ADVISORY COMMITTEE
ON
APPELLATE RULES

BOSTON, MA
OCTOBER 7-8, 2010

Agenda for Fall 2010 Meeting of
Advisory Committee on Appellate Rules
October 7-8, 2010
Boston, Massachusetts

I. Introductions

II. Approval of Minutes of April 2010 Meeting

III. Report on June 2010 Meeting of Standing Committee

IV. Other Information Items

- A. Federal Circuit proposal to amend 28 U.S.C. § 46(c)
- B. Item No. 08-AP-Q (FRAP 10(b) and digital audiorecordings)
- C. Circuit splits relating to the Appellate Rules

V. Action Items

- A. For publication
  1. Item No. 08-AP-M (interlocutory appeals in tax cases)
  2. Item No. 08-AP-D (FRAP 4(a) – postjudgment motions)

VI. Discussion Items

- A. Item No. 08-AP-G (substantive and style changes to Form 4)
- B. Item No. 08-AP-H (manufactured finality)
- C. Item No. 09-AP-B (definition of "state" and Indian tribes)
- D. Item No. 09-AP-C (Bankruptcy Rules Committee's project to revise Part VIII of the Bankruptcy Rules)
- E. Item No. 08-AP-L (FRAP 6(b)(2)(A) / *Sorensen* issue)
- F. Item No. 09-AP-D (implications of *Mohawk Industries, Inc. v. Carpenter*)
- G. Item No. 10-AP-A (premature notices of appeal)
- H. Item No. 10-AP-B (statement of the case)

VII. Additional Old Business and New Business

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

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

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

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

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

VIII. Adjournment

ADVISORY COMMITTEE ON APPELLATE RULES

Chair: 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	**Reporter:** Professor Catherine T. Struve University of Pennsylvania Law School 3400 Chestnut Street Philadelphia, PA 19104
Members: Professor Amy Coney Barrett University of Notre Dame Law School 3165 Eck Hall of Law Notre Dame, IN 46556	 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 Robert Michael Dow, Jr. United States District Court Everett McKinley Dirksen United States Courthouse 219 South Dearborn Street, Room 1978 Chicago, IL 60604
Honorable Allison Eid Supreme Court Justice Colorado Supreme Court 101 W. Colfax Avenue – Suite 800 Denver, CO 80202	Honorable Peter T. Fay United States Court of Appeals James Lawrence King Federal Justice Building 99 Northeast Fourth Street, Room 1255 Miami, FL 33132
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
  Richard G. Taranto, Esq. Farr & Taranto 1150 18th Street, N.W. Washington, DC 20036-2435	**Advisor:** Leonard Green Clerk United States Court of Appeals 540 Potter Stewart United States Courthouse 100 East Fifth Street Cincinnati, OH 45202
Liaison Member: Dean C. Colson, Esquire Colson Hicks Eidson 255 Aragon Avenue Second Floor Coral Gables, FL 33134	**Secretary:** Peter G. McCabe Secretary, Committee on Rules of Practice and Procedure Washington, DC 20544

Members	Position	District/Circuit	Start Date	End Date
Jeffrey S. Sutton **Chair**	B	Illinois (Northern)	Member: 2005 Chair: 2009	2012
Amy Coney Barrett	ACAD	North Carolina	2010	2013
James F. Bennett	ESQ	Missouri	2005	2011
Kermit Edward Bye	C	Eighth Circuit	2005	2011
Robert Michael Dow, Jr	D	Illinois (Northern)	2010	2013
Allison Eid	JUST	Colorado	2010	2013
Peter T. Fay	C	Eleventh	2009	2012
Douglas Letter*	DOJ	Washington, DC		
Maureen E. Mahoney	ESQ	Washington, DC	2005	2011
Richard G. Taranto	ESQ	Washington, DC	2009	2012
Catherine T. Struve **Reporter**	ACAD	Pennsylvania	2006	Open
** Ex-Officio*				
Principal Staff:				
Peter G. McCabe		202-502-1800		
John K. Rabiej		202-502-1820		

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
CHAIRS and REPORTERS

Honorable Lee H. Rosenthal United States District Judge United States District Court 11535 Bob Casey U.S. Courthouse 515 Rusk Avenue Houston, TX 77002-2600	Professor Daniel R. Coquillette Boston College Law School 885 Centre Street Newton Centre, MA 02459
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
Honorable Eugene R. Wedoff United States Bankruptcy Court Everett McKinley Dirksen United States Courthouse 219 South Dearborn Street Chicago, IL 60604	Professor S. Elizabeth Gibson Burton Craige Professor of Law 5073 Van Hecke-Wettach Hall University of North Carolina at Chapel Hill C.B. #3380 Chapel Hill, NC 27599-3380
Honorable Mark R. Kravitz United States District Judge United States District Court Richard C. Lee United States Courthouse 141 Church Street	Professor Edward H. Cooper University of Michigan Law School 312 Hutchins Hall Ann Arbor, MI 48109-1215
Honorable Richard C. Tallman United States Circuit Judge 902 William Kenzo Nakamura U.S. Courthouse – 1010 Fifth Avenue Seattle, WA 98104-1195	Professor Sara Sun Beale Duke University School of Law Science Drive & Towerview Road Box 90360 Durham, NC 27708-0360
Honorable Sidney A. Fitzwater Chief Judge United States District Court Earle Cabell Federal Building and United States Courthouse 1100 Commerce Street, Room 1528 Dallas, TX 75242-1310	Professor Daniel J. Capra Fordham University School of Law 140 West 62nd Street New York, NY 10023

Effective October 1, 2010

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

John K. Rabiej Chief Rules Committee Support Office Administrative Office of the U.S. Courts Washington, DC 20544
James N. Ishida Senior Attorney-Advisor Rules Committee Support Office Administrative Office of the U.S. Courts Washington, DC 20544
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Ms. Gale B. Mitchell Administrative Specialist Rules Committee Support Office Administrative Office of the U.S. Courts Washington, DC 20544
Ms. Denise London Administrative Officer Rules Committee Support Office Administrative Office of the U.S. Courts Washington, DC 20544
Ms. Jamila White-Bandah Staff Assistant **(Temporary)** Rules Committee Support Office

Administrative Office of the U.S. Courts Washington, DC 20544
Program Assistant **(Temporary)** Rules Committee Support Office Administrative Office of the U.S. Courts Washington, DC 20544

TAB

I

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 14, 2010

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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 14, 2010 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 2010.

Approved the *Strategic Plan for the Federal Judiciary.*

Approved the following with regard to a planning process for the Judicial Conference and its committees:

a. The Executive Committee chair may designate for a two-year renewable term an active or senior judge, who will report to that Committee, to serve as the judiciary planning coordinator. The planning coordinator will have responsibility to facilitate and coordinate the strategic planning efforts of the Judicial Conference and its committees.

b. With suggestions from Judicial Conference committees and others, and the input of the judiciary planning coordinator, the Executive Committee will identify issues, strategies, or goals to receive priority attention over the next two years.

c. The committees of the Judicial Conference will integrate the *Strategic Plan for the Federal Judiciary* into committee planning and policy development activities.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

With regard to appellate rules:

a. Approved proposed amendments to Appellate Rules 4 and 40 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.

b. Agreed to seek legislation amending 28 U.S.C. § 2107, consistent with the proposed amendments to Appellate Rule 4, to clarify the treatment of the time to appeal in a case in which a United States officer or employee is a party.

With regard to bankruptcy rules:

a. Approved proposed amendments to Bankruptcy Rules 2003, 2019, 3001, 4004, and 6003, and new Rules 1004.2 and 3002.1, 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.

b. Approved proposed revisions of Bankruptcy Official Forms 9A, 9C, 9I, 20A, 20B, 22A, 22B, and 22C, to take effect on December 1, 2010.

Approved proposed amendments to Criminal Rules 1, 3, 4, 6, 9, 32, 40, 41, 43, and 49, and new Rule 4.1, 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 Rules 101 through 1103 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.

Advisory Committee on Appellate Rules
Table of Agenda Items — September 2010

FRAP Item	Proposal	Source	Current Status
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 Discussed and retained on agenda 11/09 Draft approved 05/10 for submission to Standing Committee Approved by Standing Committee 06/10
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
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 Approved by Supreme Court 04/10

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 Approved by Supreme Court 04/10
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 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10
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 Approved by Supreme Court 04/10
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 Discussed and retained on agenda 11/09

FRAP Item	Proposal	Source	Current Status
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 Discussed and retained on agenda 11/09
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 Discussed and retained on agenda 11/09
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 Discussed and retained on agenda 11/09
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 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10
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 Discussed and retained on agenda 11/09
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

FRAP Item	Proposal	Source	Current Status
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 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10
09-AP-C	Consider possible FRAP amendments in the light of project to revise Part VIII of the Bankruptcy Rules	Bankruptcy Rules Committee	Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10
09-AP-D	Consider implications of Mohawk Industries, Inc. v. Carpenter	John Kester, Esq.	Discussed and retained on agenda 04/10
10-AP-A	Consider treatment of premature notices of appeal under FRAP 4(a)(2)	Hon. Jeffrey S. Sutton	Discussed and retained on agenda 04/10
10-AP-B	Consider FRAP 28's treatment of statements of the case and of the facts	Hon. Jeffrey S. Sutton	Discussed and retained on agenda 04/10
10-AP-D	Consider factors to be taken into account when taxing costs under FRAP 39	Hon. Jeffrey S. Sutton	Awaiting initial discussion
10-AP-E	Consider effect of withdrawal of a timely-filed post-judgment motion on the time to appeal in a civil case	Howard J. Bashman, Esq.	Awaiting initial discussion
10-AP-F	Consider issues raised by Comer v. Murphy Oil USA, 607 F.3d 1049 (5th Cir. 2010), concerning en banc practice	Richard G. Taranto, Esq.	Awaiting initial discussion
10-AP-G	Consider amending FRAP to address intervention on appeal	Douglas Letter, Esq.	Awaiting initial discussion
10-AP-H	Consider issues relating to appellate review of remand orders	Committee on Federal-State Jurisdiction	Awaiting initial discussion

TAB

II

DRAFT

Minutes of Spring 2010 Meeting of
Advisory Committee on Appellate Rules
April 8 and 9, 2010
Asheville, North Carolina

I. Introductions

Judge Jeffrey S. Sutton called the meeting of the Advisory Committee on Appellate Rules to order on Thursday, April 8, 2010, at 8:30 a.m. at the Inn on Biltmore in Asheville, North Carolina. The following Advisory Committee members were present: Judge Kermit E. Bye, Judge Peter T. Fay, Mr. James F. Bennett,[1] Ms. Maureen E. Mahoney, Dean Stephen R. McAllister, and Richard G. Taranto. 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. Leonard Green, liaison from the appellate clerks; Mr. John K. Rabiej, Mr. James N. Ishida and Mr. Jeffrey N. Barr from the Administrative Office ("AO"); and Ms. Marie Leary from the Federal Judicial Center ("FJC"). Prof. Catherine T. Struve, the Reporter, took the minutes.

Judge Sutton welcomed the meeting participants and noted his regret that Judge Rosenthal, Justice Holland, and Professor Coquillette were unable to be present. He introduced the Committee's two new members, Judge Fay and Mr. Taranto. Judge Sutton observed that Judge Fay had served previously on the Appellate Rules Committee, and that the Committee would benefit from his expertise. Judge Sutton recalled that he had worked with Mr. Taranto before Judge Sutton was appointed to the bench and noted that he would be an excellent addition to the Committee.

During the meeting, Judge Sutton thanked Mr. McCabe, Mr. Rabiej, Mr. Ishida, Mr. Barr, and the AO staff for their expert work in preparing for the meeting, and he thanked Ms. Leary and the FJC for their skilled research support.

II. Approval of Minutes of November 2009 Meeting

A motion was made and seconded to approve the minutes of the Committee's November 2009 meeting. The motion passed by voice vote without dissent.

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[1] Mr. Bennett missed a portion of the meeting due to a court obligation.

III. Report on January 2010 Meeting of Standing Committee

Judge Sutton reported on the Standing Committee's discussions at its January 2010 meeting. He noted that he had described to the Standing Committee aspects of the Appellate Rules Committee's ongoing work. In particular, he had discussed the pending proposal to amend Appellate Rules 4 and 40 and to consider proposing legislation to amend 28 U.S.C. § 2107, and he had described the proposal to amend Appellate Rules 13 and 14 to account for permissive interlocutory appeals from the Tax Court.

Judge Sutton noted that the Standing Committee had spent part of the meeting discussing the implications of the Supreme Court's decisions in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), for pleading standards. Mr. Rabiej observed that bills are pending in both Houses of Congress that would respond to *Twombly* and *Iqbal*, though the two bills would take different approaches. The House bill would reinstate the "no set of facts" language from *Conley v. Gibson*, 355 U.S. 41 (1957), whereas a draft bill under consideration in the Senate apparently would turn the clock back to the state of pleading jurisprudence as it existed on the day before the Supreme Court decided *Twombly*. Mr. Rabiej noted that both bills would retain the possibility that the pleading standard adopted in the legislation could subsequently be altered through the rulemaking process. Mr. Rabiej reported that statistics gathered by the AO thus far do not indicate that *Iqbal* and *Twombly* have produced a large change in pleading practice, but these data are limited and the AO has asked the FJC to study the question further. Mr. Rabiej observed that the upcoming 2010 Civil Litigation Conference organized by the Civil Rules Committee – which will take place in May at Duke University Law School – will shed light on relevant issues, such as the possibility that some types of lawsuits involve asymmetric information. The 2010 Conference will include the presentation of empirical data; for example, one project focuses on obtaining litigation defense cost information from some 10 to 20 major companies.

Judge Sutton reported that the Standing Committee had also heard presentations from a panel of law school deans concerning the future of legal education.

IV. Other Information Items

The Reporter noted that several amendments to the Appellate Rules had taken effect on December 1, 2009, including the time-computation amendments and new Appellate Rule 12.1 concerning indicative rulings. She observed that several more Appellate Rules amendments are currently on track to take effect on December 1, 2010, if the Supreme Court approves them and Congress takes no contrary action; these pending amendments would affect Appellate Rule 1(b) (by defining the term "state" for purposes of the Appellate Rules), Appellate Rule 4 (by making a technical amendment to conform to the restyled Civil Rules), Appellate Rule 29 (to impose the new authorship and funding disclosure requirement) and Appellate Form 4 (to conform to privacy requirements).

V. Action Items

A. For final approval

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

Judge Sutton invited Mr. Letter to introduce this item, which originally stemmed from a proposal by the DOJ. Mr. Letter explained that the proposal arises from the need to clarify the operation of Appellate Rules 4(a)(1)(B) and 40(a)(1). Those rules provide all parties with extra time in cases where the parties include the United States, a federal agency, or a federal officer. The amendments are designed to make clear that the extra time applies in cases where the only federal party is a federal employee, and also in cases where the only federal party is a federal officer or employee sued in his or her individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf. Under the current rules, because the application of the longer time periods in such cases is not entirely clear, the DOJ attorneys follow the practice of complying with the shorter time periods – with the result that the federal government is not receiving the benefit of the longer periods in those cases. Mr. Letter observed that the number of affected cases is relatively small, because in many cases one of the parties fits clearly within the existing terms ("United States or its officer or agency"); nonetheless, the issue is an important one in the cases where it arises. The proposals to amend Rules 4 and 40 were first developed prior to the Supreme Court's decision in *Bowles v. Russell*, 551 U.S. 205 (2007). After *Bowles*, participants in the Rule 4 discussions came to believe that the best way to clarify the Appellate Rule 4 period would be to do so in tandem with a proposed legislative change to 28 U.S.C. § 2107. Mr. Letter reported that he has received authorization from the DOJ to pursue such a legislative amendment.

Turning to the details of the Rule 4 and 40 language as originally published for comment, Mr. Letter reported that the DOJ feels that the language should be altered so as to refer explicitly to "current or former" United States officers or employees. Mr. Letter and his colleagues within the DOJ considered possible alternatives to the proposed reference to "an act or omission occurring in connection with duties performed on the United States' behalf," but they concluded that this language – which tracks the language in Civil Rules 4(i)(3) and 12(a)(3) – is preferable. Mr. Letter consulted a DOJ colleague who handles cases involving federal officers and employees and who reports that he has not encountered difficulties with the interpretation of those Civil Rules.

A judge member inquired whether there are any statutes that might supply relevant language. Mr. Letter noted 28 U.S.C. § 2679, which provides for certifications by the Attorney General "that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose." He pointed out, though, that such certifications do not occur in *Bivens* cases. An attorney member noted the difference in procedural posture between the situations in which Civil Rules 4(i)(3) and 12(a)(3) may be

applied and the situations in which Appellate Rules 4 and 40 may be applied: these Appellate Rules will often become operative at a point in the litigation when there has already been a court finding regarding whether the relevant conduct was "in connection with" the defendant's federal duties. Mr. Letter noted that it would not be a good idea to make the applicability of the longer periods in Rules 4 and 40 depend on what the plaintiff has alleged in the complaint. The attorney member responded that another alternative might be to use the term "allegedly."

Another attorney member observed that the purpose of the longer periods is to ensure that the United States has sufficient time for deliberation concerning litigation strategy – in particular, sufficient time for the Solicitor General to decide whether to take an appeal or to seek rehearing. This member suggested that it would make sense to tie the availability of the longer periods to whether the United States has actually decided to provide representation. That might be accomplished, he suggested, by language such as "... current or former United States officer or employee for whom the United States files the notice of appeal or is providing representation at the time of the entry of such judgment, order, or decree." A judge asked how the other parties to the litigation would know whether such a standard was met in cases where the government was paying for private counsel rather than providing the representation directly.

Mr. Letter expressed a desire to consult his colleagues at the DOJ concerning these suggested alternative formulations. A judge member asked whether the two formulations – something like the formulation in the published proposal, plus something that would refer to the United States' provision of representation – could be combined as alternative parts of the test. The Reporter noted that such a combined test might be somewhat similar to the test currently followed in the Ninth Circuit. Another member suggested, however, that he understood the provision-of-representation proposal as designed to exclude situations where the United States is paying for private counsel. By consensus, the Committee decided to return to this drafting question the following morning.

The next morning, the Committee took up the drafting question once again. Judge Sutton noted that members had raised good points about possible ambiguity in the proposal as published for comment. Mr. Letter suggested that the DOJ could be comfortable with a proposal that tied the availability of the longer period to the United States' decision to provide representation. Judge Sutton observed that it might be less than optimal for the Appellate Rules' language to diverge from the Civil Rules' language, but that the Committee Notes to Appellate Rules 4 and 40 could explain the reasons for the difference. By consensus, the Committee determined to continue its discussions of the proposed language by email circulation. Members also discussed whether the proposed changes in wording would require re-publication – a matter that was deferred to await a more definite decision on wording choice. Mr. Rabiej noted the need to coordinate the effective date of the proposed Rule 4 and 40 changes with the effective date of the proposed legislative amendment to Section 2107.

B. For publication

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

Judge Sutton invited Ms. Mahoney to introduce this item, which concerns permissive interlocutory appeals from the Tax Court. Ms. Mahoney noted that Committee members had concluded that it would be worthwhile to amend Appellate Rules 13 and 14 to take account of permissive interlocutory appeals under 26 U.S.C. § 7482(a)(2). She observed that the agenda materials contained an initial drafting proposal by the Reporter and an alternative proposal provided by Chief Judge Colvin and Judge Thornton of the Tax Court. The latter proposal also includes a proposed amendment to Appellate Rule 24 concerning applications to proceed in forma pauperis. Judge Sutton noted that in addition to obtaining input from the Tax Court and from the DOJ, he had spoken with the chair of the Tax Section of the American Bar Association, but that the latter had not yet been able to provide a sense of the views of Tax Section members.

Ms. Mahoney reviewed Chief Judge Colvin's two proposed alternatives for amending Appellate Rule 24. Those proposals stem from the observation that the current wording of Rule 24(b) treats the Tax Court in the same sentence as "an administrative agency, board, commission, or officer." Chief Judge Colvin explains that the Tax Court is a court of law that exercises judicial powers and is independent of the political branches, and he argues that Rule 24(b) should not group the Tax Court with executive agencies, boards, and the like. Chief Judge Colvin's preferred alternative would be to delete from Rule 24(b) any reference to the Tax Court; when taken together with the proposed global definition of "district court" and "district clerk" as including the Tax Court and its clerk, this change would lead those seeking to appeal in forma pauperis from the Tax Court to proceed under Rule 24(a) by first making their i.f.p. applications to the Tax Court. Chief Judge Colvin has indicated that the Tax Court is willing to serve as the first-line decision-maker on such i.f.p. applications. Chief Judge Colvin's second proposed alternative would be to retain the treatment of the Tax Court under Rule 24(b) but to re-style that Rule so that it is clear that the Tax Court is not lumped in with administrative agencies.

An attorney member expressed support for the second proposed Rule 24 alternative; he suggested that it seems appropriate for Rule 24(b) to address i.f.p. applications both for appeals covered in Title III (addressing appeals from the Tax Court) and for review petitions covered in Title IV (review of agency orders). A judge member asked whether it would be possible to approve the proposed changes to Rules 13 and 14 for publication while deferring consideration of the Rule 24 proposal. The attorney member noted, however, that adopting the proposed Rule 13 and 14 amendments – with a global definition of "district court" and "district clerk" to include the Tax Court and its clerk – might introduce ambiguity into Rule 24 by suggesting that i.f.p. applications by those seeking to appeal from the Tax Court were covered under both Rule 24(a) and Rule 24(b).

In the light of these considerations, the Committee determined by consensus to hold this item for further review of the Rule 24 question and to return to the matter at the fall meeting.

VI. Discussion Items

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

Judge Sutton invited the Reporter to introduce this item, which concerns the possible implications, for the Appellate Rules, of the Supreme Court's decision in *Bowles v. Russell*, 551 U.S. 205 (2007). The principal developments relating to this topic – since the Committee's last meeting – came in cases that did not involve the Appellate Rules: *Union Pacific Railroad Co. v. Brotherhood of Locomotive Engineers and Trainmen*, 130 S. Ct. 584 (2009), and *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237 (2010). Both decisions concerned statutory requirements unrelated to appeal deadlines, and both held that the requirement in question was non-jurisdictional. One can thus place both of these decisions within the line of cases, typified by *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006), that have held various statutory requirements not to be jurisdictional. In this sense, both decisions highlight the questions discussed by the Committee at the fall 2009 meeting concerning possible tensions between *Arbaugh* and *Bowles*.

The Reporter noted that the Court's two most recent decisions might be read as offering competing visions of the way in which to address the respective applicability of *Arbaugh* and *Bowles* when confronted with the contention that a statutory requirement is jurisdictional. In *Union Pacific*, Justice Ginsburg, writing for a unanimous Court, followed *Arbaugh* and distinguished *Bowles* on the ground that the latter "rel[ied] on a long line of this Court's decisions left undisturbed by Congress." In *Reed Elsevier*, Justice Thomas, writing for the majority, distinguished *Bowles* on a somewhat different ground – namely, "that context, including this Court's interpretation of similar provisions in many years past, is relevant to whether a statute ranks a requirement as jurisdictional." Justice Ginsburg, joined by two other Justices, wrote separately in *Reed Elsevier* to contest this mode of reconciling *Bowles* with *Arbaugh*; in Justice Ginsburg's view, a key factor that distinguished *Reed Elsevier* from *Bowles* was that the Supreme Court had never held the statutory provision at issue in *Reed Elsevier* to be jurisdictional. Justice Ginsburg, in other words, takes the view that *Arbaugh*'s clear-statement rule applies *unless* (as in *Bowles*) existing Supreme Court precedent requires otherwise.

Justice Ginsburg's approach is more rule-like, while the *Reed Elsevier* majority's multi-factor balancing test is more like a standard. However, in cases concerning statutory appeal deadlines, the two approaches are likely to yield the same results. These two most recent cases do not seem likely to change the trajectory of the caselaw on statutory appeal deadlines; it seems likely that courts will continue to hold that most (if not all) such deadlines are jurisdictional under *Bowles*.

Mr. Letter noted that the Third Circuit has before it a set of appeals that raise the question whether the deadlines for filing post-judgment motions (of the types that can toll the time to appeal under Appellate Rule 4(a)(4)) are jurisdictional or merely claim-processing rules. This question is already the subject of a circuit split.

A participant observed that the Supreme Court currently has before it a petition for certiorari raising the question whether *Bowles* renders jurisdictional the deadline set by 38 U.S.C. § 7266 for filing in the Court of Appeals for Veterans Claims a notice of appeal from a decision of the Board of Veterans' Appeals. The Federal Circuit, sitting en banc, held that Section 7266's deadline is jurisdictional and therefore not subject to equitable tolling.

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

Judge Sutton invited Dean McAllister to present this item, which arises out of Daniel Rey-Bear's suggestion concerning the treatment of federally recognized Native American tribes in connection with Appellate Rule 29 and some other Appellate Rules. Mr. Rey-Bear, commenting on proposed Rule 1(b), suggested that federally recognized Indian tribes be included within the Rule's definition of "state." At the Committee's fall 2009 meeting, participants decided that it would be useful to focus on Rule 29's amicus-filing provisions rather than on the possibility of globally defining "state" to include Native American tribes. As a point of comparison, participants discussed the U.S. Supreme Court's amicus rule, and Dean McAllister undertook to research the history of that rule, with a view to determining why it does not treat Native American tribes the same as states.

Dean McAllister reported that the Supreme Court's amicus-filing rule can be traced back to a rule adopted in 1939. The substance of the rule has not changed materially since 1939, but its numbering has changed and so has its language. Since 1939, the Supreme Court's rule has always permitted amicus filings, without Court leave or party consent, by federal, state, and local governments. Neither Native American tribes nor foreign governments have been included in that provision, and Dean McAllister was not able to find any evidence that the question of treating tribes the same as federal, state, or local governments has been raised in connection with the Supreme Court's rule. Native American tribes and foreign governments do sometimes file amicus briefs in the Supreme Court, and Dean McAllister has not come across evidence of any such briefs being rejected except on timeliness grounds.

Dean McAllister provided an enlightening historical overview of amicus practice before the Supreme Court. Amicus filings were relatively rare during the nineteenth century, but the United States did participate as an amicus in a number of nineteenth-century cases. States evidently appeared as amici in some cases during and after the Civil War. And Dean McAllister found an 1890 case involving the City of Oakland's participation as an amicus. Thus, Dean McAllister observed, by 1939 the Supreme Court had some familiarity with federal, state and local government amicus filings. By contrast, the first Supreme Court amicus filing that Dean McAllister could find by a Native American tribe was in 1938. Dean McAllister suggested that this evidence supports the view that the omission of Native American tribes from the Supreme Court's 1939 amicus rule may have been an accident of history that has been carried forward, since then, in the later iterations of the rule. Recounting the evolution of the Supreme Court's rule, Dean McAllister noted Justice Black's observation, in 1954, that the Court was too restrictive in its approach to amicus briefs. And Dean McAllister observed that Appellate Rule

29(a) is even less inclusive than Supreme Court Rule 37.4: the latter, but not the former, allows filings without party consent or court leave by municipalities.

Judge Sutton thanked Dean McAllister for his presentation and invited Ms. Leary to describe the results of her research on tribal amicus filings in the federal district courts and courts of appeals. The Committee had asked Ms. Leary to assess whether and how often Native American tribes seek leave to file amicus briefs and how often such requests are denied. To investigate this question, Ms. Leary and her colleagues at the FJC searched the CM/ECF database of the courts of appeals. The courts of appeals only began to go "live" with their CM/ECF systems recently: the earliest circuit went "live" in 2006, ten circuits had gone "live" by 2009, and all but the Federal Circuit had gone "live" as of March 2010. This limited the length of time for which court of appeals records could be searched; Ms. Leary's search excluded the Second and Eleventh Circuits (which went live in January 2010) as well as the Federal Circuit, and the average length of time since the other circuits went "live" is only two and a half years.

Ms. Leary reported that relatively few Native American amicus briefs are filed with the consent of the parties; most such filings occur by court leave rather than party consent. Ms. Leary found 180 motions filed by Native American tribes seeking court permission to file an amicus brief. Of those, 157 were granted, 11 were denied, and 12 were not ruled on. A table compiled by Ms. Leary showed that this pattern – a relatively high percentage of motions granted and a relatively small percentage of motions denied – was consistent within each circuit as well as across the ten circuits. Most of the activity occurred in the Eighth, Ninth, and Tenth Circuits (which encompass the reservations of a large number of tribes). Of the eleven motions that were denied, two were denied as untimely, one was denied as moot, and one was denied because the filer was the plaintiff in another case scheduled for argument before the same panel on the same day; no reasons were stated for the denial of the other seven motions.

