that the privacy subcommittee would consider the matter and address a number of other privacy issues at its upcoming meeting immediately following the Standing Committee meeting.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee without objection by voice vote approved the minutes of the last meeting, held on January 12-13, 2009.

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 May 8, 2009 (Agenda Item 6).

Amendments for Final Approval

FED. R. APP. P. 1

Judge Stewart reported that the proposed amendment to Rule 1 (scope of the rules, definition, and title) was straightforward. It would define "state" for purposes of the appellate rules to include the District of Columbia and any U.S. commonwealth or territory.

Professor Struve added that, after the public comment period had ended, the advisory committee received a letter from an attorney in New Mexico asking it to expand the rule's definition of a "state" to include Native American tribes. She noted that the committee had discussed the request at length at its April 2009 meeting and had decided that the matter merited more time to develop because it implicates a number of different

rules and issues. Accordingly, the matter had been added to the advisory committee's study agenda. At the same time, though, the committee urged immediate approval of the proposed amendment to Rule 1.

The committee without objection by voice vote approved the proposed amendment for approval by the Judicial Conference.

FED. R. APP. P. 29

Judge Stewart reported that the proposed amendments to Rule 29(a) and (c) (amicus curiae brief) would add a new disclosure requirement on authorship and funding support received by an amicus in preparing its brief. The amendments had been modeled after the Supreme Court's recently revised Rule 37.6, although the advisory committee had to make a few adjustments because of differences in practice between the Supreme Court and the courts of appeals. Professor Struve added that the proposed amendment to Rule 29(a) would simply conform the rule to the proposed new definition of a "state" in Rule 1(b).

She noted that the advisory committee had received seven sets of public comments on the proposed amendments and had also considered the comments that had been submitted when the proposed revision to Supreme Court Rule 37.6 was published for comment. The comments, she said, had been very helpful, and the advisory committee had made two changes in the rule following publication. First, it reordered the subdivisions to place the authorship and disclosure provision in a new paragraph 29(c)(5).

Second, it revised subparagraph 29(c)(5)(C) to remove a possible ambiguity in the published language. The revised language would require an amicus to include in its brief a statement that "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 each such person." The revised language makes it clear that, if no such person has provided financial support for the brief, the amicus must state that fact expressly, rather than simply say nothing about funding. Professor Struve also pointed out that some public comments had suggested imposing a complete ban on funding amicus briefs, rather than merely requiring disclosure. But, she said, other commentators suggested that a ban would raise constitutional issues.

Professor Struve added that a suggestion had been received to delete the words "intended to fund." But, she explained, the advisory committee did not adopt it because the proposed alternative language — "contributed money toward the cost of the brief" — was too broad. Similar breadth in the version of Supreme Court Rule 37.6 published for comment had attracted vigorous opposition. It was later revised by the Court to use "intended to fund." She explained that without the "intended to fund" language, the disclosure requirement could require disclosure of membership dues and other indirect

financial support. Therefore, both the Supreme Court rule and the proposed appellate rule use the words "intended to fund" to make clear that the rule does not cover mere membership dues in an organization. Rather, the funding disclosure applies only when a party or counsel has contributed money with the intention of funding preparation or submission of the brief.

The committee without objection by voice vote approved the proposed amendment for approval by the Judicial Conference.

FED. R. APP. P. 40

Judge Stewart reported that the proposed amendments to Rule 40 (petition for a panel rehearing) had been presented to the Standing Committee before. They would clarify the time limit for filing a petition for rehearing in a case where an officer or employee of the United States is sued in his or her individual capacity for an act or omission occurring in connection with official duties. Originally, he explained, the Department of Justice had also sought a companion change in Rule 4 (appeal) to clarify the time limit for filing an appeal in a case where an officer or employee is sued individually for acts occurring in connection with official duties.

But, he said, the Supreme Court's decision in *Bowles v. Russell,* 551 U.S. 205 (2007), had seriously complicated any attempts to amend Rule 4. In essence, *Bowles* held that appeal time periods established by statute are jurisdictional in nature. Since the 60-day time limit for filing an appeal under Rule 4(a)(1)(B) is also established by statute, 28 § U.S.C. § 2107, there was a question whether the time period should be changed by rulemaking rather than legislation. Therefore, the Department decided to abandon the effort to amend Rule 4.

Rule 40, however, is not covered by statute. So the Department continued to seek the proposed amendments to that rule. Nevertheless, the advisory committee asked the Department to consider whether it preferred to pursue a legislative solution to deal with both situations.

Judge Stewart pointed out that a case currently pending before the Supreme Court raises the question of the application of the Rule 4 deadline in a qui tam action. *United States ex. rel. Eisenstein v. City of New York,* 129 S.Ct. 988 (2009). In view of the pendency of the case, the Department had asked that the Rule 40 proposal be held in abeyance (along with the Rule 4 proposal) to give it time to consider whether a single statutory fix might be a better approach. In addition, the Department was concerned that there could be a trap for the unwary if Rule 40 were to be amended before Rule 4 catches up. Therefore, even though the advisory committee had voted unanimously to proceed with amending Rule 40, it had decided to defer seeking final approval until the Supreme Court has acted in *Eisenstein.*

The committee without objection by voice vote approved remanding the proposed amendment back to the advisory committee.

FORM 4

Judge Stewart reported that Form 4 (affidavit accompanying a motion for permission to appeal in forma pauperis) would be amended to conform to the new privacy rules that took effect on December 1, 2007, by removing the request for full social security numbers and other personal identifier information. He noted that the Administrative Office had already made interim changes to the version of Form 4 that it posts on the Judiciary's website. Nevertheless, the official form needs to be changed to ratify those interim changes.

A member asked why a court needs all the information now required on Form 4, such as the street address, city, or state of the applicant's legal residence. Some of that information, for example, may be available from other documents, such as the pre-sentence investigation report. Other information, such as the applicant's years of schooling, may be of little use to the court.

Professor Struve explained that the advisory committee at this time was merely attempting to conform the form to the new privacy rules. It had not yet considered matters of substance. In fact, she said, the advisory committee planned to take up these issues later, and it may decide to draft two separate versions of the form to address the requests of judges for both a short version and long version of the form. Judge Stewart added that the advisory committee had a number of questions about the form and had asked its circuit-clerk liaison, Fritz Fulbruge, to survey his clerk colleagues on how the form is used in the courts.

A participant cautioned that the advisory committees should be careful not to let the privacy rules reach too far. At some point, he said, a court needs to have full information about certain matters. Another participant stated that the other parties in a case are entitled to review the petitioner's in forma pauperis application. But the applications are generally not placed in the official case file or posted on the Internet for public viewing.

The committee without objection by voice vote approved the proposed changes in the form for approval by the Judicial Conference.

Informational Items

Judge Stewart reported that the appellate and civil advisory committees had created a joint subcommittee to study a number of issues that intersect or overlap both

sets of rules, including "manufactured finality," the impact of tolling motions, and the impact of the Supreme Court's ruling in *Bowles v. Russell.*

Judge Stewart emphasized the advisory committee's shock and sadness at learning of the death of Mark Levy. He noted that Mark had participated actively in the advisory committee's April 2009 Kansas City meeting and had been responsible for a number of important proposals. He said that the advisory committee will present a resolution of remembrance and gratitude to Mrs. Levy. In addition, he had sent her some photographs that he had taken of Mark at recent advisory committee meetings in Charleston and Kansas City. She, in turn, had sent him a very nice note of appreciation.

Judge Stewart thanked the Standing Committee for its support of him personally and the advisory committee during his four years as chair. He also extended his special thanks to Professor Struve for her tireless, thorough, and uniformly excellent work.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Swain and Professor Gibson presented the report of the advisory committee, as set out in further detail in Judge Swain's memorandum and attachments of May 11, 2009 (Agenda Item 7).

Amendments for Final Approval

FED. R. BANKR. P. 1007, 1014, 1015, 1018, 1019, 4004, 5009, 5012, 7001, 9001

Professor Gibson reported that the advisory committee was seeking final approval of all but one of the proposed changes it had published for comment in August 2008. The committee, she said, would republish proposed new Rule 1004.2 for further comment because it had made a significant change in response to the first round of comments.

The amendments and proposed new rules, she explained, fall into several categories. Six of the provisions principally implement new chapter 15 of the Bankruptcy Code, governing cross-border insolvencies: FED. R. BANKR. P. 1014 (dismissal and change of venue), FED. R. BANKR. P. 1015 (consolidation or joint administration of cases), FED. R. BANKR. P. 1018 (contested petitions), FED. R. BANKR. P. 5009(c) (closing cases), new FED. R. BANKR. P. 5012 (agreements concerning coordination of proceedings in chapter 15 cases), and FED. R. BANKR. P. 9001 (general definitions).

Professor Gibson said that amendments to two rules would change the procedure for seeking denial of a discharge on the grounds that the debtor has received a discharge

within the prohibited time period to get a second discharge. She explained that all objections to discharge are currently classified as adversary proceedings and must be initiated by complaint. But, as revised, FED. R. BANKR. P. 4004 (grant or denial of discharge) and FED. R. BANKR. P. 7001 (scope of the Part VII adversary proceeding rules) would allow certain objections to discharge to be initiated by motion, rather than complaint. The advisory committee, she added, had received some helpful technical comments on the amendments and had decided as a result to make changes in the placement of the provisions. Originally, the proposal would have set forth the principal change in Rule 7001. But a former member pointed out that since Rule 7001 introduces the Part VII adversary proceeding rules, it should not begin by referring to a contested matter. Therefore, the advisory committee had moved the key provision to Rule 4004(d). The change, she said, would not require republishing.

Three of the rules, she said, deal with the statutory obligation of individual debtors to file a statement that they have completed a personal financial management course. Amended FED. R. BANKR. P. 1007(c) (lists, schedules, statements, and time limits) would extend the deadline for filing the statement from 45 to 60 days after the date set for the meeting of creditors. This would allow the clerk of court, under proposed new FED. R. BANKR. P. 5009(b) (notice of failure to file the statement), to send a notice within 45 days to anyone who has not filed the required statement that they must do so before the 60-day period expires. Rule 4004(c)(4) (grant of discharge) would be amended to direct the court to withhold the discharge until the statement is filed.

Professor Gibson stated that the advisory committee had received one comment from a bankruptcy judge that the noticing obligation would place an undue burden on the clerks of court. But a survey taken of the clerks by the committee's bankruptcy-clerk liaison, James Waldron, had shown that many send out the notice now, and it would not impose a major burden to require it.

Professor Gibson said that FED. R. BANKR. P. 1019 (conversion of a case to chapter 7) would provide a new period to object to exemptions when a case is converted from chapter 11, 12, or 13 to chapter 7. The amendment would give creditors a new period to object – unless the case had previously been in chapter 7 and the objection period had expired, or it has been pending more than a year after plan confirmation. The advisory committee had received one comment on the rule from the National Association of Bankruptcy Trustees supporting the rule but not supporting the one-year provision.

The committee without objection by voice vote approved the proposed amendments for approval by the Judicial Conference.

FED. R. BANKR. P. 4001

Professor Gibson reported that the advisory committee recommended approval of two changes to Rule 4001 (relief from the automatic stay and other matters) without

publication because they are simply conforming amendments. Rule 4001 contains two time-period adjustments that had been overlooked and not included in the package of time-computation rules that will take effect on December 1, 2009.

OFFICIAL FORM 23

The advisory committee would also make a change in Official Form 23 (debtor's certification of completing a financial management course) without publication to conform to the change being made in Rule 1007. It would revise the instructions regarding the time for consumer debtors to file their certificate of having completed a personal financial management course. The proposed change in the form would become effective on December 1, 2010, at the same time that the proposed amendment to Rule 1007 takes effect.

The committee without objection by voice vote approved the proposed amendments to Rule 4001 and Official Form 23 without publication for approval by the Judicial Conference.

Amendments for Publication

FED. R. BANKR. P. 1004.2

Professor Gibson explained that the advisory committee would republish proposed new Rule 1004.2 (petition in a chapter 15 case) because it had made a substantive change in subdivision 1004.2(b) in response to public comments following the August 2008 publication.

An entity filing a chapter 15 petition to recognize a foreign proceeding must state in the petition the country where the debtor has the "center of its main interests." A party may challenge that designation. A commentator argued, persuasively, that the proposed 60-day time period allowed in the August 2008 version of the rule for a party to challenge the designation was simply too long. Therefore, the advisory committee would now set the deadline to file a challenge at 7 days before the hearing on the petition unless the court orders otherwise.

The committee without objection by voice vote approved the proposed new rule for republication.

FED. R. BANKR. P. 2003, 2019, 3001, 3002.1, 4004

Professor Gibson highlighted some of the other proposed changes to be published, focusing on two that she said were likely to attract a good deal of attention.

Rule 2019 (representation of creditors and equity security holders in Chapter 9 and 11 cases), she explained, is a long-standing rule that requires disclosure of interests by representatives of creditors and equity security holders. She noted that the advisory committee had received suggestions from trade associations that the rule be deleted on the grounds that it is unnecessary and over-inclusive.

On the other hand, the advisory committee had received comments from the National Bankruptcy Conference, the American Bar Association's Business Bankruptcy Committee, and two bankruptcy judges in the Southern District of New York that the rule should not be eliminated. Rather, it should be rewritten and expanded in scope, both as to whom it applies and what information they must disclose. In response, the advisory committee added a broader definition to the rule to require disclosures from all committees and groups that consist of more than one creditor or equity security holder, as well as entities or committees that represent more than one creditor or equity security holder. The court would also have discretion to require an individual party to disclose.

In addition, the amended rule would expand the type of financial disclosure that must be made beyond just having a financial interest in the debtor. As revised, a party in interest would have to disclose all "disclosable economic interests," defined in the rule as all economic rights and interests that establish an economic interest in a party that could be affected by the value, acquisition, or disposition of a claim or interest.

The purpose of the expanded rule, she said, was to provide better information on the motive of all parties who assert interests in a case to help the court ascertain whom they represent and what they are trying to do. In addition, the advisory committee had reorganized the rule to clarify the requirements and specify the consequences of noncompliance.

Professor Gibson explained that the proposed amendments to Rule 3001(c) (proof of claim based on a writing) and new Rule 3002.1 (notice relating to claims secured by a security interest in the debtor's principal residence) would govern home mortgages and other claims in consumer cases. Rule 3001(c) specifies the supporting information that must be attached to a proof of claim. She pointed out that claims today are often filed by financial entities that the debtor has never heard of because they are bought and sold in bulk freely on the market. Amended Rule 3001(c) would tighten up the documentation requirements to allow the debtor to see what claims are legitimate, what fees are being charged, and what defaults are alleged. Proposed subdivision 3001(c)(2)(D) specifies the consequences for a claim holder of not complying with the rule.

Professor Gibson explained that new Rule 3002.1 would work in tandem with the Rule 3001(c) changes and would govern mortgage claims in chapter 13 cases. It is common for debtors to attempt to cure their mortgage defaults and maintain their payments under the chapter 13 plan in order to keep their home. But problems arise with mortgage securitization, as holders of the mortgages change. The amounts of arrearages

claimed on the mortgage, as well as various penalties and fees, are not clear to either the debtors or the trustees. Debtors, for example, often believe that they have cured the default, but after the plan is completed and the case closed they face a new default notice with a variety of new fees added on. Accordingly, the proposed rule would require full disclosure by the mortgage holder of both the amounts needed to cure and any fees and charges assessed over the course of the plan. The proposed rule also provides for a final cure and sanctions for not following the prescribed procedures.

Professor Gibson reported that some bankruptcy courts have been following a similar procedure on a local basis with considerable success. The bankruptcy system, she said, should benefit from the national uniformity that the rule will bring.

One member questioned the wisdom of adding new sanctions provisions to the rules. He suggested that it is unusual to have sanctions set forth in separate rules, rather than in a general sanctions provision, such as those in FED. R. CIV. P. 11 and FED. R. BANKR. P. 9011.

Professor Gibson explained that the two proposed amendments are very different from the other rules because they deal with the specific requirement that a creditor give a debtor information about the amount of the mortgage or other consumer claims. Judge Swain added that there are very few other sanctions provisions in the bankruptcy rules, and they tend to deal with very practical disclosure issues. FED. R. BANKR. P. 2019 (representation of creditors and equity security holders in chapter 9 and 11 cases), for example, authorizes a court to refuse to hear from a party that has failed to disclose. Proposed Rules 3001(c) and 3002.1, she said, attempt to have the creditor focus specifically on fees and charges tacked onto mortgages.

OFFICIAL FORMS 22A, 22B, 22C

Professor Gibson reported that the proposed changes in the means test forms were designed to conform the forms more closely to the language and intent of the 2005 bankruptcy legislation. Judge Swain explained that the revisions would replace the term "household size" in several places on the forms with "number of persons" in order to count dependents in a way that is consistent with Internal Revenue Service nomenclature.

The committee without objection by voice vote approved the proposed amendments to the rules and forms for publication.

Informational Items

Judge Swain reported that the advisory committee was working on two major projects that would have a major impact on the bankruptcy rules and forms.

REVISION OF THE BANKRUPTCY APPELLATE RULES

First, Judge Swain said, the advisory committee was reviewing comprehensively Part VIII of the Federal Rules of Bankruptcy Procedure, governing appeals from a bankruptcy court to a district court or bankruptcy appellate panel. The current rules had been modeled on the Federal Rules of Appellate Procedure (FRAP) as they existed more than 20 years ago. Since that time, though, the FRAP have been amended several times and restyled as a body. The Part VIII bankruptcy rules, she said, are no longer in sync with them.

She pointed out that Eric Brunstad, a former advisory committee member and distinguished appellate attorney, had drafted for the committee a revised set of rules to bring the Part VIII rules up to date. The two principal goals that the advisory committee would try to achieve are:

1. to clarify the rules – because the current rules are obscure and difficult in many respects; and

2. to eliminate the "hourglass" effect, under which page limits imposed on appeals from the bankruptcy court to the district court later undercut a party's further appeal to the court of appeals.

Judge Swain reported that the advisory committee had convened a very successful special subcommittee meeting in March 2009, to which it had invited a variety of interested parties to discuss their experience with the current rules and suggest how the rules might be improved. She said that the meeting had demonstrated that there is a great deal of support for pursuing the project to revise the part VIII rules.

On the other hand, concern had been expressed by several participants that it would not be advisable to pattern the bankruptcy rules strictly after the current Federal Rules of Appellate Procedure because the bankruptcy courts have made enormous progress in taking advantage of technology. Since most bankruptcy courts and courts hearing bankruptcy appeals now operate with electronic case files and electronic filing, several of the current appellate rules are outdated or immaterial. For example, she said, courts using electronic records are no longer concerned with the colors of briefs or with many of the other requirements devised for a purely paper world. She said that the advisory committee would attempt to draft new appellate rules that take electronic record-keeping fully into account. She added that the committee will conduct another special subcommittee meeting in the fall and is grateful for Professor Struve's collaboration in its work on the bankruptcy appellate rules.

BANKRUPTCY FORMS MODERNIZATION

Second, Judge Swain reported that the advisory committee had made a good deal of progress on its major project to update and modernize the bankruptcy forms. She noted that its forms subcommittee had conducted an extensive analysis and

deconstruction of all the information contained in the forms currently filed at the commencement of a bankruptcy case. It had also obtained the services of a professional forms consultant who has worked for the Internal Revenue Service and the Social Security Administration in formulating questions for the general public and making forms more user-friendly and effective in eliciting required information.

She added that the advisory committee's forms subcommittee was also working closely with the group designing the "Next Generation" electronic system that will replace CM/ECF with a new system that will take full advantage of recent advances in electronics and add new functionality. She pointed out that several individuals and organizations had asked the judiciary to build a greater capacity into the new system to capture, retrieve, and disseminate individual data elements provided by filers on the standard bankruptcy forms. She noted that the forms modernization subcommittee will meet again on June 26, 2009, at the Administrative Office.

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 May 8, 2009 (Agenda Item 5).

Amendments for Final Approval

FED. R. CIV. P. 8(c)

Judge Kravitz reported that the advisory committee in August 2007 had published a proposal to eliminate discharge in bankruptcy as an affirmative defense that must be asserted under Rule 8(c) (pleading affirmative defenses) to avoid waiver. He noted, though, that the Department of Justice had objected to the change.

Judge Eugene R. Wedoff, a member of the Advisory Committee on Bankruptcy Rules, had acted as the civil advisory committee's liaison with officials in the Department on the matter, but had been unable to reach an agreement with them. The civil advisory committee then asked the Advisory Committee on Bankruptcy Rules formally to consider the proposed amendment. That committee too supported eliminating the bankruptcy-discharge defense from Rule 8. The civil advisory committee met again in April 2009 and invited both Judge Wedoff and the Department to make presentations.

After a lengthy discussion, the advisory committee voted unanimously, except for the Department, to proceed with the proposed change to Rule 8. Judge Kravitz explained that the advisory committee was convinced that inclusion of a bankruptcy discharge as an affirmative defense is simply wrong as a matter of law because the Bankruptcy Code for

years has made all debts discharged in bankruptcy legally unenforceable. They cannot be asserted in any judicial proceedings. Nevertheless, the current rule has misled some courts into finding waiver when a party fails to assert bankruptcy as an affirmative defense. The advisory committee, he said, believed that it was important to eliminate a rule that is continuing to lead some judges to err.

Judge Swain added that the Advisory Committee on Bankruptcy Rules was in complete agreement with those views. Professor Gibson added that the only complication in the matter was that even though a debtor may obtain a discharge in bankruptcy, there are certain statutory exceptions to the discharge. A question might arise in future litigation, for example, over whether a particular type of debt excluded from the discharge in the bankruptcy litigation may still be enforced legally. She explained that this issue is what had caused the Department's concerns. Nevertheless, she said, the proposed amendment to Rule 8 was needed because it will eliminate a trap.

Judge Kravitz reported that Judge Wedoff had prepared some language that might be added to the committee note to reinforce Professor Gibson's point. Ms. Shapiro said that the Department of Justice rested on the statements that it had already made on the matter. She added, though, that the proposed additional language for the committee note will go a long way to easing the Department's concerns.

The committee without objection by voice vote approved adding the proposed, bracketed language to the committee note.

The committee, with one objection (the Department of Justice), by voice vote approved the proposed amendment to Rule 8(c) for approval by the Judicial Conference.

FED. R. CIV. P. 26

Judge Kravitz expressed his gratitude to Judge David G. Campbell and Professor Richard L. Marcus for serving superbly as chair and reporter, respectively, of the advisory committee's Rule 26 project. He noted that the project had been very thorough and had produced a set of balanced, well-crafted amendments that will reduce discovery costs and make a practical, positive difference in the lives of practicing lawyers.

Judge Kravitz reported that the proposed amendments to Rule 26 (disclosures and discovery) enjoyed wide support among bench and bar, and among both plaintiff and defendant groups. Among the supporters were the American Bar Association, its Section on Litigation, the American College of Trial Lawyers, the Association of the Bar of New Jersey, the Federal Bar Council of the Second Circuit, the Federal Magistrate Judges Association, the American Association for Justice, the Lawyers for Civil Justice, the Federation of Defense and Corporation Counsel, the Defense Research Institute, the American Institute of Certified Public Accountants, and the Department of Justice. The amendments had been opposed only by a group of law professors. Their concerns, he said, had been carefully considered, but not shared, by the advisory committee.

Judge Kravitz explained that the amendments would accomplish two results. First, they will require lawyers to disclose a brief summary of the proposed testimony of non-retained expert witnesses whom they expect to use. This change should eliminate the confusion that now exists regarding the testimony of treating physicians, employees, and other non-retained experts.

Second, the rule will place draft reports of retained experts and communications between lawyers and their retained experts under work-product protection. In doing so, it will reduce costs, focus the discovery process on the merits of an expert's opinion, and channel lawyers into making better use of experts. At the same time, though, the amendments will not eliminate any valuable information that may be elicited during the discovery phase of a case. Judge Kravitz explained that little useful information is available today under the current rule because lawyers use stipulations and a variety of other practices to prevent discoverable information from being created in the first place.

These other practices are unnecessary and wasteful. One common practice is to hire two sets of experts – one to testify and the other to consult with the litigation team. In addition to being inefficient, the practice gives a tactical advantage to parties with financial resources. Another artificial discovery-avoidance tactic involves using experienced experts who make extraordinary efforts not to record any preliminary draft report in order to prevent discovery.

He noted that the advisory committee had made a few changes in the draft following publication of the amendments. It had eliminated the last paragraph of the committee note, referring to use of information at trial, and added a new sentence in the

note. Both emphasize that the rule does not undercut the gate-keeping role and responsibilities of judges under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The advisory committee had also changed the wording of Rule 26(b)(4) from "regardless of the form of the draft" to "regardless of the form in which the draft is recorded" to better capture the idea of drafts recorded electronically, while precluding the concept of an "oral" draft report.

The advisory committee, however, had decided not to extend the protection against disclosure enjoyed by retained expert witnesses to non-retained experts. There had been, he said, public comments recommending that the protection be extended at least to employees. The advisory committee, he said, may do so in the future. But for now, it had decided to defer the issue for a number of reasons. Most importantly, the committee believed that it could not proceed with a change because it had not signaled it sufficiently to the public and would have to republish the proposal. In addition, he explained, drafting a provision to extend the protection would be very tricky, as many employees are both fact witnesses and experts. There are also questions regarding former employees vis-a-vis present employees. Moreover, if the provision were limited to employees, it may be seen as tilting more towards defendants, rather than plaintiffs, and the advisory committee wants to be scrupulously neutral on the issue.

Several members praised the work of the advisory committee and said that the proposed amendments would eliminate the need for stipulations and artificial devices now used to avoid the rule. They suggested that the amendments will allow discovery of witnesses to proceed more openly and honestly. Members said that the advisory committee had done an excellent job of working through and accommodating the various public comments. Judge Kravitz added that Judge Campbell and Professor Marcus deserved the lion's share of the credit for the work.

The committee without objection by voice vote approved the proposed amendments to Rule 26 for approval by the Judicial Conference.

FED. R. CIV. P. 56

Judge Kravitz reported that the major project to revise Rule 56 (summary judgment) had been an exercise in rule-making at its very best. The advisory committee, he said, had taken full advantage of empirical research by the Federal Judicial Center (Joe Cecil), the Administrative Office (Jeffrey Barr and James Ishida), and Judge Rosenthal's staff (Andrea Kuperman). It had prepared and circulated several different drafts and had conducted three public hearings and two mini-conferences with lawyers, judges, and professors. The advisory committee, he said, had listened carefully to the views of people with very differing ideas, and it had made several changes in the proposed rule as a result of the public hearings and written comments.

The rules process, in short, had worked exactly as it should. He offered his special thanks to Judge Michael M. Baylson, chairman of the Rule 56 subcommittee, for his dedication and leadership in producing a greatly improved rule governing a central component of the civil litigation process. He also thanked Professor Cooper, the committee's reporter, for his enormous assistance and wise counsel during the project.

Judge Kravitz reported that the advisory committee had announced two overarching goals for the project at the outset. First, it did not want to change the substantive standard for summary judgment in any way. Second, it did not want the rule to tilt in either direction, towards plaintiffs or defendants. Both goals, he said, had been achieved.

The advisory committee also had two other goals in mind. First, it had set out to bring the text of the rule in line with the way that summary judgment is actually practiced in the courts today. Second, it wanted to bring some national uniformity to summary judgment practice. The committee, Judge Kravitz said, had accomplished the first goal. The second goal, he said, had been accomplished in part.

Judge Kravitz reported that the advisory committee had made three changes in the rule from the version that had been published.

First, it had eliminated from the rule the requirement of a point-counterpoint procedure based on the comments of several judges and lawyers who have used the procedure and believe that it imposes unnecessary expense. Several judges who testified at the public hearings, including Judges Holland, Lasnik, Wilken, and Hamilton, had been articulate in opposing the point-counterpoint procedure on the basis of their personal experience. But, he said, many other judges and lawyers, including the chair and several members of the advisory committee, believe that the procedure is quite effective.

Judge Kravitz emphasized, though, that all sides agree that, regardless of the specific procedure used to handle summary judgment motions, it is essential that lawyers provide pinpoint citations to the record to back up their assertions. Therefore, the advisory committee had decided to allow districts to continue with their own procedures for eliciting the facts, but uniformly to require pinpoint citations. He added that, even without the prescribed point-counterpoint procedure, the revised rule embodies a number of other good new features, such as specifically acknowledging partial summary judgment, limiting motions to strike, and addressing non-compliance.

The second significant change made following publication was to re-introduce the word "shall" into the text of the rule. As revised in new Rule 56(a) it would specify that: "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."

"Shall," he said is an ambiguous term and should not normally be used in drafting. But the dilemma that the advisory committee faced was that the word "shall" had acquired a substantive meaning in former Rule 56(c).

"Shall" had been used in the rule for decades until replaced with "should" as part of the 2007 general restyling of the civil rules. But in revisiting the matter in depth, Judge Kravitz said, the advisory committee simply could not find an appropriate replacement term for "shall," based on the pertinent case law. Neither "should" nor "must" are completely accurate. Many public comments, moreover, had asserted that selecting one or the other term would be viewed as making a change in substance and tilting the playing field. The advisory committee, he said, had even tried to formulate a revision using the passive voice, but decided that the alternative might inflict even more damage.

After hearing all the arguments, Judge Kravitz said, the advisory committee had returned to the vow that it had made at the outset of the project – not to change the substantive standard for granting summary judgment as developed in each circuit under the historical term "shall." Therefore, it decided to return to "shall" and allow the case law to continue to deal with that term. If, however, the Supreme Court were to change the substantive standard in the future, the advisory committee could later adjust the language of the rule. In essence, he said, the advisory committee does not advocate use of the term "shall" in drafting, but it had faced an unsolvable problem. The ambiguity in Rule 56 was so intractable that it could not be changed without affecting substance.

The third change made following publication was to eliminate the national rule's proposed time schedule for filing motions for summary judgment, responses to those motions, and replies to the responses. With elimination of the point-counterpoint procedure, there was no longer a need to retain all the deadlines. The advisory committee had been unanimous in deciding to specify only the deadline for filing a summary judgment motion and not to prescribe a schedule for further filings and responses. He noted that there is, for example, no other place in the Federal Rules of Civil Procedure where the rules fix briefing schedules, and it would not be appropriate to specify them for just one category of motions. In addition, he said, some lawyers recommended that the rule provide for sur-replies, which would have complicated the rule further.

The advisory committee had also been concerned about the time-computation rules that take effect on December 1, 2009. They will incorporate the time periods to respond and reply in the existing Rule 56, only to have a completely revised rule delete those time periods on December 1, 2010, when the new Rule 56 would take effect. The advisory committee concluded, however, that it needed to produce the best rule possible for the future, even though there might be some confusion for a year.

Finally, Judge Kravitz explained that the advisory committee had considered at length whether to republish the rule, since several changes had been made following the August 2008 publication. But it decided unanimously not to do so because, at the Standing Committee's direction, it had already solicited the public's comments on a number of specific issues. The revised rule, he said, does not add any provision not fully noticed to the public. Rather, the advisory committee merely eliminated some provisions of the published rule.

Several committee members agreed that the rules process had worked at its best to facilitate a healthy public debate on summary judgment practice and to produce a very workable new rule. Several noted that legitimate differences of opinion had been expressed on some of the major issues, and the advisory committee had accommodated the differing views as well as possible. Some pointed out that they personally favored the point-counterpoint procedure, but recognized that it could not be forced on all the courts, particularly those that have tried and rejected it. They noted, though, that individual judges and districts that have adopted the procedure will be free to continue using it.

Support was voiced for the advisory committee's decision to return to use of the word "shall' in Rule 56(a) on the grounds that it preserves the substantive standard for granting summary judgment. A few members went further and suggested that "shall" is an appropriate term to use in drafting, despite the style conventions. The committee's style consultant, Professor Kimble, though, disagreed and asserted that "shall" is never appropriate. He suggested that a different formulation might still be developed to maintain the substantive standard.

Judge Rosenthal emphasized that the advisory committee's dilemma had been to resolve a conflict between two competing principles. First, as part of the restyling process, all the advisory committees have consistently eliminated the word "shall." But the higher principle that prevailed was avoiding making any change in the substantive standard for summary judgment. She noted that, in the interests of improving style by changing "shall" to "should" in the 2007 restyling amendments, the committee had actually changed the substantive law in some circuits.

A member suggested adopting a public comment to replace "as to" with "about" in proposed Rule 56(a)(2). The style consultant agreed that the change was better stylistically, but several members urged that the change not be made since it was not essential. One member added that the current language is almost a sacred phrase and should not be tinkered with.

The committee without objection by voice vote agreed not to make the proposed additional change in the language of Rule 56(a)(2).

Another member expressed concern over the language in proposed Rule 56(c)(2) authorizing a party to assert in its response or reply that the other party's material cited to

support or dispute a fact "cannot be presented in a form that would be admissible in evidence." He suggested that the language had been revised from the formulation presented to the public for comment, *i.e.,* that the material "is not admissible in evidence." The revised language, he said, appeared to require the judge to make a ruling on the potential future admissibility of evidence.

Judge Kravitz explained that affidavits and other materials submitted as part of the summary judgment process are not evidence. Professor Cooper added that the published language was too broad because it cannot be known until trial what evidence will be admissible. Some public comments, he said, had suggested alternative language, such as "would not be admissible" or "could not be put in a form that would be admissible." The specific language added after publication was intended to show that something more than an affidavit is needed. There is no need for the objecting party to make a separate motion to strike. In addition, failure to challenge the material during summary-judgment proceedings does not forfeit the party's right to challenge its admissibility at trial.

Other members suggested that the change in language was helpful because it lays out an option for parties to deal with an issue that arises often as part of summary-judgment practice, though not specified in the current rule. When a party objects that a submission cannot be produced in any admissible form, it allows the judge to cut through the issues and remedy any technical problems as part of the summary-judgment motion itself, rather than wasting time on motions to strike. Judge Kravitz pointed out that the revised rule gives the judge flexibility to tell a party that it has not presented the material in an admissible form, to give the party an additional opportunity to correct the defect, and to fashion an appropriate remedy.

One member suggested that the problem with the language may be that it could be construed as requiring the moving party to carry some burden, such as to show that the other party cannot present evidence in an admissible form. The word "cannot" appeared to be the problem. She suggested that it be changed to "could not." It was also suggested that the chair and reporter of the advisory committee consider possible modifications in the language.

Judge Kravitz recommended, alternatively, that an explanatory sentence be added to the committee note. He pointed out that in the situation covered by the provision, there is no doubt that the party has not properly presented the pertinent material, but it is difficult to say that it "cannot" be so presented. He suggested adding language to the note to explain that an assertion that the opponent could not produce material in admissible form functions like an objection at trial. The proponent of the material can then either show that it is admissible or explain the admissible form that is anticipated.

A member stated that the text of the rule was perfectly appropriate. An objector only has to assert that the material cannot be presented. The moving party then has the burden of showing that it can.

Another member suggested that the rule might be rephrased to say something like: "If an objection has been made that the material has not been presented in a form that can be admissible at trial, the court may require (or allow) the proponent of the material to show that it can be presented in an admissible form." Judge Kravitz pointed out, though, that the advisory committee was trying to get away from motions to strike. It would prefer to have parties address the matter in their summary-judgment briefs.

Other members said that the language of the rule, as modified after publication, was correct. One pointed out that proposed Rule 56(c)(2) must be read together with proposed Rule 56(c)(4), which states that an affidavit used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated. The trial judge can easily handle any problems that arise. A member declared that it is a very interesting issue in theory, but will not be a real problem in practice.

A member suggested substituting the word "object" for "assert." "Assert" requires the opponent to know, or allege, that the material cannot be presented in admissible form. "Object" makes it clear that the opponent is only raising the point, placing the burden on the proponent. Judge Kravitz explained that the advisory committee had used the word "assert" because it is a word commonly used to refer to a point mentioned in a brief. He agreed to change it to "object."

The committee with one objection by voice vote approved changing "assert" and "asserting" in proposed Rule 56 to "object" and "objecting."

The committee without objection by voice vote then approved the proposed amendments to Rule 56 for approval by the Judicial Conference.

The committee without objection by voice vote further approved the proposed amendments without republication.

A member suggested adding language to the committee note to alert the reader that the revised rule places the burden on the parties to raise the point that the submitted material cannot be presented in an admissible form.

The committee by a vote of 7 to 3 approved making the suggested addition to the committee note.

Amendment for Publication

SUPPLEMENTAL RULE E(4)(f)

Professor Cooper noted that Rule E(4)(f) (in rem and quasi in rem actions – procedure for release from arrest or attachment) would be amended to delete the last sentence because it has been superseded by statutory and rule developments. The statutes cited in the rule, 46 U.S.C. §§ 603 and 604, were repealed in 1983. Deletion of the reference to them seems entirely appropriate, and publishing the amendment for public comments might also flush out any arguments that other statutes should be invoked.

Deletion of the reference to forfeiture actions, though, is more complicated. Rule G, which took effect in 2006, governs forfeiture actions in rem arising from a federal statute. It also specifies that Supplemental Rule E continues to apply to the extent that Rule G does not. The problem, he said, is how best to integrate Rule G with Rule E(4)(f). The proposed amendment would strike the last sentence of Rule E(4)(f) and let courts figure it out on a case-by-case basis. The Department of Justice, he said, had suggested adding a sentence stating that Rule G governs hearings in a forfeiture action.

Professor Cooper added that the advisory committee recommended publishing the rule for comment. But since the proposed changes are relatively minor, the publication should be deferred until other amendments to the civil rules are proposed and the proposed amendment to Supplemental Rule E(4)(f) can be included in the same publication.

The committee without objection by voice vote approved the proposed amendment for publication at an appropriate future time.

Informational Items

Judge Kravitz reported that the advisory committee would convene a major conference on the state of civil litigation to be held at Duke Law School in May 2010. He noted that Judge John G. Koeltl would chair the conference, and the Federal Judicial Center was helping him compile empirical data for the program. He pointed out that Judge Koeltl was working with the Litigation Section of the American Bar Association on a survey of its members. In addition, Judge Koeltl had persuaded RAND and others to produce papers and other information for the conference. He had put together a comprehensive agenda and was now securing moderators and panel members. The Chief Justice will deliver a taped message. The program may be broadcast by Duke, and the Duke Law Review is expected to publish the proceedings.

Judge Kravitz reported that a special subcommittee chaired by Judge Campbell and assisted by Professor Marcus was considering a range of potential changes to Rule 45 (subpoenas). The subcommittee was in the process of seeking input and planning for mini-conferences with the bench and bar.

Judge Kravitz reported that a joint subcommittee comprised of members of the civil and appellate advisory committees had been appointed and will begin studying several issues that intersect both sets of rules. In addition, the civil advisory committee was examining issues arising when judges are sued in their individual capacities, including service in those cases. One suggestion is to require that service be made on the clerk of the court where the judge sits.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Tallman and Professor Beale presented the report of the advisory committee, as set forth in Judge Tallman's memorandum and attachments of May 11, 2009 (Agenda Item 9).

Amendments for Final Approval

VICTIMS' RIGHTS AMENDMENTS

FED. R. CRIM. P. 12.3

Judge Tallman reported that the proposed amendment to Rule 12.3 (notice of public-authority defense) would conform the rule with a similar amendment made recently in Rule 12.1 (notice of alibi defense). He noted that the change was appropriate, even though the public-authority defense arises rarely.

The committee without objection by voice vote approved the proposed amendment for approval by the Judicial Conference.

A member pointed out that proposed Rule 12.3 and Rule 12.1 both permit the district court in certain circumstances to order the government to turn over to the defendant the names and telephone numbers of victims, which would otherwise be protected. She recommended that both rules require the Government to inform the protected persons that their names and numbers are being disclosed. Judge Tallman replied that proposed Rule 12.3(a)(D)(ii) explicitly authorizes a court to fashion a reasonable procedure to protect the victims' interests.

FED. R. CRIM. P. 21

Judge Tallman reported that the proposed amendment to Rule 21(b) (transfer for trial) would allow a court to consider the convenience of any victim in making a decision to transfer a case for trial.

A member questioned the need for the rule since it is not required by the Crime Victims' Rights Act. Judge Tallman pointed out that the advisory committee has been

concerned over criticism that it has not been expansive enough in making changes to the rules to implement the Act. Professor Beale added that this was one of the few rules where the advisory committee had made changes that go beyond what is mandated by the Act. She explained that the advisory committee wants to incorporate victims' rights as fully as possible without doing damage to the carefully balanced criminal justice system. Victims' rights groups, she said, have expressed a particularly strong interest in victims being able to attend court proceedings, and the proposed amendment to Rule 21 would further that interest. She pointed out, though, that the committee had made several other, more significant changes in the rules for victims at earlier meetings.

The committee without objection by voice vote approved the proposed amendment for approval by the Judicial Conference.

FED. R. CRIM. P. 5

Judge Tallman reported that the advisory committee had withdrawn its proposed change to Rule 5 (initial appearance) because it felt the current language adequately referenced the statutes providing consideration of the safety of victims and the community. The proposal would have required a court, in making the decision to detain or release a defendant at an initial appearance, to consider the right of any victim to be reasonably protected from the defendant.

Professor Beale explained that the advisory committee had been concerned that by singling out one situation, it had put its finger on the scales and changed the substantive law. The proposed amendment, moreover, was redundant and unnecessary. The Bail Reform Act, she said, is a carefully balanced and nuanced law, and just singling out one factor in support of victims could cause more damage than good. But in light of the politics of the situation, the decision to withdraw the amendment had not been an easy one for the committee.

A member agreed that many of the victims' rules amendments were not necessary, but clear political implications counsel in favor of including them. The Crime Victims' Rights Act, he said, emphasizes particularly the safety of victims. Therefore, this may be one area where a rule amendment may be advisable. Victims are particularly vulnerable to being harmed by defendants who have been released. He said, moreover, that he had not been persuaded by the argument that the proposed amendment would change the substantive law.

Judge Tallman pointed out that the Federal Magistrate Judges Association, whose members apply the rule every day, oppose changing the rule because they view the Bail Reform Act and the Crime Victims' Rights Act as sufficient, and changing the rule would upset the careful balance of the statutes. Judge Rosenthal added that the rule already

speaks of detention or release "as provided by statute," which covers both the Bail Reform Act and the Crime Victims' Rights Act.

Members questioned whether the Standing Committee is authorized to initiate its own rules proposals or to forward to the Judicial Conference a proposed amendment that has been withdrawn or rejected by an advisory committee. Professor Coquillette suggested that the Rules Enabling Act appears to contemplate the Standing Committee confining itself to reviewing the recommendations of the advisory committees.

A member recommended sending the matter back to the advisory committee for further consideration. But Judge Tallman pointed out that the advisory committee had already published the rule for comment, had then discussed it thoroughly, and had voted unanimously not to proceed with the amendment. He said that he was not sure that returning the matter to the committee would change the result.

A participant suggested, though, that other statutory changes may be made in the future. Sending the rule back to the advisory committee, rather than rejecting it, would keep the matter alive and be advisable as a matter of policy. A member added that the advisory committee might be asked to include the matter as part of its ongoing study of how the courts are implementing the Crime Victims' Rights Act. Professor Beale added that there is a careful balance between that statute and the Bail Reform Act, and the advisory committee will continue to monitor the situation closely to make sure that any problems are addressed.

The committee unanimously by voice vote returned the proposed amendment to the advisory committee with instructions to further study proposed amendments to Rule 5 as part of its ongoing study of the courts' implementation of the Crime Victims' Rights Act.

OTHER AMENDMENTS

FED. R. CRIM. P. 15

Judge Tallman reported that the advisory committee had briefed the Standing Committee before on the proposed amendments to Rule 15 (depositions). Recommended by the Department of Justice, they would allow the government – under certain limited conditions – to take a deposition in a criminal case outside the United States and outside the physical presence of the defendant, with the defendant participating by electronic means. Before allowing the deposition to proceed, the trial court would have to make case-specific findings on the following six factors:

1. the witness's testimony could provide substantial proof of a material fact in a felony prosecution;

2. there is a substantial likelihood that the witness's attendance at trial cannot be obtained;
3. the witness's presence for a deposition in the United States cannot be obtained;
4. the defendant cannot be present because: (I) the country where the witness is located will not permit the defendant to attend the deposition; (ii) for an in-custody defendant, secure transportation and continuing custody cannot be assured at the witness's location; or (iii) for an out-of-custody defendant, no reasonable conditions will assure an appearance at the deposition or at trial or sentencing;
5. the defendant can meaningfully participate in the deposition through reasonable means; and
6. for the deposition of a government witness, the attorney for the government has established that the prosecution advances an important public interest.

Judge Tallman explained that the Fourth Circuit had already approved procedures similar to those set forth in the proposed amendment and had held that the Confrontation Clause did not prohibit the introduction of deposition testimony taken under those procedures. *United States v. Ali,* 528 F.3d 210 (4th Cir. 2008), *cert. denied,* 129 S. Ct. 1312 (2009).

Judge Tallman pointed out that an analogous proposal for a change to Rule 26 (taking testimony) had been forwarded to the Supreme Court in 2002, but the Court rejected it on Confrontation-Clause grounds in an opinion by Justice Scalia. The advisory committee, he said, recognized fully that there may also be confrontation issues with the new proposal. But it also recognized that the practical need for the amendment is substantial, and it had been carefully crafted to address the Confrontation-Clause factors considered by the Supreme Court in 2002. He added that, unlike the proposed amendments to Rule 26, the proposed amendment to Rule 15 deals only with the taking of depositions and not the later admissibility of their contents at trial, which is where the Confrontation Clause issue arises.

Judge Tallman noted that there had been opposition to the proposed rule, as expected, from the defense bar. As a result, the advisory committee had limited the rule's reach to make sure that a deposition is restricted to evidence necessary to the government's case. But the committee did not adopt three other suggestions made by the defense bar during the comment period: (1) to limit the rule to government witnesses; (2) to require the government to show that the deposition would produce evidence "necessary" to its case; and (3) to require the government to show that it had made diligent efforts to secure the witness's testimony in the United States.

Deputy Attorney General Ogden thanked the committee for its attention to the matter and emphasized that the proposed rule is of substantial importance to the Department of Justice. It would be needed only in a few cases, but the depositions would

be very important in those cases. The detailed procedures will require the Department to go to a great deal of trouble and expense to obtain the testimony. Arranging for a foreign deposition is costly and difficult, so it will not be pursued lightly, and the rule will be used only in cases that are vitally important to the United States.

Mr. Ogden said that the Department fully recognizes the importance of the issues under the Confrontation Clause. But, he said, the careful conditions that the rule specifies go a long way to shield the proposal from constitutional infirmity. The rule, he assured the committee, will not be taken lightly. Using the rule will be expensive because the government will likely also have to pay for defense counsel. And it will have to get the cooperation of the State Department and the approval of the foreign country involved. Moreover, the trial court has to approve taking the deposition, and it can do so only after having made all the requisite findings specified in the rule.

A member pointed out that subparagraph 15(c)(3)(F) is the only part of the rule that refers to the government. The rest of the rule would also apply to defendants. Professor Beale explained that the federal defenders had wanted to limit the rule to government witnesses, but the advisory committee did not agree. In fact, the committee had been surprised that the suggestion had come from the defenders. The defenders, she said, had suggested that they would very rarely use the device. As a matter of policy, though, the advisory committee believed that the rule should not be just a one-way street.

A participant suggested that the proposed amendments will have an impact on the admissibility of declarations against penal interest under FED. R. EVID. 804(b)(3). To admit evidence under Rule 804, he said, a party must show that the declarant was not only absent from trial, but cannot be deposed. Under proposed Rule 15, and its expanded possibilities to conduct depositions, declarations against penal interest will be admissible less often.

A member expressed strong opposition to the proposed amendments, asserting that they were directly contrary to the Confrontation Clause. He said that the committee should not recommend rules that are constitutionally debatable. That alone, he said, should be grounds for not proceeding further.

In addition, he said, there was no empirical support for the rule. Normally, he said, the advisory committee asks for data and background information. In this case, the procedures differ widely from country to country. The advisory committee needs to have a clearer understanding of the different procedures and requirements imposed around the world. It also needs to know more specifically how big a problem the government actually faces without the rule. In addition, he said, many additional procedural safeguards required by the developing case law had not been included in the proposed amendments, including some of the requirements set forth in the *Ali* case. The key question, he said, is not how rarely the proposed authority will be exercised, but whether it is fundamentally sound.

He noted that subparagraph 15(c)(3)(F) specifies that the procedure may only be invoked if there is "an important public interest." But, he noted, the government claims an important public interest in every prosecution. The provision, consequently, is not meaningful. Subparagraph 15(c)(3)(E) requires that the defendant be able to participate in the deposition by "reasonable means," but that standard is too vague. In addition, it is unclear how the government will show that the witness cannot be obtained. He concluded that if this rule were so important to the country, it should be enacted by legislation, rather than by rule.

A member pointed out that the Confrontation Clause can still be used to prevent any testimony elicited at the foreign deposition from being used in court. Mr. Ogden agreed that admissibility questions must still be addressed in each case, but said that courts are competent to make the case-by-case decisions that the rule requires.

A member suggested that the rule would be very helpful because it would provide national uniformity on a matter that individual courts currently have to struggle with. She said that trial courts need guidance and a framework for dealing with foreign depositions. Another participant said, however, that it may be premature for the committee to bless the specific proposed procedure and suggested that the Department might consider adopting an internal guide rather than seeking a rule.

Professor Beale said, though, that the proposed rule would create a desirable template to guide the Department and the courts on taking depositions. She pointed out that the rule is procedural in nature. She emphasized that the evidence produced at the deposition still must face other obstacles under the Confrontation Clause and the Federal Rules of Evidence when the government tries to admit the testimony.

Another member expressed concern about proceeding by rule at this point and questioned whether the advisory committee had pinned down all the procedures correctly. Perhaps some additional flexibility may be needed. Moreover, she suggested, the advisory committee may be underestimating how often the defense might want to invoke the rule. The principal justification for the rule is that the courts need some procedural guidance on taking foreign depositions. But in light of the lack of definitive information at this point, it might be better to defer on a rule and consider providing other kinds of guidance to the courts, such as memoranda, white papers, or studies.

A participant asked whether the Department of Justice had considered proceeding with an internal Department memorandum based on the existing case law, rather than seeking a controversial rule. Mr. Ogden responded that the Department had conducted an extensive review of the matter and had taken an official position that seeking a federal rule is the best way to proceed.

A member added that the government faces many thorny problems in meeting the requirements and restrictions of other countries' laws. The federal courts, therefore, may

need more advice on how to deal with these problems as a practical matter. Mr. Ogden responded that the Department would not even proceed if there were legal impediments in a particular country. He pointed out that the rule is based on the actual cases that had arisen to date and reflects the current case law.

A member responded, though, that it would be very difficult to obtain additional relevant information without actually having a rule in place. A procedural rule is needed, he said, and the Confrontation Clause and rules of evidence are in place to protect against constitutional violations. The Department of Justice, he said, still has obstacles to face, even if it follows the procedures specified in the rule. He recommended proceeding with the rule and monitoring how it works in practice.

Mr. Ogden noted that the Department had some concern about proposed subparagraph 15(c)(3)(F), which requires the government to establish that the prosecution advances "an important public interest." He pointed out that the requirement would lead to a determination by the court as to what is important, and what is not. The Department, he said, was prepared instead to have the certification made internally by a high-level Department official, at least as high as the Assistant Attorney General level.

Judge Tallman explained that the reason for including the provision was to respond to criticisms by the defense community that it would be too easy for a prosecutor to use the foreign deposition procedure without some greater level of accountability. The defense bar had argued for a certification by the Attorney General. He suggested that the committee might strike subparagraph (F) entirely upon assurance that the Department will impose an internal requirement of high-level approval.

A participant suggested that it is misleading to say that only a few cases will be brought under the rule because there are in fact many cases in this area. The key issue, he said, is preserving the defendant's right to face-to-face confrontation. The situations presented by the rule are similar in ways to those involved in confrontation of child witnesses. He suggested that the advisory committee was, in effect, trying to apply *Maryland v. Craig,* 497 U.S. 836 (1990), and the various statutes that implement it.

Judge Rosenthal concluded that members had expressed discomfort on two levels:

1. Whether the case had been made that the rule is needed.

2. Whether the committee knows enough about how the rule might be applied, even though it would be difficult to obtain that information in advance without having a rule in place.

She added that the advisory committee also needed to decide whether subparagraph 15(c)(3)(F) was needed, and whether the committee was confident enough to let the rule go forward in final form to the Judicial Conference and the Supreme Court.

She noted that the advisory committee had drafted the rule very carefully to respond to all the expressed concerns. She pointed out that Justice Scalia's 2002 opinion was specific in setting forth the minimal requirements for a rule, and the rule that the advisory committee had drafted appeared to respond well to the concerns he had articulated. One member suggested that although the draft rule contained all the minimal requirements, it might also specifically state that a judge may imposed other requirements.

A participant noted that FED. R. EVID. 804(b)(1) (hearsay exceptions – declarant unavailable) deals with admissibility and has its own standard that requires a party to be afforded a trial-like "opportunity" to examine the witness before the witness's testimony may be admitted. He suggested that the criminal provision be dovetailed with the evidence rule or use the language of the evidence rule. Admissibility of the deposition evidence at trial is governed by the standards of FED. R. EVID. 804(b)(1), so a different standard is not needed in proposed FED. R. CRIM. P. 15(c). In fact, if the evidence is admissible under FED. R. EVID. 804(b)(1), it will probably also satisfy the Confrontation Clause under the pertinent case law. But for the evidence to meet the Rule 804(b)(1) standard, the defendant needs a "trial-like" opportunity to confront the witness.

A member moved to adopt the proposed amendments to Rule 15 with two changes:

1. delete proposed subparagraph 15(c)(3)(F) – on the representation of the Department of Justice that before invoking the revised Rule 15, it will require internal approval by an Assistant Attorney General; and

2. amend subparagraph 15(c)(3)(E) to conform it to the provisions of FED. R. EVID. 804(b)(1).

Professor Beale reported, though, that the advisory committee had been persuaded not to import the standard of FED. R. EVID. 804(b)(1) into the revised criminal rule. She explained that the district court evaluates motive and opportunity under Rule 804(b)(1) after the deposition has been taken, while ruling on admissibility of the evidence at trial. The standard in proposed FED. R. CRIM. P. 15(c), however, is different. It articulates the requirements that must be met for approving taking the deposition in the first place.

The member restated his motion to approve the proposed amendments with just one change – elimination of subparagraph 15(c)(3)(F).

The committee by a vote of 9-1 approved the motion and voted to forward the proposed amendments to Rule 15 for approval by the Judicial Conference.

FED. R. CRIM. P. 32.1

Judge Tallman reported that the proposed amendments to Rule 32.1(a)(6) (revocation or modification of probation or supervised release) had been requested by the

Federal Magistrate Judges Association. They would resolve ambiguities and clarify in two ways the burden of proof for obtaining release in revocation and modification proceedings.

First the amended rule would specify the precise statutory provision that governs the revocation proceeding – 18 U.S.C. § 3143(a)(1), rather than all of 18 U.S.C. § 3143(a), which contains other provisions that do not apply and have caused some confusion. Second, the current rule places the burden of proof on the person seeking release, but it does not specify the standard. The revised rule specifies that the person facing revocation or modification must establish by "clear and convincing evidence" that he or she will not flee or pose a danger to any other person or the community.

He noted that an additional change to the rule, to allow video conferencing of these proceedings, was pending separately before the advisory committee for approval to publish as part of the package of technology-related amendments.

A member pointed out that the proposed committee note stated that the amendment reflected established case law. But only a single Ninth Circuit case and a district court case had been cited. She questioned whether the case law was in fact uniform across the country and expressed some concern that the committee may be making a substantive change in the law in some circuits. Professor Beale responded that the case law is, in fact, clear, as is the statute itself. She added that the defense bar did not object to the rule specifying the standard of "clear and convincing evidence."

Professor Coquillette recommended that the case references and the last sentence of the note be eliminated. He pointed out that case law is subject to change. Judge Tallman agreed with the suggestion.

The committee unanimously by voice vote approved the proposed amendments to the rule for approval by the Judicial Conference.

Amendments for Publication

FED. R. CRIM. P. 12 and 34

Judge Tallman reported that the proposed amendments to Rule 12 (pleadings and pretrial motions) would conform the rule to the Supreme Court's decision in *United States v. Cotton,* 535 U.S. 625 (2002). They would also save judicial resources by encouraging defendants to raise all objections to an indictment before trial. Rule 12(b)(3)(B), he said, sets forth the general rule that a defendant must raise before trial any claim alleging a defect in the indictment or information. But it also specifies that the particular objection that the indictment fails to state an offense may be raised at any time. This exception was justified originally on the ground that the latter claim is jurisdictional in nature and therefore may be raised at any point.

In *Cotton*, however, the Supreme Court abandoned that justification by holding that a defective indictment does not deprive a court of jurisdiction. A claim that the indictment fails to allege an essential element of an offense does not raise jurisdictional issues. The claim can be forfeited if not timely raised. Judge Tallman explained that the Department of Justice had asked the advisory committee to amend Rule 12 to require explicitly that a claim that an indictment fails to state an offense be raised before trial.

The proposed amendment would do so. But it also contains a fail-safe provision in proposed Rule 12(e)(2), which states that a court may grant relief from the waiver either: (1) for good cause; or (2) if the indictment's omission of an element of the offense has prejudiced a substantial right of the defendant. The proposed amendment to Rule 34 (arresting judgment) would conform that rule to the proposed amendment to Rule 12(b).

Judge Tallman explained that the advisory committee had wrestled with whether to require a defendant to show both good cause and prejudice to obtain relief from the waiver, but it had concluded that only one or the other should be required. Professor Beale added that the advisory committee wanted to provide judges with greater leeway in dealing with this specific type of error and noted that it is a different standard from that required for relief from other errors.

Several members suggested that "forfeiture" would be a better choice of words than "waiver" because the context makes clear that Rule 12 deals with forfeiture. Moreover, the Supreme Court used the term "forfeiture" in *Cotton.* Judge Tallman replied that "waiver" has always been used in the text of Rule 12, even though "forfeiture" might be a better term if the advisory committee were writing the rule on a clean slate. He suggested that the proposed rule could be published using the term "forfeiture," and the advisory committee could solicit public comments regarding the appropriate choice. It was also suggested that both terms could be used in the publication and placed in brackets to solicit comments from bench and bar.

Some members questioned whether the proposed amendments were completely consistent with *United States v. Cotton* and suggested that there are alternative possible readings of the holding. Judge Rosenthal noted that revising the remedy provision of the rule, Rule 12(e)(2), would pose many drafting difficulties. Professor Beale explained that the advisory committee had struggled with drafting that portion of the rule and suggested that it might be advisable, in light of the comments of the members, for the advisory committee to explore the issues further and consider additional adjustments in the rule. A member suggested that the advisory committee also take a fresh look at all the criminal rules that use the term "waiver," rather than "forfeiture."

Due to the many issues surrounding the provision, Judge Rosenthal suggested that the best course of action might be for the matter to be returned to the advisory committee for further study.

The committee without objection by voice vote approved returning the proposed amendments to Rules 12 and 34 to the advisory committee for further study.

TECHNOLOGY RULES

Judge Tallman reported that the proposed amendments started with a commission given to Judge Anthony J. Battaglia and his subcommittee to review all the Federal Rules of Criminal Procedure with a view towards improving them to take account of technology changes. He added that technology has now reached the stage of high reliability and accessibility that the rules should take specific account of it and make it easier for prosecutors, law enforcement officers, judges, and others to use the system. The proposed changes deal largely with the issuance of arrest and search and seizure warrants, and with the use of video conferencing to avoid having to bring people into court.

FED. R. CRIM. P. 1

Judge Tallman reported that the proposed amendment to Rule 1 (scope of the rules and definitions) would broaden the definition of "telephone," "telephonic," or "telephonically" to include any form of live electronic voice communication. The definition is intended to be sufficiently broad in order to cover both recent changes and future changes in technology. The committee note, moreover, also speaks of services for the hearing impaired.

Judge Tallman emphasized that use of the technological options is discretionary. Judges, prosecutors, and officers may continue to handle proceedings in the traditional way. But he pointed out that there are many areas in the country where the distance between a judicial officer and a law enforcement officer is great. The proposed rules authorize the use of technology to close the distance gap and improve enforcement of the law.

Professor Beale pointed out that live communication will continue to be required for taking an oath. Under proposed new Rule 4.1, "[t]he judge must place under oath — and may examine — the applicant and any person on whose testimony the application is based." The proposed rules preserve live communication in person by video or telephone.

FED. R. CRIM. P. 3

Judge Tallman reported that Rule 3 (complaint) would be amended to require that a complaint be made under oath before a magistrate judge "except as provided in Rule 4.1."

FED. R. CRIM. P. 4

Judge Tallman explained that Rule 4 (arrest warrant or summons on a complaint) sets forth the procedure for obtaining a warrant on a complaint. The amended rule adopts the concept of a "duplicate original" that has been in Rule 41 for years, dealing with issuance of search warrants by telephone. The term will now be used for other kinds of process besides search warrants. Under proposed Rule 4(d), all warrant applications may be presented to a magistrate judge by telephone or other reliable electronic means.

FED. R. CRIM. P. 4.1

Judge Tallman explained that new Rule 4.1 (complaint, warrant, or summons by telephone or other reliable electronic means) was the heart of the technology amendments. It would place in one rule the procedure for obtaining electronic process of all kinds. The new rule extends the Rule 41(e)(3) procedures governing the issuance of a warrant on information transmitted by reliable electronic means to the issuance of a complaint and summons. Testimony taken by electronic means must be recorded in writing, but a written summary or order suffices if the testimony is limited to attesting to the contents of a written affidavit submitted by reliable electronic means. The applicant must prepare a "duplicate original" of a complaint, warrant, or summons and must read or otherwise transmit its contents verbatim to the judge. When approved by the judge, the duplicate original may serve as the original. The officer, who may be many miles away, may use the duplicate original as an original.

The judge always has discretion to require that the oath be taken in person. In addition, the judge may modify the complaint, warrant, or summons, and transmit the modified version to the applicant electronically, or direct the applicant to modify the proposed duplicate original. The judge, for example, might require more facts or alter the warrant to specify clearly what the agent is authorized to search and seize. The officer at the other end makes the changes and sends them to the judge.

Rule 4.1 also contains a provision in subsection (c), using language now found in Rule 41, specifying that "absent a finding of bad faith, evidence is not subject to suppression." This is derived from the decision of the Supreme Court in *United States v. Leon*, 468 U.S. 897 (1984).

Professor Beale pointed out that the new Rule 4.1 has a number of innovations not found in the current Rule 41. The oath, for example, would be broken out from the rest of the conversation between the law enforcement officer and the magistrate judge. She noted that many judges interpret the current rule to require the judge to write down everything said during the conversation. The new rule allows the judge to prepare only a summary or a brief order (rather than a verbatim record of the conversation) if the conversation was limited to an oath affirming a written affidavit. The rest of the conversation may be recorded. Judge Tallman added that the rule should produce a better record of all the proceedings from start to finish. It may also encourage greater use of the warrant process by law enforcement officers, which is good as a matter of public policy.

A member questioned the numbering of the new rule as FED. R. CRIM. P. 4.1, asking why it should not be placed later in the body of rules. Judge Tallman responded that the advisory committee had considered the matter and had decided to set forth the procedures immediately following the first place in the rules where they could be invoked – after Rule 4, governing issuance of arrest warrants. He suggested that the rule could easily be moved to a later position in the rules. A member suggested soliciting comments from the public on the appropriate numbering of the rule.

FED. R. CRIM. P. 9

Judge Tallman reported that amended Rule 9 (arrest warrant or summons on an indictment) would allow an arrest warrant on an indictment or information to be issued electronically.

FED. R. CRIM. P. 40

Rule 40 (arrest for failing to appear in another district or for violating conditions of release set in another district) would be amended to permit the use of video conferencing to conduct a Rule 40 appearance, with the defendant's consent. The procedure would be discretionary with the court.