In addition to searching the records of the courts of appeals, the Committee also asked Ms. Leary to search the records of four federal district courts: the Eastern District of California, the District of Minnesota, the Eastern District of Oklahoma, and the Eastern District of Wisconsin. Ms. Leary's search of those districts found no relevant motions in the latter three districts. In the Eastern District of California, Ms. Leary found five motions – three that were granted and two that were not ruled on. She then expanded her search to encompass all districts within the Ninth Circuit. That expanded search yielded 49 motions by Native American tribes seeking permission to file an amicus brief, of which 42 were granted, four were denied, and three were not ruled on.

Judge Sutton thanked Ms. Leary for her careful and helpful research. The Reporter recounted the results of her search for tribal-court amicus-filing provisions. At the fall 2009 meeting, it was suggested that it might be useful to investigate whether tribal court systems have rules concerning amicus filings and, if so, how those rules treat amicus filings by government litigants. The Reporter sought to focus this inquiry on tribes with relatively large court systems. As a very rough proxy for this, the Reporter compiled a list of the 20 largest federally recognized

tribes (measuring size by reservation and trust land population according to the census data), and also included three additional tribes in the courts of which a 2002 survey by the Bureau of Justice Statistics reported at least 3,000 civil cases or 3,000 criminal cases filed during a calendar year. A research assistant then searched the Internet for relevant provisions in the law of these 23 tribes. She found only six relevant tribal-law provisions: two rules that require court permission for amicus filings, two rules that require either court permission or party consent, and two rules that address amicus filings but do not make clear the standards for such filings. She did not find any rules that address whether governments other than the tribe in question are exempt from the general amicus-filing requirements. The Reporter suggested that the absence of such findings is not surprising: In the light of the U.S. Supreme Court's decisions narrowing the reach of tribal-court subject matter jurisdiction, tribal courts are less likely to hear cases that directly implicate the interests of another government than are either federal courts or state courts.

As a point of comparison, the Reporter also looked at state-court amicus-filing provisions. She found that many state-court rules require court permission for amicus filings. Some state-court rules require either court permission or party consent. A handful of state-court rules appear to permit amicus filings without either court permission or party consent. Sixteen states have a court rule that exempts certain types of government entities from applicable amicus-filing requirements; of those exemptions, sixteen treat the relevant state specially, six treat municipalities specially, four treat the United States specially, and two or three treat other states specially. Though only a small number of state provisions explicitly authorize special treatment for filings by the federal government in state courts, it is possible that such filings are already separately authorized by 28 U.S.C. § 517. That statute provides that "[t]he Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States." Though this statute has rarely been cited by state courts, it could be argued to authorize amicus filings by the federal government in state court proceedings.

Focusing on the eight instances in which the Ninth Circuit had denied a Native American tribe leave to file an amicus brief, Mr. Letter asked whether it was possible that those denials occurred because the motions for leave to file were untimely. Ms. Leary stated that that was possible. An attorney member wondered whether the scope of Supreme Court Rule 37.4 matters a great deal, given that it is very rare, nowadays, for the Supreme Court to deny leave to file an amicus brief.

Another attorney member suggested that it would be useful to solicit the views of the Eighth, Ninth, and Tenth Circuits. Given the concentration of tribal amicus activity in those circuits, an appellate judge member wondered whether any concerns about such filings could be accommodated by means of local circuit rules. Another appellate judge member stated that he did not recall ever turning down a Native American tribe's request to file an amicus brief; this judge agreed with the suggestion that it might be better to address the issue by local circuit rule.

Mr. Letter reported that colleagues within the DOJ believe that the tribal-amicus question merits government-to-government consultation with the federally recognized Native American tribes. A November 5, 2009 Presidential Memorandum for the heads of executive departments and agencies noted the federal government's special relationship with Indian tribal governments, and directed federal agencies – pursuant to Executive Order 13175 of November 6, 2000 – to "engag[e] in regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications." The DOJ would be glad to facilitate a government-to-government consultation process with the tribes concerning the amicus-filing issue. Some Committee members questioned, though, whether the executive branch policy of consultation could practicably be transposed to the context of the rulemaking process.

Returning to the merits of the issue, an appellate judge member suggested that Ms. Leary's findings could be argued to cut in more than one direction. Another member responded that the fact that the courts of appeals usually grant motions by tribes to file amicus briefs should not be dispositive; in this member's view, the question is one of according the tribes the same dignity accorded to states. This member also observed that there are many more municipalities than Native American tribes in the United States; given that Supreme Court Rule 37.4 permits municipal amici to file without party consent or court leave, he suggested, adopting a similar approach to tribal amici would not overburden the courts. He argued that if Native American tribes do not need a rule permitting them to file amicus briefs without party consent or court leave, neither do states, cities or the federal government. An attorney member agreed that according tribes equal dignity provides the best argument in favor of amending Rule 29; but this member suggested that the Appellate Rules Committee might wish to follow the Supreme Court's lead on this issue. Mr. Letter responded that the Supreme Court would, of course, have an opportunity to consider the merits of any proposed amendment to Rule 29(a) during the approval process.

An attorney member suggested that if Rule 29(a) is expanded to encompass Native American tribes, the revised rule should also encompass foreign and municipal government amici. Mr. Letter stated that the DOJ does not have a position concerning whether municipal governments should be added to the list in Rule 29(a), and he noted that court of appeals judges might have different preferences on that point than the Supreme Court does. With respect to foreign governments, Mr. Letter noted that there is a question of reciprocity. Foreign countries vary in their approaches to requests by the United States to appear as an amicus in their courts; some permit such amicus appearances, some require intervention, and some instead provide for a filing by the host government on the United States' behalf. Having a provision in the Appellate Rules permitting amicus filings by foreign governments without party consent or court leave, Mr. Letter suggested, could sometimes be helpful in persuading foreign courts to permit filings by the United States.

It was noted that with the upcoming adoption of new Appellate Rule 29(c)(5) – which is on track to take effect December 1, 2010, assuming approval by the Supreme Court and no contrary action by Congress – Rule 29 will impose a new authorship and funding disclosure

requirement but will exempt from that new requirement the entities that are entitled under Rule 29(a) to file their amicus brief without court leave or party consent. An attorney member noted the likelihood that the disclosure requirement may actually be useful to some entities that might be amicus filers; an entity that is being pressured by a party to make an amicus filing can respond that the amicus would have to pay for the filing itself or disclose that someone else paid for it. This member suggested that – with respect to the disclosure question – it might make sense to wait and see how new Rule 29(c)(5) works when it takes effect. Another member, though, responded that failing to include tribes within the categories listed in Rule 29(a) will subject tribes to a new requirement once new Rule 29(c)(5) becomes effective. He questioned why the disclosure requirement should apply to tribes when it does not apply to states; states, he observed, have sometimes received help from others in writing amicus briefs, and they have not been (and will not be) required to disclose such help in connection with their amicus filings.

An appellate judge member asked whether any treaties with Native American tribes might bear on the amicus-filing question. The Reporter stated that she is not aware of any treaty provisions specifically addressing the issue. Because treaty-making between the United States and Native American tribes ended in 1871, at a time when tribes were not in the habit of making amicus filings in the courts, it would have been unlikely that any treaty would speak to this particular issue. However, there may be more general provisions that might bear on the question, as might the federal government's general trust responsibility to the tribes.

An appellate judge suggested that some judges on the courts of appeals have expressed skepticism about the value of amicus briefs; such judges might prefer to have more control over amicus filings. It is important, this member stressed, to find out what the judges would prefer. Supreme Court Rule 37.4, the member suggested, is more puzzling than Appellate Rule 29(a), because the former includes towns but not Native American tribes; Mr. Letter agreed with this point.

An appellate judge member suggested that the Committee should consult with the Supreme Court, with a view to following the Supreme Court's lead on this issue; another appellate judge member agreed with this suggestion. By consensus, it was decided that the Committee should consult further with the Supreme Court. In addition, Judge Sutton undertook to write to the Chief Judges of the Eighth, Ninth and Tenth Circuits; he will share with them Ms. Leary's research, and ask for their views on the question of whether a provision on this topic should be adopted either in the Appellate Rules or in local circuit rules. A member noted that the issue extends beyond those three circuits; there are tribes that are located within other circuits, and the question of amicus filings by foreign nations applies to all the circuits. An appellate judge member responded that the Eighth, Ninth and Tenth Circuits are the ones that seem likely to be most affected by a rule treating amicus filings by Native American tribes. Another appellate judge member agreed, stating that the Committee should focus on tribal amicus filings rather than amicus filings by foreign governments. Mr. Letter reiterated that before the Committee takes any final action on this item, the DOJ would strongly prefer that consultation occur with the Native American tribes.

VII. Additional Old Business and New Business

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

Judge Sutton invited the Reporter to introduce this item, which arises from John Kester's suggestion that the Committee consider the implications of *Mohawk Industries, Inc. v. Carpenter*, 130 S. Ct. 599 (2009). In *Mohawk Industries*, the Court held that a district court's order to disclose information that the producing party contends is protected by attorney-client privilege does not qualify for an immediate appeal under the collateral order doctrine.

The collateral order doctrine, instituted by *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546-47 (1949), treats a non-final order as a final judgment – for purposes of taking an appeal under 28 U.S.C. § 1291 – if three requirements are met: the order must be conclusive, must resolve important questions completely separate from the merits, and must render such important questions effectively unreviewable on appeal from the ultimate final judgment. In *Mohawk Industries*, the Court held that the attempted appeal from the attorney-client privilege ruling failed to meet the third of these requirements. The Court expressed doubt as to the benefits of permitting such rulings to come within the collateral order doctrine, and expressed concern as to the burdens such a course would impose on the courts of appeals. The Court also noted the difficulty of line-drawing in this area, observing that it would be hard to distinguish rulings on attorney-client privilege disputes from rulings concerning other sorts of sensitive information. In the opinion's concluding section – which was joined by all members of the Court – Justice Sotomayor stressed that any further consideration of the petitioner's arguments for expanded appellate review of attorney-client privilege rulings should take place within the rulemaking process.

In considering possible rulemaking responses to *Mohawk Industries*, the Committee confronts a range of options, from an approach that focuses on attorney-client privilege rulings to one that attempts a broader rationalization of the areas currently covered (or not covered) by the collateral order doctrine.

A rulemaking response that focuses on attorney-client privilege would raise a number of questions: Does the unavailability of collateral-order immediate review for privilege rulings affect the incentives for attorney-client communications? Even if that is not the case, does the unavailability of such review afford undue settlement leverage to a party who obtains a ruling that the opposing side's information is non-privileged and discoverable? If immediate review of such rulings were made generally available, how many appeals would be taken? Would wealthy litigants take such appeals in order to impose cost and delay on their opponents? Would such appeals interfere with the trial judge's management of the case? Would they unduly increase the appellate courts' workload?

An approach that focuses on attorney-client privilege rulings would raise boundary issues – how and why should one distinguish attorney-client privilege rulings from other types of privilege rulings? From other discovery-related rulings? Should one, instead, attempt a broader

review of the collateral order doctrine – one that could encompass, for example, an attempt to rationalize interlocutory review of qualified-immunity rulings?

An appellate judge member suggested that the rulemaking process might provide a very useful venue for looking into questions of this nature. Mr. Letter wondered whether the *Mohawk Industries* Court's reference to the rulemaking process was intended as a signal that the Committee should consider changes in this area. An attorney member observed that the rulemaking process affords opportunities that are unavailable to the Court when deciding cases. For example, the rulemakers, if they were to decide to permit immediate appeals from privilege rulings, could calibrate the mechanism by requiring permission from either the district court, the court of appeals, or both; 28 U.S.C. § 1292(b) and Civil Rule 23(f) provide possible models in this regard. This member noted the importance of the question, observing that if privileged material is mistakenly disclosed, that disclosure can have a huge monetary impact on the disclosing party. Another attorney member later added that a rulemaking discussion could include the possibility of procedures for expediting any immediate appeal from a privilege ruling. This member also noted that it would be worthwhile to consider and address the possibility that creating an avenue for immediate appeals from privilege rulings could open the way for an argument that a party that fails to take such an immediate appeal has waived its rights to contest the ruling later.

Another attorney member suggested that in some instances the availability (or not) of immediate appellate review for privilege rulings might actually affect a client's privilege-related decision-making. In this member's experience with parallel civil litigation and administrative proceedings, he carefully advises the client concerning the decision whether to waive the privilege and the scope of that waiver. The unavailability of immediate appellate review, he said, could affect the advice he would given in such situations concerning the optimal scope of any waiver. This member stated that the question is worth the Committee's consideration, both because the Supreme Court noted the possibility of rulemaking and because of the question's importance to lawyers and clients.

An appellate judge stated that he reads the *Mohawk Industries* opinion as suggesting that the Court is not happy with the current state of the collateral order doctrine. There are thorny issues, under current law, with respect to collateral-order appeals from qualified-immunity rulings. The judge stated that immediate review may be justified in some instances but that such review can be quite burdensome for the courts of appeals, and he questioned whether it is worthwhile to afford immediate appellate review of all such rulings, including those concerning the immunity of police officers and lower-level government officials. He suggested that a provision requiring the court of appeals' permission for such immediate appeals – akin to Civil Rule 23(f) – could work well. Another member agreed with the observation that the law concerning qualified immunity is messy. An attorney member wondered how often immediate appeals from qualified immunity rulings succeed.

Mr. Letter suggested that the Committee should focus its attention, as an initial matter, on the question of privilege rulings. With respect to such rulings, it is important to account for the

differing circumstances in which they may arise. In criminal cases, for instance, there is a need for speed and it would not necessarily be appropriate to permit an immediate appeal in that context.

An appellate judge member said that he believes that immediate appellate review can be important in order to protect attorney-client privilege. Another appellate judge observed that there is varying caselaw on whether the collateral order doctrine encompasses appeals from remands to administrative agencies.

Mr. Rabiej noted that at the time that Congress enacted 28 U.S.C. § 2072(c), which authorizes the rulemakers to define a decision as final for purposes of appeal, and 28 U.S.C. § 1292(e), which authorizes the rulemakers to provide for interlocutory appeals, it had been assumed that suggestions for such rulemaking would originate in the Civil Rules Committee or the Criminal Rules Committee. An attorney member observed that the Civil and Criminal Rules Committees are likely to be interested in the question of appellate review of privilege rulings. Judge Sutton noted that the Civil / Appellate Subcommittee might look into the matter.

The discussion of the varied caselaw concerning the collateral order doctrine led the Committee to consider the more general question of the Committee's process for identifying areas of study. Judge Sutton suggested that it might be useful for the Committee to adopt a process for identifying, and periodically reviewing, rule-based circuit splits. Mr. Rabiej noted that the Committees have not employed such a practice in the past. He suggested that circuit splits may concern controversial issues. Mr. McCabe stated that there has been a presumption against altering the rules. An attorney member asked whether the United States Sentencing Commission employs a similar procedure. Another attorney member observed that the Supreme Court can resolve a circuit split more quickly than the rulemaking process can. One member noted that U.S. Law Week lists various circuit splits, and another member observed that one could monitor petitions for certiorari that refer to the Appellate Rules.

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

Judge Sutton invited the Reporter to update the Committee on the Bankruptcy Rules Committee's project to revise Part VIII of the Bankruptcy Rules. Part VIII contains 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 an open meeting in Boston on September 30, 2009, and is continuing its deliberations by conference call this spring. The resulting proposals will be published for comment, at the earliest, in summer 2011. It appears likely that the Committee will be asked to comment on the draft during fall 2010 and/or spring 2011. A number of the project's features – such as its treatment of electronic filing – are of interest to the Appellate Rules Committee. Moreover, close coordination between the two committees is important with respect to instances where the Bankruptcy and Appellate Rules interlock – in particular, with respect to the rules governing direct permissive appeals under 28 U.S.C. § 158(d)(2).

Judge Sutton noted that members should let him know if they are particularly interested in working on issues relating to electronic filing. This topic led to a more general discussion of electronic filing. An appellate judge member noted that he reads briefs on his Kindle. Mr. McCabe observed that electronic filing issues implicate all the rules committees, and that all the advisory committees should coordinate their efforts in this area.

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

Judge Sutton invited the Reporter to introduce this issue, which concerns the treatment of premature notices of appeal in civil cases. Shortly after the Committee's fall 2009 meeting, the Supreme Court denied certiorari in *CHF Industries, Inc. v. Park B. Smith, Inc.*, 130 S. Ct. 622 (2009), which presented a question concerning the treatment under Appellate Rule 4(a)(2) of a notice of appeal filed from an order disposing of fewer than all the claims in the case.

The caselaw concerning premature notices of appeal is complicated by at least two features. First, there is the"cumulative finality" doctrine, under which some courts have held that a notice of appeal filed after an order disposing of some claims or issues but before another order or orders disposing of the remaining claims or issues relates forward to effect an appeal after the disposition of all remaining claims or issues. This doctrine was first enunciated prior to the 1979 promulgation of Appellate Rule 4(a)(2), and there currently exists a division among the circuits concerning whether the cumulative finality doctrine – as a principle separate from Rule 4(a)(2) – survives the adoption of that Rule and the Supreme Court's decision in *FirsTier Mortgage Co. v. Investors Mortgage Insurance Co.*, 498 U.S. 269 (1991). Second, there is the Supreme Court's decision in *FirsTier*, which then-Judge Roberts characterized as "leav[ing] a vast middle ground of uncertainty" concerning the circumstances under which relation forward is proper under Rule 4(a)(2).

The pre-1979 cumulative finality doctrine is exemplified by the Fifth Circuit's decision in *Jetco Electronic Industries, Inc. v. Gardiner*, 473 F.2d 1228 (5th Cir. 1973). In *Jetco*, one defendant's motion to dismiss was granted, after which the plaintiff filed a notice of appeal. Months later, the rest of the case was disposed of. The court of appeals refused to dismiss the appeal, holding that the two orders, viewed together, ended the litigation. The courts of appeals

are divided on the question of whether Rule 4(a)(2), as interpreted in *FirsTier*, displaces the older cumulative finality doctrine; the Fifth Circuit says yes, but the Third Circuit disagrees.

The pathmarking case interpreting Rule 4(a)(2) is the Court's 1991 *FirsTier* decision. In *FirsTier*, the notice of appeal was filed after the court's announcement from the bench that it would grant summary judgment, but before the parties had submitted the proposed findings and conclusions requested by the court. The Court did not decide whether the bench ruling was final. Rather, it held that the notice of appeal related forward under Rule 4(a)(2). The rule's purpose, the Court stated, is to protect a litigant who files a notice of appeal from a decision that he reasonably believes to be a final judgment. But the rule is not designed to protect one who files a notice of appeal from a clearly interlocutory decision – for example, a discovery ruling or a Rule 11 sanction – because it would not be reasonable to believe that such a decision constituted a final judgment.

Questions of Rule 4(a)(2)'s application cover a spectrum of scenarios. At one end of the spectrum are instances where the notice of appeal is filed after the court has announced its decision but before proposed findings have been submitted. This was the pattern at issue in *FirsTier*, and the Court held that the notice related forward.

Moving along the spectrum, one finds instances where the notice of appeal was filed after the announcement of a decision that was contingent on a future event, but before the occurrence of that event. An example is a decision dismissing a complaint but granting leave to re-plead within a certain time period. Various circuits have found that the notice of appeal related forward under such circumstances, and this conclusion is supported by cases that were cited with approval in the 1979 Committee Note to Rule 4(a)(2). However, in *Strasburg v. State Bar of Wisconsin*, 1 F.3d 468 (7th Cir. 1993), the Seventh Circuit found that the notice of appeal did not relate forward for two reasons: first, because dismissal of the complaint was conditional (the district court had granted the plaintiffs a time period within which to re-file the complaint and serve certain defendants), and second, because the district court had told the appellants that their notice of appeal was a "nullity."

At a further point along the spectrum, one finds instances where the notice of appeal was filed prior to the district court's provision of a certification of the relevant order for immediate appeal under Civil Rule 54(b). Some seven circuits have found relation forward in such circumstances, but the Eleventh Circuit has disagreed.

A still further point on the spectrum concerns instances where the court disposes of fewer than all claims or parties, after which a notice of appeal is filed, after which the court disposes of the remaining claims and parties. This was the pattern presented by the *CHF Industries* case. Some nine circuits have found relation forward under these circumstances. But one of those circuits – the Seventh Circuit – has disparate caselaw on the question. And the Eighth Circuit has adopted the opposite view.

The caselaw varies somewhat subtly on questions that concern instances where the notice of appeal is filed after an order that determines liability but leaves the amount of damages or interest undetermined. Another pattern arises when a party files a notice of appeal from a magistrate judge's findings and conclusions before those findings and conclusions have been reviewed by the district court; the Fifth and Ninth Circuits have found no relation forward in such cases, while the Second Circuit has disagreed. But the Second Circuit case appears to have been driven by its particular facts: the appellant was pro se and the magistrate judge's disposition was misleadingly entered as a "judgment." Moving still further along the spectrum, most cases are in accord that relation forward does not occur when a notice of appeal is filed after entry of a clearly interlocutory order that would not qualify for certification under Civil Rule 54(b); but there is one Tenth Circuit decision to the contrary.

In assessing the state of the doctrine, the Reporter suggested, it might be useful to consider several factors. Is the doctrine in tension with the final judgment rule? Does it offend the doctrine stated in *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982), that only one court – trial or appellate – should have control of a case at a given time? Does the doctrine avoid setting traps for unsophisticated litigants? Is the doctrine fair to the appellee?

An appellate judge member asked how well the doctrine accords with the text of Appellate Rule 4(a)(2). The *FirsTier* decision, he suggested, is easier to understand than the Rule. An attorney member asked whether the doctrine leads to confusion for the appellate clerks' offices. An appellate judge member noted that if a clerk is in doubt about a question of relation forward, the clerk would consult a judge. An attorney member observed that it is important for the rules concerning notices of appeal to be clear.

Judge Sutton agreed that ambiguity is undesirable in a rule that concerns appeal timing. He noted that this item ties in with other projects that the Committee is currently considering, such as the manufactured-finality doctrine. He suggested that at the fall 2010 meeting the Committee should further consider possible amendments to Rule 4(a)(2). An attorney member asked what policy preferences such a proposed amendment should seek to further; this member noted that the Committee will need to make judgments concerning whether the various fact patterns warrant relation forward. One participant suggested, for example, that it might be reasonable to permit relation forward when a notice of appeal is filed from a Rule 11 sanctions order. Another attorney member wondered whether one way to amend Rule 4(a)(2) would be to insert "appealable if entered" – so that Rule 4(a)(2) would read: "A notice of appeal filed after the court announces a decision or order that would be appealable if entered – but before the entry of the judgment or order – is treated as filed on the date of and after the entry." The Reporter noted that this wording would change current practice in a number of circuits.

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

Judge Sutton introduced this item, which concerns the provisions in Appellate Rule 28 that direct the appellant to provide separate statements of the case and of the facts. As a point of

comparison, Supreme Court Rule 24 does not require such separate statements; rather, Supreme Court Rule 24(g) requires "[a] concise statement of the case, setting out the facts material to the consideration of the questions presented, with appropriate references to the joint appendix, *e.g.*, App. 12, or to the record, *e.g.*, Record 12." Judge Sutton observed that the Supreme Court's approach makes more sense: It seems intuitively more sensible to permit the appellant to weave the two statements together and present the relevant events in chronological order.

Mr. Letter suggested that it would make sense to change Rule 28 unless judges really do want separate statements of the case and the facts. An attorney member agreed, noting that it is difficult to tell, under the current rule, where one should describe the decisions below. Attorneys end up adding parts not called for by the rules. This member suggested that the approach to this question should be nationally uniform. Another member agreed that he has always found the separate requirements awkward; he has assumed that judges want the statement of the case to set forth the basic procedural posture of the appeal – for instance, that the appeal is from the grant of summary judgment.

Another attorney member, however, offered a different view. He has not found the separate requirements problematic. In the statement of the case he denotes the basic orders that the appellate court is being asked to review – for example, in a patent case on appeal to the Federal Circuit, one might state that the appeal concerns a verdict of invalidity and a verdict of non-infringement. Clarity on these points can be useful, he suggested, and it is not necessarily provided by the information that advocates include in the jurisdictional statement. He argued that it is useful to know what ruling the appellant is challenging before one starts reading the facts; and requiring the statement of the case before the statement of the facts may help discipline counsel's presentation of the facts. He concluded by noting that the key question is what judges would prefer.

An appellate judge member said that he looks to the statement of the case for basic information on what the case is about – such as a statement that the appeal is from the grant of summary judgment dismissing a wrongful termination claim. Another appellate judge member stated that he prefers the statement of the case to be one simple paragraph. Judge Sutton noted that the problem arises because Rule 28(a)(6) requires not merely statements of the nature of the case and the disposition below but also a description of "the course of proceedings" below. Mr. Letter agreed that this aspect of Rule 28(a)(6) prompts inexperienced lawyers to include too much detail.

An appellate judge member noted that he finds the statement of the issues presented for review (required by Rule 28(a)(5)) to be very helpful. Mr. Letter said that it would be useful for that statement of issues to include a few sentences setting forth what the case is about. He suggested that it might be worthwhile to re-write Rules 28(a)(5), (6) and (7). Judge Sutton observed that it makes sense to have a paragraph that sets out the ruling that is being challenged; but he noted that no participant had defended current Rule 28(a)(6)'s reference to the "course of proceedings."

Judge Sutton suggested that a two to three page introduction can be a useful way to frame the brief. Mr. Letter noted that some U.S. Attorney's offices take this approach, but that practices vary by district. An attorney member observed that inviting too much in the way of an introduction might tempt those commenting on a draft brief to advocate the inclusion of too many issues "up front." An advocate might worry, he suggested, that omitting any issue from such an introduction downplays that issue. Judge Sutton observed that there is no need for the Rules to require an introduction.

An appellate judge member stated that the briefs his court receives are generally well-written and helpful, and that the summary of argument helps the judges to focus their reading. It was observed that with respect to the contents of the brief, as with the question of double-sided printing of briefs, judges will have many different views. A member suggested deleting "course of proceedings" from Rule 28(a)(6).

Judge Sutton suggested that it would be useful to consult the American Bar Association's Council of Appellate Lawyers on these questions. An attorney member suggested that the Committee also consult the American Academy of Appellate Lawyers. Judge Sutton stated that he would write to these two groups to solicit their views.

E. Item No. 10-AP-C (reply brief word limits)

Judge Sutton invited the Reporter to introduce this item, which arises from the Supreme Court's decision, effective February 2010, to revise Supreme Court Rule 33 to lower the word limit for reply briefs on the merits from 7,500 words to 6,000 words. A question was raised whether that change provides a reason to alter Appellate Rule 32's length limits. Ever since their adoption, the Appellate Rules have followed a pattern of setting the permitted length of reply briefs at half the permitted length of principal briefs. From 1980 to 2007, the Supreme Court's rules set the ratio of the page limits for reply and principal briefs at 40 %. In 2007, the Court published for comment a proposal to switch from page limits to word limits. Some who commented on that proposal complained that the reply brief limits were too tight. Ultimately, the Court decided in 2007 to increase the ratio to 50 %, so that reply briefs were limited to 7,500 words. The Supreme Court's February 2010 change merely restores the prior 40 % ratio. That change does not, the Reporter suggested, necessarily warrant a change in the Appellate Rules' length limits. The real question is whether lawyers and judges desire to change those limits.

An attorney member stated that there are reasons for the difference between Supreme Court Rule 33's 40 % ratio and Appellate Rule 32's 50 % ratio. In appeals to the court of appeals, this member argued, an appellee is more likely to present alternative grounds for affirmance which may require a lengthier reply brief. An appellate judge member stated that shorter reply briefs are better but that he is not complaining about the current rule. Another appellate judge member noted that a litigant can move for leave to exceed Rule 32's length limits. The attorney member responded that it is best to design the rule to accommodate the general run of cases, because motion practice is not a good way to mitigate the effects of an

overly stringent length limit. Another attorney member pointed out that the timetable for reply briefs is short, which would make it difficult to move for leave to file an over-length reply brief. Mr. Letter, by contrast, noted that most reply briefs seem too long to him – though he conceded that sometimes the extra length is necessitated by the appellee's decision to raise alternative grounds for affirmance. He questioned why the appellant should be allowed 50 % more words than the appellee.

The latter observation led an attorney member to note the undesirable results that can occur when an insubstantial cross-appeal permits the cross-appellant extra brief length. Mr. Letter noted that the Committee had considered this critique of Appellate Rule 28.1. The Committee had considered imposing separate word limits for the briefs' discussions of the appeal and the cross-appeal, but had rejected the idea as impracticable – a view with which the appellate clerks had agreed. It had been noted, as well, that a judge who is bothered by the use of the extra length to brief issues unrelated to the cross-appeal can take the advocate to task over this at oral argument. An attorney member observed that such a prospect can help to deter the misuse of the extra length.

A motion was made to remove Item No. 10-AP-C from the Committee's agenda. The motion was seconded and passed by voice vote without opposition.