FED. R. CRIM. P. 41

Rule 41 (search and seizure) would be substantially reduced in size because its provisions for issuing a telephonic warrant would be moved to the new Rule 4.1. In addition, the revised rule provides that electronic means may be used for the return of a search warrant or tracking warrant.

FED. R. CRIM. P. 43

Rule 43 (defendant's presence) would be amended to include a cross-reference to Rule 32.1. In addition, the court may permit misdemeanor proceedings to be handled by video conferencing.

A member noted that Rule 43 specifies that the entire proceedings in misdemeanor cases could be conducted without the defendant's presence. It would be possible, for example, for the arraignment, plea, and sentencing all to be conducted without the judge verifying in person that the defendant is the correct person before the court. But, she noted, that is already the case under the current Rule 43.

Judge Tallman explained that waiver of the defendant's presence should normally be used only for traffic cases and other low-penalty offenses, even though the language of the rule is broad enough to cover more serious offenses. He said that the system has to rely on the sound judgment of magistrate judges to determine which cases to apply the

rule in. He observed, for example, that the advisory committee had heard of several cases where prison inmates want to get rid of cases outstanding against them to avoid negative effect on their prison condition and opportunities. Professor Beale added that the proposed rule is an improvement over the current rule because it adds the alternative of conducting the proceedings by video conferencing to the current option of proceeding without the presence of the defendant at all.

FED. R. CRIM. P. 49

Rule 49 (serving and filing papers) would be amended to conform the criminal rules with the civil rules regarding electronic filing of documents. It is derived from FED. R. CIV. P. 5(d)(3), and makes clear that a paper filed electronically in compliance with a court's local rule is a written paper.

A participant stated that in the recent restyling of the evidence rules, the term "telephone" had been changed to "phone" in order to capture cell phones. It was recommended that the terminology in the criminal rules and the evidence rules be consistent. During a break in the proceedings, representatives of the criminal and evidence advisory committees and the Style Subcommittee conferred and agreed to change the references in the proposed restyled evidence rules back from "phone" to "telephone."

Professor Beale added that the package of technology amendments also included an amendment to Rule 6(e) (recording and disclosing grand jury proceedings), previously approved by the Standing Committee for publication. It would authorize the taking of a grand jury return by video conferencing.

FED. R. CRIM. P. 32.1

Judge Tallman pointed out that the amendments to Rule 32.1 (revocation or modification of probation or supervised release) were somewhat different from the other technology amendments. They deal with defendants who are subject to revocation or modification of probation or supervised release. At the defendant's request, the court would be able to allow the defendant to participate in the proceedings through video conferencing. The advisory committee, he said, had reviewed the case law and had seen no suggestion that the defendant's waiver would be inconsistent with the Sentencing Reform Act.

A participant suggested that the revised rule appeared to carry the negative implication that a judge may not modify conditions by telephone. In revocation cases where a defendant is far away, a judge may simply telephone the defendant and the probation officer to resolve a matter without the need for a hearing. The rule, he said, should not imply that the judge cannot continue to resolve matters in this manner. As written, though, it appears to apply to all modifications of probation or supervised release.

It should, instead, provide that in appropriate cases a judge may simply use the telephone to resolve problems.

Professor Beale stated that the situation posed is different from that contemplated in the proposed amendments to Rule 32.1. In the former, the defendant is waiving a hearing altogether. The judge then chooses to speak personally with the defendant and the probation officer by telephone and be assured that the defendant's waiver is voluntary and knowing. The proposed amendments to Rule 32.1, by contrast, address holding a hearing – which the defendant has not waived – by video conferencing at the defendant's request.

Another participant suggested that there may be a potential conflict between Rule 32.1(c)(2)(A), specifying that a hearing is not required if the person waives it, and the proposed new Rule 32.1(f) because the latter applies to the entire rule and could be construed as replacing Rule 32.1(c)(2)(A). Another participant recommended adding a heading to Rule 32.1(f).

Professor Beale reported that Rule 32.1 was the only rule in the technology package that had produced any controversy during the advisory committee's deliberations. Some members, she said, had expressed concerns over a judge being able to revoke release by video conference. A member added that the appropriate procedure depends in large measure on what the judge is going to do. Sometimes the modifications will be very minor in nature, but other times they may be more serious. She pointed out that before video conferencing became widely available, judges simply used the telephone to handle many different circumstances. Video conferencing is easier to use than in the past, but it is still a big step to take and is more difficult and inconvenient than using the telephone.

A participant suggested adding a sentence to the committee note to address the issue. Another suggested that the note state that whenever a defendant is entitled to waive a hearing completely, the proceeding may be conducted by telephone. Others agreed that additional language would be helpful.

A participant pointed out that use of the word "proceedings" in Rule 32.1(f) may create some ambiguity. In reality, the rule should refer to a "hearing" conducted by video conference. That term, she said, is used several other places in the rule.

A participant questioned the need for the rule because a defendant may waive the hearing altogether. Professor Beale explained that the rule sets forth alternatives. The advisory committee had decided to exempt Rule 32.1 proceedings from the requirements of Rule 43 because there had been some uncertainty among the members as to whether Rule 43 applied to revocation and modification proceedings.

The committee without objection by voice vote approved Rule 32.1 for publication with additional language to be included in the committee note

emphasizing that use of a telephone is still a permissible alternative to video conferencing in appropriate circumstances.

The committee then without objection by voice vote approved all the other proposed technology-related amendments for publication, including the amendments to Rule 6 approved for publication by the committee in June 2008.

Judge Tallman pointed out that proposed amendments to Rule 47 (motions and supporting affidavits) had been withdrawn by the advisory committee.

Judge Rosenthal extended special thanks to Judge Battaglia for spearheading the technology project and producing a superb package of amendments.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Hinkle and Professor Capra presented the report of the advisory committee, as set forth in Judge Hinkle's memorandum and attachments of May 6, 2009 (Agenda Item 8).

Amendments for Final Approval

FED. R. EVID. 804(b)(3)

Judge Hinkle reported that the proposed amendment to Rule 804(b)(3) (statement against interest) would change the hearsay exception regarding the statement against penal interest of an unavailable witness. The existing rule, he said, requires a defendant in a criminal case to show "corroborating circumstances" in order to have the statement admitted. But the government introducing a statement does not have the same requirement. The amended rule, he said, would apply the corroborating circumstances requirement to the government as well. The Department of Justice, he said, did not object to the amendment, and there had been no written comments objecting to its substance. One comment from a defense lawyer had recommended that corroborating circumstances be deleted as a requirement for a defendant, but the committee did not consider that course appropriate as a substantive matter. The public hearings had been cancelled because no witnesses had asked to testify on the rule.

The committee without objection by voice vote approved the proposed amendment for approval by the Judicial Conference.

Amendments for Publication

RESTYLED FED. R. EVID. 101-1103

Judge Hinkle reported that the written agenda materials provided background information about the restyling project. The effort to restyle the federal rules started back in the early 1990s under the leadership of committee chair Judge Robert Keeton and committee member Professor Charles Alan Wright. It has been a long and successful process over several years, though not without controversy. Some had thought that it would not be worth the effort to change the rules, even if the end product were improved. But, in fact, the four restyling projects have been very successful, and the rules are clearly much better than before.

He pointed out that accuracy and clarity are the most important values in the restyling effort. It is important, he said, for a judge or a lawyer to be able to look at an evidence rule and know immediately what it means. Consistency is also important, but it does not rise to the same level as the other two values.

The process used to restyle the Federal Rules of Evidence, he said, had started with Professor Kimble rewriting each of the rules in the first instance. Then Professor Capra made his changes. The drafts were then sent to the advisory committee and the style subcommittee of the Standing Committee for comment. The rules were reviewed carefully several times and at several levels. In addition, some members of the Standing Committee had already made specific comments on the proposed rules.

But, he said, that will not be the end of the process. The advisory committee was only asking for authority to publish the rules for comment. It should receive a number of public comments, each of which will be reviewed in 2010. He thanked Judge Hartz for spotting inconsistencies, and he thanked Jeffrey Barr and Stacey Williamson of the Administrative Office for great staff support in getting the package completed.

Judge Hinkle reported that the advisory committee was presenting Rules 801-1103 to the Standing Committee for the first time. All the other rules in the restyling package had been presented to the committee at earlier meetings. The advisory committee was now seeking authority to publish the entire set of evidence rules for comment. It would also like authority to make further corrections before publication.

Judge Hinkle noted that several changes had been made in the restyled hearsay rules from "offered to prove" to "admitted to prove," and the advisory committee will highlight the terminology in the publication. Professor Capra explained that the change had started with the restyling of Rule 803(22). There, it would be a substantive change from the current rule to use "offered to prove" because the judge plays a fact-finding role and so admissibility is not controlled by the purpose of the proffering party. Once the advisory committee had made the change from "to prove" to "admitted to prove", he said,

it decided to change all the instances of "offered to prove" to "admitted to prove" because the judge has some role as to each piece of evidence offered. What is determinative is not what the lawyer states the evidence is offered for, but what the judge admits it to prove. He said that the advisory committee wanted to hear from the public on the use of the terminology so that it can make a reasoned choice on it.

A member questioned the use of unnumbered bullet points, rather than numbers, noting that bullet points cannot be cited. He added, though, that it is not a big problem because a whole rule may be cited. Professor Kimble explained that the style guidelines call for using bullet points where there is no preferred rank order in a list. In Rule 407 (subsequent remedial measures), for example, there is no way to cite each of the measures listed. In addition, he pointed out that when a list is created with numbered divisions, a dangling paragraph may follow. That dangling paragraph cannot be effectively cited. Where a list is created within a rule, with text before the list and more text after the list, bullets work better than numbers. The member pointed out, though, that not every series in the restyled rules appeared to have been broken out and expressed a strong preference for breaking out and numbering all series and lists.

The member also questioned the use of dashes, rather than commas. In some cases, he pointed out, dashes are used to set off an aside, which is an appropriate usage. But often what appears within the dashes follows from what is said before the dash, which is inappropriate usage. Professor Kimble responded that dashes may properly be used for both purposes. They are often more successful than commas, especially if there are other commas in a sentence. One member emphasized that dashes make the text easier to read, and that is the key objective of the restyling effort.

The committee without objection by voice vote approved the proposed amendments for publication, subject to the advisory committee making additional, minor style changes.

Professor Capra thanked Professor Kimble for truly excellent work. He also said that the style subcommittee had accomplished amazing work with a very fast turn around time. In short, he said, the process had been fantastic. Judge Hinkle added that very special thanks are due to Professor Capra for his major, indispensable role in the restyling project.

GUIDELINES ON STANDING ORDERS

Judge Rosenthal reported that the primary changes made in the text of the proposed guidelines since the last meeting had been to strike just the right balance between concerns that the draft guidelines had placed insufficient limits on individual-judge orders and countervailing concerns that individual-judge orders are entirely

appropriate and useful. She thanked Judge Raggi for her help in improving the product to address those competing concerns.

Judge Rosenthal pointed out that the revised guidelines distinguish between substantive rules of practice, on the one hand, and rules of courtroom conduct, on the other. The former should clearly be set forth in local rules of court. But rules of courtroom conduct are appropriate for orders by individual judges. The revised second paragraph of Guideline 4, she said, now makes that distinction clear. In addition, at the request of the Department of Justice a new bullet point had been added to the internal administrative matters listed in Guideline 1 to suggest that standing orders are appropriate to deal with courthouse or courtroom access for individuals with disabilities. In addition, Guidelines 7 and 8 had been supplemented.

Judge Rosenthal reported that a reference had been added to Bankruptcy Rule 9029. She noted that the Advisory Committee on Bankruptcy Rules had suggested that the guidelines address some special needs of the bankruptcy courts. The bankruptcy courts, for example, sometimes need greater flexibility to use standing orders to effect urgently needed changes during the time that it takes for local rules to be put into effect. The recent implementation of the massive 2005 bankruptcy reform legislation demonstrated the value of operating under standing orders.

The committee, she said, planned to send the guidelines to the Judicial Conference with a request that they be distributed to the courts for consideration as non-binding guidance. But Mr. Rabiej suggested that it might be more effective to have the Judicial Conference actually adopt the guidelines. Some members agreed and said that it would be easier to get courts to adopt them if they are approved by the Conference itself. Judge Rosenthal added that the Conference might also be informed that the committee is considering bankruptcy guidelines and may return with additional recommendations.

The committee without objection by voice vote approved submitting the proposed guidelines for approval by the Judicial Conference.

SEALED CASES

Judge Hartz reported that the sealing subcommittee would meet again immediately following the Standing Committee meeting. He pointed out that the subcommittee included a representative from each advisory committee, a Department of Justice representative, and a clerk of court. He noted that the subcommittee was only addressing cases that are entirely sealed, not sealed documents within a case.

He reported that Tim Reagan of the Federal Judicial Center had completed a good deal of work on sealed cases, having examined all the cases filed in 2006 at both the district and appellate levels. He had found no bankruptcy cases in which an entire case

had been sealed by a court. He added that roughly 10,000 magistrate-judge and miscellaneous cases had been found, and a few will be sampled from each court. Most of these matters involve initial proceedings pending formal initiation of a criminal prosecution.

Judge Hartz pointed out that no indications of abuse had been found. In fact, he said, he had only seen one case that he thought might have been sealed improperly. The decisions of courts to seal cases, he said, appear to be reasonable. Nevertheless, there may be some other issues that should be addressed, such as how long cases should remain sealed. Apparently, there is a problem in that some courts appear to overlook the task of unsealing cases.

He noted that the subcommittee would consider whether there should be standards on when cases should be sealed. The subcommittee would also consider whether there should be procedural requirements for sealing, who should order the sealing, whether there should be notice of sealing, whether a record should be made of the reasons for sealing, and whether there should be time limits on the length of sealing. He pointed out that the subcommittee would also look at whether certain administrative measures should be pursued, such as adding special prompts to the courts' electronic case management and filing systems. Finally, the subcommittee would consider whether there is a need for additional empirical research or public hearings.

Judge Hartz pointed out that the subcommittee had contemplated at the start of the project that it would discover that most sealed cases might be national security cases. But, in fact, very few involve national security. The biggest group of sealed cases, he said, are criminal cases that involve danger to witnesses and victims. There are also a number of qui tam civil cases.

He thanked Professor Richard Marcus for participating in all the meetings and working exceptionally hard on the project. Judge Rosenthal added that Professor Marcus is a recognized national authority on sealing.

LONG-RANGE PLANNING

Judge Rosenthal pointed out that the rules committees have been deeply involved in long-range planning for several years. Some examples of current activities include the ongoing work of the privacy subcommittee, the convening of the upcoming conference at Duke Law School on the state of civil litigation, and the major projects of the Advisory Committee on Bankruptcy Rules to reformulate the appellate bankruptcy rules and modernize the bankruptcy forms. She invited all the participants to send the Administrative Office staff any additional ideas for long-range planning that the committees should consider.

REPORT OF THE PRIVACY SUBCOMMITTEE

Judge Raggi reported that she had been asked to chair the special subcommittee to examine implementation of the new privacy rules. The subcommittee, she said, would hold its first meeting immediately following the Standing Committee meeting. She pointed out that the subcommittee included several colleagues from the Court Administration and Case Management Committee, which had established the original Judicial Conference privacy policies later incorporated into the 2007 amendments to the w1federal rules. She added that Professor Capra will be the reporter for the subcommittee, and Judge Hinkle will participate. She said that the subcommittee would address the following areas:

1. Are amendments needed to the national privacy rules?

2. Are there problems in criminal cases and sealed cases that need to be addressed further? Should, for example, the Judicial Conference policy that certain documents not be included in the public case file be stated expressly in the national rules? If so, should the list of documents be expanded or contracted?

3. Should the policy of placing the burden on the parties to redact sensitive information be reviewed with an eye towards simplification? Are there viable alternatives that will assure protection of private information without imposing undue burden on the courts? Is more public education needed to inform the parties of their obligations to redact private information from transcripts?

4. Are additional efforts needed to implement the existing rules, especially in response to Congressional concerns that personal information still appears in some court case files?

NEXT MEETING

The committee agreed to hold the next meeting in January 2010, 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 Thursday and Friday, January 7-8, 2010, in Phoenix, Arizona.

Respectfully submitted,

Peter G. McCabe
Secretary

IV

JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

PRELIMINARY REPORT
JUDICIAL CONFERENCE ACTIONS
September 15, 2009

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All the following matters requiring the expenditure of funds were approved by the Judicial Conference *subject to the availability of funds* and to whatever priorities the Conference might establish for the use of available resources.

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At its September 15, 2009 session, the Judicial Conference of the United States —

EXECUTIVE COMMITTEE

Approved a resolution in recognition of the substantial contributions made by the Judicial Conference committee chairs whose terms of service end in 2009.

COMMITTEE ON THE ADMINISTRATION OF THE BANKRUPTCY SYSTEM

Authorized the transfer of the official duty station for the vacant bankruptcy judgeship position in the Eastern District of California from Bakersfield to Sacramento.

COMMITTEE ON THE BUDGET

Approved the Budget Committee's budget request for fiscal year 2011, subject to amendments necessary as a result of (a) new legislation, (b) actions of the Judicial Conference, or (c) any other reason the Executive Committee considers necessary and appropriate.

COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT

Adopted a courtroom sharing policy for magistrate judges in new courthouse and courtroom construction, to be included in the *U.S. Courts Design Guide.*

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Approved proposed amendments to Appellate Rules 1, 4, and 29 and Form 4 and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

With regard to bankruptcy procedures:

a. Approved proposed amendments to Bankruptcy Rules 1007, 1014, 1015, 1018, 1019, 4001, 4004, 5009, 7001, and 9001, and new Rule 5012 and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law; and

b. Approved proposed revisions of Exhibit D to Official Form 1 and of Official Form 23, to take effect on December 1, 2009.

Approved proposed amendments to Civil Rules 8(c), 26, and 56 and Illustrative Form 52 and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Approved proposed amendments to Criminal Rules 12.3, 15, 21, and 32.1 and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Approved proposed amendments to Evidence Rule 804(b)(3) and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Approved proposed *Guidelines for Distinguishing Between Matters Appropriate for Standing Orders and Matters Appropriate for Local Rules and for Posting Standing Orders on a Court's Web Site* and agreed to transmit them, along with an explanatory report, to the courts.

MEMORANDUM

DATE: October 16, 2009

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Criminal Rules Committee's consideration of indicative rulings

The Criminal Rules Committee considered the question of indicative rulings at its October 13, 2009 meeting. The agenda materials that formed the basis for that consideration are enclosed. I understand that the Criminal Rules Committee's discussion on October 13 resulted in some changes to the proposed Committee Note, and I will provide an update concerning those changes when I have the specifics.

Encl.

MEMO TO: **Members, Criminal Rules Advisory Committee**

FROM: **Professor Sara Sun Beale, Reporter**

RE: **Indicative Rulings**

DATE: **September 22, 2009**

Appellate Rule 12.1 and Civil Rule 62.1, which are scheduled to go into effect on December 1, 2009, create a mechanism for obtaining "indicative rulings." The question is whether to propose a parallel provision in the Criminal Rules. This issue was discussed briefly at the October 2007 meeting of the Advisory Committee. The Committee expressed interest in considering such a rule, but further action was deferred to allow the Civil and Appellate Rules to work their way through the process.

1. The New Civil and Appellate Rules

New Civil Rule 62.1 will establish procedures facilitating the remand of certain post-judgment motions filed after an appeal has been docketed in a case in which the district court indicates that it would grant the motion.

New Appellate Rule 12.1 sets out procedures to be followed for motions that the district court cannot grant because an appeal is pending. In a memorandum to the Appellate Rules Committee (excerpted infra), Professor Catherine Struve describes the origins of the proposal to incorporate indicative rulings explicitly in the rules, and also notes they have been employed in criminal as well as civil cases. In *United States v. Cronic*, 466 U.S. 648, 667 n.42 (1984), the Supreme Court recognized the practice of indicative rulings in criminal cases, and the local rules of the D.C. and 7th Circuits, which appear to be applicable to criminal cases, provide procedures for indicative rulings. Appellate Rule 12.1 was intentionally drafted in broad terms that would not limit the existing authority for indicative rulings in any case – civil, criminal, or bankruptcy.

The Committee note to Rule 12.1 addresses the possibility of indicative rulings in criminal cases. It states:

The procedure formalized by Rule 12.1 is helpful when relief is sought from an order that the court cannot reconsider because the order is the subject of a pending appeal. In the criminal context, the Committee anticipates that Rule 12.1 will be used primarily if not exclusively for newly discovered evidence motions under Criminal Rule 33(b)(1) *(see United States v. Cronic,* 466 U.S. 648, 667 n.42 (1984)), reduced sentence motions under Criminal Rule 35(b), and motions under 18 U.S.C. § 3582(c).

2. Indicative Rulings in Criminal Cases: Action in the Appellate Rules Committee and the Standing Committee

During the consideration of the Rules 12.1, the Solicitor General expressed concern over the possibility that the new rule might be subject to misuse in the criminal context. Both the Appellate Rules Committee and the Standing Committee addressed these concerns in the context of the language of the Committee Note.

After the public comment period, the Solicitor General suggested that Rule 12.1's Committee Note be revised to read: "Appellate Rule 12.1 is limited to the Civil Rule 62.1 context and to newly discovered evidence motions under Criminal Rule 33(b)(1), as provided in *United States v. Cronic*, 466 U.S. 648 n.42 (1984), reduced sentence motions under Criminal Rule 35(b), and motions under 18 U.S.C. 3582(c)." (emphasis added). The Solicitor General's letter of February 14, 2008, explained:

> We make this proposal after extensive consultations with our criminal law experts within the Justice Department, including in the United States Attorneys' offices throughout the United States. Their broad experience makes clear that the issue of possible indicative rulings legitimately arises only in the context of FRCrP 33(b)(1) (dealing with motions for a new trial based on newly discovered evidence), FRCrP 35(b)) dealing with motions by the Government for a reduced sentence because of a defendant's substantial assistance), and 18 U.S.C. 3582(c) (dealing with motions for a reduction in sentence from the Director of the Bureau of Prisons or based on a retroactive guidelines amendment); we are not aware of any other types of motions in criminal cases for which an indicative ruling might be appropriate. We are concerned that, without the change to the Committee Note that we are urging, the federal district courts will be swamped with inappropriate motions by prisoners acting pro se who do not understand the limited purposes for which indicative rulings are warranted.

At its April 2008 meeting in the Advisory Committee on Appellate Rules discussed the Solicitor General's concerns, but declined to adopt the language he suggested. The minutes reflect the following discussion:

> A member asked how the DOJ could be sure that the three situations listed in its suggested language are the only criminal contexts in which the indicative-ruling practice might prove useful. A judge member questioned how likely the indicative-ruling practice

is to be used in the criminal context. Another judge observed that in a recent Tenth Circuit decision, the court abated an appeal in order to permit the appellant to file a Section 2255 motion in the district court; he observed that it would be undesirable for the Note to state that such a procedure is foreclosed. Another judge member asked the DOJ to explain the reason for its concern about the Reporter's suggested Note language. Mr. Letter responded that the DOJ is concerned that without limiting language in the Note, the indicative-ruling mechanism might be misused by jailhouse litigants. The judge member responded that his instinct is to avoid defining or limiting the uses to which the mechanism can be put. The Solicitor General asked whether the Committee would be willing to say "envisions" rather than "anticipates." A member wondered whether, given the DOJ's concerns, it might be better to remove the Note's reference to the criminal context. It was noted, however, that the Criminal Rules Committee is planning to consider whether to adopt an indicative-ruling provision for the Criminal Rules; the Criminal Rules Committee might benefit from the opportunity to observe how the practice develops under new Appellate Rule 12.1. A member expressed support for the term "anticipates." By voice vote, the Committee decided to adopt the Reporter's suggested changes to the Note language for the Note's second paragraph and for the first sentence of the Note's last paragraph.

The issue was raised again at the Standing Committee, and the language of the Committee Note was modified to address the concern that the language proposed by the Advisory Committee was "too restrictive" and might not allow for the use of the procedure in unforseen situations where it would be of value. The minutes describe the discussion of this concern as follows:

> Professor Struve explained that the advisory committee had been reluctant to limit the rule to the three situations suggested by the Department of Justice because there may be other situations when indicative rulings are appropriate. A member added that the procedure could be useful in handling § 2255 motions, as appellate courts have said that a district court should rarely hear a § 2255 motion when an appeal is pending. He noted that a three-judge panel of his court recently had permitted use of the indicative ruling procedure in a § 2255 case. But Mr. Tenpas responded that the Department was particularly concerned about systematic use, and abuse, of the procedure by pro se inmates in § 2255 cases.
>
> A member pointed out that the principal safeguard against abuse is that the court of appeals has discretion to deny any request for an indicative ruling and may refuse to remand a matter to the trial court. The discretion vested in the court of appeals safeguards against excessive use of the procedure.

After the chair of the Advisory Committee and the reporter accepted the language that had been proposed to avoid an unduly restrictive interpretation of Rule 12.1 in criminal cases, the Standing Committee approved the Rule with the new language in the Committee Note.

3. Issue Presented

The question is whether to move forward at this time with a proposed amendment to the Federal Rules of Criminal Procedure that would parallel Civil Rule 62.1 and dovetail with new Appellate Rule 12.1.

An amendment to the Criminal Rules is not necessary in order for the parties in criminal cases to seek indicative rulings. As described in Professor Struve's memorandum, this practice is already employed from time to time in criminal cases. The practice was recognized by the Supreme Court in *United States v. Cronic*, 466 U.S. 648 n.42 (1984), and made applicable to criminal cases by the local rules in some circuits.[1]

Although the practice of indicative rulings was also established in civil cases prior to the adoption of Rules 12.1 and 62.1, those rules were adopted in order to promote awareness of the possibility of indicative rulings, ensure that the possibility was available in all circuits, and render the relevant procedures uniform throughout the circuits. The question is whether the same justifications warrant a new Rule of Criminal Procedure.

In general, Judicial Conference policy is to be consistent throughout the rules in dealing with the same general issue. On the other hand, there are distinct concerns in the criminal context. Solicitor General Waxman, who first proposed an appellate rule on indicative rulings, favored explicitly excluding criminal cases. And, as noted above, the Department of Justice continued to express concerns that pro se prisoners would clog the system with inappropriate efforts to employ the indicative ruling procedure unless it was limited to a specific class of cases: Rule 33 motions based upon newly discovered evidence, Government motions for substantial assistance sentence reductions under Rule 35(b), and motions for a reduction based upon a retroactive change in the Sentencing Guidelines.

Since the new Civil and Appellate rules have not yet taken effect, we do not know whether they will increase the frequency with which the parties will seek indicative rulings in criminal cases.

4. Additional materials

The following materials are included as attachments to this report:

- A draft rule of Criminal Procedure based on Civil Rule 62.1
- Civil Rule 62.1, Appellate Rule 12.1, and the accompanying Committee Notes

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[1]Those local rules may be repealed or revised when Rules 12.1 and 62.1 go into effect on December 1, 2009.

- Professor Struve's memorandum to the Appellate Rules Committee – providing the history of the proposals and addressing the question whether indicative rulings should be available in criminal cases

- The Minutes of the Standing Committee (June 2008)

DRAFT CRIMINAL RULE BASED ON CIVIL RULE 62.1

Rule XX. Indicative Ruling on a Motion for Relief That is Barred by a Pending Appeal

(a) **Relief Pending Appeal.** If a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may:

(1) defer considering the motion;

(2) deny the motion; or

(3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue.

(b) **Notice to the Court of Appeals.** The movant must promptly notify the circuit clerk under Federal Rule of Appellate Procedure 12.1 if the district court states that it would grant the motion or that the motion raises a substantial issue.

(c) **Remand.** The district court may decide the motion if the court of appeals remands for that purpose.

Committee Note

This new rule adopts for any motion that the district court cannot grant because of a pending appeal the practice that most courts follow when a party

makes a motion under Rule 60(b) of the Federal Rules of Civil Procedure to vacate a judgment that is pending on appeal. After an appeal has been docketed and while it remains pending, the district court cannot grant a Rule 60(b) motion without a remand. But it can entertain the motion and deny it, defer consideration, or state that it would grant the motion if the the court of appeals remands for that purpose or state that the motion raises a substantial issue. Experienced lawyers often refer to the suggestion for remand as an "indicative ruling." (Appellate Rule 4(a)(4) lists six motions that, if filed within the relevant time limit, suspend the effect of a notice of appeal filed before or after the motion is filed until the last such motion is disposed of. The district court has authority to grant the motion without resorting to the indicative ruling procedure.)

This clear procedure is helpful whenever relief is sought from an order that the court cannot reconsider because the order is the subject of a pending appeal. Rule XX does not attempt to define the circumstances in which an appeal limits or defeats the district court's authority to act in the face of a pending appeal. The rules that govern the relationship between trial courts and appellate courts may be complex, depending in part on the nature of the order and the source of appeal jurisdiction. Rule XX applies only when those rules deprive the district court of authority to grant relief without appellate permission. If the district court concludes that it has authority to grant relief without appellate permission, it can act without falling back on the indicative ruling procedure.

To ensure proper coordination of proceedings in the district court and in the appellate court, the movant must notify the circuit clerk under Federal Rule of Appellate Procedure 12.1 if the district court states that it would grant the motion or that the motion raises a substantial issue. Remand is in the court of appeals' discretion under Appellate Rule 12.1.

Often it will be wise for the district court to determine whether it in fact would grant the motion if the court of appeals remands for that purpose. But a motion may present complex issues that require extensive litigation and that may either be mooted or be presented in a different context by decision of the issues raised on appeal. In such circumstances the district court may prefer to state that the motion raises a substantial issue, and to state the reasons why it prefers to decide only if the court of appeals agrees that it would be useful to decide the motion before decision of the pending appeal. The district court is not bound to grant the motion after stating that the motion raises a substantial issue; further proceedings on remand may show that the motion ought not be granted.

Rule 62.1. Indicative Ruling on a Motion for Relief That is Barred by a Pending Appeal

(a) Relief Pending Appeal. If a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may:

(1) defer considering the motion;

(2) deny the motion; or

(3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue.

(b) Notice to the Court of Appeals. The movant must promptly notify the circuit clerk under Federal Rule of Appellate Procedure 12.1 if the district court states that it would grant the motion or that the motion raises a substantial issue.

(c) Remand. The district court may decide the motion if the court of appeals remands for that purpose.

Committee Note

This new rule adopts for any motion that the district court cannot grant because of a pending appeal the practice that most courts follow when a party makes a Rule 60(b) motion to vacate a judgment that is pending on appeal. After an appeal has been docketed and while it remains pending, the district court cannot grant a Rule 60(b) motion without a remand. But it can entertain the motion and deny it, defer consideration, or state that it would grant the motion if the the court of appeals remands for that purpose or state that the motion raises a substantial issue. Experienced lawyers often refer to the suggestion for remand as an "indicative ruling." (Appellate Rule 4(a)(4) lists six motions that, if filed within the relevant time limit, suspend the effect of a notice of appeal filed before or after the motion is filed until the last such motion is disposed of. The district court has authority to grant the motion without resorting to the indicative ruling procedure.)

This clear procedure is helpful whenever relief is sought from an order that the court cannot reconsider because the order is the subject of a pending appeal. Rule 62.1 does not attempt to define the circumstances in which an appeal limits or defeats the district court's authority to act in the face of a pending appeal. The rules that govern the relationship between trial courts and appellate courts may be complex, depending in part on the nature of the order and the source of appeal

jurisdiction. Rule 62.1 applies only when those rules deprive the district court of authority to grant relief without appellate permission. If the district court concludes that it has authority to grant relief without appellate permission, it can act without falling back on the indicative ruling procedure.

To ensure proper coordination of proceedings in the district court and in the appellate court, the movant must notify the circuit clerk under Federal Rule of Appellate Procedure 12.1 if the district court states that it would grant the motion or that the motion raises a substantial issue. Remand is in the court of appeals' discretion under Appellate Rule 12.1.

Often it will be wise for the district court to determine whether it in fact would grant the motion if the court of appeals remands for that purpose. But a motion may present complex issues that require extensive litigation and that may either be mooted or be presented in a different context by decision of the issues raised on appeal. In such circumstances the district court may prefer to state that the motion raises a substantial issue, and to state the reasons why it prefers to decide only if the court of appeals agrees that it would be useful to decide the motion before decision of the pending appeal. The district court is not bound to grant the motion after stating that the motion raises a substantial issue; further proceedings on remand may show that the motion ought not be granted.

Rule 12.1. Remand After an Indicative Ruling by the District Court on a Motion for Relief That Is Barred by a Pending Appeal

(a) Notice to the Court of Appeals. If a timely motion is made in the district court for relief that it lacks authority to grant because of an appeal that has been docketed and is pending, the movant must promptly notify the circuit clerk if the district court states either that it would grant the motion or that the motion raises a substantial issue.

(a) Remand After an Indicative Ruling. If the district court states that it would grant the motion or that the motion raises a substantial issue, the court of appeals may remand for further proceedings but retains jurisdiction unless it expressly dismisses the appeal. If the court of appeals remands but retains jurisdiction, the parties must promptly notify the circuit clerk when the district court has decided the motion on remand.

Committee Note

This new rule corresponds to Federal Rule of Civil Procedure 62.1, which adopts for any motion that the district court cannot grant because of a pending appeal the practice that most courts follow when a party moves under Civil Rule 60(b) to vacate a judgment that is pending on appeal. After an appeal has been docketed and while it remains pending, the district court cannot grant relief under a rule such as Civil Rule 60(b) without a remand. But it can entertain the motion and deny it, defer consideration, state that it would grant the motion if the court of appeals remands for that purpose, or state that the motion raises a substantial issue. Experienced lawyers often refer to the suggestion for remand as an "indicative ruling." (Appellate Rule 4(a)(4) lists six motions that, if filed within the relevant time limit, suspend the effect of a notice of appeal filed before or after the motion is filed until the last such motion is disposed of. The district court has authority to grant the motion without resorting to the indicative ruling procedure.)

The procedure formalized by Rule 12.1 is helpful when relief is sought from an order that the court cannot reconsider because the order is the subject of a pending appeal. In the criminal context, the Committee anticipates that Rule 12.1 will be used primarily if not exclusively for newly discovered evidence motions under Criminal Rule 33(b)(1) (*see United States v. Cronic*, 466 U.S. 648, 667 n.42 (1984)), reduced sentence motions under Criminal Rule 35(b), and motions under 18 U.S.C. § 3582(c).

Rule 12.1 does not attempt to define the circumstances in which an appeal limits or defeats the district court's authority to act in the face of a pending appeal. The rules that govern the relationship between trial courts and appellate courts may be complex, depending in part on the nature of the order and the source of appeal jurisdiction. Appellate Rule 12.1 applies only when those rules deprive the district court of authority to grant relief without appellate permission.

To ensure proper coordination of proceedings in the district court and in the court of appeals, the movant must notify the circuit clerk if the district court states that it would grant the motion or that the motion raises a substantial issue. The "substantial issue" standard may be illustrated by the following hypothetical: The district court grants summary judgment dismissing a case. While the plaintiff's appeal is pending, the plaintiff moves for relief from the judgment, claiming newly discovered evidence and also possible fraud by the defendant during the discovery process. If the district court reviews the motion and indicates that the motion "raises a substantial issue," the court of appeals may well wish to remand rather than proceed to determine the appeal.

If the district court states that it would grant the motion or that the motion raises a substantial issue, the movant may ask the court of appeals to remand so that the district court can make its final ruling on the motion. In accordance with Rule 47(a)(1), a local rule may prescribe the format for the litigants' notifications and the district court's statement.

Remand is in the court of appeals' discretion. The court of appeals may remand all proceedings, terminating the initial appeal. In the context of postjudgment motions, however, that procedure should be followed only when the appellant has stated clearly its intention to abandon the appeal. The danger is that if the initial appeal is terminated and the district court then denies the requested relief, the time for appealing the initial judgment will have run out and a court might rule that the appellant is limited to appealing the denial of the postjudgment motion. The latter appeal may well not provide the appellant with the opportunity to raise all the challenges that could have been raised on appeal from the underlying judgment. *See, e.g.*, *Browder v. Dir., Dep't of Corrections of Ill.*, 434 U.S. 257, 263 n.7 (1978) ("[A]n appeal from denial of Rule 60(b) relief does not bring up the underlying judgment for review."). The Committee does not endorse the notion that a court of appeals should decide that the initial appeal was abandoned — despite the absence of any clear statement of intent to abandon the appeal — merely because an unlimited remand occurred, but the possibility that a court might take that troubling view underscores the need for caution in delimiting the scope of the remand.

The court of appeals may instead choose to remand for the sole purpose of ruling on the motion while retaining jurisdiction to proceed with the appeal after the

district court rules on the motion (if the appeal is not moot at that point and if any party wishes to proceed). This will often be the preferred course in the light of the concerns expressed above. It is also possible that the court of appeals may wish to proceed to hear the appeal even after the district court has granted relief on remand; thus, even when the district court indicates that it would grant relief, the court of appeals may in appropriate circumstances choose a limited rather than unlimited remand.

If the court of appeals remands but retains jurisdiction, subdivision (b) requires the parties to notify the circuit clerk when the district court has decided the motion on remand. This is a joint obligation that is discharged when the required notice is given by any litigant involved in the motion in the district court.

When relief is sought in the district court during the pendency of an appeal, litigants should bear in mind the likelihood that a new or amended notice of appeal will be necessary in order to challenge the district court's disposition of the motion. *See, e.g.*, *Jordan v. Bowen*, 808 F.2d 733, 736-37 (10th Cir. 1987) (viewing district court's response to appellant's motion for indicative ruling as a denial of appellant's request for relief under Rule 60(b), and refusing to review that denial because appellant had failed to take an appeal from the denial); *TAAG Linhas Aereas de Angola v. Transamerica Airlines, Inc.*, 915 F.2d 1351, 1354 (9th Cir. 1990) ("[W]here a 60(b) motion is filed subsequent to the notice of appeal and considered by the district court after a limited remand, an appeal specifically from the ruling on the motion must be taken if the issues raised in that motion are to be considered by the Court of Appeals.").

MEMORANDUM

DATE: March 27, 2007

TO: Advisory Committee on Appellate Rules

CC: Reporters and Advisory Committee Chairs

FROM: Catherine T. Struve

RE: Item No. 07-AP-B: Proposed Appellate Rule on indicative rulings

This memo considers possible options for a proposed Appellate Rule 12.1 that would reflect the procedure to be followed when a district court is asked for relief that it lacks authority to grant due to a pending appeal. If the Appellate Rules Committee approves the proposed Rule, the goal would be to seek permission to publish the proposed Rule for comment this summer, along with proposed Civil Rule 62.1.

I. History of the proposal

In March 2000, the Solicitor General proposed that the Appellate Rules Committee consider adopting a new Appellate Rule 4.1 to address the practice of indicative rulings.[2] The Department of Justice argued that a FRAP rule on this topic would promote awareness of the possibility of indicative rulings; would ensure that the possibility was available in all circuits; and would render the relevant procedures uniform throughout the circuits.[3] The Appellate Rules Committee discussed the proposal at its April 2000 meeting and retained the matter on its study agenda. At the April 2001 meeting, the Committee concluded that the DOJ's proposal should be referred to the Civil Rules Committee, on the ground that any such rule would more appropriately be placed in the Civil Rules.[4]

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[2] *See* Minutes of the Advisory Committee on Appellate Rules, April 13, 2000.

[3] *See id.*

[4] *See* Minutes of the Advisory Committee on Appellate Rules, April 11, 2001.

At its May 2006 meeting, the Civil Rules Committee approved a recommendation to publish for comment a new Civil Rule 62.1 concerning indicative rulings. Though the Committee decided not to request publication in summer 2006, it reported on the proposal at the Standing Committee's June 2006 meeting; at that meeting, there was some discussion of the placement and caption of the proposed Civil Rule. Further discussion of the proposed Civil Rule took place at the Standing Committee's January 2007 meeting, and the Standing Committee has asked the Appellate Rules Committee to consider adopting an Appellate Rules provision that recognizes the Civil Rule 62.1 procedure. The Standing Committee has asked the Civil and Appellate Rules Committees to coordinate so that the provisions concerning indicative rulings will dovetail and will be published for comment simultaneously. A copy of the current draft of proposed Civil Rule 62.1 is enclosed.

In February 2007, we asked Fritz Fulbruge for his input (and that of his fellow circuit clerks) on the indicative-ruling proposal. His memo – which reports his thoughts and those of the D.C. Circuit and Third Circuit clerks – is attached. Fritz reports that overall the clerks do not seem enthusiastic about the proposed rule, in part because "the appellate courts are satisfied with leaving the issue at rest because of locally developed procedures." Mark Langer, the D.C. Circuit clerk, states: "I prefer not to have any rule. We handle things pretty well here without a rule." Despite their doubts about the necessity of a national rule, however, Fritz and the two other clerks who commented on the proposal have provided very helpful insights, which I have attempted to incorporate into this memo and the proposed Rule and Note.

II. Current circuit practices concerning indicative rulings

Ordinarily, "a federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously. The filing of a notice of appeal is an event of jurisdictional significance--it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982).[5] Thus, in civil cases the pendency of an appeal limits the district court's possible dispositions of a motion for relief from the judgment under

[5] *See also In re Jones*, 768 F.2d 923, 931 (7th Cir. 1985) (Posner, J., concurring) ("The purpose of the rule is to keep the district court and the court of appeals out of each other's hair....").

Rule 60(b).[6] The court has three options: (1) deny the motion,[7] (2) defer consideration of the

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[6] By pendency of an appeal, I mean to refer to instances when the notice of appeal has become effective. A Civil Rule 60(b) motion that is filed no later than 10 days after entry of judgment tolls the time for taking an appeal, and a notice of appeal filed before the disposition of such a motion does not "become[] effective" until the entry of the order disposing of the motion. Appellate Rule 4(a)(4)(B)(i).

[7] *See Puerto Rico v. SS Zoe Colocotroni*, 601 F.2d 39, 42 (**1st Cir.** 1979) ("[W]hen an appeal is pending from a final judgment, parties may file Rule 60(b) motions directly in the district court without seeking prior leave from us. The district court is directed to review any such motions expeditiously, within a few days of their filing, and quickly deny those which appear to be without merit...."); *Hyle v. Doctor's Assocs., Inc.*, 198 F.3d 368, 372 n.2 (**2d Cir.** 1999) ("Like most circuits ... , we have recently recognized the power of a district court to *deny* a Rule 60(b) motion after the filing of a notice of appeal from the judgment sought to be modified, *see, e.g., Selletti v. Carey*, 173 F.3d 104, 109 (2d Cir. 1999); *Toliver v. County of Sullivan*, 957 F.2d 47, 49 (2d Cir. 1992), notwithstanding an earlier contrary authority, *see Weiss v. Hunna*, 312 F.2d 711, 713 (2d Cir. 1963), which had previously been cited with apparent approval, *see New York State National Organization for Women*, 886 F.2d 1339, 1349-50 (2d Cir. 1989); *Contemporary Mission, Inc. v. United States Postal Service*, 648 F.2d 97, 107 (2d Cir. 1981)."); *United States v. Contents of Accounts Numbers 3034504504 and 144-07143 at Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 971 F.2d 974, 988 (**3d Cir.** 1992); *Fobian v. Storage Tech. Corp.*, 164 F.3d 887, 891 (**4th Cir.** 1999) ("[W]hen a Rule 60(b) motion is filed while a judgment is on appeal, the district court has jurisdiction to entertain the motion, and should do so promptly. If the district court determines that the motion is meritless, as experience demonstrates is often the case, the court should deny the motion forthwith; any appeal from the denial can be consolidated with the appeal from the underlying order."); *Karaha Bodas Co. v. Perusahaan Perambangan Minyak Dan Gas Bumi Negara*, No. 02-20042, 2003 WL 21027134, at *4 (**5th Cir.** 2003) (unpublished per curiam opinion) ("Under the Fifth Circuit's procedure, the appellate court asks the district court to indicate, in writing, its inclination to grant or deny the Rule 60(b) motion. If the district court determines that the motion is meritless, the appeal from the denial is consolidated with the appeal from the underlying order."); *Kusay v. United States*, 62 F.3d 192, 195 (**7th Cir.** 1995) ("Many cases, including *United States v. Cronic*, 466 U.S. 648, 667 n.42 (1984), say that a district court may deny, but not grant, a post-judgment motion while an appeal is pending. *Cronic* involved a motion for a new trial under Fed.R.Crim.P. 33, but the principle is general."); *Hunter v. Underwood*, 362 F.3d 468, 475 (**8th Cir.** 2004) ("Our case law ... permits the district court to consider a Rule 60(b) motion on the merits and deny it even if an appeal is already pending in this court ...."); *Mahone v. Ray*, 326 F.3d 1176, 1180 (**11th Cir.** 2003) ("[D]istrict courts retain jurisdiction after the filing of a notice of appeal to entertain and deny a Rule 60(b) motion.").

The Supreme Court has stated in passing that "the pendency of an appeal does not affect the district court's power to grant Rule 60 relief." *Stone v. I.N.S.*, 514 U.S. 386, 401 (1995). But

motion,[8] or (3) indicate its inclination to grant the motion and await a remand from the Court of Appeals for that purpose.[9] The district court's options are further limited within the Ninth

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a number of courts "have explicitly recognized that the statement in *Stone* is dicta and thus have not modified their similar Rule 60(b) approach." *Shepherd v. Int'l Paper Co.*, 372 F.3d 326, 331 (5th Cir. 2004) (adopting this view).

[8] *Cf. LSJ Inv. Co. v. O.L.D., Inc.*, 167 F.3d 320, 324 (6th Cir. 1999) (holding that although Sixth Circuit "cases allow the court to entertain a motion for relief even while an appeal is pending, they do not require the court to do so. Once the defendants appealed, it was not erroneous for the district court to let the appeal take its course.").

Some circuits, however, have suggested that deferral is generally inappropriate. *See, e.g.*, *Puerto Rico v. SS Zoe Colocotroni*, 601 F.2d 39, 42 (**1st Cir.** 1979) ("[W]hen an appeal is pending from a final judgment, parties may file Rule 60(b) motions directly in the district court without seeking prior leave from us. The district court is directed to review any such motions expeditiously, within a few days of their filing, and quickly deny those which appear to be without merit....").

[9] *See Fobian v. Storage Tech. Corp.*, 164 F.3d 887, 891 (**4th Cir.** 1999) ("If the district court is inclined to grant the motion, it should issue a short memorandum so stating. The movant can then request a limited remand from this court for that purpose."); *Karaha Bodas Co., L.L.C. v. Perusahaan Perambangan Minyak Dan Gas Bumi Negara*, No. 02-20042, 2003 WL 21027134, at *4 (**5th Cir.** 2003) (unpublished per curiam opinion) ("If the district court is inclined to grant the motion, it should issue a short memorandum so stating. Appellant may then move this court for a limited remand so that the district court can grant the Rule 60(b) relief. After the Rule 60(b) motion is granted and the record reopened, the parties may then appeal to this court from any subsequent final order."); *Bovee v. Coopers & Lybrand C.P.A.*, 272 F.3d 356, 364 (**6th Cir.** 2001) ("Where a party seeks to make a motion under Fed.R.Civ.P. 60(b) to vacate the judgment of a district court, after notice of appeal has been filed, the proper procedure is for that party to file the motion in the district court. . . . If the district judge was inclined to grant the motion, he or she could enter an order so indicating; and, the party could then file a motion in the Court of Appeals to remand."); *Kusay v. United States* , 62 F.3d 192, 195 (**7th Cir.** 1995) ("A district judge disposed to alter the judgment from which an appeal has been taken must alert the court of appeals, which may elect to remand the case for that purpose."); *Pioneer Ins. Co. v. Gelt*, 558 F.2d 1303, 1312 (**8th Cir.** 1977) ("If, on the other hand, the district court decides that the motion should be granted, counsel for the movant should request the court of appeals to remand the case so that a proper order can be entered."); *Mahone v. Ray*, 326 F.3d 1176, 1180 (**11th Cir.** 2003) ("[A] district court presented with a Rule 60(b) motion after a notice of appeal has been filed should consider the motion and assess its merits. It may then deny the motion or indicate its belief that the arguments raised are meritorious. If the district court selects the latter course, the movant may then petition the court of appeals to remand the matter so as to confer jurisdiction on the district court to grant the motion."); *Hoai v. Vo*, 935 F.2d 308, 312 (**D.C. Cir.** 1991)

Circuit, because that circuit takes the view that the district court lacks power to deny a Rule 60(b) motion while an appeal is pending.[10] Though the Ninth Circuit thus diverges from other circuits on the question of whether a district court can deny such a motion without a remand, its indicative-ruling procedure seems fairly similar, in other respects, to that in other circuits.[11]

Local rules or practices addressing the practice of indicative rulings currently exist in the Sixth,[12] Seventh[13] and D.C.[14] Circuits. I was unable to find local rules or handbook provisions

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("[W]hen both a Rule 60(b) motion and an appeal are pending simultaneously . . . . the District Court may consider the 60(b) motion and, if the District Court indicates that it will grant relief, the appellant may move the appellate court for a remand in order that relief may be granted.").

[10] *See Smith v. Lujan*, 588 F.2d 1304, 1307 (**9th Cir.** 1979).

That the Sixth Circuit might take this view is suggested by its statement that the pendency of an appeal deprived the district court of jurisdiction to decide a Rule 60(b) motion. *See S.E.C. v. Johnston*, 143 F.3d 260, 263 (6th Cir. 1998), *abrogated on other grounds by Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon*, 541 U.S. 1, 16 (2004).

[11] *See, e.g., Williams v. Woodford*, 384 F.3d 567, 586 (9th Cir. 2004).

[12] Sixth Circuit Rule 45 provides in relevant part:

> Duties of Clerks--Procedural Orders
> (a) Orders That May be Entered by Clerk. The clerk may prepare, sign and enter orders or otherwise dispose of the following matters without submission to this Court or a judge, unless otherwise directed:
> ...
> (7) Orders granting remands and limited remands for the purpose of allowing the district court to grant a particular relief requested by a party and to which no other party has objected, or where the parties have moved jointly, where such motion is accompanied by the certification of the district court pursuant to *First National Bank of Salem, Ohio v. Hirsch*, 535 F.2d 343 (6th Cir. 1976).

The procedure set by *First National Bank* is as follows: "[T]he party seeking to file a Rule 60(b) motion ... should ... file[] that motion in the district court. If the district judge is disposed to grant the motion, he may enter an order so indicating and the party may then file a motion to remand in this court." *First Nat'l Bank of Salem, Ohio v. Hirsch*, 535 F.2d 343, 346 (6th Cir. 1976).

[13] Seventh Circuit Rule 57 provides:

> Circuit Rule 57. Remands for Revision of Judgment
> A party who during the pendency of an appeal has filed a motion under

concerning indicative rulings in the other Circuits. The reason may be that, as Fritz reports, the indicative-ruling procedure is not often used; Fritz estimates that in the Fifth Circuit such requests surface only about 30 times per year.

III. Questions to be addressed

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A. Should the Appellate Rule encompass remands in criminal cases?

The indicative-ruling process on the criminal side appears to be roughly similar to that

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Fed. R. Civ. P. 60(a) or 60(b), Fed. R. Crim. P. 35(b), or any other rule that permits the modification of a final judgment, should request the district court to indicate whether it is inclined to grant the motion. If the district court so indicates, this court will remand the case for the purpose of modifying the judgment. Any party dissatisfied with the judgment as modified must file a fresh notice of appeal.

[14] D.C. Circuit Handbook of Practice and Internal Procedures VIII.E. provides:

E. Motions for Remand
(*See* D.C. Cir. Rule 41(b).)

Parties may file a motion to remand either the case or the record for a number of reasons, including to have the district court or agency reconsider a matter, to adduce additional evidence, to clarify a ruling, or to obtain a statement of reasons. The Court also may remand a case or the record on its own motion.

If the *case* is remanded, this Court does not retain jurisdiction, and a new notice of appeal or petition for review will be necessary if a party seeks review of the proceedings conducted upon remand. *See* D.C. Cir. Rule 41(b). In general, a remand of the case occurs where district court or agency reconsideration is necessary. *See, e.g., Raton Gas Transmission Co. v. FERC*, 852 F.2d 612 (D.C. Cir. 1988); *Siegel v. Mazda Motor Co.*, 835 F.2d 1475 (D.C. Cir. 1987). By contrast, if only the record is remanded, such as where additional fact-finding is necessary, this Court retains jurisdiction over the case. *See* D.C. Cir. Rule 41(b).

It is important to note that where an appellant, either in a criminal or a civil case, seeks a new trial on the ground of newly discovered evidence while his or her appeal is pending, or where other relief is sought in the district court, the appellant must file the motion seeking the requested relief in the district court. *See Smith v. Pollin*, 194 F.2d 349, 350 (D.C. Cir. 1952); Fed. R. Crim. P. 33; Fed. R. Civ. P. 60. If that court indicates that it will grant the motion, the appellant should move this Court to remand the case to enable the district court to act. *See Smith v. Pollin*, 194 F.2d at 350.

envisioned in proposed Civil Rule 62.1. When a new trial motion under Criminal Rule 33[15] is made during the pendency of an appeal, "[t]he District Court ha[s] jurisdiction to entertain the motion and either deny the motion on its merits, or certify its intention to grant the motion to the Court of Appeals, which [can] then entertain a motion to remand the case." *United States v. Cronic*, 466 U.S. 648, 667 n.42 (1984).[16]

Under the current rules,[17] a pending appeal affects motions under Criminal Rule 35(a)

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[15] Criminal Rule 33(b)(1) explicitly notes the need for a remand before the district court can grant a motion for a new trial: "If an appeal is pending, the court may not grant a motion for a new trial until the appellate court remands the case."

[16] *See U.S. v. Graciani*, 61 F.3d 70, 77 (**1st Cir.** 1995) (adopting this procedure); *U.S. v. Camacho*, 302 F.3d 35, 36-37 (**2d Cir.** 2002) (citing *Cronic* and stating that "the district court retains jurisdiction to deny a Rule 33 motion during the pendency of an appeal, even though it may not grant such motion unless the Court of Appeals first remands the case to the district court"); *U.S. v. Fuentes-Lozano*, 580 F.2d 724, 726 (**5th Cir.** 1978) (per curiam) ("A motion for a new trial may be presented directly to the district court while the appeal is pending; that court may not grant the motion but may deny it, or it may advise us that it would be disposed to grant the motion if the case were remanded. Alternatively, as here, to avoid delay, the appellant may seek a remand for the purpose of permitting the district court fully to entertain the motion."); *U.S. v. Phillips*, 558 F.2d 363, 363-64 (**6th Cir.** 1977) (per curiam) ("[T]he proper procedure for a party wishing to make a motion for a new trial while appeal is pending is to first file the motion in the district court. If that court is inclined to grant the motion, it may then so certify, and the appellant should then make a motion in the court of appeals for a remand of the case to allow the district court to so act."); *U.S. v. Frame*, 454 F.2d 1136, 1138 (**9th Cir.** 1972) (per curiam) ("By necessary implication, Rule 33 permits a district court to entertain and deny a motion for a new trial based upon newly discovered evidence without the necessity of a remand. Only after the district court has heard the motion and decided to grant it is it necessary to request a remand from the appellate court."); *Garcia v. Regents of Univ. of Ca.*, 737 F.2d 889, 890 (**10th Cir.** 1984) (per curiam) ("It is settled that under Rule 33 of the Federal Rules of Criminal Procedure a district court may entertain a motion for new trial during the pendency of an appeal, although the motion may not be granted until a remand request has been granted by the appellate court.").

[17] The caselaw concerning motions under Criminal Rule 35 is complicated because of courts' readings of a previous version of the Rule. Prior to the enactment of the Sentencing Reform Act of 1984, Rule 35(a) stated that "[t]he court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence." Applying that Rule, the Ninth Circuit held that "the trial court retains jurisdiction to correct [a] sentence under Rule 35(a) while [an] appeal is pending." *Doyle v. U.S.*, 721 F.2d 1195, 1198 (9th Cir. 1983). Congress's amendment to Rule 35(a), however, led the Ninth Circuit to change its approach and hold that the district court lacked jurisdiction to grant Rule 35(a) relief during an appeal, because the amended Rule 35 provided "that district courts

differently than motions under Rule 35(b). It appears that the district court lacks jurisdiction to modify a final judgment under Rule 35(b)[18] while an appeal from that judgment is pending.[19] Appellate Rule 4(b), however, explicitly provides that the district court may correct a sentence under Rule 35(a) despite the pendency of an appeal.[20]

Two of the three circuits that have provisions addressing indicative rulings address them in the criminal as well as civil context: The Seventh Circuit's rule addresses motions to reduce a sentence under Criminal Rule 35(b), while the D.C. Circuit's Handbook addresses motions for a

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are to 'correct a sentence that is determined on appeal ... to have been imposed in violation of law, ... upon remand of the case to the court.'" *U.S. v. Ortega-Lopez*, 988 F.2d 70, 72 (9th Cir. 1993).

[18] *See, e.g., U.S. v. Campbell*, 40 Fed.Appx. 663, 664 (**3d Cir.** 2002) (nonprecedential opinion) ("After the filing of the original notice of appeal, this Court assumed exclusive jurisdiction over the subject matter of the appeal . . . , and the District Court lost jurisdiction to consider a Rule 35 motion. . . . It was for that reason that the parties . . . sought a summary remand to the District Court to permit disposition of the government's motion."); *U.S. v. Bingham*, 10 F.3d 404, 405 (**7th Cir.** 1993) (per curiam) ("Where a party moves for sentence reduction under Rule 35(b) during the pendency of an appeal, it must request that the district court certify its inclination to grant the motion. If the district court is inclined to resentence the defendant, it shall certify its intention to do so in writing. The government (or the parties jointly) may then request that we remand by way of a motion that includes a copy of the district court's certification order.").

[19] This approach accords with the view expressed by the Supreme Court prior to the adoption of the Criminal Rules. *See Berman v. U.S.*, 302 U.S. 211, 214 (1937) ("As the first sentence was a final judgment and appeal therefrom was properly taken, the District Court was without jurisdiction during the pendency of that appeal to modify its judgment by resentencing the prisoner.").

[20] Rule 35(a) provides that "[w]ithin 7 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error." Rule 4(b)(5) provides in part: "The filing of a notice of appeal under this Rule 4(b) does not divest a district court of jurisdiction to correct a sentence under Federal Rule of Criminal Procedure 35(a), nor does the filing of a motion under 35(a) affect the validity of a notice of appeal filed before entry of the order disposing of the motion." The brevity of Rule 35(a)'s 7-day deadline helps to avoid scenarios in which the district court and court of appeals are both acting with respect to the same judgment. *Cf.* 1991 Advisory Committee Note to Rule 35 ("The Committee believed that the time for correcting such errors should be narrowed within the time for appealing the sentence to reduce the likelihood of jurisdictional questions in the event of an appeal and to provide the parties with an opportunity to address the court's correction of the sentence, or lack thereof, in any appeal of the sentence.").

new trial based on newly discovered evidence under Criminal Rule 33. As noted above, the current draft Rule is drafted so as to encompass the criminal context; and the Note refers to the procedure described in *Cronic*.

Excerpt from Minutes of the Standing Committee on Practice and Procedure, June 9-10, 2008

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FED. R. APP. P. 12.1

Judge Stewart explained that the proposed new Rule 12.1 (remand after an indicative ruling by the district court) was designed to accompany new FED. R. CIV. P. 62.1 (indicative ruling on a motion for relief that is barred by a pending appeal). It had been coordinated closely with the Advisory Committee on Civil Rules.

Judge Stewart reported that the Department of Justice had expressed concern about potential abuse of the indicative ruling procedure in criminal cases. As a result, the advisory committee modified the committee note after publication by editing the note's discussion of the scope of the rule's application in criminal cases. Professor Struve added that the Advisory Committee on Criminal Rules might wish to consider a change in the criminal rules to authorize indicative rulings explicitly. Accordingly, the advisory committee had included language in the committee note to anticipate that possible development.

A member questioned the language that had been added to the second paragraph of the committee note stating that the advisory committee anticipates that use of indicative rulings "will be limited to" three categories of criminal matters – newly discovered evidence motions under FED. R. CRIM. P. 33(b)(1), reduced sentence motions under FED. R. CRIM. P. 35(b), and motions under 18 U.S.C. § 3582(c). He worried that the language might be too restrictive and recommended that it be revised to state that "the Committee anticipates that Rule 12.1 will be used primarily, if not exclusively, for [those matters]."

Professor Struve explained that the advisory committee had been reluctant to limit the rule to the three situations suggested by the Department of Justice because there may be other situations when indicative rulings are appropriate. A member added that the procedure could be useful in handling § 2255 motions, as appellate courts have said that a district court should rarely hear a § 2255 motion when an appeal is pending. He noted that a three-judge panel of his court recently had permitted use of the indicative ruling procedure in a § 2255 case. But Mr. Tenpas responded that the Department was particularly concerned about systematic use, and abuse, of the procedure by pro se inmates in § 2255 cases.

A member pointed out that the principal safeguard against abuse is that the court of appeals has discretion to deny any request for an indicative ruling and may refuse to remand a matter to the trial court. The discretion vested in the court of appeals safeguards against excessive use of the procedure.

Judge Stewart and Professor Struve agreed that the recommended substitute language for the committee note, "the Committee anticipates that Rule 12.1 will be used primarily, if not exclusively,

for . . ., " would be acceptable. A motion was made to approve the proposed new rule, with the revised note language.

The committee without objection by voice vote approved the proposed new Rule 12.1 for approval by the Judicial Conference.

* * * * *

V

MEMORANDUM

DATE: October 16, 2009

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 08-AP-M

At the April 2009 meeting, the Committee directed me to draft a possible Rules amendment to address the question of interlocutory tax appeals. I enclose my March 2009 memo, which summarizes the background for the proposed amendments. Part I of this memo sets forth proposed language for the amendments, while Part II discusses a few drafting choices.

I. Proposed amendments

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 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.

Committee Note

Rule 13 is amended in accord with an amendment to Rule 14 that addresses the treatment of interlocutory appeals from Tax Court orders under 26 U.S.C. § 7482(a)(2). Rule 13 addresses appeals as of right from Tax Court decisions; thus, Rule 13(d)(1)'s current reference to "[a]n appeal from the Tax Court" is unduly broad and Rule 13(d)(1) is amended to refer only to appeals from Tax Court "decision[s]."

Rule 14. Applicability of Other Rules to the Review of a Tax Court Decision or Order

(a) Appeal as of right from a decision. All provisions of these rules, except Rules 4-9, 15-20, and 22-23, apply to the review of a Tax Court decision.

(b) Appeal by permission from an order. All provisions of these rules, except Rules 3-4, 5(d)(1)(B), 6-9, 13, 15-20, and 22-23, apply to appeals by permission from a Tax Court order. The appeal is governed by Rule 5, except for 5(d)(1)(B). References in Rules 5, 10, 11, and 12(c) to the district court and district clerk are to be read as referring to the Tax Court and its clerk.

Committee Note

Rule 14 is amended by the addition of new subdivision (b) which addresses the treatment of interlocutory appeals from Tax Court orders under 26 U.S.C. § 7482(a)(2). Subdivision (b) provides that such appeals are governed by Rule 5. Rule 5(d)(1)(B), however, does not apply to such appeals because it references Rule 7 cost bonds and Rule 7 does not apply to appeals from the Tax Court. In general, the Appellate Rules apply to interlocutory appeals from Tax Court orders, except that Rules 3- 4, 5(d)(1)(B), 6-9, 13, 15-20, and 22-23 do not apply.

The caption of Title III is amended to mention Tax Court "order[s]" as well as Tax Court "decision[s]."