VIII. Schedule Date and Location of Fall 2010 Meeting

The Committee's fall 2010 meeting will be held on October 7 and 8, 2010, in Boston, Massachusetts.

IX. Adjournment

The Committee adjourned at 10:00 a.m. on April 9, 2010.

Respectfully submitted,

Catherine T. Struve
Reporter

TAB

III

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 14-15, 2010
Washington, DC
Draft Minutes

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ATTENDANCE

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Washington, D.C., on Monday and Tuesday, June 14 and 15, 2010. All the members were present:

Judge Lee H. Rosenthal, Chair
Dean C. Colson, Esquire
Douglas R. Cox, Esquire
Judge Harris L Hartz
Judge Marilyn L. Huff
Chief Justice Wallace Jefferson
John G. Kester, Esquire
Dean David F. Levi
William J. Maledon, Esquire
Judge Reena Raggi
Judge James A. Teilborg
Judge Diane P. Wood

The Department of Justice was represented on the committee by Lisa O. Monaco, Principal Associate Deputy Attorney General. Other attendees from the Department included Karyn Temple Claggett, Elizabeth Shapiro, Kathleen Felton, J. Christopher Kohn, and Ted Hirt.

Professor R. Joseph Kimble, the committee's style consultant, participated throughout the meeting, and Judge Barbara Jacobs Rothstein, director of the Federal Judicial Center, participated in part 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
Emery G. Lee III	Research Division, Federal Judicial Center
Tim Reagan	Research Division, Federal Judicial Center
Andrea Kuperman	Judge Rosenthal's rules law clerk

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Jeffrey S. Sutton, 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
Professor Richard L. Marcus, Associate Reporter
Advisory Committee on Criminal Rules —
Judge Richard C. Tallman, Chair
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter
Advisory Committee on Evidence Rules —
Judge Robert L. Hinkle, Chair
Professor Daniel J. Capra, Reporter

INTRODUCTORY REMARKS

Judge Rosenthal reported that the Supreme Court had transmitted to Congress all the rule amendments approved by the Judicial Conference in September 2009, except the proposed amendment to FED. R. CRIM. P. 15 (depositions). That proposal would have authorized taking the deposition of a witness in a foreign country outside the presence of the defendant if the presiding judge were to make several special findings of fact. The Court remitted the amendment to the committee without comment, but some further explanation of the action is anticipated. She noted that the advisory committee had crafted the rule carefully to deal with delicate Confrontation Clause issues, and it appears that it may have further work to do.

Judge Rosenthal reflected that the rules committees had accomplished an enormous amount of work since the last Standing Committee meeting in January 2010. First, she said, the Advisory Committee on Evidence Rules had completed the restyling of the entire Federal Rules of Evidence and was now presenting them for final approval. The evidence rules, she noted, are the fourth set of federal rules to be restyled, and the final product is truly impressive.

Second, she said, final approval was being sought for important changes in the appellate and bankruptcy rules and for a package of amendments to the criminal rules that would allow courts and law enforcement authorities to take greater advantage of technological developments. Third, she pointed to the recent work of the sealing and privacy subcommittees and the Federal Judicial Center's major report on sealed cases in the federal courts.

Finally, she emphasized that the civil rules conference held at Duke Law School in May 2010 had been an unqualified success. She noted that the conference proceedings and the many studies and articles produced for the event should be viewed as just the beginning of a major rules project that will continue for years. All in all, she said, it had been a truly productive year for the rules committees, and the year was still not half over.

Judge Rosenthal introduced the committee's newest member, Chief Justice Wallace Jefferson of Texas. She noted that he is extremely well regarded across the entire legal community and recently received more votes that any other candidate for state office in Texas. She described some of his many accomplishments and honors, and she noted that he will be the next presiding officer of the Conference of Chief Justices.

With regret, she reported that several rules committee chairs and members were attending their last Standing Committee meeting because their terms would expire on October 1, 2010. She thanked Judge Swain and Judge Hinkle for their leadership and enormous contributions as advisory committee chairs for the past three years.

She pointed out that Judge Swain, as chair of the Advisory Committee on Bankruptcy Rules, had embarked on new projects to modernize the official bankruptcy forms and update the bankruptcy appellate rules, and had guided the committee through controversial rules amendments that were necessary to respond to economic developments. She emphasized that the work had been extremely complicated, timely, and meticulous.

Judge Hinkle's many accomplishments as chair of the Advisory Committee on Evidence Rules, she said, included the major, and very difficult, project of restyling the Federal Rules of Evidence. The new rules, she said, are outstanding and are an appropriate monument to his leadership as chair.

Judge Rosenthal said that the terms of two members of the Standing Committee were also about to end – Judge Hartz and Mr. Kester. She noted that Judge Hartz had come perfectly prepared to serve on the committee, having been a private practitioner, a prosecutor, a law professor, and a state judge. She thanked him for his incisive work as chair of the sealing subcommittee, for his amazing attention to detail, and for his willingness to do more than his share of hard preparatory work.

She said that Mr. Kester had been a wonderful member, bringing to the committee invaluable insights and wisdom as a distinguished lawyer. She detailed some of his background as a partner at a major Washington law firm, a law clerk to Justice Hugo Black, a former president of Harvard Law Review, a former high-level official at the Department of Defense, and a member of many public and civic bodies. She noted that he always shows great respect and appreciation for the work of judges and has written articles on law clerks and how they affect the work of judges.

Judge Rosenthal pointed out that two of the committee's consultants – Professor Geoffrey C. Hazard, Jr. and Joseph F. Spaniol, Jr. – had been unable to attend the meeting and would be greatly missed. She noted that Mr. Spaniol had been part of the federal rules process for more than 50 years.

Judge Rosenthal reported that Tom Willging was about to retire from his senior position with the Research Division of the Federal Judicial Center. She noted that Dr. Willging had worked closely with the Advisory Committee on Civil Rules for more than 20 years and had directed many of the most important research projects for that committee. She thanked him for his many valuable contributions to the rules committees and emphasized his hard work, innovative approach, and completely honest assessments.

Judge Rosenthal also thanked the staff of the Administrative Office for their uniformly excellent work in supporting the rules committees, noting in particular that they coped successfully with the recent upsurge in rules committee activities and contributed mightily to the success of the May 2010 civil rules conference at Duke Law School.

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 7-8, 2010.

LEGISLATIVE REPORT

Civil Pleading

Judge Rosenthal reported that legislation had been introduced in 2009 in each house of Congress attempting to restore pleading standards in civil cases to those in effect before the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S. Ct. 1937 (2009). Three hearings had been held on the bills, but none since January 2010.

In May 2010, she said, a discussion draft had been circulated of new legislation that would take a somewhat different approach from the two earlier bills. She added that Congressional markup of some sort of pleading legislation had been anticipated by May, but had been postponed indefinitely. Another markup session, she said, may be scheduled before the summer Congressional recess, but there is still a good deal of uncertainty over what action the legislature will take.

Judge Rosenthal pointed out that the judiciary's primary emphasis has been to promote the integrity of the rulemaking process and to urge Congress to use that process, rather than legislation, to address pleading issues. She noted that the rules committees have been: (1) monitoring pleading developments since *Twombly* and *Iqbal;* (2) memorializing the extensive case law developed since those decisions; and (3) drawing on the Administrative Office and the Federal Judicial Center to gather statistics and other empirical information on civil cases before and after *Twombly* and *Iqbal*. That information, she said, had been given to Congress and posted on the judiciary's website. In addition, she, Judge Kravitz, and Administrative Office Director Duff had written letters to Congress emphasizing the importance of respecting and deferring to the Rules Enabling Act process, especially in such a delicate and technical legal area as pleading standards.

Sunshine in Litigation

Judge Rosenthal reported that the committee was continuing to monitor proposed "sunshine in litigation" legislation that would impose restrictions on judges issuing protective orders during discovery in cases where the information to be protected by the order might affect public health or safety. She noted that a new bill had recently been introduced by Representative Nadler that is narrower than earlier legislation. But, she said, it too would require a judge to make specific findings of fact regarding any potential

danger to public health and safety before issuing a protective order. As a practical matter, she explained, the legislation would be disruptive to the civil discovery process and require a judge to make important findings of fact without the assistance of counsel and before any discovery has taken place in a case.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Sutton and Professor Struve presented the report of the advisory committee, as set forth in Judge Sutton's memorandum and attachments of May 28, 2010 (Agenda Item 11).

Amendments for Final Approval

FED. R. APP. P. 4(a)(1) and 40(a)
and
PROPOSED STATUTORY AMENDMENT TO 28 U.S.C. § 2107

Judge Sutton reported that the proposed changes to Rule 4 (time to appeal) and Rule 40 (petition for panel rehearing) had been published for comment in 2007. The current rules, he explained, provide additional time to all parties to file a notice of appeal under Rule 4 (60 days, rather than 30) or to seek a panel rehearing under Rule 40 (45 days, rather than 14) in civil cases in which one of the parties in the case is a federal government officer or employee sued in an *official* capacity. The proposed amendments, he said, would clarify the law by specifying that additional time is also provided in cases where one of the parties is a federal government officer or employee sued in an *individual* capacity for an act or omission occurring in connection with duties performed on the government's behalf.

He noted, by way of analogy, that both FED. R. CIV. P. 4(i)(3) (serving a summons) and FED. R. CIV. P. 12(a)(3) (serving a responsive pleading) refer to a government officer or employee sued "in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf." The same concept was being imported from the civil rules to the appellate rules.

Judge Sutton pointed out that the advisory committee had encountered a complication when the Supreme Court held in *Bowles v. Russell*, 551 U.S. 205 (2007), that an appeal time period reflected in a statute is jurisdictional in nature. In light of that opinion, the advisory committee questioned the advisability of making the change in Rule 4 without also securing a similar statutory amendment to 28 U.S.C. § 2107.

The advisory committee, he said, had considered dropping the proposed amendment to Rule 4 and proceeding with just the amendment to Rule 40 – which has no statutory counterpart. But the committee was uncomfortable with making the change in

one rule but not the other because the two deal with similar issues and use identical language. Accordingly, after further discussion, the committee decided to pursue both the Rule 4 and Rule 40 amendments, together with a proposed statutory change to 28 U.S.C. § 2107. Amending all three will bring uniformity and clarity in all civil cases in which a federal officer or employee is a party.

Judge Sutton reported that the advisory committee had made a change in the proposed amendments following publication to specify that the rules apply to both current and former government employees.

He also explained that the advisory committee had debated whether to set forth specific safe harbors in the text of the rule to ensure that the longer time periods apply in certain situations. All committee members, he said, agreed to include two safe harbors in the rule. They would cover cases where the United States: (1) represents the officer or employee at the time the relevant judgment is entered; or (2) files the appeal or rehearing petition for the officer or employee.

Judge Sutton explained that two committee members had wanted to add a third safe harbor, to cover cases where the United States pays for private representation for the government officer or employee. There was no opposition to the third safe harbor on the merits, but a seven-member majority of the committee pointed to practical problems that cautioned against its inclusion. For example, neither the clerk's office nor other parties in a case will know whether additional time is provided because they will not be able to tell from the pleadings and the record whether the United States is in fact financing private counsel. The rule, moreover, had proven quite complicated to draft, and adding another safe harbor would make it more difficult to read.

In short, he said, the advisory committee concluded that the third safe harbor was simply not appropriate for inclusion in the text of the rule. He suggested, though, that some language addressing it could be included in the committee note, even though it would be unusual to specify a safe harbor in the note that is not set forth in the rule itself.

A participant inquired as to how often the situation arises where the government funds an appeal but does not provide the representation directly. Judge Sutton responded that the advisory committee had been informed that it arises rather infrequently, in about 30 to 50 cases a year.

A member suggested that the committee either add the third safe harbor to the text of the rules or not include any safe harbors in the rules at all. For example, the text of the two rules could be made simpler and a non-exclusive list added to the committee notes.

Judge Sutton explained that the advisory committee had originally drafted the rule using the words, "including, but not limited to . . . ." The style subcommittee, however, did not accept that formulation because it was not consistent with general usage elsewhere

in the rules. He suggested, therefore, that two options appeared appropriate: (1) returning to the original language proposed by the advisory committee, *i.e.*, "including but not limited to . . ."; or (2) retaining the current language of the rule with two safe harbors, but adding language to the note referring to the third safe harbor as part of a non-exclusive list. Professor Struve offered to draft note language to accomplish the latter result.

A member moved to adopt the second option, using the language drafted by Professor Struve, with a minor modification.

The committee without objection by voice vote approved the proposed amendments to Rules 4 and 40, including the additional language for the committee notes. Without objection by voice vote, it also approved the proposed corresponding statutory amendment to 28 U.S.C. § 2107.

Informational Items

Judge Sutton reported that the advisory committee was considering proposals to amend FED. R. APP. P. 13 (review of Tax Court decisions) and FED. R. APP. P 14 (applicability of other rules to review of Tax Court decisions) to address interlocutory appeals from the Tax Court. He noted that the committee would probably ask the Standing Committee to authorize publication of the proposed amendments at its January 2011 meeting.

He reported that the advisory committee was continuing to study whether federally recognized Indian tribes should be given the same status as states under FED. R. APP. P. 29 (amicus briefs), thereby allowing them to file amicus briefs without party consent or court permission. He said that he would consult on the matter with the chief judges of the Eighth, Ninth, and Tenth Circuits, where most tribal amicus filings occur. One possibility, he suggested, would be for those circuits to amend their local rules to take care of any practical problems. This course might avoid the need to amend the national rules. Otherwise, he said, the advisory committee would consider amending Rule 29. In addition, he noted that the Supreme Court does not give tribes the right to file amicus briefs without permission, but it does allow municipalities to do so.

He also reported that the advisory committee was considering some long-term projects, including possible rule amendments in light of the recent Supreme Court decision in *Mohawk Industries, Inc. v. Carpenter*, 130 S. Ct. 599 (2009), which held that a ruling by a district court on attorney-client privilege did not qualify for an immediate appeal under the "collateral order" doctrine. Another long-term project, he said, involved studying the case law on premature notices of appeal. He noted that there are splits among the circuits regarding the status of appeals filed prior to the entry of an appealable final judgment.

Finally, Judge Sutton noted that the advisory committee was considering whether to modify the requirements in FED. R. APP. P. 28(a)(6) and (7) (briefs) that briefs contain separate statements of the case and of the facts. He suggested that the requirements prevent lawyers from telling their side of the case in chronological order. Several members agreed with that assessment and encouraged the advisory committee to proceed.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Swain and Professor Gibson presented the report of the advisory committee, as set out in Judge Swain's memorandum and attachment of May 27, 2010 (Agenda Item 10).

Amendments for Final Approval

FED. R. BANKR. P. 1004.2

Judge Swain reported that proposed new Rule 1004.2 (chapter 15 petition) would require a chapter 15 petition – which seeks recognition of a foreign proceeding – to designate the country in which the debtor has "its center of main interests." The proposal, originally published in 2008, had been criticized in the public comments for allowing too much time for a party to file a motion challenging the designation. As a result, the advisory committee republished the rule in 2009 to reduce the time for filing an objection from 60 days after notice of the petition is given to 7 days before the date set for the hearing on the petition.

She noted that no comments had been submitted on the revised proposal, and only stylistic changes had been made after publication.

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

FED. R. BANKR. P. 2003

Professor Gibson explained that under current law the officer presiding at the first meeting of creditors or equity security holders, normally the trustee, may defer completion of the meeting to a later date without further notice. The proposed amendment to Rule 2003 (meeting of creditors or equity security holders) would require the officer to file a statement specifying the date and time to which the meeting is adjourned. This procedure will make it clear on the record for those parties not attending whether the meeting was actually concluded or adjourned to another day.

She noted that § 1308 of the Bankruptcy Code requires chapter 13 debtors to file their tax returns for the last four taxable periods before the scheduled date of the meeting.

If, however, a debtor has not filed the returns by that date, § 1308(b)(1) permits the trustee to "hold open" the meeting for up to 120 days to allow the debtor additional time to file.

Under FED. R. BANKR. P. 3002(c) (filing a proof of claim or interest), taxing authorities have 60 days to file their proofs of claim after the debtor files the returns. If the debtor fails to file them within the time period provided by § 1308, the failure is a basis under § 1307 of the Code for mandatory dismissal of the case or conversion to chapter 7.

Professor Gibson pointed out that the purpose of the proposed amendment to Rule 2003 was to give clear notice to all parties as to whether a meeting of creditors has been concluded or adjourned and, if adjourned, for how long. It will let them know whether the trustee has extended the debtor's time to file tax returns as required for continuation of a chapter 13 case, since adjourning the meeting functions as "holding open" the meeting for purposes of the tax return filing provision.

She noted that eight of the nine public comments on the rule had been favorable. The Internal Revenue Service, however, recommended that the rule be revised to require the presiding officer to specify whether the meeting of creditors is being: (1) "held open" explicitly under § 1308 of the Code to give a taxpayer additional time to file returns; or (2) adjourned for some other purpose.

She reported that the advisory committee had debated the matter, and the majority voted to approve the rule as published for three reasons. First, no court has required a presiding officer to state specifically that the meeting is being "held open" or to cite § 1308. Rather, courts distinguish only between whether the meeting is concluded or continued. Second, the advisory committee believed that "holding open" and "adjourning" are truly equivalent terms, even though Congress used the inartful term "hold open" in § 1308. Third, the advisory committee was persuaded that the consequences of a presiding officer not specifically using the term "hold open" would be sufficiently severe for the debtor – conversion or dismissal of the case – that use of the exact words should not be required. Moreover, the taxing authorities are not prejudiced because they still have 60 days to file their proofs of claim.

Professor Gibson reported that the only change made since publication was the addition of a sentence to the committee note stating that adjourning is the same as holding open. The modification was made to address the concerns expressed by the Internal Revenue Service.

Ms. Claggett and Mr. Kohn stated that the Department of Justice appreciated the advisory committee's concerns for the Internal Revenue Service's position, but wanted to reiterate the position for the record. Mr. Kohn explained that making a distinction in the rule between adjourning a meeting for any possible reason and holding it open for the

narrow purpose of § 1308 is fully consistent with § 1308. The meeting, he said, can be "held open" for only one purpose. Congress, he said, had used the term deliberately, and it should be carried over to the rule.

The Department, he said, agreed that § 1308 had been designed to help taxing authorities prod debtors into filing returns and promptly providing information early in a case. The Department, he said, was concerned that there will be confusion if the distinction between holding open and adjourning a meeting is blurred. Moreover, the sanctions that may be imposed for failing to file in a timely fashion may be compromised.

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

FED. R. BANKR. P. 2019

Judge Swain reported that the advisory committee was recommending a substantial revision of Rule 2019 (disclosure of interests) to expand both the coverage of the rule and the content of its disclosure requirements. The rule, she said, provides the courts and parties with needed insight into the interests and potentially competing motivations of groups participating in a case. It attracted little attention over the years until buyers of distressed debt began to participate actively in chapter 11 cases.

The revised rule would require official and unofficial committees, groups, or entities that consist of, or represent, more than one creditor or equity security holder to disclose their "disclosable economic interests." That term is defined broadly in the revised rule to include not only a claim, but any other economic right or interest that could be affected by the treatment of a claim or interest in the case.

Among other things, she said, there has been strategic use of the current rule, especially to force hedge funds and other distressed-debt investors to reveal their holdings when they act as ad hoc committees of creditors or equity security holders. As a result, a hedge fund association suggested that the rule be repealed in its entirety. Other groups, however, including the National Bankruptcy Conference and the American Bar Association, recommended that the rule be retained and broadened.

Judge Swain pointed out that the proposal had drawn considerable attention, including 14 written comments and testimony from seven witnesses at the advisory committee's public hearing. In the end, she said, all but one commentator acknowledged the need for disclosure and supported expansion of the current rule.

Three sets of objections were voiced to the proposal as published. First, distressed-debt buyers objected to the proposed requirement to divulge the date that each disclosable economic interest was acquired and the amount paid for it. That information, the industry said, would compromise critical business secrets, such as trading strategies,

seriously damage their operations, and undercut the bankruptcy process. Second, objections were raised to applying the disclosure requirements to entities acting in certain institutional roles, such as entities acting in a purely fiduciary capacity. Third, there were objections to applying the rule to "groups" that are really composed of a single affiliated set of actors, or to law firms or other entities that are only passively involved in a case.

On the other hand, she said, there had been many public comments in support of the rule. The supporters, however, agreed that the rule would still be effective even if narrowed to address some of the objections. Accordingly, after publication, the committee made a number of changes to narrow the disclosure requirements and the sanctions provision.

She said that republication would not be necessary because all the subject matter included in the revised rule had been included in the broader published rule, and the advisory committee had added no new restrictions or requirements. Republication, moreover, would delay the rule by a year, and it is important to have it take effect as soon as possible to avoid further litigation over the scope and meaning of the current rule and strategic invocation of the current rule to gain leverage in disputes.

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

FED. R. BANKR. P. 3001

Professor Gibson reported that the proposed amendments to Rule 3001 (proof of claim) and new Rule 3002.1 (notice of fees, charges and payment amount changes imposed during the life of a chapter 13 case in connection with claims secured by a security interest in the debtor's principal residence) were designed to address problems encountered in the bankruptcy courts with inadequate claims documentation in consumer cases. First, she said, proofs of claims are frequently filed without the documentation currently required by the rules and Official Form 10, especially by bulk purchasers of consumer claims. Second, problems arise in chapter 13 cases as a result of inadequate notice of various fees and penalties assessed on home mortgages. Debtors who successfully complete their plan payments may be faced with deficiency or foreclosure notices soon after they emerge from bankruptcy with a discharge.

Professor Gibson explained that current Rule 3001(c) lays down the basic requirement that whenever a claim is based on a writing, the original or a duplicate of the writing must be filed with the proof of claim. The published amendments to Rule 3001(c)(1) would have added a requirement that a copy of the debtor's last account statement be attached to open-end or revolving credit-card account claims. The statement would let the debtor and trustee know who the most recent holder of the claim was, how old the claim is and whether it may be barred by the statute of limitations.

Because accounting mistakes occur and creditors change periodically, it would also help debtors to match up the claim with the specific debt.

She reported that the two rules had attracted a good deal of attention, including more than a hundred written comments and several witnesses at the advisory committee's public hearing. Comments from buyers of consumer debt objected because the last account statements, they said, are often no longer available. Federal law, for example, requires that they be kept for only two years. In addition, industry representatives stated that some of the loan information required by the amendments is not readily available to current creditors and cannot be broken out as specified in the proposed rules. Some commentators also argued that a copy of the last statement would unnecessarily reveal private information as to the nature and specifics of the credit card purchases of the debtor.

Professor Gibson reported that as a result of the public comments and testimony, the advisory committee had decided to withdraw the proposed revolving and open-end credit related amendments, redraft them, and republish them for further comment as a proposed new paragraph (c)(3). See *infra*, page 18.

The advisory committee, therefore, was seeking final approval at this point of only the proposed changes in Rule 3001(c)(2). They would require that additional information be filed with a proof of claim in cases in which the debtor is an individual, including:
(1) itemized interest charges and fees; and (2) a statement of the amount necessary to cure any pre-petition default and bring the debt current. In addition, a home mortgage creditor with an escrow account would have to file an escrow statement in the form normally required outside bankruptcy.

To standardize the new requirements of paragraph (c)(2) and supersede the many local forms already imposing similar requirements, the advisory committee was also seeking approval to publish for comment a proposed new standard national form – Official Form 10, Attachment A. See *infra*, page 20. The form would take effect on December 1, 2011, the same date as the proposed amendments to Rule 3001(c)(2).

Professor Gibson added that some public comments had recommended requiring a creditor to provide additional information on fees and calculations, while others argued for less information. The advisory committee, she said, had tried to strike the correct balance between obtaining additional disclosures needed for the debtor and trustee to understand the claim amounts and avoiding imposing undue burdens on creditors.

Professor Gibson pointed out that proposed new subparagraph (c)(2)(D) sets forth sanctions that a court may impose if a creditor fails to provide any of the information specified in Rule 3001(c). Modeled after FED. R. CIV. P. 37(c)(1), it specifies that if the

holder of a claim fails to provide the required information, the court may preclude its use as evidence or award other appropriate relief.

She reported that the provision had attracted several comments. After publication, the advisory committee revised the rule and committee note to emphasize that: (1) a court has flexibility to decide what sanction to apply and whether to apply a sanction at all; (2) the rule does not create a new ground to disallow a claim, beyond the grounds specified in § 502 of the Code; and (3) a court has discretion to allow a holder of the claim to file amendments to the claim. The proposed rule, she said, is a clear rejection of the concept that creditors may routinely ignore the documentation requirements of the rule and force debtors to go to the court to obtain necessary information.

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

FED. R. BANKR. P. 3002.1

Professor Gibson explained that proposed new rule 3002.1 (notice related to post-petition changes in payment amounts, and fees and charges, during a chapter 13 case in connection with claims secured by a security interest in the debtor's principal residence) implements § 1322(b)(5) of the Bankruptcy Code. It would provide a procedure for debtors to cure any pre-petition default, maintain payments, and emerge current on their home mortgage at the conclusion of their chapter 13 plan. For the option to work, she explained, the chapter 13 trustee needs to know the required payment amounts, and the debtor should face no surprises at the end of the case.

She noted that subdivision (b) of the new rule would require the secured creditor to provide notice to the debtor, debtor's counsel, and the trustee of any post-petition changes in the monthly mortgage payment amount, including changes in the interest rate or escrow account adjustments. As published, the rule would have required a creditor to provide the notice 30 days in advance of a change. Public comments pointed out, though, that only 25 days is sometimes required by non-bankruptcy law. Accordingly, the advisory committee modified the rule after publication to require 21 days' advance notice of changes.

She added that the advisory committee had drafted a new form to implement subdivision (b) (Official Form 10, Supplement 1, Notice of Mortgage Payment Change). It would be published for comment in August 2010 and take effect on December 1, 2011, the same time as the proposed new rule. See *infra,* page 20.

Professor Gibson reported that subdivision (c) would require the creditor to provide notice to the debtor, debtor's counsel, and the trustee of any post-petition fees, expenses, and charges within 180 days after they are imposed. She explained that

debtors are often unaware of the different kinds of charges that creditors assess, some of which may not be warranted or appropriate under the mortgage agreement or applicable non-bankruptcy law. The proposed amendments would give the debtor or trustee the chance to object to any claimed fee, expense, or charge within one year of service of the notice. She added that the advisory committee had worked hard to strike the right balance between providing fair notice to debtors and avoiding imposing unnecessary burdens on creditors.

She noted that the advisory committee had drafted a new form to implement subdivision (c) (Official Form 10, Supplement 2, Notice of Postpetition Mortgage Fees, Expenses, and Charges). It would be published for comment in August 2010 and take effect on December 1, 2011, the same time as the proposed new rule. See *infra*, page 20.

Professor Gibson explained that subdivisions (f) through (h) deal with final-cure payments and end-of-case proceedings. They will permit debtors to obtain a determination as to whether they are emerging from bankruptcy current on their mortgage. The amendments recognize that in some districts, debtors make mortgage payments directly, and in others they are paid by the chapter 13 trustee. In all districts, the trustee makes the default payments.

Within 30 days of the debtor's completion of all payments under the plan, the trustee would be required by the rule to provide notice to the debtor, debtor's counsel, and the holder of the mortgage claim that the debtor has cured any default. The holder of the claim would be required to file a response indicating whether it agrees that the debtor has cured any default and also indicating whether the debtor is current on all payments.

She pointed out that subdivision (i) contains a sanction provision for failure to provide the information required under the rule, similar to the sanction provision proposed in Rule 3001, *supra* page 14.

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

FED. R. BANKR. P. 4004

Professor Gibson explained that the proposed amendments to Rule 4004 (grant or denial of discharge) would resolve a problem identified by the 7th Circuit in *Zedan v. Habash*, 529 F.3d 398 (2008). They would permit a party in specific, limited circumstances to seek an extension of the time to object to the debtor's discharge after the time for objecting has expired. The proposal would address the unusual situation in which there is a significant gap in time between the deadline in Rule 4004(a) for a party to object to the discharge (60 days after the first date set for the meeting of creditors) and the date that the court actually enters the discharge order.

During such a gap, a party – normally a creditor or the trustee – may learn of facts that may provide grounds to revoke the debtor's discharge under § 727(a) of the Code, such as fraud committed by the debtor. But it is too late at that point to file an objection. The party, moreover, cannot seek revocation because § 727(d) of the Code specifies that revocation is not permitted if a party learns of fraud *before* the discharge is granted. The party, therefore, may be left without appropriate recourse.

The proposed amendments would allow a party to file a motion to extend the time to object to discharge after the objection deadline has expired and before the discharge is granted. The motion must show that: (1) the objection is based on facts that, if learned after the discharge was entered, would provide a basis for revocation under § 727(d); and (2) the party did not know of those facts in time to file an objection to discharge. The motion, moreover, must be filed promptly upon discovery of the facts.

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

FED. R. BANKR. P. 6003

Judge Swain reported that Rule 6003 (relief immediately after commencement of a chapter 11 case) generally prohibits a court from issuing certain orders during the first 21 days of a chapter 11 case, such as approving the employment of counsel, the sale of property, or the assumption of an executory contract or unexpired lease. The proposed rule amendment would make it clear that the waiting period does not prevent a court from later issuing an order with retroactive effect, relating back, for example, to the date that the application or motion was filed. Thus, professionals can be paid for work undertaken while their application is pending.

The amendment would also clarify that the court is only prevented from granting the relief specifically identified in the rule. A court, for example, could approve the procedures for a sale during the 21-day waiting period, but not the actual sale of estate property itself.

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

OFFICIAL FORMS 22A, 22B, and 22C

Judge Swain reported that the proposed amendments to the "means-test" forms, Official Forms 22A (chapter 7), 22B (chapter 11), and 22C (chapter 13), would replace in several instances the terms "household" and "household size" with "number of persons" or "family size." The revised terminology more closely reflects § 707(b) of the Code and IRS standards. Section 707(b)(2)(A)(ii)(I) of the Code specifies that the debtor's means-test deductions for various monthly expenses may be taken in the amounts specified in the IRS National and Local Standards. The national standards, she said, are based on numbers of persons, rather than household size. The local standards are based on family size, rather than household size.

In addition, she said, an instruction would be added to each form explaining that only one joint filer should report household expenses regularly paid by a third person. Instructions would also be added directing debtors to file separate forms if only one joint debtor is entitled to an exemption under Part I (report of income) and they believe that filing separate forms is required by § 707(b)(2)(C) of the Code. The statutory provisions, she said, are ambiguous on means-testing exclusions. Therefore, the form does not impose a particular interpretation, and the instructions allow debtors to take positions consistent with their interpretations of the ambiguous exemption provisions.

The revisions, she said, would become effective on December 1, 2010.

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

Amendments for Final Approval, Without Publication

OFFICIAL FORMS 20A AND 20B

Judge Swain reported that the proposed changes to Official Forms 20A (notice of motion or objection) and 20B (notice of objection to claim) were technical in nature and did not require publication. They would conform the forms to: (1) the 2005 amendment to § 727(a)(8) of the Code, which extends the time during which a debtor is barred from receiving successive discharges from 6 years to 8 years; and (2) the 2007 addition of FED. R. BANKR. R. 9037, which directs filers to provide only the last four digits of any social security number or individual taxpayer-identification number.

The revisions, she said, would become effective on December 1, 2010.

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

Amendments for Publication

FED. R. BANKR. P. 3001

As noted above on pages 12-14, the proposed amendments to Rule 3001(c)(1) (proof of claim) published in August 2009 would have required a creditor with a proof of claim based on an open-end or revolving consumer credit agreement to file the debtor's last account statement with the proof of claim. The main problem that the rule was designed to address is that credit-card debt purchased in bulk claims may be stale.

Professor Gibson explained that the advisory committee had withdrawn the published proposal in light of many comments from creditors that they could not effectively produce the account statements, especially since claims for credit-card debt may be sold one or more times before the debtor's bankruptcy. Some recommended that pertinent information be required instead.

Professor Gibson explained that the advisory committee would replace the proposal with a substitute new paragraph 3001(c)(3). In lieu of requiring that a copy of the debtor's last account statement be attached, the revised proposal would require the holder of a claim to file with the proof of claim a statement that sets forth several specific names and dates relevant to a consumer-credit account. Those details, she said, are important for a debtor or trustee to be able to associate the claim with a known account and to determine whether the claim is timely or stale.

Although the creditor would not have to attach the underlying writing on which the claim is based, a party, on written request, could require the creditor to provide the writing. In certain cases, the debtor needs the information to assert an objection.

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

FED. R. BANKR. P. 7054

Judge Swain reported that the proposed amendment to Rule 7054 (judgment and costs) would conform the rule to FED. R. CIV. P. 54 and increase the time for a party to respond to the prevailing party's bill of costs from one day to 14 days. The current period, she said, is an unrealistically short amount of time for a party to prepare a response. In addition, the time for serving a motion for court review of the clerk's action in taxing costs would be extended from 5 to 7 days, consistent with the 2009 time-computation rules that changed most 5-day deadlines to 7 days.

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

FED. R. BANKR. P. 7056

Judge Swain explained that Rule 7056 (summary judgment) incorporates FED. R. CIV. P. 56 in adversary proceedings. Rule 56 is also incorporated in contested matters through FED. R. BANKR. P. 9014(c).

She reported that the proposed amendment to Rule 7056 would alter the rule's default deadline for filing a summary judgment motion in bankruptcy cases. She explained that the deadline in civil cases – 30 days after the close of discovery – may not work well in fast-moving bankruptcy contested matters, where hearings often occur shortly after the close of discovery. Therefore, the advisory committee decided to set the deadline for filing a summary judgment motion in bankruptcy at 30 days before the initial date set for an evidentiary hearing on the issue for which summary judgment is sought. As with FED. R. CIV. P. 56(c)(1), she noted, the deadline may be altered by local rule or court order.

A member suggested that the proposed language of the amendment was a bit awkward and recommended moving the authorization for local rule variation to the end of the sentence. Judge Swain agreed to make the change.

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

OFFICIAL FORM 10
and
ATTACHMENT A, SUPPLEMENT 1, AND SUPPLEMENT 2

Judge Swain reported that the advisory committee was recommending several changes in Official Form 10 (proof of claim). The holder of a secured claim would be required to specify the annual interest rate on the debt at the time of filing and whether the rate is fixed or variable. In addition, an ambiguity on the current form would be eliminated to make it clear that the holder of a claim must attach the documents that support a claim, and not just a summary of the documents.

To emphasize the duty of accuracy imposed on a party filing a proof of claim, the signature box would be amended to include a certification that the information submitted on the form meets the requirements of FED. R. BANKR. P. 9011(b) (representations to the court), *i.e.*, that the claim is "true and correct to the best of the signer's knowledge, information, and reasonable belief." This is particularly important, she said, because a proof of claim is prima facie evidence of the validity of a claim. In addition, a new space would be provided on the form for optional use of a "uniform claim identifier," a system

implemented by some creditors and chapter 13 trustees to facilitate making and crediting plan payments by electronic funds transfer

Professor Gibson reported that three new claim-attachment forms had been drafted to implement the mortgage claims provisions of proposed Rules 3001(c)(2) and 3002.1. They would prescribe a uniform format for providing additional information on claims involving a security interest in a debtor's principal residence.

Attachment A to Official Form 10 would implement proposed Rule 3001(c)(2) and provide a uniform format for the required itemization of pre-petition interest, fees, expenses, and charges included in the home-mortgage claim amount. It would also require a statement of the amount needed to cure any default as of the petition date. If the mortgage installment payments include an escrow deposit, an escrow account statement would have to be attached, as required by proposed Rule 3001(c)(2)(C).

Supplement 1 to Official Form 10 would implement proposed Rule 3002.1(b) and require the home-mortgage creditor in a chapter 13 case to provide notice of changes in the mortgage installment payment amounts.

Supplement 2 to Official Form 10 would implement proposed Rule 3002.1(c) and provide a uniform format for the home-mortgage creditor to list post-petition fees, expenses, and charges incurred during the course of a chapter 13 case.

Judge Swain noted that, following publication, the proposed form changes would become effective on December 1, 2011.

The committee without objection by voice vote approved the proposed amendments to Form 10 and the new Attachment A and Supplements 1 and 2 to the form for publication.

OFFICIAL FORM 25A

Judge Swain reported that Official Form 25A is a model plan of reorganization for a small business. It would be amended to reflect the recent increase of the appeal period in bankruptcy from 10 to 14 days in the 2009 time-computation rule amendments. The effective date of the plan would become the first business day following 14 days after entry of the court's order of confirmation.

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

Informational Items

Professor Gibson reported that the advisory committee was continuing to make progress on its two major ongoing projects – revising the bankruptcy appellate rules and modernizing the bankruptcy forms. She noted that the committee would begin considering a draft of a completely revised Part VIII of the Bankruptcy Rules at its fall 2010 meeting. In addition, it would try to hold its spring 2011 meeting in conjunction with the meeting of the Advisory Committee on Appellate Rules in order to have the two committees consider the proposed revisions together.

Judge Swain reported that the forms modernization project, under the leadership of Judge Elizabeth L. Perris, had made significant progress in reformatting and rephrasing the many forms filed at the outset of a individual bankruptcy case. She noted that the project had obtained invaluable support from Carolyn Bagin, a nationally renowned forms-design expert, and it was continuing to reach out to users of the forms to solicit their feedback through surveys and questionnaires. In addition, the project was working closely with the groups designing the next generation replacement for CM/ECF to make sure that the new system includes the ability to extract and store data from the forms and to retrieve the data for user-specified reports.

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 attachment of May 17, 2010 (Agenda Item 5). The advisory committee had no action items to present.

Informational Items

FED. R. CIV. P. 45

Judge Kravitz reported that the advisory committee, aided by a subcommittee chaired by Judge David G. Campbell, was exploring potential improvements to Rule 45 (subpoenas). Professor Marcus, he noted, was serving as the subcommittee's reporter.

Judge Kravitz said that substantial progress had been made in addressing some of the problems most often cited with the current rule. The subcommittee's efforts have included: (1) reworking the division of responsibility between the court where the main action is pending and the ancillary discovery court; (2) enhancing notice to all parties before serving document subpoenas; and (3) simplifying the overly complex rule. The subcommittee, he noted, had drafted three models to illustrate different approaches to simplification, including one that would separate discovery subpoenas from trial subpoenas.

Judge Kravitz reported that the committee would convene a Rule 45 mini-conference with members of the bench and bar in Dallas in October 2010. The

conference, he said, should be helpful in informing the advisory committee on what approach to take at its fall 2010 and spring 2011 meetings. Rule amendments might be presented to the Standing Committee in June 2011.

PLEADING

Judge Kravitz reported that the advisory committee was continuing to monitor dismissal-motion statistics and case-law developments in light of the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007) and *Ashcroft v. Iqbal,* 129 S. Ct. 1937 (2009). The committee, he said, was focusing in particular on whether the decisions have had an impact on motions to dismiss and rates of dismissal.

Dr. Cecil explained that the Federal Judicial Center was collecting and coding court orders disposing of Rule 12(b)(6) motions in about 20 district courts and comparing outcomes in 2006 with those in 2010 to see whether there are any differences. In addition, the Center was examining court records to determine whether judges in granting dismissal motions allow leave to amend and whether the plaintiffs in fact file amended complaints.

Judge Kravitz noted that a division of opinion had been voiced at the May 2010 Duke conference on the practical impact of *Twombly* and *Iqbal*. One prominent judge, for example, urged the participants to focus on the actual holdings in the two cases, and not on the language of the opinions. Other judges concurred and argued that the two cases had not changed the law materially and were being implemented very sensibly by the lower courts. On the other hand, two prominent professors argued that the two Supreme Court decisions would cause great harm, were cause for alarm, and would effectively diminish access to justice.

Judge Kravitz emphasized that stability matters. He suggested that the advisory committee's intense research efforts demonstrated that the law of pleading in the federal courts was clearly settling down, and the evolutionary process of common-law development was working well. For that reason, he said, it would make no sense to enact legislation or change pleading standards at this point. He noted that the advisory committee's reporters were considering different ways to respond to the cases by rule, but they were awaiting the outcome of further research efforts by the Federal Judicial Center.

He pointed out that the advisory committee was looking carefully at the frequently cited problem of "information asymmetry." To that end, it was considering permitting some pre-dismissal, focused discovery to elicit information needed specifically for pleading. Another approach, he said, might be to amend FED. R. CIV. P. 9 (pleading special matters) to enlarge the types of claims that require more specific pleading. In addition, there may be a need for more detailed pleading requirements regarding affirmative defenses.

In short, he said, the advisory committee was looking at several different approaches and focusing on special, limited discovery for pleading purposes. He added that true "notice pleading" is actually quite rare in the federal courts. To the contrary, he said, when plaintiffs know the facts, they usually set them forth in the pleadings. The problem seems to be that some plaintiffs at the time of filing simply lack access to certain information that they need in order to plead adequately.

Judge Kravitz added that pleading issues should occupy a good deal of the advisory committee's time at its November 2010 meeting. The committee, he said, should have a report available in January 2011, but it may not have concrete proposals ready until later.

MAY 2010 CIVIL LITIGATION REVIEW CONFERENCE

Judge Kravitz thanked Dean Levi for making the facilities at Duke Law School available for the May 2010 conference. He said that the event had been a resounding success, thanks largely to the efforts of the conference organizer, Judge John G. Koeltl. He pointed out that Judge Koeltl had done an extraordinary job in creating an excellent substantive agenda, assembling an impressive array of speakers, and soliciting a wealth of valuable articles and empirical data.

Several members who had attended the conference agreed that the program had been outstanding. They described the panel discussions as extremely substantive and valuable.

Specific Suggestions Made at the Conference

Judge Kravitz noted that a few recommendations had been made at the conference for major rule changes, such as: (1) moving away from "trans-substantivity" towards different rules for different kinds of cases; (2) abandoning notice pleading; (3) limiting discovery; and (4) recasting the basic goals enunciated in Rule 1. Nevertheless, he emphasized, most of the speakers and participants at the conference did not advocate radical changes in the structure of the rules. Essentially, the consensus at the conference was that the civil process should continue to operate within the broad 1938 outline.

Judge Kravitz noted that the topics discussed at the conference were largely matters that the advisory committee has been considering in one form or another for years. He added that much of the discussion and many of the papers presented dealt with discovery issues, and he proceeded to describe some of the suggestions.

The initial disclosures required by Rule 26(a), he said, came under attack from two sides. Some speakers recommended eliminating them entirely, while others urged that they be expanded and revitalized.

Some support was voiced for imposing presumptive limits on discovery. In particular, it was suggested that the current presumptive ceiling on the number of depositions and the length of depositions might be reduced.

Judge Kravitz reported that strong support was voiced by many participants for increased judicial involvement at the pretrial stage of civil cases. Lawyers at the conference all cited a need for more actual face-to-face time with judges in the discovery process. Judges, they said, need to be personally available to provide direction to the litigants and resolve disputes quickly. Nevertheless, he suggested, it would be difficult to mandate appropriate judicial attention through a national rule change. Other approaches, such as judicial education, may be more effective in achieving this objective.

Support was offered for developing form interrogatories and form document requests specifically tailored to different categories of cases, such as employment discrimination or securities cases. The models could be drafted collectively by lawyers for all sides and established as the discovery norm for various kinds of cases.

A concept voiced repeatedly was the need for greater cooperation among lawyers. Judge Kravitz pointed out that data from the recent Federal Judicial Center's discovery study had demonstrated a direct correlation between lawyer cooperation and reduced discovery requests and costs. He noted that a panelist at the conference emphasized that the discovery process is considerably more coordinated and disciplined in criminal cases (where the defendant's freedom is at stake) than in civil cases (where money is normally the issue). He observed that lawyers in criminal cases focus on the eventual trial and outcome, while civil lawyers focus mostly on the discovery phase itself. There are, moreover, more guidelines and limits in criminal discovery, due to the specific language of FED. R. CRIM. P. 16 and the Jencks Act. In addition, there are no economic incentives for the attorneys to prolong the discovery phase in criminal cases.

Judge Kravitz reported that many participants who represent defendants in civil cases complained about discovery costs. Among other things, they stated that the costs of reviewing discovery documents before turning them over to the other side continue to be huge, despite the recent enactment of FED. R. EVID. 502 (limitations on waiver of attorney-client privilege and work product). He observed that lawyers are naturally reluctant to let their opponents see their clients' documents, even if the rule now gives them adequate legal protection.

Professor Cooper noted that plaintiffs' lawyers, on the other hand, argued that the emphasis that defendants place on their discovery burdens and costs is misplaced. They suggested, to the contrary, that the greatest problem with discovery is stonewalling on the part of defendants.

Judge Kravitz noted that support was also voiced at the conference for adopting simplified procedures, improving the Rule 16 and Rule 26 conferences, fashioning sensible discovery plans, and providing for greater cost shifting.

He reported that electronic discovery was a major topic at the conference. The lawyers, he said, were in agreement on two points. First, they recommended amending the civil rules to specify with greater precision what materials must be preserved at the outset of a case, and even before a federal case is filed. Second, they urged revision of the current sanctions regime in Rule 37(e) and argued that the rule's safe harbor is too shallow and ineffective.

Judge Kravitz said that current law provides clear triggers for the obligation to preserve potential litigation materials, but they are not specified in the federal rules. Preservation obligations, moreover, vary among the states and among the federal circuits. He said that the advisory committee was examining potential rule amendments to address both the preservation and sanctions problems. But, he cautioned, it will be very difficult to accomplish the changes that the bar clearly wants through the national rules.

He pointed out that the Rules Enabling Act limits the rules committees to matters of procedure, not substance. That statutory limitation is a serious impediment to regulating pre-lawsuit preservation obligations. Yet, once a case is actually filed in a federal court, the rules may address preservation and sanctions issues. Thus, despite the difficulty of drafting a rule to accomplish what the participants recommend, the advisory committee will move forward on the matter.

Professor Cooper agreed that the bar was promoting the laudatory goal of having clear and precise rules on what they must preserve and how they must preserve it. But the task of crafting a national preservation rule will involve complex drafting problems, as well as jurisdictional problems, and it just may not be possible.

Professor Coquillette added that state attorney-conduct rules addressing spoliation have been incorporated in a number of federal district-court rules. He explained that the Standing Committee had considered adopting national rules on attorney conduct a few years ago, but it eventually backed away from doing so because it involved many competing interests and difficult state-law issues.

Judge Kravitz reported that an excellent presentation was made at the conference on a promising pilot project in the Northern District of Illinois that focuses on electronic discovery. It emphasizes educating the bar about electronic discovery, promoting cooperation among the lawyers, and having the parties name information liaisons for discovery.

Judge Kravitz observed that, overall, the bar sees the 2006 electronic-discovery rule amendments as a success. They have worked well despite continuing concerns about

preservation and sanctions. He suggested that the rules may well need further refining, but they were, in retrospect, both timely and effective.

Judge Kravitz referred to a panel discussion at the conference that focused on trials and settlement. He noted that substantial angst was expressed by some participants over diminution in the number of trials generally. Nevertheless, no changes to that phenomenon appear in sight. One professor, he noted, argued that since all civil cases are eventually bound for settlement, the rules should focus on settlement, rather than trial. On the other hand, an attorney panelist countered that maintaining the current focus of the rules on the trial facilitates good results before trial.

Perceptions of the Current System

Judge Kravitz reported that several written proposals had been submitted to the conference by bar groups, and a good deal of survey data had been gathered. One clear conclusion to be drawn from the conference, he said, is that a large gap exists between the perceptions of plaintiffs' lawyers and those of defendants' lawyers. Those differences, he said, will be difficult to reconcile. Nevertheless, the advisory committee may be able to take some meaningful steps toward achieving workable consensus.

The general consensus, he said, is that the civil rules are generally working well. At the same time, though, frustration experienced by certain litigants leads them to believe that the system is not in fact working. The two competing perceptions, he said, are reconcilable. The reality appears to be that the process works well in most cases, but not in certain kinds of cases, particularly complex cases with high stakes. The various empirical studies, he said, show that the stakes in cases clearly matter, and complex cases with more money at stake tend to have more discovery problems and greater discovery costs. The goal in each federal civil case, he suggested, should be to agree on a sensible and proportionate discovery plan that relates to the stakes of the litigation.

Dr. Lee described and compared the various studies presented at the conference. He said that two different kinds of surveys had been conducted – those that asked lawyers for their general perceptions and those that were empirically based on actual experiences in specific cases.

The two approaches, he said, produce different results. For example, the responses from lawyers in a perception study showed that they believe that about 70% of litigation costs are associated with discovery. The empirical studies, on the other hand, demonstrate that discovery costs were actually much lower, ranging between 20% and 40%. By way of further example, a recent perception-study showed that 80% or 90% of lawyers agree that litigation is too expensive. Yet the Federal Judicial Center studies demonstrate empirically that costs in the average federal case were only about $15,000 to $20,000.

The difference between the two results, he suggested, is due to cognitive biases. Respondents focus naturally on extreme cases and cases that stand out in their memory, and not on all their other cases. Perceptions, understandably, are not always accurate.

Judge Kravitz added that the empirical studies show that the vast majority of civil cases in the federal courts actually have little discovery. Nevertheless, discovery in complex civil cases can be enormous and extremely costly. Lawyers at the conference, he said, emphasized that it is the complex cases that judges should spend their time on.

Dr. Lee added that the empirical studies show that discovery costs clearly increase in complex cases. The stakes in litigation, he said, are the best predictor of costs, and they alone explain about 40-50% of the variations in costs shown in the studies. The economics of law practice, he said, also affects costs. Large firms, for example, have higher costs, and hourly billing increases costs for plaintiffs. He concluded that most of the factors shown in the studies to affect costs – such as complexity, litigation stakes, and law practice economics – are not driven by the rules themselves, but by other causes. Therefore, changing the rules alone may only have a marginal impact on the problems.

Future Committee Action

Judge Kravitz suggested that a handful of common themes had emerged at the conference. (1) There was universal agreement that cooperation among the attorneys in a case has a beneficial impact on limiting cost and delay. (2) There was universal agreement that active judicial involvement in a case, especially a case that has potential discovery problems, is essential. (3) There was little enthusiasm for retaining the Rule 26(a) mandatory disclosures in their current format. (4) Discovery costs in some cases are very high, and they may drive parties to settlement in some cases. (5) Certain types of cases are more prone to high discovery costs than others.

He noted that the advisory committee would address each of these issues, and it may also form a subcommittee to explore how judicial education and pilot projects might contribute to improvements, especially if the pilots are carefully crafted and channeled through the Federal Judicial Center to assure that they generate useful data to inform future policy choices. The bottom line, he said, is that the advisory committee will be digesting and working on these issues for a long time.

A member suggested that the conference discussions on electronic discovery were particularly meaningful and asked the advisory committee to place its greatest priority on addressing the electronic discovery issues – preservation and sanctions. He said that most of the other problems referred to at the conference can be resolved by lawyers working cooperatively, but rules changes will be needed to address the electronic discovery problems.

Other members agreed, but they questioned whether changes in the electronic discovery rules to address preservation obligations can be promulgated under the Rules Enabling Act. Judge Kravitz pointed out that the advisory committee was very sensitive to the limits on its authority. He said that the committee might be able to rework the sanction provisions, make them clearer, and specify the applicable conduct standards more precisely. On the other hand, preservation obligations are normally addressed in state laws and ethics rules. There are also federal laws on the subject, such as Sarbanes-Oxley. He said that the advisory committee would explore preservation issues closely, and it might be able to make the preservation triggers clearer. Ultimately, though, legislation may be required, as with the 2008 enactment of FED. R. EVID. 502 (attorney-client privilege and work product; limitations on waiver).

A member pointed out that general counsels from several corporations participated actively in the conference. He noted that they did not generally criticize the way that the rules are working and recommended only minor tweaks in the rules. On the other hand, they argued unanimously and strongly for greater judicial involvement in the discovery process, especially early in cases. They tended to be critical of their own lawyers for contributing to increased costs and saw the courts as the best way to drive down costs. He acknowledged that mandating effective early judicial involvement is hard to accomplish formally by a rule, but it should be underscored as an essential ingredient of the civil process.

A judge added that many suggestions raised at the conference are not easily addressed in rules, but might be promoted through best-practices initiatives, handbooks, websites, workshops, and other educational efforts. She added that controlled pilot projects could also be helpful to ascertain what practices work well and produce positive results.

A member noted that he had heard a good deal of criticism of judges at the conference, especially about their lack of sufficient focus on resolving discovery matters. He noted that magistrate judges handle discovery extremely well and can provide the intense focus on discovery that is needed, especially with regard to electronic discovery. The system, though, may not be working effectively in some districts because the magistrate judges have been assigned by the courts to other types of duties and do not focus on discovery.

A participant cautioned, though, that for every theme raised at the conference, there was a counter theme. Several lawyers suggested, for example, that there should be a single judge in a case. Yet every court has its own culture and different available resources. Essentially, each believes that its own way of doing things is the best approach.

Judge Rosenthal pointed out that a report of the conference and an executive summary would be prepared. She added that the advisory committee and the Standing

Committee were resolved to take full advantage of what had transpired at the conference, and the proceedings will be the subject of considerable committee work in the future.

RULE 26(C) PROTECTIVE ORDERS

Judge Kravitz reported that the advisory committee had brought Rule 26(c) (protective orders) back to its agenda for further study in light of continuing legislative efforts to impose restrictions on the use of protective orders. He noted that the chair and reporter had worked on a possible revision of Rule 26(c), working from Ms. Kuperman's thorough analysis of the case law on protective orders in every circuit.

He noted that draft amendments to Rule 26(c) had been circulated at the advisory committee's spring 2010 meeting. They would incorporate into the rule a number of well-established court practices not currently explicit in the rule itself and add a provision on protecting personal privacy.

The committee, he said, was of the view that the federal courts are doing well in applying the protective-order rule in its current form. Nevertheless, it decided to keep the proposed revisions on its agenda for additional consideration. He noted, too, that none of the participants at the May 2010 conference had cited protective orders as a matter of concern to them. That fact, he suggested, was an implicit indication that the current rule is working well.

OTHER MATTERS

Judge Kravitz referred briefly to a number of other matters pending on the advisory committee's agenda, including the future of the illustrative forms issued under Rule 84 and the committee's interplay with the appellate rules committee on a number of issues that intersect both sets of rules.

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 19, 2010 (Agenda Item 6).

Amendments for Final Approval

TECHNOLOGY AMENDMENTS

Judge Tallman reported that the package of proposed technology changes would make it easier and more efficient for law enforcement officers to obtain process, typically early in a criminal case. It includes the following rules:

FED. R. CRIM. P. 1	Scope and definitions
FED. R. CRIM. P. 3	Complaint
FED. R. CRIM. P. 4	Arrest warrant or summons
FED. R. CRIM. P. 4.1 (new)	Issuing process by telephone or other reliable electronic means
FED. R. CRIM. P. 6	Grand jury
FED. R. CRIM. P. 9	Arrest warrant or summons on an indictment or information
FED. R. CRIM. P. 40	Arrest for failing to appear or violating release conditions in another district
FED. R. CRIM. P. 41	Search and seizure
FED. R. CRIM. P. 43	Defendant's presence
FED. R. CRIM. P. 49	Serving and filing papers

Judge Tallman commended the leadership of Judge Anthony Battaglia of the Southern District of California, who chaired the subcommittee that produced the technology package. The project, he said, was a major effort that had required substantial consultation, analysis, and drafting. He also thanked Professors Beale and King, the committee's hard-working reporters, for their contributions to the project.

He noted that the proposed amendments are intended to authorize all forms of reliable technology for communicating information for a judge to consider in reviewing a complaint and affidavits or deciding whether to issue a warrant or summons. Among other things, the term "telephone" would be redefined to include any form of technology for transmitting live electronic voice communications, including cell phones and new technologies that cannot yet be foreseen.

The amendments retain and emphasize the central constitutional safeguard that issuance of process must be made at the direction of a neutral and detached magistrate.

They are designed to reduce the number of occasions when law enforcement officers must act without obtaining prior judicial authorization. Since a magistrate judge will normally be available to handle emergencies electronically, the amendments should eliminate most situations where an officer cannot appear before a federal judge for prompt process.

The heart of the technology package, he said, is new Rule 4.1. It prescribes in one place how information is presented electronically to a judge. It requires a live conversation between the applicant and the judge for the purpose of swearing the officer, who serves as the affiant. A record must be made of that affirmation process.

Rule 4.1 also reinforces and expands the concept of a "duplicate original warrant" now found in Rule 41 and extends it to other kinds of documents. In the normal course, he said, the signed warrant will be transmitted back to the applicant, but there will also be occasions in which the judge will authorize the applicant to make changes on the spot to a duplicate original.

He noted that new Rule 4.1 preserves the procedures of current Rule 41 and adds improvements. Like Rule 41, Rule 4.1 permits only a federal judge, not a state judge, to handle electronic proceedings.

Judge Tallman pointed out that the proposed amendments carry the strong endorsement of the Federal Magistrate Judges Association. Helpful comments were also received from individual magistrate judges, federal defenders, and the California state bar. The advisory committee, he said, had amended the published rules in light of those comments.