II. Drafting choices

The draft amendments shown in Part I track closely the approach already taken in Rules 13 and 14. Thus, proposed new Rule 14(b)'s list of inapplicable FRAP provisions is very similar to the list in existing Rule 14 (which would become new Rule 14(a)). The two lists of exclusions differ only in obvious ways: proposed Rule 14(b) excludes Rules 3 and 4 because those Rules deal specifically with appeals as of right, and proposed Rule 14(b) does not exclude Rule 5 (other than Rule 5(d)(1)(B)). I should note that the list of inapplicable provisions in current Rule 14 has never been substantively amended. Whether the inclusions and exclusions specified in current Rule 14 are as appropriate now as they were when first adopted in 1968 is a question upon which the Committee might wish to seek comment if and when it decides to publish the proposal sketched above.

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.[1] This is another matter on which the Committee might wish to request specific comments.

Proposed Rule 14(b), like current Rule 13(d)(1), specifies particular Rules in which references to the district court and the district clerk are to be read to refer to the Tax Court and its clerk. There are other Appellate Rules that also use the term "district court" or "district clerk." The Committee may wish to consider whether it would like to provide a global definition instead of specifying only certain rules in which the terms "district court" and "district clerk" refer to the Tax Court and its clerk. An example of this alternative approach can be found in Rule 6(b)(1)(C), which refers simply to "any applicable rule": "when the appeal is from a bankruptcy appellate panel, the term 'district court,' as used in any applicable rule, means 'appellate panel.'"

Here is a chart showing Appellate Rules that refer to "district court" or "district clerk." The endnotes discuss issues specific to particular rules.

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[1] 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 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). For a discussion of various sorts of bonds in tax appeals, see 14 Mertens Law of Fed. Income Tax'n § 51:21.

	Provision specified in Rules 13(d)(1) and/or 14(b) (as applicable) as a rule in which references to district court and clerk mean Tax Court and clerk	***Provision not specified*** as a rule in which references to district court and clerk mean Tax Court and clerk
Provision applies to review of Tax Court ***decisions*** and – under proposed new Rule 14(b) – would apply to interlocutory appeals from Tax Court ***orders***	10(a), 10(b)(1)(A)(iii), 10(b)(3)(C), 10(c), 10(d), 10(e)(1), 10(e)(2), 11(b)(1), 11(b)(2), 11(c), 11(e), 11(f), 11(g),[1] 12(c)	1(a)(2), 26(a)(4),[2] 28(a)(4)(A), 30(a)(2), 30(e),[3] 37,[4] 39(d)(3) & 39(e),[5] 42(a), 43(a)(3),[6] 46(a)(1)[7]
Provision applies to review of Tax Court ***decisions*** but would not apply to interlocutory appeals from Tax Court orders	3(a)(1), 3(a)(3),[8] 3(b)(1), 3(d), 3(e), 12(a)	
Provision does not apply to review of Tax Court decisions but would apply to interlocutory appeals from Tax Court ***orders***	5(a)(1), 5(a)(3), 5(b)(1)(E)(ii), 5(d)(1)(A), 5(d)(3)	
Provision does not apply to review of Tax Court decisions and would not apply to interlocutory appeals from Tax Court orders		4, 6-9, 22, 24(a)[9]

III. Conclusion

My suggestions concerning the proposed amendments are necessarily tentative because I lack experience with tax litigation. If the Committee decides to move forward with the proposals, the comment period could provide a useful opportunity not only to seek comment on the new provisions concerning interlocutory appeals by permission but also to seek comment on the appropriateness of the existing decisions, memorialized in Rule 14, as to which Appellate Rules should apply in appeals from the Tax Court.

The Committee may also wish to consider providing a more global definition of "district

court" and "district clerk" than those currently provided in Rule 13(d)(1) and sketched in proposed Rule 14(b). That is to say, instead of specifying certain Rules in which "district court" and "district clerk" are to be read to mean the Tax Court and its clerk, the Committee might consider inserting a provision saying simply, "In appeals from the Tax Court, the terms 'district court' and 'district clerk,' as used in any applicable rule, mean the Tax Court and its clerk." That sentence could be added as a new Rule 14(c), and one could then delete both the last sentence of existing Rule 13(d)(1) and the last sentence of proposed Rule 14(b).

Endnote 1. Rule 11(g) states: "If, 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." A motion for release will not, of course, be made during an appeal from the Tax Court; but other intermediate orders might be sought during such an appeal.

Endnote 2. Current Rule 26(a)(4) states: "As used in this rule, 'legal holiday' means New Year's Day, Martin Luther King, Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, Christmas Day, and any other day declared a holiday by the President, Congress, or the state in which is located either the district court that rendered the challenged judgment or order, or the circuit clerk's principal office." Effective December 1, 2009 (absent contrary action by Congress) Rule 26(a)'s time-computation provisions will change. However, the rule will continue to incorporate into the definition of "legal holiday" certain state holidays.

Proposed Rule 1(b) is currently on track to take effect December 1, 2010 if the Supreme Court approves it and Congress takes no contrary action. Proposed Rule 1(b) will define "state" for purposes of the Appellate Rules to include the District of Columbia and any U.S. commonwealth or territory. Thus, one can think of the District of Columbia as "the state in which is located" the Tax Court.

Endnote 3. Rule 30(e) provides: "If a transcript of a proceeding before an administrative agency, board, commission, or officer was used in a district-court action and has been designated for inclusion in the appendix, the transcript must be placed in the appendix as an exhibit." Technically, this provision applies to appeals from Tax Court decisions and – under the proposed new Rule 14(b) – would apply to interlocutory appeals from Tax Court orders. It is unclear to me how often a transcript of an administrative proceeding would be used in a Tax Court proceeding. Rule 30(e) is not specified in either current Rule 13(d)(1) or proposed Rule 14(b) as a rule in which references to the district court mean the Tax Court. That seems unproblematic to me given the uncertainty as to how often Rule 30(e) would be relevant to appeals from the Tax Court.

Endnote 4. Rule 37 provides: "(a) When the Court Affirms. Unless the law provides otherwise, if a money judgment in a civil case is affirmed, whatever interest is allowed by law is

payable from the date when the district court's judgment was entered. (b) When the Court Reverses. If the court modifies or reverses a judgment with a direction that a money judgment be entered in the district court, the mandate must contain instructions about the allowance of interest."

These provisions apply to appeals from Tax Court decisions and – under the proposed new Rule 14(b) – would apply to interlocutory appeals from Tax Court orders. They are not, however, specified in either current Rule 13(d)(1) or proposed Rule 14(b) as provisions in which references to the district court mean the Tax Court.

At first glance, it may seem odd to include Rule 37 among the rules that are potentially applicable to interlocutory appeals from Tax Court orders under proposed Rule 14(b): an *interlocutory* appeal would seem unlikely to concern a money judgment. However, as noted in my March 2009 memo, most 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 a petition. In such a situation, I suppose it might be possible to see someone seek a permissive appeal under Section 7482(a)(2) to obtain immediate review of a disposition of fewer than all claims in a petition, under circumstances where the disposition in question looks like a money judgment. So perhaps there may be some instances in which Rule 37 might be relevant to permissive interlocutory appeals from the Tax Court.

Rule 37(a), by its own terms, governs interest in the event of an affirmance "[u]nless the law provides otherwise." I have not researched the question of interest on Tax Court judgments, but it seems that Rule 37(a) is drafted so as to avoid any conflict with the applicable tax law provisions: If a tax-law provision governs the treatment of interest in the event a Tax Court judgment is affirmed, Rule 37(a) is written so as not to conflict with that provision.

Rule 37(b) does not pose an obvious conflict with tax law either. Again, I have not researched the question of tax-law provisions that may govern interest when a Tax Court judgment is modified or reversed. But if such provisions exist, Rule 37(b) does not conflict with them; it merely directs the court of appeals to include in the mandate instructions about the allowance of interest.

Endnote 5. Rule 39(d)(3) states: "The clerk must prepare and certify an itemized statement of costs for insertion in the mandate, but issuance of the mandate must not be delayed for taxing costs. If the mandate issues before costs are finally determined, the district clerk must—upon the circuit clerk's request—add the statement of costs, or any amendment of it, to the mandate."

Rule 39(e) states: "The following costs on appeal are taxable in the district court for the benefit of the party entitled to costs under this rule: (1) the preparation and transmission of the record; (2) the reporter's transcript, if needed to determine the appeal; (3) premiums paid for a supersedeas bond or other bond to preserve rights pending appeal; and (4) the fee for filing the notice of appeal."

These provisions apply to appeals from Tax Court decisions and – under the proposed new Rule 14(b) – would apply to interlocutory appeals from Tax Court orders. They are not, however, specified in either current Rule 13(d)(1) or proposed Rule 14(b) as provisions in which references to the district court and district clerk mean the Tax Court and its clerk.

Rule 39(b) provides: "Costs for or against the United States, its agency, or officer will be assessed under Rule 39(a) only if authorized by law." In the context of tax disputes, a relevant statute is 26 U.S.C. § 7430, which provides (subject to certain limits) that "[i]n any administrative or court proceeding which is brought by or against the United States in connection with the determination, collection, or refund of any tax, interest, or penalty under this title, the prevailing party may be awarded a judgment or a settlement for– (1) reasonable administrative costs incurred in connection with such administrative proceeding within the Internal Revenue Service, and (2) reasonable litigation costs incurred in connection with such court proceeding." See also Tax Court Rules 230-233.

Endnote 6. Rule 43(a)(3) states: "If a party against whom an appeal may be taken dies after entry of a judgment or order in the district court, but before a notice of appeal is filed, an appellant may proceed as if the death had not occurred. After the notice of appeal is filed, substitution must be in accordance with Rule 43(a)(1)."

This provision applies to appeals from Tax Court decisions and – under the proposed new Rule 14(b) – would apply to interlocutory appeals from Tax Court orders. It is not, however, specified in either current Rule 13(d)(1) or proposed Rule 14(b) as a rule in which references to the district court mean the Tax Court.

More generally, it is worth noting that Rule 43(c)(2), concerning automatic substitution of public officers, is slightly in tension (as to its specifics) with 26 U.S.C. § 7484. Rule 43(c)(2) provides: "When a public officer who is a party to an appeal or other proceeding in an official capacity dies, resigns, or otherwise ceases to hold office, the action does not abate. The public officer's successor is automatically substituted as a party. Proceedings following the substitution are to be in the name of the substituted party, but any misnomer that does not affect the substantial rights of the parties may be disregarded. An order of substitution may be entered at any time, but failure to enter an order does not affect the substitution." Section 7484 provides: "When the incumbent of the office of Secretary changes, no substitution of the name of his successor shall be required in proceedings pending before any appellate court reviewing the action of the Tax Court." (Though the term "Secretary" might be taken to refer only to the Treasury Secretary himself or herself, it appears to have a broader meaning. 26 U.S.C. § 7701(a)(11)(B) provides: "When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof ... [t]he term 'Secretary' means the Secretary of the Treasury or his delegate." And Section 7701(a)(12)(A)(I) provides that the term "or his delegate," "when used with reference to the Secretary of the Treasury, means any officer, employee, or agency of the Treasury Department duly authorized by the Secretary of the Treasury directly, or indirectly by one or more redelegations of authority, to perform the function mentioned or described in the context." This includes the Commissioner of Internal Revenue.)

The bottom line of both provisions is the same: a transition from one Commissioner to the next does not affect any pending appeals. But the technical mechanism differs: Rule 43(c)(2) provides for automatic substitution of the new Commissioner, whereas Section 7484 simply provides that no substitution is needed.

Endnote 7. Rule 46(a)(1) provides: "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)."

Rule 46 applies to appeals from Tax Court decisions and – under the proposed new Rule 14(b) – would apply to interlocutory appeals from Tax Court orders. It is not, however, specified in either current Rule 13(d)(1) or proposed Rule 14(b) as a rule in which references to the district court mean the Tax Court. It is not clear that it makes any difference whether "district court" in Rule 46(a)(1) is read to encompass the Tax Court. Under the Tax Court's present rules, the eligibility requirements for an attorney to be admitted to practice before the Tax Court seem similar to those for admission to the bar of a court of appeals under Rule 46(a)(1). *See* Tax Court Rule 200.

Endnote 8. Rule 3(a)(3) provides: "An appeal from a judgment by a magistrate judge in a civil case is taken in the same way as an appeal from any other district court judgment."

Technically, this provision applies to appeals from Tax Court decisions; under proposed Rule 14(b), it would not apply to interlocutory appeals from Tax Court orders. Rule 3 is specified in Rule 13(d)(1) as a rule in which references to the district court and district clerk mean the Tax Court and its clerk.

Rule 3(a)(3) would at first glance seem to have no application to appeals from the Tax Court. The Tax Court does not employ magistrate judges as that term is used in 28 U.S.C. §§ 631-39. The Tax Court does employ "special trial judges" who can decide certain types of tax matters and who can make recommended findings of fact and conclusions of law on other matters, *see* 26 U.S.C. § 7443A; Tax Court Rule 183. *See generally* Christopher M. Pietruszkiewicz, *Conflating Standards of Review in the Tax Court: A Lesson in Ambiguity*, 44 Hous. L. Rev. 1337 (2008) (discussing role of special trial judges in Tax Court proceedings); Leandra Lederman, *Tax Appeal: A Proposal to Make The United States Tax Court More Judicial*, 85 Wash. U. L. Rev. 1195, 1201 (2008) (describing the Tax Court's special trial judges as "judicial officers who are somewhat analogous to magistrate judges"). One of the typical tasks of special trial judges appears to be the determination of small tax cases (involving amounts of $50,000 or less); when such matters are tried under streamlined procedures to a special trial judge, the question of appellate procedure would not arise because no appeal is available. *See* 26 U.S.C. § 7463(b). However, it appears that there are some types of decisions by special trial judges that could be appealed to the court of appeals. *See* 26 U.S.C. §§ 7443A(b) & (c). *See generally* Kathleen Pakenham, *You Better Shop Around: The Status and Authority of Specialty*

Trial Judges in Federal Tax Cases, 103 Tax Notes 1527 (2004) (discussing a previous version of Section 7443A).

Though I have not attempted to explore all the duties of special trial judges, it seems likely that special trial judges – though analogous in some ways to magistrate judges – would not necessarily be deemed so similar in their roles as to fit within the term "magistrate judge" for purposes of Rule 3(a)(3). Assuming that to be the case, Rule 3(a)(3) would have no application to appeals from the Tax Court.

Endnote 9. Despite the fact that it is not excluded from application to Tax Court appeals by Rule 14 (or by proposed Rule 14(b)), Rule 24(a) does not appear to be intended to apply by its own terms to appeals from the Tax Court. Rather, Rule 24(b) provides that "When an appeal or review of a proceeding before an administrative agency, board, commission, or officer (including for the purpose of this rule the United States Tax Court) proceeds directly in a court of appeals, a party may file in the court of appeals a motion for leave to proceed on appeal in forma pauperis with an affidavit prescribed by Rule 24(a)(1)." Because Rule 24(a) does not appear to apply to appeals from the Tax Court, its references to the district court and district clerk need not encompass references to the Tax Court and its clerk.

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

[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]

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[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).

VI. A

MEMORANDUM

DATE: October 16, 2009

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 03-09

At its fall 2008 meeting, the Appellate Rules Committee gave final approval to a proposed amendment to Rule 40(a)(1). The Department of Justice had originally proposed amending both Rule 40(a)(1) and Rule 4(a)(1)(B) to clarify those Rules' treatment of suits involving federal officers or employees. However, the Department withdrew its proposal concerning Rule 4(a)(1)(B) and the Committee did not proceed further with that proposal. Judge Stewart presented the proposed Rule 40(a)(1) amendment at the January 2009 Standing Committee meeting for discussion rather than final approval, so as to provide the new administration with an opportunity to review the Department's preferences concerning the possibility of coordinating changes to both Rule 4(a)(1)(B) and Rule 40(a)(1).

Shortly after the January 2009 Standing Committee meeting, the Supreme Court granted certiorari in *United States ex rel. Eisenstein v. City of New York*, 129 S. Ct. 988 (2009) – a case that presented a question concerning the interpretation of Rule 4(a)(1)(B) and 28 U.S.C. § 2107. The question in *Eisenstein* was one that had divided the courts of appeals: how to classify (for purposes of the 30-day and 60-day appeal periods set by Rule 4(a)(1) and Section 2107) qui tam actions in which the government had not appeared.

At its April 2009 meeting, the Committee discussed *Eisenstein*'s potential relevance to the Rule 40(a)(1) amendment. Doug Letter undertook to consult with the Solicitor General on the questions relating to Rules 40(a)(1) and 4(a)(1)(B). The Committee determined by consensus that in the meantime Judge Stewart would seek to place the Rule 40(a)(1) amendment on the Standing Committee's agenda for action at the June meeting.

At the end of May, Doug reported that the Deputy Attorney General intended to urge the Committee to put the Rule 40 matter on hold pending the decision in *Eisenstein*. Judge Stewart notified the Committee that in light of this he intended to recommend to the Standing Committee that the Rule 40 proposal be held in abeyance. At its June meeting, the Standing Committee

accordingly remanded the Rule 40 issue to the Advisory Committee.

One week later, the Supreme Court decided *Eisenstein*, holding unanimously that "when the United States has declined to intervene in a privately initiated [False Claims Act] action, it is not a 'party' to the litigation for purposes of either § 2107 or Federal Rule of Appellate Procedure 4." *United States* ex rel. *Eisenstein v. City of New York*, 129 S.Ct. 2230, 2237 (2009).[1]

It seems best to await input from the Department of Justice before proceeding further with Item No. 03-09. In the meantime, Part I of this memo briefly recapitulates the proposed Rule 40(a)(1) amendment as it was approved by the Advisory Committee in fall 2008. Part II summarizes the *Eisenstein* decision.

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).[2] However, the 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

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[1] A copy of the decision is enclosed.

[2] 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).

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 decision in *Eisenstein*

Prior to *Eisenstein*, there was 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 had not appeared. Four circuits held that the 60-day period applied even if the government had 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 applied if the government had chosen not to intervene, unless "other circumstances ... indicate[d] 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 applied. *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 2009, the Supreme Court granted certiorari in *Eisenstein*. See 129 S. Ct. 988 (2009). The question presented read 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 case was argued shortly after the Appellate Rules Committee's April 2009 meeting. Some passages during the oral argument highlighted questions relating to the nature of the appeal deadline. For example, Justice Stevens observed that because the appeal-time deadlines are jurisdictional the Supreme Court would create problems (if it chose the 30-day deadline for qui tam actions in which the government had not intervened) in those circuits where circuit precedent applied the 60-day period in such actions.[3] Justice Alito returned to this concern later in the

[3] *See* Transcript of Oral Argument, *United States ex rel. Eisenstein v. City of New York*, No. 08-660, 2009 WL 1064202, at 26-27. Admittedly such problems would arise only in cases in which litigants relied on the availability of the 60-day period and the judgment was still open on appellate review. *See* Oral Argument Transcript at 27 (Justice Ginsburg: "Even a jurisdictional issue becomes subject to preclusion once you have gone the appeal route .... So even the jurisdictional base can be precluded and not raised on collateral attack.").

argument.[4]

At two points during the argument, Justices noted the possibility of rulemaking activity in the area. Justice Breyer suggested that the Court might choose to apply the 60-day period "and then suggest the Rules Committee look into this."[5] Later in the argument, the Chief Justice voiced the expectation that the Appellate Rules Committee would work on clarifying the applicability of Rule 4(a)(1)'s 30-day and 60-day provisions.[6] Counsel for the United States then pointed out that because the deadline is also statutory there is a question whether the rulemakers could clarify the point;[7] none of the Justices responded explicitly to this concern.

These passages in the argument (and some others) suggested that some members of the Court might be inclined to choose to apply the 60-day period in *Eisenstein* and then to suggest that the Rules Committee look into clarifying Rule 4(a)(1).[8] But that is not what the Court ultimately chose to do.

In an opinion by Justice Thomas, the Court unanimously held that "[a]lthough the United

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[4] *See* Oral Argument Transcript at 46 (Justice Alito: "What about the relators and the parties in the four circuits that have adopted the 60-day rule. They had a court of appeals opinion in front of them that said you had 60 days. They're just out of luck now?"); *id.* (Counsel for the United States: "Well, I think they also were on notice that there's a long-standing circuit split on this question which the court has never answered.").

[5] *See* Oral Argument Transcript at 32.

[6] *See* Oral Argument Transcript at 46-47 (Chief Justice Roberts: "I'm sure that the Appellate Rules Advisory Committee, when they hear this decision, if they haven't already, will put something in the rules about whether it's 30 days or 60 days. So I'm not terribly concerned about clarity going forward. It's going to be made clear by the Advisory Committee and the submission of new rules, and I see no reason that they wouldn't make it clear. I don't know whether they'll think 30 or 60 is the best idea.... So it's just a question of -- in this case and, as Justice Stevens pointed out, what the effect is going to be on other cases. And it seems to me that in that situation, 60 days makes the most sense because otherwise you're disrupting the system solely based on a trap for the unwary.").

[7] *See* Oral Argument Transcript at 47-48 ("I'm not sure that the advisory committee could come back and effectively amend the -- amend the statute by changing the rule.").

[8] Because none of the Justices responded during the argument to the government's concern about the scope of the rulemakers' authority with respect to statutory deadlines, it seemed difficult to predict how the Court would view that question. But it seemed possible that the Court might (for example) suggest that the Rules Committee look at the matter and propose legislation (if necessary).

States is aware of and minimally involved in every [False Claims Act] action ... it is not a 'party' to an FCA action for purposes of the appellate filing deadline unless it has exercised its right to intervene in the case." *United States ex rel. Eisenstein v. City of New York*, 129 S. Ct. 2230, 2233 (2009). The Court laid the groundwork for its conclusion by describing the framework for False Claims Act ["FCA"] qui tam actions:

> The FCA establishes a scheme that permits either the Attorney General, [31 U.S.C.] § 3730(a), or a private party, § 3730(b), to initiate a civil action alleging fraud on the Government. A private enforcement action under the FCA is called a qui tam action, with the private party referred to as the "relator."... When a relator initiates such an action, the United States is given 60 days to review the claim and decide whether it will "elect to intervene and proceed with the action," §§ 3730(b)(2), 3730(b)(4); see also § 3730(c)(3) (permitting the United States to intervene even after the expiration of the 60-day period "upon a showing of good cause").
>
> If the United States intervenes, the relator has "the right to continue as a party to the action," but the United States acquires the "primary responsibility for prosecuting the action." § 3730(c)(1). If the United States declines to intervene, the relator retains "the right to conduct the action." § 3730(c)(3). The United States is thereafter limited to exercising only specific rights during the proceeding. These rights include requesting service of pleadings and deposition transcripts, § 3730(c)(3), seeking to stay discovery that "would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts," § 3730(c)(4), and vetoing a relator's decision to voluntarily dismiss the action, § 3730(b)(1).

Eisenstein, 129 S. Ct. at 2233-34. The Court reasoned that the FCA's intervention provision presumes that the government is not a party unless it intervenes – "there would be no reason for the United States to intervene in an action in which it is already a party" – and also noted that "Congress expressly gave the United States discretion to intervene in FCA actions – a decision that requires consideration of the costs and benefits of party status." *Id.* at 2234. The Court rejected the argument that the United States' status as a "real party in interest" in FCA qui tam actions rendered the United States a party for purposes of Section 2107 and Rule 4(a)(1).[9] In

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[9] It seems likely that this aspect of the *Eisenstein* Court's reasoning will have effects beyond the context of False Claims Act litigation. Decisions in other contexts have sometimes relied on a real-party-in-interest theory. *See, e.g., Sedgwick v. Superior Court for District of Columbia*, 584 F.2d 1044, 1045 n.1 (D.C. Cir. 1978) ("Although the nominal party in this [habeas] case is the Superior Court of the District of Columbia, that court is represented on this appeal by the U.S. Attorney. Significantly, the original prosecution in the Superior Court was in the name of the United States. This case might just as well have been brought as a suit to enjoin the United States Attorney from maintaining the prosecution. The real party in interest is the

rejecting a variety of other arguments for applying the 60-day time period, the Court explained that it was bound by "the Rule's text, which hinges the applicability of the 60-day period on the requirement that the United States be a 'party' to the action." *Id.* at 2236.

The concern over harsh effects on litigants in circuits that had applied the 60-day period – which the Justices had discussed at oral argument – was addressed in a footnote in the opinion:

> Petitioner contends that the uncertainty regarding Rule 4(a)(1)(B) has created a "tra[p] for the unwary," and that our decision will unfairly punish those who relied on the holdings of courts adopting the 60-day limit in cases in which the United States was not a party.... As an initial matter, it is unclear how many pending cases are implicated by petitioner's concern as such cases would have to involve parties who waited more than 30 days to appeal from the judgment in an FCA case in which the United States declined to intervene. But to the extent that there are such cases, the Court must nonetheless decide the jurisdictional question before it irrespective of the possibility of harsh consequences. See Torres v. Oakland Scavenger Co., 487 U.S. 312, 318, 108 S.Ct. 2405, 101 L.Ed.2d 285 (1988) ("We recognize that construing Rule 3(c) [of the Federal Rules of Appellate Procedure] as a jurisdictional prerequisite leads to a harsh result in this case, but we are convinced that the harshness of our construction is 'imposed by the legislature and not the judicial process' " ...).

Eisenstein, 129 S. Ct. at 2236 n.4. As it turns out, at least one appeal – brought prior to the grant of certiorari in *Eisenstein* – has now been dismissed as untimely under that case's holding. *See Darian v. Accent Builders, Inc.*, 2009 WL 2039112, at *1 (9th Cir. June 16, 2009) (withdrawing prior memorandum disposition and dismissing the appeal as time-barred under *Eisenstein*).

The decision in *Eisenstein* appears to set a bright-line rule. I am not certain, however, that its application will always be straightforward. To its holding that the United States "is not a 'party' to an FCA action for purposes of the appellate filing deadline unless it has exercised its right to intervene in the case," the Court appended the following footnote:

> This does not mean that the United States must intervene before it can appeal any order of the court in an FCA action. Under the collateral-order doctrine recognized by this Court in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546-547, ... (1949), the United States may appeal, for example, the dismissal of an FCA action over its objection. See 31 U.S.C. § 3730(b)(1); see also § 3730(c)(3); *Marino v. Ortiz*, 484 U.S. 301, 304 ... (1988) (per curiam) (noting that "denials of [motions to intervene] are, of course, appealable"). In such a case, the

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United States or the United States Attorney, for purposes of application of Fed.R.App.P. 4(a). Accordingly, this appeal, filed 48 days after judgment, was timely."). Such decisions seem unlikely to remain good law after *Eisenstein*.

> Government is a party for purposes of appealing the specific order at issue even though it is not a party for purposes of the final judgment and Federal Rule of Appellate Procedure 4(a)(1)(B).

Eisenstein, 129 S. Ct. at 2233 & n.2. This footnote observes that the United States can sometimes appeal an order entered in an FCA action without first intervening, and the footnote explains that "[i]n such a case, the Government is a party for purposes of appealing the specific order at issue." In such instances, what time period governs the Government's appeal? The appeal is one as of right, and it is governed by Section 2107 and Rule 4(a)(1); does the fact that the government "is a party for purposes of appealing the specific order" mean that the 60-day time period governs? The footnote does not clearly resolve this point.

More generally, it is interesting to consider what light *Eisenstein* might shed on the questions the Committee has previously discussed concerning Item No. 03-09. It may be relevant, in this connection, to note that the *Eisenstein* Court rejected a purposive argument on the ground that the text governed:

> [P]etitioner contends that the underlying purpose of the 60-day time limit would be best served by applying Rule 4(a)(1)(B) in every FCA case. The purpose of the extended 60-day limit in cases where the United States is a party, he claims, is to provide the Government with sufficient time to review a case and decide whether to appeal. Petitioner contends that, even in cases where the Government did not intervene before the district court issued its decision, the Government may want to intervene for purposes of appeal, and should have the full 60 days to decide. But regardless of the purpose of Rule 4(a)(1)(B) and the convenience that additional time may provide to the Government, this Court cannot ignore the Rule's text ....

Eisenstein, 129 S. Ct. at 2236. In my March 14, 2008 memo I reviewed possible arguments concerning the scope of Section 2107's 60-day appeal period with respect to actions involving federal employees and with respect to individual-capacity suits arising from acts or omissions alleged to have occurred while a federal officer or employee was acting on the United States' behalf. I argued that there are good policy arguments in favor of applying the 60-day appeal period to such suits. But, as to the question of whether Section 2107's reference to suits "in which the United States or an officer or agency thereof is a party" can be read to encompass such actions, I concluded that the answer would likely depend on the interpretive approach taken by the Court:

> Based on the analysis tentatively sketched above [in the March 2008 memo], it would seem that at least one aspect of the published Rule 4(a)(1)(B) proposal may expand the scope of the sixty-day appeal time beyond that provided in Section 2107(b). Specifically, stating that the sixty-day appeal time extends to cases involving federal "officers or employees" – rather than to cases involving federal "officers" – may extend beyond the statutory provision's scope.

> It is not as clear that the published proposal's inclusion of certain individual-capacity suits extends beyond the statutory provision's current scope. One could argue the question either way. Under the view taken by the Second Circuit in *Hare* [*v. Hurwitz*, 248 F.2d 458, 459 (2d Cir. 1957)] – or a view that uses Section 2107's legislative history and stresses the original meaning of the provision as of 1948 – one could conclude that the published provision's inclusion of individual-capacity suits expands the reach of the sixty-day appeal period. By contrast, under the view taken by the Fourth, Fifth and Ninth Circuits – or a view that stresses a purposive approach to interpreting Section 2107 – one could conclude that the current statutory provision extends to some individual-capacity suits.

To the extent that the *Eisenstein* Court rejected a purposive argument because it conflicted with the Court's reading of rule (and statutory) text, the *Eisenstein* decision might be adduced as support for the view that individual-capacity suits against federal officers fall outside the scope of Section 2107's 60-day provision. (On the other hand, it should be noted that the purposive argument rejected in *Eisenstein* might have struck the Court as unpersuasive on its merits in any event – given that the United States (the posited beneficiary of the extra appeal time) disclaimed any need for it in qui tam actions where it had declined to intervene.)

III. Conclusion

The *Eisenstein* decision provides further questions for study in connection with possible proposals to amend Rule 4 and Rule 40 with respect to suits involving federal employees and with respect to individual-capacity suits arising from acts or omissions alleged to have occurred while a federal officer or employee was acting on the United States' behalf. I therefore suggest that the Committee retain Item 03-09 on the study agenda pending further input from the Department of Justice.

Encl.

129 S.Ct. 2230, 173 L.Ed.2d 1255, 77 USLW 4453, 73 Fed.R.Serv.3d 1132, Med & Med GD (CCH) P 302,896, 09 Cal. Daily Op. Serv. 7076, 2009 Daily Journal D.A.R. 8242, 21 Fla. L. Weekly Fed. S 916
(Cite as: 129 S.Ct. 2230)

H

Supreme Court of the United States
UNITED STATES, ex rel. Irwin EISENSTEIN, Petitioner,
v.
CITY OF NEW YORK, NEW YORK, et al.
No. 08-660.

Argued April 21, 2009.
Decided June 8, 2009.

Thomas, J., delivered the opinion for a unanimous Court.

Gideon A. Schor, New York City, for Petitioner.

Paul T. Rephen, New York City, for Respondents.

Jeffrey B. Wall, pro hac vice, for the United States as amicus curiae, by special leave of the Court, supporting the Respondents.

Gideon A. Schor, Counsel of Record, Lewis D. Zirogiannis, Wilson Sonsini, Goodrich & Rosati, New York, NY, for Petitioner.

Michael A. Cardozo, Corporation Counsel of the City of New York, Paul T. Rephen, Counsel of Record, Leonard J. Koerner, Andrew G. Lipkin, New York, New York, for Respondents.

For U.S. Supreme Court Briefs, see:2009 WL 507031 (Pet.Brief)2009 WL 796304 (Resp.Brief)2009 WL 1007125 (Reply.Brief)

Justice THOMAS delivered the opinion of the Court.

The question presented is whether the 30-day time limit to file a notice of appeal in Federal Rule of Appellate Procedure 4(a)(1)(A) or the 60-day time limit in Rule 4(a)(1)(B) applies when the United States declines to formally intervene in a *qui tam* action brought under the False Claims Act (FCA), 31 U.S.C. § 3729. The United States Court of Appeals for the Second Circuit held that the 30-day limit applies. We affirm.

I

[1] Petitioner Irwin Eisenstein and four New York City (City) employees filed this lawsuit against the City to challenge a fee charged by the City to nonresident workers. They contended, *inter alia,* that the City deprived the United States of tax revenue that it otherwise would have received if the fee had not been deducted as an expense from the workers' taxable income. In their view, this violated the FCA, which creates civil liability for "[a]ny person who knowingly presents, or causes to be presented, to an officer or employee of the United States Government ... a false or fraudulent claim for payment or approval." § 3729(a)(1). Although the United States is a "real party in interest" in a case brought under the FCA, Fed. Rule Civ. Proc. 17(a), an FCA action does not need to be brought by the United

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States. The FCA also allows "[a] person [to] bring a civil action for a violation of section 3729 for the person and for the United States Government," § 3730(b)(1). In a case brought by a person rather than the United States, the FCA grants the United States 60 days to review the claim and decide whether it will "elect to intervene and proceed with the action." § 3730(b)(2). After reviewing the complaint in this case, the United States declined to intervene but requested continued service of the pleadings. The United States took no other action with respect to the litigation. The District Court subsequently granted respondents' motion to dismiss the complaint and entered final judgment in their favor.

***2233** Petitioner filed a notice of appeal 54 days later. While the appeal was pending, the Court of Appeals *sua sponte* ordered the parties to brief the issue whether the notice of appeal had been timely filed. Federal Rule of Appellate Procedure 4(a)(1)(A)-(B) and 28 U.S.C. §§ 2107(a)-(b) generally require that a notice of appeal be filed within 30 days of the entry of judgment but extend the period to 60 days when "the United States or an officer or agency thereof is a party," § 2107(b). Petitioner argued that his appeal was timely filed under the 60-day limit because the United States is a "party" to every FCA suit. Respondents countered that the appeal was untimely under the 30-day limit because the United States is not a party to an FCA action absent formal intervention or other meaningful participation.

The Court of Appeals agreed with respondents that the 30-day limit applied and dismissed the appeal as untimely. See 540 F.3d 94 (C.A.2 2008). We granted certiorari, 555 U.S. ----, 129 S.Ct. 988, 173 L.Ed.2d 172 (2009), to resolve division in the courts of appeals on the question,[FN1] and now affirm.

> FN1. Compare *Rodriguez v. Our Lady of Lourdes Medical Center*, 552 F.3d 297, 302 (C.A.3 2008); *United States ex rel. Lu v. Ou*, 368 F.3d 773, 775 (C.A.7 2004); *United States ex rel. Russell v. Epic Healthcare Mgmt. Group*, 193 F.3d 304, 308 (C.A.5 1999); *United States ex rel. Haycock v. Hughes Aircraft Co.*, 98 F.3d 1100, 1102 (C.A.9 1996), with *United States ex rel. Petrofsky v. Van Cott, Bagley, Cornwall, McCarthy*, 588 F.2d 1327, 1329 (C.A.10 1978) *(per curiam)*.

II

[2] A party has 60 days to file a notice of appeal if "the United States or an officer or agency thereof is a party" to the action. See § 2107(b) ("In any such [civil] 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 [of judgment]"); Fed. Rule App. Proc. 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"). Although the United States is aware of and minimally involved in every FCA action, we hold that it is not a "party" to an FCA action for purposes of the appellate filing deadline unless it has exercised its right to intervene in the case.[FN2]

> FN2. This does not mean that the United States must intervene before it can appeal any order of the court in an FCA action. Under the collateral-order doctrine recognized by this Court in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546-547, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949), the United States may appeal, for example, the dismissal of an FCA action over its objection. See 31 U.S.C. § 3730(b)(1); see also § 3730(c)(3); *Marino v. Ortiz*, 484 U.S. 301, 304, 108 S.Ct. 586, 98 L.Ed.2d 629 (1988) *(per curiam)* (noting that "denials of [motions to intervene] are, of course, appealable"). In such a case, the Government is a party for purposes of appealing the specific order at issue even though it is not a party for purposes of the final judgment and Federal Rule of Appellate Procedure 4(a)(1)(B).

A

[3] The FCA establishes a scheme that permits either the Attorney General, § 3730(a), or a private party, § 3730(b), to initiate a civil action alleging fraud on the Government. A private enforcement action under the FCA is called a *qui*

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tam action, with the private party referred to as the "relator." *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 769, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000). When a relator ***2234** initiates such an action, the United States is given 60 days to review the claim and decide whether it will "elect to intervene and proceed with the action," §§ 3730(b)(2), 3730(b)(4); see also § 3730(c)(3) (permitting the United States to intervene even after the expiration of the 60-day period "upon a showing of good cause").

If the United States intervenes, the relator has "the right to continue as a party to the action," but the United States acquires the "primary responsibility for prosecuting the action." § 3730(c)(1). If the United States declines to intervene, the relator retains "the right to conduct the action." § 3730(c)(3). The United States is thereafter limited to exercising only specific rights during the proceeding. These rights include requesting service of pleadings and deposition transcripts, § 3730(c)(3), seeking to stay discovery that "would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts," § 3730(c)(4), and vetoing a relator's decision to voluntarily dismiss the action, § 3730(b)(1).

[4] Petitioner nonetheless asserts that the Government is a "party" to the action even when it has not exercised its right to intervene. We disagree. A "party" to litigation is "[o]ne by or against whom a lawsuit is brought." Black's Law Dictionary 1154 (8th ed.2004). An individual may also become a "party" to a lawsuit by intervening in the action. See *id.*, at 840 (defining "intervention" as "[t]he legal procedure by which ... a third party is allowed to become a party to the litigation"). As the Court long ago explained, " [w]hen the term [to intervene] is used in reference to legal proceedings, it covers the right of one to interpose in, *or become a party to,* a proceeding already instituted." *Rocca v. Thompson*, 223 U.S. 317, 330, 32 S.Ct. 207, 56 L.Ed. 453 (1912) (emphasis added). The Court has further indicated that intervention is the requisite method for a nonparty to become a party to a lawsuit. See *Marino v. Ortiz*, 484 U.S. 301, 304, 108 S.Ct. 586, 98 L.Ed.2d 629 (1988) *(per curiam)* (holding that "when [a] nonparty has an interest that is affected by the trial court's judgment ... the better practice is for such a nonparty *to seek intervention* for purposes of appeal" because "only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment" (internal quotation marks omitted; emphasis added)). The United States, therefore, is a "party" to a privately filed FCA action only if it intervenes in accordance with the procedures established by federal law.

To hold otherwise would render the intervention provisions of the FCA superfluous, as there would be no reason for the United States to intervene in an action in which it is already a party. Such a holding would contradict well-established principles of statutory interpretation that require statutes to be construed in a manner that gives effect to all of their provisions. See, *e.g.*, *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 166, 125 S.Ct. 577, 160 L.Ed.2d 548 (2004); *Dole Food Co. v. Patrickson*, 538 U.S. 468, 476-477, 123 S.Ct. 1655, 155 L.Ed.2d 643 (2003). Congress expressly gave the United States discretion to intervene in FCA actions-a decision that requires consideration of the costs and benefits of party status. See, *e.g.*, Fed. Rule Civ. Proc. 26(a) (requiring a party to disclose certain information without awaiting any discovery request); Rule 34 (imposing obligations on parties served with requests for production of information); Rule 37 (providing for sanctions for noncompliance with certain party obligations). The Court cannot disregard that congressional assignment of discretion by ***2235** designating the United States a "party" even after it has declined to assume the rights and burdens attendant to full party status. [FN3]

> FN3. This Court's decision in *Devlin v. Scardelletti*, 536 U.S. 1, 122 S.Ct. 2005, 153 L.Ed.2d 27 (2002), is not to the contrary. There, the Court held that in a class-action suit, a class member who was not a named party in the litigation could appeal the approval of a settlement without formally intervening. See *id.*, at 6-14, 122 S.Ct. 2005. But the Court's ruling was premised on the class-action nature of the suit, see *id.*, at 10-11, 122 S.Ct. 2005, and specifically noted that party status depends on "the applicability of various procedural rules that may differ based on context," *id.*, at 10, 122 S.Ct. 2005. For the reasons explained above, we conclude that in the specific context of the FCA, intervention is necessary for the United States to obtain status as a "party" for purposes of Rule 4(a)(1)(B).

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B

Petitioner's arguments that the United States should be designated a party in all FCA actions irrespective of its decision to intervene are unconvincing. First, petitioner points to the United States' status as a "real party in interest" in an FCA action and its right to a share of any resulting damages. See Fed. Rule Civ. Proc. 17(a); *Vermont Agency of Natural Resources, supra,* at 772, 120 S.Ct. 1858; see also 6A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 1545, pp. 351-353 (2d ed.1990) ("[W]hen there has been ... a partial assignment the assignor and the assignee each retain an interest in the claim and are both real parties in interest"). But the United States' status as a "real party in interest" in a *qui tam* action does not automatically convert it into a "party."

The phrase, "real party in interest," is a term of art utilized in federal law to refer to an actor with a substantive right whose interests may be represented in litigation by another. See, *e.g.,* Fed. Rule Civ. Proc. 17(a); see also Cts.Crim.App. Rule Prac. & Proc. 20(b), 44 M.J. LXXII (1996) ("When an accused has not been named as a party, the accused ... shall be designated as the real party in interest"); Black's Law Dictionary, *supra,* at 1154 (defining a "real party in interest" as "[a] person entitled under the substantive law to enforce the right sued upon and who generally ... benefits from the action's final outcome"). Congress' choice of the term "party" in Rule 4(a)(1)(B) and § 2107(b), and not the distinctive phrase, "real party in interest," indicates that the 60-day time limit applies only when the United States is an actual "party" in *qui tam* actions-and not when the United States holds the status of "real party in interest." Cf. *Barnhart v. Sigmon Coal Co.,* 534 U.S. 438, 452, 122 S.Ct. 941, 151 L.Ed.2d 908 (2002) ("[W]hen Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion" (internal quotation marks omitted)). Consequently, when, as here, a real party in interest has declined to bring the action or intervene, there is no basis for deeming it a "party" for purposes of Rule 4(a)(1)(B).

[5] We likewise reject petitioner's related claim that the United States' party status for purposes of Rule 4(a)(1)(B) is controlled by the statutory requirement that an FCA action be "brought in the name of the Government." 31 U.S.C. § 3730(b)(1). A person or entity can be named in the caption of a complaint without necessarily becoming a party to the action. See 5A C. Wright & A. Miller, Federal Practice and Procedure § 1321, p. 388 (3d ed.2004) ("[T]he caption is not ***2236** determinative as to the identity of the parties to the action"). And here, it would make little sense to interpret the naming requirement of § 3730(b)(1) to dispense with the specific procedures for intervention provided elsewhere in the statute.

Second, petitioner relies on the Government's right to receive pleadings and deposition transcripts in cases where it declines to intervene, see § 3730(c)(3). But the existence of this right, if anything, weighs against petitioner's argument. If the United States were a party to every FCA suit, it would already be entitled to such materials under Federal Rule of Civil Procedure 5, thus leaving no need for a separate provision preserving this basic right of litigation for the Government.

[6] Third, petitioner relies on the fact that the United States is bound by the judgment in all FCA actions regardless of its participation in the case. But this fact is not determinative; nonparties may be bound by a judgment for a host of different reasons. See *Taylor v. Sturgell,* 553 U.S. ----, ----, 128 S.Ct. 2161, 2171-2174, 171 L.Ed.2d 155 (2008) (describing "six established categories" in which a nonparty may be bound by a judgment); see also Restatement (Second) of Judgments § 41(1)(d), p. 393 (1980) (noting that a nonparty may be bound by a judgment obtained by a party who, *inter alia,* is "an official or agency invested by law with authority to represent the person's interests"). If the United States believes that its rights are jeopardized by an ongoing *qui tam* action, the FCA provides for intervention-including "for good cause shown" after the expiration of the 60-day review period. The fact that the Government is bound by the judgment is not a legitimate basis for disregarding this statutory scheme.

Finally, petitioner contends that the underlying purpose of the 60-day time limit would be best served by applying

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Rule 4(a)(1)(B) in every FCA case. The purpose of the extended 60-day limit in cases where the United States is a party, he claims, is to provide the Government with sufficient time to review a case and decide whether to appeal. Petitioner contends that, even in cases where the Government did not intervene before the district court issued its decision, the Government may want to intervene for purposes of appeal, and should have the full 60 days to decide. But regardless of the purpose of Rule 4(a)(1)(B) and the convenience that additional time may provide to the Government, this Court cannot ignore the Rule's text, which hinges the applicability of the 60-day period on the requirement that the United States be a "party" to the action.[FN4]

> FN4. Petitioner contends that the uncertainty regarding Rule 4(a)(1)(B) has created a "tra[p] for the unwary," and that our decision will unfairly punish those who relied on the holdings of courts adopting the 60-day limit in cases in which the United States was not a party. See Brief for Petitioner 25-27. As an initial matter, it is unclear how many pending cases are implicated by petitioner's concern as such cases would have to involve parties who waited more than 30 days to appeal from the judgment in an FCA case in which the United States declined to intervene. But to the extent that there are such cases, the Court must nonetheless decide the jurisdictional question before it irrespective of the possibility of harsh consequences. See *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 318, 108 S.Ct. 2405, 101 L.Ed.2d 285 (1988) ("We recognize that construing Rule 3(c) [of the Federal Rules of Appellate Procedure] as a jurisdictional prerequisite leads to a harsh result in this case, but we are convinced that the harshness of our construction is 'imposed by the legislature and not the judicial process' " (quoting *Schiavone v. Fortune*, 477 U.S. 21, 31, 106 S.Ct. 2379, 91 L.Ed.2d 18 (1986))).

III

We hold that when the United States has declined to intervene in a privately ***2237** initiated FCA action, it is not a "party" to the litigation for purposes of either § 2107 or Federal Rule of Appellate Procedure 4. Because petitioner's time for filing a notice of appeal in this case was therefore 30 days, his appeal was untimely. The judgment of the Court of Appeals is affirmed.

It is so ordered.

U.S.,2009.
U.S. ex rel. Eisenstein v. City of New York, New York
129 S.Ct. 2230, 173 L.Ed.2d 1255, 77 USLW 4453, 73 Fed.R.Serv.3d 1132, Med & Med GD (CCH) P 302,896, 09 Cal. Daily Op. Serv. 7076, 2009 Daily Journal D.A.R. 8242, 21 Fla. L. Weekly Fed. S 916

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VI. B

MEMORANDUM

DATE: October 16, 2009

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 05-05

In a May 2005 submission, Public Citizen pointed out that when an amicus filed a brief in support of an appellee, the interaction of Rules 29(e) and 26(a)(2) might leave the appellant with little or no time to incorporate into its reply brief a response to the amicus's contentions.[1] Though Public Citizen had previously raised concerns about the staggered timing for amicus briefs under Rule 29(e), Public Citizen's renewed interest in the topic stemmed from the 2002 amendments to FRAP 26(a) (which changed the trigger for skipping intermediate weekends and holidays from less-than-7-days to less- than-11-days).

The Committee held Public Citizen's suggestion in abeyance pending the outcome of the time-computation project. By adopting a days-are-days approach, the time-computation amendments that will take effect this December remove much of the basis for Public Citizen's concern. Public Citizen's May 2005 letter does, however, raise a few other points as well. Given that the time-computation amendments will take effect this December, the time appears to be ripe for the Committee to take up Item No. 05-05 once again, with a view to deciding whether any further action is warranted.

Part I of this memo recapitulates the history of the proposal. Part II suggests that the Committee remove the proposal from its agenda.

I. The history of Public Citizen's proposal

Prior to 1998, Appellate Rule 29 required an amicus to file within the time allowed for the brief of the party supported by the amicus.[2] The 1998 amendment to Rule 29 adopted the 7-

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[1] A copy of Brian Wolfman's May 25, 2005 letter on behalf of Public Citizen is enclosed.

[2] As adopted in 1968, FRAP 29 provided in relevant part that "[s]ave as all parties otherwise consent, any amicus curiae shall file its brief within the time allowed the party whose position as to affirmance or reversal the amicus brief will support unless the court for cause shown shall grant leave for later filing, in which event it shall specify within what period an

day stagger, with the goal of avoiding duplicative arguments.[3] The 1998 Committee Note explains:

> The 7-day stagger was adopted because it is long enough to permit an amicus to review the completed brief of the party being supported and avoid repetitious argument. A 7-day period also is short enough that no adjustment need be made in the opposing party's briefing schedule. The opposing party will have sufficient time to review arguments made by the amicus and address them in the party's responsive pleading. The timetable for filing the parties' briefs is unaffected by this change.

In response to the 1998 amendments, Public Citizen raised concerns about the new timing system. As described in the minutes of the Advisory Committee's October 1999 meeting, "Public Citizen Litigation Group has raised two concerns about this change: First, an appellant might have to file a reply brief before being able to read the brief of an amicus supporting the appellee. Second, an amicus supporting an appellee might not be able to see the appellee's brief until just before the amicus's brief is due, and thus the amicus might not be able to take account of the arguments made by the appellee in its brief." The minutes describe the discussion that ensued:

> Mr. Letter said that he wrote to several organizations that frequently file amicus briefs in the courts of appeals to solicit their suggestions about how FRAP 29 might be amended to fix these problems. He received virtually no response to his letter. He also talked to several appellate attorneys in the Department of Justice. None of them had experienced the problems feared by Public Citizen Litigation Group.
>
> Mr. Letter urged that Item No. 98-03 be removed from the Committee's study agenda. If these problems materialize in the future, the Committee can address them at that time. For the present, though, no action was necessary.
>
> A member moved that Item No. 98-03 be removed from the Committee's study agenda. The motion was seconded. The motion carried.

In 2002, however, an amendment to Rule 26(a)'s time-computation provision affected Rule 29(e)'s operation and again raised Public Citizen's concern. Prior to the 2002 amendments, Rule 26(a) provided that intermediate weekends and holidays were to be omitted when

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opposing party may answer."

[3] Rule 29(e) currently provides: "An amicus curiae must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the principal brief of the party being supported is filed. An amicus curiae that does not support either party must file its brief no later than 7 days after the appellant's or petitioner's principal brief is filed. A court may grant leave for later filing, specifying the time within which an opposing party may answer."

computing periods of less than seven days. The 2002 amendments changed the trigger to "less than 11 days" – which effectively extended Rule 29(e)'s seven-day periods: Seven days always mean at least nine days (because one weekend will always intervene); could mean as many as eleven days (if two weekends intervene); and occasionally mean thirteen days (if two weekends and the Christmas and New Year's holidays intervene). But the 2002 shift in Rule 26(a) from "less than 7 days" to "less than 11 days" did not affect the calculation of the due dates for the *parties'* briefs.[4]

The effective lengthening of Rule 29(e)'s 7-day deadlines gave rise to the concerns that Public Citizen voiced in its May 2005 submission to the Committee. Public Citizen suggested, among other things, that the seven-day period be restated as "7 calendar days."

At its April 2006 meeting, the Committee discussed Public Citizen's observation that when an amicus filed a brief in support of an appellee, the interaction of Rules 29(e) and 26(a)(2) might leave the appellant with little or no time to incorporate into its reply brief a response to the amicus's contentions. After that discussion, Doug Letter undertook to consult other entities that frequently file amicus briefs (including state governments), and to report to the Committee at its next meeting. I enclose a copy of his November 13, 2006 letter summarizing the results of his research. As the letter reports, Doug sought to identify major amicus filers, and his office contacted some 24 appellate practitioners – including three state Solicitors General, other government attorneys, private attorneys, and public interest lawyers – to ask their views on possible amendments to the timing rules in FRAP 29(e). He received ten responses. The respondents unanimously opposed eliminating the "stagger" – i.e., the time lag between the due date for a party's brief and the due date for an amicus who supports that party. Those responding argued that the stagger helps the amicus to avoid duplicating the party's arguments and sometimes helps the amicus decide whether to file at all. Some respondents asserted that briefing tends to be less coordinated in the Courts of Appeals than it is in the Supreme Court, and they also observed that potential amici at the Supreme Court level have less need to see the party's brief because they can see the prior briefing. While no respondents supported eliminating the stagger, some did express concern that the opposing party might experience a time crunch in preparing its reply brief; accordingly, a few recommended that the Committee extend the deadline for the reply brief.

In November 2006, the Committee discussed the matter further, and noted that Public Citizen's proposal intersected with the issues raised by the time-computation project. Members observed that if the Project's recommended days-are-days approach were adopted, then short deadlines currently computed as business days would henceforth be computed as calendar days. The Appellate Rules Committee's Deadlines Subcommittee did not take a position on whether Rule 29(e)'s stagger should be abandoned, but the Subcommittee recommended that if the stagger were to be retained, it should remain 7 days (i.e., revert to 7 calendar days). The

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[4] The 40-, 30-, and 14-day periods set by FRAP 31(a)(1) were too long to be affected and the 3-day period in FRAP 31(a)(1) was too short to be affected.

following excerpt from the meeting minutes reflects the Committee's further discussion:

> Mr. Letter noted his impression that Public Citizen would be satisfied if FRAP 29(e)'s deadlines reverted to 7 calendar days. A judge member expressed skepticism about the appellate practitioners' argument that practice in the Courts of Appeals differs significantly from that in the Supreme Court; but the member stated that he would not object to seeing the stagger revert to 7 calendar days. Mr. Letter observed that if timing crunches arise they can be addressed by motion. He also noted that parties should generally be aware ahead of time that an amicus filing is in the offing, because under FRAP 29(a) amici other than certain government entities must obtain party consent or else move for permission to file.
>
> Another member expressed support for eliminating the stagger, because the FRAP should where possible conform to Supreme Court practice; the member stated that it is not that hard for an amicus to coordinate its briefing with that of the party it supports. Mr. Letter noted, however, that this is not the case when the party in question is the Department of Justice: Because the draft usually undergoes revision up until the last minute, the DOJ almost never shares its draft with potential amici in advance. A practitioner member noted that Supreme Court practice differs because the amici have the benefit of a "preview"of the parties' briefs (based on their filings below and regarding certiorari). The member also argued that having adopted the stagger relatively recently (in 1998), the Committee should follow the principle of "stare decisis" and not alter the rule unless there seems to be a real problem with it. A judge member agreed that the rulemakers should not go back and forth on the issue (though he also found it implausible that the stagger actually eliminates duplicative arguments).
>
> A practitioner member wondered whether it would be worthwhile to consider addressing the "time crunch" by extending the time for the reply brief. Mr. Letter responded that such a solution would be overbroad, because it would prolong the briefing schedule in many cases where it turns out that no amici file briefs. Mr. Fulbruge noted statistics that support this point: During calendar year 2005 in the Fifth Circuit, there were some 125 amicus filings and a total of some 9,000 appeals. Moreover, many of those amicus filings were at the en banc stage rather than during initial briefing.
>
> A judge member proposed that the Committee wait to see what happens with the Time-Computation Project before considering what, if any, changes to make to FRAP 29(e). If the Time-Computation Project goes forward, that will alter the landscape in significant ways. It was proposed that Judge Stewart write to Mr. Wolfman of Public Citizen to state that the Committee, like other advisory committees, is currently considering changes to the time-computation rules, and that the Committee plans to defer further consideration of Public Citizen's

proposal until after the time-computation matter is resolved. The proposal was moved and seconded, and carried by voice vote without opposition.

II. Remaining issues relating to Public Citizen's proposal

Assuming that the time-computation amendments take effect on December 1, 2009, the core problem identified in Public Citizen's May 2005 submission will be eradicated, because Rule 29(e)'s 7-day periods will once again be counted on a days-are-days basis.

Public Citizen's May 2005 letter does note an additional issue: Rule 29(e)'s 7-day deadlines for amici run from the *filing* of the relevant brief, whereas Rule 31(a)'s deadlines for the appellee's brief and the appellant's reply brief run from the *service* of the preceding party brief.[5] As Public Citizen notes, if counsel for a party serves that party's brief by hand on the other parties but files the brief by mailing it to the clerk, there can be a gap of several days between service and filing – allowing an amicus supporting that party to file later relative to the party's opponent, and thus giving the party's opponent less time to incorporate into its brief a response to the amicus's arguments. Public Citizen therefore proposes in the 2005 letter that Rule 29(e) be amended to run the amicus's deadline from the date of service rather than from the date of filing. Public Citizen also suggests that the Committee Note urge amici to serve their briefs electronically so as to maximize the parties' time to respond to assertions in the amicus briefs.

In the four years since these proposals were made, technological developments have advanced in ways that alleviate the remaining difficulties identified by Public Citizen. As the courts of appeals move to the CM/ECF system, it seems likely that the system will lead most amici, like most parties, to serve and file their briefs electronically. A general norm of electronic filing and service will address Public Citizen's remaining concerns without the need for a rule amendment.

I therefore suggest that the Committee remove Item No. 05-05 from its docket.

Encls.

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[5] For cases involving cross-appeals, Rule 28.1(f) likewise pegs the timing of the parties' briefs (other than the appellant's principal brief) to the *service* of the preceding party brief.

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May 25, 2005

Honorable Samuel A. Alito, Jr.
Chair
Advisory Committee on Appellate Rules
United States Post Office and Courthouse
Federal Square and Walnut Street, Room 357
P.O. Box 999
Newark, New Jersey 07101-0999

Re: Timing of amicus briefs under FRAP

Dear Judge Alito:

I am writing regarding the time for filing amicus briefs under FRAP 29(e). The issue arose in a case that we are currently litigating on behalf of an appellant. Rule 29(e) provides that an amicus brief is due no later than 7 days after the filing of the principal brief of the party supported by the amicus. When an amicus brief is filed in support of an appellant, that leaves plenty of time – usually about 20 days – for the appellee to reply both to the appellant's brief and, if necessary, to the amicus brief. However, the time is much tighter for an appellant, which has only 14 days to file its reply brief. If, as in most cases, the appellee's amicus files on the due date, the appellant has only half of the allotted time, or, nominally, only 7 days, to consider and respond to the amicus brief.

I say "nominally" because the period is effectively shorter than 7 days. Under FRAP 26(a)(2), weekends and holidays are excluded in counting the 7-day period. Therefore, an amicus will *always* have at least 9 days to file its brief. In the case of an amicus brief filed in support of an appellee, then, the effect of Rule 26(a)(2) is to shorten the already quite short nominal 7-day period for considering and responding to the amicus brief.

An example illustrates our point. Say that the appellee files its brief at the clerk's office on Thursday June 9, 2005, and serves the brief by hand (as occurs in about half of our appellate cases). The appellant's reply is due on Thursday, June 23, 2005. The appellee's amicus need not, and as a matter of practice generally will not, be filed until the deadline – in this example, late in the day on Monday, June 20, 2005. That leaves only 3 calendar days for the appellant to

consider the amicus brief and incorporate a response into its reply brief. The problem would be considerably exacerbated if the amicus chose to file and serve the brief by regular U.S. mail, as it has a right to do. If that occurred, the brief probably would not be received by appellant's counsel until Wednesday or Thursday, the due date for appellant's reply. To make matters worse, if, in the above example, either Monday, June 13 or Monday, June 20, were a federal holiday, the amicus brief would not be due until late in the day on Tuesday, June 21, 2005, just two days before appellant's reply would be due. Finally, the time crunch would be magnified if, as is sometimes the case, more than one amicus files a brief in support of the appellee.

The above example – involving the filing of an appellee's brief on a Thursday – maximizes the time crunch imposed by the interaction of Rules 26(a)(2) and 29(e). However, even a scenario that *minimizes* the filing period for the amicus is highly problematic. Let's say that the appellee physically files its brief on Wednesday June 8, 2005, and serves the brief by hand. The appellant's reply is due on Wednesday, June 22, 2005. The appellee's amicus need not file until late in the day on Friday, June 17, 2005. That leaves only 5 calendar days, including two weekend days, for the appellant to consider the amicus brief and incorporate a response into its reply brief. As above, the problem would be exacerbated if the amicus chose to file and serve the brief by regular U.S. mail, because the appellant likely would not receive the amicus brief until Monday or even Tuesday.

It is possible that the effect on Rule 29(e) was not contemplated by the Advisory Committee when Rule 26(a)(2) was amended in 2002 to increase from less than 7 days to less than 11 days the time periods for which interim weekends and holidays are excluded. In any event, amici do not need the extension provided by Rule 26(a)(2) as do other litigants facing filing deadlines of less than 11 days. Amici generally know about the case and have an idea of what they are going to say before they receive the brief of the party that they are supporting. Indeed, they are often provided drafts of the principal brief as the process unfolds. Perhaps that is why, until 1998, FRAP required amici briefs to be filed at the same time as the principal brief that they were supporting. Although we think the 7-day window for amici is sensible for a number of reasons, we do not think it is necessary to extend that window under Rule 26(a)(2), given the difficulty such an extension imposes on appellants. Therefore, we recommend that the Committee propose that Rule 29(e) be amended to require that an amicus file its brief no later than 7 *calendar* days after the principal brief of the party that it is supporting. Moreover, we suggest that a Committee note strongly encourage amici to serve their briefs electronically, given the short time period for response (particularly for appellants).

The time for responding to an amicus brief is sometimes shorter than the nominal period for another reason as well. The time for a party to answer a principal brief runs from the service of that brief, not from its physical filing in the clerk's office. But the time for the filing of the amicus brief runs from the time when the brief that the amicus supports is actually received and filed stamped at the clerk's office. Thus, in cases where the appellee mails its brief to the

courthouse, the time for the appellant to consider the appellee's amicus brief is effectively shortened. Indeed, even without Rule 26(a)(2), depending on the speed of the mail, the amicus may not be required to file its brief until 10 days (or more) into the 14 day-period in which the appellant has to reply. The Advisory Committee was aware of this issue when it established the 7-day amicus filing window. *See* 1998 Adv. Comm. Note to Rule 29(e). We recognize that the time crunch created by this problem will not generally be as severe as the Rule 26(a)(2) problem discussed above because, in general, when a party mails its brief to the court, it also mails the brief to opposing counsel, which would extend the 14-day period for filing the reply by three days. *See* FRAP 26(c). That is not always the case, however. In some of our cases, for instance, counsel for both parties are in Washington, D.C., and the briefs are hand served, while the court is in another city (say, New York), and the brief is "filed" by mail. Therefore, we also ask the Committee to consider amending Rule 29 to require amici to file their briefs no later than 7 calendar days from the date on which the principal brief that they are supporting is *served*. This change will not impose a burden on amici because an amicus can be expected to be in communication with the party it is supporting and obtain prompt service from that party, regardless of when that party's brief is actually filed with the court.

Thank you for considering this request.

Sincerely,

Brian Wolfman

Brian Wolfman

cc: Professor Patrick J. Schiltz, Reporter
Peter G. McCabe, Secretary

U.S. Department of Justice
Civil Division, Appellate Staff
950 Pennsylvania Ave., NW, Room 7513
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November 13, 2006

Honorable Carl E. Stewart
United States Court of Appeals
2299 United States Court House
300 Fannin St.
Shreveport, LA 71101-3074

Re: Possible Amendment for Amicus Brief Filing Times

Dear Judge Stewart:

At the FRAP Committee's last meeting, we discussed a proposal made by the Public Citizen Litigation Group concerning the timing for filing of amici briefs. During that discussion, the Committee raised the question whether we should consider recommending that the practice in the courts of appeals be changed to match that of the Supreme Court, where amici briefs are due on the same day as the party they are supporting. I agreed to poll various offices that often file amici briefs, and report to the Committee on this idea. As explained below, the feedback was unanimously against adopting the Supreme Court practice in the courts of appeals.

For background, it is important to know that, prior to 1998, FRAP 29(e) required amici curiae to file their briefs on the same day as the briefs being supported. In 1998, however, the Supreme Court changed this rule to allow a "7-day stagger" between the amicus brief and the principal brief it supports. As amended, FRAP 29(e) provides:

> An amicus curiae must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the principal brief of the party being supported is filed. An amicus curiae that does not support either party must file its brief no later than 7 days after the appellant's or petitioner's principal brief is filed. A court may grant leave for later filing, specifying the time within which an opposing party may answer.

The Committee had recommended this change in order "to permit an amicus to review the completed brief of the party being supported and avoid repetitious argument." Advisory Committee Notes, Fed. R. App. P. 29(e). The Committee also noted that the 7-day period is "short enough that . . . [t]he opposing party will have sufficient time to review arguments made by the amicus and address them in the party's responsive pleading." Ibid.

Last year, the Committee received a letter from the Public Citizen Litigation Group expressing concern that the 7-day delay makes it difficult for appellants to adequately respond in their reply briefs to arguments made by amici in support of appellees. While the 2002 amendment of FRAP 26(a)(2) increased the period for amicus briefs from 7 calendar days to 7 business days, the 14-day time frame for reply briefs continues to be measured in calendar days, creating a situation in which appellants could receive opposing amici briefs shortly before they must submit their reply briefs.

The Committee accordingly decided to consider recommending amendment of FRAP 29(e) to require, as it did prior to 1998, that amici curiae submit their briefs at the same time as the briefs being supported. Such a change would bring the FRAP in line with Supreme Court practice and provide opposing parties with more time to incorporate rebuttal arguments into their briefs.

Ms. Kelsi Corkran of my office and I contacted approximately two dozen appellate practitioners—including three state Solicitor Generals, several private practice and government attorneys, and the legal directors of various public interest organizations—and asked for their feedback regarding a possible change to FRAP 29(e). We received responses from the following: Mitch Bernard, Litigation Program Director of the National Resources Defense Council; Ted Cruz, State Solicitor General of Texas; Roy Englert, partner at Robbins, Russell; Marcia Greenberger, Co-President of the National Women's Law Center; Ayesha Khan, Legal Director of Americans United for Separation of Church and State; Manuel Medeiros, State Solicitor General of California; Richard Samp, Chief Counsel of the Washington Legal Foundation; Stephen Shapiro, Legal Director of the American Civil Liberties Union; Evan Tager, partner at Mayer Brown Rowe & Maw; and Brian Wolfman, Director of Public Citizen Litigation Group.

The respondents unanimously opposed adopting the Supreme Court practice in the courts of appeals. Consistent with the reasoning expressed in the Advisory Committee Notes, most of the respondents cited non-duplication as the primary benefit of providing amici with a later filing date. Several people noted the difficulty of obtaining advanced drafts of principal briefs and the importance of reviewing the principal brief in order to fashion amicus arguments that avoid redundancy. Potential amici sometimes also wait until after the principal brief has been filed before deciding whether to submit an amicus brief at all. As one State Solicitor General explained, "it may transpire that the issue the [amicus] was concerned about was handled just fine, obviating the [amicus] brief altogether; on the other hand the principal brief may be so bad that you'd spill your tea reaching for the phone to request consent to file."

Many of the respondents pointed to distinctions between Supreme Court and court of appeals

briefing that make simultaneous filing more appropriate at the Supreme Court level. Several people described Supreme Court briefing as a more "highly coordinated process" in which parties frequently exchange drafts prior to the filing date. Draft-sharing is less common at the court of appeals level. One public interest attorney also noted that amici in the Supreme Court "are virtually always aware of the issue in the case and what the parties are going to say more-or-less shortly after review is granted [because] the cert petition and [opposition to cert] are available, as are the briefs below." Similarly, another public interest attorney observed, in contrast to the courts of appeals, the Supreme Court clearly defines the issues for review (i.e., through the "Questions Presented") well before the filing date for the appellant's principal brief.

There was some disagreement among respondents about the impact of the delayed amicus filing date on the opposing principal party. Several people took the position that the delay has little effect on opposing parties, and that any time crunch created by amici submissions is "outweighed by the positives" of allowing the 7-day stagger. One private practice attorney, however, reiterated Public Citizen's concern that, with only 14 calendar days between filing dates for the appellee's brief and the appellant's reply brief, amicus briefs in support of appellee sometimes arrive to appellants after they have already completed their reply brief and circulated it among clients, co-counsel, and other interested parties. Although none of the respondents supported amending FRAP 29(e) to require simultaneous filing by principal parties and supporting amici, a few recommended that the Committee adjust the reply brief deadline to ensure that appellants have time to respond to arguments made by amici in support of appellee.

In sum, none of the appellate practitioners that we contacted favored adopting the Supreme Court approach to amicus brief filing dates in the courts of appeals. I hope that this information is helpful to the Committee.

Sincerely,

Douglas N. Letter

VI. C

MEMORANDUM

DATE: October 16, 2009

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 07-AP-E

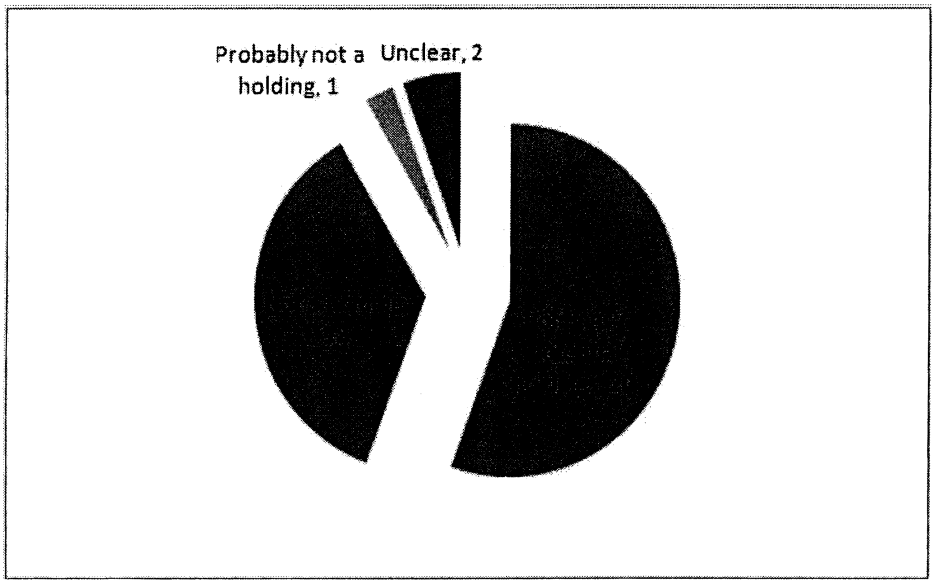
As the Committee has discussed at its recent meetings, the Supreme Court's decision in *Bowles v. Russell*, 551 U.S. 205 (2007), has raised a number of questions concerning the nature of appeal deadlines (as well as other litigation deadlines).

Part I of this memo examines some very rough data concerning *Bowles*' effects on would-be appellants. Part II discusses the fact that courts do not appear to be applying the clear statement rule set forth in *Arbaugh v. Y&H Corporation*, 546 U.S. 500, 503 (2006), to questions concerning appeal deadlines. And Part III discusses the possible uses of cases such as *Becker v. Montgomery*, 532 U.S. 757 (2001), to mitigate the effects of jurisdictional deadlines in cases where some document, filed within the appeal time, constitutes the substantial equivalent of a notice of appeal.

I. How big an effect does *Bowles* have in practice?

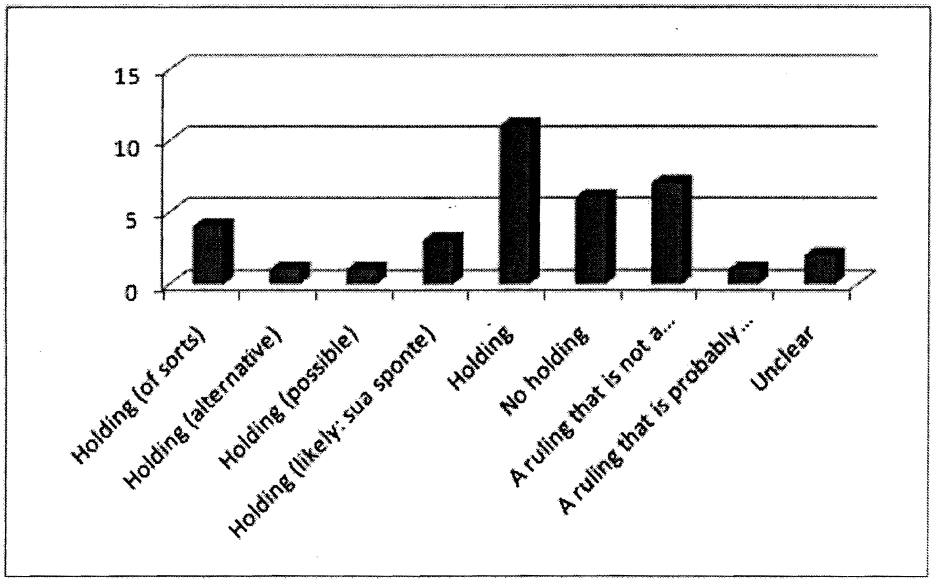
During the Committee's discussion at the spring 2009 meeting, participants asked whether we know how much of an effect *Bowles* is really having on appellate practice. For instance, how often does the application of *Bowles* result in a would-be appellant losing the opportunity for appellate review? As a very rough cut at this question, I re-examined the appellate-deadline decisions in the spreadsheet that I had compiled for the spring 2009 meeting. I focused only on the decisions (on that list) that were handed down after *Bowles* and that address *Bowles*' discussion of the jurisdictional nature of appeal deadlines. The list includes 36 such decisions; a spreadsheet summarizing those decisions is enclosed. It should be stressed that these are only a non-random sample of decisions since *Bowles*. The list does not, for example, include all non-precedential opinions that cite *Bowles*.

Of the 36 decisions listed in the spreadsheet, I first grouped them roughly according to whether the decision included a *holding* on the question of whether an appeal requirement (such as a deadline) is jurisdictional. My findings can be roughly represented as follows:



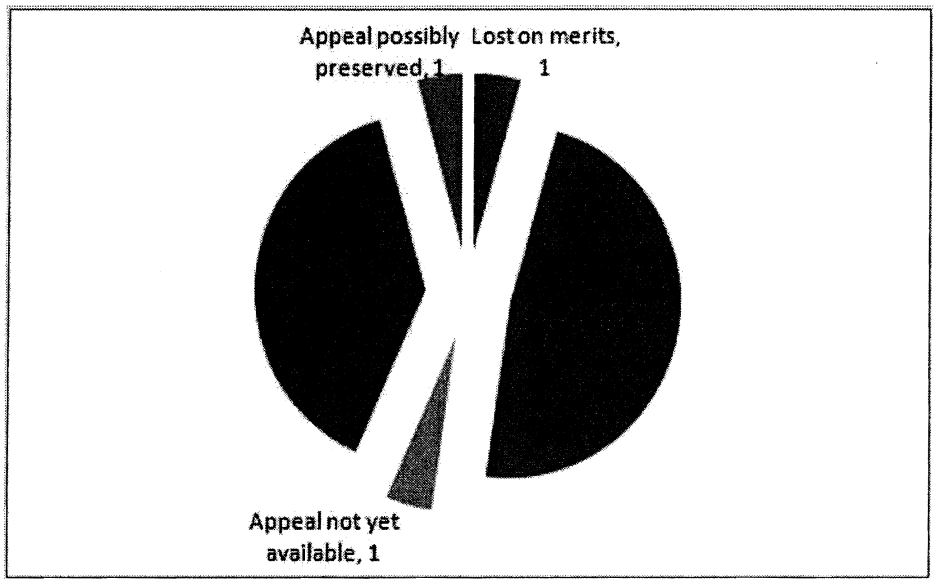
As can be seen from this figure, more than half the cases involve holdings concerning the jurisdictional (or non-jurisdictional) nature of an appeal requirement. But a sizeable minority of the cases (13) do not involve such a holding.

The rough groupings noted above can be broken down in more detail as well. Thus, for example, the category "Holdings / Potential holdings" includes cases where the categorization of an appeal requirement as jurisdictional or non-jurisdictional clearly affected the disposition of the appeal, but it also includes cases where it seems likely – but not certain – that such a determination affected the disposition. For instance, in three cases the court appears to have raised the issue of noncompliance sua sponte – a posture that suggests that the ruling on the jurisdictional nature of the requirement affected the disposition of the appeal: In those three cases the view of the requirement as jurisdictional presumably made it more likely that the court would raise the issue sua sponte (though it is also possible, in appropriate circumstances, for some non-jurisdictional issues to be raised by the court sua sponte). Here is a slightly more detailed breakdown of the 36 cases. The legends on this chart summarize categories listed in the enclosed spreadsheet; the spreadsheet provides further details concerning the cases.



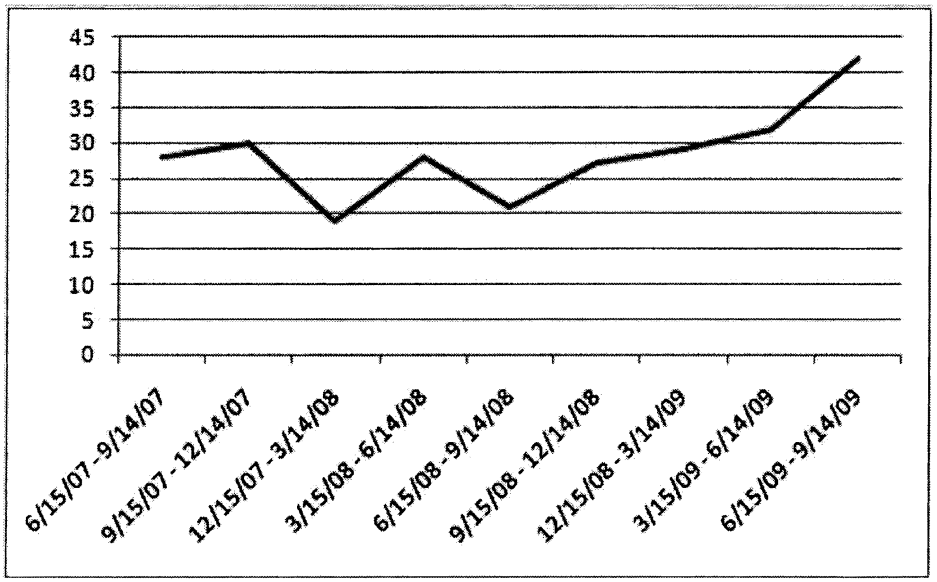
I should stress that my use of the term "holding" here is shorthand – intended to denote cases in which the conclusion that (under *Bowles*) a particular appeal requirement is either jurisdictional or non-jurisdictional affects the disposition of the appeal. Thus, even a case in which the court says "we hold that requirement X is not jurisdictional" would not count (in my tally) as a holding if the fact that the requirement is not jurisdictional did not actually affect the disposition of the appeal (for example, because the appellee timely objected in any event).

Next, I excluded those cases in which the jurisdictional / non-jurisdictional distinction clearly did not affect the outcome of the appeal – i.e., the 13 cases in the left-most piece of the pie chart on the preceding page. As to the remaining 23 cases, I examined whether the would-be appellant was found to have forfeited the chance to appeal or whether, instead, the court's reasoning resulted in the preservation of appeal rights. Here is a rendering of my findings:



As this chart indicates, these 23 cases are roughly split. In 11 of them, the determination that an appeal requirement is jurisdictional led to the conclusion that the would-be appellant (or petitioner) had lost the opportunity to seek review in the court of appeals. But in 9 other cases, the determination that a requirement is not jurisdictional led to the opposite conclusion. The remaining three cases were harder to categorize. In one, classed in the chart as "appeal not yet available," the petitioner had not yet exhausted his administrative remedies (and exhaustion was deemed a jurisdictional requirement). In another, classed as "lost on merits," the court concluded that a time limit was not jurisdictional, but then avoided deciding whether the failure to timely appeal otherwise barred relief, by concluding that in any event the appeal failed on the merits; I classed this as among the cases in which the classification mattered to the disposition, because the court could not properly have held against the appellant on the merits if the time limit in question had been jurisdictional. In the third, classed as "appeal possibly preserved," the court of appeals (applying the teaching of *Eberhart v. United States*, 546 U.S. 12 (2005) (per curiam) that the 7-day time period in Criminal Rule 33 is not jurisdictional) remanded to the district court for analysis of whether to grant an extension, under Criminal Rule 45(b), of the Rule 33 deadline.

There is no assurance that the sampling analyzed here is representative. And the size of the sample is small relative to the total pool of court of appeals decisions citing *Bowles*. The chart below shows the number of such decisions handed down in each full three-month period since *Bowles* was decided.



As the chart indicates, the number of citations is rising. My guess, however, is that some of the increase is due to the incorporation of citations to *Bowles* into boilerplate language that courts employ when dismissing an appeal for untimeliness or the like.

In sum, it appears that *Bowles* is foreclosing appeals by some litigants (because the limit they flouted turns out to be jurisdictional) but is also preserving appeals by some other litigants (who failed to comply with a non-jurisdictional requirement). Going forward, it would be useful to obtain a better sense of the proportion and absolute number of cases that fall within the former category; those cases seem to present the greatest area for concern over the effects of *Bowles*.

II. *Arbaugh*'s clear statement rule

In *Arbaugh v. Y&H Corporation*, 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, 516 (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.

At the Committee's April 2009 meeting, it was suggested that it would be useful to know

how often the *Arbaugh* clear statement rule is applied in connection with appeal deadlines. I performed a Westlaw search designed to gather federal court opinions that discuss the *Arbaugh* clear statement rule,[1] and reviewed the results to identify opinions that concern appeal-related requirements. The search pulled up one Supreme Court opinion, 25 court of appeals opinions, and 49 trial court opinions. Interestingly, none of these opinions discussed *Arbaugh* in relation to a question of appellate jurisdiction or appellate procedure.

Three opinions did discuss *Arbaugh* in connection with certain requisites for judicial review of agency action under the Administrative Procedures Act. *See Trudeau v. Federal Trade Comm'n*, 456 F.3d 178, 184 (D.C. Cir. 2006) (citing *Arbaugh* and stating that the APA's requirement of final agency action is not jurisdictional); *Sharkey v. Quarantillo*, 541 F.3d 75, 87 (2d Cir. 2008) (noting that "review under the APA is limited to review of 'final agency action,' 5 U.S.C. § 704," that "final agency action is not subject to judicial review under the APA to the extent that such action is 'committed to agency discretion by law,' 5 U.S.C. 701(a)(2)," and that the presumption favoring judicial review "can be overcome if Congress, subject to constitutional constraints, implicitly or explicitly precludes judicial review"); *see id.* at 87-88 & n.10 (noting the relevance of *Arbaugh* to the question whether such requisites are jurisdictional, and declining to decide whether they are jurisdictional because they were satisfied in the case at hand); *Long Term Care Partners, LLC v. United States*, 516 F.3d 225, 232 (4th Cir. 2008) ("We assume without deciding that the *Arbaugh* rule applies equally to statutory 'final agency action' under the APA and non-statutory inquiries under *Leedom* [*v. Kyne*, 358 U.S. 184 (1958)], rendering both nonjurisdictional."). Review under the APA itself does not strike me as directly relevant to practice in the court of appeals; though I lack expertise in administrative law, my impression is that review under the APA is sought in the district court.[2] However, at least one statutory

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[1] It was necessary to use a word search, because simply keyciting *Arbaugh* netted a very large universe of cases: eight Supreme Court opinions, 123 court of appeals opinions, and 586 district court opinions. I used the following search in the ALLFEDS database: arbaugh /p (clear! /s (statement stated states stating)). That search, run on September 20, 2009, netted 75 results.

[2] "Jurisdiction over APA challenges to federal agency action is vested in the district courts under general federal jurisdiction." Charles H. Koch, Jr., 2 Admin. L. & Prac. § 8.11 (2d ed.). Of course, limits on district court review of an agency determination would also be relevant to the question of the court of appeals' power to second-guess the agency determination when reviewing the judgment of the district court. However, I do not class such limitations as directly relevant to appellate practice or jurisdiction, because if we were to broaden the inquiry to that extent, then we would also be obliged to include within our inquiry all sorts of questions pertaining to the district court's subject matter jurisdiction. In order to maintain our focus on questions relating directly to appeals, I have excluded from the inquiry issues that concern the power of the district court.

scheme that provides for direct court of appeals review of agency action borrows from the APA;[3] and I would think that Section 704 would apply to petitions for court of appeals review under such a scheme. Therefore, one could argue that cases applying *Arbaugh* to determine whether Section 704's finality requirement is jurisdictional will be relevant (in at least some cases) to the jurisdiction of the courts of appeals. However, all three of the cases in my search results were cases in which review was sought in the district court under the APA. The indirect nature of the link between these cases and appellate practice serves to illustrate that *Arbaugh* has not, so far, played a central role in discussions of appellate practice or jurisdiction.

To investigate why this is so, I performed a different Westlaw search, this time looking for federal-court opinions that cite both *Arbaugh* and *Bowles*. As of September 25, 2009, there were only 20 such opinions.[4] In analyzing those opinions, it makes sense to start with *Bowles* itself. In *Bowles*, the dissenters relied heavily on *Arbaugh* for the proposition that Section 2107(c)'s 14-day time limit was not jurisdictional. *See, e.g.*, *Bowles*, 551 U.S. at 216-17 & n.1 (Souter, J., joined by Stevens, Ginsburg & Breyer, JJ., dissenting). But the *Bowles* majority distinguished *Arbaugh* on the ground that it did not concern a time limit:

> Nor do *Arbaugh v. Y & H Corp.*, 546 U.S. 500 ... (2006), or *Scarborough v. Principi*, 541 U.S. 401 ... (2004), aid petitioner. In *Arbaugh*, the statutory limitation was an employee-numerosity requirement, not a time limit. 546 U.S., at 505.... *Scarborough*, which addressed the availability of attorney's fees under the Equal Access to Justice Act, concerned "a mode of relief ... ancillary to the judgment of a court" that already had plenary jurisdiction. 541 U.S., at 413 ....

Bowles, 551 U.S. at 211.[5]

Since deciding *Bowles*, the Supreme Court has discussed both *Bowles* and *Arbaugh* in one case: *John R. Sand & Gravel Co. v. United States*, 128 S. Ct. 750 (2008). In *John R. Sand & Gravel*, the Court held that the Court of Federal Claims limitation statute sets a jurisdictional

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[3] See 16 U.S.C. § 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.").

[4] Or 21, if one counts *Bowles* itself.

[5] It was of course true that *Arbaugh* did not concern a time limit. On the other hand, as the *Bowles* dissenters pointed out, *Arbaugh* did discuss the nature of time limits: "we have clarified that time prescriptions, however emphatic, 'are not properly typed "jurisdictional."' *Scarborough v. Principi*, 541 U.S. 401, 414 ... (2004)...." *Arbaugh*, 546 U.S. at 510.

time limit which must therefore be raised by the court *sua sponte*.[6] Justice Breyer, writing for a seven-Justice majority, set the stage for this holding by distinguishing between limitations periods that are waivable and those that are not:

> 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 v. Russell*, ... 127 S.Ct. 2360, 2365-66 ... (2007). 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 v. Y & H Corp.*, 546 U.S. 500, 514 ... (2006). As convenient shorthand, the Court has sometimes referred to the time limits in such statutes as "jurisdictional." *See, e.g.*, *Bowles*, *supra*, at 2364.[7]

In a prior memo I suggested that the *John R. Sand & Gravel Co.* Court's citation to *Bowles* was intriguing because the Court's description of *Bowles* as turning upon notions of judicial efficiency seemed different from the rationales adduced in *Bowles* itself.[8] It is also worth noting that there is good reason why the *John R. Sand & Gravel Co.* opinion cites *Arbaugh* with a "*see also*": *Arbaugh*, at the cited page, was not discussing statutory time limits – it was discussing the *effect* of deeming a requirement as going to subject matter jurisdiction, and this was the proposition for which *John R. Sand & Gravel Co.* cited it.

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[6] *John R. Sand & Gravel Co.*, 128 S. Ct. at 752.

[7] *John R. Sand & Gravel*, 128 S. Ct. at 753.

[8] At the pages cited by the *John R. Sand & Gravel* Court, the *Bowles* opinion stressed "the jurisdictional significance of the fact that a time limitation is set forth in a statute," 127 S. Ct. at 2364, emphasized "the jurisdictional distinction between court-promulgated rules and limits enacted by Congress," *id.* at 2365, and explained why "[j]urisdictional treatment of statutory time limits makes good sense": "Within constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider. 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." *Id.*

In sum, the Supreme Court has not explained how to reconcile *Bowles* and *Arbaugh* other than to instruct that *Arbaugh* did not govern in *Bowles* because *Bowles* concerned a time limit and *Arbaugh* did not. Perhaps the Court will take the opportunity to clarify the interaction between these two precedents when it decides *Reed Elsevier, Inc. v. Muchnick* – a case in which the Supreme Court granted certiorari on the following question: "Does 17 U.S.C. § 411(a) restrict the subject matter jurisdiction of the federal courts over copyright infringement actions?"[9] The briefs in the *Reed Elsevier* case make numerous references to both *Bowles* and *Arbaugh*; the case is set for argument on October 7, 2009.

In the meantime, what can be learned from the decisions of lower federal courts that cite both *Bowles* and *Arbaugh*? Of the 19 lower-court decisions, four are less relevant to our analysis because they cite *Bowles* and *Arbaugh* when explaining the *effects* of determining that a requirement is jurisdictional[10] rather than citing those cases when discussing *whether* a particular requirement is jurisdictional. Among the remaining 15 cases, some are more informative than others.[11] A few of the cases note the question of whether a particular requirement is jurisdictional, but then avoid deciding that question.[12] In one case both *Bowles* and *Arbaugh*

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[9] *Reed Elsevier, Inc. v. Muchnick*, 129 S.Ct. 1523, 1523 (2009).

[10] *See U.S.* ex rel. *Vuyyuru v. Jadhav*, 555 F.3d 337, 347 (4th Cir. 2009) (citing *Bowles* for proposition that Congress sets the jurisdiction of lower federal courts and *Arbaugh* for proposition that "when a district court lacks subject matter jurisdiction over an action, the action must be dismissed"); *United States v. Sensient Colors, Inc.*, 2009 WL 394317, at *3, *11 (D.N.J. Feb. 3, 2009) (citing *Arbaugh* for proposition that lack of subject matter jurisdiction requires dismissal and citing *Bowles* for proposition that jurisdictional requirements do not admit of equitable exceptions); *Kirk v. Parker*, 2008 WL 5255908, at *1 (W.D. Okla. 2008) (adopting magistrate judge's report and recommendation and citing *Bowles* for proposition that there are no equitable exceptions to jurisdictional requirements); *id.* at *2 (magistrate judge's report and recommendation, citing *Arbaugh* for proposition that jurisdictional defects must be raised sua sponte); *Pekular v. Mansfield*, 21 Vet. App. 495, 501 (Vet. App. 2007) (citing *Bowles* and *Arbaugh* for proposition that "[w]hen a court lacks jurisdiction over a matter, it *must* dismiss the matter and is without authority to consider whether equitable relief is warranted").

[11] A couple of cases discuss *Arbaugh* and *Bowles* as part of a longer line of decisions touching upon the question of jurisdiction; these cases do not shed light on the question of how to distinguish cases falling within *Arbaugh*'s clear statement rule from cases governed by *Bowles*. *See Kingman Reef Atoll Inv., L.L.C. v. U.S.*, 541 F.3d 1189, 1196 (9th Cir. 2008) (holding that the Quiet Title Act's limitations period is jurisdictional); *Lemire v. Sec'y of Health and Human Servs.*, 2008 WL 2490654, at *14 (Fed. Cl. 2008) (dismissing petition as untimely under the Vaccine Act).

[12] *See, e.g.*, *United States v. Garcia*, 312 Fed.Appx. 801, 805 (6th Cir. Feb. 25, 2009) (unpublished opinion) (noting authorities suggesting that "because [Criminal] Rule 35 is incorporated into 18 U.S.C. § 3582(c)(1)(B), its time limit is statutory and, therefore,

were taken to support the conclusion that an exhaustion requirement imposed by courts under ERISA is not jurisdictional; in that instance, the two cases were not seen as being in opposition because the requirement at issue was judge-made rather than statutory.[13]

Some other cases readily apply one of the two decisions and distinguish the other. For example, in *Thomas v. Miller*, 489 F.3d 293, 295 (6th Cir. 2007), the court concluded without difficulty that a numerical threshold in the Consolidated Omnibus Reconciliation Act was – like the numerical threshold at issue in *Arbaugh* – non-jurisdictional.[14] Conversely, in holding that

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jurisdictional," but deciding the case on an alternative ground); *Maynard v. Dist. of Columbia*, 579 F. Supp. 2d 137, 142 (D.D.C. 2008) (avoiding the need to decide whether the 90-day limitations period in the Individuals with Disabilities Education Act is jurisdictional by concluding that if it is not jurisdictional, equitable tolling was unwarranted under the circumstances); *Smith v. Dist. of Columbia*, 496 F. Supp. 2d 125, 127 (D.D.C. 2007) (same) ("While *Bowles* dealt with a statutory deadline to timely file a notice of appeal, it is in tension with case law suggesting that other statutory time limitations are not jurisdictional and should be pled as affirmative defenses.... *See e.g.*, *Arbaugh*."); *Epstein v. Susquehanna River Basin Com'n*, 2008 WL 2370158, at *5 (M.D. Pa. June 9, 2008) (reasoning that equitable tolling would not be warranted in any event and thus avoiding decision on whether time period in Susquehanna River Compact is jurisdictional).

[13] *Metropolitan Life Ins. Co. v. Price*, 501 F.3d 271, 279 (3d Cir. 2007) ("Congress has expressly provided for jurisdiction over ERISA cases in 29 U.S.C. § 1132(e). Neither that provision nor any other part of ERISA contains an exhaustion requirement. Thus, as a judicially-crafted doctrine, exhaustion places no limits on a court's adjudicatory power.").

[14] The *Thomas* court's footnote distinguishing *Bowles* (which had been decided less that two weeks before) explains that "[t]here is no contradiction between *Bowles* and *Arbaugh*. In the former, Congress limited jurisdiction by statute; in the latter, it did not." *Thomas*, 489 F.3d at 298 n.6. The difficulty, of course, is that distinguishing *Bowles* from *Arbaugh* on this basis will not always provide guidance in the next instance when one is trying to determine whether or not a statutory requirement is jurisdictional. Perhaps, though, some additional guidance can be gleaned from the *Thomas* court's observation that "*Bowles* ... rests on a long-held interpretation of the congressional enactments that confer jurisdiction upon the courts of appeals." *Id.*

Bowles was similarly distinguished in *Quinn v. Altria Group, Inc.*, 2008 WL 3518462 (S.D.N.Y. Aug. 1, 2008). In holding that the applicability of the Age Discrimination in Employment Act to foreign corporations is not a jurisdictional question, the *Quinn* court explained that *Bowles* concerned "specific statutory time limits in contexts in which, the Supreme Court noted, there has been a 'longstanding treatment of [those particular] statutory time limits ... as jurisdictional.'" *Id.* at *2.

Likewise, in holding that 28 U.S.C. § 2636(i)'s limitations period is a waivable defense, the Court of International Trade relied on a case that had cited *Arbaugh*. *See Parkdale Int'l, Ltd. v. United States*, 508 F. Supp. 2d 1338, 1347 n.6 (Ct. Int'l Trade 2007) (citing *Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 468 (2007) (quoting *Arbaugh*)). The *Parkdale* court

the period set by 38 U.S.C. § 7266(a) for appealing a decision of the Board of Veterans' Appeals is jurisdictional, the Court of Appeals for Veterans Claims noted "the clarity and forcefulness with which *Bowles* speaks regarding the jurisdictional importance of congressionally imposed periods of appeal," and cited *Arbaugh* only fleetingly as a case distinguished by *Bowles*. *Henderson v. Peake*, 22 Vet.App. 217, 218 n.1, 221 (Vet. App. 2008).

By contrast, the opinions at the court of appeals level in the *Reed Elsevier* case (noted above) highlight tensions between *Arbaugh* and *Bowles*.[15] The panel majority held that the district court lacked "jurisdiction to certify a class consisting of claims arising from the infringement of unregistered copyrights and to approve a settlement with respect to those claims." *In re Literary Works in Elec. Databases Copyright Litig.*, 509 F.3d 116, 118 (2d Cir. 2007). The majority cited *Bowles* and stressed that "section 411(a) creates a statutory condition precedent to the suit itself." *Id.* at 124.[16] Judge Walker, arguing in dissent that "the fact that some of the otherwise presumably valid copyrights have not been registered is an insufficient basis for undoing this class-action settlement," *id.* at 128, asserted that "§ 411(a) does not create rights but is rather like the enforcement mechanisms or claim-processing rules in *Kontrick*, *Eberhart*, and *Arbaugh*," *id.* at 130-31.

In sum, *Arbaugh*'s clear statement rule has not been used to analyze appeal deadlines. The caselaw does not yet provide a clear view on the dividing line between deadlines governed by *Bowles* and deadlines governed by *Arbaugh*. (Given the play given both cases by the briefs in the *Reed Elsevier* case, the Supreme Court's decision might provide guidance in this regard.) Given the *Bowles* Court's stress on the notion that statutory appeal deadlines are jurisdictional, it seems likely that most statutory appeal deadlines will be governed by *Bowles* rather than

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fleetingly cited *Bowles*, with a "*cf.*," as a case that distinguished *Arbaugh* "in the context of habeas corpus." *Id.*

See also Solis v. Koresko, 2009 WL 2776630, at *5 (E.D. Pa. Aug. 31, 2009) (following *Arbaugh* and holding that question of whether a plan is covered by ERISA is not jurisdictional).

[15] Another case alluding to that tension is *Reyes-Vanegas v. EEOC*, in which the court directed the plaintiff to provide facts that might ground a claim that 42 U.S.C. § 2000e-5's 90-day limitations period was equitably tolled. *Reyes-Vanegas v. EEOC*, 2007 WL 2556318, at *3 (N.D. Cal. Sept. 4, 2007) ("It is not clear whether the reasoning of *Bowles* extends beyond the statutory scheme there.... [T]he Ninth Circuit continues to apply equitable principles to statutory time periods other than appeals to the Circuit Court. *See Forester v. Chertoff*, 2007 U.S.App. LEXIS 20632 (9th Cir. August 29, 2007) (following *Arbaugh* ...).").

[16] *See also In re Literary Works*, 509 F.3d at 124 n.5 (citing *Bowles* and stating that "courts lack subject matter jurisdiction over claims that Congress has specified do not yet exist").

Arbaugh – at least absent a persuasive reason to exempt them from *Bowles*' reach.[17]

III. *Becker v. Montgomery* and related cases

The Committee, at the April 2009 meeting, noted the line of cases holding that insubstantial defects in the notice of appeal should be disregarded, and wondered whether that line of cases might function to mitigate the stringency of *Bowles*' holding that statutory appeal deadlines are jurisdictional. The argument would be that even if a deadline is jurisdictional, compliance can be found if a document filed within the deadline contains the required substance. So, for example, some other document such as a brief or a motion could be deemed an effective substitute for a notice of appeal.[18] There is, indeed, support in the caselaw for such an approach.

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[17] One decision recently distinguished *Bowles* and held that 38 U.S.C. § 7105(d)(3)'s deadline for seeking review in the Board of Veterans' Appeals is not jurisdictional. *See Percy v. Shinseki*, 23 Vet. App. 37, 38 (Vet. App. 2009). The decision in *Percy* was driven in part by the fact that Section 7105(d)(3) authorizes extensions of its 60-day deadline "for a reasonable period on request for good cause shown." *Id.* at 42.

[18] In this memo I will take as my main example the notion of effective substitutes for a notice of appeal. The same theme plays out in connection with analogous sorts of statutory appeal deadlines. A recent example is *Blausey v. U.S. Trustee*. In *Blausey*, after the debtors filed a notice of appeal and request for direct-appeal certification in the bankruptcy court, that court certified a direct appeal to the court of appeals under 28 U.S.C.A. § 158(d)(2). The clerk prematurely sent the record to the court of appeals and the court of appeals clerk docketed the appeal. However, the debtors did not file a petition for permission to appeal in the court of appeals until after the 10-day deadline that was then imposed by interim provisions set forth in a note to Section 158(d)(2). A divided merits panel upheld the motions panel's decision to construe the notice of appeal as a petition for permission to appeal, reasoning that the transmission of the record had confused the debtors. But the majority warned that "bankruptcy petitioners and bankruptcy courts should now be on notice of this potential pitfall. Consequently, future failure to timely file a petition to appeal in these circumstances is unlikely to be given the benefit of the good cause exception." *Blausey v. U.S. Trustee*, 552 F.3d 1124, 1131 (9th Cir. 2009). Judge Gorsuch, in dissent, objected that this reasoning "runs afoul of the Supreme Court's directions about the respect due statutory limits on our jurisdiction...." *Id.* at 1134 (Gorsuch, J., dissenting).

In circumstances similar to those in *Blausey*, a divided panel permitted the trustee's appeal. Judge Posner reasoned that the bankruptcy-court record – transmitted to the court of appeals, and including the request for bankruptcy-court certification of the appeal – contained "[a]ll the information ... that a petition for review would have contained." *In re Turner*, 574 F.3d 349, 352 (7th Cir. 2009). Judge Van Bokkelen concurred "[f]or the reasons stated in *Blausey*." *Id.* at 356. Judge Sykes dissented, objecting that "this stretches the concept of 'functional equivalence' too far." *Id.* at 357.

But that approach does not entirely soften the impact of *Bowles*, for two main reasons. First, the effective-substitute theory can only apply if *some* document (that could be deemed an effective substitute for a notice of appeal) has been filed within the relevant time period. Second, courts are not always consistent in their willingness to look past formal defects to the substance of the filing.

In a civil case, 28 U.S.C. § 2107 requires the timely filing of a "notice of appeal," but it does not define what constitutes such a notice.[19] Appellate Rule 4(a)(1) directs the timely filing of "the notice required by Rule 3." Appellate Rule 3(c)(1) requires the notice to "(A) specify the party or parties taking the appeal by naming each one in the caption or body of the notice ... ; (B) designate the judgment, order, or part thereof being appealed; and (C) name the court to which the appeal is taken." Appellate Rule 3(c)(4) provides that "[a]n appeal must not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice." And Appellate Rule 4(d) protects an appellant who mistakenly files the notice in the court of appeals rather than the district court.[20]

Well before the adoption of the Appellate Rules, the Supreme Court made clear that other documents could serve as the functional equivalent of a notice of appeal:

> Although the timely filing of a notice of appeal is a jurisdictional prerequisite for perfecting an appeal ... , a liberal view of papers filed by indigent and incarcerated defendants, as equivalents of notices of appeal, has been used to preserve the

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For examples under other statutory frameworks, *compare, e.g.*, *Amalgamated Transit Union Local 1309, AFL-CIO v. Laidlaw Transit Servs., Inc.*, 435 F.3d 1140, 1146-47 (9th Cir. 2006) (interpreting 28 U.S.C. § 1453(c)(1), contrary to its text, to set a 7-day deadline for seeking permission to appeal, but "suspend[ing] for good cause the requirements of FRAP 5(a)(1), (b)(1) and (c) in this case, and constru[ing] plaintiffs' timely notice of appeal and untimely petition for permission to appeal as together constituting one timely and proper petition for permission to appeal"), *with Estate of Storm v. Nw. Iowa Hosp. Corp.*, 548 F.3d 686, 688 (8th Cir. 2008) (court lacked jurisdiction to hear interlocutory appeal because notice of appeal filed in district court did not "comply with the requirement of § 1292(b) that application be made to the court of appeals within ten days of the district court's order" and did not meet requirements of Appellate Rule 5).

[19] 18 U.S.C. § 3731, which authorizes certain types of government appeals in criminal cases, requires that "[t]he appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered," but it does not mention or define what constitutes the notice of appeal.

[20] Rule 4(d) provides: "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."

> jurisdiction of the Courts of Appeals. *See, e.g.*, *Lemke v. United States*, 346 U.S. 325 ... (notice of appeal filed prior to judgment); *O'Neal v. United States*, 272 F.2d 412 (C.A.5th Cir.) (appeal bond filed in District Court); *Tillman v. United States*, 268 F.2d 422 (C.A.5th Cir.) (application for leave to appeal in forma pauperis filed in District Court); *Belton v. United States*, ... 259 F.2d 811 (letter written to District Court); *Williams v. United States*, ... 188 F.2d 41 (notice of appeal delivered to prison officials for forwarding to District Court). *See also Jordan v. United States District Court*, ... 233 F.2d 362, vacated on other grounds *sub nom. Jordan v. United States*, 352 U.S. 904 ... (mandamus petition filed in Court of Appeals held equivalent of notice of appeal from judgment in proceeding pursuant to 28 U.S.C. s 2255, 28 U.S.C.A. s 2255); *West v. United States*, ... 222 F.2d 774 (petition for leave to appeal in forma pauperis filed in Court of Appeals held equivalent in s 2255 case).

Coppedge v. United States, 369 U.S. 438, 442 n.5 (1962). That same year, the Court decided *Foman v. Davis*, 371 U.S. 178 (1962), which applied a similarly forgiving approach to notices of appeal filed by a represented litigant. Foman's first notice of appeal, which designated the original judgment, was ineffective because Foman's motion to vacate the judgment (deemed a Civil Rule 59(e) motion) was pending. Foman's second notice of appeal named only the order denying the motion to vacate (and denying leave to amend the complaint). The Court held that appellate jurisdiction nonetheless existed to review the underlying judgment:

> The defect in the second notice of appeal did not mislead or prejudice the respondent. With both notices of appeal before it (even granting the asserted ineffectiveness of the first), the Court of Appeals should have treated the appeal from the denial of the motions as an effective, although inept, attempt to appeal from the judgment sought to be vacated. Taking the two notices and the appeal papers together, petitioner's intention to seek review of both the dismissal and the denial of the motions was manifest. Not only did both parties brief and argue the merits of the earlier judgment on appeal, but petitioner's statement of points on which she intended to rely on appeal, submitted to both respondent and the court pursuant to rule, similarly demonstrated the intent to challenge the dismissal.
>
> It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities.

Id. at 181.

More recently, the Court has explained that "the notice afforded by a document, not the litigant's motivation in filing it, determines the document's sufficiency as a notice of appeal. If a document filed within the time specified by Rule 4 gives the notice required by Rule 3, it is

effective as a notice of appeal." *Smith v. Barry*, 502 U.S. 244, 248-49 (1992).[21] More recently still, the Court rejected the contention that the failure to hand-sign a notice of appeal constitutes a jurisdictional defect. The signature requirement arose from Civil Rule 11(a), which applied to the notice because the notice was filed in the district court. *See* Appellate Rule 1(a)(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."). As the Court explained: "Appellate Rules 3 and 4 ... are indeed linked jurisdictional provisions. Rule 3(a)(1) directs that a notice of appeal be filed 'within the time allowed by Rule 4[.]'.... Rule 3(c)(1) details what the notice of appeal must contain.... Notably, a signature requirement is not among Rule 3(c)(1)'s specifications, for Civil Rule 11(a) alone calls for and controls that requirement and renders it nonjurisdictional." *Becker v. Montgomery*, 532 U.S. 757, 765-66 (2001).

These decisions indicate that so long as a document, filed within the relevant time period, provides the information required by Rule 3(c), the failure to designate that document a "notice of appeal" will not prove fatal. Nothing in *Bowles* need be read to require a contrary view. Admittedly, it would have been possible for Bowles himself to argue that his Rule 4(a)(6) motion to reopen the time to appeal was the substantial equivalent of the notice of appeal, thus meeting the requirement that the notice be filed no later than 14 days after the date of entry of the order reopening the time for appeal. Such an argument could have drawn support from cases holding that a Rule 4(a)(5) motion to extend appeal time can, in appropriate circumstances, serve as the substantial equivalent of the notice of appeal.[22] But, in actuality, it does not seem that such an argument was presented to the Court in *Bowles*, and thus the result in *Bowles* need not be taken as a rejection of the substantial-equivalence theory. Indeed, another case suggests tacit approval of the notion that a motion to extend can be taken as the functional equivalent of a notice of appeal:

> [O]n the *Bowles* Court's view that appeal time limits set by Section 2107 are mandatory and jurisdictional and thus must be examined sua sponte, the Court—if it disagreed with the notion that a motion to extend can serve as the functional equivalent of a notice of appeal—would have had to so hold in *Lockyer v. Andrade*, 538 U.S. 63 ... (2003). The Ninth Circuit had held Andrade's appeal was

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[21] The *Smith* Court held that the appellant's "informal brief," filed in the court of appeals, could serve as a notice of appeal if it contained the information required by Rule 3(c). *See id.* at 250.

[22] *See Rinaldo v. Corbett*, 256 F.3d 1276, 1279 (11th Cir. 2001) (construing Rule 4(a)(5) motion as notice of appeal); *Listenbee v. City of Milwaukee*, 976 F.2d 348, 350 (7th Cir. 1992) (same). *See also Isert v. Ford Motor Co.*, 461 F.3d 756, 762-63 (6th Cir. 2006) ("As this circuit's cases show and as the many decisions from other circuits confirm, an extension-of-time motion frequently will satisfy the modest requirements of Rule 3(c). ... The problem in this case, then, was not just that the Iserts filed a motion for extension of time; it was that the motion gave no indication which judgment (among many) the Iserts wished to appeal.").

> timely because it viewed his motion for an extension of time as the functional equivalent of a notice of appeal. *See Andrade v. Attorney General of State of California*, 270 F.3d 743, 752 (9th Cir. 2001), rev'd, 538 U.S. 63 ... (2003). The Supreme Court reversed on the merits without questioning the existence of appellate jurisdiction.

16A Federal Practice and Procedure § 3949.6, n.29 (4th ed. 2008).

But no litigant can take the functional-equivalence cases as a basis for complacency. It is worth noting that when explaining why the failure to hand-sign the notice did not doom the appeal in *Becker*, the Court stressed the fact that the signing requirement was "nonjurisdictional" because it was set by Civil Rule 11(a) and not Appellate Rule 3(c).[23] In cases where the Court has decided that a notice of appeal lacked an attribute required by Appellate Rule 3(c) itself, the Court's approach has sometimes been quite unforgiving.

A leading example of the unforgiving approach is *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988). After the dismissal of the complaint in intervention filed by Torres and others, the intervenors' lawyer filed a notice of appeal that named the 15 intervenors other than Torres, followed by "et al." Torres' name was omitted through a clerical mistake by the lawyer's secretary. The Court held that the notice did not effect an appeal on behalf of Torres:

> We believe that the mandatory nature of the time limits contained in Rule 4 would be vitiated if courts of appeals were permitted to exercise jurisdiction over parties not named in the notice of appeal. Permitting courts to exercise jurisdiction over unnamed parties after the time for filing a notice of appeal has passed is equivalent to permitting courts to extend the time for filing a notice of appeal. Because the Rules do not grant courts the latter power, we hold that the Rules likewise withhold the former.

Id. at 315. Rule 3 was amended in 1993 "to reduce the amount of satellite litigation spawned by ... *Torres*." 1993 Committee Note to Rule 3(c). Rule 3(c)(1)(A) now provides that the notice

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[23] A recent case consistent with this distinction is *Contino v. United States*, 535 F.3d 124, 127 (2d Cir. 2008). In *Contino*, the appellant attempted (within the appeal period) to file a notice of appeal electronically – violating a local rule requiring paper filing for notices of appeal. The court noted that Civil Rule 5 directs the clerk not to refuse to file a paper "because it is not in the form prescribed by these rules or by a local rule or practice," Fed. R. Civ. P. 5(d)(4), and that Civil Rule 83 "prohibits the enforcement of a local rule regulating the form of a filing if its enforcement would cause a party to lose a right and the party's non-compliance with the rule was not willful." *Contino*, 535 F.3d at 127. As further support for its holding that the attempted filing rendered the appeal timely, the *Contino* court cited *Becker*. *See Contino*, 535 F.3d at 127 (stating that its "conclusion is consistent with the treatment of notices of appeal which the appellant failed to sign, another type of defect in form").

must "specify the party or parties taking the appeal by naming each one in the caption or body of the notice, but an attorney representing more than one party may describe those parties with such terms as 'all plaintiffs,' 'the defendants,' 'the plaintiffs A, B, et al.,' or 'all defendants except X.'"

IV. Conclusion

Although the data discussed in Part I are not in any sense conclusive, they do show that in some – but not all – of the appellate cases citing *Bowles* with respect to appeal requirements, *Bowles*' distinction between jurisdictional and non-jurisdictional deadlines has a concrete effect on whether the would-be appellant obtains a ruling on the merits of the appeal. As noted in Part II, *Arbaugh* does not appear to have gained currency in courts' discussions of appeal deadlines. But, as discussed in Part III, cases recognizing other documents as the functional equivalent of a notice of appeal may soften *Bowles*' impact in some instances.

Encl.

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.	A sort of holding	Lost on merits	the court concludes the time limit is not jurisdictional. It then avoids deciding whether the failure to timely appeal otherwise bars relief, by concluding that in any event Martinez's appeal failed on the merits
U.S. v. Owen	CA2	2009	559 F.3d 82	FRCrim P	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.	a sort of holding	Possibly preserved	remands to district court for analysis of whether t grant extension, under Crim 45(b), of time to file Crim 33 motion. Applies Eberhart's teaching that the Crim 33 time period is not jurisdictional
U.S. v. Jacobo Castillo	CA9	2007	496 F.3d 947, 957 (en banc)	FRCrim P	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.	a sort of holding	Preserved	seems like a holding -- even though the en banc opinion does not determine whether D will prevai on appeal -- because the ruling that the issue is non-jurisdictional leads the en banc court to remand to the panel for analysis on the merits. (As it turned out, the panel affirmed.)
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.	a sort of holding	Preserved	one could argue it's a holding because the court excuses compliance with the local rule. But one could argue that the non-jurisdictional nature of the local rule is not the true basis for the outcome given the court's reliance on Civil Rules 5 and 83

Omari v. Holder	CA5	2009	562 F.3d 314, 317	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.	Alternative holding	Forfeited	Holding seems alternative because the court also notes in passing that Omari "has given us no reason to equitably excuse the exhaustion requirement."
Alaska Wilderness League v. Kempthorne	CA9	2008	548 F.3d 815. opinion vacated, 559 F.3d 916. appeal dismissed as moot, 571 F.3d 859.	43	1349	(c)(3)	[majority & dissent debate issues of tolling in agency-review context]	can be viewed as a holding	Preserved	majority applies a tolling principle, while dissent argues that under Bowles tolling should be unavailable.
Grullon v. Mukasey	CA2	2007	509 F.3d 107, 112	8	1252	(d)(1)	When an exhaustion requirement is statutory and envinces 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.	Holding	Forfeited	notes that "Valenzuela would have a plausible claim to dispensation for 'manifest injustice' if we were to uphold that exception" but holds that exception is unavailable under Bowles
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.	Holding	Forfeited	though the gov't raised the timeliness objection, the ruling on jurisidictional nature of the deadline is a holding because court relies on it to reject petrs' equitable tolling arguments
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.	Holding	Forfeited	

U.S. v. Comprehensive Drug Testing, Inc.	CA9	2008	513 F.3d 1085, 1101. NB: the analysis on the cited point is adopted by the en banc court on reh'ing: 2009 WL 2605378, at *2 (9th Cir. 2009).	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).	Holding	Forfeited	the status of the reconsideration motion -- i.e., the court's determination that it did not count as a tolling motion -- determned the question of the appeal's timeliness
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 Bowle	Holding	Not yet available	ruling on the unavailability of a futility exception to the statutory exhaustion requirement counts as a holding
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.	Holding	Preserved	applying its forfeiture analysis, majority concludes that the untimely but unobjected-to Rule 59(e) motion tolled the appeal time

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.	Holding	Preserved	"The fact that the bankruptcy court and the district court overlooked the fact that the case wa still technically pending in the bankruptcy court under Interim Bankruptcy Rule 8001(f)(2) apparently prompted the district court to certify the judgment for appeal. Under these circumstances, where both courts wish to certify the case to this Court for appeal, this error is technical in nature, does not affect the substantial rights of the parties, and prompts us to exercise our discretion in favor of proceeding to the merits of this appeal."
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 notic of appeal, is no longer mandatory and jurisdictional.	Holding	Preserved	court provides thoughtful discussion of when sua sponte consideration of nonjurisdictional problems is appropriate. In this case, the government waived the timeliness objection and the court refused to raise it sua sponte.
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.	Holding	Preserved	fact that the time period is not jurisdictional permits court to consider the merits. Government did not raise a timeliness objection (perhaps because D explained his lawyer had refused to file a notice of appeal)
In re Turner	CA7	2009	574 F.3d 349	28	158	(d)(2) & note	[panel splits over issue of substantial compliance w/ petition requirement]	Holding	Preserved	"the failure to comply with a rule that is not jurisdictional-and we repeat that requirements for perfecting an appeal that do not involve deadlines are not jurisdictional-is not fatal if no one is harmed by the failure, and in this case there was not the slightest harm, or even minor inconvenience, to anybody."
U.S. v. Urutyan	CA4	2009	2009 WL 1241481	FRAP	4	(b)(1)(A)	Urutyan's failure to comply with the non-statutory time limitations of Rule 4(b) does not divest this court of subject-matter jurisdiction over his appeal.	Holding	Preserved	government had expressly waived any timeliness objection

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.	no holding		
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.	no holding		appeal dismissed after appellee's objection
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.	no holding		Court rules against the City on its sufficiency-of-evidence contention by following Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc., 546 U.S. 394 (2006). Court states it's not resolving question of whether Civil Rule 50(b)'s requirement is jurisdictional, so I class this as a case that does not involve a holding. True, Kelley's briefs do not cite Unitherm so it is possible that the court raised the Unitherm issue sua sponte. but even a non-jurisdictional problem can sometimes be raised sua sponte.

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 Governmen 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.	No holding		regarding cross-appeal rule, the Court concludes that it "need not type the rule 'jurisdictional' in order to decide this case." instead, it bases its holding on the particular context, as noted in the quote at left. Justice Alito, joined by Justice Stevens and in relevant part by Justice Breyer, argues in dissent that the cross-appeal rule is not jurisdictional.
In re McNeil-PPC, Inc.	CAFED	2009	574 F.3d 1393	35	142		[dissent cites Bowles for proposition that this DI is jur'al]	No holding		Majority holds the appeal timely
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.	no holding		statements re jurisdictional nature of the deadline seem like dicta given that the appellee raised the timeliness issue. there is no sign in the briefs that CCI argued for an equitable exception. NB: This opinion issued on remand from Supreme Court for reconsideration in light of Hall Street Associates L.L.C. v. Mattel, Inc., --- U.S. ----, 128 S.Ct. 1396, 170 L.Ed.2d 254 (2008).
Sueiro Vazquez v. Torregrosa de la Rosa	CA1	2007	494 F.3d 227, 234	FRAP	3		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.	not a holding		the fact that the requirement of a notice of appeal is jurisdictional presumably does not affect the outcome here, because in this case the would-be cross-appellant realized their error & brought it to the court's attention and then the cross-appellee objected

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.	not a holding		appeal dismissed on gov't's objection. "[W]hen the government recognizes a violation of Rule 4(b)(1)(A), it should consider filing a motion for dismissal under Federal Rule of Appellate Procedure 27 and 10th Circuit Rule 27.2(A)(1)(a) to avoid briefing on the merits. Failure to invoke Rule 27.2(A)(1)(a), however, does not constitute forfeiture where, as here, the appellee seeks dismissal for failure to timely appeal in its response brief."
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.	not a holding		The court also holds: "we do not require a party to raise Rule 4(b) issues in a motion to dismiss. ... Here, the government's objection was proper because it was raised in the government's initial brief."
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)).	not a holding		ruling the time period jurisdictional here is not a problem, because the lack of a separate document rendered the appeal timely. NB: the court does not mention 28 U.S.C. 2107(d) ("This section shall not apply to bankruptcy matters or other proceedings under Title 11.")
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 lim at issue in Bowles.	not a holding		court dismisses petition for permission to appeal after concluding that even if unique circumstances doctrine were available, petitioner did not qualify for it

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.	not a holding		court's conclusion that the Civil 50(b) period is nonjurisdictional does not determine outcome of appeal, because it concludes the timeliness objection was timely raised.
U.S. v. Lopez	CA11	2009	562 F.3d 1309	FRAP	4	(b)(1)(A)	The Supreme Court has made clear that only rules of limitation that implement a statutory directive may be mandatory and jurisdictional.... Because the deadline in Rule 4(b) for filing a notice of appeal in a criminal case is not grounded in a federal statute, we hold that it is not jurisdictional. [However, even though the court of appeals initially had raised the timeliness issue sua sponte, the court of appeals held on remand that the government had not waived its objection to the timeliness of the appeal, and the court therefore dismissed the appeal as untimely]	not a holding		
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.	probably not a holding	Forfeited	gov't raised the timeliness issue in its brief. Can be viewed as a holding if it seems likely that the court would have viewed the case as falling within the unique circumstances doctrine if that doctrine were available. That seems unlikely, however.
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)	Sua sponte	Forfeited	though it's not clear from face of opinion, docket strongly suggests that the court raised timeliness sua sponte
Estate of Storm v. Northwest Iowa Hosp. Corp.	CA8	2008	548 F.3d 686	28	1292	(b)	An appellant's failure to file an application for permission to appeal in this court within ten days of the district court's certification is a jurisdictional defect under § 1292(b).	Sua sponte	Forfeited	court evidently raises the issue of jurisdiction sua sponte

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....	Sua sponte	Forfeited	Apparently raised sua sponte
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. Pep't of Transportation, 735 F.2d 1335, 1336 (Fed.Cir.1984); see also Bowles	Unclear	Forfeited	Untimely petition dismissed; unclear whether respondent raised the timeliness objection
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....	Unclear	Forfeited	Appellee raised timeliness objection. Court cites Bowles for proposition that a jurisdictional deadline is not subject to equitable tolling. But there's no indication of a specific equitable tolling argument being made in this case by the appellant.

VI. D

MEMORANDUM

DATE: October 15, 2009

TO: Advisory Committee on Appellate Rules

FROM: **Steven M. Colloton**
Circuit Judge

RE: Joint Civil/Appellate Subcommittee

* * * * * * * * *

The joint subcommittee of the advisory committees on the civil rules and appellate rules met by teleconference on August 14, 2009. All six members of the subcommittee participated, along with reporters Edward Cooper and Catherine Struve, from the civil and appellate committees, respectively, and Judge Mark Kravitz, chair of the civil rules committee. The subcommittee considered two matters that arose from comments submitted to the appellate rules committee concerning pending amendments to Federal Rule of Appellate Procedure 4(a)(4)(B)(ii).

The first matter involves a lack of clarity in the current rules concerning the time for civil appeals. A commentator has noted that under Appellate Rule 4(a)(4)(B), the time to appeal from an amended *judgment* runs from the entry of the *order* disposing of the last remaining tolling motion. In some scenarios, however, the amended judgment may not be entered until the time for appeal – as measured from the entry of the order on the tolling motion – has expired.

To resolve this problem, the Subcommittee recommends an amendment to Appellate Rule 4(a)(4) causing the time for appeal to run from the latest of entry of an order disposing of the last tolling motion or the entry of any altered or amended judgment. The Subcommittee also recommends a corresponding amendment to Civil Rule 58(a) to clarify the requirement that every altered or amended judgment be set out in a separate document. Although the problem seems likely to arise only infrequently in practice, and there are means under the current rules for a careful attorney to protect the rights of his or her client, the

Subcommittee believes that the amendments would improve clarity and eliminate a potential timing trap for the unwary. Please refer to Part I of Professor Struve's memorandum of September 7, 2009, for a comprehensive discussion of the issue and the proposed amendments.

The second matter involves suggestions by commentators that Appellate Rule 4(a)(4) be amended so that the initial notice of appeal in a civil case encompasses appeals from any subsequent order disposing of a postjudgment motion. The Subcommittee recommends no action on this matter. One member stated that the suggested amendment appeared to be a "solution in search of a problem," and that sentiment was shared widely within the Subcommittee. Please refer to Professor Struve's memorandum of September 7 for a discussion of this matter.

The Civil Rules Advisory Committee received a report on these matters during its October 2009 meeting. The committee took no action, but contemplated that actions of both advisory committees could be coordinated in the spring of 2010. Draft minutes of the Civil Rules Committee meeting about this matter are also attached for your information.

Encl.

Rule 58 - Appellate Rule 4

Judge Colloton presented the Report of the Joint Civil/Appellate Subcommittee. The Subcommittee was formed to provide joint consideration of topics that overlap the Civil and Appellate Rules. The topics currently on the agenda arise from suggestions and comments made to the Appellate Rules Committee. The Subcommittee is ready to report on two of them.

The first question involves Appellate Rule 4 and Civil Rule 58. The problem is primarily a Rule 4 problem. Under Rule 4(a)(4)(B), appeal time runs "from the entry of the order disposing of the last" remaining motion that tolls appeal time. It is possible that appeal time may run out, as measured from entry of the order, even before an amended judgment is entered. An example might be an order "disposing of" a motion for new trial by conditionally granting a new trial, subject to denial if the plaintiff accepts a remitted amount within 40 days. If the plaintiff does not act on the remittitur within 30 days from entry of the order, there may be confusion as to the proper course. The defendant might file a notice of appeal, and then withdraw it if remittitur is not accepted and the new trial order becomes absolute and defeats finality. The defendant might ask for an extension of appeal time. Or the defendant might wait, hoping that the absence of a final judgment will allow an appeal after a remitted judgment is entered. Although there seem to be ways to muddle through, the Subcommittee has submitted to the Appellate Rules Committee a revision of Rule 4(a)(4)(A) that would run appeal time from "the latest of entry of the order disposing of the last such remaining motion or, if a motion's disposition results in alteration or amendment of the judgment, entry of any altered or amended judgment: * * *." A parallel change would be made in the Rule 4(a)(4)(B)(i) and (ii) provisions for premature notices of appeal and appeals from an order disposing of a tolling motion or altering or amending the judgment.

Civil Rule 58(a) has become involved with the Appellate Rule 4 discussion because Rule 4(a)(7)(A)(i) provides that a judgment is entered for purposes of 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)." There is a potential for confusion in applying Rule 4 — where mistakes can lead to forfeiture of the right to appeal by filing an untimely notice of appeal — to any extent that Rule 58 is confusing. And there is a possibility that ambiguity may lurk in Rule 58(a). The rule as it now reads can be shown with one draft of possible amendments:

> Separate Document. Every judgment and [altered or] amended judgment must be set out in a separate document, but a separate document is not required ~~for~~ when an order — without [altering or] amending the judgment — disposes of a motion * * *.

At least one court has concluded that Rule 58(a) does not mean what it says when it refers to an order that "disposes of" a motion. The theory seems to be that an order granting any of the tolling motions will always lead to an amended judgment, so the rule can only refer to orders that deny a tolling motion. But that is not accurate. The simplest illustration of an order that grants a tolling motion without leading to an amended judgment if an order that amends Rule 52 findings of fact or makes additional findings — the additional or amended findings may not lead to any change in the judgment. The intended meaning, as reflected in the 2002 Committee Note, is that a separate document is required only when the judgment is amended. A party who waits for entry of an amended judgment may inadvertently let the appeal period expire.

Present action was not requested on the Rule 58 draft. The Appellate Rules Committee will consider the same package, and the actions of both Committees can be coordinated for the spring meetings.

The Subcommittee also considered the question whether Appellate Rule 4(a)(4)(B)(ii) should be made parallel to Rule 4(b)(3)(C). Rule 4(b)(3)(C) provides that for appeals in a criminal case, a valid notice of appeal is effective, without amendment, to appeal from an order disposing of any of the tolling motions listed in Rule 4(b)(3)(A). Rule 4(a)(4)(B)(ii), in contrast, provides that for appeals in a civil action a party intending to challenge an order disposing of any of the tolling motions, or a judgment altered or amended on such a motion, must file an amended notice of appeal even though that party had already filed a timely notice of appeal. The Subcommittee concluded that the civil and criminal contexts are sufficiently different to justify the different approaches. No

changes will be recommended.