The advisory committee, he explained, had withdrawn a proposed amendment to FED. R. CRIM. P. 32.1 (revoking or modifying probation or supervised release) that would have allowed video teleconferencing to be used in revocation proceedings. He noted that there is strong societal value in having defendants appear face-to-face before a judge, and many observers fear that embracing technology may diminish the use of courtrooms and undercut the dignity of the court. Revocation proceedings, he said, are in the nature of a sentencing, and they clearly may affect the determination of innocence or guilt. For that reason, the advisory committee concluded that while video teleconferencing is appropriate for certain criminal proceedings, it should not be used for revocation proceedings.

FED. R. CRIM. P. 1

Judge Tallman reported that the proposed amendment to Rule 1 (scope and definition) would expand the term "telephone," now found in Rule 41 to allow new kinds of technology.

A member asked whether the term "electronic" is appropriate since other kinds of non-electronic communications may become common in the future. Judge Rosenthal

explained that the same issue had arisen with the 2006 "electronic discovery" amendments to the Federal Rules of Civil Procedure. She said that after considerable consultation with many experts, the civil advisory committee chose to adopt the term "electronically stored information." She added that if new, non-electronic means of communication are developed, it may well be necessary to amend the rules in the future to include those alternatives, but at this point "electronic" appears to be the best term to use in the rule.

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

FED. R. CRIM. P. 3

Judge Tallman explained that the proposed amendment to Rule 3 (complaint) refers to new Rule 4.1 and authorizes using the protocol of that rule in submitting complaints and supporting materials to a judge by telephone or other reliable electronic means.

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

FED. R. CRIM. P. 4

Judge Tallman reported that the proposed amendments to Rule 4 (arrest warrant or summons on a complaint) also refers to new Rule 4.1 and authorizes using that rule to issue an arrest warrant or summons.

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

FED. R. CRIM. P. 4.1

Judge Tallman pointed out that proposed new rule 4.1 (complaint, warrant, or summons by telephone or other reliable electronic means) is the heart of the technology amendments. He emphasized that a judge's use of the rule is purely discretionary. A judge does not have to permit the use of technology and may insist that paper process be issued in the traditional manner through written documents and personal appearances.

He noted that if the protocol of Rule 4.1 is used, the supporting documents will normally be submitted electronically to the judge in advance. A phone call will then be made, the applicant law enforcement officer will be placed under oath, and a record will be made of the conversation. If the applicant does no more than attest to the contents of the written affidavit submitted electronically, the record will be limited to the officer's swearing to the accuracy of the documents before the judge. The judge will normally

acknowledge the jurat on the face of the warrant. If, however, the judge takes additional testimony or exhibits, the testimony must be recorded verbatim, transcribed, and filed.

The judge may authorize the applicant to prepare a duplicate original of the complaint, warrant, or summons. The duplicate will not be needed, though, if the judge transmits the process back to the applicant.

The judge may modify the complaint, warrant, or summons. If modifications are required, the judge must either transmit the modified version of the document back to the applicant or file the modified original document and direct the applicant to modify the duplicate original document. In addition, Rule 4.1(a) adopts the language in existing Rule 41(d) specifying that, absent a finding of bad faith, evidence obtained from a warrant issued under the rule is not subject to suppression on the grounds that issuing the warrant under the protocol of the rule was unreasonable under the circumstances.

A member noted that the proposed rule expands the requirement in current Rule 41(d) that testimony be recorded and filed. Yet, he said, there is no requirement in either the current or revised rule that the warrant and affidavits themselves be filed. He pointed out that record-keeping processes among the courts are inconsistent, and the advisory committee should explore how documents are being filed and preserved in the courts, especially in the current electronic environment.

Judge Tallman agreed and noted that the advisory committee was aware of the inconsistencies. Some districts, for example, assign a magistrate-judge docket number to warrant applications and file the written documents in a sealed file without converting them to electronic form. Other courts digitize the documents and transfer them to the district court's criminal case file when an indictment is returned and a criminal case number assigned. He said that preserving a record of warrant proceedings is very important to defense lawyers, and the advisory committee will look further into the matter.

Mr. Rabiej reported that one of the working groups designing the next generation CM/ECF system is addressing how best to handle criminal process and other court documents that generally do not appear in the official public case file. Dr. Reagan explained that as part of the Federal Judicial Center's recent study of sealed cases, he had looked at all cases filed in the federal courts in 2006. Typically, he said, a warrant application is assigned a magistrate-judge electronic docket number. Although the records may still be retained in paper form in the magistrate judge's chambers in one or more districts, most courts incorporate them into the files of the clerk's office.

A member suggested that Rule 4.1 may be mandating more requirements than necessary. Judge Tallman pointed out, though, that the requirements had largely been carried over from the current Rule 41. He said that the rule needs to be broadly drafted because there are so many different situations that may arise in the federal courts. An officer, he said, may be on the telephone speaking with the magistrate judge, writing out

the application, and taking down what the judge is saying. More typically, though, an officer will call the U.S. attorney's office and have a prosecutor draft the application.

A member said that the rule assumes that the applicant will wind up with an official piece of paper in hand. Yet in the current age of rapid technological development, perhaps an electronic version of the document should suffice. By way of example, electronic boarding passes are now accepted at airports, and police officers use laptop computers and hand-held devices in their patrol cars.

Judge Tallman explained, though, that Rule 41(f) requires the officer to leave a copy of a search warrant and a receipt for the property taken with the person whose property is being searched. Professor Beale added that Rule 4.1 may need to be changed in the future to take account of electronic substitutes for paper documents. Nevertheless, the rule as currently proposed will help a great deal now because it will make electronic process more widely available and reduce the number of situations where officers act without prior judicial authorization. Ms. Monaco added that the Department of Justice believes that the new rule will be of great help to its personnel, and it plans to provide the U.S. attorneys with guidance on how to implement it.

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

FED. R. CRIM. P. 6

Judge Tallman reported that the proposed amendment to Rule 6 (grand jury) would allow a judge to take a grand jury return by video teleconference. He noted that there are places in the federal system where the nearest judge is located a substantial distance from the courthouse in which the grand jury sits. The rule states explicitly that it is designed to avoid unnecessary cost and delay. The rule would also preserve the judge's time and safety.

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

FED. R. CRIM. P. 9

Judge Tallman reported that the proposed amendment would authorize the protocol of Rule 4.1 in considering an arrest warrant or summons on an indictment or information.

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

FED. R. CRIM. P. 40

Judge Tallman reported that the proposed amendment to Rule 40 (arrest for failing to appear or violating conditions of release in another district) would allow using video teleconferencing for an initial appearance, with the defendant's consent. It will be helpful to some defendants, as, for example, when a defendant faces a long transfer to another district and hopes that the judge might quash the warrant or order release if he or she is able to present a good reason for not having appeared in the other district.

Professor Beale added that Rule 40 currently states that a magistrate judge should proceed with an initial appearance under Rule 5(c)(3), as applicable. The advisory committee, she said, had some concern whether current Rule 5(f), allowing video teleconferencing of initial appearances on consent, would clearly be applicable to Rule 40 situations. So, as a matter of caution, it recommended adding a specific provision in Rule 40 to make the matter clear.

A member cautioned that the committee should not encourage a reduction in the use of courtrooms, and he asked where the participants will be located physically for the Rule 40 video teleconferencing. Judge Tallman suggested that the judge and the defendant normally will both be in a courtroom for the proceedings.

He added that the potential benefits accruing to a defendant who consents to video conferencing under Rule 40 outweigh the general policy concerns about diminishing the use of courtrooms. Professor Beale pointed out that Rule 5 already authorizes video teleconferencing in all initial appearances if the defendant consents. Moreover, the role of lawyers and the use of court interpreters will not change. The proposed amendment merely extends the current provision to the Rule 40 subset of initial appearances.

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

FED. R. CRIM. P. 41

Judge Tallman said that the proposed amendments to Rule 41 (search and seizure) are largely conforming in nature. Most of the current text in Rule 41 governing the protocol for using reliable electronic means for process would be moved to the new Rule 4.1. In addition, revised Rule 41(f) would explicitly authorize the return of search warrants and warrants for tracking devices to be made by reliable electronic means.

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

FED. R. CRIM. P. 43

Judge Tallman reported that, after considering the public comments, the advisory committee withdrew a proposed amendment to Rule 32.1 (revoking or modifying

probation or supervised release) and a proposed conforming cross-reference to Rule 32.1 in Rule 43(a) (defendant's presence). The withdrawn provisions would have authorized a defendant, on consent, to participate in a revocation proceeding by video teleconference.

The remaining Rule 43 amendment would authorize video teleconferencing in misdemeanor or petty offense proceedings with the defendant's written consent. He noted that Rule 43 currently permits arraignment, plea, trial, and sentencing in misdemeanor or petty offense cases in the absence of the defendant. The procedure, he noted, is used mainly in minor offenses occurring on government reservations such as national parks because requiring a defendant to return to the park for court proceedings may impose personal hardship. He emphasized, though, that the presiding judge may always require the defendant's presence and does not have to permit either video teleconferencing or trial in absentia.

A member agreed that there are practical problems with misdemeanors in national parks, but lamented the trend away from courtroom proceedings. The dignity of the courtroom and the courthouse, he said, are very important and have positive societal value. The physical courtroom, moreover, affects personal conduct. In essence, steps that reduce the need for courtroom proceedings should only be taken with the utmost caution and concern.

Judge Tallman agreed and explained that the advisory committee had withdrawn the proposed amendment to Rule 32.1 for just that reason. Several members concurred that substitutes to a physical courtroom should be the exception and never become routine. One member noted, though, that courts are being driven to using video teleconferencing by the convenience demands of others, including law enforcement personnel, lawyers, and parties. A member added that the only practical alternative to video teleconferencing for a defendant in a misdemeanor case now is for the defendant not to show up and to pay a fine.

Members suggested that language be added to the committee note to emphasize that the use of video teleconferencing for misdemeanor or petty offense proceedings should be the exception, not the rule, and that judges should think carefully before allowing video trials or sentencing. They suggested that the advisory committee draft appropriate language to that effect for the committee note. Judge Tallman pointed out that the committee note to the current Rule 5 contains appropriate language that could be adapted for the Rule 43 note. After a break, the additional language was presented to the committee and approved.

The committee without objection by voice vote approved the proposed amendment, including the additional note language, for approval by the Judicial Conference.

FED. R. CRIM. P. 49

Judge Tallman reported that the proposed amendment to Rule 49 (serving and filing papers) would bring the criminal rules into conformity with the civil rules on electronic filing. Based on FED. R. CIV. P. 5(d)(3), it would authorize the courts by local rule to allow papers to be filed, signed, or verified by reliable electronic means, consistent with any technical standards of the Judicial Conference.

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

Technical Amendments for Final Approval without Publication

FED. R. CRIM. P. 32

Judge Tallman reported that the proposed amendments to Rule 32(d)(2)(F) and (G) (sentencing and judgment) had been recommended by the committee's style consultant. They would remedy two technical drafting problems created by the recent package of criminal forfeiture rules.

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

FED. R. CRIM. P. 41

Judge Tallman reported that the proposed amendments to Rule 41 (search and seizure) were also technical and conforming in nature. The rule currently gives a law enforcement officer 10 "calendar" days after use of a tracking device has ended to return the warrant to the judge and serve a copy on the person tracked. The proposed amendments would delete the unnecessary word "calendar" from the rule because all days are now counted the same under the 2009 time computation amendments' "days are days" approach.

Judge Rosenthal suggested that when the rule is sent to the Judicial Conference for approval, the committee's communication should explain why as a matter of policy it chose the shorter period of 10 days, rather than 14 days, since the 10-day periods in most other rules had been changed to 14 days as part of the time computation project.

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

Amendments for Publication

FED. R. CRIM. P. 37

Judge Tallman reported that the proposed new Rule 37 (indicative rulings) would authorize indicative rulings in criminal cases, in conformance with the new civil and appellate rules that formalize a procedure for such rulings – FED. R. CIV. P. 62.1 and FED. R. APP. P. 12.1. Professor Beale pointed out that the criminal advisory committee had benefitted greatly from the work of the civil and appellate committees in this matter. She added that the advisory committee would also delete the first sentence of the second paragraph of the proposed committee note.

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

FED. R. CRIM. P. 5 and 58

Judge Tallman reported that the proposed amendments to Rule 5 (initial appearance) and Rule 58 (petty offenses and other misdemeanors) had been suggested by the Department of Justice and would implement the government's notice obligations under applicable statutes and treaties.

He noted that the proposed amendment to Rule 5(c)(4) would require that the initial appearance of an extradited foreign defendant take place in the district where the defendant is charged, rather than in the district where the defendant first arrives in the United States. The intent of the amendment is to eliminate logistical delays. A member voiced concern, though, over potential delay of the initial appearance if the defendant no longer receives an initial appearance as soon as he or she arrives in the United States.

A member suggested adding language to the rule requiring that the initial appearance be held promptly. Professor Beale and Judge Tallman pointed out that Rule 5(a)(1)(B) already states explicitly that the initial appearance must be held "without unnecessary delay." The member suggested that it would be helpful to include a reference in the committee note to the language of Rule 5(a)(1)(B). After a break, Judge Tallman presented note language to accomplish that result.

Judge Tallman explained that the other proposed amendments to Rule 5 and 58 would carry out treaty obligations of the United States to notify a consular officer from the defendant's country of nationality that the defendant has been arrested, if the defendant requests. A member recommended removing the first sentence of the committee note for each rule, which refers to the government's concerns. Professor Beale agreed that the sentences could be removed, but she noted that the rule and note had been carefully negotiated with the Department of Justice. Judge Tallman suggested rephrasing the first sentence of each note to state simply that the proposed rule facilitates compliance with treaty obligations, without specifically mentioning the government's motivation.

The committee without objection by voice vote approved the proposed amendments, including the additional note language, for publication.

Informational Items

FED. R. CRIM. P. 16

Judge Tallman noted that at the January 2010 Standing Committee meeting, he had presented a report on the advisory committee's study of proposals to broaden FED. R. CRIM. P. 16 (discovery and inspection) and incorporate the government's obligation to provide exculpatory evidence to the defendant under *Brady v. Maryland,* 373 U.S. 83 (1963) and later cases. He noted that the advisory committee had convened a productive meeting on the subject in February with judges, prosecutors, law enforcement authorities, defense attorneys, and law professors. The participants, he said, had been very candid and non-confrontational, and the meeting provided the committee with important input on the advisability of broadening discovery in criminal cases.

He reported that the Federal Judicial Center had just sent a survey to judges, prosecutors, and defense lawyers on the matter, and the responses have been prompt and massive, with comments received already from 260 judges and nearly 2,000 lawyers. He added that the records of the Department of Justice's Office of Professional Responsibility showed that over the last nine years an average of only two complaints a year had been sustained against prosecutors for misconduct. But, he added, lawyers may be reluctant to file formal complaints with the Department. The current survey, he noted, was intended in part to identify any types of situations that have not been reported.

FED. R. CRIM. P. 12

Judge Tallman noted that in June 2009 the Standing Committee recommitted to the advisory committee a proposed amendment to Rule 12 (pleadings and pretrial motions) that would have required a defendant to raise before trial any claims that an indictment fails to state an offense. The advisory committee was also asked to explore the advisability of using the term "forfeiture," rather than "waiver," in the proposed rule.

He reported that the pertinent Rule 12 issues are complex. Therefore, the committee was considering a more fundamental, broader revision of the rule that might clarify which motions and claims must be raised before trial, distinguish forfeited claims from waived claims, and clarify the relationship between these claims and FED. R. CRIM. P.52 (harmless and plain error).

FED. R. CRIM. P. 11

Judge Tallman reported that the recent Supreme Court decision in *Padilla v. Kentucky,* 130 S. Ct. 1473 (March 31, 2010) had demonstrated the importance of informing an alien defendant of the immigration consequences of a guilty plea. As a result, he said, the advisory committee had appointed a subcommittee to examine whether

immigration and citizenship consequences should be added to the list of matters that a judge must include in the courtroom colloquy with a defendant in taking a guilty plea under FED. R. CRIM. P. 11 (pleas).

CRIME VICTIMS' RIGHTS

Judge Tallman reported that the advisory committee was continuing to monitor implementation of the Crime Victims' Rights Act. Among other things, he said, the committee had discovered an instance of an unintended barrier to court access by crime victims. An attorney representing victims had been unable to file a motion asserting the victim's rights because the district court's electronic filing system only authorized motions to be filed by parties in the case. On behalf of the advisory committee, he said, he had brought the matter to the attention of the chair of the Judicial Conference committee having jurisdiction over development of the CM/ECF electronic system.

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 10, 2010 (Agenda Item 7).

Amendments for Final Approval

RESTYLED EVIDENCE RULES 101-1103

Judge Hinkle reported that the restyling of the Federal Rules of Evidence was the only action matter on the agenda. He noted that the project had been a joint undertaking on the part of the advisory committee and the Standing Committee's Style Subcommittee, comprised of Judge Teilborg (chair), Judge Huff, and Mr. Maledon.

He noted that the project to restyle the federal rules had originated in the early 1990s under the sponsorship of the Standing Committee chair at the time, Judge Robert Keeton, who set out to bring greater consistency and readability to the rules. Judge Keeton had appointed Professor Charles Alan Wright as the first chair of the Standing Committee's new Style Subcommittee and Bryan Garner as the committee's first style consultant. Judge Hinkle pointed out that Mr. Garner had authored the pamphlet setting out the style conventions followed by the subcommittee – *Guidelines for Drafting and Editing Court Rules.*

Judge Hinkle explained that the restyled appellate rules took effect in 1998, the restyled criminal rules in 2002, and the restyled civil rules in 2007. With each restyling effort, he said, there had been doubters who said that restyling was not worth the effort and that the potential disruption would outweigh the benefits. Each time, he said, the

doubters had been proven wrong. He pointed out, for example, that a professor who had opposed restyling changes later wrote an article proclaiming that they were indeed an improvement.

He added that whatever disruption there may be initially will evaporate rather quickly because the committee worked intensively to avoid any changes in substance. He pointed out, though, that there are indeed differences between the evidence rules and the other sets of federal rules because the evidence rules are used in courtrooms every day, and lawyers need to know them intimately and instinctively.

Judge Hinkle reported that Professor Kimble had assumed the duties of style consultant near the end of the criminal rules restyling project and had been an indispensable part of both the civil and evidence restyling efforts. He pointed out that the restyled civil rules had proven so successful that they had been awarded the Burton Award for Reform in Law, probably the nation's most prestigious prize for excellence in legal writing.

Judge Hinkle explained that the process used by the advisory committee to restyle the rules had involved several steps. It started with Professor Kimble drafting a first cut of the restyled rules. That product was reviewed by Professor Capra, the committee's reporter, who examined the revisions carefully to make sure that they were technically correct and did not affect substance. Then the rules were reviewed again by the two professors and by members of the advisory committee. They were next sent to the Style Subcommittee for comment. After the subcommittee's input, they were reviewed by the full advisory committee.

The advisory committee members reviewed the revised rules in advance of the committee meeting and again at the meeting. He added that the committee had also been assisted throughout the project by Professor Kenneth S. Broun, consultant and former member of the committee, by Professor Stephen A. Saltzburg, representing the American Bar Association (and former reporter to the criminal advisory committee), and by several other prominent advisors. He explained that the rules were all published for comment at the same time, even though they had been reviewed and approved for publication by the Standing Committee in three batches at three different meetings.

Judge Hinkle reported that if the advisory committee decided that any change in the language of a rule impacted substance, it made the final call on the revised language. If, however, a change was seen as purely stylistic, the advisory committee noted that it was not a matter of substance, and the Style Subcommittee made the final decision on language.

Judge Hinkle reported that the public comments had been very positive. The American College of Trial Lawyers, for example, assigned the rules to a special committee, which commented favorably many times on the product. The Litigation Section of the American Bar Association also praised the revised rules and stated that they

are clearly better written than the current rules. The only doubt raised in the comments was whether the restyling was worth the potential disruption. Nevertheless, only one negative written public comment to that effect had been received.

At its last meeting, the advisory committee considered the comments and took a fresh look at the rules. In addition, Professors Capra and Kimble completed another top-to-bottom review of the rules. The Style Subcommittee also reviewed them carefully and conducted many meetings by conference call.

Finally, the advisory committee received helpful comments from members of the Standing Committee in advance of the current meeting. The comments of Judges Raggi and Hartz were reviewed carefully and described in a recent memorandum from Professor Capra. Dean Levi also suggested changes just before the meeting that Judge Hinkle presented orally to the committee.

A motion was made to approve the package of restyled evidence rules, including the recent changes incorporated in Professor Capra's memo and those described by Judge Hinkle.

A member stated that she would vote for the restyled rules, but expressed ambivalence about the project. She applauded the extraordinary efforts of the committee in producing the restyled rules, but questioned whether they represent a sufficient improvement over the existing rules to justify the transactional costs of the changes.

She also expressed concern over the need to revise the language of all the rules since the evidence rules are so familiar to lawyers as to make them practically iconic. They are cited and relied on everyday in courtroom proceedings. Any changes in language, she said, will inevitably be used by lawyers in future arguments that changes in substance were in fact made.

She noted that some of the changes clearly improve the rules, such as adding headings, breakouts, numbers, and letters that judges and lawyers will find very helpful. Nevertheless, every single federal rule of evidence was changed in the effort, and some of the changes were not improvements. She asked whether it was really necessary to change each rule of evidence, especially because the rules were drafted carefully over the years, and many of them have been interpreted extensively in the case law.

She recited examples of specific restyled rules that may not have been improved and suggested that some of them were actually made worse solely for the sake of stylistic consistency. In short, she concluded, the new rules represent a solution in search of a problem. Nevertheless, despite those reservations, she stated that she would not cast the only negative vote against the revised rules and would vote to approve the package, but with serious doubts.

A member suggested that those comments were the most thoughtful and intelligent criticisms he had ever heard about the restyling project. Yet, he had simply not been persuaded.

Another member also expressed great appreciation for those well-reasoned views, but pointed out that the great bulk of lawyers and organizations having reviewed the revised rules support them enthusiastically. She explained that the new rules eliminate wordiness and outdated terms in the existing rules. They also improve consistency within the body of evidence rules and with the other federal rules. Moreover, the restyling retains the familiar structure and numbering of the existing evidence rules, even though the style conventions might have called for renumbering or other reformatting. In the final analysis, she suggested, the restyled evidence rules are significantly better and lawyers will easily adapt to the changes.

A member agreed and said that, as a practicing lawyer, he had been skeptical when the project had first started. He pointed out, though, that the committee had made extraordinary efforts to avoid any changes in substance or numbering that could potentially disrupt lawyers. This attempt to preserve continuity, he said, had been a cardinal principle of the effort and had been followed meticulously.

On behalf of the Style Subcommittee, Judge Teilborg offered a special tribute to Judge Hinkle for his outstanding leadership of the project, as well as his great scholarship and technical knowledge. The end product, he said, was superlative and could only have been achieved through an enormous amount of work and cooperation. He also thanked Judge Huff and Mr. Maledon for their time and devotion to the Style Subcommittee's efforts, especially for giving up so many of their lunch hours for conference calls.

Judge Teilborg added that it had been a joy to observe the intense interplay between Professors Capra and Kimble, truly experts in their respective fields. He pointed out that Professor Kimble had left his hospital bed after surgery to return quickly to the project. He also thanked Jeffrey Barr of the Administrative Office for his great work as scribe in keeping the minutes and preparing the drafts. Finally, he thanked Dean Levi and Judges Raggi and Hartz for offering helpful changes in the final days of the project.

A member suggested that one of the great benefits of the restyling process is that the reviewers uncover unintended ambiguities in the rules. He pointed out that Professor Capra was keeping track of all the ambiguities in the evidence rules, so they may be addressed in due course as matters of substance on a separate track. He also remarked that the committee's style conventions are not well known to the public and suggested that they be made available to bench and bar to help them understand the process.

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

REPORT OF THE SEALING SUBCOMMITTEE

Judge Hartz, chair of the Sealing Subcommittee, reported that the subcommittee had been charged with examining the sealing of entire cases in the federal courts. The assignment had been generated by a request to the Judicial Conference from the chief judge of the Seventh Circuit.

Judge Hartz noted that the bulk of the subcommittee's work in examining current court practices had been assigned to the Federal Judicial Center. Dr. Reagan of the Center, he said, had reviewed every sealed case filed in the federal courts in 2006.

He pointed out that there are very good reasons for courts to seal cases – such as matters involving juveniles, grand juries, fugitives, and unexecuted warrants. The study, he added, revealed that many of the sealed "cases" docketed by the courts were not entire cases, but miscellaneous proceedings that carry miscellaneous docket numbers.

He noted that the Center's report had been exhaustive, and the subcommittee felt comfortable that virtually all the sealing decisions made by the courts had been supported by appropriate justification. On the other hand, it was also apparent from the study that court sealing processes could be improved. In some cases, for example, lesser measures than sealing an entire case might have sufficed, such as sealing particular documents. Moreover, the study found that in practice many sealed matters are not timely unsealed after the reason for sealing has expired.

In the end, the subcommittee decided that there is no need for new federal rules on sealing. The standards for sealing, he said, are quite clear in the case law of every circuit, and the courts appear to be acting properly in sealing matters. Nevertheless, there does appear to be a need for Judicial Conference guidelines and some practical education on sealing.

Professor Marcus said that it is worth emphasizing that when the matter was first assigned to the rules committee, the focus was on whether new national rules are needed. He added that there is a general misperception that many cases are sealed in the courts. The Federal Judicial Center study, though, showed that there are in fact very few sealed cases, and many of those are sealed in light of a specific statute or rule, such as in qui tam cases and grand jury proceedings. As for dealing with public perceptions, he said, the committee should emphasize that the standards for sealing are clear and that judges are acting appropriately. Nevertheless, some practical steps should be taken to improve sealing practices in the courts.

He noted that the subcommittee's report does not recommend any changes in the national rules. Its recommendations, rather, are addressed to the Judicial Conference's

Court Administration and Case Management Committee. The report recommends consideration of a national policy statement on sealing that includes three criteria.

> First, an entire case should be sealed only when authorized by statute or rule or justified by a showing of exceptional circumstances and when there is no lesser alternative to sealing the whole case, such as sealing only certain documents.
>
> Second, the decision to seal should be made only by a judge. Instances arise when another person, such as the clerk of court, may seal initially, but that decision should be reviewed promptly by a judge.
>
> Third, once the reason for sealing has passed, the sealing should be lifted. He noted that the most common problem identified during the study was that courts often neglect to unseal documents promptly.

Professor Marcus explained that the subcommittee was also recommending that the Court Administration and Case Management Committee consider exploring the following steps to promote compliance with the proposed national policy statement:

(1) judicial education to make sure that judges are aware of the proper criteria for sealing, including the lesser alternatives;
(2) education for judges and clerks to ensure that sealing is ordered only by a judge or reviewed promptly by a judge;
(3) a study to identify when a clerk may seal a matter temporarily and to establish procedures to ensure prompt review by a judge;
(4) judicial education to ensure that judges know of the need to unseal matters promptly and to set expiration dates for sealing;
(5) programming CM/ECF to generate notices to courts and parties that a sealing order must be reviewed after a certain time period;
(6) programming CM/ECF to generate periodic reports of sealed cases to facilitate more effective and efficient review of them; and
(7) administrative measures that the courts might take to improve handling requests for sealing.

The committee endorsed the subcommittee report and recommendations and voted to refer them to the Court Administration and Case Management Committee for appropriate action.

REPORT OF THE PRIVACY SUBCOMMITTEE

Judge Raggi, chair of the Privacy Subcommittee, reported that the subcommittee's assignment was to consider whether the current privacy rules are adequate to protect

privacy interests. At the same time, she noted, it is also important to emphasize the need to protect the core value of providing maximum public access to court proceedings.

She noted that the subcommittee included three representatives from the Court Administration and Case Management Committee, whose contributions have been invaluable. In addition, she said, Judge John R. Tunheim, former chair of the Court Administration and Case Management Committee, and Judge Hinkle were serving as advisors to the subcommittee.

In short, the subcommittee was reviewing: (1) whether the new rules are being followed; and (2) whether they are adequate. To address those questions, she explained, the subcommittee had started its efforts with extensive surveys by the Administrative Office and the Federal Judicial Center. It then conducted a major program at Fordham Law School, organized by Professor Capra, to which more than 30 knowledgeable individuals with particular interests in privacy matters were invited. The invitees included judges, members of the press, representatives from non-government organizations, an historian, government lawyers, criminal defense lawyers, and lawyers active in civil, commercial, and immigration cases. With the benefit of all the information and views accumulated at the conference, the subcommittee will spend the summer drafting its report for the January 2011 Standing Committee meeting.

Judge Raggi noted that, like the sealing subcommittee, her subcommittee's report will likely not include any recommendations for changes in the federal rules. Rather, it will provide relevant information on current practices in the courts and on the effectiveness of the new privacy rules. Professor Capra added that the Federal Judicial Center had prepared an excellent report on the use of social security numbers in case filings that will be a part of the subcommittee report.

LONG RANGE PLANNING

It was noted that the April 2010 version of the proposed *Draft Strategic Plan for the Federal Judiciary* had been included in the committee's agenda materials, and several of the plan's strategies and goals relate to the work of the rules committees. It was also pointed out that a separate chart had been included in the materials setting out the specific matters in the proposed plan that have potential rules implications.

NEXT MEETING

The members agreed to hold the next committee meeting on January 6-7, 2011, in San Francisco.

Respectfully submitted,

Peter G. McCabe,
Secretary

TAB

IV-A

MEMORANDUM

DATE: September 16, 2010

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Federal Circuit legislative proposal concerning 28 U.S.C. § 46(c)

The enclosed letter from Chief Judge Rader, on behalf of the judges of the Federal Circuit, proposes amending 28 U.S.C. § 46(c) to include in an en banc court any senior circuit judge "who participated on the original panel, regardless of whether an opinion of the panel has formally issued." This proposal has been referred to the Judicial Conference Committee on Court Administration and Case Management for consideration.

The proposal, at first glance, appears to have no direct implications for the Appellate Rules, because the sentence of Section 46(c) that Chief Judge Rader proposes should be amended does not bear directly on (for example) the number of votes needed to decide to hear or rehear a case en banc. But on the assumption that the issue may hold interest for the Appellate Rules Committee, this memo briefly sets forth some background considerations that might bear upon the proposal.

Section 46(c) currently provides in relevant part that

> [a] court in banc shall consist of all circuit judges in regular active service, or such number of judges as may be prescribed in accordance with section 6 of Public Law 95-486 (92 Stat. 1633), except that any senior circuit judge of the circuit shall be eligible (1) to participate, at his election and upon designation and assignment pursuant to section 294(c) of this title and the rules of the circuit, as a member of an in banc court reviewing a decision of a panel of which such judge was a member, or (2) to continue to participate in the decision of a case or controversy that was heard or reheard by the court in banc at a time when such judge was in regular active service.

28 U.S.C. § 46(c). For those who take a purposive approach to statutory interpretation, the legislative history of Section 46(c) might support interpreting that statute to permit en banc participation by a senior judge who participated in panel consideration of an appeal even if the

panel did not formally issue a decision. On the other hand, a textualist might cavil at such a reading, given the statute's explicit reference to en banc review of "a decision of [the] panel."

Section 46 was initially adopted as part of the 1948 Judicial Code. As originally enacted, the section provided in relevant part that "[a] court in banc shall consist of all active judges of the circuit." Act of June 25, 1948, Pub. L. No. 80-773, c. 646, 62 Stat. 871. The statute was amended in 1963 to read in relevant part: "A court in banc shall consist of all circuit judges in regular active service. A circuit judge of the circuit who has retired from regular active service shall also be competent to sit as a judge of the court in banc in the rehearing of a case or controversy if he sat in the court or division at the original hearing thereof." Act of Nov. 13, 1963, Pub. L. No. 88-176, § 1(b), 77 Stat. 331.[1] The latter sentence was stricken from the statute in 1978. *See* Act of Oct. 20, 1978, Pub. L. No. 95-486, § 5(a), (b), 92 Stat. 1633.[2] In 1982,

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[1] A Senate Report explained that "[t]he purpose of the bill ... will be to permit such a judge [i.e., a judge "who has retired after hearing the original appeal"] to sit on a rehearing in banc of a case where he participated at the original hearing thereof." Senate Report No. 596, 1963 U.S.C.C.A.N. 1105, 1106. The report explained that an en banc court

> consists of all the circuit judges in regular active service with the provision, however, that where a circuit judge who has retired from regular active service has sat as such a judge on the precise subject matter or issue upon which the court has ordered a hearing in banc, he becomes competent to sit as a member of the court in banc only if the precise subject matter or issue on which he has previously sat is before the court in banc. For example, if a motion to dismiss for want of jurisdiction has been before the panel on which the retired judge originally sat, either before or after his retirement, and the court of appeals has ordered a rehearing in banc, he, then, is competent to sit as a member of the court in banc; the same would be true in respect to a hearing and a rehearing on the merits of an issue.
>
> It is believed that judge who has sat on an issue in an appellate hearing on which a rehearing has been ordered should be a member of the court for rehearing purposes.

Id.

[2] The report accompanying the Senate's original version of the bill explained:

> This section amends 28 U.S.C. Section 46, to delete from subsection (c) of that section language which previously stated that a retired judge in senior status was competent to sit on an en banc court if he had sat at the original hearing of the case. This amendment was recommended by the Commission on Revision of the Federal Court Appellate System in its June 1975 report. It also had the support of some of the circuit judges who testified at the hearings on S. 729 in the 94th

Congress amended Section 46(c)'s treatment of the composition of the en banc court in two respects, one of which affected senior judge participation.[3] The portion of the legislation affecting senior judge participation added the following proviso to the definition of the en banc court: "except that any senior circuit judge of the circuit shall be eligible to participate, at his election and upon designation and assignment pursuant to Section 294(c) of this title and the rules of the circuit, as a member of an in banc court reviewing a decision of a panel of which such judge was a member." Act of Apr. 2, 1982, Pub. L. No. 97-164, Title II, § 205, 96 Stat. 53. Most recently, Congress amended Section 46(c) in 1996 to provide for the continued participation of a senior judge who had been active status at the time that a particular case "was heard or reheard by the court in banc." Act of Aug. 6, 1996, Pub. L. No. 104-175, § 1, 110 Stat. 1556.[4]

The legislative history of the 1982 amendments may shed light on the policy considerations that animated lawmakers when enacting the current statutory language concerning senior judge participation. A Senate report on the 1982 legislation explains that the purpose was "to clarify confusion arising from" the 1978 legislation:

> The Conference Report accompanying the final bill does not explain why that sentence [i.e., the sentence authorizing a "circuit judge ... who has retired from regular active service ... to sit as a judge of the court in banc in the rehearing of a case or controversy if he sat in the court or division at the original hearing thereof"] was stricken, but the Senate Report accompanying the original Senate

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> Congress.... Since the size of the en banc court becomes a problem for circuits whose total complement of judges exceeds the number nine, it is felt that such problems should not be exacerbated by including retired judges on the en banc court. Also, if the Congress should authorize, in the future, the en banc function to be performed by less than the full number of active judges, the Revision Commission has suggested that judges eligible to retire be ineligible to serve on a limited en banc court, and thus this amendment to Section 48(c) is a logical change in the composition of the en banc court.

S. Rep. No. 117, 95th Cong., 1st Sess. 1977, 1978 U.S.C.C.A.N. 3569, 3615, 1977 WL 9635.

[3] The other aspect of the legislation's effect on en banc court composition concerned the authorization for courts with large numbers of active judges to compose their en banc courts of fewer than all active judges. That provision continues in effect. See 28 U.S.C. § 46(c) (referring to "such number of judges as may be prescribed in accordance with section 6 of Public Law 95-486 (92 Stat. 1633)").

[4] The purpose of this amendment evidently was to resolve a circuit split. *See* H. R. Rep. No. 104–697, 104th Cong., 2nd Sess. 1996, 1996 WL 421818, 1996 U.S.C.C.A.N. 1345, 1346 (citing *United States v. Cocke*, 399 F.2d 433, 435 n.* (5th Cir. 1968) (en banc), and *United States v. Hudspeth*, 42 F.3d 1013 (7th Cir. 1994) (en banc)).

> bill leaves no doubt that the purpose to be served was only that of reducing the size of en banc panels. Since becoming effective that change has had one direct consequence apparently unanticipated in 1978; circuit court judges eligible to elect retirement in 'senior status' have refused to make the election rather than abdicate their opportunity to sit in en banc review of panel decisions in which they have participated. Their assertion that the en banc panel should not be denied their participation in reviewing a case with which they are fully familiar has merit. In light of standing authorization for large courts of appeals to fashion 'limited en bancs' by rule, the value of a statutory prohibition of en banc participation by senior judges who have been members of an original hearing panel would appear questionable, if not thoroughly nonexistent. Their potential contribution far outweighs the slight possibility that their presence will prove to be an administrative burden. As amended by subsection (b) of section 205, section 46 will again permit a senior judge sitting on an original hearing panel to participate in en banc review of that panel's decision.

S. Rep. No. 275, 97th Cong., 1st Sess. 1981, 1982 U.S.C.C.A.N. 11, 37, 1981 WL 21373 (footnote omitted). This history suggests that the 1982 Congress was focusing on the balance between the administrative burdens of large en banc courts and the goal of retaining the contribution of judges who "s[at] on an original hearing panel" and are "fully familiar" with the case. The latter policy goal is similar to the argument advanced by Chief Judge Rader in favor of the proposed amendment to Section 46(c).

Chief Judge Rader's letter summarizes the apparent positions of the circuits on the eligibility of senior judges to participate in en banc rehearings. He suggests that there is a relatively even (6-5) split between circuits that "seem to limit participation of judges in senior status to en banc review of a 'decision' of a panel of which the judge was a member only if the panel opinion has first issued" and circuits that "seem to define en banc participation by whether the judge in senior status sat on the original 'panel,' without reference to whether the panel's opinion formally issued."[5] Chief Judge Rader does not specify which circuits fall in which category. From the face of the provisions listed in the table below, the former category – circuits that require that there have been an actual panel "decision" – includes the Third, Fourth, Fifth, Eighth, Ninth, Eleventh, and Federal Circuits. The latter category – circuits which might not require that there have been an actual panel "decision" – includes the Second, Sixth, Seventh, Tenth, and D.C. Circuits, and possibly also the First Circuit.[6]

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[5] He discusses the First and Fourth Circuits' practices separately and does not include them in this count.

[6] I should emphasize that these inferences are drawn from relatively subtle variations in the language of the relevant local provisions; if the Committee decides that it would be useful to obtain a more definite picture of the various circuit practices, it would be advisable to survey the circuit clerks.

Circuit	Provision
First	First Circuit Rule 35.0(a): "A court en banc consists solely of the circuit judges of this circuit in regular active service except that any senior circuit judge of this circuit shall be eligible to participate, at that judge's election, in the circumstances specified in 28 U.S.C. § 46(c)." *Igartua de la Rosa v. United States*, 407 F.3d 30, 32 (1st Cir. 2005): "[T]he unvarying practice of this court for many years has been to include on the en banc panel any senior circuit judge of this circuit who sat on the original panel and chooses to participate. This practice is not affected by the fact that the panel in this case withdrew its decision while the en banc petition was pending; given our past practice, a withdrawal of the panel decision by the en banc court itself has never prevented a senior circuit judge who sat on the panel from sitting on the en banc court."
Second	Second Circuit IOP 35.1: "(c) Judges Eligible to Participate in an En Banc Hearing or Rehearing. Only an active judge or a senior judge who sat on the three-judge panel is eligible to participate in the en banc hearing or rehearing. A judge's status as an active or senior judge is determined on the date of the hearing or rehearing en banc, i.e., on the date oral argument is heard or the case is submitted. "(d) Judges Eligible to Participate in an En Banc Decision. Only an active judge or a senior judge who either sat on the three-judge panel or took senior status after a case was heard or reheard en banc may participate in the en banc decision. A judge who joins the court after a case was heard or reheard en banc is not eligible to participate in the en banc decision."
Third	Third Circuit IOP 9.6.4: "A senior judge of this court may elect, pursuant to 28 U.S.C. § 46(c), to participate as a member of the en banc court reviewing a decision of a panel on which the senior judge was a member. That election may be made by letter to the clerk, with copies to all active judges, covering all cases on which the senior judge may thereafter sit, or may be made on a case by case basis. Any judge participating in an en banc poll, hearing, or rehearing while in regular active service who subsequently takes senior status may elect to continue participating in the final resolution of the case."
Fourth	Fourth Circuit Rule 35(c): "An en banc hearing will be before all eligible, active and participating judges of the Court. An en banc rehearing will be before all eligible and participating active judges, and any senior judge of the Court who sat on the panel that decided the case originally. An active judge who takes senior status after a case is heard or reheard by an en banc Court will be eligible to participate in the en banc decision."

Fifth	Fifth Circuit Rule 35.6: "The en banc court will be composed of all active judges of the court plus any senior judge of the court who participated in the panel decision who elects to participate in the en banc consideration. This election is to be communicated timely to the chief judge and clerk. Any judge participating in an en banc poll, hearing, or rehearing while in regular active service who subsequently takes senior status may elect to continue participating in the final resolution of the case."
Sixth	Sixth Circuit IOP 35(a): "The en banc court is composed of all judges in regular active service at the time of a rehearing, any senior judge of the court who sat on the original panel, and, if no oral argument en banc were held, any judge who was in regular active service at the time that the en banc court agreed to decide the case without oral argument."
Seventh	Seventh Circuit IOP 5(f): "Only Seventh Circuit active judges and any Seventh Circuit senior judge who was a member of the original panel may participate in rehearings en banc." *United States v. Hudspeth*, 42 F.3d 1013, 1014 (Seventh Circuit 1994): "The panel decision, when circulated to the full court in accordance with Rule 40(f), had been completed, had been voted on, and was ready for issuance when rehearing en banc was granted. There is no rational difference, so far as participation by a senior judge is concerned, between that case and one in which rehearing en banc is granted after the panel decision is issued. In both cases the panel has finalized its decision, although in only one has the decision been issued. The nonfinalized decision is 'decision' enough to come within the terms of the statute, sensibly interpreted."
Eighth	Eighth Circuit IOP IV.D: "On a rehearing en banc, a judge who has taken senior status may elect to participate in an en banc panel if the rehearing is to review the decision of a panel of which that judge was a member."

Ninth	Advisory Committee Note 2 to Ninth Circuit Rules 35-1 to 35-3: "A judge who takes senior status after a call for a vote may not vote or be drawn to serve on the en banc court. This rule is subject to two exceptions: (1) a judge who takes senior status during the pendency of an en banc case for which the judge has already been chosen as a member of the en banc court may continue to serve on that court until the case is finally disposed of; and (2) a senior judge may elect to be eligible, in the same manner as an active judge, to be selected as a member of the en banc court when it reviews a decision of a panel of which the judge was a member." Ninth Circuit General Order 5.1(a)(4): "Judge eligible to serve on the en banc court – means any active or senior judge who is not recused or disqualified and who entered upon active service prior to the date the court is drawn. Senior judges shall not serve on an en banc court except: (i) a senior judge who was a member of the three-judge panel that decided the case being reheard en banc may elect to be eligible to be selected as a member of the en banc court. Any senior judge who elects to be eligible shall notify the Clerk's Office prior to the date the panel is drawn; (ii) a senior judge who takes senior status while serving as a member of an en banc court may continue to serve until all matters pending before that en banc court, including remands from the Supreme Court, are finally disposed of." Ninth Circuit Rule 22-2(d) (regarding capital cases): "The En Banc Court. The Clerk shall include in the pool of the names of all active judges, the names of those eligible senior judges willing to serve on the en banc court. An eligible senior judge is one who sat on the panel whose decision is subject to review."
Tenth	Tenth Circuit Rule 35.5: "The en banc panel consists of this court's active judges who are not disqualified and any senior judge who was a member of the hearing panel, unless he or she elects not to sit."
Eleventh	Eleventh Circuit Rule 35-10: "Senior circuit judges of the Eleventh Circuit assigned to duty pursuant to statute and court rules may sit en banc reviewing decisions of panels of which they were members and may continue to participate in the decision of a case that was heard or reheard by the court en banc at a time when such judge was in regular active service."

Federal	Federal Circuit IOP 14.2(e) (regarding petitions for rehearing en banc): "Notice shall be given that the court en banc shall consist of all circuit judges in regular active service who are not recused or disqualified and any senior circuit judge of the court who participated in the decision of the panel and elects to sit, in accordance with the provisions of 28 U.S.C. § 46(c)." Federal Circuit IOP 14.4(b) (regarding sua sponte petitions for rehearing en banc): "Notice shall be given that the en banc panel shall include all circuit judges in regular active service who are not recused or disqualified and any senior circuit judge of the circuit who participated in the decision of the panel and elects to sit, in accordance with the provisions of 28 U.S.C. § 46(c)."
D.C.	D.C. Circuit Handbook XIII.B.2: "The Court sitting en banc consists of all active judges, plus any senior judges of the Court who were members of the original panel and wish to participate."

Encl.

DUFF
SAYENGA
BURCHILL
MINOR (C)
STROM
AUGUSTYN
McCABE
MATTOS

United States Court of Appeals
for the Federal Circuit

THE NATIONAL COURTS BUILDING
717 MADISON PLACE, N.W.
WASHINGTON, D.C. 20439

CHAMBERS OF
CHIEF JUDGE RANDALL R. RADER

(202) 275-8500

July 8, 2010

Mr. James C. Duff
Secretary to the Judicial Conference of the United States
Administrative Office of the United States Courts
Thurgood Marshall Federal Judicial Building
One First Street, NE, Room 7-100
Washington, DC 20544

Dear Mr. Duff:

On behalf of the judges of the U.S. Court of Appeals for the Federal Circuit, I request the Judicial Conference to seek an amendment to 28 U.S.C. § 46(c) regarding the role in en banc proceedings of circuit judges in senior status. It is this Court's considered opinion that the current language of the statute has resulted in disparate treatment of judges in senior status amongst the circuits, and a desire for national uniformity counsels for clarification of the statutory language.

In its current form, 28 U.S.C. § 46(c) provides that "[a] court [e]n banc shall consist of all circuit judges of the circuit who are in regular active service," except that a judge in senior status may participate in an en banc proceeding when the en banc court is "reviewing a decision of a panel of which such judge was a member." Use of the term "decision" raises the question of whether a determination in a case by a panel is a "decision" under the statute only upon the formal issuance of its opinion, and not before. In the circumstance in which no panel opinion has issued, such as when an appellate court votes sua sponte for hearing en banc following a panel hearing and determination, but prior to the entry of judgment, it is not clear whether a judge in senior status who was on the initial panel would be entitled to participate in the en banc proceeding.

A review of the local rules and procedures of the thirteen circuits indicates that six circuits (including the Federal Circuit) seem to limit participation of judges in senior status to en banc review of a "decision" of a panel of which the judge was a member only if the panel opinion has first issued. On the other hand, five circuits seem to define en banc participation by whether the judge in senior status sat on the original "panel," without reference to whether the panel's opinion formally issued. The First Circuit defines eligibility "in the circumstances specified in 28 U.S.C. § 46(c)," but in at least one opinion seems to favor inclusion of judges in senior status who sat on the panel.[1]

[1] In Igartua de la Rosa v. U.S., 407 F.3d 30, 32 (1st Cir. 2005), the First Circuit addressed the question of whether a senior circuit judge who participated in the panel

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The Fourth Circuit's rule distinguishes between hearings en banc and rehearings en banc. Notably, in the hearing context (i.e., when no prior panel determination exists), the Fourth Circuit provides for an en banc hearing before "all eligible, active and participating judges," whereas in the *re*hearing context, it states "all eligible and participating *active* judges (or a senior judge who sat on the panel that decided the case originally.")

In U.S. v. Hudspeth, 42 F.3d 1013, 1014 (7th Cir. 1994) (en banc), the Seventh Circuit held that a judge in senior status who had sat on a three-judge panel was entitled to participate in the en banc stage of the same case "where the panel decision was all set to be released when the grant of rehearing en banc intercepted it". The Seventh Circuit considered this "nonliteral interpretation" of 28 U.S.C. § 46(c) sound because "[t]here is no rational difference, so far as participation by a senior judge is concerned, between [this] case and one in which rehearing en banc is granted after the panel decision is issued." Id.

As a policy matter, the Seventh Circuit's expansive reading of the statute makes sense because it takes advantage of the prior work, research, study and deliberation done by a judge in senior status during the judge's initial consideration of the case, and points to the absence of any reason for distinguishing between a case in which a panel opinion has been announced and one in which en banc review is ordered prior to formal issuance of the opinion. In an effort to conserve judicial resources and eliminate intercircuit conflict, it is recommended that 28 U.S.C. § 46(c) be amended to include all judges in senior status who participated on the original panel, regardless of whether an opinion of the panel has formally issued.

Sincerely,

Randall R. Rader
Chief Judge

cc: Jan Horbaly
Clerk of Court and Circuit Executive

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decision is eligible to sit on the en banc court when the panel decision had been withdrawn. The court answered in the affirmative, stating: "[T]he unvarying practice of this court for many years has been to include on the en banc panel any senior circuit judge of this circuit who sat on the original panel and chooses to participate. This practice is not affected by the fact that the panel in this case withdrew its decision while the en banc petition was pending; given our past practice, a withdrawal of the panel decision by the en banc court itself has never prevented a senior circuit judge who sat on the panel from sitting on the en banc court."

TAB

IV-B

MEMORANDUM

DATE: September 16, 2010

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 08-AP-Q

At its April 2009 meeting, the Committee discussed Judge Michael Baylson's suggestion that the Appellate Rules Committee consider the possibility of allowing the use of digital audio recordings in place of written transcripts for the purposes of the record on appeal. By consensus, the Committee retained this suggestion on its study agenda.

This summer, Judge Baylson forwarded to us an opinion that he filed following a nine-day bench trial in a complex case concerning allegations of racial bias in school redistricting; post-trial briefing proceeded entirely on the basis of digital recordings, without any written transcript. *See* Memorandum on Conclusions of Law, Doe v. Lower Merion School Dist., Civil Action No. 09-2095, at 2 n.2 (June 24, 2010). The opinion is enclosed.

Encl.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

STUDENT DOE 1, et al.,	:	CIVIL ACTION
	:	
v.	:	
	:	
LOWER MERION SCHOOL DISTRICT	:	NO. 09-2095

MEMORANDUM ON CONCLUSIONS OF LAW

Baylson, J. **June 24, 2010**

I. Introduction and Summary

Plaintiffs Students Doe 1 through 9 ("Students") are African–American students who live in Lower Merion School District ("District"), which is a government subdivision of a township located in Montgomery County, Pennsylvania. The Students, by and through Parents/Guardians Doe 1 through 10 (collectively with Students, "Plaintiffs"), allege that the District discriminated against them based on their race, by adopting a redistricting plan in January 2009, Plan 3R, that took away their ability to choose to attend either of the District's high schools, Harriton and Lower Merion, and required them to attend Harriton High School. In particular, Plaintiffs allege that the District violated the Equal Protection Clause of the Fourteenth Amendment (Count I), 42 U.S.C. § 1981 (Count II), and Title VI of the Civil Rights Act, 42 U.S.C. § 2000d et seq. (Count III), all pursuant to 42 U.S.C. § 1983, by discriminating against the Students based on their race. Plaintiffs live in what has been referred to throughout trial as the "Affected Area," a neighborhood that undisputedly contains one of the highest concentrations of African–American students in the District.[1]

[1]The Court's February 24, 2010 Memorandum denying the District's Motion for Summary Judgment, and May 13, 2010 Memorandum setting forth the factual findings,

On May 13, 2010, following a nine–day bench trial (Docket Nos. 89–94, 97–104),[2] the Court made detailed findings of fact. Doe v. Lower Merion Sch. Dist., No. 09-2095, 2010 WL 1956585 (E.D. Pa. May 13, 2010) ("Doe II"). Subsequently, the parties submitted further briefing on the legal issues stemming from the findings of fact (Docket Nos. 117–118), and on June 9, 2010, the Court held a hearing respecting such briefing (Docket No. 119). Following the hearing, Plaintiffs submitted supplemental briefing. (Docket No. 120.) For the reasons that follow, the Court has concluded that the District did not violate the Equal Protection Clause, 42 U.S.C. § 1981, or Title VI of the Civil Rights Act, and thus, that judgment should be entered in favor of the District.

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summarized the relevant factual and procedural background, and explained the boundaries of the Affected Area. See Doe v. Lower Merion Sch. Dist., 2010 WL 1956585, at *2–3 (E.D. Pa. May 13, 2010) (factual findings memorandum) ("Doe II"); Doe v. Lower Merion Sch. Dist., 689 F. Supp. 2d. 742, 743–46 (E.D. Pa. 2010) ("Doe I") (summary judgment memorandum).

[2]To their credit, the parties have exclusively relied on digital audio recordings of court proceedings that have been electronically uploaded to this Court's CM–ECF filing system, in reviewing and citing the evidence introduced at trial, and arguments presented in hearings. No written transcript exists, resulting in substantial savings in cost and a significant reduction in paper usage. This Court participated in the Digital Audio File Electronic Access Pilot Program. See Michael Kunz, Clerk of Court, U.S. Dist. Ct. for the E.D. Pa, Digital Audio File Electronic Access Pilot Program Notice, http://www.paed.uscourts.gov/documents/handbook/notices/app_bb.pdf (last visited June 23, 2010) (summarizing the program). Earlier this year, after finding this pilot program to be successful, the Judicial Conference of the United States allowed all district courts, "at the discretion of the presiding judge, to make digital audio recordings of court hearings available online to the public." U.S. Courts, Judiciary Approves PACER Innovations to Enhance Public Access, Mar. 16, 2010, http://www.uscourts.gov/News/NewsView/10-03-16/Judiciary_Approves_PACER_Innovations_To_Enhance_Public_Access.aspx (last visited June 23, 2010).

However, assuming this Court's judgment is appealed, the Federal Rules of Appellate Procedure currently have no provision permitting the use of digital audio files in an appeal in which one of the parties raises an issue as to the relevance of particular evidence introduced, or arguments made, in the district court. In such a situation, Federal Rule of Appellate Procedure 10 requires a written transcript. This Court respectfully suggests that the Advisory Committee on Appellate Rules consider the benefits of digital audio files.

The task of running a populous township's school system composed of two high schools, two middle schools, and six elementary schools, is not one in which a federal district judge should interfere unless there is an overriding constitutional issue. Nevertheless, discrimination against any individual because of race or any other protected classification is illegal, and a judge has a high responsibility to act once proof of discrimination has been presented. This case requires the Court to balance these competing interests in deciding whether the redistricting of a geographic area due to its racial makeup violates the Equal Protection Clause and requires judicial action contrary to the school district's assignment plan.

Although Congress and the Supreme Court have unequivocally prohibited public officials from discriminating on the basis of individual racial classifications in distributing benefits or burdens, neither has determined that adverse impact alone is unconstitutional. This principle must be evaluated in the context of this Court's factual findings, particularly that the District did not invidiously discriminate against any individual student because of his or her race, but instead "targeted" the Plaintiffs' neighborhood for redistricting to Harriton High School, in part because that community has one of the highest concentrations of African–American students in the District.

Neither the parties' briefs nor this Court's substantial research disclose another school redistricting case in which such neighborhood "targeting" played a role in school assignments, and a court adjudicated the constitutionality of the overall redistricting scheme in light of such "targeting." In this sense, the current case is novel.

In a democracy, choices are necessarily limited, but the nature of the freedom in question affects the validity of a restriction on choice. For example, because we give paramount

protection to freedom of speech, freedom of press, and freedom of religion under the First Amendment, courts will not generally tolerate denials of an individual's choice of what to say or print, or whether or how to pray. The same is not true of a student's choice of high school, which is not a fundamental right, but is protected by the Equal Protection Clause, which does not permit school districts to burden students by depriving them of such choice on the basis of impermissible classifications. However, common sense teaches that school assignments are and should be related to where students live, because proximity between home and school has many positive social and educational benefits.

A court must protect a member of a minority group from the denial of a right guaranteed by the Constitution. Our recent constitutional history clearly demonstrates that racial discrimination is not tolerated. Some Supreme Court decisions that have dealt with allegations of discrimination in the educational context have applied "strict scrutiny" to review decisions in which racial considerations have played a role, thereby requiring a school district to show that redistricting is "narrowly tailored" to "compelling" state interests. Other Supreme Court cases not involving any individual racial discrimination, however, have applied less exacting levels of scrutiny.

A basic principle underlying this case is that pure "racial balancing" at the high school level, standing alone, would be improper, but that considering racial demographics alongside numerous race–neutral, valid educational interests—similar to the goal of achieving general diversity in higher education admissions programs, with reference to multiple factors such as race, gender, economic background, religion, and other individual characteristics—has never been held unconstitutional.

If strict scrutiny applies to this case, the Court must determine whether the inclusion of a particular geographic area due to its racial makeup violates the Equal Protection Clause, or whether the District has shown that the same redistricting plan would have been adopted absent such a concentration of African–American students. This is not a case in which a particular student has been provided a lesser education than his or her peers due to race, nor does the case involve the busing of students as a necessary measure to remedy previously segregated schools, or the denial of access to a particular educational program, course of study, or other educational resource. Rather, the question presented by this case is whether the Students have been burdened in a manner that offends the Equal Protection Clause by being deprived of their choice to attend a particular high school, because they live in a neighborhood assigned to Harriton High School due to its high concentration of African–American students, when the evidence shows that both high schools are excellent and offer outstanding opportunities,[3] and that all students in Plaintiffs' neighborhood, a majority of whom are not African–American, are similarly burdened.