The Subcommittee has a third item on the agenda, the set of problems that are referred to as "manufactured finality." Those issues will be explored in the coming months. And the Subcommittee will work to accomplish any coordination that may be useful as the Bankruptcy Rules Committee pursues its work on the Part 8 rules that govern appeals.

MEMORANDUM

DATE: September 7, 2009

TO: Judge Steven M. Colloton

FROM: Catherine T. Struve

RE: Possible amendments to Civil Rule 58 and Appellate Rule 4(a)(4)

This memo summarizes my understanding[1] of the considerations underlying the Civil / Appellate Subcommittee's discussions concerning the possibility of Rule amendments to alter the treatment of certain issues relating to motions that toll the time for taking a civil appeal. These items arise from comments[2] submitted on the pending amendment to Appellate Rule 4(a)(4)(B)(ii).[3]

Part I of this memo discusses the possibility of amending the Civil Rules and Appellate Rules to address a problem identified by Peder Batalden. Mr. Batalden points out that under Appellate Rule 4(a)(4)(B) the time to appeal from an amended *judgment* runs from the entry of the *order* disposing of the last remaining tolling motion. In some scenarios, Mr. Batalden suggests, the judgment might not be issued and entered until well after the entry of the order. As the Subcommittee discussed during the summer, revisions to Appellate Rules 4(a)(4)(A) and (B) could address this problem, and an accompanying amendment to Civil Rule 58(a) would also be desirable.

Part II of this memo discusses an additional suggestion. Public Citizen Litigation Group ("Public Citizen") and the Seventh Circuit Bar Association Rules and Practice Committee (the "Bar Association") have suggested that Appellate 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

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[1] Informed by your guidance and that of Professor Cooper.

[2] The full text of the comments is available at http://www.uscourts.gov/rules/2007_Appellate_Rules_Comments_Chart.html.

[3] 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.

postjudgment motion. The Subcommittee's discussions this summer, as you know, led to the conclusion that this suggestion should not be pursued.

The topic of manufactured finality – which I understand the Subcommittee may address in future deliberations – is not covered in this memo.

I. Proposed amendments to Appellate Rule 4(a)(4) and Civil Rule 58(a)

Mr. Batalden has identified a lack of clarity in the rules governing the time for civil appeals. Because any lack of clarity in the appeal-time framework is undesirable, a clarifying amendment to Rule 4(a)(4) is worthwhile. In addition, due to the importance of Civil Rule 58(a)'s separate document requirement, a clarifying amendment to Civil Rule 58(a) would also be useful.

Part I.A. below sets forth my understanding concerning the desirability of the proposed amendments. Part I.B. sets forth the amendments themselves.

A. The desirability of the proposed amendments

As Mr. Batalden pointed out, 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. 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:

(1) file the notice of appeal by Day 30 (and then withdraw the notice of appeal if

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[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.

the plaintiff rejects the reduced award);[5]

(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."

To assess whether a separate document is required for the order "disposing of" the new trial motion we must examine Appellate Rule 4(a)(7) and and Civil Rule 58(a). Appellate Rule 4(a)(7) is designed to incorporate, for purposes of Rule 4(a), the separate-document rules found in Civil Rule 58(a).[6] Under Rule 4(a)(7)(A),

[a] judgment or order is entered for purposes of this Rule 4(a):

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[5] If the plaintiff accepts the reduced award and the judgment is amended to reflect the reduced award, it should not be necessary for the defendant to amend the notice of appeal unless the defendant intends to challenge something about the amendment of the judgment – such as the remittitur amount. Cautious practitioners, though, are likely to amend the notice of appeal in any event just to be on the safe side.

[6] There is currently a technical glitch in Appellate Rule 4(a)(7), because its application turns on whether "Federal Rule of Civil Procedure 58(a)(1)" does or does not require a separate document. The appropriate reference, after the restyling of the Civil Rules, is to Civil Rule 58(a), not Civil Rule 58(a)(1). A technical amendment designed to update these cross-references has been approved by the Appellate Rules Committee and the Standing Committee and will be submitted to the Judicial Conference for its approval this month. That technical amendment will, if approved, take effect December 1, 2010. For simplicity's sake, the discussion in the text proceeds as though Rule 4(a)(7) refers to Civil Rule 58(a).

> (i) if [Civil Rule 58(a)] 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 [Civil Rule 58(a)] requires a separate document, when the judgment or order is entered in the civil docket ... 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 ...."

The key question, then, is whether Civil Rule 58(a) requires a separate document. Rule 58(a) (in what we may call "clause 1") provides that "Every judgment and amended judgment must be set out in a separate document," but it also provides (in what we may call "clause 2") that "a separate document is not required for an order disposing of" any of a list of motions; the list includes all the motions that have tolling effect under Appellate Rule 4(a)(4)(A).[7] On the one hand, it might be argued that a separate document is required in our hypothetical when the court conditionally grants the new trial motion, because if the plaintiff accepts the reduced award that will result in an amendment of the original judgment. But on the other hand, it might be argued that no separate document is required for the *order* (as opposed to the amended judgment), for two reasons:

First, the apparent meaning of Rule 58(a) is that no separate document is required for the order because it is "an order disposing of" a listed motion. But the Seventh Circuit has addressed this problem by reading 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). In the Seventh Circuit, and any circuit that might come to follow it, it would be clear that, in our hypothetical, clause 2 of Rule 58(a) does not apply because the order is not one that *denies* a postjudgment motion. However, it is not clear that other circuits will follow *Kunz*, and therefore some uncertainty on this issue is likely to remain.

Second, it might also be argued that (1) the order is not currently appealable and therefore (2) the order does not currently constitute a judgment within the terms of Civil Rule 54(a), which would mean that (3) Civil Rule 58(a)'s separate document requirement (which is cast in terms of "judgments") does not apply. The order would not be immediately appealable because the outcome depends on a contingency that has not yet occurred – namely, the plaintiff's decision whether to accept the reduced award. (An appealable judgment would result only when the plaintiff accepts the reduced award, or – if the plaintiff does not accept – after the new trial.) This, of course, illustrates the incongruous result that could be produced by a literal reading of Appellate Rules 4(a)(7) and 4(a)(4)(B)(ii): the reason a separate document is not required, in this view, is that the order is not currently appealable – yet the fact that the order is not currently appealable also means that, under Rule 4(a)(7)(A)(i), the order is deemed entered when it is

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[7] Civil Rule 58(a)'s list of motions is somewhat broader than Appellate Rule 4(a)(4)(A)'s list of tolling motions, but that discrepancy is not material to the issues discussed in this memo.

entered in the civil docket, and that, under Rule 4(a)(4)(B)(ii), the time to appeal from the order or from the resulting alteration or amendment of the judgment runs from that date of entry.

During the fall 2008 Appellate Rules Committee meeting, one attorney member noted that he had seen this general type of 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).

Based on our discussions to date, if a rule change is warranted, it seems that the best way to address Mr. Batalden's concern would be through coordinated amendments to Civil Rule 58's separate document requirement and to Appellate Rule 4(a)(4). The Civil Rule 58 amendment would read something like this: "Every judgment and [altered or] amended judgment must be set out in a separate document, but a separate document is not required ~~for~~ when an order -- without [altering or] amending the judgment -- dispose~~s~~ing of a motion: * * *."[8]

Amending Civil Rule 58(a) would take us partway to a solution to the problem, by clarifying the list of orders for which no separate document is required. That change would

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[8] Apart from the larger questions concerning the desirability of each of these possible changes, there is a more technical consideration that would affect the drafting of each of these amendments. That consideration concerns the terms "alteration" and "amendment." Civil Rule 59 and Appellate Rule 4 (or its predecessor, former Civil Rule 73) have used these terms in the disjunctive ever since the 1946 amendments to the Civil Rules took effect. The proposed draft language in this memo carries that practice forward. But, as Professor Cooper has pointed out, it is unclear "whether we have to say 'altered or' amended. Why not just amended? Tradition, and the need to change in too many places to be worth the fuss? Or some functional theory that a judgment can be altered without amending it?" If the Committees decide to proceed with either of the amendments discussed in this memo, it will be necessary to decide whether to continue using these terms in the disjunctive.

address the first of the arguments (set forth on page 4) for maintaining that no separate document is required: It could no longer be argued that no separate document is required in the wake of the order just because it is "an order disposing of" a listed motion.

But amending Civil Rule 58(a) alone would not address the second argument: It could still be argued that the order conditionally granting the new trial is not immediately appealable, that it therefore does not constitute a "judgment" as defined in Civil Rule 54(a), and that it therefore is not subject to Civil Rule 58(a)'s separate document requirement – leaving us with the same problem described on the preceding page: Because no separate document is required, under Rule 4(a)(7)(A)(i), the order is deemed entered when it is entered in the civil docket, and under Rule 4(a)(4)(B)(ii) the time to appeal from the order or from the resulting alteration or amendment of the judgment runs from that date of entry rather from a later date.

To put the point in more general terms, these difficulties arise from the fact that Appellate Rules 4(a)(4)(A), (B)(i) and (B)(ii) all peg timing questions to the entry of *the order disposing of* the last remaining tolling motion, and they do not take account of the possibility that time may elapse between that order and any ensuing amendment or alteration of the judgment. So the best way to address that problem (assuming that a rules amendment is warranted) is to amend those provisions to refer to that possibility. In short, these issues could be addressed by amending Rule 4(a)(4) as shown in Part I.B.

B. The proposed amendments

Here are the proposed amendments to Civil Rule 58(a) and Appellate Rule 4(a)(4):

Rule 58. Entering Judgment

(a) Separate Document. Every judgment and [altered or[9]] amended judgment must be set out in a separate document, but a separate document is not required ~~for~~ when an order — without [altering or] amending the judgment — dispose~~s~~ing of a motion:[10]

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[9] "Alter or amend" appears in Civil Rule 59, and in Rule 58(a)(4)'s invocation of Rule 59. It appears throughout Rule 4(a)(4). It seems better to adopt the same phrase in every appearance in Rule 58(a) and Rule 4. But we may be able to discard "altered or." If a judgment is altered, it should be formally amended or vacated in honor of a new judgment. See supra note 8.

[10] Professor Cooper suggests that this wording – "when an order – without altering or amending the judgment – disposes ..." – is awkward. He queries whether it would work to reframe Rule 58(a) so as to avoid that awkward phrasing. The reframed Rule might read:

> (a)(1) Every judgment and amended judgment must be set out in a separate document.

(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.

Committee Note

Rule 58(a) is amended to conform to changes in Appellate Rule 4 that clarify the provisions for starting appeal time from the latest of entry of the order disposing of the last timely tolling motion or, if disposition of the motion results in [alteration or] amendment of the judgment, entry of any [altered or] amended judgment. The Rule 58 amendment makes clear the need to enter an [altered or] amended judgment in a separate document whenever disposition of the motion [alters or] amends the judgment.

It should be remembered that in some situations an order may dispose of one of the listed motions by granting the motion without [altering or] amending the judgment. An example would be an order amending or making additional findings of fact under Rule 52(b) without changing the judgment. [No separate document is required if the order does not [alter or] amend the judgment.]

> (2) A separate document is not required for an order that -- without amending the judgment -- disposes of a motion: * * * [present paragraphs (1) through (5) would become subparagraphs (A) through (E).]

As Professor Cooper puts the question:

> The potential downside is that this seems to take sides in what was, at least as of 2002, a debate among the circuits. The 2002 Committee Note observes that "[s]ome courts treat such orders as those that deny a motion for new trial as a 'judgment,' so that appeal time does not start to run until the order is entered on a separate document. Without attempting to address the question whether such orders are appealable, and thus judgments as defined by rule 54(a), the amendment provides that entry on a separate document "is not required * * *." It was this dilemma that led to the awkward recent drafting that substitutes "when an order -- without amending the judgment -- disposes of a motion * * *." "[F]or an order that – *** -- disposes of a motion" reads more naturally. If we separate (1) from (2), is it less risky?

Rule 4. Appeal as of Right--When Taken

(a) Appeal in a Civil Case.

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(4) **Effect of a Motion on a Notice of Appeal.**

(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 latest of entry of the order disposing of the last such remaining motion or, if a motion's disposition results in alteration or amendment of the judgment, entry of any altered or amended judgment:

(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] ***[will be "28"]***[11] days after the judgment is entered.

(B)(i) If a party files a notice of appeal after the court announces or enters a judgment--but before it disposes of any motion listed in Rule 4(a)(4)(A)--the notice becomes effective to appeal a judgment or order, in whole or in part, ~~when~~ upon the latest of entry of the order disposing of the last such remaining motion ~~is entered~~ or, if a motion's disposition results in alteration or amendment of the judgment, entry of any altered or amended judgment.

(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] ***[will be "judgment's alteration or amendment"]*** upon such a motion, must file a notice of appeal, or

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[11] N.B.: Bolded, italicized notations in brackets indicate the effect of pending amendments to Rule 4(a)(4) that will take effect December 1, 2009, absent contrary action by Congress.

an amended notice of appeal--in compliance with Rule 3(c)--within the time prescribed by this Rule measured from the latest of entry of the order disposing of the last such remaining motion or, if a motion's disposition results in alteration or amendment of the judgment, entry of any altered or amended judgment.

(iii) No additional fee is required to file an amended notice.

* * *

Committee Note

Rule 4(a)(4)(A) currently provides that if a timely motion of certain listed types is filed, the time to appeal runs for all parties from the entry of the order disposing of the last such remaining motion. Subdivisions (a)(4)(B)(i) and (ii) also contain timing provisions that depend on the date of entry of the order disposing of the last such remaining motion. These three subdivisions are amended to make clear that if one of those tolling motions results in the alteration or amendment of the judgment, the relevant date is the latest of the entry of any altered or amended judgment or the entry of the order disposing of the last remaining tolling motion. To illustrate: Suppose that Defendant moves for judgment as a matter of law under Civil Rule 50(b) and wins an amended judgment. Plaintiff then moves for a new trial; the motion is denied. Denial of Plaintiff's motion is the "latest of" the described events. [As a second illustration: In a different case, two defendants each move for judgment under Civil Rule 50(b). The court grants Jones's motion and enters judgment for Jones, without directing entry of a final judgment pursuant to Civil Rule 54(b). Later, it grants Brown's motion, and enters judgment that plaintiff take nothing. This is the "latest of" the described events.]

II. The proposals by Public Citizen and the Bar Association

As noted above, Public Citizen and the Bar Association have suggested that Appellate 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. This is a more sweeping proposal than Mr. Batalden's. In some instances it would streamline the process for the would-be appellant. But that benefit should be weighed against the possibility that the change would deprive potential appellees of notice they would receive under the current rule. In addition, it turns out to be challenging to draft an appropriately tailored amendment.

Part II.A. summarizes the proposals, and Parts II.B. through II.D sketch my understanding concerning the desirability of the proposed amendments.

A. The proposals

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."

B. An initial assessment of the proposals

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[12] and (2) to adopt in Rule 4(b) language stating that a previously-filed notice of appeal encompasses the disposition of tolling motions.[13]

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

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[12] 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.

[13] 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.

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).

But as the next two subsections illustrate, the drafting would pose other challenges.

C. Possible language for an amendment to Rule 4(a)(4)

Here is a possible amendment to Rule 4(a)(4), designed to implement the suggestions discussed above.

Rule 4. Appeal as of Right--When Taken

(a) Appeal in a Civil Case.

***

(4) **Effect of a Motion on a Notice of Appeal.**

(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] ***[will be "28"]*** days after the judgment is entered.

(B)(i) If a party files a notice of appeal after the court announces or enters a judgment--but before it disposes of any motion listed in Rule 4(a)(4)(A)--the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.

(ii) A party ~~intending~~ who intends to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a [judgment altered or amended] ***[will be "judgment's alteration or amendment"]*** upon such a motion, and who has not previously filed a valid notice of appeal, 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.

(iii) ~~No additional fee is required to file an amended notice.~~ 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) [and from a judgment's alteration or amendment upon such a motion].[14]

* * *

[14] The bracketed language may be unnecessary: Appealing the order disposing of the motion logically embraces any change in the judgment directed by the order. But keeping subdivision (iii) parallel to subdivision (ii) might help to avoid confusion.

D. Drafting difficulties

The potential complexity of tolling-motion practice in multi-party civil cases makes it hard to draft the Rule 4(a)(4) amendment.

In particular, the reference – in the possible amendment set out in Part II.C above – to "a valid notice of appeal" may be undesirably broad. In the civil-appeal context[15] there is a fair amount of caselaw stating that a notice of appeal that enumerates fewer than all the possible issues for appeal fails to encompass the other issues (applying the "expressio unius" canon).[16] 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. To illustrate the point, consider the following pair of hypotheticals.

Hypothetical One: Defendant Brown is dismissed January 3, 2008; no Rule 54(b) judgment. Jury verdict for Plaintiff against Defendant Jones; judgment is entered on the verdict on August 1, 2009. On August 2, 2009, Plaintiff files a notice of appeal designating "the final judgment entered August 1, 2009"; though this notice does not specify that Plaintiff is challenging the dismissal as against Brown, at that moment it is unlikely that Jones will think Plaintiff is appealing from the judgment for Plaintiff against Jones.[17] The clerk serves notice of the filing by mailing a copy to counsel of record for each party (Jones, Brown, and also Green, a defendant who was dismissed from the action in 2008). On August 8, 2009, Jones files a renewed rule 50(b) motion (thereby suspending the effect of Plaintiff's notice of appeal). The motion is granted; an amended judgment that Plaintiff take nothing against Jones is entered on

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[15] My impression is that the "expressio unius" question concerning notices of appeal arises more rarely in the criminal-appeal context than in the civil 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), and *United States v. Oberhauser*, 284 F.3d 827, 833 (8th Cir. 2002).

[16] *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).

[17] It is possible to think of variants on this hypothetical in which Jones would have reason to anticipate that the notice of appeal runs against Jones as well. For example, this would be true if one of Plaintiff's claims against Jones had been dismissed prior to trial in an order as to which no Civil Rule 54(b) judgment was entered.

September 28. Plaintiff's original notice springs into effect on September 28; see Rule 4(a)(4)(B)(i). Plaintiff does nothing to amend the August 2 notice of appeal.

In this hypothetical, should Plaintiff's notice of appeal be treated – under the proposed amendment to Rule 4(a)(4) – as encompassing a challenge to the grant of judgment as a matter of law to Jones? It is conceivable that Plaintiff may not want to appeal the judgment as a matter of law for Jones; for example, Plaintiff might conclude that such a challenge would be unlikely to succeed. However, a proponent of the proposed amendment might argue that Jones should simply assume that Plaintiff's generic notice of appeal "from the final judgment" encompasses any and all grievances that Plaintiff may have with the outcome of the case. That would certainly be true as to interlocutory orders entered prior to entry of the final judgment. For instance, defendant Green – who won summary judgment dismissing Plaintiff's claims against her in June 2008 – is considered to be on notice that the notice of appeal encompasses a challenge to that dismissal. Why should Jones be treated differently than Green?

Hypothetical Two: Same as above, except that Plaintiff's notice of appeal states that Plaintiff is appealing from "the order of January 3, 2008, dismissing Plaintiff's claims against defendant Brown." The specificity of this notice will likely lead to the conclusion that the notice of appeal does not encompass a challenge to the June 2008 dismissal of Plaintiff's claims against Green. That being so, why should the proposed Rule 4(a)(4) amendment permit that notice of appeal to encompass a challenge to the (post-judgment) dismissal of Plaintiff's claim against Jones?

If we conclude that the amendment should not, in fact, permit such a specific notice of appeal to encompass the challenge to the dismissal of the claim against Jones, the question is how to draft the rule so as to capture that insight. We have considered a few options, but we have not yet hit upon one that seems fully satisfactory.

We considered the possibility of using the phrase "a valid notice of appeal from the entire judgment" – to distinguish such a notice from notices that designate only a particular order. But Professor Cooper has aptly captured the difficulties with that language:

> We probably cannot say "original" judgment -- that would create real problems when a first entire judgment is set aside and a new judgment is later entered. But appeal can be taken from something that is not easily characterized as an "entire" judgment -- an easy example is judgment on liability, leaving attorney fees to be resolved. Although I hope it is unlikely, I suppose one of the time-suspending motions could be addressed to a Rule 54(b) judgment: is that an "entire" judgment? Suppose judgment is entered, a notice of appeal is filed on Day 2, a Rule 59 motion is timely filed, a responsive Rule 59 or other suspending motion is filed, an amended judgment is entered on one of the motions pending disposition of the other (whether or not that was a wise thing to do), the other motion leads to a further amendment of the judgment: was the original judgment an "entire"

judgment? And so on.

We also considered the possibility of tackling this issue through a requirement that the notice of appeal have designated the relevant party as an appellee, thus: "A valid notice of appeal is effective without amendment as an appeal by any party named as an appellant in the notice to appeal from an order disposing of any of the motions referred to in Rule 4(a)(4)(A) as to any party named as an appellee in the notice." But an objection to that approach is that FRAP 3 currently includes no requirement that the notice of appeal name the appellee(s).[18] Admittedly, some courts have suggested that the better practice is to name the appellee(s) in the notice of appeal.[19] But the notion that this is better practice does not necessarily provide a reason to write it into FRAP 3 across the board; such a change could sometimes lead to forfeitures of all or part of an appeal. One possible resolution might be to take an intermediate approach which (1) for general purposes, continues *not* to require the notice of appeal to name appellees; but (2) provides that a notice of appeal encompasses a later disposition of a post-judgment motion only if the notice names as an appellee any party benefited by the disposition of the post-judgment motion. Such an approach might encourage litigants to name the appellees in the notice of appeal, but would pose a risk of forfeiture only if a litigant failed to name an appellee and then sought to argue that the notice of appeal encompassed the disposition of a postjudgment motion that benefited that appellee. A cost of this approach would be the additional intricacy it would introduce into practice under Rule 4.

In sum, the "expressio unius" problem illustrates the broader conceptual question presented by this item. As Professor Cooper puts it, that question is "whether we should, as Rule 4 now does, require an amended notice of appeal. If not, how should we attempt -- if at all -- to distinguish the cases in which Jones should fairly expect to become embroiled in the appeal from those in which Jones deserves notice that the Plaintiff will continue to pursue the dispute on appeal? The idea of writing the rule in terms of reasonable expectations seems a non-starter."

III. Conclusion

As discussed in Part I, amendments to address Mr. Batalden's concern seem relatively straightforward and useful. By contrast, as explained in Part II, amendments along the lines suggested by Public Citizen and the Bar Association pose significant drafting challenges and do not seem necessary.

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[18] *See, e.g.*, *Crawford v. Roane*, 53 F.3d 750, 752 (6th Cir. 1995) ("Federal Rule of Appellate Procedure 3(c), only requires that the notice of appeal 'specify the party or parties taking the appeal,' and does not require an appellant to name appellees.").

[19] *See, e.g.*, *House v. Belford*, 956 F.2d 711, 717 (7th Cir. 1992) ("Even though courts have declined to require the appellant to name each appellee in the notice of appeal, we do not think it is good legal practice to fail to do so.").

VI. E

MEMORANDUM

DATE: October 16, 2009

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 08-AP-G

The privacy-related changes to Form 4 are on track to take effect this December 1 (absent contrary action by Congress). As the Committee discussed in April, other possible changes to Form 4 are also worth considering. In addition to the project to re-style the forms, there is also a question whether to adopt a shorter form as an alternative to (or substitute for) current Form 4. Moreover, specific issues have been raised about two questions on the current form: 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 – and Question 11 – which inquires about payments for non-attorney services in connection with the case.

This memo focuses on a particular subset of the issues concerning Questions 10 and 11 – namely, issues relating to work-product protection. In my prior memo to the Committee (a copy of which is enclosed), I suggested that to the extent that Question 11 is read to encompass payments to investigators or to experts (in particular 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.

Because it seems likely that many if not most of those who apply to appeal i.f.p. are unrepresented, one potentially relevant question is whether the scope of work product protection available to a pro se litigant differs from that available when the litigant is represented. Cases and other authorities addressing this question are rare – perhaps because pro se litigants may be less likely than lawyers are to raise claims of work-product protection.[1] But though it is possible

[1] In fact, some of the caselaw bearing on this question arises from assertions by a represented party of work product protection for material created by the party before the party retained counsel. *See, e.g.*, *Moore v. Tri-City Hosp. Authority*, 118 F.R.D. 646, 650 (N.D.Ga. 1988) ("Plaintiff has demonstrated that these entries were made in contemplation of the litigation in this particular case.... The mere fact that plaintiff's assertion of work-product includes the month and a half period before plaintiff retained counsel is not determinative.").

to find statements suggesting that the work product of pro se litigants is unprotected,[2] it seems clear that a pro se litigant's work product should be protected under Rule 26(b)(3) and the principles of *Hickman v. Taylor*, 329 U.S. 495 (1947). Moreover, it can be argued that such work product should qualify, in appropriate circumstances, for heightened protection as opinion work product.

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
>
> (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.

The work product of a pro se litigant clearly falls within the ambit of Rule 26(b)(3)(A),

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[2] One example can be found in a recent opinion by the New York County Lawyer's Association Committee on Professional Ethics addressing the question "Is an attorney ethically permitted to search metadata ... in electronic documents sent by opposing counsel, which is not in the form of a document production?" The opinion appears to suggest that one reason why searching metadata in documents provided by a pro se litigant may be less problematic is that such litigants cannot invoke the same sort of work product protection as lawyers:

> [I]f a lawyer is facing a pro se litigant and suspects that a lawyer is nonetheless drafting the pleadings for the pro se litigant, the lawyer who searches the properties to see whether a lawyer has drafted the material is not likely to uncover attorney work product or client confidences or secrets and may not be intending to uncover such material because a pro se litigant does not have the attorney work product protection.

NYCLA Committee on Professional Ethics, Opinion Number 738, Searching Inadvertently Sent Metadata in Opposing Counsel's Electronic Documents, March 24, 2008.

because that Rule refers to documents and things "prepared ... by or for [a] party or its representative." Rule 26(b)(3) dates back to the 1970 amendments to the Civil Rules, and the 1970 Committee Note sheds some light on the Rule's intended scope. *Hickman v. Taylor* had focused on *attorney* work product, and the 1970 Committee Note to Civil Rule 26 reported "confusion and disagreement as to the scope of the *Hickman* work-product doctrine, particularly whether it extends beyond work actually performed by lawyers." The cases cited in the Note suggest that the focus of that debate was not on lawyers versus pro se litigants, but rather on lawyers versus non-lawyer investigators of various types. *See* 1970 Committee Note to Civil Rule 26 (citing cases discussing FBI agents, claim agents, investigators and insurers). The Note also pointed out that under the pre-1970 framework a document request – even if it surmounted a work product objection – might founder on the "good cause" hurdle then included in Rule 34:

> A court may conclude that trial preparation materials are not work-product because not the result of lawyer's work and yet hold that they are not producible because "good cause" has not been shown.... When the decisions on "good cause" are taken into account, the weight of authority affords protection of the preparatory work of both lawyers and nonlawyers (though not necessarily to the same extent) by requiring more than a showing of relevance to secure production.

Id. Rule 26(b)(3), the Note advised,

> reflects the trend of the cases by requiring a special showing, not merely as to materials prepared by an attorney, but also as to materials prepared in anticipation of litigation or preparation for trial by or for a party or any representative acting on his behalf. The subdivision then goes on to protect against disclosure the mental impressions, conclusions, opinions, or legal theories concerning the litigation of an attorney or other representative of a party. The *Hickman* opinion drew special attention to the need for protecting an attorney against discovery of memoranda prepared from recollection of oral interviews. The courts have steadfastly safeguarded against disclosure of lawyers' mental impressions and legal theories, as well as mental impressions and subjective evaluations of investigators and claim-agents.

Though it does not appear that the drafters of the 1970 amendments were focusing on pro se litigants when they formulated Rule 26(b)(3), both the text of the Rule and its rationale support the inclusion of pro se litigants among those whose work product is protected. As a California court noted when reaching the same conclusion about California's work product provision, "[a pro se] litigant needs the same opportunity to research relevant law and to prepare his or her case without then having to give that research to an adversary making a discovery request." *Dowden v. Superior Court*, 73 Cal.App.4th 126, 133, 86 Cal.Rptr.2d 180, 185 (Cal.App. 4th Dist. 1999). Not only should the pro se litigant's work product be seen to fall

within Rule 26(b)(3)(A),[3] but one can also argue that Rule 26(b)(3)(B)'s heightened protection for opinion work product extends to the opinion work product of a pro se litigant, because that litigant is serving as his or her own attorney. The aphorism that a party should not be permitted to use wits borrowed from her adversary[4] seems all the more compelling when the adversary in question is a pro se litigant.

In some situations, a pro se litigant's dual role as advocate and witness may raise interesting questions concerning the scope of the protection. For example, a witness who uses a document to refresh his recollection while testifying in a deposition ordinarily renders the document discoverable,[5] but his lawyer's consultation of the same document during the same deposition would not. What if the witness is serving as his own lawyer?[6] Such questions may be thorny, but they seem unlikely to arise concerning the types of information that might be elicited by Form 4's Question 11. If, as seems true, work product protection extends to information that would reveal a self-represented party's litigation strategy, then in some circumstances full answers to Question 11 might reveal information that falls within that protection.

Encl.

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[3] *See, e.g.*, *Zimmerman v. Atlanta Hawks, Ltd.*, 1990 WL 58462, at *3 (N.D.Ga. Jan. 31, 1990) (holding that notes made by pro se plaintiff prior to appointment of counsel were work product and refusing to order production because defendant had failed to show substantial need).

[4] *See Hickman*, 329 U.S. at 516 (Jackson, J., joined by Frankfurter, J., concurring).

[5] *See* Fed. R. Evid. 612; John Kimpflen et al., 10 Fed. Proc., L. Ed. § 26:233 (citing cases that have held Rule 612 applicable to depositions).

[6] *See Nielsen v. Society of New York Hosp.*, 1988 WL 100197, at *2 (S.D.N.Y. Sept. 22, 1988) (pro se plaintiff's notes concerning prior portions of a deposition were protected work product as to which defendant had failed to show substantial need); *id.* (rejecting as unsupported by the record defendant's argument that plaintiff had waived the protection by using the notes to refresh his recollection while testifying, and reasoning that "If plaintiff were represented by counsel, his attorney's notes in similar circumstances would not be subject to production. A plaintiff appearing pro se is entitled to no less protection.").

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.

[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.

VI. F

MEMORANDUM

DATE: October 16, 2009

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 08-AP-L

As the Committee noted last fall, 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 (absent contrary action by Congress). 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."

Rule 6(b)(2)(A)(ii) deals 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 Appellate Rules, 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 ...."

At the fall 2008 meeting, the Committee discussed the possibility of amending Rule 6(b)(2) to eliminate the Rule's ambiguity. The Committee decided to seek the views of the Bankruptcy Rules Committee on this question. The Bankruptcy Rules Committee referred the matter to its Subcommittee on Privacy, Public Access, and Appeals. That Subcommittee considered the question during a July 2009 conference call. I enclose the Subcommittee's very informative memo detailing its reactions. At its October 2009 meeting, the Bankruptcy Rules Committee voted unanimously in support of the language change in Rule 6(b)(2)(A)(ii) proposed by the Appellate Rules Committee. It also voted unanimously to request the Appellate Rules Committee to consider the additional wording changes in Rule 6(b)(2)(A)(i) and (ii) that are noted on pp. 3-4 of the Subcommittee's memo.

As the enclosed Subcommittee memo details, the Subcommittee has made (and the Bankruptcy Rules Committee has approved) a very helpful suggestion for a further refinement to the proposal. I concur in that suggestion. In Part II of this memo, I set forth a revised version of

the proposed Rule 6 amendment that reflects the Subcommittee's guidance. In Part I, I note one other issue: the need for coordination of the possible amendments to Appellate Rule 4, Appellate Rule 6 and current Bankruptcy Rule 8015. The proposed language set forth in Part II of this memo also reflects my tentative attempt to suggest a possible path for that coordinated effort; those aspects of the proposed language will undoubtedly benefit from the further guidance of the Bankruptcy Rules Committee.

I. Coordination of possible changes to Appellate Rule 4, Appellate Rule 6 and Bankruptcy Rule 8015

As noted elsewhere in this agenda book,[1] the Civil / Appellate Subcommittee has been considering the possibility of amending Appellate Rule 4(a)(4) to clarify appeal deadlines in cases where a motion tolls the appeal time. The Rule 4(a)(4) proposal grows out of a suggestion that problems may arise in some cases because Appellate Rules 4(a)(4)(A), (B)(i) and (B)(ii) all peg timing questions to the entry of the order disposing of the last remaining tolling motion, and they do not take account of the possibility that time may elapse between that order and any ensuing amendment or alteration of the judgment.[2] If the Appellate Rules Committee were to adopt an amendment in response to that concern, it might alter Rule 4(a)(4)(B)(ii)'s wording to run the appeal time "from the latest of entry of the order disposing of the last such remaining motion or, if a motion's disposition results in alteration or amendment of the judgment, entry of any altered or amended judgment." Similar changes would be made to Rules 4(a)(4)(A) and 4(a)(4)(B)(i). Such amendments, if adopted, might raise a question as to whether the wording of Appellate Rule 6(b)(2)(A)(i) and (ii) should be amended in similar fashion.

Because the full Appellate Rules Committee has not yet considered the Rule 4(a)(4) proposals, it has seemed premature to ask the Bankruptcy Rules Committee to consider this question at this time. But going forward, it is clear that the two Committees will need to coordinate their approaches to this question. This is particularly true because current Bankruptcy Rule 8015 explicitly addresses the question of appeal time – and does so in a way that is at odds with current Appellate Rule 6(b)(2)(A).

Bankruptcy Rule 8015 currently provides that "[u]nless 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

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[1] See the memo on Item Nos. 08-AP-D, 08-AP-E, and 08-AP-F.

[2] Such time delays might arise, for example, where remittitur is ordered or where the court directs the parties to draft a proposed judgment in a case involving complex injunctive relief.

of a subsequent judgment."[3] Appellate Rule 6(b)(2)(A)(i) currently provides in part that "[i]f 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." Thus, oddly, both of these rules purport to set the point from which the re-started appeal time runs, and the two rules specify what may (in some cases) turn out to be two different points in time. That is to say, in cases where the order granting rehearing is entered on Day X and the resulting amended judgment is entered on Day X + 20, Appellate Rule 6(b)(2)(A) currently tells us that the appeal time runs from Day X yet Bankruptcy Rule 8015 tells us that the appeal time runs from Day X + 20.

Bankruptcy Rule 8015, as it now stands, avoids the timing problem that is currently present in both Appellate Rule 6(b)(2)(A) and Appellate Rule 4(a)(4): in cases where there is a time lag between entry of an order granting rehearing and the subsequent entry of a resulting amended judgment, Bankruptcy Rule 8015 pegs the appeal time to the latter point. As a policy matter, this is salutary. As a matter of current doctrine, it is problematic because it conflicts with Appellate Rule 6(b)(2)(A), which pegs appeal time to the former point.

One question might be whether Bankruptcy Rule 8015 needs to address this question at all. As a point of comparison, Civil Rules 50, 52 and 59 do not address the question of when appeal time re-starts after disposition of a tolling motion. In any event, if Bankruptcy Rule 8015 (or any successor provision) continues to address this point, it makes sense to ensure that it does so in wording that precisely parallels the formula selected for Appellate Rule 6(b)(2)(A).

Another question might be whether the problem that has led the Civil / Appellate Subcommittee to recommend amending Rule 4(a)(4) is equally likely to arise in the context of bankruptcy appeals. It would be useful to obtain the guidance of the Bankruptcy Rules Committee concerning the likelihood that there would be a time lag between entry of an order granting rehearing under Bankruptcy Rule 8015 and entry of any resulting amended judgment. If the possibility of such a time lag exists in bankruptcy practice, then it seems worthwhile to consider mirroring (in Appellate Rule 6(b)(2)(A) and Bankruptcy Rule 8015) the approach proposed to be taken in Appellate Rule 4(a)(4). If there are reasons why such a time lag would not arise in the context of bankruptcy appeals, then perhaps there is less need for Appellate Rule 6(b)(2)(A) and Bankruptcy Rule 8015 to track the approach taken (with respect to this issue) in Appellate Rule 4(a)(4).

An effort to coordinate the Rules' language is especially timely given that – as noted elsewhere in this agenda book – the Bankruptcy Rules Committee is currently considering a

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[3] Absent contrary action by Congress, on December 1, 2009, Rule 8015's 10-day period will become a 14-day period as part of the time-computation changes. The 2009 amendments also have apparently changed the ending of Rule 8015, which will conclude "or the entry of subsequent judgment" rather than (as currently) "or the entry of **a** subsequent judgment" (emphasis added). The latter change does not appear to be intended to make a substantive difference.

project to revise Part VIII of the Bankruptcy Rules. In the most recent iteration of that project, Bankruptcy Rule 8015 would become Bankruptcy Rule 8022. Proposed Bankruptcy Rule 8022(b) would read as follows: "If a timely motion for rehearing is filed, the time for appeal to the court of appeals for all parties runs from the entry of the order denying rehearing or the entry of a subsequent judgment on appeal." Obviously, Appellate Rule 6's reference to Bankruptcy Rule 8015 would require revision if Rule 8015 becomes Rule 8022. And if the time-lag concerns noted above can in fact arise in the context of bankruptcy appeals, then it is to be hoped that the language ultimately chosen for proposed Bankruptcy Rule 8022(b) and Appellate Rule 6(b)(2)(A) will be precisely parallel.

II. Language for a proposed amendment to Appellate Rule 6

Here is a sketch of language for a possible amendment to Appellate Rule 6. This proposed language tracks the approach currently taken in the proposed amendments to Appellate Rule 4(a)(4) as delineated by the Civil / Appellate Subcommittee. The language shown here does not precisely conform to the approach in current Bankruptcy Rule 8015 or proposed Bankruptcy Rule 8022; therefore, further collaboration with the Bankruptcy Rules Committee will be necessary in order to ensure that changes are made in one or both sets of rules so as to achieve consistency. The language below merely represents a tentative proposal that is designed to serve as a possible basis for further discussion by both Committees.

Rule 6. Appeal in a Bankruptcy Case From a Final Judgment, Order, or Decree of a District Court or Bankruptcy Appellate Panel

* * *

(b) Appeal From a Judgment, Order, or Decree of a District Court or Bankruptcy Appellate Panel Exercising Appellate Jurisdiction in a Bankruptcy Case.

* * *

(2) Additional Rules. In addition to the rules made applicable by Rule 6(b)(1), the following rules apply:

(A) Motion for rehearing.

(i) If a timely motion for rehearing under Bankruptcy Rule ~~8015~~ [8022] is filed, the time to appeal for all parties runs from the latest of entry of the order disposing of the last such remaining motion or, if a motion's disposition results in alteration or amendment of the judgment, entry of any altered or amended judgment. A notice of appeal filed after the district court or bankruptcy appellate

panel announces or enters a judgment, order, or decree--but before disposition of the motion for rehearing--becomes effective ~~when~~ upon the latest of entry of the order disposing of the last such remaining motion ~~for rehearing is entered~~ or, if a motion's disposition results in alteration or amendment of the judgment, entry of any altered or amended judgment.

(ii) ~~Appellate review of~~ A party intending to challenge the order disposing of the motion – or the alteration or amendment of a judgment, order, or decree upon such a motion – ~~requires the party, in compliance with Rules 3(c) and 6(b)(1)(B), to amend a previously filed notice of appeal. A party intending to challenge an altered or amended judgment, order, or decree~~ must file a notice of appeal, or an amended notice of appeal, in compliance with Rules 3(c) and 6(b)(1)(B). The notice or amended notice must be filed within the time prescribed by Rule 4 – excluding Rules 4(a)(4) and ~~4~~(b) – measured from the latest of entry of the order disposing of the last such remaining motion or, if a motion's disposition results in alteration or amendment of the judgment, entry of any altered or amended judgment.

* * *

Committee Note

Subdivision (b)(2)(A). Subdivision (b)(2)(A) is amended so that it more closely parallels the approach taken in Rule 4(a)(4). Rule 4(a)(4)(A) currently provides that if a timely motion of certain listed types is filed, the time to appeal runs for all parties from the entry of the order disposing of the last such remaining motion. Rules 4(a)(4)(B)(i) and (ii) also contain timing provisions that depend on the date of entry of the order disposing of the last such remaining motion. These three subdivisions of Rule 4(a)(4) are now being amended to make clear that if one of those tolling motions results in the alteration or amendment of the judgment, the relevant date is the latest of the entry of any altered or amended judgment or the entry of the order disposing of the last remaining tolling motion. A similar timing issue arises with respect to Rule 6(b)(2)(A); accordingly, that Rule is also amended to make clear that if a rehearing motion under Bankruptcy Rule [8022] results in an alteration or amendment of the judgment, the relevant date is the latest of the entry of any altered or amended judgment or the entry of the order disposing of the last remaining timely rehearing motion.

Subdivision (b)(2)(A)(ii) is also amended to address problems that stemmed from the adoption — during the 1998 restyling project — of language referring to challenges to "an altered or amended judgment, order, or decree." Current 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 …." Before the 1998 restyling, 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 1998 restyling made a

similar change in Rule 4(a)(4). One court has explained that the 1998 amendment introduced ambiguity into that Rule: "The new formulation could be read to expand the obligation to file an amended notice to circumstances where the ruling on the post-trial motion alters the prior judgment in an insignificant manner or in a manner favorable to the appellant, even though the appeal is not directed against the alteration of the judgment." *Sorensen v. City of New York*, 413 F.3d 292, 296 n.2 (2d Cir. 2005). Though the *Sorensen* court was writing of Rule 4(a)(4), a similar concern arises with respect to Rule 6(b)(2)(A)(ii). Rule 4(a)(4) [was amended in 2009] to remove the ambiguity identified by the *Sorensen* court. The current amendment follows suit by removing Rule 6(b)(2)(A)(ii)'s reference to challenging "an altered or amended judgment, order, or decree," and referring instead to challenging "the alteration or amendment of a judgment, order, or decree."

III. Conclusion

The concurrent projects to revise Appellate Rule 4(a)(4), Appellate Rule 6 and Part VIII of the Bankruptcy Rules have significant synergies. One such synergy, as discussed in this memo, is that these projects provide the opportunity to rationalize the Rules' treatment of timing when a rehearing motion under Bankruptcy Rule 8015 tolls the time to take an appeal to the court of appeals from a district court or bankruptcy appellate panel exercising appellate jurisdiction in a bankruptcy case. At the same time, Appellate Rule 6(b)(2)(A)(ii) can also be amended to remove the ambiguity that initially drew the Committee's attention.

Encl.

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON PRIVACY, PUBLIC ACCESS, AND APPEALS

RE: SUGGESTED AMENDMENT OF FRAP 6(b)(2)(A)(ii)

DATE: AUGUST 18, 2009

The Advisory Committee on Appellate Rules has asked for the views of this Advisory Committee on a possible change to FRAP 6(b)(2)(A), which governs a bankruptcy appeal to the court of appeals following the disposition of a motion for rehearing in a district court or a bankruptcy appellate panel. The Subcommittee considered this matter during its July 1, 2009, conference call, and it recommends that the Advisory Committee express its support for the Appellate Rules Committee's proposed amendment. It does, however, suggest that some additional wording changes be considered for inclusion in the amendment. The current version of Appellate Rule 6(b)(2)(A) is attached to this memorandum as Attachment A.

The proposed amendment would change the wording of Rule 6(b)(2)(A)(ii) to eliminate an ambiguity that was unintentionally introduced by the restyling of the appellate rules. The reference to a challenge to "an altered or amended judgment, order, or decree" would be changed to a challenge to "the alteration or amendment of a judgment, order, or decree." Thus, as amended, Rule 6(b)(2)(A)(ii) would read as follows (with the Appellate Rules Committee's proposed changes indicated):

> (ii) ~~Appellate review of~~ A party intending to challenge the order disposing of the motion – or the alteration or amendment of a judgment, order, or decree upon such a motion – ~~requires the party, in compliance with Rules 3(c) and 6(b)(1)(B),~~

~~to amend a previously filed notice of appeal. A party intending to challenge an altered or amended judgment, order, or decree~~ must file a notice of appeal, or an amended notice of appeal, in compliance with Rules 3(c) and 6(b)(1)(B). The notice or amended notice must be filed within the time prescribed by Rule 4 – excluding Rules 4(a)(4) and ~~4~~(b) – measured from the entry of the order disposing of the motion.

As is explained in more detail in the attached memo by Professor Struve, reporter to the Appellate Rules Committee, this change would track an amendment to the parallel provision of FRAP 4(a)(4)(B)(ii) that is scheduled to go into effect on December 1, 2009. Other changes to FRAP 6(b)(2)(A)(ii) are proposed in order to make the wording of the rule more consistent with the parallel Rule 4 provision.

The Subcommittee supports the amendment proposed by the Appellate Rules Advisory Committee. It would eliminate an ambiguity that has raised questions under FRAP 4(a)(4)(B)(ii) – whether the filing of an amended notice of appeal is required when a party is appealing from a judgment or order that is altered or amended in some insignificant or favorable manner – and would restore to Rule 6 the clear meaning of its pre-restyled version. It would also eliminate any suggestion that Rule 6 is intended to operate differently than the parallel Rule 4 provision.

In the course of its discussions, the Subcommittee noted that, even as amended, Appellate Rule 6(b)(2)(A)(ii) would differ in wording from the parallel Appellate Rule 4(a)(4)(B)(ii). The latter rule provides that the time for appealing from an order disposing of one of the listed post-trial motions or the alteration or amendment of a judgment runs from "the entry of the order disposing of the last such remaining motion." Rule 6(b)(2)(A)(ii), by contrast, measures the time

for filing a notice of appeal from "the entry of the order disposing of the motion." The same wording difference exists with respect to Rule 4(a)(4)(B)(i) and Rule 6(b)(2)(A)(i). The Subcommittee noted that Rule 4(a)(4) applies to several types of post-trial motions, whereas Rule 6(b)(2)(A) only applies to motions for rehearing, and that might be the source of the difference in wording of the two rules. Nevertheless, because more than one motion for rehearing could be filed in a bankruptcy appeal, the Subcommittee suggests that the time for filing a notice of appeal under Rule 6(b)(2)(A)(i) and (ii) run from the entry of the last order disposing of any such motion.

The actual wording of any amendment to Appellate Rule 6 should be left up to the Appellate Rules Committee. Nevertheless, the Subcommittee recommends that, in addition to conveying its support for the proposed amendment to Appellate Rule 6(b)(2)(A)(ii), the Advisory Committee also suggest that the Appellate Rules Committee consider the additional changes to Rule 6(b)(2)(A)(i) and (ii) that are highlighted below:

> (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 last such remaining motion. A notice of appeal filed after the district court or bankruptcy appellate panel announces or enters a judgment, order, or decree—but before disposition of allthe motions for rehearing—becomes effective when the order disposing of the last such remaining motion for rehearing is entered.
>
> (ii) ~~Appellate review of~~ A party intending to challenge the order disposing of the motion – or the alteration or amendment of a judgment, order, or decree upon such a motion – ~~requires the party, in compliance with Rules 3(c) and 6(b)(1)(B),~~

~~to amend a previously filed notice of appeal. A party intending to challenge an altered or amended judgment, order, or decree~~ must file a notice of appeal, or an amended notice of appeal, in compliance with Rules 3(c) and 6(b)(1)(B). The notice or amended notice must be filed within the time prescribed by Rule 4 – excluding Rules 4(a)(4) and ~~4~~(b) – measured from the entry of the order disposing of the last such remaining motion.

If the Advisory Committee on Appellate Rules agrees with the additional wording change suggested above, a similar change should be proposed to Bankruptcy Rule 8015. It currently provides: "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." Any such change can be considered as part of the Part VIII rules revision project.

Attachment A

Rule 6. Appeal in a Bankruptcy Case from a Final Judgment, Order, or Decree of a District Court or Bankruptcy Appellate Panel

* * * * *

(b) Appeal From a Judgment, Order, or Decree of a District Court or Bankruptcy Appellate Panel Exercising Appellate Jurisdiction in a Bankruptcy Case.

* * * * *

(2) **Additional Rules.** In addition to the rules made applicable by Rule 6(b)(1), the following rules apply:

(A) **Motion for rehearing.**

(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. A notice of appeal filed after the district court or bankruptcy appellate panel announces or enters a judgment, order, or decree—but before disposition of the motion for rehearing—becomes effective when the order disposing of the motion for rehearing is entered.

(ii) Appellate review of the order disposing of the motion requires the party, in compliance with Rules 3(c) and 6(b)(1)(B), to amend a previously filed notice of

appeal. 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—excluding Rules 4(a)(4) and 4(b)—measured from the entry of the order disposing of the motion.

(iii) No additional fee is required to file an amended notice.

Attachment B

MEMORANDUM

DATE: October 20, 2008

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 08-AP-L

A pending amendment will remove an ambiguity in Rule 4(a)(4) that was pointed out in *Sorensen v. City of New York*, 413 F.3d 292 (2d Cir. 2005). The amendment was approved by the Judicial Conference in September; if the Supreme Court approves it and Congress takes no action to the contrary, the amendment will 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.

As *Sorensen* explains: "The [restyled] formulation could be read to expand the obligation to file an amended notice to circumstances where the ruling on the post-trial motion alters the prior judgment in an insignificant manner or in a manner favorable to the appellant, even though the appeal is not directed against the alteration of the judgment." *Sorensen v. City of New York*, 413 F.3d 292, 296 n.2 (2d Cir. 2005). The pending amendment removes that ambiguous reference to "a judgment altered or amended upon" a post-trial motion, and refers instead to "a judgment's alteration or amendment" upon such a motion.

During the course of research this summer, I 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 ...."

Part I of this memo briefly reviews the history of Rule 6(b)(2) and suggests 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). Part II suggests possible language for such an amendment.

I. The history of Rule 6(b)(2)

The substance of current Rule 6(b)(2) came into the Rule in 1993, when the Rule was amended to read in relevant part:

> If any party files a timely motion for rehearing under Bankruptcy Rule 8015 in the district court or the bankruptcy appellate panel, the time for appeal to the court of appeals for all parties runs from the entry of the order disposing of the motion. A notice of appeal filed after announcement or entry of the district court's or bankruptcy appellate panel's judgment, order, or decree, but before disposition of the motion for rehearing, is ineffective until the date of the entry of the order disposing of the motion for rehearing. Appellate review of the order disposing of the motion requires the party, in compliance with Appellate Rules 3(c) and 6(b)(1)(ii), to amend a previously filed notice of appeal. A party intending to challenge an alteration or amendment of the judgment, order, or decree shall file an amended notice of appeal within the time prescribed by Rule 4, excluding 4(a)(4) and 4(b), measured from the entry of the order disposing of the motion. No additional fees will be required for filing the amended notice.

The Note indicates that this language was intended to track the language of Rule 4(a)(4). As amended in 1993, Rule 4(a)(4) then read in relevant part:

> If any party makes a timely motion of a type specified immediately below, the time for appeal for all parties runs from the entry of the order disposing of the last such motion outstanding. .... A notice of appeal filed after announcement or entry of the judgment but before disposition of any of the above motions is ineffective to

> appeal from the judgment or order, or part thereof, specified in the notice of appeal, until the date of the entry of the order disposing of the last such motion outstanding. Appellate review of an order disposing of any of the above motions requires the party, in compliance with Appellate Rule 3(c), to amend a previously filed notice of appeal. A party intending to challenge an alteration or amendment of the judgment shall file an amended notice of appeal within the time prescribed by this Rule 4 measured from the entry of the order disposing of the last such motion outstanding. No additional fees will be required for filing an amended notice.

Thus, prior to 1998, the relevant language in Rules 4(a)(4) and 6(b) was parallel. In 1998, the restyling condensed two of the Rule 4(a)(4) sentences into one ("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.") but the drafters did not attempt the same thing with Rule 6. The restyling also introduced into both Rule 4(a)(4) and Rule 6(b)(2) the ambiguity mentioned above.

Accordingly, current Rule 6(b)(2)(A)(ii) reads:

> (ii) Appellate review of the order disposing of the motion requires the party, in compliance with Rules 3(c) and 6(b)(1)(B), to amend a previously filed notice of appeal. 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 – excluding Rules 4(a)(4) and 4(b) – measured from the entry of the order disposing of the motion.

Removing the ambiguity in Rule 6(b)(2)(A)(ii) would seem to be worthwhile for the same reasons that justify the pending amendment to Rule 4(a)(4)(B)(ii). If the Committee decides to amend Rule 6(b)(2)(A)(ii), it may also wish to consider amending the provision's first sentence so that it tracks more closely the approach taken in Rule 4(a)(4)(B)(ii). Unless there is a reason for the two provisions to diverge, it seems preferable for their language to be as similar as possible. In addition, the first sentence of current Rule 6(b)(2)(A)(ii) might strike the reader as odd because it seems to assume that there has been a previously filed notice of appeal: It refers only to amending the prior notice, and not also to filing a new notice. Admittedly, common sense would dictate that if a notice has not previously been filed, one is required in order to challenge the order disposing of the Bankruptcy Rule 8015 motion. But there would seem to be no reason not to

refer to both possibilities (i.e., to both filing a notice of appeal and amending a prior notice of appeal), as is currently done in Rule 4(a)(4)(B)(ii) and the second sentence of Rule 6(b)(2)(A)(ii).

II. A possible amendment to Rule 6(b)(2)(A)(ii)

In case the Committee is inclined to consider amending Rule 6(b)(2)(A)(ii), here is possible language for such an amendment:

> (ii) ~~Appellate review of~~ A party intending to challenge the order disposing of the motion – or the alteration or amendment of a judgment, order, or decree upon such a motion – ~~requires the party, in compliance with Rules 3(c) and 6(b)(1)(B), to amend a previously filed notice of appeal. A party intending to challenge an altered or amended judgment, order, or decree~~ must file a notice of appeal, or an amended notice of appeal, in compliance with Rules 3(c) and 6(b)(1)(B). The notice or amended notice must be filed within the time prescribed by Rule 4 – excluding Rules 4(a)(4) and ~~4~~(b) – measured from the entry of the order disposing of the motion.
>
> **Committee Note**
>
> **Subdivision (b)(2)(A)(ii).** Subdivision (b)(2)(A)(ii) is amended to address problems that stemmed from the adoption — during the 1998 restyling project — of language referring to challenges to "an altered or amended judgment, order, or decree." Current 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 ...." Before the 1998 restyling, 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 1998 restyling made a similar change in Rule 4(a)(4). One court has explained that the 1998 amendment introduced ambiguity into that Rule: "The new formulation could be read to expand the obligation to file an amended notice to circumstances where the ruling on the post-trial motion alters the prior judgment in an insignificant manner or in a manner favorable to the appellant, even though the appeal is not directed against the

alteration of the judgment." *Sorensen v. City of New York*, 413 F.3d 292, 296 n.2 (2d Cir. 2005). Though the *Sorensen* court was writing of Rule 4(a)(4), a similar concern arises with respect to Rule 6(b)(2)(A)(ii).

Rule 4(a)(4) [was amended in 2009] to remove the ambiguity identified by the *Sorensen* court. The current amendment follows suit by removing Rule 6(b)(2)(A)(ii)'s reference to challenging "an altered or amended judgment, order, or decree," and referring instead to challenging "the alteration or amendment of a judgment, order, or decree." The amendment also revises the Rule so that it more closely parallels the language of Rule 4(a)(4)(B)(ii).

VI. G

MEMORANDUM

DATE: October 16, 2009

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 08-AP-P

At the spring 2009 meeting, the Committee discussed Peder Batalden's suggestion that Rule 32 be amended to provide for 1.5-spaced briefs rather than double-spaced briefs. As the minutes reflect, participants expressed diverse views. In addition to discussing line spacing, some participants raised the possibility of permitting double-sided printing. In turn, it was noted that permitting double-sided printing would raise questions concerning how briefs should be bound. The question was raised whether the shift to electronic filing would, in time, decrease the importance of these issues – though one participant responded that judges are likely to continue to require hard copies for the foreseeable future. Participants noted that many judges and lawyers have strong views on these questions, and the issue of permitting local variation was raised. No firm conclusions were reached, and the Committee retained this item on the study agenda.

After the meeting, John Rabiej asked James Ishida to review the history of the proposed amendments to Rule 32.[1] John reports:

> I asked James to review our records and extract excerpts dealing with proposed amendments to Rule 32, which would have required double-sided printing of briefs. As noted by James, the amendment was rejected after public comment for three main reasons: (1) double-sided printing may leave the brief illegible, especially if passages are highlighted by law clerks in yellow; (2) judges and law clerks use the blank pages to annotate or write comments; and (3) any environmental savings would be offset by the need to use heavier stock paper to prevent "bleedthrough," which would make the briefs less legible.

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[1] As noted in my prior memo, 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. An amended version of the proposal was published for comment in 1993. A third version of the proposal was published for comment in 1994. When, in 1995, the Appellate Rules Committee submitted a further revised draft to the Standing Committee, the Standing Committee sent it back to the Appellate Rules Committee for further study. Yet another draft was published for comment in 1996, and after comment and some revision, this draft ultimately gained approval and took effect in 1998.

Thirty-one commentators objected to the double-sided printing. The majority were judges, including: Judges Aldisert, Baldock, Birch, Bowman, Browning, Canby, Edmondson, Farris, Feinberg, Gibson, Luttig, Mahoney, Mayer, David Nelson, Dorothy Nelson, Thomas Nelson, Noonan, Reinhardt, Stapleton, and Suhrheinlich. All the public comments can be found in the June 5, 1995, Appellate Rules Committee report to the Standing Committee.

I enclose James' very helpful memo of May 20, 2009, detailing the history of the consideration of the double-sided printing issue. I also enclose relevant excerpts from the Appellate Rules Committee's June 5, 1995 report.

Encls.

Proposed Rules Amendments re Double-Sided Printing

Appellate Rules

December 1992 - Appellate Rules Committee recommended publishing for public comment numerous changes to Appellate Rule 32. The changes — which included limitations on the number of characters per inch, method for binding briefs, printing of briefs and appendices — did not include double-siding printing.

December 1992 - Standing Committee approved the proposed amendment for publication.

December 1992 - Proposed amendment published for public comment.

April 1993 - In light of the public comments, the Advisory Committee made substantial changes to the proposed amendment and recommended republishing it. Again, no changes were proposed re double-sided printing.

June 1993 - Standing Committee approved the revised amendment and request to republish.

October 1993 - Revised amendment published for public comment.

April 1994 - Witnesses from the publishing and computer industries testified at the advisory committee meeting.

May 1994 - Advisory Committee made additional changes to the published rule amendment, including, for the first time, a provision allowing double-sided printing in briefs so long as the brief is clear and legible. The new revision is in response to several comments received during the second public comment period. Several committee members noted, however, that their circuits had local rules specifically prohibiting double-sided briefs. A motion was made to remove the double-sided language, leaving the rule silent on the issue of single or double-sided printing. The motion was defeated by a vote of 3-5, leaving the double-sided provision in the draft rule amendment.

The Advisory Committee also recommended that the proposed rule amendment be republished.

June 1994 - Standing Committee approved republication.

April 1995 - Advisory Committee reviewed comments on the proposed amendment and made further revisions, including the elimination of double-sided printing. The Advisory Committee noted 31 commentators opposed double-siding printing because: (1) double-sided printing may leave the brief illegible, (2) many judges and law clerks use the blank page to annotate or write notes, and (3) any environmental savings by using double-sided printing will be offset by the need to use heavier weighted paper in order to meet the legibility requirement in the proposed amendment.

The Advisory Committee not only removed language permitting double-sided printing, but it also added language to the rule and committee note that specifically stated only one side of the paper may be used for the brief. The single-page requirement is still in the current rule.

Civil Rules

November 1995 - Civil Rules Committee placed on its study calendar a proposal requiring that all papers filed in the district court be on recycled paper and printed double-sided.

Criminal Rules

April 1992 - Criminal Rules Committee considered a request from the Environmental Defense Fund to amend various rules of practice and procedure "to require that only double-sided, unbleached paper, be used for all court documents." The Advisory Committee unanimously agreed to communicate to the EDF that its proposal was being considered by other Judicial Conference committees.

In 2000, the Court Administration and Case Management Committee eventually took up a proposal that would require the use of recycled paper for all court filings. The proposal was based on the fact that both the executive and legislative branches have enacted laws and policies to encourage the use of recycled paper, as well as the fact that some federal and state courts have established rules requiring the use of recycled paper. CACM ultimately decided not to pursue the proposal on jurisdictional grounds. ("The Committee was of the opinion that while paper recycling was a laudatory goal, a rule or policy requiring filings to be submitted on recycled paper was beyond the scope of the Committee's jurisdiction.")

May 20, 2009

SUMMARY
OF COMMENTS RECEIVED ON PROPOSED AMENDMENTS TO RULES 28 AND 32

1. Rule 28

Only two comments were specifically aimed at Rule 28. Because of the interrelationship of the changes in Rule 28 and 32, most commentators combined their discussion of the two rules. Because the "substance" of the change is contained in Rule 32, all issues except those specifically addressing Rule 28 are treated with Rule 32.

One commentator suggests that subdivision (g) should be shown as "reserved" in order to preserve the current labels for the remaining subdivisions.

Public Citizen suggests amendment of subdivision (h) to make it clear that when there is more than one appellant or appellee, a court of appeals cannot require the filing of a joint brief. At its September 1993 meeting the Advisory Committee rejected a proposal that each side file a single brief in a consolidated or multi-party appeal, but the Committee had not considered the wisdom of prohibiting a court from requiring a joint brief. No change was made.

2. Rule 32

The Committee received a total of sixty-nine comments on the proposed amendments to Rule 32. Most of them deal with discreet provisions without expressing either general support for or opposition to the amendments as a whole. Six of the comments, however, expressed support for the amendments and the general approach taken by them and 11 comments stated general opposition. The commentators who oppose the rule amendments typically criticize the complexity of the proposed rule and its technical nature.

The vast majority of comments were directed at specific provisions. The most commonly addressed issues are outlined below.

a. Proportional type

Nine commentators expressed opposition to the use of proportional type. Another 15 commentators would delete the preference for proportional type. Most of these commentators state that proportional type is too difficult to read.

Twenty-seven commentators say that if proportional type is permitted, it should be required to be larger than 12 point. Most of the commentators say that it should be at least 14 or 15 point.

One commentator specifically supports the preference for proportional typeface because use of a proportional typeface makes it possible to fit more material on a single page and there will be a resulting environmental savings.

b. Monospaced type

The commentators who oppose use of proportional type, as well as those who would delete the preference for proportional type, prefer monospaced type. 19 commentators say that the monospaced type permitted under the rule should have no more than 10 characters per inch, the equivalent of pica type on a standard typewriter.

c. Double-sided printing

Thirty-one commentators oppose double-sided printing. A major concern is legibility even though the rule permits double-sided printing only when the brief is legible. Several commentators point out, however, that even if a brief is legible when submitted by the party, once the user of the brief highlights portions and takes notes on the brief there may be bleed through that destroys legibility. Another concern is that the back-side is currently used by many judges and law clerks for notetaking. Several of the opponents point out that any environmental saving that might result from use of fewer sheets of paper is likely to be offset by the use of heavier weight paper needed to meet the legibility requirement.

One commentator supports double-sided printing specifically because of the environmental savings.

d. Length limitations

Twelve commentators specifically oppose use of word limitations (both total words per brief and average number of words per page); one other opposes

applying word limits to *pro se* litigants proceeding *in forma pauperis*. Another five commentators implicitly reject the word limitations by saying that the rule should use page limits. Various reasons are given for the opposition. Some oppose word counts because not all lawyers have computers or office machinery that will perform the counting function. Others oppose the counts because of the time and effort that will be used to comply with a rule that they think is unnecessarily technical. Still others worry about the fact that different word-processing systems count words differently.

Eight commentators support the use of word limits as the most straightforward way to address the "cheating" that is currently a problem. Three of these commentators, however, recommend that the rule define a "word" in an effort to minimize the variation in word counting as performed by various computer programs. One commentator favors a character count rather than a word count because it eliminates the variations resulting from the different counting methods used by software programs.

Seven commentators object to what they believe is a shortening of brief length. They state that the word limitations in the published rule shorten briefs. The Ninth Circuit Advisory Committee on Rules and the Los Angeles County Bar Association Appellate Courts Committee, both recommend that the total number of words be raised to 14,000 for a principal brief and 7,000 for a reply brief, but that the average number of words per page remain at no more than 280. Judge Easterbrook recommends that the total number of words be increased to 14,500 per brief and that the average number of words per page be no more than 320. The National Association of Criminal Defense Lawyers recommends increasing both the word limits and the safe harbors by 10%.

Several commentators also state that the safe harbors are too restrictive.

Three commentators object to the requirement that a brief include a certification that it does not exceed either the total word count or the limit on average number of words per page. They find the requirement demeaning.

e. Use of decisions retrieved electronically

Seven commentators object to that portion of the Committee Note stating that decisions retrieved electronically from Lexis or Westlaw may not be included in an appendix. The commentators note that if citation to an opinion that is either unpublished or not yet published is permitted, inclusion of the opinion as retrieved from Lexis or Westlaw may be the only pragmatic way to provide the

court with a copy of the opinion. Because of the delay in publication of advance sheets and the slow response time to requests for copies of slip opinions, the electronically retrieved opinion may be all that the party can obtain. The restriction could deprive the litigants and the court of the opportunity to use the most current precedent. Moreover, the ability to "download" opinions and print them on high quality laser printers can eliminate legibility problems.

f. Miscellaneous "technical" matters.

Five commentators oppose requiring different margins depending upon whether a brief is prepared with monospaced or proportional type.

Four oppose the requirement that a brief lie flat when open. One approves the requirement but requests further guidance as to the type of binding that is acceptable. One commentator suggests that the rule should require spiral binding for all 8-1/2 by 11 inch briefs.

Six commentators recommend deleting the requirement that the print have a resolution of 300 dots per inch or more. The commentators believe that the requirement is too technical and that requiring "legibility" is sufficient.

2. Rule 32

The published amendments changed Rule 32 in several significant ways. The published rule would permit a brief to be produced using either a monospaced typeface or a proportionately spaced typeface, although the rule expressed a preference for the latter. Monospaced and proportionately spaced typefaces were defined in the rule. Margins were specified for different paper sizes and different typefaces.

The proposed rule established new length limitations for briefs. A principal brief would be limited to a total of 12,500 words and a reply brief could not exceed 6,250 words. In addition, the average number of words per page could not exceed 280 words. The latter limitation was included to ensure that the typeface used would be sufficiently large to be easily legible.

1. Honorable Ruggero J. Aldisert
United States Circuit Judge
6144 Calle Real
Santa Barbara, California 93117-2053

Given the caseload crises in the United States Courts of Appeals, Judge Aldisert states that any rule amendment should be designed to assist the judges. He believes that certain portions of the proposed amendments do not pass that test. He states that the rule should prohibit the use of proportionately spaced typeface because it is too difficult to read, but that if proportional type is used, the point size should be greater than 12. He objects to brief length being measured by number of words because it will be more difficult for court personnel to monitor. His strongest objection is to authorizing double-sided printing of briefs. Judge Aldisert uses the reverse side of the pages for his notes.

Specifically Judge Aldisert suggests that a monospaced typeface be not more than 10 characters per inch. He also suggests that brief lengths be expressed in number of pages and that a principal brief should be no more than 35 pages.

2. American Bar Association
Section of Litigation
750 North Lake Shore Drive
Chicago, Illinois 60611

The section disagrees with and proposed changes to (a)(1)-(6), (a)(7), and (b)(2).

With regard to (a)(1)-(6) the section disagrees with the substance and mechanics used to curtail the ability of lawyers to circumvent the current page limits.

a. The section opposes (a)(6) stating that it effectively shorten the maximum length of a brief from 50 to 44 pages. The sections emphasizes that a party appearing before a court of appeals has a right to present all of his or her non-frivolous arguments to the court.

b. The section believes that the paragraphs (a)(1)-(6) are unduly confusing, hard to follow, and will be even more difficult to administer. The section cites the differing margin requirements depending upon the typeface used as illustrative. The section further notes that many word processors do not have word counting capabilities and that many pro se litigants and small firms still use typewriters. The section recommends a simpler solution such as keeping the current margin and page length requirements and requiring that all briefs not commercially printed be produced in 11-point, 10 character per inch Courier. As an alternative, it suggests the Fifth Circuit Rules 28.1 and 32.1, which allows proportional fonts but is relatively easy to follow and administer.

With regard to (a)(7), the section opposes the restrictive language in the Committee note regarding legibility of documents to be included in an appendix. The section believes that simply requiring "legibility" is sufficient and that the additional requirements of the note should not be added to the rule and that the language of the note should be stricken. The section points out that in many cases, the "original" document in the record is a copy. Sometimes the record document is a copy of a fax. Similarly, Westlaw and Lexis opinions can be retrieved on printers that produce a 300 dot per inch resolution in double column format.

With regard to (b)(2), the section notes that neither the text nor the note indicate whether the length limitations apply to "other papers." The section

recommends that, at a minimum, the rule should refer to Rule 40(b), which prescribes a 15-page limit for a petition for rehearing.

3. State Bar of Arizona
111 West Monroe, Suite 1800
Phoenix, Arizona 85003-1742

The State Bar of Arizona has no objections to and foresees no particular difficulties with the proposed amendments.

4. Stewart A. Baker, Esquire
Steptoe & Johnson
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036-1795

Notes that it is difficult to read long lines of proportionally spaced type. He suggests that if the words per page limit is a subtle way of requiring the use of larger margins, the rule should be more direct.

5. Honorable Bobby R. Baldock
United States Circuit Judge
Post Office Box 2388
Roswell, New Mexico 88202

Judge Baldock prefers 14 point proportional type to either 12 point proportional type (which he characterizes as the least desirable) or monospaced type with at least 10 characters per inch. Judge Baldock also objects to double-sided printing.

6. Honorable Stanley F. Birch, JR.
United States Circuit Judge
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Judge Birch joins in the remarks of Judge Edmondson (see summary below).

7. Honorable Michael Boudin
United States Circuit Judge
J.W. McCormack Post Office and
Courthouse
Boston, Massachusetts 02109

Judge Boudin questions the replacement of the 50/25-page length limitations for principal and reply briefs by the new provisions governing typeface, words per page, and total number of words. He believes the new provisions are unduly complicated and will be especially burdensome for solo and small firm practitioners. He recognizes that there probably should be different page limits for printed and typewritten briefs but would otherwise simply include in the rule an admonishment that "any devices that appear unreasonably designed to crowd more than an ordinary number of words into the page limits may subject the brief to rejection, or requirement of refiling in proper form, or (in egregious cases) other sanctions. He also suggests that it is unnecessary to require an appendix to lie flat when open.

8. Honorable Pasco M. Bowman
United States Circuit Judge
819 U.S. Courthouse
Kansas City, Missouri 64106

Judge Bowman prefers monospaced type and suggests deleting the preference for either monospaced type or proportional type. He also suggests that the rule require 14 or 15 point proportional type rather than 12. He notes that the use of 12 point proportional type can result in considerably more words per page than the 280 word maximum in the proposed rule. With regard to monospaced type he questions why a maximum of 11 characters per inch is specified when the most common monospaced typefaces have only 10 characters per inch. He questions whether double-sided printing is a good idea.

9. Honorable James R. Browning
United States Circuit Judge
121 Spear Street
Post Office Box 193939
San Francisco, California 94119-3939

Judge Browning prefers single-sided briefs. He prefers monospaced

typeface; if the rule permits proportionately spaced typeface, he believes that it should be larger than 12 point. With regard to monospaced typeface, he suggests that 10 characters per inch should be the minimum.

10. The State Bar of California
The Committee on Appellate Courts
555 Franklin Street
San Francisco, California 94102-4498

The committee opposes using a word count to limit the length of a brief and reducing the length of a brief from 50 pages to 44.6 (12,500 words per brief divided by 280 words per page). The committee says that many law firms do not have the capability of counting words using their word processing equipment and the safe harbors cause too significant loss in length. The committee also opposes the prohibition on using Lexis and Westlaw printouts in an appendix. The committee further notes that two-sided briefs are difficult to read and that common brief bindings generally do not lie flat.

11. The State Bar of California
The Committee on Federal Courts
555 Franklin Street
San Francisco, California 94102-4498

The committee states that the word limits are "a very bad idea." They believe that the cost exacted by the change is too great. Time will be wasted simply on compliance with a format requirement. Many attorney's offices do not have equipment that will count words and even automated counting will be unduly time consuming. The committee prefers the current page limits but would find a total word limit, without per-page limits, more palatable. The safe-harbor alternatives are not palatable.

The committee opposes the prohibition on use of Lexis and Westlaw printouts in an appendix. If necessary, the rule simply should require that the printouts be legible.

12. Honorable William C. Canby, Jr.
United States Circuit Judge
6445 United States Courthouse
230 N. First Avenue
Phoenix, Arizona 85025

Judge Canby states that double-spaced pica type is far easier to read than proportionately spaced type in 12, 14, or even 15 point type. Judge Canby urges the committee to require monospaced type with 10 characters per inch. If, however, the rule continues to allow proportionately spaced type, it should be 14 point type. He would not, however, say "at least 14 points" because footnotes are difficult to read at 14 points and even more difficult at 15 points. Judge Canby also urges reconsideration of the two-sided brief.

13. Aaron H. Caplan, Esquire
on behalf of the Law Firm Waste Reduction Network
Perkins Coie
1201 Third Avenue, 40th Floor
Seattle, Washington 98101-3099

Mr. Caplan writes on behalf of the Law Firm Waste Reduction Network, an affiliation of attorneys and staff from among Seattle's larger law firms. The group writes in support of those portions of the proposed rule permitting the use of both sides of the page and encouraging the use of proportionately spaced typefaces. The group also proposes that the committee consider encouraging the use of recycled content paper for submissions to the courts of appeals.

The group calls double-sided printing both environmentally beneficial and cost-effective. They note that legibility is not an objection because the rule already takes legibility into account. Note taking, they say, is not a problem because commercially printed briefs are double-sided and there should not be a different standard when briefs are produced in-house.

With regard to recycled content paper, the group says that the states of Florida, New York and Colorado permit papers submitted to their courts on recycled-content paper and that Michigan and Washington have similar proposals under consideration. The group also notes that Executive Order 12873 requires the use of recycled paper by the administration. The group states that recycled-content paper is comparable to most types of

nonrecycled paper in terms of quality, function, availability, and price and requires no changes in office machinery. They argue that mandating recycled-content paper for important appellate documents would have a ripple effect making the use of such paper acceptable generally in the practice of law, a profession that uses a great deal of paper products.

14. Chicago Council of Lawyers
Federal Courts Committee
One Quincy Court Building, Suite 800
220 South State Street
Chicago, Illinois 60604

The Federal Courts Committee of the Chicago Council of Lawyers supports the goal of setting a national standard for typeface and other requirements, "to clear the tangle of contradictory local rules."

The committee, however, opposes replacing the current page limits with the proposed word count. The committee believes that overlong briefs are usually the product of either poor writing style or the courts' insistence that all issues be fully briefed, on pain of waiver.

The committee also opposes the requirement that only "printed court or agency decision[s]" be included in an appendix. The committee points out that very often district court opinions are not printed at all. Even as to those that are "printed" there is a lag time of two to three weeks before incoming slip opinions are available in the federal court library and that West advance sheets run a full month to two months behind decision dates. The restriction would deprive the reviewing court of the benefit of the most recent, on-point authority.

15. Clerks of the United States Courts of Appeals for
D.C. Circuit and the First through Eleventh Circuits

The primary concern of the clerks is that the rule be one that can realistically be enforced by deputy clerks and easily understood and abided by litigants. Specifically, the clerks state:

a. Legibility is crucial, but they question the need to require a "resolution of 300 dots per inch." How would a deputy clerk clearly identify a possible violation?
b. They suggest deletion of the preference for proportional type.

c. They are concerned about the requirement that a typeface design be serifed, Roman, text style. Given the large variety of type styles, they are concerned about enforceability and about fairness to those who have invested in alternatives.

d. They prefer a single margin requirement rather than varying the margins depending upon whether monospaced or proportional type is used.

e. Paragraphs (a)(4) and (5), dealing with boldface and underlining or italicizing case names, unnecessarily limit formatting discretion and provide more detail than is necessary in a national rule.

f. They support the use of word counts for defining the length of a brief provided the certification by the litigant can be relied upon for purposes of filing. They suggest that it might be helpful to create a form certification as an appendix to the rules.

16. Competitive Enterprise Institute
1001 Connecticut Avenue, N.W., Suite 1250
Washington, D.C. 20036

The institute opposes double-sided printing and, anticipating that the Advisory Committee will receive suggestions that it mandate the use of recycled paper, mandating the use of recycled paper. The institute does not believe that such measures will have any significant environmental benefits. Among other factors the institute provides statistics about the pollutants generated in recycling paper.

17. Peter W. Davis, Esquire, Chair
Ninth Circuit Advisory Committee on
Rules of Practice
Crosby, Hearey, Roach & May
1999 Harrison Street
Oakland, California 94612

The Ninth Circuit committee generally favors the approach taken in the proposed revisions and supports the basic concepts: that there be distinct provisions for proportionately spaced type in contrast to monospaced type, and that the length of proportionately spaced briefs be calculated by a "word-count" method.

The committee favors the word-count method because it removes the incentive to cram words on a page or otherwise "cheat" on a page limit.

The one objection to word counting that troubled the committee is that various word processing systems count differently so that the total will vary depending on the system used. They believe that the difference can be more than 200 words for a 35 page brief (or the equivalent of a three-quarters of a page). Even so, the committee believes that the benefits of the rule outweigh its drawbacks and that it should be adopted.

The committee made a number of suggestions for "fine-tuning" the rule.

a. In paragraph (a)(1) the committee believes that the 300 dots per inch requirement is too technical and that requiring "a clear black image" is sufficient.

b. The committee also suggests that only single-sided printing be permitted.

c. In paragraph (a)(2) the committee questions whether there is a uniform preference for proportional typefaces.

d. In subsections (a)(2)(A) and (B), the committee recommends that the rule require proportional fonts to be 14 points rather than 12. The committee also believes that defining proportional and monospaced type in terms of "advance widths" may not be understood by many practitioners and suggests more reader-friendly definitions. The committee suggests that proportionately spaced type could be defined as that having "characters of different widths" and that monospaced type could be defined as that having "characters of the same width." The committee also suggests deleting the reference in the rule to particular type style examples. The committee does not believe that it is necessary to require serifed styles to ensure readability. Finally, the committee believes that monospaced type should be 10 characters per inch rather than 11.

e. In subsection (a)(3)(A), the committee would use a single margin requirement for all briefs.

f. In subsection (a)(3)(B), the committee would eliminate the option of using 6-1/8 by 9-1/4 inch paper.

g. The committee believes that paragraphs (a)(4) and (5) impinge unnecessarily on formatting discretion.

h. With regard to paragraph (a)(6), the committee recommends that the permissible number of words be increased from 12,500 (6,250 for a reply brief) to 14,000 (7,000). A brief containing 14,000 words

would be 50 pages in length if the average number of words per page is 280. The committee would eliminate the "safe harbor" exception from the certificate of compliance because it is overly complicated and burdensome to enforce. The committee believes that a word count is the better approach for all proportionately spaced briefs.

With regard to monospaced briefs, the committee believes that litigants may use excessive single-spaced footnotes to circumvent the limitation on length. The committee recommends, therefore, that any monospaced principal brief exceeding 40 pages (or reply brief exceeding 20 pages) should be subject to the average words per page and maximum words per brief rule as well as the certificate of compliance requirement.

i. In paragraph (a)(7), the committee suggests that the volumes of an appendix be limited to 300 pages each.

j. The committee suggests that paragraph (a)(8) prohibit plastic covers on briefs.

k. In paragraph (a)(9), the committee suggests that requiring a brief to "lie flat" may be too restrictive and suggests that it might be better to require that it "stay open" or "lie reasonably flat when open."

18. The Bar Association of the District of Columbia
Litigation Committee and its Subcommittee on Court Rules
1819 H. Street, N.W., 12th Floor
Washington, D.C. 20006

Although the Litigation Committee agrees that there should be a uniform national standard for appellate briefs, one that will preempt local rules on the subject, the committee believes that the existing provisions in Rules 28 and 32 dealing with the length and form of a brief are sufficient to accomplish the Advisory Committee's goals of ensuring that all litigants have an equal opportunity to present their material and that the documents are easily legible. The Litigation Committee opposes the proposed revisions for several reasons. The committee objects in general to the complexity of the proposed revisions. The committee objects to the complexity not only because of the burdens ordinarily accompanying any complex rule, but also because, in this case, the complexity "suggests that lawyers have an improper attitude and simply cannot be trusted." The Litigation Committee urges the courts of appeals "simply to respect the integrity of the bar to comply with present requirements." If the Standing Committee, however, believes that a word count is necessary to curtail

"cheating," the Litigation Committee suggests that a word count alone is a sufficient limitation.

Specifically, the Litigation Committee notes that some long-time practitioners on the committee did not understand the requirement that a font be "serifed, roman, text style" and that even the distinction between "monospaced" and "proportionately" spaced typeface eluded some members of the committee. The committee questions the propriety of including examples of acceptable typefaces in the rule, calling them "a virtual advertisement for a product sold by those who drafted and testified in favor of the rule." The committee questions the need to vary the margin sizes depending upon whether a typeface is monospaced or proportionately spaced.

The committee states that the complexity of the rule will make court evaluation of compliance difficult. The committee notes the need for the litigants to certify the total and average word counts. The committee states that the rule's reliance upon the party's representation as to compliance demonstrates the superfluousness of the rule. The committee objects to reliance upon the word count derived from the word processing system used to prepare the brief because different systems count differently.

The committee believes that the 300 dots per inch minimum is unnecessary (in light of the requirement that text be a "clear black image") and that court determination of compliance will be difficult. If the judgment is that it is important to keep the 300 dpi standard, the Litigation Committee believes that it should be moved from the text of the rule to the note so that the rule will not become outdated by technological changes.

The Litigation Committee also objects to the requirement that a brief lie flat when open.

Finally, the committee objects to the requirement that only "printed court or agency decisions" may be included in an appendix. The committee states that if an unpublished decision may be cited, a party should be permitted to use the decisions in the form normally obtained from Lexis, Westlaw, or the courthouse database through the Internet. The committee argues that "[s]ometimes, an electronically retrieved version of a decision is far more legible than an nth-generation photocopy that is the only 'original' available to a party."

19. District of Columbia Bar
Section on Courts, Lawyers and the Administration of Justice
Anthony C. Epstein, Co-chair
Jenner & Block
601 Thirteenth Street, N.W., Suite 1200
Washington, D. C. 20005

The section agrees that the length of a brief and other papers should be primarily governed by limits on the number of words and by general rules concerning the layout of pages. The section states that the proposed amendments are, however, too detailed and will be confusing to those not versed in typographic issues. Specifically, the section states:

a. The requirement of "a clear black image on white paper" is sufficient; there is no need for the "300 dots per inch" standard.

b. The rule should not require a certification of compliance. The rule could provide that by filing a brief, an attorney certifies that the brief complies with the rule. The certification requirement is "implicitly demeaning to the integrity and professionalism of lawyers." The rules do not otherwise require certification of compliance even when a violation may not be obvious from the face of a document.

20. Honorable Frank H. Easterbrook
United States Circuit Judge
219 South Dearborn Street
Chicago, Illinois 60604

Judge Easterbrook states that the proposed amendments are a substantial step forward but he suggests a number of additional amendments.

a. He suggests that the copies of faxes and Lexis printouts should not be includible in an appendix. He believes that the appropriate step would be to permit inclusion of a document in an appendix only if the original has 300 dots per inch or better.

b. To aid a judge with vision difficulties, the rule should require lawyers to retain electronic copies of any brief composed on a computer so that the courts by local rule, or order in particular cases, may call for the briefs and other papers in electronic form. This would permit a judge to enlarge the text on a computer screen, print it in a larger size on a local printer, or even have it read aloud by a computer equipped to do so. He does not suggest that the rule require routine filing of disks.

c. He continues to believe that the rule should adopt character rather than word limits.

d. He is concerned that the conversion from pages to words has substantially curtailed the maximum length of a brief from the old 50-page rule. The proposed rule establishes a maximum of 12,500 words per brief and an average of 280 words per page. Using five briefs submitted to the Supreme Court (printed, of course) he found that the number of words in a 50 page printed brief would ordinarily be at least 14,000 and may be almost as high as 16,900. He also found that a 50 page typewritten brief produced in 12 point Courier also has significantly more than 12,500 words. Using one inch margins all around his document had 13,875 words (counted by Microsoft Word) and using the smallest margins allowed by the current rule 14,543 words. Setting the same brief in an easily read proportional typeface and using the margins in the proposed rule, his document had 16,333 words in 50 pages. The average words per page in the printed briefs varied from a low of 283 to a high of 338. The typewritten brief in 12 point Courier had 277.5 words per page with the one inch margins and 290.1 words per page with the smaller margins. The brief with proportional typeface had 326.7 words per page.
As previously stated, Judge Easterbrook prefers a character count to a word count. His examples show that there is less variation in character count from one word-processing package to another than there is using a word count.

In a later comment, Judge Easterbrook responds to the comments of the Ninth Circuit Advisory Committee on Rules. He agrees with many aspects of the comment and differs with others. Specifically he responds as follows:

a. He rejects the suggestion that the rule define how to count a word as not feasible. He prefers a character count because it eliminates the disparity in word count approaches across software packages, but if a character count is rejected he believes we simply must live with the variation from package to package as to word count.

b. The 300 dot per inch may be too technical, but rather than delete it he would offer more explanation in the committee note.

c. Double-sided printing is fine but he agrees that the rule should require 20 pound paper (or heavier) to prevent bleed through.

d. The preference for proportional type should be retained. "The current prejudice against it by some judges may be traced to its use

as a cheating device. From here on, only legibility counts."

e. The minimum point size may stay at 12. "Once typographical tricks have been eliminated as a means to squeeze more words into a brief, lawyers will begin to appreciate how type can be used for persuasion. A brief set in Adobe Garamond ought to be 13-point; a brief set in Berthold Baskerville ought to be 12-point; if we try to give a table of these things we'll end up in a swamp."

f. The term "advance widths" can be abandoned in favor of the proposed definitions of "characters of different widths" and "characters of the same width" for proportional and monospaced type.

g. Examples of typefaces do not belong in the text of the rule but would be helpful in the committee note.

h. It is essential to limit proportionally spaced fonts to those with serifs. A sans serif font is tiring to read in longer passages.

i. The reason the rule requires a monospaced font to have no more than 11 characters per inch (cpi) rather than 10 cpi is that some of the monospaced fonts built into printers yield about 10-1/4 or 10-1/2 cpi when printed at 12 point but when printed at 13 point, they look too large. Perhaps the rule could say that 10 cpi is strongly preferred and that no more than 10-1/2 cpi are allowed.

j. The reason for wider side margins for proportionally spaced type is that it is less readable in lines that reach 6-1/2 inches.

k. It would not be a big loss to abandon the pamphlet brief.

l. Boldface generally should be prohibited and case names should be in italic unless that is impossible.

m. The word limits should be increased to 14,500 per principal brief and no more than 320 word per page. The safe-harbors are designed for simplicity and should be retained. Judge Easterbrook agrees that the rule might limit the safe harbor for monospaced briefs to 40 pages to ward off the excessive use of footnotes.

n. Appendix volumes exceeding 300 pages are not troublesome.

o. Plastic covers are not problematic but Judge Easterbrook dislikes plastic backs, but is not convinced that either should be the subject of rulemaking.

p. Requiring a brief to "stay open" or "lie reasonably flat when open" would do the trick without compelling everyone to use spiral binders.

21. Honorable J.L. Edmondson
United States Circuit Judge
Room 416, 56 Forsyth Street
Atlanta, Georgia 30303

Judge Edmondson strongly objects to typeface as small as 12 point. If proportionately-spaced typeface is allowed, he believes that 15 point type should be required. If monospaced typeface is used, he believes that at least ten characters per inch should be the standard but he prefers even fewer than 10 characters per inch. Judge Edmondson also objects to double-sided briefs. He further objects to single spacing footnotes that contain more than simple citations to authority.

22. Honorable Jerome Farris
United States Circuit Judge
United States Courthouse
1010 5th Avenue
Seattle, Washington 98104

Judge Farris objects to printing text on both sides of the page. He also objects to use of proportionately spaced type. He further objects to the word counts; they will be difficult for a person using a typewriter. He suggests that the 11 characters per inch be changed to 10 characters per inch which is standard for typewriters.

23. Honorable Wilfred Feinberg
United States Circuit Judge
United States Courthouse
Foley Square
New York, New York 10007

Judge Feinberg opposes double-sided briefs. He suggests that the rule should specify that a monospaced typeface may have no more than 10 characters per inch. He further suggests that proportional typeface should be prohibited rather than preferred but if it is permitted it should be at least 14 point type.

24. Honorable Floyd R. Gibson
United States Circuit Judge
837 United States Courthouse
811 Grand Avenue
Kansas City, Missouri 64106-1991

Judge Gibson objects to the use of 12 point proportional type; he finds monospaced, pica (10 characters per inch) much easier to read. He also questions permitting double-sided printing unless it can be done without the imprint on one side of the page interfering with the characters on the other side of the page.

25. Joseph A. Halpern, Elizabeth A. Phelan, & Heather R. Hanneman, Esquires
Holland & Hart
555 Seventeenth Street, Suite 2900
Denver, Colorado 80202-3979

Mr. Halpern, et al, oppose the substitution of a word limitation for a page limitation even though they recognize the desirability of minimizing creative evasions of page limitations and the need for uniformity and legibility of briefs. They point out that gamesmanship will continue with a word limitation. They note that different word processing systems, and even different versions of the same system, count "words" differently. They performed a word-count on the same 50 page brief and found that Word Perfect 5.1 counted 12,436 words, MicroSoft Word 6.0 counted 12,850, and WordPerfect Windows 6.1 counted 13,011 words. Given the difference in word counting functions, Mr. Halpern concludes that a certificate concerning word count will be meaningless. Other gamesmanship opportunities exist; lawyers may eliminate parallel citations, shorten case names in citations, or use typographical characters that do not count as words, such as "7" instead of "seven." Finally they note that a word limitation is onerous for parties that do not have access to word processing systems.

Mr. Halpern, Ms. Phelan, and Ms. Hanneman recommend that Rule 32 limit the length of a brief by (1) using a page limitation; (2) specifying a minimum point size; and (3) specifying acceptable typefaces for briefs.

26. Honorable Shirley M. Hufstedler
Hufstedler & Kaus
Thirty-Ninth Floor
355 South Grand Avenue
Los Angeles, California 90071-3101

Judge Hufstedler objects to the revisions for a variety of reasons including that they will require conscientious lawyers to spend unjustifiable amounts of time trying to comply. She does not believe that the benefits to the judges are significant enough to justify the increased cost to litigants.

Judge Hufstedler also object to shortening the length of appellate briefs; she believes that shortening the length will actually increase the work for courts of appeals because there will be more motions to file oversized brief and difficult factual situations and hard questions of law will not be effectively explained if the length in inappropriately shortened. She does not believe that shorter briefs are more efficient or conducive to quality decision making.

Judge Hufstedler also challenges the apparent assumption that every lawyer who files a brief in a federal appellate court is computer literate and has available to him or her the kind of equipment that permits ready compliance with the revised rule.

27. Honorable Procter Hug, Jr.
United States Circuit Judge
50 W. Liberty Street, Suite 800
Reno, Nevada 89501

Judge Hug objects to permitting the use of 12 point proportional type to prepare a brief. He believes that it is too difficult to read. He thinks that the use of monospaced pica, 10 character per inch, should be encouraged, if not mandated. If proportional type is permitted it should not be smaller than 15 point type.

28. Sandra S. Ikuta, Esquire
O'Melveny & Myers
400 South Hope Street
Los Angeles, California 90071-2899

Ms. Ikuta believes that 12 point type is too small to be easily read. She

also believes that proportional type is less readable than monospaced type, especially in footnotes.
She recommends monospaced typeface of 10 characters per inch on single-sided pages. The preferred typeface should be 15 point type.

29. Lawrence A. G. Johnson
Johnson & Swenson
2535 East 21st Street
Tulsa, Oklahoma 74114

Mr. Johnson suggests that Rule 32 should permit a brief writer to petition a court for permission to scan pertinent photographs and documentary evidence into the body of brief and that such items should be exempt from the page limits.

30. P. Michael Jung, Esquire
Strasburger & Price, L.L.P.
901 Main Street, Suite 4300
Dallas, Texas 73202

Mr. Jung suggests that 32(a)(7) should permit inclusion in an appendix of any court or agency decision, whether printed or not. Unprinted decisions, available only in electronic or manuscript form, may well be those whose inclusion is most helpful to the court.

31. Brett M. Kavanaugh, Esquire
2727 29th Street, N.W. #134
Washington, D.C. 20008

Mr. Kavanaugh believes that the rule should require, or at least encourage, monospaced typeface. At a minimum, he states, the rule should not state a preference for proportionately spaced typeface.

Mr. Kavanaugh further suggests that if proportionately spaced typeface is to be allowed, the rule should require a 14 or 15 point type.

Mr. Kavanaugh suggests that the rule should prohibit double-sided briefs except for "printed" briefs.

With regard to the requirement that a brief be bound so that it lies flat when open, Mr. Kavanaugh suggests that the rule require spiral binding for

all 8-1/2 by 11-inch briefs.

32. Mr. Kevin M. Kelly
1800 Avenue of the Stars
Suite 500
Los Angeles, California 90067

Mr. Kelly objects to double-sided printing of briefs. He also objects to the use of 12 point proportional type. He finds 12 point type difficult to read especially if certain small fonts (such as CG Times) are used. He recommends use of 14 or 15 point proportional typeface but would favor stating a preference for monospaced type.

33. Kelly M. Klaus, Esquire
Wilson Sonsini Goodrich & Rosati
650 Page Mill Road
Palo Alto, California 94304-1050

As a general matter Mr. Klaus questions the need to amend Rule 32. She believes that the existing rule has the virtues of brevity and flexibility and that the proposed rule is unduly complex and will result in an increase in motions to strike portions of brief that allegedly fail to comply with the rule. Specifically, with regard to double-sided briefs, Ms. Klaus notes that even though the rule required that counsel's finished product be legible, that highlighting and notetaking on the brief by judges and law clerks will likely bleed through the paper causing legibility problems. Ms. Klaus also objects to the preference for proportionately spaced typeface. She suggests that monospaced type be preferred or even required and that the rule specify a maximum of 10 characters per inch rather than 11.

34. Associate Professor Michael S. Knoll
The Law Center
University of Southern California
University Park
Los Angeles, California 90089-0071

Professor Knoll suggests that the rule should omit the preference for proportional type and encourage the use of monospaced type because it is easier to read. He also believes that lawyers could abuse the 12 point proportional font option and attempt to press more words into their documents using the safe harbor provisions in (a)(6)(A). If proportional

type is permitted, he believes the rule should require 14 or 15 point type. He also objects to double-sided briefs.

35. Stephen A. Kroft, Esquire
McDermott, Will & Emery
2049 Century Park East
Los Angeles, California 90067-3208

Mr. Kroft does not believe that the proposed amendments will materially improve the legibility of appellate briefs but that the amendments may create unnecessary difficulties. He favors monospaced type, specifically courier pica (10 characters per inch) because he finds it easier to read. He states that 12 point proportional type is not only more difficult to read, but it results in many more than 280 words per page. He would prefer 40 page briefs in courier pica type rather than 35 page briefs in 12 point proportional type. If proportional type is to be encouraged, he suggests that it be no smaller than 15 point type. He does not favor double-sided printing.

36. Honorable Pierre N. Leval
United States Circuit Judge
United States Courthouse
Foley Square
New York, New York 10007

Judge Leval notes that word counts may be impractical for pro se litigants proceeding in forma pauperis. He believes that pro se litigants proceeding in forma pauperis should be exempted from the word count and be subject, instead, to page limits.

37. Los Angeles Chapter of the Federal Bar Association
Section on Appellate Practice

The section endorses the work and comments of the Ninth Circuit Advisory Committee on Rules of Practice. The section also urges that the rule provide guidance as to the criteria by which "words" will be defined for purposes of applying the word count limitation. The section suggests that citations (including parallel citations and citations to the record) be counted as a single word.

38. Los Angeles County Bar Association
Appellate Courts Committee
617 South Olive Street
Los Angeles, California 90014-1605

The Appellate Courts Committee of the Los Angeles County Bar Association agrees that the word count approach will greatly further the purposes of the rule. The committee states that use of a word count will level the playing field and eliminate the "cheating" now possible by playing font and spacing games. The committee is concerned, however, about the number of words and the ways a word is counted. The committee recommends that the count be raised to 14,000 and 7,000 (from 12,500 and 6,250). The committee also recommends that the rule define a "word" so that practitioners will know how to count a "word." The committee also suggests that all requirements pertaining to one format category of brief should be contained under a single heading rather than requiring the reader to jump from subsection to subsection to find all applicable requirements.

The committee offers the following suggestions:

a. Double-sided reproduction should be encouraged but heavier weight paper should be required to avoid bleed-through.
b. The rule might have an appendix that provides samples of approved typefaces, samples of approved type sizes, and a chart summarizing all of the various requirements.
c. The rule might specify a standardized format for brief covers, including a list of all required information and the order in which it is to be displayed. The methods, manner and style of page numbering should be specified. It might be helpful to prescribe a standardized set of titles for various briefs.
d. The margins should be the same regardless of style of typeface.
e. Pamphlet-sized briefs can be eliminated.
f. Additional format and style parameters might be set forth as "preferred."
g. A single rule should be used to define the format of all papers rather than having separate rules for briefs, motions, etc.
h. Type size and line spacing of footnotes should be the same as the text.

39. Honorable J. Michael Luttig
United States Circuit Judge
United States Court of Appeals for
the Fourth Circuit

Judge Luttig opposes the use of proportional typeface in briefs; he also opposes double-sided briefs. If the rule allows proportional type, he recommends that it require either 14 or 15 point type. He also states that for monospaced type, the standard should be 10 characters per inch.

40. Gordon MacDougall, Esquire
1025 Connecticut Avenue, N.W.
Washington, D.C. 20036

Mr. MacDougall states that Rule 32 should stay "as is." He states that the proposal eliminates the use of a typewriter. He suggests that a resolution of 300 dots is not needed in a national rule. He states that a national rule in inappropriate on the matter of two-sided briefs. He opposes the preference for proportionately spaced typeface. He would not change the margins. He states that the elimination of the 50 page rule would work a hardship on those required to count words or else be confined to 40 pages. He opposes the requirements that the case number be positioned at the top of the cover and that counsel's telephone numbers appear on the cover. He also opposes the "lie flat" requirement for binding briefs and appendices.

41. Honorable J. Daniel Mahoney
United States Circuit Judge
55 Red Bush Lane
Milford, Connecticut 06460

Judge Mahoney finds monospaced type easier to read than proportionately spaced typeface. He suggested that proportional typeface should be 14 or 15 point and that monospaced type should be no more than 10 characters per inch. Judge Mahoney opposes double-sided printing of briefs.

42. Honorable H. Robert Mayer
United States Circuit Judge
United States Court of Appeals for
the Federal Circuit
Washington, D.C. 20439

Judge Mayer opposes double-sided printing. He also objects to the preference for proportionately spaced typefaces and would change the definition of monospaced typeface to specify no more than 10 characters per inch. Judge Mayer also suggests that proportionately spaced typeface should be at least 14 point.

43. State Bar of Michigan
United States Courts Committee
Richard Bisio
Honigman Miller Schwartz and Cohn
2290 First National Building
Detroit, Michigan 48226-3583

The United States Courts Committee of the State Bar of Michigan opposes the detailed regulation of brief format in the proposed amendments. The committee proposes that the first paragraph of present Rule 32(a) be retained with a modification specifying a minimum type size and that the current page limits of Rule 28(g) be retained (a redraft is provided). The committee believes that the increased time and expense of compliance with and enforcement of the detailed provisions in the proposed amendments will outweigh the marginal increase in readability or any other advantages. The committee also suggests that paragraph 32(a)(7) of the proposed rule be modified to permit use in an appendix of copies of electronically retrieved opinions when they are not readily available from other sources.

44. Kathleen L. Millian, Esquire
Terris, Pravlik & Wagner
1121 12th Street, N.W.
Washington, D.C. 20005-4632

Ms. Millian requests that the Committee consider allowing submissions on non-white recycled paper. Rule 32(a) states that all briefs must be submitted on white paper. Ms. Millian notes that recycled paper with a high content of post-consumer waste is usually gray-tone or off-white and requests that the rule be amended to allow non-white recycled paper. She

states that the fact that the paper is not white does not affect its durability or readability.

45. John S. Moore, Esquire
Valikanje, Moore & Shore, Inc., P.S.
405 East Lincoln Avenue
P.O. Box C2550
Yakima, Washington 98907

Mr. Moore disapproves of the changes in Rule 28 and 32. He states that it "[w]ill take a specialist to spend time to make certain that compliance has been achieved."

46. Jesse A. Moorman, Esquire
Wood & Moorman
808 North Spring Street, Suite 614
Los Angeles, California 90012

Mr. Moorman says that the definition of "proportionately spaced typeface" is not clear and that using the term "advance width" may not even follow the conventions of the typesetting community. He also comments that the omission of "Times Roman" or "Times New Roman" from the examples may be confusing because they are widely available in Windows.

Mr. Moorman likes the idea of a brief "lying flat" but wants more guidance as to what is acceptable.

47. National Association of Criminal Defense Lawyers
1627 K Street, N.W.
Washington, D. C. 20006

The association makes a number of comments.

a. It appreciates the simple yet flexible manner in which the rule would accommodate both proportional and monospaced typefaces, by adjusting margin width. It also appreciates the receding on the question of single-spaced footnotes and headings.
b. The association supports the abolition of Rule 28(g) and in particular its local option provision but notes that the committee note should make it clear that local options would be invalid under the revised rule.
c. The association supports the change to a word count but opposes

the reduction in brief length that results from the 12,500 word limitation (at 280 words per page, 45 pages) and the 40 page safe harbor length. The association opposes the reduction. The association "emphatically" urges the committee to add 10% to each of the proposed word counts and safe harbor page counts.

d. The association finds the certification of compliance "demeaning overkill."

e. The association supports the provision permitting a petition for rehearing or suggestion for rehearing in banc to be produced with simple binding and without a cover.

48. Honorable David A. Nelson
United States Circuit Judge
Potter Stewart U.S. Courthouse
100 E. 5th Street
Cincinnati, Ohio 45202-3988

Judge Nelson opposes double-sided briefs and suggests that if the issue is addressed at all that the rule state that the use of both sides is not encouraged. He thinks that 12 point proportionately spaced typeface is too small for the safe harbor. He also opposes the word-count provisions because not all lawyers have equipment capable of performing automatic word counts.

49. Honorable Dorothy W. Nelson
United States Circuit Judge
125 South Grand Avenue, Suite 303
Pasadena, California 91105

Judge Nelson objects to the use of proportionately spaced typeface and suggests that its use be prohibited. If it is permitted, she suggests that at least 14, and preferable 15, point type be required. She notes that 12 point type typically produces between 400 and 450 words per page, far more than the 280 words per page permitted under the rule. Judge Nelson also objects to double-sided briefs.

50. Honorable Thomas G. Nelson
United States Circuit Judge
Post Office Box 1339
304 North Eighth Street
Boise, Idaho 83701-1339

Judge Nelson suggests that Rule 32 should require monospaced typeface and since 10 characters per inch is most commonly used, the rules should use 10 rather than 11. If monospaced typeface is not required, Judge Nelson suggests that the rule should express a preference for monospaced typeface.

Judge Nelson does not believe that the word limit will protect the readability of a brief. He suggests discarding the word limit and tightening the safe harbor provisions and using them as the standards for brief preparation. He suggests limiting the allowable line per page on an 8-1/2 by 11-inch page, having no footnotes, to 28 lines. Footnotes should be double-spaced and in the same typeface as the body of the brief. He believes that, if footnotes cannot be used as a length extender, their use will decline. If double-spaced footnotes are unacceptable, he suggests that footnotes be limited to an average of three lines per page, or 105 lines in a 35-page brief. If proportionately spaced typeface is permitted, the minimum size should be 15 point.

In additional, Judge Nelson suggests that the Committee limit a principal brief to no more than 35 pages regardless of the typeface used and a reply brief to 15 pages.

He objects to double-sided printing.

51. New Jersey State Bar Association
One Constitution Square
New Brunswick, New Jersey 08901-1500

The association opposes the word-count approach because it may be more difficult for practitioners to follow and particularly difficult for pro se litigants and others without sophisticated word processing programs. In light of typeface and margin requirements, the association believes that page limits can be used.

52. Ninth Circuit Senior Advisory Board
comments forwarded by Mr. Mark Mendenhall
Assistant Circuit Executive
United States Courts for the Ninth Circuit
121 Spear Street, Suite 204
Post Office Box 193846
San Francisco, California 94119-3846

The Senior Advisory Board is a body of distinguished, experienced senior counsel who provide advice and guidance to the Ninth Circuit Judicial Council and the Ninth Circuit Judicial Conference. The board opposes the proposed amendments for several reasons. The board does not believe that the amendment will help the courts or save them time. The board suggests that the proposed amendments violate the following general principles about rulemaking: appellate rules should provide general guidance and direction to assist the lawyers and the courts and should not be rigid or tied to a particular state of technology; rules should not prohibit accommodation to local needs and conditions, nor should national rules attempt to micromanage regional court operations. Specifically, the board states that specifying computer printer resolution, limiting the length of a brief to a specified number of words, and specifying typeface and spacing are too rigid for a national rule. The board believes that the rule makes an arbitrary 40% reduction in the maximum brief length (from 50 to 30 pages) and questions whether the committee had adequate information upon which to base the change. If 30 pages is inadequate to provide the judges with sufficient information, the board believes that the limitation may delay the decisionmaking process.

53. Honorable John T. Noonan, Jr.
United States Circuit Judge
121 Spear Street
P.O. Box 193939
San Francisco, California 94119-3939

Judge Noonan objects to double-sided printing of briefs.

54. Associate Professor Julie Rose O'Sullivan
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, D.C. 20001-2075

She believes that the rule should prohibit the use of proportional type but that if it is permitted, the rule should require 14 or 15 point type. She also objects to double-sided briefs.

55. Mr. Patrick D. Otto
Mohave Community College
1971 Jagerson Avenue
Kingman, Arizona 86401

Mr. Otto agrees with the proposed amendments.

56. Public Citizen Litigation Group
2000 P Street, N.W., Suite 700
Washington, D.C. 20036

Public Citizen has a number of comments on the proposed amendments.

a. As to 32(a)(2)(A), the terms "roman style" or "text" style should be explained either in the rule or the note.

b. As to 32(a)(4), the rule should not forbid use of bold type for emphasis.

c. As to 32(a)(6), Public Citizen in not averse to the use of a word limit rather than a page limit if the committee is determined to "fix" this "problem" although they state that lawyers will find ways to stretch a word limit. Public Citizen "object[s] strenuously," however, to the "substantial cut in the permissible length of briefs." With 280 words per page, the maximum size of a principal brief would be 44-1/2 pages. Examining several briefs containing fewer than 90% of the applicable page limits (on the assumption that none of such briefs would have been manipulated to comply with length limitations), Public Citizen found that no brief averaged as few as 250 words per page. The average ranged from a low of 254 words per page to a high of 278 words per page. Public Citizen also contended that their briefs tend to use fewer footnotes and fewer blocked quotations than seems to be the norm. Others of their briefs had an average number of word per page as high as 305 or 311.

In light of recent amendments to FRAP requiring a statement of subject matter and appellate jurisdiction and a statement of standard of review, and in light of the growth in the complexity of federal law and the quantity of federal precedent. Public Citizen states that "it seems unfair to the litigants to require their counsel to write shorter briefs." Public Citizen suggests that the number of words per brief and the average number of words per page should be more realistic and should not effectively reduce the existing length limitation. Public Citizen supports the concept of a safe harbor but says the 30 page limit is too low. Public citizen suggests that 37 pages should suffice for a principal brief and 18 pages for a reply.

57. Honorable Stephen Reinhardt
United States Circuit Judge
312 North Spring Street
Los Angeles, California 90012

He objects to double-sided printing and the proposal concerning typeface. He urges the committee to make the rule comprehensible to those without a great deal of technical expertise and to avoid excessive detail and a hypertechnical rule.

58. Robert H. Rotstein, Esquire
McDermott, Will & Emery
2049 Century Park East
Los Angeles, California 90067-3208

Mr. Rotstein believes that the use of proportionately spaced typeface is "detrimental to effective appellate advocacy and decision making because the briefs are too difficult to read, especially in 12 point type. He urges the committee to require "ten pitch pica monospaced typeface" in appellate briefs. In the alternative he suggests proportionately spaced typeface in at least 14 point type. Mr. Rotstein also opposes double-sided printing.

59. K. John Shaffer, Esquire
Stutman, Treister & Glatt
3699 Wilshire Boulevard
Suite 900
Los Angeles, California 90010-2739

His principal objection is to the complexity of the proposed rule. He

suggests that the rule should simply require monospaced type with 10 characters per inch. He also objects to permitting double-sided briefs.

60. Lawrence J. Siskind, Esquire
Cooper, White & Cooper
201 California Street
Seventeenth Floor
San Francisco, California 94111

Mr. Siskind objects to double-sided briefs. He also dislikes the preference for proportionately spaced typeface because he believes it is harder to read. He would prefer that the rule state a preference for monospaced typeface but would be satisfied if the rule omitted a preference for either. He believes that the minimum acceptable size for proportional type should be 14 point.

61. Diane M. Stahle, Esquire
Davis, Hockenberg, Wine, Brown, Koehn & Shors, P.C.
The Financial Center
666 Walnut Street, Suite 2500
Des Moines, Iowa 50309-3993

Ms. Stahle favors limiting brief by number of words rather than the number of pages but states that it is unclear whether headings are included in the word count. If headings are to be counted, she suggests changing the language in paragraph (a)(6) -- lines 104-107 -- to read: "and in either case there must be on average no more than 280 words per page including headings, footnotes and quotations."

62. Honorable Walter K. Stapleton
United States Circuit Judge
Federal Building, 844 King Street
Wilmington, Delaware 19801

Judge Stapleton opposes the provision permitting text on both sides of each page. He believes that any environmental savings would be offset by the use of heavier paper made necessary to render the brief legible.

63. Marc D. Stern & Denise Simmonds
American Jewish Congress
Stephen Wise Congress House
15 East 84th Street
New York, New York 10028-0458

Mr. Stern and Ms. Simmonds approve of the proposed revision believing "that it accurately reflects the current technology widely used in the preparation of appellate briefs. They suggest that the rule should be a "mandatory and inflexible national requirement" and that local departures should be forbidden.

64. Honorable Richard R. Suhrheinrich
United States Circuit Judge
United States Post Office and
Federal Building
315 West Allegan, Room 241
Lansing, Michigan 48933

Judge Suhrheinrich objects to printing briefs on both sides of the page and use of proportionately spaced type at less than 14 point. He also believes that the rule makes life difficult for a person using a typewriter. Word counts are difficult for a typewriter user. He suggests, at a minimum, that the rule allow monospaced type of 10 characters per inch, rather than 11, because 10 is standard on typewriters.

65. Honorable Stephen S. Trott
United States Circuit Judge
Room 666
United States Court Building
Boise, Idaho 83724

Judge Trott urges to the committee to be concerned about ease of reading and suggests that proportionately spaced typeface be 14 or 15 point type. Judge Trott also believes that most of the proposed rule is too technical to be readily understood.

66. Professor Eugene Volokh
School of Law
University of California, Los Angeles
405 Hilgard Avenue
Los Angeles, California 90024-1476

Professor Volokh objects to double-sided printing of briefs. The bleed-through from two-sided printing will make briefs much harder to read but the even greater problem will be the bleed-through from highlighting and notes made by the reader of the briefs. Because heavier paper will be used to avoid the foregoing problems, there will be little, if any, environmental savings.

67. Honorable J. Clifford Wallace
Chief Judge, United States Court of Appeals
United States Courthouse
San Diego, California 92101-8918

Chief Judge Wallace states that the Ninth Circuit Court of Appeals' Executive Committee endorses, in principle, the comments submitted by the Ninth Circuit Advisory Committee on Rules of Practice and Procedure.

68. Leslie R. Weatherhead
Witherspoon, Kelley, Davenport & Toole
422 West Riverside, Suite 1100
Spokane, Washington 99201-0390

Ms. Weatherhead opposes use of a word count to limit the length of a brief. She suggests that a better solution would be to sanction those lawyers who chisel on brief length limits by fudging the margins, typefaces, etc.

Ms. Weatherhead suggests that the rule should direct parties to attempt to produce a joint appendix "subject to the right of any party to supplement the joint appendix with whatever materials were overlooked or become necessary as the case develops in the briefing."

69. Honorable Charles E. Wiggins
United States Circuit Judge
50 West Liberty Street, Suite 950
Reno, Nevada 89501

Judge Wiggins has diabetes related vision problems. He requests that: the total pages be limited; margins be reasonable; the number of lines of text per page be limited; that all type (including that used for footnotes) be of a size and type style that is reasonable (he needs 14 or 15 point type to be able to read). He also encourages the committee to print, in the rule, an example of the required size and style of type. He further encourages requiring counsel to submit at least one "floppy disc" so that any judge who needs to do so may project the brief on a computer screen in a much larger version than the authorized type size.

VI. H

MEMORANDUM

DATE: October 16, 2009

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 09-AP-B

This item arises from a comment submitted by Daniel Rey-Bear concerning the pending amendment to Appellate Rule 1. New Rule 1(b), which is on track to take effect December 1, 2010 (if the Supreme Court approves it and Congress takes no contrary action), will define the term "state," for purposes of the Appellate Rules, to include the District of Columbia and any United States commonwealth or territory. Mr. Rey-Bear, commenting on the proposed Rule 1(b), has proposed that federally recognized Indian tribes be included within the Rule's definition of "state." I enclose his March 13, 2009 and October 5, 2009 letters.

As the Committee noted at its spring 2009 meeting, Mr. Rey-Bear's suggestion is thoughtful and important and deserves careful study. Though the suggestion has implications for several Rules – Rules 22, 26, 29, 44, and 46 – it seems likely that the most significant rule in that group is Rule 29: Mr. Rey-Bear's comments indicate that the main impetus for his proposal is his view that Native American nations should be treated the same as states for purposes of amicus filings. He proposes that tribes should be entitled under Rule 29(a) to file amicus briefs without obtaining party consent or leave of court, and he also argues that tribes should not be subjected to the new authorship and funding disclosure requirement in proposed new Rule 29(c)(5).[1]

At the Committee's spring 2009 meeting, Doug Letter undertook to make initial inquiries among relevant federal government entities concerning the treatment of tribal litigants for the purposes of both Rule 29(a)'s provision for filing without party consent or court leave and proposed Rule 29(c)(5)'s provision concerning disclosure of amicus-brief authorship and funding. Pending the results of those inquiries, this memo briefly recapitulates my previous discussion of some of the issues raised by Mr. Rey-Bear's suggestion, and sketches some possible avenues for future empirical investigation.

I. An overview of issues raised by Mr. Rey-Bear's suggestion

Mr. Rey-Bear points out that Native American tribes, like states, are sovereign

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[1] Like proposed Rule 1(b), proposed Rule 29(c)(5) will take effect on December 1, 2010, if the Supreme Court approves it and Congress takes no contrary action.

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, 26, 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 including Indian tribes within Rule 1(b)'s definition of "state" would not affect the determination of legal holidays under Rule 26(a) "because there is no known federally established Indian reservation where a circuit court's principal office or a federal district court is located." 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."

A. Rule 22(b)

In prior memos, I have 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.

B. Rule 26(a)

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." Mr. Rey-Bear's October 2009 letter states that including tribes within the definition of "state" will not affect the determination of legal holidays under Rule 26(a) because no district courts and no principal circuit court offices are located on federally established Indian reservations. Assuming that Mr. Rey-Bear is correct on this point, that would remove one question about the proposed inclusion of Native American tribes within the definition of "state"; on that view, the analysis of Rule 26(a) weighs neither in favor of the proposed inclusion nor against it.

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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.

C. 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 pending 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.

This aspect of Mr. Rey-Bear's proposal is discussed further in Part II below.

D. 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.[3] 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 constitutional power to relax restrictions that the political branches have, over time, placed on the exercise of a tribe's inherent legal authority").

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

E. 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."[4] 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.

II. Some possible ways to study Mr. Rey-Bear's proposal concerning Rule 29

The discussion at the Committee's spring 2009 meeting suggested that members might find it helpful to obtain data concerning the frequency with which Native American tribes file amicus briefs by consent of the parties, file amicus briefs with court permission, or are denied leave to file amicus briefs.

I used some Westlaw searches to obtain an approximate sense of possible answers to the first two questions. As a very rough (and under-inclusive) method of searching for amicus filings by Native American nations, I ran the following search in Westlaw's CTA-BRIEFS database: pr,ti((amicus) /s (tribe nation indian "native american")).[5] That search retrieved 120 documents (not all of which were relevant). To get a sense of how many of the search results were relevant, I skimmed the first 30 results. Those 30 results included 20 amicus briefs filed by Indian tribes

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[4] 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.

[5] The search is under-inclusive because Westlaw's CTA-BRIEFS database contains "*selected* briefs filed with the U.S. Court of Appeals" (emphasis added). Moreover, though the database includes filings in some circuits as far back as the 1970s, its coverage of other circuits commences much more recently (for the Tenth Circuit, as recently as 2000).

(either alone or together with other amici). Of those 20 amicus briefs, six stated that the parties had consented to the brief's filing; eight appeared to be filed by permission;[6] and for the remaining six, the basis for filing was not discernable from the brief. The briefs I skimmed indicate that Native American tribes file amicus briefs in cases involving a wide range of issues. Consent to these amicus filings is often given,[7] but perhaps more often the amicus finds it necessary to seek leave of court.[8]

Because the Westlaw database evidently includes only briefs that were filed, searches in that database will not shed light on one of the more salient questions – namely, how often Native American tribes fail to obtain party consent and also are denied leave to file an amicus brief. I wonder whether it might be possible to search the CM/ECF replication databases for relevant docket entries in the courts of appeals – perhaps using something like the terms "motion /s (tribe indian) /s (amicus amici brief) /s denied." I have not yet consulted Marie Leary about the feasibility of such a study, because before asking the Federal Judicial Center to invest time in such research it seemed advisable to await both the results of Doug Letter's inquiries and the Committee's further consideration of how it would prefer to proceed.

Encls.

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[6] I am assuming that the briefs in Westlaw's database were actually filed – i.e., that if permission was sought, it was granted.

[7] As another very rough measure of the proportion of briefs that were filed by consent, I ran the following "locate" command within the search results: (brief 29(a)) /s consent!. This located 41 of the 120 documents – suggesting that a significant proportion, but not a majority, of the tribal amicus briefs in the database were filed with party consent.

[8] For an example of a case in which the United States refused to consent to the filing of an amicus brief by a tribe, see Motion of Amici Curiae Oglala Sioux Tribe, Hemp Industries Association, and Vote Hemp for Leave to File Accompanying Amici Brief, *United States v. White Plume*, Nos. 05-1654 & 05-1656 (8th Cir.), 2005 WL 5628783.

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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
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cc: John Dossett, National Congress of American Indians
Richard Guest, Native American Rights Fund
Governor John Antonio, Pueblo of Laguna
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October 5, 2009

VIA EMAIL AND FIRST-CLASS MAIL

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 Amendment to Appellate Rule 1 Regarding Indian Tribes (Docket No. 08–AP-007)

Dear Mr. McCabe:

This letter follows up on my letter of March 13, 2009 (enclosed here), which proposed that new Federal Rule of Appellate Procedure 1(b), which will define the term "state" for purposes of the Appellate Rules, be revised to include federally recognized Indian tribes.

Per a telephone discussion on May 29, 2009 with Professor Catherine Struve, the Reporter for the Advisory Committee on Appellate Rules, I understand that my proposal may be put on the discussion agenda for the Committee's fall meeting. And from the Judiciary's Federal Rulemaking website and the Rules Committee Support Office, I understand that the Committee's next meeting is scheduled for November 5-6, 2009. Given that, I write this letter to reaffirm my proposal and to request that it be considered at the Committee's upcoming meeting. This letter also addresses three points regarding my proposal noted in Professor Struve's memo of March 27, 2009 to the Committee, which addressed comments on the proposed Rule 1(b) in advance of the Committee's April 2009 meeting. The first two of these matters were discussed with Professor Struve on May 29, 2009.

First, Professor Struve's memo on page 4 states the following:

> 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.

Unlike foreign sovereigns, which by definition are foreign to the federal system of government in the United States, Indian tribes are "domestic dependant nations," *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831), which are "physically within the territory of the United States and subject to ultimate federal control," *United States v. Wheeler*, 435 U.S. 313, 322 (1978). Indian tribes therefore constitute one of the distinct classes of governments that comprise the United States, along with the fifty states, the District of Columbia, and the various United States commonwealths and territories. Given this, there is a substantial reason for distinguishing Indian tribes from foreign nations, and including the former but not the latter with the definition of "state" in proposed Rule 1(b). Otherwise, Indian tribes will remain the only domestic sovereign in the United States not accorded equal status under the Rules, and Indian tribes will not even be accorded the same status as Guam, American Samoa, the U.S. Virgin Islands, Puerto Rico, and the Northern Mariana Islands, which are not even independent sovereigns with inherent powers like Indian tribes and states, *see Wheeler*, 435 U.S. at 321-23. Excluding Indian tribes from Rule 1(b) unduly disrespects their domestic sovereign status.

Second, Professor Struve's memo on page 5 notes that my prior letter did not address application of Rule 1(b) to Rule 26(a), regarding time computation, which is scheduled to be amended effective December 1, 2009. The amended version of Rule 26 that has been forwarded to Congress and will become effective later this year provides generally that in any time period calculation "if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday." Rule 26(a)(1)(C); Rule 26(a)(2)(C). Rule 26 then defines "legal holiday" to include federal holidays and "any other 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." Rule 26(a)(6)(C).

Revision of Rule 1(b) to include federally recognized Indian tribes would not have any affect on this application of Rule 26 because there is no known federally established Indian reservation where a circuit court's principal office or a federal district court is located. For reference, compare the listings of locations of circuit clerks' principal offices and federal district courts, organized by circuit, available at http://www.uscourts.gov/courtlinks/, with maps of all federally recognized Indian reservations in the United States, organized by state, available at http://www.nationalatlas.gov/printable/fedlands.html#list.

Finally, as noted on page 3 of my prior letter and on page 3 of Professor Struve's memo, the main reason for my proposing inclusion of Indian tribes in the definition of "state" in Rule 1 is the additional burdens otherwise placed on Indian tribes regarding amicus curiae filings, especially under the revised version of Rule 29. Just since the submission of my comments, my firm has filed another appellate amicus brief that reiterates my concern on this

point. *See* Navajo Nation's and Pueblo of Laguna's *Amicus Curiae* Brief Supporting the Jicarilla Apache Nation and Opposing Mandamus Petition, *In re United States of America*, No. 2009-M908 (Fed. Cir. Aug. 13, 2009). I accordingly hope that the Committee with consider this comment and revise Rule 1 so that Indian tribes will be treated like all other sovereign and territorial governments in the United States and not be subject to additional disclosure and filing requirements under revised Rule 29.

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

Enclosure: Letter from Daniel I.S.J. Rey-Bear, Nordhaus Law Firm LLP, to Peter G. McCabe, Secretary, Committee on Rules of Practice and Procedure (March 13, 2009).

cc (w/encl.): Prof. Catherine Struve, Reporter, Advisory Committee on Appellate Rules

VII

MEMORANDUM

DATE: October 16, 2009

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 09-AP-C

The Bankruptcy Rules Committee is reviewing Part VIII of the Bankruptcy Rules – the rules that govern appeals from bankruptcy court to a district court or bankruptcy appellate panel. These rules were originally modeled on the Appellate Rules, but they have not always been updated to reflect changes to the Appellate Rules over time. The current review is designed to consider amendments that clarify the Part VIII rules and make certain other improvements, while also taking account of new developments such as the prevalence of electronic filing. The Bankruptcy Rules Committee committed this review, in the first instance, to its Subcommittee on Privacy, Public Access, and Appeals. The Subcommittee held a special meeting in March 2009 and continued its discussions by phone over the summer. An open subcommittee meeting was held in Boston on September 30, 2009.

The basis for the discussion at the open subcommittee meeting was the enclosed draft. As the draft makes clear, the project involves an ambitious, thoughtful and labor-intensive effort to re-structure and revise the Part VIII Rules. Shortly prior to the meeting, I provided to the leaders of the project my tentative reactions to the proposed draft – obviously, speaking only for myself and not for any member of the Committee. Part I of this memo summarizes my suggestions and comments on the enclosed draft, notes the need for guidance from the Bankruptcy Rules Committee on possible revisions to the Appellate Rules, and sketches a possible amendment to Appellate Rule 6. Part II highlights matters discussed during the September 30 subcommittee meeting. Part III concludes by noting that a number of aspects of the Part VIII project provide an interesting model for possible future changes to the Appellate Rules.

In this memo most of my references will be to the Bankruptcy Rules, and I will refer to them as simply "Rule X" – e.g., "Rule 8002." Where I refer to an Appellate Rule, I will so specify.

I. Tentative suggestions on the September 2009 draft

My suggestions on the draft fall into two main categories: first, suggestions that concern matters of direct interest to the Appellate Rules Committee, and second, suggestions that concern other matters as to which the Appellate Rules Committee does not have a direct stake but experience with the Appellate Rules might be informative.

A. Matters of direct interest to the Appellate Rules Committee

The matters of most direct interest to the Appellate Rules Committee concern procedures for taking permissive appeals directly from the bankruptcy court to the court of appeals under 28 U.S.C. § 158(d)(2). Of particular interest is the mechanism for taking those appeals. Additional matters of interest concern procedures employed when taking those appeals – including, for example, the procedure for seeking a stay pending appeal, for assembling the record on appeal, and for indicative rulings. Additionally, as discussed in a separate memo,[1] proposed Rule 8022's treatment of motions for rehearing requires careful coordination with the proposed revisions to Appellate Rule 6(b)(2)(A).

1. The mechanism for permissive direct appeals under Section 158(d)(2)

The Appellate Rules do not currently take special notice of permissive direct appeals under 28 U.S.C. § 158(d)(2). The time has come, however, to consider amending the Appellate Rules to provide specially for such appeals.

At the time that Section 158(d)(2) came into being as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 [BAPCPA], the Appellate Rules Committee decided that no immediate action was necessary with respect to the Appellate Rules. The minutes of the Committee's April 2005 meeting explain:

> ... [BAPCPA] would amend § 158 to permit appeals by permission -- both of final orders and of interlocutory orders -- directly from a bankruptcy court to a court of appeals....
>
> When Rule 5 was restyled in 1998, the Committee intentionally wrote the rule broadly so that it could accommodate new permissive appeals authorized by Congress or the Rules Enabling Act process. In this instance, that strategy appears to have worked, as Rule 5 seems broad enough to handle the new permissive appeals authorized by § 1233 [of BAPCPA]. Indeed, § 1233 specifically provides that "an appeal authorized by the court of appeals under section 158(d)(2)(A) of

[1] See the memo on Item No. 08-AP-L.

title 28 ... shall be taken in the manner prescribed in subdivisions (a)(1), (b), (c), and (d) of rule 5 of the Federal Rules of Appellate Procedure." Section 1233 clarifies that references in Rule 5 to "district court" should be deemed to include a bankruptcy court or BAP and that references to "district clerk" should be deemed to include a clerk of a bankruptcy court or BAP.