Applying strict scrutiny to these facts, the Court concludes that the District has satisfied its burden of showing that Plan 3R was narrowly tailored to meet numerous race–neutral compelling interests—namely, having two equally sized high schools, minimizing travel time and costs, maintaining educational continuity, and fostering students' ability to walk to school. The District's mere consideration of the racial demographics of Plaintiffs' neighborhood does not

[3]At trial, the Court observed that, in light of the outstanding nature of both high schools in the District, forcing students to attend one school versus the other resembles forcing one to drive a Rolls Royce or a Bentley, when most people are driving Chevrolets or Toyotas. Of course, if the District discriminated on the basis of individual racial classifications in taking away Plaintiffs' choice of high school, and could not show that redistricting was narrowly tailored to compelling state interests, the adoption of Plan 3R would nonetheless violate the Equal Protection Clause.

warrant an opposite conclusion under existing Supreme Court or Third Circuit precedent. Thus, Plaintiffs are not entitled to relief.

II. Discussion

A. Appropriate Level of Scrutiny

Before determining whether the District's actions comport with the Equal Protection Clause, the Court must first determine the appropriate level of scrutiny for evaluating the constitutionality of the District's adoption of Plan 3R. As this Court has previously explained, the differences between the levels of scrutiny—strict scrutiny, intermediate scrutiny, and rational basis review—are not merely rhetorical. See Doe v. Lower Merion Sch. Dist., 689 F. Supp. 2d. 742, 747–48 (E.D. Pa. 2010) ("Doe I") (explaining the standards under, and the effects of, each level of scrutiny). In many cases, whether a given governmental action is found to be constitutional will hinge upon the operative level of scrutiny. That said, in cases applying strict scrutiny to educational policies involving race, the Supreme Court has repeatedly clarified that "'[s]trict scrutiny is not strict in theory, but fatal in fact. Although all governmental uses of race are subject to strict scrutiny, not all are invalidated by it.'" Parents Involved in Community Schools v. Seattle School District No. 1, 551 U.S. 701, 833 (2007) ("Seattle") (quoting Grutter v. Bollinger, 539 U.S. 306 (2003) (internal quotation marks and alterations omitted)).

1. Supreme Court Cases Applying Strict Scrutiny

Turning first to the most stringent of the levels of scrutiny, strict scrutiny, Plaintiffs have asserted that Supreme Court precedent requires such searching scrutiny in the present case. As explained below, the Supreme Court cases relied upon by Plaintiffs are distinguishable, indicating that strict scrutiny may not be the operative standard to evaluate the constitutionality

of the District's January 2009 redistricting.

a. Seattle

Throughout this case, the parties have vigorously disputed whether this case is governed by Seattle, in which the Supreme Court concluded that school districts in Seattle and Louisville violated the Equal Protection Clause by using a student's race to determine what high school he or she would attend.[4] Seattle sheds significant light on what level of scrutiny the District must withstand, because it is the only Supreme Court case involving high school student placement that Plaintiffs have cited in support of their position that strict scrutiny applies, and the only recent Supreme Court case respecting the use of race in placing high school students.

The parties agree that in contrast to the student assignment plans at issue in Seattle, which assigned students to high schools based on individual racial classifications, the District assigned students to either Harriton High School or Lower Merion High School by neighborhood. (Pls.' Supp. Post–Trial Br. 2, Def.'s Post–Trial Br. 2); see also Doe II, 2010 WL 1956585, at *27. Plaintiffs, however, argue that this distinction "should not deter the Court from applying strict scrutiny" (Pls.' Supp. Post–Trial Br. 2), because Seattle "presents the exact same legal issue as this case," and numerous factual similarities between Seattle and this case remain (Pls.' Post–Trial Br. 2). The District disagrees, contending that the fact that Seattle, unlike the case at hand, does not involve individualized assignments, indicates that Seattle is "factually inapposite." (Def's Post–Trial Br. 2-4.) The District, moreover, avers that because the Seattle majority "did not rule out any and all consideration of race," Seattle neither prohibits the redistricting at issue in this case nor requires that strict scrutiny be applied. (Def.'s Post–Trial

[4] Doe I provided a detailed summary of Seattle. See Doe I, 689 F. Supp. 2d at 748–50.

Br. 2–4.)

If the Seattle Court had not emphasized that the student placements at issue in the case used "individual racial classifications," Plaintiffs would have a stronger argument that the lack of individualized student assignments in this case does not preclude application of Seattle's strict scrutiny standard. Chief Justice Roberts's opinion for the majority of the Seattle Court, however, repeatedly focused upon the school districts' use of individual racial classifications in determining that the student placement plans at issue in Seattle were unconstitutional. Chief Justice Roberts emphasized that both the Seattle and Louisville plans individually assigned students on the basis of race in his initial description of the underlying student placement plans: "In each case, the school district relies upon an individual student's race in assigning that student to a particular school, so that the racial balance at the school falls within a predetermine range based on the racial composition of the school district as a whole." Seattle, 551 U.S. at 710 (emphasis added). Specifically, for the Seattle schools, "the racial composition of the particular school and the race of the individual student" constituted the second in a series of "tiebreakers" that determined who would fill the open slots at an oversubscribed school, while the Louisville schools evaluated whether to place a student at a nonmagnet schools based in part on whether the student's race would violate the school's compliance with the "racial guidelines" requiring such schools to maintain a black student enrollment of between fifteen and fifty percent. Id. at 710, 716.

In proceeding with its legal analysis, the Seattle majority continued to focus upon the school districts' use of individual racial classifications. Chief Justice Roberts began the constitutional analysis by observing that "[i]t is well established that when the government

distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny," and thus, "the school districts must demonstrate that the use of individual racial classifications in the assignment plans . . . is narrowly tailored." Id. at 720 (internal quotation marks omitted) (emphasis added). The Seattle majority then rejected the districts' assertion "that the way in which they have employed individual racial classifications is necessary to achieve their stated ends." Id. at 733 (emphasis added).

Notably, in contrast to the majority's continual focus upon individual racial classifications, the sole section of Chief Justice Roberts's opinion indicating that school districts cannot use race generally in order to obtain a racially diverse proportional student body, Part III.B, represented the views of only four Justices—Chief Justice Roberts, and Justices Scalia, Thomas, and Alito. Justice Kennedy, who joined in Parts I, II, III.A, and III.C of the majority opinion, wrote a separate concurrence emphasizing that he disagreed with Part III.B of Chief Justice Roberts's opinion, because "[d]iversity, depending on its meaning and definition, is a compelling educational goal a school district may pursue." Id. at 783. Nonetheless, Justice Kennedy left no doubt that he agreed with the Seattle majority that the student assignment plans at issue in the case triggered strict scrutiny because they employed "individual racial classifications," which he defined as being "decisions based on an individual student's race." Id. at 784 (emphases added). He explained that in his view, although he believed that pursuing diversity is a compelling educational goal, the Seattle and Kentucky assignment plans were not narrowly tailored to meet that goal, because they used "the crude categories of 'white' and 'non-white' as the basis for its assignment decisions." Id. at 786.

The Seattle majority's consistent focus upon individual racial classifications, coupled

with Justice Kennedy's affirmation of the individual racial classifications standard, and Chief Justice Roberts's inability to command a majority on disapproving of any use of race in assigning students, require this Court to apply strict scrutiny to student assignment plans only if they are based on individual racial classifications.

The extensive testimony and exhibits presented during trial establish that the present case does not involve assigning particular students to attend Harriton High School based on individual racial classifications; rather, the District assigned particular neighborhoods including the Affected Area to attend Harriton High School, and all students in those neighborhoods, both those who were African–American and those who were not, lost their choice of high school. See Doe II, 2010 WL 1956585, at *27. The Court's finding that in Plan 3R, the District Administration recommended to the Board that the Affected Area be redistricted to attend Harriton High School, in part because the Affected Area has one of the highest concentrations of African–American students in the District, see id., falls short of requiring particular students to attend Harriton High School because they are African–American. Thus, the District's adoption of Plan 3R falls outside the facts and holding of Seattle, and is not subject to strict scrutiny in light of Seattle.[5]

b. Additional Supreme Court Cases Cited by Plaintiffs

In addition to Seattle, Plaintiffs contend that the following Supreme Court cases indicate that strict scrutiny governs this case: (1) Grutter, 539 U.S. at 306, and Gratz v. Bollinger, 539

[5]Throughout this case, Plaintiffs' counsel ably advocated that the facts underlying the District's adoption of Plan 3R "fit" within the Seattle holding. However, like the women in the Cinderella fairy tale, who unsuccessfully endeavored to squeeze their feet into Cinderella's tiny glass slipper, counsel simply cannot succeed.

U.S. 244 (2003) (University of Michigan's race–based admissions programs); (2) Adarand Constructors v. Pena, 515 U.S. 200 (1995) and City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1988) ("Croson") (affirmative action programs concerning government contracts); and (3) Johnson v. California, 543 U.S. 499 (2005) (prison policy of double–celling inmates by race). Strict scrutiny, however, is not necessarily required by these cases, because each, like Seattle, involves a policy that expressly employs individual racial classifications.

The first two cases addressed the constitutionality of the University of Michigan's admissions policies: Gratz struck down the undergraduate program's use of a mechanical, predetermined formula that automatically awarded racial minority applicants extra points towards admission, and Grutter upheld the law school's consideration of race as one of many factors in admission, because such consideration was narrowly tailored to the compelling educational interest of cultivating broad student diversity. The admissions policies at issue in Gratz and Grutter, similar to the student placement policy in Seattle, rewarded or burdened prospective applicants based on individual racial classifications, and thus, were subject to strict scrutiny.

Although the Gratz Court criticized the University of Michigan undergraduate program for not considering "each particular applicant as an individual, assessing all of the qualities that individual possesses, and in turn, evaluating that individual's ability to contribute to contribute to the unique setting of higher education," the Court nonetheless noted that the university's admissions policy required "a factual review of [each] application to determine whether an individual is a member of one of these minority groups." 539 U.S. at 271–72. As a result, rather than "us[ing] race in a non–individualized manner," as Plaintiffs assert (Pls.' Supp. Br. 4), the admissions policy struck down in Gratz awarded or declined to award points towards admission

based on individual applicants' racial classifications.

In addition to not individually assigning each student to high school based on his or her membership in particular racial or ethnic group, the District also did not use a "mechanical" process to determine what neighborhoods would be redistricted, such as assigning to Harriton High School students in all neighborhoods with high concentrations of African–American students. Had such a process been employed, North Ardmore, the only other neighborhood with a high concentration of African–American students that had been assigned to attend Lower Merion High School prior to redistricting, would also have been redistricted to attend Harriton, rather than remaining districted to attend Lower Merion High School, as it did under Plan 3R. Thus, contrary to Plaintiffs' assertions, this case does not involve "a factual scenario identical . . . analytically [to] Gratz" (Pls.' Supp. Br. 3).

As for Croson and Adarand, Plaintiffs incorrectly asserted at oral argument that neither case involved "individual selection per se," and instead gave an "edge" to racial minorities. (Docket No. 119.) In Croson, the Supreme Court held that the City of Richmond's policy of requiring prime contractors to award city construction contracts that subcontract at least thirty percent of the contract dollar amount to minority businesses, violated the Equal Protection Clause, because the city failed to "demonstrate a compelling interest in apportioning public contracting opportunities on the basis of race," by identifying the need for remedial action, and to show that non–discriminatory remedies would be insufficient. 488 U.S. at 505. The City of Richmond's policy involved the use of an "unyielding racial quota." Id. at 499.

As for Adarand, a majority of the Supreme Court held that the federal government's practice of giving general contractors on government projects a financial incentive to hire

subcontractors controlled by "socially and economically disadvantaged individuals," and presuming that racial minorities met this description, should be examined under strict scrutiny. See 515 U.S. at 204–05, 227. Accordingly, the Adarand Court remanded the case for a determination of whether the government practice could withstand such scrutiny. See id. at 235. In so ruling, Adarand broadly stated that "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny." Id. at 227. Adarand, like Croson, also explicitly employed individual racial classifications. Although the underlying federal statutes and regulations were "race neutral," the parties agreed that the federal government used "classifications based explicitly on race" to create a "rebuttable presumption used in some certification determinations." Id. at 213.

In both Croson and Adarand, the challenged government policies presumed that members of certain racial minority groups were disadvantaged when it came to procuring government contracts, and expressly benefitted members of such groups in awarding government contracts. See Croson, 488 U.S. at 499–05; Adarand, 515 U.S. at 207. Both cases also involved individual racial classifications by setting up procedures in which the government contract decisions were based on an individual subcontractor's race, similar to the school districts' use of an individual student's membership in a racial minority group to determine his or her high school placement in Seattle.

Turning next to the unwritten California prison policy at issue in Johnson v. California, 543 U.S. 499 (2005), which placed new or transferred inmates with cell mates of the same race during their initial evaluations, and which failed strict scrutiny, it expressly used the racial classifications of individual prospective inmates to segregate them.

In sum, this Court is not convinced that the Supreme Court cases relied upon by Plaintiffs require strict scrutiny to be the operative standard for evaluating the constitutionality of the District's adoption of Plan 3R. All of the cases involve individual racial classifications, which were not used to assign students in this case. In addition, aside from Seattle, the remaining Supreme Court cases relied upon by Plaintiffs do not involve high school education.

Each of these cases, moreover, involved a policy that expressly considered racial classifications. In contrast, this case involved a facially neutral redistricting plan and facially neutral redistricting guidelines, and the issue presented is whether the targeting of a specific residential area for school redistricting based on its racial demographics is unconstitutional. Thus, unlike this case, the Supreme Court cases discussed above did not involve the "additional difficulties posed by [policies] that, although facially race neutral, [may] result in racially disproportionate impact and [may be] motivated by a racially discriminatory purpose," Adarand, 515 U.S. at 213. In order to address this "additional difficulty," the Court will now turn to the cases setting forth the standard for evaluating such policies.

2. Race–Neutral Policies Motivated by a Racially Discriminatory Purpose

a. Pryor v. National Collegiate Athletic Association, 288 F.3d 548, 562 (3d Cir. 2002)

Notwithstanding the Supreme Court cases discussed above, in Pryor, the Third Circuit determined that "[o]nce a plaintiff establishes a discriminatory purpose based on race, the decisionmaker must come forward and try to show that the policy or rule at issue survives strict scrutiny." Pryor further explained that "[r]acial classifications, well intentioned or not, must survive the burdensome strict scrutiny analysis because 'absent searching judicial inquiry . . .

there is simply no way of determining what classifications are benign or remedial and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.'" Id. (quoting Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977) (internal quotation marks omitted)).

Pryor, however, focused upon the notice pleading standards for purposeful discrimination. In Pryor, the plaintiffs alleged that the National Collegiate Athletics Association ("NCAA") committed purposeful discrimination under Title VI and 42 U.S.C. § 1981, by "adopting certain educational standards because of their adverse impact on black student athletes seeking athletic scholarships." Id. at 552. In reversing the district court's dismissal pursuant to Federal Rule of Civil Procedure 16(b)(6) of the plaintiffs' Title VI and 42 U.S.C. § 1981 claims, id. at 560–61, the Third Circuit in Pryor held that under the notice pleading standards of Federal Rules of Civil Procedure 8 and 9, the plaintiffs "sufficiently alleged a claim for relief," id., at 552. The Pryor court carefully noted that "one may doubt that the NCAA harbored . . . ill motives," given that "many NCAA schools have long engaged in fierce recruiting contests to obtain the best high school athletes in the country, many of whom are black," and "[n]othing in [the Third Circuit's decision] precludes either summary judgment or trial findings that conclude that NCAA did not intend to discriminate on the basis of race." Id. at 566. Nonetheless, despite Pryor's focus on the sufficiency of the pleadings, its holding that once race has been shown to be a motivating factor in decisionmaking, all racial classifications must survive strict scrutiny remains binding on district judges in this Court.[6]

[6]Seattle's focus on applying strict scrutiny to student assignment and placement programs only involving individual racial classifications calls into question whether Pryor's pronouncement on the broad applicability of strict scrutiny to policies motivated in part on race,

b. Arlington Heights Inquiry

In reaching its conclusion that strict scrutiny applies when race is found to be a motivating factor in decisionmaking, Pryor relies heavily upon Arlington Heights, in which the Supreme Court clarified that "racial discrimination is not just another competing consideration" that courts should analyze in order to determine the decisionmaker's motivations in adopting a challenged policy. 429 U.S. at 265. Rather, Arlington Heights states that "[w]hen there is a proof that a discriminatory purpose has been a motivating factor in the decision, . . . judicial deference is no longer justified." Id. at 265–66.[7] Under Arlington Heights, in order to determine whether "invidious discriminatory purpose was a motivating factor," a court must "conduct a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." Id. at 266. Relevant evidence includes the following: "the historical background of the decision," "[t]he specific sequence of events leading up to the challenged decision," "[d]epartures from the normal procedural sequence," "[s]ubstantive departures," and "[t]he legislative or administrative history . . . , especially where there are contemporary statements by members of the

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applies to student assignment plans that do not involve individual racial classifications.

[7]Adarand, and Johnson stated that "all racial classifications" trigger strict scrutiny. See Adarand, 515 U.S. at 227 ("[W]e hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny."); Johnson, 543 U.S. at 505 ("We have insisted on strict scrutiny in every context, even for so-called "benign" racial classifications . . . ."). Nonetheless, as already discussed, Adarand and Johnson involved individual racial classifications, which differentiate them from the present case. Adarand also took care to note that it "concerns only classifications based explicitly on race, and presents none of the additional difficulties posed by laws that, although facially race neutral, result in racially disproportionate impact and are motivated by a racially discriminatory purpose." 515 U.S. at 213. This language indicates that the Supreme Court did not intend for strict scrutiny to be applied to cases such as Arlington Heights, Pryor, or this case, in which the challenged policies do not expressly employ "individual racial classifications."

decisionmaking body, minutes of its meetings, or reports." Id. at 267-68.

Arlington Heights, despite requiring lower courts to carefully examine circumstantial evidence to determine whether discriminatory intent exists, also emphasized that an "official action will not be held unconstitutional solely because it results in a racially disproportionate impact." 429 U.S. at 264–65. Thus, plaintiffs still bear the burden of demonstrating "[p]roof of racially discriminatory intent or purpose." Id. at 265.

In this case, the Court specifically "reject[ed] any allegations of invidious discrimination or hostility towards African–American students by the Administration or the Board." Doe II, 2010 WL 1956585, at *28. Nonetheless, the Administration, which the Board entrusted with the responsibility of coming up with redistricting proposals, presented to the Board four redistricting plans, each of which assigned students in either North Ardmore or the Affected Area, the two neighborhoods with the highest concentrations of African–American students, to Harriton High School, and did not allow such students to elect to attend Lower Merion High School instead. Id., at *11, 27–28. Under each of the proposed redistricting plans, the percentage of students at Harriton High School who are African–American would increase from 5.6 percent prior to redistricting, to between 7.8 to 9.9 percent under the given plan, resulting in "racial parity" between the two high schools. See id. at *28. Numerous emails and conversations discussing the inclusion of these two areas, the rejection of the sole redistricting Scenario that did not include one of these areas, the "candid elimination of at least two Scenarios on the basis of race," and testimony by Dr. Haber, the District's redistricting consultant, that race was considered throughout the redistricting process—in short, the historical background of the District's decisionmaking and contemporaneous statements by District officials and Dr. Haber—indicate

that the Affected Area's high concentration of African–American students factored into the District's adoption of Plan 3R. See id. at *27–28. Although the Board Members did not vote on Plan 3R on the basis of race, racial demographics nonetheless factored into the District's recommendation that the Board adopt the Plan.

Under Arlington Heights, when race is a motivating factor, the burden of proof shifts to the governmental entity to establish

> that the same decision would have resulted even had the impermissible purpose not been considered. If this were established, the complaining party in a case of this kind no longer fairly could attribute the injury complained of to improper consideration of a discriminatory purpose. In such circumstances, there would be no justification for judicial interference with the challenged decision.

429 U.S. at 271 n. 21. Assuming that the District's consideration of the Affected Area's racial demographics in assigning students from that neighborhood to Harriton is considered evidence that race was a motivating factor during redistricting,[8] the appropriate inquiry for this Court is whether Plan 3R would have been adopted regardless of the racial composition of the Affected Area.

B. Constitutional Analysis

In light of Pryor's language indicating that strict scrutiny applies to any policy using racial classifications, and Arlington Heights, under which strict scrutiny is appropriate if race was a motivating factor in the decisionmaking in question, the Court will analyze whether the District's adoption of Plan 3R was narrowly tailored to compelling state interests. However, if the

[8]Notably, no congressional statute or Supreme Court precedent expressly provides that mere consideration of a neighborhood's racial demographics in assigning students to schools constitutes decisionmaking in which race has been a motivating factor.

redistricting in question survives strict scrutiny, it will also survive less searching scrutiny under intermediate scrutiny or rational basis review.

1. Summary of Factual Findings

In addition to the factual determinations respecting the role race played in motivating the District during redistricting, the Court made the following findings after reviewing the extensive trial testimony and voluminous exhibits:

- **Excellent, Equal High Schools:** The District's two high schools are two of the best in the state, if not the nation. Doe II, 2010 WL 1956585, at *4. The two high schools offer the same courses and activities, except that Harriton also offers two magnet programs: the International Baccalaureate ("IB") program, and a program offering college–level classes at Penn State University. See id. at *7–8.
- **Equalized High School Enrollment Goal:** The District had to redistrict after the Board accepted the recommendation of the Community Advisory Committee ("CAC"), which included several residents in the District, to build two schools of equal enrollment capacity, as part of the District's capital improvement program to modernize its schools. See id. at *7. Prior to redistricting, Lower Merion High School always had a substantially higher population than Harriton High School. Id. at *8. The overwhelming majority of the Lower Merion Township population lives much closer to Lower Merion High School than to Harriton. Id. at *27 n. 22.
- **Busing and Historic Walk Zones:** With the exception of areas within a mile of District schools that are designated as walk zones, all areas of the District, including the Affected Area, have always received bus service provided by the District. Id. Even though

portions of the Affected Area are within a mile of Lower Merion High School, no section of the Affected Area falls within the historic Lower Merion High School walk zone. See id. at *22–23. None of the trial witnesses testified about how the boundaries of the historic walk zone were selected. Id. at *22 n. 18.

- **Race–Neutral Non–Negotiables:** In April 2008, in the early stages of redistricting, the Board came up with a list of race–neutral Non–Negotiables, which addressed valid educational goals and constitutes mandates that the District must follow, and which included equalizing the student populations in the two high schools, and not increasing the number of buses used to transport children. See id. at *8–9.
- **Community Values:** The following month, the Board hired outside consultants to solicit values identified by residents in the District—"Community Values"—that would help guide the redistricting process. One of the Community Values was to cultivate broad diversity, including "ethnic" and "racial" diversity. See id. at *9–10.
- **Public Presentation of Proposed Plans:** The Administration presented each of the four proposed redistricting plans to the Board at a public meeting open to the District community. See id. at *16–20. After each presentation, the Board solicited input and feedback on the proposed Plans. See id. The Administration took into account the community's feedback in creating and selecting subsequent proposed Plans. See id.
- **3–1–1 Feeder Pattern:** Following the public presentation of Proposed Plan 2, the Board understood the primary community concern to be educational continuity, the desire to keep students together from elementary through to high school in order to ease middle and high school transitions. See id. at *18. Proposed Plans 3 and 3R largely put in place

a 3–1–1 Feeder Pattern in which students districted for one of three elementary schools attended the same middle school and the same high school. See id. at *22–23.

- **Board[9] Vote on Plan 3R:** Seven of the nine Board members voted in favor of, or expressed support for, Plan 3R. David Ebby, who voted against the plan, credibly provided valid, pedagogical reasons for voting against Plan 3R, including his view that educational continuity leads to stagnation. See id. at *26. Diane diBonaventuro also voted against the plan and made several race–related statements that indicated that she "agonized over . . . the effects . . . Plan 3R would have on African–American students in the Affected Area," but was unsuccessful in persuading the Board to not adopt the plan. See id. at *25.

2. Narrow Tailoring to Compelling Educational Interests

At trial, the District presented ample evidence that the January 2009 redistricting aimed at addressing the following goals, each of which the Court has already found to have a valid educational interest: (a) equalizing the populations at the two high schools, (b) minimizing travel time and transportation costs, (c) fostering educational continuity, and (d) fostering walkability. As the Court will explain, during the redistricting process, the District consistently aimed to satisfy all four of these compelling educational interests. Because Plan 3R is the only plan the Court is aware of that simultaneously meets these goals, it is narrowly tailored and therefore survives strict scrutiny. An opposite conclusion is not warranted by the mere fact that the

[9]The District's Board is an elected body and its members serve specific terms. There is an obvious difference between redistricting decisions that violate the Constitution because public officials considered improper individual classifications, such as race, and redistricting decisions that are merely unpopular. The former are the province of courts, and the latter of the electorate.

District considered the racial demographic makeup of the Affected Area during redistricting.

a. Equally Sized School Populations

First and foremost, the District's "cardinal redistricting principal" was that Harriton High School and Lower Merion High School have equal high school student populations. Doe II, 2010 WL 1956585, at *13. In fact, the District only decided to redistrict because it accepted the CAC's proposal to modernize the high schools by creating two equally sized high schools, and prior to redistricting, Lower Merion High School's population exceeded that of Harriton High School by 700 students. See id. at *7.

The CAC, in determining that two equally sized high schools best met the District's educational and pedagogical goals, rejected an alternative option of keeping the high schools at their student enrollment levels prior to redistricting. See id. The CAC explained that having a significant disparity in high school populations led to differences in the high schools' educational offerings, and perpetuated traffic and parking problems at Lower Merion High School, the larger high school. Id. In contrast, the CAC concluded that equalizing the enrollment at the District's two high schools allowed students to benefit from the smallest possible schools, which would foster a stronger sense of community, better student–faculty interactions, and better educational outcomes, while maximizing student access to programs and facilities, given that each school would offer the same range of courses and co–curricular activities. Id.

Consistent with the CAC's recommendation, the first Non–Negotiable adopted by the Board was that "[t]he enrollment of the two high schools and two middle schools will be equalized." Id. at *9. As demonstrated by the CAC's detailed findings and examination of relevant research respecting educational outcomes, this goal of equalizing high school

populations is a compelling educational interest, because it furthers the legitimate, pedagogical goal of improving student access to courses, teachers, co–curricular activities, programs, and facilities. In order to increase the Harriton student population, redistricting would have to reassign neighborhoods encompassing several hundred students who would otherwise attend Lower Merion High School, to Harriton.

Throughout the redistricting process, the District consistently aimed to achieve numeric equality between the two high schools, id. at *28, as is evidenced by the various redistricting plans it considered. The first redistricting Scenario considered by the Administration was eliminated in part for violating the Board's mandate of two equally sized high schools by projecting a Lower Merion High School student population that exceeded that high school's enrollment capacity by fifteen students, and had 150 more students than Harriton High School. Id. at *13. Unlike Scenario 1, each of the redistricting plans that the Administration publicly presented to the Board prior to Plan 3R, equalized the populations at the two high schools: Proposed Plan 1 projected a Harriton High School population of 1108 and a Lower Merion High School population of 1137; Proposed Plan 2 projected a Harriton population of 1137 and a Lower Merion High School population of 1135; and Proposed Plan 3 projected a Harriton population of 1089 and a Lower Merion High School population of 1185. Id. at *11.

As for Plan 3R, which the Board ultimately adopted, it projected that the two high schools would have equal populations by the 2013 to 2014 school year, after grandfathering is complete. (Pls.' Trial Ex. 4, at 0194.)[10] For the 2009 to 2010 school year, the first year after

[10]In referencing pages of the parties' trial exhibits, the Court will only provide the last four digits of the bates numbers, rather than the lengthier, full bates numbers.

Plan 3R was implemented, Harriton had a student population of 894, and Lower Merion High School had a student population of 1401. Doe II, 2010 WL 1956585, at *26. Because Plan 3R projected that Harriton and Lower Merion High Schools would have respective enrollments of 798 and 1470 (Pls.' Trial Ex. 4, at 0194), the actual student enrollment figures for the 2009 to 2010 school year showed more students enrolling in Harriton than expected, putting the District on track to equalize the high school populations by the 2013 to 2014 school year.

b. Minimal Travel Time and Costs

Several members of the Administration testified at length about the District's inability to increase its number of buses, due to the limitations on bus storage facilities, and given that increasing the number of buses would heighten fuel, storage, and employee costs. Doe II, 2010 WL 1956585, at *5. As a result, the District was legitimately concerned about minimizing travel time and transportation costs.