The Reporter said that neither he nor Prof. Morris (the Reporter to the Bankruptcy Rules Committee) believes that anything in § 1233 requires this Committee to amend Rule 5. With the clarifications made by § 1233 itself, Rule 5 should suffice to handle the new permissive appeals.

.... By consensus, the Committee agreed to remove Item No. 05-03 from its study agenda.

Importantly, a key basis for the Committee's conclusion that no Appellate Rules amendments were needed was the fact that BAPCPA put in place interim procedures for administering the new direct appeals mechanism. Section 1233(b) – the BAPCPA provision setting forth those interim procedures – specifies that "[a] provision of this subsection shall apply to appeals under section 158(d)(2) of title 28, United States Code, until a rule of practice and procedure relating to such provision and such appeals is promulgated or amended under chapter 131 of such title [28 U.S.C.A. § 2071 et seq.]."

Effective December 1, 2008, a new subdivision (f) was added to Bankruptcy Rule 8001 to address appeals under Section 158(d)(2). Thus, as to the matters covered in Rule 8001(f), the interim BAPCPA procedures no longer apply. Rule 8001(f) will be amended effective December 1, 2009 (absent contrary action by Congress) to adjust time periods as part of the time-computation project. However, after December 1, 2009, the general thrust of the Rule will continue to be as described in the 2008 Committee Note to Rule 8001(f):

Subdivision (f) is added to the rule to implement the 2005 amendments to 28 U.S.C. § 158(d). That section authorizes appeals directly to the court of appeals, with that court's consent, upon certification that a ground for the appeal exists under § 158(d)(2)(A)(i)-(iii). Certification can be made by the court on its own initiative under subdivision (f)(4), or in response to a request of a party or a majority of the appellants and appellees (if any) under subdivision (f)(3). Certification also can be made by all of the appellants and appellees under subdivision (f)(2)(B). Under subdivision (f)(1), certification is effective only when a timely appeal is commenced under subdivision (a) or (b), and a notice of appeal has been timely filed under Rule 8002. These actions will provide sufficient notice of the appeal to the circuit clerk, so the rule dispenses with the uncodified temporary procedural requirements set out in § 1233(b)(4) of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8.

...

> A certification under subdivision (f)(1) does not place the appeal in the circuit court. Rather, the court of appeals must first authorize the direct appeal. Subdivision (f)(5) therefore provides that any party intending to pursue the appeal in the court of appeals must seek that permission under Rule 5 of the Federal Rules of Appellate Procedure. Subdivision (f)(5) requires that the petition for permission to appeal be filed within 30 days after an effective certification.

For the moment, then, the state of play concerning permissive direct appeals under Section 158(d)(2) is that Rule 8001(f) governs a variety of aspects of procedure before the bankruptcy court, district court and bankruptcy appellate panel and – with respect to proceedings in the court of appeals – provides that "[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)."[2] Current Rule 8001(f)'s 30-day time limit for the petition for permission to appeal thus supersedes the 10-day time limit previously set in the interim statutory provision (Section 1233(b)(4)(A) of BAPCPA).[3] But Rule 8001(f) does not address any other aspect of procedure in the court of appeals (other than to direct that it proceed under Appellate Rule 5). It therefore seems possible to argue that Sections 1233(b)(5) and (6) of BAPCPA are still operative despite the adoption of Rule 8001(f).[4] Those sections provide:

> (5) References in rule 5.--For purposes of rule 5 of the Federal Rules of Appellate Procedure--

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[2] Rule 8001(f)(1), in turn, provides that "A certification of a judgment, order, or decree of a bankruptcy court to a court of appeals under 28 U.S.C. § 158(d)(2) shall not be effective until a timely appeal has been taken in the manner required by subdivisions (a) or (b) of this rule and the notice of appeal has become effective under Rule 8002." The concept of the notice of appeal becoming effective appears to refer to Rule 8002's treatment of the effect of tolling motions.

[3] Of course, the bankruptcy rules ordinarily do not have the effect of superseding statutes. (28 U.S.C. § 2075, concerning rulemaking for "cases under Title 11," does not include a supersession clause.) But in the case of the interim procedures set by BAPCPA, Section 1233(b)(1) explicitly provides for supersession. And it seems fair to count Rule 8001(f) as a "rule authorizing the appeal" for purposes of Appellate Rule 5(a)(2)'s deference to "the time specified by the statute or rule authorizing the appeal."

[4] The argument would be that as yet no rule has been promulgated "relating to such provision[s]" within the meaning of BAPCPA Section 1233(b)(1).

(A) a reference in such rule to a district court shall be deemed to include a reference to a bankruptcy court and to a bankruptcy appellate panel; and

(B) a reference in such rule to a district clerk shall be deemed to include a reference to a clerk of a bankruptcy court and to a clerk of a bankruptcy appellate panel.

(6) Application of rules.--The Federal Rules of Appellate Procedure shall apply in the courts of appeals with respect to appeals authorized under section 158(d)(2)(A), to the extent relevant and as if such appeals were taken from final judgments, orders, or decrees of the district courts or bankruptcy appellate panels exercising appellate jurisdiction under subsection (a) or (b) of section 158 of title 28, United States Code.

Both of these provisions appear to serve a useful function. Rule 5's references to the district court and district clerk will not always make sense, in connection with Section 158(d)(2) appeals, unless they are read to include references to the other two types of court and types of clerk as appropriate. Likewise, it is useful to specify which portions of the Appellate Rules apply to a Section 158(d)(2) appeal.

Proposed Rule 8006 as it is set forth in the draft Part VIII revision would alter the analysis in a number of ways. First, it would delete the 30-day time limit (currently set by Rule 8001(f)) for petitioning the court of appeals for permission to appeal. Second, proposed Rule 8006 would include the following provision:

(h) Effectiveness of Certification. A certification for direct review of a judgment, order, or decree of a bankruptcy court to a court of appeals under 28 U.S.C. § 158(d)(2) may not be treated as a certification entered on the docket within the meaning of § 1233(b)(4)(A) of Public Law No. 109-8 until a timely appeal has been taken in the manner required by subdivisions (a) or (b) of this rule and the notice of appeal has become effective under Rule 8002.

Some might at first glance find this provision confusing. For one thing, it refers to a provision – Section 1233(b)(4)(A) – that might seem to have been previously superseded by Rule 8001(f) (as noted above in footnote 3 and the accompanying text). Having once been superseded, it seems questionable whether Section 1233(b)(4)(A) would later spring back to life just because the provision (Rule 8001(f)) that superseded it has itself been superseded (by proposed Rule 8006). From the Note to proposed Rule 8006(h), the intent behind this provision appears to be to make clear that Section 1233(b)(4)(A) has been superseded. If this is the intent, it might be worth considering whether there is a way to state that more clearly in proposed Rule 8006(h).

The note to proposed Rule 8006 raises the important issue of the deadline for filing the petition for permission to appeal. As the note points out, if the statute or rule authorizing the appeal fails to set a time period for filing the petition, the default deadline is "the time provided by Rule 4(a) for filing a notice of appeal." It may be worthwhile for the participants in the Part VIII project to consider further whether it makes sense to rely in Rule 4(a)'s deadlines in the context of permissive appeals under Section 158(d)(2). The note to proposed Rule 8006 cites Appellate Rule 4(a)(1)(A)'s 30-day deadline. But it seems possible that in some instances the relevant deadline might instead by the 60-day deadline that – under Appellate Rule 4(a)(1)(B) – applies "[w]hen the United States or its officer or agency is a party." *Compare* In re *Perry Hollow Management Co., Inc.*, 297 F.3d 34, 38 (1st Cir. 2002) (an adversary proceeding involving only a creditor and a private bankruptcy trustee was not a proceeding involving "the United States or its officer or agency" for purposes of Rule 4(a)(1)(B), and therefore the 60-day deadline did not apply); *id.* at 38-39 (the 60-day deadline did apply to an appeal from a related contested proceeding between the same parties because an assistant U.S. trustee cross-examined one of the witnesses, "and, therefore, the U.S. Trustee, an agency of the United States, became a party to the contested matter"); and *id.* at 39 ("Because the contested matter and the adversary proceeding were consolidated 'for all purposes,' the sixty-day limit governing the contested matter extends to the entire consolidated case."), *with* In re *Serrato*, 117 F.3d 427, 428 (9th Cir. 1997) ("As a court-appointed private bankruptcy trustee, Decker is an officer of the courts, but not an officer of the United States. Accordingly, the appropriate notice period was 30 days, not 60, and appellants did not timely file their notice of appeal.").

Without attempting to determine which types of bankruptcy matters should be considered matters in which "the United States or its officer or agency is a party" for purposes of Appellate Rule 4(a)(1)(B), two observations can be made. First, in at least some bankruptcy proceedings the United States, its officer or agency will be a party, and in such proceedings Appellate Rule 4(a) – if applicable – would direct that the time for appeal as to all would-be appellants is 60 days. Sixty days seems like a very long time period for seeking permission to appeal under Section 158(d)(2). As two points of comparison, Section 1233(b)(4)(A)'s interim provision set a 10-day deadline and current Rule 8001(f) sets a 30-day deadline. Second, though there are undoubtedly good reasons for the longer time period provided by Rule 4(a)(1)(B),[5] those reasons

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[5] As the Committee Note to the 1946 amendment to Civil Rule 73 explained:

> In cases where the United States or an officer or agency thereof is a party, allowance of sixty days to the government, its officers and agents is well justified. For example, in a tax case the Bureau of Internal Revenue must first consider and decide whether it thinks an appeal should be taken. This recommendation goes to the Assistant Attorney General in charge of the Tax Division in the Department of Justice, who must examine the case and make a recommendation. The file then goes to the Solicitor General, who must take the time to go through the papers and reach a conclusion. If these departments are rushed, the result will be that an appeal is taken merely to preserve the right, or without adequate consideration,

have not led to the adoption of special U.S.-party time periods under existing permissive-appeal provisions such as 26 U.S.C. § 7482(a)(2), 28 U.S.C. §§ 1292(b), (d)(1) or (d)(2), or Civil Rule 23(f).[6] Selecting one uniform time period for use in all permissive appeals under Section 158(d)(2) would avoid uncertainty and litigation over whether the longer time period applies in a given case.

Assuming that it is deemed useful to opt out of Appellate Rule 5(a)(2)'s default provision by specifying a time for seeking permission to appeal, it also would be useful for participants in the Part VIII project (and the Appellate Rules Committee) to consider where to place the new deadline. As a point of comparison, other permissive appeal provisions contain their own deadlines (so that the deadline need not be stated in Appellate Rule 5).[7] If this model were to be followed, then the relevant deadline would be placed in proposed Rule 8006.

The current Part VIII draft raises an additional question concerning a possible amendment to the Appellate Rules. The note to proposed Rule 8006 states in part: "Under FRAP 5(a)(3), if a party cannot seek permission to appeal from the court of appeals until a district court first grants permission in an amended order, the time to file a petition for permission to appeal in the court of appeals runs from the district court's entry of its amended order. In the case of a request for permission to appeal following a certification, the time should run from the entry of the certification. It would be helpful if FRAP 5(a) were amended to make it clear that its provisions apply to certifications." Appellate Rule 5 was designed, from the first, to mesh with the certification procedure set by 28 U.S.C. § 1292(b). Over time, of course, the uses of Appellate Rule 5 have expanded to cover other types of permissive appeals, but it retains the features that are designed to mesh with any applicable requirement for certification or findings by the lower court. It therefore would be helpful to obtain the further guidance of the Bankruptcy Rules Committee concerning specific aspects of Appellate Rule 5 that require amendment.

> and once taken it is likely to go forward, as it is easier to refrain from an appeal than to dismiss it. Since it would be unjust to allow the United States, its officers or agencies extra time and yet deny it to other parties in the case, the rule gives all parties in the case 60 days....

[6] All of these provisions set 10-day time limits for seeking permission to appeal. (Absent contrary action by Congress, Civil Rule 23(f)'s 10-day period will become 14 days when the time-computation amendments take effect on December 1, 2009.)

[7] In addition to 26 U.S.C. § 7482(a)(2), 28 U.S.C. §§ 1292(b), (d)(1) and (d)(2), and Civil Rule 23(f), see also 28 U.S.C. § 1453(c)(1). (Section 1453(c)(1)'s current "not less than 7 days" deadline is admittedly problematic, but will be fixed effective December 1, 2009. For present purposes Section 1453(c)(1), despite its flaws, does provide another example of a permissive-appeal provision that specifies its own deadline.)

If the question is whether Appellate Rule 5(a)(3)'s reference to the "district court" can be read to encompass bankruptcy courts and bankruptcy appellate panels, that question would be addressed by the proposed Appellate Rule 6(c) sketched below. The more important question is whether Appellate Rule 5(a)(3) appropriately fits the particular certification procedure that is involved in direct permissive appeals under Section 158(d)(2). One unique aspect of Section 158(d)(2) appeals is the fact that the required certification is not always issued by the court that entered the challenged order (the bankruptcy court); in some instances the certification is, instead, issued by the district court or the bankruptcy appellate panel. Because of that feature of Section 158(d)(2) certifications, I take the note to proposed Rule 8006 to be suggesting that Appellate Rule 5(a)(3) may not be appropriate for use in Section 158(d)(2) appeals. That is to say, where a case is no longer pending in the bankruptcy court, it would not make sense to say that the bankruptcy court "may amend its order .... to include the required permission."[8] To address this incongruity, it may be best to (1) exclude Appellate Rule 5(a)(3) from application to Section 158(d)(2) appeals, and (2) include – in the provision setting the time limit for seeking court of appeals permission to take a Section 158(d)(2) appeal – language specifying when the time limit begins to run. As suggested above, it seems useful to consider placing the time limit within the Part VIII rule that sets the framework for Section 158(d)(2) appeals; in the current draft, that would be proposed Rule 8006.

In the Appellate Rules, the suggestion noted above could be implemented by means of an amendment to Appellate Rule 6. When crafting such an amendment, it would also be useful to consider an additional change. Proposed Rule 8006(i) provides that "a request for permission to take a direct appeal must be filed with the court of appeals in accordance with the practice of the court of appeals." Rule 8006(i) would arguably count as a "rule ... relating to" the interim provisions in Sections 1233(b)(5) and (6); if so, then proposed Rule 8006(i) might well have the effect of superseding those provisions of Section 1233. In that event, it would seem advisable to replace Sections 1233(b)(5) and (6) with rule provisions that serve the same purposes. As a very rough cut at the matter, perhaps an amendment to Appellate Rule 6 might read as follows:

Rule 6. Appeal in a Bankruptcy Case ~~From a Final Judgment, Order, or Decree of a District Court or Bankruptcy Appellate Panel~~

(a) Appeal From a Judgment, Order, or Decree of a District Court Exercising Original Jurisdiction in a Bankruptcy Case. 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.

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[8] Appellate Rule 5(a)(3), of course, refers to the district court, not the bankruptcy court. The questions are (1) whether to include in the Appellate Rules a provision directing that references to the district court be read to encompass – as appropriate – a bankruptcy court or a bankruptcy appellate panel, and (2) if so, whether to exclude Appellate Rule 5(a)(3) from application to Section 158(d)(2) appeals.

(b) Appeal From a Judgment, Order, or Decree of a District Court or Bankruptcy Appellate Panel Exercising Appellate Jurisdiction in a Bankruptcy Case.

(1) Applicability of Other Rules. 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."

(2) Additional Rules. In addition to the rules made applicable by Rule 6(b)(1), the following rules apply:

(A) Motion for rehearing.

(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. A notice of appeal filed after the district court or bankruptcy appellate panel announces or enters a judgment, order, or decree--but before disposition of the motion for rehearing--becomes effective when the order disposing of the motion for rehearing is entered.

(ii) Appellate review of the order disposing of the motion requires the party, in compliance with Rules 3(c) and 6(b)(1)(B), to amend a previously filed notice of appeal. 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--excluding Rules 4(a)(4) and 4(b)--measured from the entry of the order disposing of the motion.

(iii) No additional fee is required to file an amended notice.

(B) The record on appeal.

(i) Within 10 [14][9] days after filing the notice of appeal, the appellant must file with the clerk possessing the record assembled in accordance with Bankruptcy Rule 8006--and serve on the appellee--a statement of the issues to be presented on appeal and a designation of the record to be certified and sent to the circuit clerk.

(ii) An appellee who believes that other parts of the record are necessary must, within 10 [14] days after being served with the appellant's designation, file with the clerk and serve on the appellant a designation of additional parts to be included.

(iii) The record on appeal consists of:

- the redesignated record as provided above;
- the proceedings in the district court or bankruptcy appellate panel; and
- a certified copy of the docket entries prepared by the clerk under Rule 3(d).

(C) Forwarding the record.

(i) When the record is complete, the district clerk or bankruptcy appellate panel clerk must number the documents constituting the record and send them promptly to the circuit clerk together with a list of the documents correspondingly numbered and reasonably identified. Unless directed to do so by a party or the circuit clerk, the clerk will not send to the court of appeals documents of unusual bulk or weight, physical exhibits other than documents, or other parts of the record designated for omission by local rule of the court of appeals. If the exhibits are unusually bulky or heavy, a party must arrange with the clerks in advance for their transportation and receipt.

(ii) All parties must do whatever else is necessary to enable the clerk to assemble and forward the record. The court of appeals may provide by rule or order that a certified copy of the docket entries be sent in place of the redesignated record, but any party may request at any time during the pendency of the appeal that the redesignated record be sent.

(D) Filing the record. Upon receiving the record--or a certified copy of the docket entries sent in place of the redesignated record--the circuit clerk must file it and immediately notify all parties of the filing date.

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[9] The bracketed time periods shown here are those that will take effect on December 1, 2009, absent contrary action by Congress.

(c) Permissive direct review under 28 U.S.C. § 158(d)(2). These rules apply to a direct appeal by permission under 28 U.S.C. § 158(d)(2), but:

(1) Rules [3-4, 5(a)(3), 6(a), 6(b), 9, 10, 11, 12(a), 12(b), 13-20, 22-23, and 24(b)] do not apply; and

(2) the term "district court," as used in any applicable rule, means – to the extent appropriate – a bankruptcy court or bankruptcy appellate panel, and the term "district clerk," as used in any applicable rule, means – to the extent appropriate – the clerk of the bankruptcy court or of the bankruptcy appellate panel.

It would be very useful to obtain the input of the Bankruptcy Rules Committee on the drafting of such a possible amendment to Appellate Rule 6. The draft Appellate Rule 6(c) sketched above largely borrows its list of exclusions from existing Appellate Rule 6(b)(1). In the case of permissive direct appeals, I wonder whether some further adjustments might be warranted.

In the example sketched above, I exclude Appellate Rule 6(b)(2) from applying to direct appeals under Section 158(d)(2). Appellate Rule 6(b)(2)(B)'s streamlined procedure for designating the record assumes that there has already been an appeal from the bankruptcy court to the district court or bankruptcy appellate panel and that there is thus already a compiled record that simply needs redesignating. This would not be true in the case of a direct appeal from bankruptcy court to the court of appeals, and therefore it may be better to exclude Appellate Rule 6(b)(2) from applying to such appeals and leave the matter to the treatment provided in proposed Rules 8008 and 8009.

As another example, Appellate Rule 8(b) provides for a proceeding against a surety and provides for the enforcement of the surety's liability in the district court. Would the translation of this practice into the context of the bankruptcy court pose any jurisdictional problems? It would seem to be a practical measure. Moreover, current Rule 8005 does not provide for a proceeding against a surety in the bankruptcy court, but proposed Rule 8007 does – from which I infer that the participants in the Part VIII project perceive no jurisdictional difficulties. My lack of expertise in bankruptcy practice leaves me unsure exactly how the jurisdictional analysis would unfold. It seems that a proceeding against a surety is not one of the matters listed as a core proceeding under 28 U.S.C. § 157(b)(2), but that list states that it is not exhaustive. If a proceeding against a surety would not be considered a core proceeding, then would it be appropriate to adopt wholesale the procedure currently specified in Appellate Rule 8(b)?[10] On

[10] Could one perhaps do so based on a notion of consent? See 28 U.S.C. § 157(c)(2) ("Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments,

these jurisdictional and procedural questions the guidance of the participants in the Part VIII project would be very helpful.

2. Procedure for seeking a stay or injunction pending appeal

Proposed Rule 8007 concerns the procedure for seeking a stay or injunction pending appeal. Its procedures generally parallel those prescribed by Appellate Rule 8. As noted above, I am intrigued by the adoption in proposed Rule 8007(g) of the procedure currently set by Appellate Rule 8(b), and I look forward to learning more about the analysis of the bankruptcy court's jurisdiction to hear and determine proceedings against a surety.

Apart from the question about proceedings against a surety, proposed Rule 8007 generally looks as though it would mesh well with Appellate Rule 8.[11] However, I am interested by proposed Rule 8007(c)'s specification that "[a] motion for the relief specified in Rules 8007(a) or (b) filed in the district court, the bankruptcy appellate panel, or the court of appeals commences an original proceeding in which the court reviews the request for relief *de novo*." Appellate Rule 8 does not specify the extent, if any, to which a court of appeals should defer to a district court's prior determination of a request for a stay or injunction pending appeal, and my sense is that the courts of appeals vary in their approaches. *Compare, e.g.*, *Lightfoot v. Walker*, 797 F.2d 505, 507 (7th Cir. 1986) ("Rule 8 ... does indeed authorize this court to stay a judgment pending appeal, with or without bond; and if the basis of the application for such a stay lay in events occurring after the district court had denied a similar application, we would make an independent judgment. But if as in the present case the application is in effect an appeal from the district judge's denial of the stay, we shall treat it as such and give the district judge's action the appropriate deference."), *with Congregation Lubavitch v. City of Cincinnati*, 923 F.2d 458, 460 (6th Cir. 1991) (court of appeals, when deciding motion to stay district court's injunction, is "not reviewing the district judge's grant of the injunction, and [is] therefore not bound to defer to his judgment," but "[w]e are, however, bound to accept the district court's factual findings unless we find them to be 'clearly erroneous.' Fed.R.Civ.P. 52(a).").

3. The record on appeal

Having suggested above that direct appeals under Section 158(d)(2) should not be governed by the streamlined procedures set in Appellate Rule 6(b)(2)(B) for the record on appeal, I also think that it might be useful to consider expanding Rules 8008 and 8009 to encompass such direct appeals. In particular, perhaps it would be advisable to mention the court of appeals

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subject to review under section 158 of this title.").

[11] Subdivision (c)(4) of proposed Rule 8007 specifies that "If [a request is] made to the court of appeals, the movant must comply with applicable practice of the court of appeals."

(as well as the district court and bankruptcy appellate panel) in proposed Rules 8008(e)(2)(C) and (e)(3). Likewise, it might be useful to consider mentioning the court of appeals and the circuit clerk in the relevant subsections of proposed Rules 8009(b) - (f).

4. Indicative rulings

Proposed Rule 8009(h) puts in place an indicative-ruling procedure for use when the bankruptcy court is asked for relief that it lacks authority to grant due to a pending appeal. This provision could be read to encompass direct appeals from the bankruptcy court to the court of appeals under Section 158(d)(2); in such instances, it looks as though proposed Rule 8009(h) would mesh well with new Appellate Rule 12.1 (which is on track to take effect December 1, 2009). Under the approach taken in the proposed Appellate Rule 6(c) sketched above, Appellate Rule 12.1 would not be excluded from application to such appeals, and references in Appellate Rule 12.1 to the district court would be read to mean the bankruptcy court.

As a side note (not directly related to the Part VIII project), one other issue that might be worth considering, in this connection, is that when Appellate Rule 12.1 takes effect it will also apply, inter alia, to appeals from final judgments of a district court or bankruptcy appellate panel exercising appellate jurisdiction in a bankruptcy case. Appellate Rule 6(b)(1)(A) will not exclude Appellate Rule 12.1 from applying to such appeals, and Appellate Rule 6(b)(1)(C) will direct users to read Appellate Rule 12.1's references to the district court as also encompassing bankruptcy appellate panels. I would think that the indicative-ruling procedure would not be problematic in this context and could be useful, but that is a question that Committee members might wish to discuss.

5. Motions for rehearing

My separate memo concerning Appellate Rule 6(b)(2)(A) discusses the need to coordinate the choice of language in proposed Rule 8022(b) and Appellate Rule 6(b)(2)(A) concerning the starting point for appeal time after the disposition of a motion for rehearing.

B. Matters as to which experience with the Appellate Rules may be of interest

Though the Part VIII revisions reflect the distinct requirements and features of bankruptcy practice, they are also modeled to some extent on the current Appellate Rules. Thus, the participants in the Part VIII revision project may be interested in proposals – currently at different stages of review and approval – to alter the Appellate Rules' treatment of tolling motions and to add a new disclosure requirement for amicus briefs.

1. The treatment of tolling motions

Proposed Rule 8002(b), like current Rule 8002(b), deals with the effect of tolling motions. Current Rule 8002(b) pegs appeal times to the entry of the order disposing of the last outstanding tolling motion. In this connection it may be of interest that the Civil / Appellate Subcommittee is currently considering a proposal to alter the similar wording of Appellate Rule 4(a)(4). The Civil / Appellate project grows out of a litigator's comment that under Appellate Rule 4(a)(4)(B) the time to appeal from an amended *judgment* runs from the entry of the *order* disposing of the last remaining tolling motion. In some scenarios, this commentator points out, the judgment might not be issued and entered until well after the entry of the order. The Civil and Appellate Rules Committees are considering amendments to Civil Rule 58(a) and Appellate Rule 4(a)(4) in response to this comment. Under the proposed amendment to Appellate Rule 4(a)(4), the relevant start date for appeal would be the latest of entry of the order disposing of the last remaining tolling motion or, if a motion's disposition results in alteration or amendment of the judgment, entry of any altered or amended judgment.

Proposed Rule 8002(b) employs similar language at one point in subdivision (c)(2), referring to "the entry of the order disposing of the last such motion outstanding, or the entry of any judgment, order, or decree altered or amended upon such motion, whichever is later." This captures the same idea as the proposed amendments to Appellate Rule 4(a)(4). However, it seems useful to consider making the use of this language consistent throughout proposed Rule 8002(b); this would suggest that it might be useful to revise proposed Rule 8002(b)(1) ("the time for appeal for all parties runs from the entry of the order disposing of the last such motion outstanding") as well as another part of proposed Rule 8002(b)(2) ("the notice becomes effective to appeal a judgment, order, or decree, in whole or in part, when the order disposing of the last such motion outstanding is entered").

Proposed Rule 8002(b)(2) makes a change (compared to current Rule 8002(b)(2)) that may be undesirable – at least if the experience with Appellate Rule 4(a)(4)(B)(ii) is a guide. Currently, Rule 8002(b)(2) provides that "A party intending to challenge an alteration or amendment of the judgment, order, or decree [as a result of a tolling motion] shall file a notice, or an amended notice, of appeal within the time prescribed by this Rule 8002 measured from [etc.]." Proposed Rule 8002(b)(2) will refer instead to "a judgment, order, or decree altered or amended upon any motion listed in Rule 8002(b)(1)." The latter formulation tracks current Appellate Rule 4(a)(4)(B)(ii) – but not for long: effective December 1, 2009 (absent contrary action by Congress), Appellate Rule 4(a)(4)(B)(ii) will be amended to remove what is seen as an undesirable ambiguity. The 2009 Committee Note to Appellate Rule 4 explains the issue:

> Prior to the [1998] restyling [of the Appellate Rules], subdivision (a)(4) instructed that "[a]ppellate review of an order disposing of any of [the post-trial motions listed in subdivision (a)(4)] requires the party, in compliance with Appellate Rule 3(c), to amend a previously filed notice of appeal. A party intending to challenge an alteration or amendment of the judgment shall file a

notice, or amended notice, of appeal within the time prescribed by this Rule 4 measured from the entry of the order disposing of the last such motion outstanding." After the restyling, subdivision (a)(4)(B)(ii) provided: "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."

One court has explained that the 1998 amendment introduced ambiguity into the Rule: "The new formulation could be read to expand the obligation to file an amended notice to circumstances where the ruling on the post-trial motion alters the prior judgment in an insignificant manner or in a manner favorable to the appellant, even though the appeal is not directed against the alteration of the judgment." Sorensen v. City of New York, 413 F.3d 292, 296 n.2 (2d Cir. 2005). The current amendment removes that ambiguous reference to "a judgment altered or amended upon" a post-trial motion, and refers instead to "a judgment's alteration or amendment" upon such a motion. Thus, subdivision (a)(4)(B)(ii) requires a new or amended notice of appeal when an appellant wishes to challenge an order disposing of a motion listed in Rule 4(a)(4)(A) or a judgment's alteration or amendment upon such a motion.

2. Amicus disclosure requirements

Because proposed Rule 8016 is modeled to some extent on Appellate Rule 29, participants in the Part VIII project may wish to consider whether it would be useful to incorporate language similar to that contained in the pending amendment to Appellate Rule 29. If the Supreme Court approves that amendment and Congress takes no contrary action, then as of December 1, 2010, Rule 29(c) will require that most amicus briefs[12] indicate whether a party's counsel authored the brief in whole or in part; whether a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and 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. As the Committee Note to new Rule 29(c)(5) explains:

> 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

[12] The new requirement will not apply to briefs filed by the United States, its officer or agency, or a state, territory, commonwealth or the District of Columbia.

assess whether the amicus itself considers the issue important enough to sustain the cost and effort of filing an amicus brief.

II. The September 30, 2009 Subcommittee meeting

The September 30, 2009 Subcommittee meeting provided a very useful opportunity for discussion of the enclosed draft. The meeting opened with a general discussion of the project. The participants then split into small groups and discussed specific subsets of the Part VIII rules. The small group meetings were followed with further discussion by the full Subcommittee. The discussion resulted in proposals for a number of possible changes to the enclosed draft.

III. Conclusion

The project to revise Part VIII of the Bankruptcy Rules is an impressive undertaking. The Appellate Rule Committee should coordinate closely with the Bankruptcy Rules Committee so as to ensure a good fit between the Appellate Rules and the Part VIII Rules on issues relating to direct permissive appeals under Section 158(d)(2) and also on timing issues relating to rehearing motions. In both these connections the Appellate Rules Committee stands to benefit from the expertise and guidance of participants in the Part VIII revision project.

More generally, the Part VIII revision project will provide models for possible future Appellate Rules amendments. A particularly noteworthy aspect of the Part VIII project is its effort to take account of the changes wrought by the shift to electronic filing. The bankruptcy courts are, of course, well ahead of the courts of appeals in implementing this shift. Their experience provides a useful model for possible changes that – in time – may become appropriate for adoption in the Appellate Rules.[13]

Encl.

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[13] So, for example, proposed Rule 8003(c)(1) directs the clerk to "transmit[]" – rather than "mail[]" – a copy of the notice of appeal. Proposed Rule 8014's specifications concerning electronic filings may be a useful model for future changes to Appellate Rule 32.

Rule 8001. Scope of Rules

(a) These Part VIII rules govern procedure in the United States district courts and the bankruptcy appellate panels relating to appeals taken from judgments, orders, and decrees of bankruptcy judges.

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

Rule 8001 is modeled after FRAP 1. It is also patterned loosely after FRBP 7001, which identifies the scope of the Part VII rules. Like FRAP 1, Rule 8001 provides that the Part VIII rules govern appeals from bankruptcy judges to the district courts and the bankruptcy appellate panels. It also recognizes that, in instances where the Part VIII rules reference or provide for filings in the bankruptcy courts or the courts of appeals, filings in those courts must comply with the applicable practice of those courts. For example, Rule 8006(i) references the filing in the court of appeals of a request for permission to take a direct appeal of a certified matter. The request filed in the court of appeals must comply with applicable practice of the court of appeals. Similarly, Rule 8007(c)(4) references filing in the court of appeals a motion for a stay pending appeal. The motion filed in the court of appeals must comply with applicable practice of the court of appeals. In general, Part VIII takes advantage of the definitions used in Rules 9001 and 9002.

Rule 8002. Time for Filing Notice of Appeal

(a) Fourteen-day Period.

(1) The notice of appeal required by Rules 8003, 8004, or 8006 must be filed with the clerk within 14 days of the date of the entry of the judgment, order, or decree appealed from.

(2) If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days of the date on which the first notice of appeal was filed, or within the time otherwise allowed by this Rule 8002, whichever period last expires.

(3) A notice of appeal filed after the announcement of a decision or order but before entry of the judgment, order, or decree must be treated as filed after entry of the judgment, order, or decree and on the day thereof. A new or amended notice of appeal is not required, except as provided in Rule 8002(b)(2).

(4) If a notice of appeal is mistakenly filed with the district court or the bankruptcy appellate panel, the clerk of the district court or the clerk of the bankruptcy appellate panel must note thereon the date on which it was received and transmit it to the clerk and it is deemed filed with the clerk on the date so noted.

(b) Effect of Motion on Time for Appeal.

(1) If any party timely files in the bankruptcy court any of the following motions, the time for appeal for all parties runs from the entry of the order disposing of the last such motion outstanding:

(A) a motion to amend or make additional findings under Rule 7052, whether or not granting the motion would alter the judgment;

(B) to alter or amend the judgment under Rule 9023;

(C) for a new trial under Rule 9023; or

(D) for relief under Rule 9024 if the motion is filed no later than 14 days after the entry of judgment.

(2) If a party files a notice of appeal after the court announces or enters a judgment, order, or decree, but before it disposes of any motion listed in Rule 8002(b)(1), the notice becomes effective to appeal a judgment, order, or decree, in whole or in part, when the order disposing of the last such motion outstanding is entered. A party intending to challenge on appeal an order disposing of any motion listed in Rule 8002(b)(1) must file a notice of appeal of, or an amended notice of appeal adding, the order disposing of such motion. A party intending to challenge on appeal a judgment, order, or decree altered or amended upon any motion listed in Rule 8002(b)(1) must file a notice of appeal of, or an amended notice of appeal adding, the altered or amended judgment, order, or decree. The notice of appeal, or amended notice of appeal, must be filed in compliance with Rule 8003 within the time prescribed by this Rule 8002 measured from the entry of the order disposing of the last such motion outstanding, or the entry of any judgment, order, or decree altered or amended upon such motion, whichever is later. No additional fees will be required for filing an amended notice of appeal.

(c) Extension of Time for Appeal.

(1) The bankruptcy judge may extend the time for filing the notice of appeal by any party, unless the judgment, order, or decree appealed from:

(A) grants relief from an automatic stay under § 362, § 922, § 1201, or § 1301 of the Code;

(B) authorizes the sale or lease of property or the use of cash collateral under § 363 of the Code;

(C) authorizes the obtaining of credit under § 364;

(D) authorizes the assumption or assignment of an executory contract or unexpired lease under § 365 of the Code;

(E) approves a disclosure statement under § 1125 of the Code; or

(F) confirms a plan under § 943, § 1129, § 1225, or § 1325 of the Code.

(2) A request to extend the time for filing a notice of appeal must be made by written motion filed before the time for filing a notice of appeal has expired, except that such a motion filed not later than 21 days after the expiration of the time for filing a notice of appeal may be granted upon a showing of excusable neglect. An extension of time for filing a notice of appeal may not exceed 21 days from the expiration of the time for filing a notice of appeal otherwise prescribed by this rule or 14 days from the date of entry of the order granting the motion, whichever is later.

Rule 8002 is derived from current Rule 8002 and FRAP 4(a). Inasmuch as 28 U.S.C. § 158(c)(2) refers to Rule 8002 as prescribing the time for taking an appeal to a district court or bankruptcy appellate panel, Rule 8002 is retained as the appropriate rule for specifying the timeliness of an appeal. Rule 8002(b)(2) clarifies that, if a timely motion of the kind specified in Rule 8002(b)(1) is filed, any party wishing to appeal an order disposing of such a motion, or any judgment, order, or decree altered or amended as a result of such an order, must either amend an existing notice of appeal to include the order or the altered or amended judgment, order, or decree, or file an original notice of appeal that includes the order or the altered or amended judgment, order, or decree in compliance with these Part VIII Rules. As used in these Part VIII rules, the term "clerk" refers to the clerk of the bankruptcy court. See FRBP 9001(3). The clerk of the district court or the clerk of the bankruptcy appellate panel are referred to, respectively, as the "clerk of the district court" and the "clerk of the bankruptcy appellate panel." Under Rule 8003(a)(3)(C), a party filing a notice of appeal is generally required to file a prescribed fee. Pursuant to Rule 8002(b)(3), a party is not required to file an additional fee in connection with filing an amended notice of appeal.

Rule 8003. Appeal as of Right; How Taken; Joint Appeals

(a) Filing the Notice of Appeal.

(1) An appeal from a judgment, order, or decree of a bankruptcy judge to a district court or a bankruptcy appellate panel as permitted by 28 U.S.C. § 158(a)(1) or (a)(2) must be taken by filing a notice of appeal with the clerk within the time allowed by Rule 8002.

(2) An appellant's failure to take any step other than timely filing a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the district court or the bankruptcy

appellate panel deems appropriate, which may include dismissal of the appeal.

(3) The notice of appeal must

(A) conform substantially to the appropriate Official Form;

(B) contain the names of all parties to the judgment, order, or decree appealed from and the names, addresses, and telephone numbers of their respective attorneys; and

(C) be accompanied by the prescribed fee.

Upon request of the clerk, each appellant must file a sufficient number of copies of the notice of appeal to enable the clerk to comply promptly with Rule 8002(c).

(b) Joint or Consolidated Appeals.

(1) When two or more parties are entitled to appeal from a judgment, order, or decree of a bankruptcy judge and their interests make joinder practicable, they may file a joint notice of appeal. They may then proceed on appeal as a single appellant.

(2) When the parties have filed separate timely notices of appeal, the appeals may be joined or consolidated by the reviewing district court, bankruptcy appellate panel, or court of appeals.

(c) Service of the Notice of Appeal.

(1) The clerk must serve notice of the filing of a notice of appeal by transmitting a copy to counsel of record for each party other than the appellant or, if a party is not represented by counsel, to the party's last known address.

(2) Failure to serve notice does not affect the validity of the appeal.

(3) The clerk must note on each copy served the date of the filing of the notice of appeal and must note in the docket the names of the parties to whom copies are transmitted and the date of the transmission.

(4) The clerk must forthwith transmit to the United States trustee a copy of the notice of appeal, but failure to transmit notice to the United States trustee does not affect the validity of the appeal.

(d) Transmittal of the Notice of Appeal to the District Court or Bankruptcy Appellate Panel; Docketing of the Appeal.

(1) The clerk must forthwith transmit a copy of the notice of appeal to the clerk of the district court or the clerk of the bankruptcy appellate panel.

(2) Upon receipt of the notice of appeal, the clerk of the district court or the clerk of the bankruptcy appellate panel must docket the appeal under the title of the bankruptcy court action and must identify the appellant, adding the appellant's name if necessary, and give notice promptly to all parties to the judgment, order, or decree appealed from of the date on which the appeal was docketed.

Rule 8003 is derived from current Rule 8001(a) and FRAP 3. FRAP generally places in separate rules the procedures that address appeals as of right and appeals by leave. Rule 8003(b) is derived from FRAP 3(b). Rule 8003(c) is derived from current rule 8004 and FRAP 3(d). The notice of appeal required by Rule 8003(a) may be filed electronically, and must be filed electronically if required by applicable filing procedures. Service of the notice of appeal may also be accomplished electronically in accordance with applicable electronic notice procedures. If the clerk is required to mail copies of the notice of appeal to certain parties, the clerk may request each appellant to supply the clerk with the necessary copies. Rule 8003(d) alters existing procedure. Currently, a notice of appeal is not transmitted to the district court or the bankruptcy appellate panel, and the appeal is not docketed, until the record is designated and prepared. Consistent with FRAP, Rule 8003(d) provides for immediate transmittal and docketing of the appeal. Under Rule 8003(a)(3)(C), a party filing a notice of appeal is generally required to file a prescribed fee. Pursuant to Rule 8002(b)(3), a party is not required to file an additional fee in connection with filing an amended notice of appeal.

Rule 8004. Appeal by Leave to District Court or Bankruptcy Appellate Panel; How Taken

(a) Notice of Appeal and Motion for Leave to Appeal. An appeal from an interlocutory judgment, order, or decree of a bankruptcy judge as permitted by 28 U.S.C. § 158(a)(3) must be taken by filing with the clerk a notice of appeal of the judgment, order, or decree, as prescribed by rule 8003(a) within the time allowed by Rule 8002, accompanied by a motion for leave to appeal prepared in accordance with Rule 8004(b) and with proof of service in accordance with Rule 8010.

(b) Content of Motion; Answer.

(1) A motion for leave to appeal under 28 U.S.C. § 158(a) must contain:

(A) a statement of the facts necessary to an understanding of the questions to be presented by the appeal;

(B) a statement of those questions and of the relief sought;

(C) a statement of the reasons why leave to appeal should be granted; and

(D) a copy of the judgment, order, or decree appealed from, and any opinion or memorandum relating thereto.

(2) Within 14 days after service of the motion, an adverse party may file with the clerk of the district court or the clerk of the bankruptcy appellate panel, wherever the appeal is pending, a cross motion or an answer in opposition.

(c) Transmittal; Docketing of Appeal; Determination of Motion.

(1) The clerk must forthwith transmit the notice of appeal and the motion for leave to appeal, together with any statement of election allowed by Rule 8005, to the clerk of the district court or the clerk of the bankruptcy appellate panel.

(2) Upon receipt of the notice of appeal and motion for leave to appeal, the clerk of the district court or the clerk of the bankruptcy appellate panel must docket the appeal under the title of the bankruptcy court action and must identify the movant-appellant, adding the movant-appellant's name if necessary, and give notice promptly to all parties to the judgment, order, or decree appealed from of the date on which the appeal was docketed.

(3) The motion and any answer in opposition or cross-motion, must be submitted to the district court or bankruptcy appellate panel without oral argument unless otherwise ordered by the district court or the bankruptcy appellate panel.

(4) The clerk must transmit the notice of appeal, the motion for leave to appeal, and any statement of election allowed by Rule 8005, to the clerk of the district court or the clerk of the bankruptcy appellate panel prior to the designation and transmission of the record as prescribed by Rules 8008 and 8009.

(5) If leave to appeal is denied, the clerk of the district court or bankruptcy appellate panel shall dismiss the appeal.

(d) Appeal Improperly Taken Regarded as a Motion for Leave to Appeal. If a required motion for leave to appeal an interlocutory judgment, order, or decree is not filed, but a notice of appeal is timely filed, the district court or the bankruptcy appellate panel may grant leave to appeal or direct that a motion for leave to appeal be filed. The district court or the bankruptcy appellate panel may also deny leave to appeal but in so doing must consider the notice of appeal as a motion for leave to appeal. Unless an order directing that a motion for leave to appeal be filed provides otherwise, the motion must be filed within 14 days of entry of the order directing filing.

(e) Appeal Authorized by Court of Appeals Regarded as Satisfying Leave Requirement. If leave to appeal an interlocutory judgment, order, or decree is required by 28 U.S.C. § 158(a) and has not earlier been granted by the district court or the bankruptcy appellate panel, a court of appeals' authorization of a direct appeal under 28 U.S.C. § 158(d)(2) satisfies the requirement for leave to appeal.

Rule 8004 is derived from current Rule 8001(b) and FRAP 5. Under FRAP 5(d)(2), a notice of appeal need not be filed if the court of appeals grants permission to appeal. Rule 8004, however, retains the practice in bankruptcy appeals of requiring a notice of appeal to be filed along with a motion for leave to appeal. Rule 8004(c) clarifies that the clerk is to transmit the notice of appeal and the motion for leave to appeal, together with any statement of election allowed by Rule 8005, to the clerk of the district court or the clerk of the bankruptcy appellate panel prior to the designation and transmission of the record as prescribed by Rule 8009. This reflects what Rule 8008(a)(1) and 8009(b)(3) provide, namely that, if an appeal requires leave of the district court or bankruptcy appellate panel to proceed, the parties do not commence the process of designating the record until leave has been granted. Rule 8004(e) is derived from current Interim Rule 8003(d) and clarifies that a court of appeals' authorization to proceed with a direct appeal constitutes satisfaction of the leave to appeal requirement and, hence, a separate order granting leave to appeal by the district court or bankruptcy appellate panel need not be filed. For purposes of designating the record, entry of such an order by the court of appeals would trigger the requirements of Rule 8008 in the same manner as an order granting leave to appeal entered by the district court or the bankruptcy appellate panel if neither the district court nor the bankruptcy appellate panel granted leave to appeal previously. If the court of appeals grants permission to appeal, the record must be transmitted in accordance with FRAP 11 and 12(c). Rule 8004(c) alters existing procedure. Currently, a notice of appeal and motion for leave to appeal are not transmitted to the district court or the bankruptcy appellate panel, and the appeal is not docketed, until the motion is granted and the record is designated and prepared. Rule 8004(c) provides for immediate transmittal and docketing of the appeal. Rule 8004(b)(2) provides that any answer or cross-motion to the motion for leave to appeal must be filed in the district court or the bankruptcy appellate panel, whichever has the appeal.

Rule 8005. Election To Have Appeal Heard by District Court Instead of Bankruptcy Appellate Panel

(a) Filing of Statement of Election. An election to have an appeal heard by the district court under 28 U.S.C. § 158(c)(1) may be made only by a statement of election contained in a separate writing filed within the time prescribed by 28 U.S.C. § 158(c)(1).

(b) Timeliness of Filing. To be timely, an appellant must file with the clerk its statement of election with its notice of appeal within the time prescribed by Rule 8002 for the filing of a notice of appeal. To be timely, a party other than the appellant must file its statement of election with the clerk within 30 days after service of a notice of appeal.

(c) Transmission of Statement of Election. Upon receipt of a statement of election, the clerk must transmit the statement forthwith to the clerk of the bankruptcy appellate panel.

(d) Transfer of Motion or Appeal to District Court. Upon receipt from the clerk of a timely statement of election, the bankruptcy appellate panel must order forthwith the transfer of the appeal and any pending motion to the district court.

Rule 8005 is derived from current Rule 8001(e). The rule clarifies when a statement of election is timely taking into account the amended notice of appeal requirement of Rule 8003(b)(2). Rule 8005(c) requires immediate transfer of a filed statement of election, and Rule 8005(d) requires immediate transfer of the appeal from the bankruptcy appellate panel to the district court if the statement of election is timely, so that appellate proceedings may be directed as quickly as possible to the proper appellate court, including pending motions for relief that have been filed with the bankruptcy appellate panel.

Rule 8006. Certification for Direct Appeal to Court of Appeals; How Taken

(a) Final Orders, Judgments, or Decrees; Notice of Appeal. Certification of a final judgment, order, or decree of a bankruptcy judge for direct review in a court of appeals under 28 U.S.C. § 158(d)(2) must be sought by filing with the clerk a notice of appeal of the judgment, order, or decree, as prescribed by Rule 8003(a) within the time allowed by Rule 8002, and by compliance with the certification procedures of 28 U.S.C § 158(d)(2) and this Rule 8006.

(b) Interlocutory Orders, Judgments, or Decrees; Notice of Appeal and Motion for Leave to Appeal. Certification of an interlocutory judgment, order, or decree of a bankruptcy judge for direct review in a court of appeals under 28 U.S.C. § 158(d)(2) must be sought by filing with the clerk a notice of appeal of the judgment, order, or decree, and a motion for leave to appeal as prescribed by Rules 8003(a) and 8004(a) within the time allowed by Rule 8002, and by compliance with the certification procedures of 28 U.S.C § 158(d)(2) and this Rule 8006.

(c) Where to File Certification. A certification that one or more of the circumstances specified in 28 U.S.C. § 158(d)(2)(A)(i)-(iii) exists must be filed with the clerk of the court in which a matter is pending. A matter is pending in a bankruptcy court until the docketing, in accordance with Rule 8003(d)(2), of an appeal taken under 28 U.S.C. § 158(a)(1) or (2), or the docketing, in accordance with Rule 8004(c)(2), of an appeal taken under 28 U.S.C. § 158(a)(3). A matter is pending in a district court or a bankruptcy appellate panel after the docketing, in accordance with Rule 8003(d)(2), of an appeal taken under 28 U.S.C. § 158(a)(1) or (2), or the docketing, in accordance with Rule 8004(c)(2), of an appeal under 28 U.S.C. § 158(a)(3).

(d) Court that May Make Certification.

(1) Before Docketing in Appellate Court. Only a bankruptcy judge may make a certification on request or on its own motion while the matter is pending in the bankruptcy court.

(2) After Docketing in Appellate Court. Only the district court or the bankruptcy appellate panel may make a certification on request of the parties or on its own motion while the matter is pending in the district court or the bankruptcy appellate panel.

(e) Certification by All Appellants and Appellees Acting Jointly. A certification by all the appellants and appellees, if any, acting jointly that one or more of the circumstances specified in 28 U.S.C. § 158(d)(2)(A)(i)-(iii) exists may be made by filing the appropriate Official Form with the clerk of the court in which the matter is pending. The certification may be accompanied by a short statement of the basis for the certification, which may include the information listed in Rule 8006(g)(3). Upon filing, the clerk must enter the certification on the docket.

(f) Certification on Court's Own Motion.

(1) A certification on the court's own motion that one or more of the circumstances specified in 28 U.S.C. § 158(d)(2)(A)(i)-(iii) exists must be set forth in a separate document served on the parties in the manner required for service of a notice of appeal under Rule 8003(c)(1). The certification must be accompanied by an opinion or memorandum that contains the information required by Rule 8006(g)(3)(A)-(C).

(2) A party may file a supplementary short statement of the basis for certification within 14 days after the certification.

(g) Certification on Request; Filing; Service; Contents.

(1) A request for certification that the circumstances specified in 28 U.S.C. § 158(d)(2)(A)(i)-(iii) exist, or by a majority of the appellants and a majority of the appellees, if any, must be filed with the clerk of the court in which the matter is pending within the time specified by 28 U.S.C. § 158(d)(2).

(2) Notice of the filing of a request for certification must be served in the manner required for service of a notice of appeal under Rule 8003(c)(1).

(3) A request for certification must include the following:

(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 statute or rule, including why a circumstance specified in 28 U.S.C. § 158(d)(2)(A)(i)-(iii) exists; and

(E) an attached copy of the judgment, order, or decree that is the subject of the certification and any related opinion or memorandum.

(4) A party may file a response to a request for certification or a cross-request within 14 days after the notice of the request is served, or such other time as the court in which the matter is pending may fix.

(5) The request, cross-request, and any response is not governed by Rule 9014 and must be submitted without oral argument unless the court in which the matter is pending otherwise directs.

(6) A certification of an appeal under 28 U.S.C. § 158(d)(2) must be made in a separate document served on the parties.

(h) Effectiveness of Certification. A certification for direct review of a judgment, order, or decree of a bankruptcy court to a court of appeals under 28 U.S.C. § 158(d)(2) may not be treated as a certification entered on the docket within the meaning of § 1233(b)(4)(A) of Public Law No. 109-8 until a timely appeal has been taken in the manner required by subdivisions (a) or (b) of this rule and the notice of appeal has become effective under Rule 8002.

(i) Proceeding in Court of Appeals Following Certification. After a certification has been filed with the clerk of the court as prescribed by this Rule 8006, a request for permission to take a direct appeal must be filed with the court of appeals in accordance with the practice of the court of appeals.

Rule 8006 is derived from current Interim Rule 8001(f). The intent of the revision is to clarify the relevant procedures without duplicating the statutory requirements or time limits. Rule 8006(h) provides that a certification for direct review to a court of appeals may not be treated as a certification under the uncodified temporary procedural requirements of § 1233(b)(4)(A) of Public Law No. 109-8. The current Rule 8001(f), and this Rule 8006, replace the temporary uncodified procedures. Rule 8006(i) provides that, after a certification for direct review in the court of appeals has been filed, a request for permission to take a direct appeal must also be filed with the court of appeals in accordance with its rules and procedures. Pursuant to FRAP 5(a)(1), a party requesting discretionary permission to appeal must file a petition for permission to appeal. Pursuant to FRAP 5(a)(2), the time for filing the petition for permission to appeal with the court of appeals is the same as the time for filing a notice of appeal under FRAP 4(a) if no other time is specified by the statute or rule authorizing the appeal. Under FRAP 4(a), the time for filing is notice of appeal is 30 days from the entry of the judgment or order appealed from. Under FRAP 5(a)(3), if a party cannot seek permission to appeal from the court of appeals until a district court first

grants permission in an amended order, the time to file a petition for permission to appeal in the court of appeals runs from the district court's entry of its amended order. In the case of a request for permission to appeal following a certification, the time should run from the entry of the certification. It would be helpful if FRAP 5(a) were amended to make it clear that its provisions apply to certifications.

Rule 8007. Stay Pending Appeal; Bonds; Suspension of Proceedings

(a) Initial Motion in the Bankruptcy Court; Time to File.

(1) A party must ordinarily move first in the bankruptcy court for the following relief:

(A) a stay pending appeal of the judgment, order, or decree of a bankruptcy judge;

(B) approval of a supersedeas bond;

(C) an order suspending, modifying, restoring, or granting an injunction while an appeal is pending; or

(D) the suspension or continuance of proceedings in a case or other relief permitted by Rule 8007(f).

(2) A motion for a stay of the judgment, order, or decree of a bankruptcy judge pending appeal, or for approval of a supersedeas bond, may be made in the bankruptcy court before or after the filing of a notice of appeal of the judgment, order, or decree appealed from. A separate or amended notice of appeal need not be filed from an order of the bankruptcy court granting or denying a motion for a stay pending appeal, or granting or denying approval of a supersedeas bond.

(b) Approval of Supersedeas Bond; Stay of Execution. The court must grant a stay of execution of a money judgment upon approval of an adequate supersedeas bond.

(c) Motion in the District Court or Bankruptcy Appellate Panel; Conditions on Relief. A motion for the relief specified in Rules 8007(a) or (b), or to vacate or modify an order of the bankruptcy court granting the relief specified in Rules 8007(a) or (b), may be made to the district court, the bankruptcy appellate panel, or the court of appeals. If a statement of election is timely filed with the clerk as prescribed by Rule 8005, a motion for the relief specified in Rules 8007(a) or (b) must be made in the district court rather than the bankruptcy appellate panel. A motion for the relief specified in Rules 8007(a) or (b) filed in the district court, the bankruptcy appellate panel, or the court of appeals commences an original proceeding in which the court reviews the request for relief *de novo*.

(1) If made to the district court or the bankruptcy appellate panel, the motion must:

(A) show that moving first in the bankruptcy court would be impracticable if the moving party has not sought relief in the first instance in the bankruptcy court; or

(B) state that, a motion having been made, the bankruptcy court denied the motion or failed to afford the relief requested, and state any reasons given by the bankruptcy court for its action or inaction.

(2) If made to the district court or the bankruptcy appellate panel, the motion must also include:

(A) the reasons for granting the relief requested and the pertinent facts;

(B) originals or copies of affidavits or other sworn statements supporting facts subject to dispute; and

(C) relevant parts of the record.

(3) If made to the district court or the bankruptcy appellate panel, the moving party must give reasonable notice of the motion to all parties.

(4) If made to the court of appeals, the movant must comply with applicable practice of the court of appeals.

(d) Filing of Bond or other Security. The district court, the bankruptcy appellate panel, or the court of appeals, may condition the relief it grants under this rule on the filing of a bond or other appropriate security with the bankruptcy court.

(e) Requirement of Bond for Trustee or United States. When an appeal is taken by a trustee, a bond or other appropriate security may be required, provided that when an appeal is taken by the United States or an officer or agency thereof or by direction of any department of the Government of the United States, a bond or other security shall not be required.

(f) Continuation of Proceedings in the Bankruptcy Court. Notwithstanding Rule 7062, subject to the power of the district court, the bankruptcy appellate panel, or the court of appeals as provided in this rule or governing law, the bankruptcy judge may

(1) suspend or order the continuation of other proceedings in the case under the Code, or

(2) make any other appropriate order during the pendency of an appeal on such terms as will protect the rights of all parties in interest.

(g) Proceeding Against Surety. If a party gives security in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits to the jurisdiction of the bankruptcy court for purposes of enforcing the surety's liability on the bond or undertaking and irrevocably appoints the clerk as the surety's agent on whom any papers affecting the surety's liability on the bond or undertaking may be served. On motion, a surety's liability as stated on its bond or undertaking may be enforced in the bankruptcy court without the necessity of an independent action. The motion and any notice that the bankruptcy court prescribes may be served on the clerk, who must promptly transmit a copy to each surety whose address is known.

Rule 8007 is derived from current Rule 8005 and FRAP 8. Rule 8007(a)(1) expands the list of items enumerated in FRAP 8(a)(1) to reflect bankruptcy practice. Rule 8007(a)(2) clarifies that a motion for a stay pending appeal, or approval of a supersedeas bond, may be made before or after the filing of a notice of appeal. Rule 8007(a)(2) also recognizes that motions for stays pending appeal, and motions for approval of supersedeas bonds, are original proceedings in each court in which they may be filed subject to de novo consideration. Accordingly, a notice of appeal need not be filed with respect to an order granting or denying such motions. Rule 8007(b) reflects the rule, applicable to money judgments only, that a party may obtain a stay pending appeal as of right upon the court's approval of an adequate supersedeas bond. Occasionally a money judgment is entered other than in an adversary proceeding. Rule 8007(b) thus makes applicable to all money judgments entered in bankruptcy cases the relief available in adversary proceedings under Rule 7062. In general, a motion for a stay pending appeal filed in the court of appeals is governed by FRAP 8 and must comply with applicable procedures of the court of appeals.

Rule 8008. Record and Issues on Appeal

(a) Composition of the Record on Appeal and Statement of Issues on Appeal.

(1) Appellant's Duties. Within 14 days after filing the notice of appeal as prescribed by Rule 8003(a), entry of an order granting leave to appeal, or entry of an order disposing of the last timely motion outstanding of a kind listed in Rule 8002(b)(1), whichever is later, the appellant shall file with the clerk and serve on the appellee a designation of the items to be included in the record on appeal and a statement of the issues to be presented.

(2) Appellee's and Cross-Appellant's Duties. Within 14 days after the service of the appellant's designation and statement, the appellee may file and serve on the appellant a designation of additional items to be included in the record on appeal and, if the appellee has filed a cross appeal, the appellee as cross appellant shall

file and serve a statement of the issues to be presented on the cross appeal and a designation of additional items to be included in the record.

(3) Cross Appellee's Duties. A cross appellee may, within 14 days of service of the cross appellant's designation and statement, file and serve on the cross appellant a designation of additional items to be included in the record.

(4) Record on Appeal. Subject to Rule 8008(d), the record on appeal shall include the items designated by the parties as provided by Rules 8008(a)-(c), the notice of appeal, the judgment, order, or decree appealed from, any order granting leave to appeal, any opinion, findings of fact, and conclusions of law of the court, any transcript ordered as prescribed by Rule 8008(b), and any statement prescribed by Rule 8008(c). Notwithstanding the parties' designations, the district court, the bankruptcy appellate panel, or the court of appeals may order the inclusion of additional items from the record as part of the record on appeal.

(5) Copies for Clerk. If requested by the clerk, any party filing a designation of the items to be included in the record shall provide to the clerk a copy of the requested items designated or, if the party fails to provide the copy, the clerk shall prepare the copy at the party's expense.

(b) Transcript of Proceedings.

(1) Appellant's Duty to Order. Within 14 days after filing the notice of appeal, entry of an order granting leave to appeal, or entry of an order disposing of the last timely motion outstanding of a kind listed in Rule 8002(b)(1), 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 any local rule of the district court or bankruptcy appellate panel, and with the following qualifications:
>
> > **(i)** the order must be in writing; and
> >
> > **(ii)** the appellant must, within the same period, file a copy of the order with the clerk; or
>
> **(B)** file with the clerk a certificate stating that the appellant will not order a transcript.

(2) Cross Appellant's Duty to Order. Within fourteen days after the appellant files with the clerk the copy of the transcript order or certificate stating that appellant will not order a transcript, entry of an order granting leave to appeal, or entry of an order disposing of the last timely motion outstanding of a kind listed in Rule 8002(b)(1), whichever is later, the appellee as cross appellant must do either of the following:

(A) order from the reporter a transcript of such parts of the proceedings not ordered by appellant or already on file as the cross appellant considers necessary, subject to any local rule of the district court or bankruptcy appellate panel, and with the following qualifications:

(i) the order must be in writing; and

(ii) the cross appellant must, within the same period, file a copy of the order with the clerk; or

(B) file with the clerk a certificate stating that the cross appellant will not order a transcript.

(3) Appellee's or Cross Appellee's Right to Order. Within fourteen days after the appellant or cross appellant files with the clerk a copy of the transcript order or certificate stating that appellant or cross appellant will not order a transcript, entry of an order granting leave to appeal, or entry of an order disposing of the last timely motion outstanding of a kind listed in Rule 8002(b)(1), whichever is later, the appellee or cross appellee may order such additional transcripts as the appellee or cross appellee considers necessary, subject to any local rule of the district court or bankruptcy appellate panel, with the qualification that the order must be in writing and a copy of the order must be filed with the clerk.

(4) Payment. At the time of ordering, a party must make satisfactory arrangements with the reporter for paying the cost of the transcript.

(5) Unsupported Finding or Conclusion. If an 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.

(c) Statement of the Evidence When the Proceedings Were Not Recorded or When a Transcript Is Unavailable. Within 14 days after filing the notice of appeal, entry of an order granting leave to appeal, or entry of an order disposing of the last timely motion outstanding of a kind listed in Rule 8002(b)(1), whichever is later, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection, if the transcript of a hearing or trial is unavailable. The statement must be served on the appellee, who may serve objections or proposed amendments within 14 days after being served. The statement and any objections or proposed amendments must then be submitted to the bankruptcy court for settlement and approval. As settled and approved, the statement must be included by the clerk in the record on appeal.

(d) Agreed Statement as the Record on Appeal. In place of the record on appeal as defined in Rule 8008(a), the parties may prepare, sign, and submit to the bankruptcy court a statement of the case showing how the issues presented by the appeal arose and were

decided by the bankruptcy judge. The statement must set forth only those facts averred and proved or sought to be proved that are essential to the court's resolution of the issues. If the statement is truthful, it, together with any additions that the bankruptcy court may consider necessary to a full presentation of the issues on appeal, must be approved by the bankruptcy court and must then be certified to the district court or the bankruptcy appellate panel as the record on appeal. The clerk must then transmit it to the clerk of the district court or the clerk of the bankruptcy appellate panel within the time provided by Rule 8009(b)(2). A copy of the agreed statement may be filed in place of the appendix required by Rule 8017(b).

(e) Correction or Modification of the Record.

(1) If any difference arises about whether the record truly discloses what occurred in the bankruptcy court, the difference must be submitted to and settled by that court and the record conformed accordingly.

(2) If anything material to either party is omitted from or misstated in the record by error or accident, the omission or misstatment may be corrected and a supplemental record may be certified and transmitted:

(A) on stipulation of the parties;

(B) by the bankruptcy court before or after the record has been forwarded; or

(C) by the district court, or the bankruptcy appellate panel.

(3) All other questions as to the form and content of the record must be presented to the district court or bankruptcy appellate panel.

(f) Other. All parties must take any other action necessary to enable the clerk to assemble and transmit the record.

Rule 8008 is derived from current Rule 8006, current Rule 8007(a), and FRAP 10. Among other things, FRAP 10(a) provides that the record on appeal consists of all of the papers and exhibits filed in the district court -- i.e., all of the items filed in the district court case. This is often unworkable in the bankruptcy context, in which all of the items filed in the bankruptcy case may include tens of thousands, or even hundreds of thousands, of items. Rule 8008 retains the designation process of the current rules. Otherwise, Rule 8008 is patterned after FRAP 10. Ordinarily, the clerk will not require paper copies of the items designated as the record because the clerk will either transmit the items to the district court or the bankruptcy appellate panel electronically, or otherwise make them available electronically. If the clerk requires a paper copy of some or all of the items designated as part of the record, the clerk may request the parties to provide the necessary copies, and the rule requires the parties to comply with the request.

Rule 8009. Completion and Transmission of the Record; Notice of Mediation Procedure; Notice of Briefing Schedule; Assignment; Indicative Rulings

(a) Appellant's Duty. An appellant filing a notice of appeal must comply with Rule 8008 and must do whatever else is necessary to enable the clerk to assemble and transmit the record. If there are multiple appeals from a judgment or order, the clerk must transmit a single record.

(b) Duties of Reporter and Clerk of the Bankruptcy Court.

(1) Duty of reporter to prepare and file transcript. The reporter must prepare and file a transcript as follows:

(A) On receipt of a request for a transcript, the reporter must acknowledge on the request the date it was received and the date on which the reporter expects to have the transcript completed and must transmit the request, so endorsed, to the clerk or to the clerk of the district court or the clerk of the bankruptcy appellate panel.

(B) On completion of the transcript the reporter must file it with the clerk electronically and, if appropriate, notify the clerk of the district court or the clerk of the bankruptcy appellate panel.

(C) If the transcript cannot be completed within 30 days of receipt of the request the reporter must seek an extension of time from the clerk or from the clerk of the district court or the clerk of the bankruptcy appellate panel and the action of the clerk must be entered in the docket and the parties notified.

(D) If the reporter does not file the transcript within the time allowed, the clerk or the clerk of the district court or the clerk of the bankruptcy appellate panel must notify the bankruptcy judge.

(2) Duty of Clerk to Transmit Copy of Record; Notice of Mediation Procedure and Effect of Procedure on Briefing; Setting Briefing Schedule.

(A) Subject to Rule 8009(b)(3), when the record is complete for purposes of appeal, the clerk must transmit it electronically, or otherwise make it available in electronic form, to the clerk of the district court or the clerk of the bankruptcy appellate panel, unless the clerk of the district court or the clerk of the bankruptcy appellate panel requests a paper copy. If the clerk makes the record available in electronic form, the clerk must transmit electronically a notice to the clerk of the

district court or the clerk of the bankruptcy appellate panel stating that the record is available and how it may be accessed.

(B) On receipt of the transmission of the record, or notice of the availability of the record, the clerk of the district court or the clerk of the bankruptcy appellate panel must enter receipt on the docket and give prompt notice to all parties to the appeal.

(C) If the district court or bankruptcy appellate panel directs that paper copies of the record be furnished, the clerk of the district court or the clerk of the bankruptcy appellate panel must notify the appellant and, if the appellant fails to provide the copies, the clerk must prepare the copies at the expense of the appellant.

(D) If the district court or bankruptcy appellate panel has a mediation procedure applicable to appeals from bankruptcy judges, the clerk of the district court or the clerk of the bankruptcy appellate panel must notify the parties forthwith at the time of docketing of the appeal whether the mediation procedure has the effect of staying or modifying the time for filing briefs in the appeal, and the clerk must give adequate notice of the requirements of the mediation procedure.

(E) If the district court or the bankruptcy appellate panel establishes a briefing schedule at the time of docketing of the appeal or at the time of docketing of notice of transmission of the record or notice of availability of the record, whether by notice of the deadlines prescribed in Rules 8015 or 8017 or by order modifying the deadlines prescribed in Rules 8015 or 8017, the clerk must notify the parties forthwith at the time of docketing of the briefing schedule. If the district court or bankruptcy appellate panel does not establish a briefing schedule by notice or order, the deadlines prescribed by Rules 8015 or 8017 apply.

(3) Leave to Appeal; Transmission of Record. Subject to Rule 8009(c), if a motion for leave to appeal has been filed with the clerk as prescribed by Rule 8004, the clerk does not prepare and transmit the record unless and until leave to appeal has been granted by the district court or the bankruptcy appellate panel.

(c) Record for preliminary hearing. If prior to the time the record is transmitted as prescribed by Rule 8009(b)(2) a party moves in the district court or the bankruptcy appellate panel

(1) for leave to appeal,

(2) for dismissal;

(3) for a stay pending appeal;

(4) for approval of a supersedeas bond, or additional security on a bond or undertaking on appeal; or

(5) for any other intermediate order,

the clerk at the request of any party to the appeal must transmit to the clerk of the district court or the clerk of the bankruptcy appellate panel a copy of the parts of the record as any party to the motion or appeal designates.

(d) Retaining the Record Temporarily in the Bankruptcy Court. If the original record not available in electronic form is required to be transmitted to the clerk of the district court or the clerk of the bankruptcy appellate panel, the parties may stipulate, or the bankruptcy court on motion may order, that the clerk retain the actual record not available in electronic form temporarily for the parties to use in preparing papers on appeal. In that event the clerk must certify to the clerk of the district court or bankruptcy appellate panel that the record on appeal is complete. Upon receipt of the appellee's brief, or earlier if the district court or the bankruptcy appellate panel orders or the parties agree, the appellant must request the clerk to transmit the record.

(e) Retaining the Record by Court Order.

(1) The district court or the bankruptcy appellate panel may, by order or local rule, provide that a certified copy of the relevant docket entries for the items designated by the parties be transmitted instead of the entire record. But a party may at any time during the appeal request that designated parts of the record be transmitted.

(2) If the original record not available in electronic form is required to be transmitted to the clerk of the district court or the clerk of the bankruptcy appellate panel, the bankruptcy judge may order the record or some part of it be retained if the court requires it while the appeal is pending, subject, however, to call by the district court or the bankruptcy appellate panel.

(3) If part or all of the original record is ordered retained, the clerk must transmit to the district court or the bankruptcy appellate panel a copy of the order and the relevant docket entries together with the parts of the original record not retained by the bankruptcy judge and copies of any parts of the record designated by the parties.

(f) Retaining Parts of the Record in the Bankruptcy Court by Stipulation of the Parties. If the original record not available in electronic form is required to be transmitted to the clerk of the district court or the clerk of the bankruptcy appellate panel, the parties may agree by written stipulation filed with the clerk that designated parts

of the original record be retained in the bankruptcy court subject to call by the district court or the bankruptcy appellate panel or request by a party. The parts of the record so designated remain a part of the record on appeal.

(g) Assignment. A motion or appeal may not be referred to a magistrate judge.

(h) Indicative Rulings.

(1) Relief Pending Appeal. If a timely motion is made for relief that the bankruptcy court lacks authority to grant because of an appeal that has been docketed and is pending, the bankruptcy court may:

(A) defer consideration of the motion;

(B) deny the motion; or

(C) state that the court would grant the motion if the court in which the appeal is pending remands for that purpose or that the motion raises a substantial issue.

(2) Notice to Court in which the Appeal Is Pending. If the bankruptcy court states that it would grant the motion, or that the motion raises a substantial issue, the movant shall promptly notify the clerk of the court in which the appeal is pending if the movant wants to obtain a remand under Rule 8009(h)(3), and the movant must otherwise comply with applicable requirements of the court in which the appeal is pending.

(3) Remand After Indicative Ruling. If the bankruptcy court states that it would grant the motion or that the motion raises a substantial issue, the court in which the appeal is pending may remand for further proceedings. Upon remand, the court in which the appeal is pending retains jurisdiction unless it expressly dismissed the appeal. If the appeal is not dismissed, the parties shall promptly notify the clerk of the court in which the appeal is pending when the bankruptcy court has decided the motion on remand.

Rule 8009 is derived from current Rule 8007(b) and (c) and FRAP 11. Rule 8009(b)(2)(D) clarifies that the clerk must provide notice of the effect of any court-sponsored mediation procedure on any briefing schedule in the appeal, as well as the requirements of the procedure. Rule 8009(b)(2)(D) provides that notice of the briefing schedule may be provided and may be given at different points in time. To begin with, the clerk of the district court or the clerk of the bankruptcy appellate panel may send out a notice to the parties regarding the briefing schedule at the time of the docketing of the appeal. Rule 8017(a) provides that, ordinarily, the time for the appellant to file its opening brief begins to run from the time the record on appeal is transmitted to the clerk of the district court or the clerk of the bankruptcy appellate panel,

or notice of the availability of the record is transmitted. Thus, for example, the notice may state that appellant's brief is due 30 days after the record on appeal is transmitted to the clerk of the district court or the clerk of the bankruptcy appellate panel, or notice of the availability of the record is transmitted, appellee's brief is due 30 days after service of appellant's brief, and appellant's reply is due 15 days after service of appellee's brief, unless the district court or the bankruptcy appellate panel sets a different briefing schedule. In addition or alternatively, the clerk of the district court or the clerk of the bankruptcy appellate panel may send out a notice regarding the briefing schedule at the time the record is transmitted, or notice is transmitted regarding the availability of the record. Rule 8009(b)(3) clarifies procedures regarding motions for leave to appeal. Rule 8009(c) is derived from FRAP 11(g) and provides for the transmission of certain items to be used as part of certain preliminary hearings that may be held in the district court or the bankruptcy appellate panel prior to the preparation and transmission of the record on appeal. Rule 8009(g) concerns referrals of bankruptcy appeals to magistrate judges. If a bankruptcy matter is assigned on appeal to a magistrate judge, this may subject the matter to as many as four different stages of review as of right, and five or six different stages of review if the matter is heard en banc in the court of appeals, and/ or the Supreme Court ultimate considers the matter on certiorari. Rule 8009(g) would prohibit the assignment of bankruptcy appeals to magistrate judges. Rule 8009(h) is an adaption of FRCP 62.1 and FRAP 12.1. It provides a procedure for the issuance of an indicative ruling when a bankruptcy court determines that, because of a pending appeal, the court lacks jurisdiction to grant a request for relief that the court concludes is meritorious or raises a substantial issue. The rule, however, does not attempt to define the circumstances in which an appeal limits or defeats the bankruptcy court's authority to act in the face of a pending appeal. (Rule 8002(b) identifies motions that, if filed within the relevant time limit, suspend the effect of a notice of appeal filed before the last such motion is resolved. In these circumstances, the bankruptcy court has authority to resolve the motion without resorting to the indicative ruling procedure. Likewise, pursuant to Rule 8007, a bankruptcy court may resolve a motion requesting a stay pending appeal after a notice of appeal has been filed without having to resort to Rule 8009(h)). The court in which a bankruptcy appeal is pending, upon notification that the bankruptcy court has issued an indicative ruling and the filing of any appropriate motion in accordance with the procedures of that court, may remand to the bankruptcy court for a ruling on the motion for relief. The appellate court may also remand all proceedings, thereby terminating the initial appeal, if it expressly states that it is dismissing the appeal. It should do so, however, only when the appellant has stated clearly its intention to abandon the appeal. Otherwise, the appellate court may remand for the purpose of ruling on the motion, while retaining jurisdiction to proceed with the appeal after the bankruptcy court rules, provided that the appeal is not then moot and any party wishes to proceed. In addition to providing notice to the clerk of the appellate court of an indicative ruling, the movant may also be required to file an appropriate motion in the court in which the appeal is pending to obtain a remand under Rule 8009(h)(3), and must otherwise comply with the practices and procedures of that court.

Rule 8010. Filing and Service

(a) Filing.

(1) Filing with the Clerk. A paper required or permitted to be filed in the district court or the bankruptcy appellate panel must be filed with the clerk thereof.

(2) Filing: Method and Timeliness.

(A) In general. Filing may be accomplished by transmission to the clerk of the district court or the clerk of the bankruptcy appellate panel, but except as provided in Rule 8010(a)(2)(B) filing is not timely unless the clerk receives the paper within the time fixed for filing.

(B) A brief or appendix. A brief or appendix is timely filed if, on or before the last day for filing, it is:

(i) transmitted to the clerk of the district court or the clerk of the bankruptcy appellate panel in accordance with applicable electronic transmission procedures for the filing of papers in the district court or the bankruptcy appellate panel;

(ii) mailed to the clerk of the district court or the clerk of the bankruptcy appellate panel by First-Class Mail, or other class of mail that is at least as expeditious, postage prepaid, if the brief or appendix is permitted or required to be mailed under applicable filing procedures of the district court or bankruptcy appellate panel; or

(iii) dispatched to a third-party commercial carrier for delivery to the clerk of the district court or the clerk of the bankruptcy appellate panel within 3 calendar days, if the brief or appendix is permitted or required to be delivered to the clerk under applicable filing procedures of the district court or bankruptcy appellate panel.

(C) 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. section 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.

(D) Electronic filing. A district court or bankruptcy appellate panel may by local rule permit or require papers to be

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

(E) Quantity of Copies. If filed electronically, an original must be filed in the district court or bankruptcy appellate panel. If filed by mail or dispatch, an original and one copy of all papers must be filed when an appeal is to the district court. If filed by mail or dispatch, an original and three copies must be filed when an appeal is to a bankruptcy appellate panel. The district court or bankruptcy appellate panel may require that additional copies be furnished.

(3) Filing a Motion with a Judge. In appeals to the bankruptcy appellate panel, if a motion requests relief that may be granted by a single judge thereof, the judge may permit the motion to be filed with the judge. The judge must note the filing date on the motion and transmit it to the clerk.

(4) Clerk's Refusal of Documents. The clerk of the district court or the clerk of the bankruptcy appellate panel must not refuse to accept for filing any paper transmitted for that purpose solely because it is not presented in proper form as required by these Rules or by any local rule or practice. The district court or bankruptcy appellate panel may, by order, direct the correction of any deficiency in any paper that does not conform to the requirements of these Rules or applicable local rule, and may prescribe such other relief as the court deems appropriate.

(5) Privacy Protection. An appeal in a case whose privacy protection was governed by Rule 9037 is governed by the same rule on appeal.

(b) Service of All Papers Required. Copies of all papers filed by any party and not required by these Rules to be served by the clerk of the district court or the clerk of the bankruptcy appellate panel must, at or before the time of filing, be served by the party or a person acting for the party on all other parties to the appeal. Service on a party represented by counsel must be made on counsel.

(c) Manner of Service.

(1) Service may be any of the following:

(A) personal, including delivery to a responsible person at the office of counsel;

(B) by mail;

(C) by third-party commercial carrier for delivery within 3 calendar days; or

(D) by electronic means, if the party being served consents in writing, or as otherwise permitted or required by applicable local procedure.

(2) If authorized by local rule, a party may use the district court's or bankruptcy appellate panel's transmission equipment to make the electronic service under Rule 8010(c)(1)(D).

(3) When reasonable, considering such factors as the immediacy of the relief sought, distance, and cost, service on a party must be by a manner at least as expeditious as the manner used to file the paper with the district court or the bankruptcy appellate panel.

(4) Service by mail or by commercial carrier is complete on mailing or delivery to the carrier. Service by electronic means is complete on transmission, unless the party making service is notified contemporaneously with an attempted transmission that the paper was not transmitted successfully to the party served.

(d) Proof of Service.

(1) Papers presented for filing must contain either:

(A) an acknowledgment of service by the person served; or

(B) proof of service in the form of a statement by the person who made service certifying:

(i) the date and manner of service;

(ii) the names of the persons served; and

(iii) their mail or electronic addresses, facsimile numbers, or the addresses of the places of delivery, as appropriate for the manner of service.

(2) The clerk of the district court or the clerk of the bankruptcy appellate panel may permit papers to be filed without acknowledgment or proof of service at the time of filing but must require the acknowledgment or proof of service to be filed promptly thereafter.

(3) When a brief or appendix is filed by mailing, dispatch, or electronic transmission in accordance with this Rule 8010(a)(2)(B), the proof of service must also state the date and manner by which the

document was mailed, dispatched, or transmitted electronically to the clerk.

(e) Number of Copies. When these rules require the filing or furnishing of a number of copies, a court may require a different number by local rule or by order in a particular case.

(f) Signature. If filed electronically, every motion, response, reply, brief, or letter authorized by these Rules must indicate the electronic signature of the person filing the paper or, if the person is represented, by one of the person's attorneys. If filed in paper form, every motion, response, reply, brief, or letter authorized by these Rules must be signed by the person filing the paper or, if the person is represented, by one of the person's attorneys.

(g) Paper copies requested by court. Where a brief, motion, response, reply, letter, or other paper is filed electronically, the district court or bankruptcy appellate panel may request by order in a particular case or by local rule that a paper copy also be filed or delivered. The paper copies shall be filed or delivered in the number and within the time directed by the district court or bankruptcy appellate panel.

Rule 8010 is derived from current Rule 8008 and FRAP 25. FRAP 25 has considerably more detail than current Rule 8010. Rule 8010 adopts most of this detail. Rule 8010(a)(2)(E) provides that, in cases of paper filings, an original and one copy of all papers are to be filed if the appeal is to the district court, and an original and three copies are to be filed if the appeal is to the bankruptcy appellate panel, subject to adjustment by either court. This convention is used throughout these rules. The copy requirements do not apply to electronic filings, unless the court requests paper copies pursuant to Rule 8010(g). As used in these Part VIII rules, "transmission" includes electronic transmission, mailing, and hand delivery; "mailing" means delivery through the United States postal service or third-party commercial carrier equivalent; "delivery" includes transmission, mailing and hand delivery. Like FRAP 25(a)(5), Rule 8010(a)(5) provides that the privacy protection afforded by Rule 9037 also applies on appeal. This is included to avoid confusion and should not be construed to suggest inferentially that, unless specifically noted in these Part VIII Rules, the provisions of Part IX do not apply. Rule 8010(c)(4) provides that service of a paper electronically is complete on transmission, unless the party making service is notified contemporaneously at the time of an attempted transmission that the transmission was not successful. This is intended to capture situations in which the party attempting the transmission is notified by an electronically generated message contemporaneous with the attempted transmission that the transmission was a failure. It does not include non-contemporaneous notices of non-receipt. For example, if properly directed to a party's electronic address, service is still effective under the rule even though the party to whom the transmission is directed contends two weeks later that it did not receive the transmission. Rule 8010(f) requires an electronic signature for electronic filings, and a paper signature for paper filings. An electronic signature may be accomplished by typing the name of the person

submitting the paper on the signature line of the paper. Pursuant to Rule 8010(g), where a motion, response, reply, brief, appendix, or other paper is filed electronically, the district court or bankruptcy appellate panel may call for paper copies to be filed, either by order in a particular case, or by local rule requiring the filing or delivery of courtesy copies, chambers copies, and the like. The paper copies shall be filed or delivered in the amount and within the time directed by the district court or bankruptcy appellate panel.

Rule 8011. Corporate Disclosure Statement

(a) Who Must File. Any nongovernmental corporate party to a proceeding in a district court or a bankruptcy appellate panel must file a statement that identifies any parent corporation, any publicly held corporation that owns 10% or more of its stock, or states that there is no such corporation.

(b) Time for Filing; Supplemental Filing. A party must file the statement prescribed by Rule 8011(a) with its principal brief or upon filing a motion, response, petition, or answer in the district court or the bankruptcy appellate panel, 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 a statement before the table of contents. A party must supplement its statement whenever the information that must be disclosed under Rule 8011(a) changes.

Rule 8011 is derived from FRAP 26.1. If filed separately from a brief, motion, response, petition, or answer, the statement must be filed and served in accordance with Rule 8010.

Rule 8012. Motions; Expedition; Intervention

(a) Content of Motions; Response; Reply.

(1) Application for Relief. A request for an order or other relief, including an extraordinary writ, must be made by filing with the clerk of the district court or the clerk of the bankruptcy appellate panel a motion for such order or relief with proof of service on all other parties to the motion or appeal.

(2) Contents of a Motion.

(A) Grounds and Relief Sought. A motion must state with particularity the grounds for the motion, the relief sought, and the legal argument necessary to support it.

(B) Motion to Expedite. A motion to expedite the consideration of an appeal must explain why expedition is warranted and the circumstances that justify the district court or the bankruptcy appellate panel considering the appeal ahead of other matters. If a motion to expedite is granted, the district court or the bankruptcy appellate panel may accelerate

the transmission of the record, the deadline for filing briefs and other papers, oral argument, and resolution of the appeal. A motion to expedite may be filed with the district court or the bankruptcy appellate panel prior to docketing of an appeal as prescribed by Rules 8003(d)(2) or 8004(c)(2). If a statement of election is timely filed with the clerk as prescribed by Rule 8005, a motion to expedite made prior to docketing of an appeal must be made in the district court rather than the bankruptcy appellate panel.

(C) Accompanying Documents and Other Matter.

(i) Any affidavit, declaration, brief, or other paper necessary to support a motion must be served and filed with the motion.

(ii) An affidavit or declaration must contain only factual information, not legal argument.

(iii) A motion seeking substantive relief from a judgment, order, or decree of a bankruptcy judge must include a copy of the bankruptcy judge's order and any accompanying opinion as a separate exhibit.

(iv) A motion must contain or be accompanied by any other matter required by a specific provision of these Rules governing such a motion.

(D) Documents Barred or Not Required.

(i) A notice of motion is not required.

(ii) A proposed order is not required.

(3) Response and Reply; Time to File. Any party may file a response to a motion within 7 days after service of the motion, but the district court or the bankruptcy appellate panel may shorten or extend the time for responding to any motion. The movant may file a reply to a response within 7 days after service of the response.

(b) Determination of Motions for Procedural Orders. Notwithstanding Rule 8012(a)(3), motions for procedural orders, including any motion under Rule 9006, may be acted on at any time, without awaiting a response thereto and without a hearing. Any party adversely affected by such action may move for reconsideration, vacation, or modification of the action within 7 days of service of the procedural order.

(c) Determination of All Motions; Oral Argument. All motions will be decided without oral argument unless the district court or the bankruptcy appellate panel orders otherwise. A motion for a stay

pending appeal or for other emergency relief may be denied if not presented promptly.

(d) Emergency Motions.

(1) Whenever a movant requests expedited action on a motion on the ground that, to avoid irreparable harm, relief is needed in less time than would normally be required for the district court or the bankruptcy appellate panel to receive and consider a response, the word "Emergency" must precede the title of the motion.

(2) The emergency motion

(A) must be accompanied by an affidavit or declaration setting forth the nature of the emergency;

(B) must state whether all grounds advanced in support thereof were submitted to the bankruptcy judge and, if any grounds relied on were not submitted, why the motion should not be remanded to the bankruptcy judge for consideration in the first instance in the bankruptcy court;

(C) must include, when known, the email addresses, office addresses, and telephone numbers of moving and opposing counsel; and

(D) must be served as prescribed by Rule 8010.

(3) Prior to filing an emergency motion, the movant must make every practicable effort to notify opposing counsel in time for counsel to respond to the motion. The affidavit or declaration accompanying the emergency motion must also state when and how opposing counsel was notified, or if opposing counsel was not notified why it was not practicable to do so.

(e) Power of a Single Judge of the Bankruptcy Appellate Panel to Entertain Motions.

(1) A single judge of a bankruptcy appellate panel may grant or deny any request for relief which under these rules may properly be sought by motion, except that a single judge may not dismiss or otherwise decide an appeal or a motion for leave to appeal.

(2) The action of a single judge may be reviewed by the panel.

(f) Form of Papers; Page Limits; and Number of Copies.

(1) Format for Paper Copies.

(A) Reproduction. If a paper copy may or must be filed, a motion, response, reply, brief, affidavit, or declaration

authorized by this Rule 8012 may be reproduced by any process that yields a clear black image on light paper. The paper must be opaque and unglazed. Only one side of the paper may be used.

(B) Cover. A cover is not required for a motion, response, or reply, but 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. If a paper copy may or must be filed and a cover is used, the cover must be white.

(C) Binding. If a paper copy may or must be filed, the document must be bound in any manner that is secure, does not obscure the text, and permits the document to lie reasonably flat when open and easy to scan.

(D) Paper size, line spacing, and margins. If a paper copy may or must be filed, the document must be on 8½ by 11 inch paper. The text must be double-spaced, but quotations more than two lines long may be indented and single-spaced. Headings and footnotes may be single-spaced. Margins must be at least one inch on all four sides. Page numbers may be placed in the margins, but no text may appear there.

(E) Typeface and type styles. The document must comply with the typeface requirements of Rule 8014(a)(5) and the type-style requirements of Rule 8014(a)(6).

(2) Format for Electronic Filings. A motion, response, reply, brief, affidavit, or declaration authorized by this Rule 8012 and filed electronically must, when viewed on a screen or printed, comply with the appearance requirements of a paper copy pursuant to Rule 8012(f)(1) and length requirements of Rule 8012(f)(3).

(3) Page Limits. Unless the district court or the bankruptcy appellate panel permits or directs otherwise, a motion or a response to a motion must not exceed 10 pages, exclusive of the corporate disclosure statement and accompanying documents authorized by Rule 8012(a)(2)(C), and a reply to a response must not exceed 5 pages. Unless the district court or the bankruptcy appellate panel permits or directs otherwise, a brief in support of a motion or a response to a motion must not exceed 20 pages, exclusive of accompanying documents authorized by Rule 8012(a)(2)(C), and a brief in support of a reply must not exceed 10 pages.

(4) Number of Copies. Copies must be provided as required by Rule 8010(a)(2)(E).

(g) Intervention. Unless a statute provides another method, a person who wants to intervene in an appeal pending in the district court or the bankruptcy appellate panel must file a motion for leave to intervene with the clerk of the district court or the clerk of the bankruptcy appellate panel 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 appeal is docketed and must contain a concise statement of the interest of the moving party and the grounds for intervention.

Rule 8012 is derived from current Rule 8011, FRAP 27, FRAP 32(d) and (e), and FRAP 15(d). FRAP 27 has more detail than current Rule 8011. Rule 8012 adopts most of this detail. Rule 8012(a)(2)(B) clarifies procedures with respect to motions to expedite the consideration of an appeal. Rule 8012(g) is derived from FRAP 32(d). Rule 8012(g) clarifies procedures with respect to intervention and is derived from FRAP 15(d). In addition to the requirements of Rule 8012, motions and other papers authorized under the rule must be filed and served in accordance with Rule 8010.

Rule 8013. Form of Briefs

(a) Form of briefs. Unless the district court or the bankruptcy appellate panel by local rule otherwise provides, the form of brief must be as follows:

(1) Appellant's Brief. The appellant's brief must contain under appropriate headings and in the order here indicated:

(A) a corporate disclosure form, if required by Rule 8011;

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

(C) a jurisdictional statement, including:

(i) the basis for the bankruptcy court's subject-matter jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction;

(ii) the basis for the district court's or bankruptcy appellate panel's jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction;

(iii) the filing dates establishing the timeliness of the appeal; and

(iv) an assertion that the appeal is from a final judgment, order, or decree, or information establishing the district court's or bankruptcy appellate panel's jurisdiction on some other basis;

(D) a statement of the issues presented and the applicable standard of appellate review;

(E) a statement of the case, which must first indicate briefly the nature of the case; a statement of the facts relevant to the issues presented for review, with appropriate references to the appendix or, if the reference is to an item not in the appendix, to the record; the course of the proceedings, and the disposition in the bankruptcy court;

(F) an argument, which may be preceded by a summary, and which must contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes, and parts of the record relied on;

(G) a short conclusion stating the precise relief sought; and

(H) the certificate of compliance, if required by Rule 8014(a)(7), Rule 8014(b), or Rule 8015(e)(3).

(2) Appellee's Brief. The appellee's brief must conform to the requirements of Rule 8013(a)(1), except that none of the following need appear unless the appellee is dissatisfied with the appellant's statement:

(A) the jurisdictional statement;

(B) the statement of the issues;

(C) the statement of the case; and

(D) the statement of the applicable standard of appellate review.

(b) Reply brief. The appellant may file a brief in reply to the appellee's brief. A reply brief must contain a table of contents, with page references, and a table of authorities listing cases alphabetically arranged, statutes, and other authorities and references to the pages of the reply brief where they are cited.

(c) No Further Briefs. No further briefs may be filed except with leave of the district court or the bankruptcy appellate panel.

(d) References to Parties. In briefs and at oral argument, counsel should minimize use of the terms "appellant" and "appellee." To make briefs clear, counsel should use the parties' actual names or the designations used in the bankruptcy court, or such descriptive terms as "the employee," "the injured person," "the taxpayer," "the ship," "the stevedore."

(e) References to the Record. References to the parts of the record contained in the appendix filed with the appellant's brief must be to the pages of the appendix.

(f) Reproduction of Statutes, Rules, Regulations, or Similar Material. If determination of the issues presented requires reference to the Code or other statutes, rules, regulations, or similar material, relevant parts thereof must be reproduced in the brief or in an addendum, or they may be supplied to the court in pamphlet form.

(g) Briefs in a Case Involving Multiple Appellants or Appellees. 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.

(h) Citation of Supplemental Authorities. If pertinent and significant authorities come to a party's attention after the party's brief has been filed, or after oral argument but before a decision, a party who has filed a brief may promptly advise the clerk of the district court or the clerk of the bankruptcy appellate panel by letter signed by the party filing the letter or, if the party is represented, by one of the party's attorneys, with a copy to all other parties, setting forth the citations. The letter must state the reasons for the supplemental citations, referring either to the page of the brief or to a point argued orally. The body of the letter must not exceed 350 words. Any response must be made promptly and must be similarly limited.

Rule 8013 is derived from current Rule 8010(a) and (b) and FRAP 28. FRAP 28 has considerably more detail than current Rule 8010(a) and (b). Rule 8013 adopts most of this detail. Rule 8013(h) adopts the procedures of FRAP 28(j) with respect to the filing of supplemental authorities with the district court or the bankruptcy appellate panel after a brief has been filed or after oral argument. If the supplemental letter is filed electronically, the signature requirement must comply with Rule 8010(f).

Rule 8014. Format of Briefs, Appendices, and Other Papers; Length

(a) Format of a Brief; Paper Copies.

(1) Reproduction.

(A) If a paper copy may or must be filed, a brief may be reproduced by any process that yields a clear black image

on light paper. The paper must be opaque and unglazed. Only one side of the paper may be used.

(B) Text must be reproduced with a clarity that equals or exceeds the output of a laser printer.

(C) Photographs, illustrations, and tables may be reproduced by any method that results in a good copy of the original. A glossy finish is acceptable if the original is glossy.

(2) Cover. If a paper copy may or must be filed, except for filings by unrepresented parties, the cover of the appellant's brief must be blue; the appellee's, red; an intervenor's or amicus curiae's, green; any reply brief, gray; and any supplemental brief, tan. The front cover of a brief must contain:

(A) the number of the case centered at the top;

(B) the name of the court;

(C) the title of the case as prescribed by Rule 8003(d)(2) or 8004(c)(2);

(D) the nature of the proceeding and the name of the court below;

(E) the title of the brief, identifying the party or parties for whom the brief is filed; and

(F) the name, office address, telephone number, and email address of counsel representing the party for whom the brief is filed.

(3) Binding. If a paper copy may or must be filed, the brief must be bound in any manner that is secure, does not obscure the text, permits the brief to lie reasonably flat when open, and is easy to scan.

(4) Paper Size, Line Spacing, and Margins. If a paper copy may or must be filed, the brief must be on 8½ by 11 inch paper. The text must be double-spaced, but quotations more than two lines long may be indented and single-spaced. Headings and footnotes may be single-spaced. Margins must be at least one inch on all four sides. Page numbers may be placed in the margins, but no text may appear there.

(5) Typeface. Either a proportionally spaced or monospaced face may be used.

(A) A proportionally spaced face must include serifs, but sans-serif type may be used in headings and captions. A proportionally spaced face must be 14-point or larger.

(B) A monospaced face may not contain more than 10½ characters per inch.

(6) Type Styles. A brief must be set in plain, roman style, although italics or boldface may be used for emphasis. Case names must be italicized or underlined.

(7) Length.

(A) Page limitation. A principal brief of the appellant or appellee may not exceed 30 pages, or a reply brief 15 pages, unless it complies with Rule 8014(a)(7)(B) and (C).

(B) Type-volume limitation.

(i) A principal brief of the appellant or appellee is acceptable if:

(α) it contains no more than 14,000 words; or

(β) it uses a monospaced face and contains no more than 1,300 lines of text.

(ii) A reply brief is acceptable if it contains no more than half of the type volume specified in Rule 8014(a)(7)(B)(i).

(iii) Headings, footnotes, and quotations count toward the word and line limitations. The corporate disclosure statement, table of contents, table of citations, statement with respect to oral argument, any addendum containing statutes, rules, or regulations, and any certificates of counsel do not count toward the limitation.

(C) Certificate of Compliance.

(i) If a paper copy may or must be filed, a brief submitted under this Rule 8014(a)(7)(B) or Rule 8015(e)(2) must include a certificate signed by the attorney, or an unrepresented party, that the brief complies with the type-volume limitation. The person preparing the certificate may rely on the word or line count of the word-processing system used to prepare the brief. The certificate must state either:

(α) the number of words in the brief; or

(β) the number of lines of monospaced type in the brief.

[(ii) Official Form ___ is a suggested form of a certificate of compliance. Use of Form ___ must be regarded as sufficient to meet

the requirements of Rule 8015(e)(3) and this Rule 8014(a)(7)(C)(i).]

(b) Form of Brief; Electronic Filings. A brief authorized by this Rule 8014 or Rule 8015 and filed electronically must, when viewed on a screen or printed, comply with the appearance and length requirements of a paper copy pursuant to Rule 8014(a) or 8015(e), except for the color requirements under Rule 8014(a)(2) or 8015(d). A brief submitted electronically under Rule 8014(a)(7)(B) or Rule 8015(e)(2) must include the certification required by Rule 8014(a)(7)(C), except that, instead of a signature, the certificate must indicate the electronic signature of the person making the certification.

(c) Form of Appendix; Paper Copies. If a paper copy may or must be filed, an appendix must comply with Rule 8014(a)(1), (2), (3), and (4), with the following exceptions:

(1) The cover of a separately bound appendix must be white.

(2) An appendix may include a legible photocopy of any document found in the record or of a printed judicial or agency decision.

(3) When necessary to facilitate inclusion of odd-sized documents such as technical drawings, an appendix may be a size other than 8½ by 11 inches, and need not lie reasonably flat when opened.

(d) Form of Appendix; Electronic Filings. An appendix authorized by this Rule 8014 and filed electronically must, when viewed on a screen or printed, comply with the appearance requirements of a paper copy pursuant to Rule 8014(c).

(e) Form of Other Papers.

(1) Motion. The form of a motion, response, or reply is governed by Rule 8012(f).

(2) Other Papers; Paper Copies. If a paper copy may or must be filed, any other paper, such as an addendum to a brief that set forth statutory provisions, must be reproduced in the manner prescribed by Rule 8014(a), with the following exceptions:

(A) A cover is not necessary if the caption and signature page of the paper together contain the information required by Rule 8014(a)(2). If a cover is used, it must be white.

(B) Letters setting forth supplemental authorities as prescribed by Rule 8013.

(3) Other Papers; Electronic Filings. Any other paper, such as an addendum to a brief, filed electronically must, when viewed on a screen or printed, comply with the appearance requirements of a paper copy pursuant to Rule 8014(e)(2).

(f) Local Variation. Every district court or bankruptcy appellate panel must accept documents that comply with the form and length requirements of this Rule 8014.

Rule 8014 is derived from current Rule 8010(c) and FRAP 32. FRAP 32 has considerably more detail than current Rule 8010(c). Rule 8014 adopts most of this detail. FRAP 32(a)(7) permits the length of a brief to conform either to a prescribed page limitation or a type-volume limitation. Rule 8014 adopts this convention. Rule 8014 requires an electronic signature for the certificate of compliance if the brief is submitted electronically under Rule 8014(a)(7)(B) or Rule 8015(e)(2). An electronic signature may be accomplished by typing the name of the person making the certificate on the signature line of the certificate. Like FRAP 32(e), Rule 8014(f) directs that every district court or bankruptcy appellate panel must accept documents that comply with the form and length requirements of the national rule. Accordingly, the district courts and bankruptcy appellate panels may not require by local rule or otherwise that briefs be limited to shorter page lengths or lesser type-volume restrictions than the national rule allows. Rule 8014(f) prevents the 'hour-glass' problem that occurs in cases in which the parties must constrict their appellate presentations in the district court or the bankruptcy appellate panel (and perhaps even forfeit arguments) owing to variations in local practice that limit briefs in some jurisdictions to as little as twenty pages, but then have the full benefit of the national page limit and type-volume rules established in FRAP 32 in the court of appeals. Sharply restricted page limitations or type-volume restrictions would also sometimes leave the parties with little room for argument after satisfying the procedural requirements of Rule 8013. A theme of the revised Part VIII rules is to make bankruptcy appellate practice in the district courts and the bankruptcy appellate panels as consistent as possible with bankruptcy appellate practice in the courts of appeals to avoid the inefficiencies of each party having to craft its presentation to conform to different practices and procedures at the different levels of appeals. Note: Rule 8014 calls for an official form for the certificate of compliance similar to Official Form 6 in the Appendix of FRAP Forms. In addition to the requirements of Rule 8014, briefs and other papers authorized under the rule must be filed and served in accordance with Rule 8010.

Rule 8015. Cross-Appeals

(a) Applicability. This rule applies to a case in which a cross-appeal is filed. Rules 8013(a)-(c), 8014(a)(2), 8014(a)(7)(A)-(B), and 8017(a) do not apply to such a case, except as otherwise provided in this Rule 8015.

(b) Designation of Appellant. The party who files a notice of appeal first is the appellant for purposes of this Rule 8015 and Rules 8017(b) and 8018. If notices are filed on the same day, the plaintiff, petitioner, applicant, or movant in the proceeding below is the

appellant. These designations may be modified by the parties' agreement or by court order.

(c) Briefs. In a case involving a cross-appeal:

(1) Appellant's Principal Brief. The appellant must file a principal brief in the appeal. That brief must comply with Rule 8013(a)(1).

(2) Appellee's Principal and Response Brief. The appellee must file a principal brief in the cross-appeal and must, in the same brief, respond to the principal brief in the appeal. That brief must comply with Rule 8013(a)(1), except that the brief need not include a statement of the case or a statement of the facts unless the appellee is dissatisfied with the appellant's statement.

(3) Appellant's Response and Reply Brief. The appellant must file a brief that responds to the principal brief in the cross-appeal and may, in the same brief, reply to the response in the appeal. That brief must comply with Rule 8013(a)(1)(A)-(E) and (G), except that none of the following need appear unless the appellant is dissatisfied with the appellee's statement in the cross-appeal:

(A) the jurisdictional statement;

(B) the statement of the issues;

(C) the statement of the case; and

(D) the statement of the applicable standard of appellate review.

(4) Appellee's Reply Brief. The appellee may file a brief in reply to the response in the cross-appeal. That brief must comply with Rule 8013(a)(1)(A) and (G) and must be limited to the issues presented by the cross-appeal.

(5) No Further Briefs. Unless the district court or the bankruptcy appellate panel permits, no further briefs may be filed in a case involving a cross-appeal.

(d) Cover. If a paper copy may or must be filed, except for filings by unrepresented parties, the cover of the appellant's principal brief must be blue; the appellee's principal and response brief, red; the appellant's response and reply brief, yellow; the appellee's reply brief, gray; an intervenor's or amicus curiae's brief, green; and any supplemental brief, tan. The front cover of a brief must contain the information required by Rule 8014(a)(2).

(e) Length.

(1) Page Limitation. Unless it complies with this Rule 8015(e)(2) and (3), the appellant's principal brief must not exceed 30 pages; the appellee's principal and response brief, 35 pages; the appellant's response and reply brief, 30 pages; and the appellee's brief, 15 pages.

(2) Type-Volume Limitation.

(A) The appellant's principal brief or the appellant's response and reply brief is acceptable if:

(i) it contains no more than 14,000 words; or

(ii) it uses a monospaced face and contains no more than 1,300 lines of text.

(B) The appellee's principal and response brief is acceptable if:

(i) it contains no more than 16,500 words; or

(ii) it uses a monospaced face and contains no more than 1,500 lines of text.

(C) The appellee's reply brief is acceptable if it contains no more than half of the type volume specified in this Rule 8015(e)(2)(A).

(3) Certificate of Compliance. A brief submitted under this Rule 8015(e)(2) must comply with Rule 8014(a)(7)(C) or Rule 8014(b).

(f) Time to Serve and File a Brief. Briefs must be served and filed as follows:

(1) The appellant must serve and file its principal brief within 30 days after docketing of the notice of transmission of the record or notice of availability of the record pursuant to Rule 8009(b)(2)(B).

(2) The appellee must serve and file its principal and response brief within 30 days after service of the principal brief of appellant.

(3) The appellant must serve and file its response and reply brief within 30 days after service of the principal and response brief of the appellee.

(4) The appellee must file its reply brief within fourteen days after service of the response and reply brief of the appellant, or 3 days before scheduled argument, whichever is earlier, unless the district court or the bankruptcy appellate panel, for good cause, allows a later filing.

(5) If an appellant or cross appellant fails to file a brief within the time provided by this Rule 8015, or within an extended time, an appellee or cross appeal may move to dismiss the appeal or cross appeal. An appellee or cross appellee who fails to file a brief will not be heard at oral argument on the appeal or cross appeal unless the district court or bankruptcy appellate panel grants permission.

Rule 8015 is derived from FRAP 28.1. It operates in the same way as FRAP 28.1.

Rule 8016. Brief of an Amicus Curiae

(a) When Permitted. The United States or its officer or agency, or a State, Territory, Commonwealth, or the District of Columbia may file an amicus-curiae brief without the consent of the parties or leave of court. 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. On its own motion, and with notice to all parties to an appeal, the district court or the bankruptcy appellate panel may request a brief by an amicus curiae.

(b) Motion for Leave to File. The motion for leave must be accompanied by the proposed brief and state:

(1) the movant's interest; and

(2) the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case.

(c) Content and form. An amicus brief must comply with Rule 8014. In addition to the requirements of Rule 8014, 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 by Rule 8011. An amicus brief need not comply with Rule 8013, but must include the following:

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

(2) a table of authorities listing 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 8014(a)(7)(C), Rule 8014(b), or 8015(e)(3).

(d) Length. Except by the court's permission, an amicus brief may be no more than one-half the maximum length authorized by these rules for a party's principal brief. If the court grants a party permission to file a longer brief, that extension does not affect the length of an amicus brief.

(e) Time for Filing. An amicus curiae must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the principal brief of the party being supported is due. A

court may grant leave for later filing, specifying the time within which an opposing party may answer.

(f) Reply Brief. Except by the court's permission, an amicus curiae may not file a reply brief.

(g) Oral Argument. An amicus curiae may participate in oral argument only with the court's permission.

(h) Citation of Supplemental Authorities. If pertinent and significant authorities come to a amicus' attention after the amicus' brief has been filed, or after oral argument but before a decision, an amicus who has filed a brief may promptly advise the clerk of the district court or the clerk of the bankruptcy appellate panel by letter signed by the amicus filing the letter or, if the amicus is represented, by one of the amicus' attorneys, with a copy to all other parties, setting forth the citations. The letter must state the reasons for the supplemental citations, referring either to the page of the brief or to a point argued orally. The body of the letter must not exceed 350 words. Any response must be made promptly and must be similarly limited.

Rule 8016 is derived from FRAP 29. The practice and procedure governing the filing of amicus briefs in the courts of appeals is well-established. Just as an amicus brief may be useful to a court of appeals in deciding an appeal, it may be equally useful to a district court or bankruptcy appellate panel, and the practice in the different courts should be the same to avoid the 'hour glass' problem that occurs when the presentation of an appeal is truncated in the district court or bankruptcy appellate panel in comparison to the court of appeals. Like Rule 8013(h), Rule 8016(h) adopts the procedures of FRAP 28(j) with respect to the filing by an amicus of supplemental authorities with the district court or the bankruptcy appellate panel after a brief has been filed or after oral argument. If the supplemental letter is filed electronically, the signature requirement must comply with Rule 8010(f). In addition to the requirements of Rule 8016, a brief or letter authorized under the rule must be filed and served in accordance with Rule 8010.

Rule 8017. Briefs and Appendix; Filing and Service

(a) Briefs. Unless the district court or the bankruptcy appellate panel by local rule or by order excuses the filing of briefs or specifies different time limits:

(1) The appellant must serve and file a brief within 30 days after docketing of the notice of transmission of the record or notice of availability of the record pursuant to Rule 8009(b)(2)(B).

(2) The appellee must serve and file a brief within 30 days after service of the brief of appellant.

(3) The appellant may serve and file a reply brief within 15 days after service of the brief of the appellee, or 3 days before

scheduled argument, whichever is earlier, unless the district court or the bankruptcy appellate panel, for good cause, allows a later filing.

(4) If an appellant fails to file a brief within the time provided by this rule, or within an extended time, an appellee may move to dismiss the appeal. An appellee who fails to file a brief will not be heard at oral argument unless the district court or bankruptcy appellate panel grants permission.

(b) Appendix to brief.

(1) Subject to Rule 8008(d) and Rule 8017(b)(4), the appellant must serve and file with the appellant's principal brief excerpts of the record as an appendix, which must include the following:

(A) the relevant entries in the bankruptcy docket;

(B) the complaint and answer or other equivalent pleadings;

(C) the judgment, order, or decree from which the appeal is taken;

(D) any other orders, pleadings, jury instructions, findings, conclusions, or opinions relevant to the appeal;

(E) the notice of appeal; and

(F) any relevant transcript or portion thereof.

An appellee, cross appellant, or cross appellee may also serve and file with its principal brief an appendix which contains material required to be included by the appellant or cross appellant, or relevant to the appeal or cross appeal, but omitted by appellant or cross appellant. The record is available to the district court or the bankruptcy appellate panel and the parties should include in the appendix only those materials that the district court or the bankruptcy appellate panel should examine. The unnecessary inclusion of items should be avoided.

(2) Format of the Appendix. The appendix must begin with a table of contents identifying the page at which each part begins. The pages of the appendix must be numbered consecutively, and may be numbered by a bate stamp or similar process. The relevant docket entries must follow the table of contents. Other parts of the record must follow chronologically. When pages from the transcript of proceedings are placed in the appendix, the transcript page numbers must be shown in the brackets immediately before the included pages. Omissions in the text of papers or of the transcript must be indicated by asterisks. Immaterial formal matters such as captions, subscriptions, acknowledgments, and the like should be omitted.

(3) Reproduction of Exhibits. Exhibits designated for inclusion in the appendix may be reproduced in a separate volume, or volumes, suitably indexed.

(4) Appeal on the Original Record Without an Appendix. The district court or the bankruptcy appellate panel 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 district court or bankruptcy appellate panel may order the parties to file.

Rule 8017 is derived from current Rule 8009, FRAP 31, FRAP 30, and Supreme Court Rule 26.2. Rule 8017 adopts in general the deadlines of FRAP 31. Rule 8017 retains the simpler practice of each party filing its own appendix rather than adopt the more complex procedures for negotiating and filing a joint appendix. In addition to the requirements of Rule 8017, briefs, appendices, and other papers authorized under the rule must be filed and served in accordance with Rule 8010. Pursuant to Rule 8010(g), where a brief, appendix, or other paper is filed electronically, the district court or bankruptcy appellate panel may call for paper copies to be filed or delivered. The paper copies shall be filed or delivered in the amount and within the time directed by the district court or bankruptcy appellate panel.

Rule 8018. Oral Argument

(a) Party's Statement. Any party may file a statement setting forth the reason why oral argument should, or need not, be allowed. A party may include this statement at the beginning of its principal brief or it may file it separately with its principal brief.

(b) Presumption of Oral Argument and Exception. Oral argument must be allowed in every case unless the district judge or the judges of the bankruptcy appellate panel unanimously determine after examination of the briefs and record that oral argument is unnecessary for any of the following reasons:

(1) the appeal is frivolous;

(2) the dispositive issue or issues have been authoritatively decided; or

(3) the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.

(c) Notice of Argument; Postponement. The clerk of the district court or the clerk of the bankruptcy appellate panel must advise all parties of the date, time, and place for oral argument, and the time allowed for each side. A motion to postpone the argument or to allow

longer argument must be filed reasonably in advance of the hearing date.

(d) Order and Contents of Argument. The appellant opens and concludes the argument. Counsel must not read at length from briefs, records, or authorities.

(e) Cross-Appeals and Separate Appeals. If there is a cross-appeal, Rule 8015(b) determines which party is the appellant and which is the appellee for the purposes of oral argument. Unless the district court or the bankruptcy appellate panel directs otherwise, a cross-appeal or separate appeal must be argued when the initial appeal is argued. Separate parties should avoid duplicative argument.

(f) Nonappearance of a Party. Except as provided in Rules 8018(a) and 8018(c), if the appellee fails to appear for argument, the district court or the bankruptcy appellate panel may hear appellant's argument. If the appellant fails to appear for argument, the district court or bankruptcy appellate panel may hear the appellee's argument. If neither party appears, the case will be decided on the briefs, unless the district court or the bankruptcy appellate panel orders otherwise.

(g) Submission on Briefs. The parties may agree to submit a case for decision on the briefs, but the district court or the bankruptcy appellate panel may direct that the case be argued.

(i) Use of Physical Exhibits at Argument; Removal. Counsel intending to use physical exhibits other than documents at the argument must arrange to place them in the courtroom on the day of the argument before the court convenes. After the argument, counsel must remove the exhibits from the courtroom, unless the district court or the bankruptcy appellate panel directs otherwise. The clerk may destroy or dispose of the exhibits if counsel does not reclaim them within a reasonable time after the clerk gives notice to remove them.

Rule 8018 is derived from current Rule 8012 and FRAP 34. FRAP 34 has considerably more detail than current Rule 8012. Rule 8018 adopts most of this detail.

Rule 8019. Disposition of Appeal; Weight Accorded Bankruptcy Judge's Findings of Fact and Conclusions of Law

(a) Disposition of Appeal. On an appeal the district court or the bankruptcy appellate panel may affirm, modify, vacate, or reverse a bankruptcy judge's judgment, order, or decree, or remand with instructions for further proceedings.

(b) Accorded Weight. Findings of fact in matters over which the bankruptcy judge has jurisdiction under 28 U.S.C. §§ 157(b)(1) or 157(c)(2), whether based on oral or documentary evidence, must not

be set aside unless clearly erroneous, and due regard must be given to the opportunity of the bankruptcy judge to assess the credibility of the witnesses. Questions of law are subject to de novo review. A matter committed to the discretion of the bankruptcy judge is reviewed for abuse of discretion unless the bankruptcy judge applied an incorrect standard of law. Any matter may be reviewed for clear error. Proposed findings of fact and conclusions of law as to which a party has timely and specifically objected under Rule 9033 in matters over which the bankruptcy judge has jurisdiction under 28 U.S.C. § 157(c)(1) are subject to the provisions of Rule 9033 and the review that it prescribes.

Rule 8019 is derived from current Rule 8013. Rule 8019 clarifies that, in an appeal of an order, judgment, or decree over which the bankruptcy judge had jurisdiction under 28 U.S.C. §§ 157(b)(1) (core proceedings arising under title 11, or arising in a case under title 11), or 157(c)(2) (a proceeding related to a case under title 11 as to which all the parties have consented to have the bankruptcy judge hear and determine the proceeding), findings of fact, whether based on oral or documentary evidence, must not be set aside unless clearly erroneous, and due regard must be given to the opportunity of the bankruptcy judge to assess the credibility of the witnesses. Questions of law are always subject to do novo review. A matter committed to the discretion of the bankruptcy judge is reviewed for abuse of discretion unless the bankruptcy judge applied an incorrect standard of law. And any matter may be reviewed for clear error. In combination, these complete the general rules of appellate review. Consistent with FRBP 9033, in matters over which the bankruptcy judge had jurisdiction under 28 U.S.C. § 157(c)(1) (a proceeding that is related to a case under title 11 as to which all of the parties have not consented to have the bankruptcy judge hear and determine the proceeding), the district judge or bankruptcy appellate panel exercises de novo review of findings of fact as to which a party has timely and specifically objected. This cross-reference is added to avoid the confusion that sometimes arises under current Rule 8013 regarding whether its provisions apply to review of proposed findings of fact and conclusions of law governed by Rule 9033.

Rule 8020. Damages and Costs for Frivolous Appeal

If the district court or the bankruptcy appellate panel determines that an appeal from a judgment, order, or decree of a bankruptcy judge is frivolous, it may, after a separately filed motion or notice from the district court or the bankruptcy appellate panel and reasonable opportunity to respond, award just damages and single or double costs to the appellee. The relief authorized by this Rule 8020 should not be construed as limiting any other relief or power available to the district court or bankruptcy appellate panel.

Rule 8020 is derived from FRAP 38. The second sentence clarifies that the express provisions of this Rule do not limit or implicitly prohibit the exercise of any inherent or other authority or power that a district court or bankruptcy appellate panel may have in addressing appeals or the conduct of the parties.

Rule 8021. Costs

(a) Against Whom Assessed. The following rules apply unless the law provides or the district court or bankruptcy appellate panel orders otherwise:

(1) if an appeal is dismissed other than as provided in Rule 8023, costs are taxed against the appellant, unless the parties agree otherwise;

(2) if a judgment, order, or decree is affirmed, costs are taxed against the appellant;

(3) if a judgment, order, or decree is reversed, costs are taxed against the appellee;

(4) if a judgment, order, or decree is affirmed or reversed in part, or is vacated, costs may be allowed only as ordered by the court.

(b) Costs For and Against the United States. Costs for or against the United States, its agency, or officer may be assessed under Rule 8021(a) only if authorized by law.

(c) Costs Taxable on Appeal. Costs incurred in the production of copies of briefs, the appendices, exhibits, the record, and in the preparation and transmission of the record, the cost of the reporter's transcript if necessary for the determination of the appeal, the premiums paid for supersedeas bonds or other bonds to preserve rights pending appeal, and the fee for filing the notice of appeal must be taxed by the clerk as costs of the appeal in favor of the party entitled to costs under this Rule 8021. Costs do not include attorneys' fees. Each district court or bankruptcy appellate panel must, by local rule, fix the maximum rate for taxing the cost of producing necessary copies of a brief, appendix, exhibits, or the record authorized by these Rules. The rate must not exceed that generally charged for such work in the area where the office of the clerk of the district court or the clerk of the bankruptcy appellate panel is located and should encourage economical methods of copying. If the district court or the bankruptcy appellate panel has not adopted such a local rule, the clerk of the district court or the clerk of the bankruptcy appellate panel shall in taxing costs use the rate authorized by local rule of the court of appeals as prescribed by Rule 39(c) of the Federal Rules of Appellate Procedure.

(d) Bill of Costs; Objections. A party who wants costs taxed must, within 14 days after entry of judgment on appeal, file with the clerk of the district court or the clerk of the bankruptcy appellate panel, with proof of service, an itemized and verified bill of costs. Objections must be filed within 14 days after service of the bill of costs, unless the court extends the time. The clerk of the district court or the clerk

of the bankruptcy appellate panel must prepare and certify an itemized statement of costs.

Rule 8021 is derived from current Rule 8014 and FRAP 39. FRAP 39 has more detail than current Rule 8014. Rule 8021 adopts most of this detail.

Rule 8022. Motion for Rehearing

(a) Time to File; Contents; Answer; Action by the District Court or Bankruptcy Appellate Panel if granted

(1) Time. Unless the time is shortened or extended by order or local rule, any petition for rehearing by the district court or the bankruptcy appellate panel must be filed within 14 days after entry of judgment on appeal.

(2) Contents. The petition must state with particularity each point of law or fact that the petitioner believes the district court or the bankruptcy appellate panel has overlooked or misapprehended and must argue in support of the petition. Oral argument is not permitted.

(3) Answer. Unless the district court or the bankruptcy appellate panel requests, no answer to a petition for rehearing is permitted. But ordinarily, rehearing will not be granted in the absence of such a request.

(4) Action by the District Court or the Bankruptcy Appellate Panel. If a petition for rehearing is granted, the district court or the bankruptcy appellate panel may do any of the following:

(A) make a final disposition of the case without reargument;

(B) restore the case to the calendar for reargument or resubmission; or

(C) issue any other appropriate order.

(b) Time for Appeal Runs from Denial. If a timely motion for rehearing is filed, the time for appeal to the court of appeals for all parties runs from the entry of the order denying rehearing or the entry of a subsequent judgment on appeal.

(c) Form of Petition; Length. The petition must comply with Rule 8014(a)(1)-(6) and 8014(b). Copies must be served and filed as Rule 8017(a)(5) prescribes for the filing of a brief. Unless the district court or the bankruptcy appellate panel by local rule or order provides otherwise, a petition for rehearing must not exceed 15 pages.

Rule 8022 is derived from current Rule 8015 and FRAP 40. FRAP 40 has more detail than current Rule 8015. Rule 8022 adopts most of this detail. In

addition to the requirements of Rule 8022, a petition authorized under the rule must be filed and served in accordance with Rule 8010.

Rule 8023. Voluntary Dismissal

(a) Dismissal in the Bankruptcy Court. If an appeal has not been docketed in the district court or the bankruptcy appellate panel, the appeal may be dismissed by the bankruptcy judge on the filing of a stipulation for dismissal signed by all the parties, or on motion and notice by the appellant.

(b) Dismissal in the District Court or the Bankruptcy Appellate Panel. If an appeal has been docketed in the district court or the bankruptcy appellate panel, and the parties to the appeal sign and file with the clerk of the district court or the clerk of the bankruptcy appellate panel an agreement that the appeal be dismissed and pay any court costs or fees that may be due, the clerk of the district court or the clerk of the bankruptcy appellate panel must enter an order dismissing the appeal. An appeal may also be dismissed on motion of the appellant on terms and conditions fixed by the district court or the bankruptcy appellate panel.

(c) Settlement. If the parties have fully settled a controversy, and have agreed to dismiss an appeal, the parties must notify the district court or the bankruptcy appellate panel as expeditiously as possible. Thereafter, upon stipulation by the parties, the district court or the bankruptcy appellate panel may dismiss the appeal by reason of settlement.

(d) Dismissal for Failure to Prosecute. Upon 30 days' notice to the parties, a district court or bankruptcy appellate panel may order the dismissal of an appeal for failure to prosecute.

Rule 8023 is derived from current Rule 8001(c) and FRAP 42. Nothing in Rule 8023 prohibits a district court or bankruptcy appellate panel from dismissing an appeal for other reasons authorized by law. Parties frequently settle matters during an appeal. If the parties have fully settled a controversy, and have agreed to dismiss an appeal, they must notify the district court or the bankruptcy appellate panel as expeditiously as possible. The provision of this notice, however, should not, by itself, result in an automatic dismissal of an appeal. Frequently, settlements in bankruptcy require the approval of the bankruptcy judge to become effective under FRBP 9019. The provision of notice in Rule 8023(c) is designed to alert the district court or the bankruptcy appellate panel of the settlement so that additional time and resources are not wasted needlessly on resolving the appeal.

Rule 8024. Duties of Clerk on Disposition of Appeal

(a) Entry of Judgment on Appeal. The clerk of the district court or the clerk of the bankruptcy appellate panel must prepare, sign and enter the judgment following receipt of the opinion of the district court

or the bankruptcy appellate panel or, if there is no opinion, following the instruction of the district court or the bankruptcy appellate panel. The notation of a judgment in the docket constitutes entry of judgment.

(b) Notice of Orders or Judgments; Return of Record. Immediately on the entry of a judgment or order, the clerk of the district court or the clerk of the bankruptcy appellate panel must transmit a notice of the entry to each party to the appeal, to the United States trustee, and to the clerk, together with a copy of any opinion respecting the judgment or order, and must make a note of the transmission in the docket. Original papers transmitted as the record on appeal must be returned to the clerk on disposition of the appeal.

Rule 8024 is derived from current Rule 8016 and FRAP 45(c). It largely retains the provisions of current Rule 8016.

Rule 8025. Stay of Judgment of District Court or Bankruptcy Appellate Panel

(a) Automatic Stay of Judgment on Appeal. Judgments of the district court or the bankruptcy appellate panel are stayed until the expiration of 14 days after entry of the judgment, unless otherwise ordered by the district court or the bankruptcy appellate panel.

(b) Stay Pending Appeal to the Court of Appeals.

(1) On motion and notice to the parties to the appeal, the district court or the bankruptcy appellate panel may stay its judgment pending an appeal to the court of appeals.

(2) The stay must not extend beyond 30 days after the entry of the judgment of the district court or the bankruptcy appellate panel unless the period is extended for cause shown.

(3) If before the expiration of a stay entered pursuant to this subdivision there is an appeal to the court of appeals by the party who obtained the stay, the stay continues until final disposition by the court of appeals.

(4) A bond or other security may be required as a condition of the grant or continuation of a stay of the judgment.

(5) A bond or other security may be required if a trustee obtains a stay, but a bond or security may not be required if a stay is obtained by the United States or an officer or agency thereof or at the direction of any department of the Government of the United States.

(c) Automatic Stay of Order, Judgment, or Decree of Bankruptcy Judge. If the district court or the bankruptcy appellate

panel enters a judgment affirming an order, judgment, or decree of a bankruptcy judge, a stay of the judgment of the district court or the bankruptcy appellate panel automatically stays the order, judgment, or decree of the bankruptcy judge for the duration of the stay, unless otherwise ordered.

(d) Power of Court of Appeals Not Limited. This rule does not limit the power of a court of appeals or any judge thereof to stay a judgment pending appeal or to stay proceedings during the pendency of an appeal or to suspend, modify, restore, vacate, or grant a stay or an injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of any judgment subsequently to be entered.

Rule 8025 is derived from current Rule 8017.

Rule 8026. Rules by Circuit Councils and District Courts; Procedure When There is No Controlling Law

(a) Local Rules by Circuit Councils and District Courts.

(1) Circuit councils which have authorized bankruptcy appellate panels pursuant to 28 U.S.C. § 158(b) and the district courts may, acting by a majority of the judges of the council or district court, make and amend rules governing practice and procedure for appeals from orders or judgments of bankruptcy judges to the district court or the bankruptcy appellate panel consistent with, but not duplicative of, Acts of Congress and the rules of this Part VIII.

(2) Local rules must conform to any uniform numbering system prescribed by the Judicial Conference of the United States. Rule 83 F.R.Civ.P. governs the procedure for making and amending rules to govern appeals in the district court or the bankruptcy appellate panel.

(3) A local rule imposing a requirement of form may not be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement.

(b) Procedure When There is No Controlling Law.

(1) A district judge or bankruptcy appellate panel may regulate practice in any manner consistent with federal law, these Rules, the Official Forms, and local rules of the circuit council or the district court.

(2) No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, applicable federal rules, the Official Forms, or the local rules of the circuit council or district court unless the alleged violator has been furnished in the particular case with actual notice of the requirement.

Rule 8026 is derived from current Rule 8018.

Rule 8027. Suspension of Rules in Part VIII

In the interests of expediting decision or for other cause in a particular case, the district court or the bankruptcy appellate panel may suspend the requirements or provisions of the rules in Part VIII, except Rules 8001, 8002, 8003, 8004, 8005, 8006, 8007, 8014(a)(7), 8015(e), 8019, 8020, 8024, 8025, 8026, and 8027.

Rule 8027 is derived from current Rule 8019 and FRAP 2. Rule 8027 expands the list of rules that may not be suspended, namely those prescribing the manner and deadlines for taking an appeal as of right or by leave, the right of a party to file a statement of election, direct appeal certification, stays pending appeal, the page limit and type-volume requirements in appeals and cross-appeals, the disposition of an appeal, damages and costs for frivolous appeals, the duties of the clerk upon disposition of an appeal, the stay of a judgment in an appeal, the procedures for adopting local rules, and the suspension rule itself.

VIII

Calendar for March–May 2010 (United States)

March

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			

April

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	

May

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					

Holidays and Observances:

May 31 Memorial Day