In accordance with such concerns, the District included in its Non–Negotiables the requirement that "[t]he plan may not increase the number of buses required." Id. at *9. The community at large also expressed an interest in minimizing travel time for non–walkers, which the District incorporated into the Community Values that were aimed to guide the redistricting process. Id. at *9 n. 9.

In considering various redistricting options, the District rejected three proposals—Scenario 1, Proposed Plan 1, and the "Travel Equity Proposal" recommended by parents in the community—for failing to minimize travel times and transportation costs. See id. at *13, 17, & 19. In fact, the primary reason that the Board rejected Proposed Plan 1 is because it would result in excessive travel times for students. Id. at *17. The District only discovered this

after testing the bus travel times in the fall of 2008 and discovering that the travel times had increased significantly from the summer, when travel times had initially been tested. Id. at *17, 17 n. 14. The District continued to be guided by the aim of minimizing travel times. After the public presentation of Proposed Plan 2, two of the three goals that the Board identified as predominant community concerns were that of distance and access, and walkability. Further evidence that the Board in fact tailored its redistricting decision to the need to minimize travel times comes from Board Member Lisa Pliskin's reference in an email to the "no new buses rule." Id. at 19 n. 17.

Given that the overwhelming majority of the students in the District live closer to Lower Merion High School than to Harriton, redistricting would require significant numbers of students to be bused to Harriton. Id. at *27 n. 22. In order to minimize travel times and transportation costs, the District had to assign students to Harriton from neighborhoods that were closest to the high school. As is clear from the maps that the Court reproduced in its factual findings Memorandum, both North Ardmore and the area assigned to attend Penn Valley Elementary, including the Affected Area, are the two areas closest to Harriton High School that were not already districted to attend Harriton prior to the adoption of Plan 3R. See id. at *21–22. In fact, the thick black line indicating the Harriton attendance boundary on the maps for both Proposed Plan 3 and adopted Plan 3R, cuts relatively straight across the District to redistrict the areas closest to Harriton to that high school. See id. As a result, both North Ardmore and the Affected Area were natural candidates for redistricting, and would have been redistricted regardless of the racial and ethnic demographics of those neighborhoods.

Unsurprisingly, the time that it takes students in the Affected Area to travel on District

buses to Harriton is by no means the longest in the District: Students in the Affected Area have eighteen to nineteen minute bus rides, which cover half the distance and take half the time of the longest bus ride in the District, id. at *21.

Given the geography of the District and the fact that most of the District's student population resides closer to Lower Merion High School, Plan 3R meets the District's dual aims of equalizing the high school populations and minimizing travel times. Notably, there is no evidence that another neighborhood in the District could have been redistricted to attend Harriton High School, while simultaneously meeting both the equalization and minimal transportation goals.

c. Educational Continuity

In the public comments period following the presentation of Proposed Plan 2, the primary concern with Plan 2 that the community expressed, was that of educational continuity. Id. at *18. Parents were concerned about separating students from their elementary school peers for middle school or high school, and instead favored keeping students together from kindergarten through to grade twelve. Id.

In response to these concerns, the next redistricting plan that the District prepared and considered, Proposed Plan 3, employed a 3–1–1 Feeder Pattern that assigned students districted for three elementary schools to the same middle school and the same high school. Id. at *21. Administrators and Board Members testified at trial that they believed that such a plan had both pedagogical and psychological benefits. See id. at *21, 27. In particular, they testified that the 3–1–1 Feeder Pattern enhances the quality of students' education by facilitating middle school and high school teachers' ability to determine what their students had learned previously, and to

build upon that foundation. See id. at *21, 27. Even after deciding to expand the walk zone to accommodate community concerns about walkability, the District kept in place the 3–1–1 Feeder Pattern with Proposed Plan 3R, albeit with an expanded walk zone. In addition to fostering educational continuity, Plans 3 and 3R also met the District's other redistricting mandates of equalized high school populations and minimized student travel. Throughout trial, no other redistricting options that could meet all three goals of redistricting were discussed, again establishing that the Affected Area would have been selected for redistricting regardless of its demographic makeup.

Between the Affected Area and North Ardmore, which were natural candidates for redistricting, the Affected Area is the more logical option, because redistricting students in that area to Harriton would foster educational continuity, whereas redistricting students in North Ardmore would not. Prior to redistricting, students in North Ardmore were districted to attend Penn Wynne Elementary School, and students in all neighborhoods districted for Penn Wynne were also districted for Lower Merion High School. Consequently, keeping North Ardmore districted for Lower Merion High School allowed all students who attend Penn Wynne to stay together for high school. In contrast, students in the Affected Area were districted to attend Penn Valley Elementary School, but within the areas districted for Penn Valley, only students in the Affected Area and Haverford had a choice of high school. Students in all other neighborhoods districted for Penn Valley were already districted for Harriton. Thus, redistricting students in the Affected Area to attend Harriton enabled those students to attend high school with their peers from Penn Valley Elementary School and Welsh Valley Middle School (with the exception of those in the historic Lower Merion High School walk zone who elect to attend that high school),

whereas redistricting North Ardmore to Harriton would result in students from Penn Wynne Elementary School and Bala Cynwyd Middle School being split between the two high schools. The selection of the Affected Area for redistricting to Harriton, therefore, was narrowly tailored to meet simultaneously the District's compelling interests of equally sized high schools, minimal student travel time, and educational continuity.

Moreover, the fact that the District incorporated grandfathering into its plans—permitting students who already attended a particular high school prior to redistricting to remain at the same high school even after redistricting—and made grandfathering one of the Non–Negotiables, see id. at *9, 23, provides further proof that the District in fact placed a high priority on facilitating educational continuity.

d. Maintaining Historic School Walk Zones

While requiring redistricting to equalize the population of the two high schools, minimize travel times and costs, and foster educational continuity, the District also aimed to address walkability, which was one of the Community Values, see id. at *9 n. 9. In addition, the main concern that the community had with Proposed Plan 3 was that of walkability, given that the Plan only permitted a limited number of students in neighborhoods assigned to Harriton to choose to walk to Lower Merion High School. See id. at *22. Plan 3R therefore expanded Proposed Plan 3's abbreviated walk zone to its historical boundaries, which at times spanned a distance of one mile. Id. At trial, the historic Lower Merion walk zone was only briefly described as having been in place since the 1990's. Id. at 23 n. 21.

Although it is unclear why the Affected Area had not been included in the historic Lower Merion walk zone when that zone was designated, neither was there any evidence indicating that

the Affected Area had been excluded on the basis of race. In fact, regardless of race, expanding the historic Lower Merion walk zone to include the Affected Area would jeopardize the District's primary redistricting aim of equalizing the high school populations, by diminishing the number of students districted for Harriton. Moreover, such redistricting would also undermine educational continuity, by permitting students in the Affected Area to leave their peers from Penn Valley Elementary School and Welsh Valley Middle School, to attend Lower Merion High School. As a result, the Court has concluded that Plan 3R was narrowly tailored to meet the District's compelling educational interests of equalized high school populations, minimal student travel, educational continuity, and walkability.

e. Consideration of Racial Demographics

In addition to the compelling educational interests that have already been discussed, the District has also asserted that redistricting only took race into account in order to address the empirically measured "achievement gap" between African–American students and their peers of other racial and ethnic backgrounds in the District, and "racial isolation" that African–American students in the District experience when their classes contain only a few students of their background. (Def.'s Post–Trial Br. 15–16.)

As the Supreme Court made clear in Grutter, "[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause." 539 U.S. at 327. The Supreme Court has never prohibited a school district from taking into account the demographics of a neighborhood as one of many factors in assigning students to schools. As already explained, the Seattle majority opinion, rather than prohibiting the mere use of race in assigning students to schools, narrowly found impermissible the individual assignment of students to high school on

the basis of racial classifications. Seattle failed to clarify whether Grutter applies to high school student assignment plans: Although the Seattle majority determined that Grutter "expressly articulated key limitations on its holding," including "the unique context of higher education," 551 U.S. at 725, Justice Kennedy's separate concurrence strongly embraces Grutter's holding that cultivating broad diversity by using race as one of many factors is a compelling educational goal even in secondary education, see 551 U.S. at 788, 790, a view that the four dissenting Justices share, see id. at 864–66. In this sense, five justices have expressed support for school districts' consideration of broad diversity in assigning students to high school.

Regardless of whether Justice Kennedy's concurring opinion in Seattle is binding under Marks v. United States, 430 U.S. 188 (1977), Seattle did not prohibit school districts from taking race into account as one of several factors that are considered, as Grutter had already permitted. Similar to the University of Michigan Law School's consideration of a multitude of factors, including individual racial classifications, in determining whether a given applicant should be admitted, which survived constitutional scrutiny in Grutter, the District considered neighborhood demographics alongside numerous other goals that did not implicate race—equalizing high school populations, minimizing student travel, fostering educational continuity, and facilitating walkability. Grutter specifically provided that "narrow tailoring does not require exhaustion of every conceivable race neutral alternative." 539 U.S. at 339. Especially because the Court cannot conceive of an alternative redistricting plan that could also meet all of the District's race–neutral goals, the mere fact that the District considered racial demographics in redistricting students in the Affected Area to attend Harriton does not render the District's adoption of Plan 3R unconstitutional. The District has established that Plan 3R would still have been adopted

even had racial demographics not been considered. See Arlington Heights, 429 U.S. 271 n. 21. Accordingly, the District's adoption of Plan 3R survives strict scrutiny and comports with the Equal Protection Clause.

C. Title VI and 42 U.S.C. § 1981 Analysis

Plaintiffs' remaining claims pursuant to Title VI and 42 U.S.C. § 1981 must also fail, because those statutes' prohibitions against discrimination are coextensive with the Equal Protection Clause. See Grutter, 539 U.S. at 343 (finding that because the Equal Protection Clause was not violated by the law school admissions' use of race, the petitioner's statutory claims under Title VI and § 1981 must also fail); cf. Gratz, 539 U.S. at 276 ("[D]iscrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI.").

III. Conclusion

For the reasons detailed above, the Court has concluded that Plaintiffs are not entitled to relief on their claims that the District impermissibly and unconstitutionally discriminated against them on the basis of race. An appropriate Order entering judgment in favor of the District follows.

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TAB

IV-C

To: Judge Sutton
From: Heather Williams
Date: Thursday, August 19, 2010
Re: Circuit Splits – Federal Rules of Appellate Procedure

At the June 2010 Standing Committee, you expressed an interest in having a list prepared of the Federal Rules of Appellate Procedure on which the circuits have split. Accordingly, I began researching circuit splits arising under the Appellate Rules earlier this summer. Based on our July phone conversation, I limited my research to cases decided in 2010 that either created a new rules-based circuit split, furthered an existing split, or articulated the existence of a split.

My survey of circuit splits produced only two cases decided in 2010 that articulated an existing Appellate Rules-based circuit split. No cases decided in 2010 created a new circuit split or furthered an existing split. The two cases I found – *In re American Investors Life Insurance Co. Annuity Marketing and Sales Practices Litigation*, 695 F.Supp.2d 157 (E.D. Pa. 2010) and *Taylor v. Horizon Distributors, Inc.*, No. CV-07-1984-PHX-DGC, 2010 U.S. Dist. LEXIS 11953 (D. Az. Jan. 22, 2010) – each articulate an existing circuit split over whether attorneys' fees may be included in the costs of appeal for a bond issued under Federal Rule of Appellate Procedure 7. This split was comprehensively discussed by Professor Struve in an October 2007 memo to the Advisory Committee on Appellate Rules and will be briefly discussed in Part I of this memo. Part II outlines the methodology I used in conducting my survey of Appellate Rules circuit splits.

I. FEDERAL RULE OF APPELLATE PROCEDURE 7 CIRCUIT SPLIT.

A. Summary of the Rule 7 Circuit Split.

In 2003, a circuit split related to Federal Rule of Appellate Procedure 7 was brought to the attention of the Appellate Rules Advisory Committee. At the time, four circuits were evenly split over whether attorneys' fees may be included in the costs of appeal for a bond issued under Rule 7. Two circuits (the District of Columbia and Third Circuits) held that attorneys' fees may not be included as Rule 7 costs. *In re American President Lines*, 779 F.2d 714, 719 (D.C. Cir. 1985); *Hirschensohn v. Lawyers Title Insurance Co.*, No. 96-7312, 1997 WL 307777, 1997 U.S.App. LEXIS 13793, *1–2 (3d Cir. June 10, 1997) (unreported decision). According to these Courts, Federal Rule of Appellate Procedure 39(e) provides a complete and exhaustive list of the costs that may be included as Rule 7 costs. Because Rule 39(e) does not list attorneys' fees, the Courts found that they may not be included as Rule 7 costs. *In re American President Lines*, 779 F.2d at 716–17; *Hirschensohn*, 1997 WL 307777, 1997 U.S.App. LEXIS 13793, at *1–2.

Two circuits (the Second and Eleventh Circuits) held differently, concluding that attorneys' fees may be included as Rule 7 costs. *Adsani v. Miller*, 139 F.3d 67, 73 (2d Cir. 1998); *Pedraza v. United Guaranty Corp.*, 313 F.3d 1323, 1332 (11th Cir. 2002). According to these Courts, "statutorily authorized costs," including attorneys' fees, may be included in a Rule 7 appeal bond. *Adsani*, 139 F.3d at 73; *Pedraza*, 313 F.3d at 1334. Therefore, to determine whether attorneys' fees may be included in Rule 7 costs, these Courts looked to the statute underlying the cause of action. *See Adsani*, 139 F.3d at 73 (including attorneys' fees as costs in a Rule 7 appeal bond because the underlying statute, the Copyright Act, "provided for attorneys' fees as part of the costs"); *Pedraza*, 313 F.3d at 1334 (holding that attorneys' fees could not be

included as Rule 7 costs because the underlying statute, the Real Estate Settlement Procedures Act, did not provide for attorneys' fees as part of the costs).

Although there is no Supreme Court authority that directly addresses this issue, the Court's reasoning in *Marek v. Chesny*, 473 U.S. 1 (1985), has played an important role in the decisions of some circuit courts. In that case, the Supreme Court held that the reference to costs in Federal Rule of Civil Procedure 68 may include attorneys' fees if the statute underlying the cause of action: (1) authorizes attorneys' fees and (2) includes such fees in its definition of costs. *Id.* at 9. Because Rule 68 did not itself define costs, the Court concluded that the rule "was intended to refer to all costs properly awardable under the relevant substantive statute." *Id.*

As Professor Struve noted in her October 2007 memo, the circuit split created by the Second Circuit's 1998 decision in *Adsani* was based primarily on the Court's disagreement with the relationship between Appellate Rules 7 and 39 articulated by the D.C. and Third Circuits. According to the *Adsani* Court, "Rule 39 does not define costs for all of the Federal Rules of Appellate Procedure." 139 F.3d at 74. In fact, the Court stated, "[s]pecific costs are mentioned [in Rule 39] only in the context of how that cost should be taxed procedurally speaking." *Id.* Furthermore, like Civil Rule 68, Appellate Rule 7 does not define costs. *Id.* Therefore, Rule 7 costs should be determined by reference to the statute underlying the cause of action. *Id.* In 2002, the *Pedraza* Court agreed, stating that "the reasoning that guided the *Marek* Court's determination that [Civil] Rule 68 'costs' are to be defined with reference to the underlying cause of action is equally applicable in the context of [Appellate] Rule 7." 313 F.3d at 1332.

Since 2003, two circuits (the Sixth and Ninth Circuits) have joined the Second and Eleventh Circuits in holding that attorneys' fees may be included in Rule 7 costs, shifting the previously even split. *In re Cardizem CD Antitrust Litigation*, 391 F.3d 812, 818 (6th Cir. 2004); *Azizian v. Federated Department Stores, Inc.*, 499 F.3d 950, 953 (9th Cir. 2007). Professor Struve's 2007 memo explored rulemaking options in light of the shift in the caselaw.

B. 2010 Cases Articulating the Rule 7 Circuit Split.

This year, two cases articulated the existence of the Rule 7 circuit split. In January 2010, the District Court of Arizona noted that "[t]he courts are split on whether a [Rule 7] bond may include attorneys' fees. *Taylor v. Horizon, Inc.*, No. CV-07-1984-PHX-DGC, 2010 U.S. Dist. LEXIS 11953, at *2 (D. Az. Jan. 22, 2010). The Court did not further address the split.[1] One month later, the District Court for the Eastern District of Pennsylvania noted that "[t]here is no binding authority for … determin[ing] the 'costs of appeal' for a bond issued under Federal Rule of Appellate Procedure 7" because "[c]ircuit courts are divided as to whether to look to Federal Rule of Appellate Procedure 39(e) or to the underlying statute on which the plaintiff's claim is based in order to determine costs" and whether attorneys' fees may be included in such costs. *In re American Investors Life Insurance Co. Annuity Marketing and Sales Practices Litigation*, 695

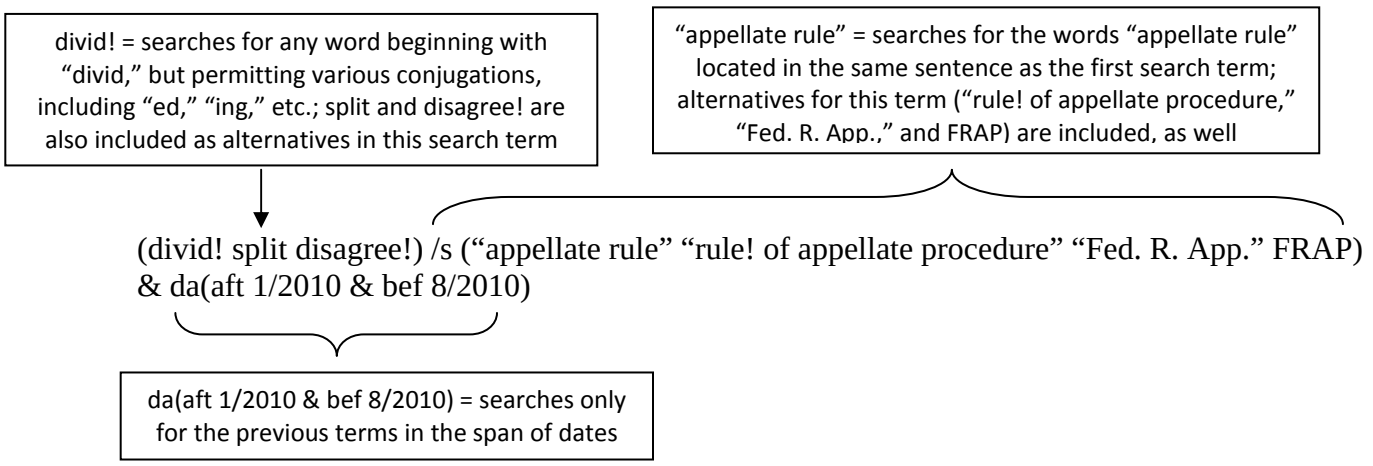
[1] In *Taylor*, the plaintiff was asked to file a $10,000 bond to guarantee payment of appeal costs, including attorneys' fees. *Taylor*, 2010 U.S. Dist. LEXIS 11953, at *1. Because the Court found that requiring Taylor, who had previously been granted *in forma pauperis* status based on his inability to pay the small filing fee, to post a $10,000 bond "would effectively foreclose his right to appeal," it did not further address the Rule 7 circuit split. *Id.* at *2.

F.Supp.2d 157, 164 (E.D. Pa. 2010). Because the Court found that attorneys' fees would be unavailable under either approach, it did not include attorneys' fees as Rule 7 costs.[2] *Id.* at 165.

II. METHODOLOGY.

A. Search Terms Used.

I used the following search terms to search for Appellate Rules-based circuit splits. In addition to listing the terms, I have provided a brief description of the terms chosen. This search could be easily run by OJP staff before each Advisory (or Standing) Committee meeting.[3]



In order to double check this work, I received advice from a contact at Westlaw, who verified that the search terms listed above were likely to retrieve all results mentioning or creating Appellate Rules-based circuit splits, within the last year (January 2010 to present).[4]

B. Resources Searched & Methodology Used.

I used the search terms described above in a combination of seven databases available on Westlaw and Lexis. I searched in four Westlaw databases: (1) the Federal Rules Decisions Cases (FRD-CS) database, which compiles all decisions concerning the federal rules from 1941 to present; (2) the District Court Cases – After 1944 (DCT) database, which compiles all district

[2] The Court found that attorneys' fees were not available under the "Rule 39 approach" because the Rule does not include attorneys' fees in its list of costs. *In re American Investors Life Ins.*, 695 F.Supp.2d at 165. The Court also found that attorneys' fees were not available under the "underlying statute approach" because RICO, the underlying statute, does not provide for attorneys' fees as costs against the particular defendant at issue in the case. *Id.*

[3] Westlaw, for example, offers a service called *West Clip*, which periodically and automatically runs a search against a chosen database, and captures and alerts the point of contact to new opinions on the subject as they are decided.

[4] The following search terms, based on the Appellate Rules example in the text above, should generate results for circuit splits arising under any of the five sets of federal rules: (divid! split disagree!) /s ("appellate rule" "rule! of appellate procedure" "Fed. R. App." FRAP "bankruptcy rule" "rule! of bankruptcy procedure" "Fed. R. Bankr. P." FRBP "civil rule" "rule! of civil procedure" "Fed. R. Civ. P." FRCP "criminal rule" "rule! of criminal procedure" "Fed. R. Crim. P." FRCrP "evidence rule" "rule! of evidence" "Fed. R. Evid." FRE) & da(aft 1/2010 & bef 8/2010).

court decisions from 1944 to present; (3) the U.S. Courts of Appeals Cases (CTA) database, which compiles all circuit court decisions from 1944 to present; and (4) the All Federal Cases (ALLFEDS) database, which combines the three previous databases, and which I used primarily to double check my previous work. I searched in three Lexis databases: (1) the U.S. District Court Cases, Combined database, which compiles all district court decisions from 1789 to present; (2) the U.S. Courts of Appeals Cases, Combined database, which compiles circuit court decisions from 1789 to present; and (3) the Federal Court Cases, Combined database, which combines the two previous databases, and which I used primarily to double check my work.

I also used more simplistic searches (*i.e.*, FRAP /s split, or "Fed. R. App." /s divid) in other online resources. BNA United States Law Week includes a feature that compiles and summarizes Court of Appeals cases that create new circuit splits or further existing splits. The 2010 cases discussed in Part I do not appear in this resource because: (1) they are district court, rather than Court of Appeals cases, and (2) they do not create a new circuit split or further an existing split. (They only acknowledge that a circuit split on the Rule 7 issue exists.) BNA Law Week is a helpful tool for tracking the creation of new splits and researching whether existing splits have been furthered by an additional circuit court decision. It does not, however, compile district court decisions that acknowledge or address existing circuit splits, like the Rule 7 split.

Washington & Lee University School of Law Professor Benjamin Spencer maintains and regularly updates a blog dedicated to tracking developments relating to federal circuit splits. (The blog is available at http://splitcircuits.blogspot.com/.) Professor Spencer did blog about one of the 2010 cases discussed in Part I (*In re American Investors Life Insurance Co. Annuity Marketing and Sales Practices Litigation*). Unfortunately, the blog does not indicate how Professor Spencer searches for his information. Therefore, I viewed Professor Spencer's blog as a way of double checking my work, rather than as a definitive source for all potential splits.

TAB

V-A1

MEMORANDUM

DATE: September 16, 2010

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 08-AP-M

Over the past year, the Committee has been considering possible amendments to Appellate Rules 13 and 14 to address permissive interlocutory appeals under 26 U.S.C. § 7482(a)(2). Chief Judge John O. Colvin and Judge Michael B. Thornton of the United States Tax Court have suggested revisions to those proposed amendments and have also proposed amending Appellate Rule 24. Gilbert S. Rothenberg, Acting Deputy Assistant Attorney General, has submitted comments on behalf of the Tax Division of the Department of Justice. This memo sets forth a new draft of the proposals that takes account of that input and of the Committee's discussions at the Spring 2010 meeting.

Part I summarizes the background of the proposals; a longer version of this Part appeared in a prior memo.[1] Part II encapsulates the input and discussions on the proposals to date. Part III sets forth the latest version of the proposed amendments to Rules 13, 14, and 24.

I. Reasons for considering the proposed amendments

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.[2] In 1986, Congress responded to *Shapiro*[3] by enacting 26 U.S.C. § 7482(a)(2), which

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[1] That memo was included in the Spring 2010 agenda book, the contents of which can be accessed at http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/ResearchingRules/AgendaBooks.aspx.

[2] The *Shapiro* court explained: "The language of § 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 § 1292(b), also refers solely to the 'district court,' and Rule 5 is expressly excluded from application to the

adopts for interlocutory appeals from the Tax Court a system similar to Section 1292(b)'s system for interlocutory appeals from the district courts.[4] 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 Section 7482(a)(2), the Tax Court has looked to caselaw interpreting Section 1292(b).[5]

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 2010, 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 the Appellate Rules to make clear that Appellate Rule 5 applies to interlocutory tax appeals under Section 7482(a)(2).

II. Evolution of the proposals

During its initial discussions of this question, the Committee noted that it would be useful 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 informally consulted Judge Mark V. Holmes of the U.S. Tax Court 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. Judge Holmes agreed that these appeals are rare, but he noted that occasionally they can present important questions, and he expressed support for the idea of amending the rules to take

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Tax Court by Rule 14." *Shapiro*, 632 F.2d at 171.

[3] *See* H. R. Conf. Report No. 99-841, III, 1986 U.S.C.C.A.N. 4075, 4894.

[4] *See generally* Knibb, Fed. Ct. App. Manual § 18:1 (5th ed.).

[5] *See, e.g., General Signal Corp. & Subsidiaries v. C.I.R.,* 104 T.C. 248, 255 (U.S. Tax Ct. 1995).

account of them. In addition, Douglas Letter consulted the Tax Division of the Department of Justice concerning the possible Title III amendments and related issues. In a March 25, 2009 memorandum, Gilbert Rothenberg – the Chief of the Tax Division's Appellate Section – shared comments and suggestions from Steve Parks, a Tax Division attorney. The memorandum expressed support for the idea of amending the rules to address interlocutory tax appeals.

After further consideration, the Appellate Rules Committee decided to consider possible Appellate Rules amendments to address the question of interlocutory appeals under Section 7482(a)(2). The Committee discussed possible wording for such amendments at its November 2009 meeting and again at the April 2010 meeting. The proposals shown in Part II, below, reflect those discussions as well as the feedback that we received from Chief Judge Holmes and Judge Thornton (on behalf of the Tax Court) and from Mr. Rothenberg (on behalf of the DOJ's Tax Division). I enclose copies of the March 12, 2010, memorandum from Chief Judge Colvin and Judge Thornton and of the April 1, 2010, memorandum from Mr. Rothenberg.

The Rule 13 and 14 proposals shown in Part III of this memo reflect the re-drafting suggestions made in the Tax Court memorandum, as re-styled by Professor Kimble. The Rule 24 proposal shown in Part III of this memorandum reflects the second of the Tax Court's two alternative proposals, as re-styled by Professor Kimble. The second alternative is selected for the reasons stated in Mr. Rothenberg's memorandum; though there is ample authority for the Tax Court to authorize litigants to proceed before the Tax Court in forma pauperis, further research by my research assistant did not disclose any basis to conclude that there is statutory authority for the Tax Court to authorize *appeals* to be taken in forma pauperis.

III. Proposed amendments to Rules 13, 14, and 24

Here are proposed drafts of the amendments to Rules 13, 14, and 24:

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE[6]

TITLE III. ~~REVIEW OF A DECISION OF~~ APPEALS FROM THE UNITED STATES TAX COURT

Rule 13. ~~Review of a Decision of~~ Appeals from the Tax Court

(a) ~~How Obtained; Time for Filing Notice of Appeal~~ Appeal as of Right.

(1) **How Obtained; Time for Filing a Notice of Appeal.**

~~(1) Review of a decision of~~ (A) An appeal as of right from 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

[6]New material is underlined; matter to be omitted is lined through.

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)~~ (B) 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)**~~(2) **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)~~ (3) **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)~~ (4) **The Record on Appeal; Forwarding; Filing.**

~~(1)~~ (A) An appeal as of right from the Tax Court[7] is governed by the parts[8] 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.~~

[7] In more recent style comments, Professor Kimble suggests that this subsection could commence simply "The appeal ..." as opposed to "An appeal as of right from the Tax Court ..."

[8] The Tax Court's proposed amendment would insert "applicable" before "parts." Professor Kimble objects to this insertion on the ground that it would be undesirable to suggest that there are portions of the parts of Rules 10, 11, and 12 regarding the record on appeal, the time and manner of forwarding and filing, and the docketing in the court of appeals that are inapplicable to appeals as of right from the Tax Court.

~~(2)~~ (B) If an appeal as of right from ~~a~~ the Tax Court[9] ~~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.

(b) Appeal by Permission. An appeal by permission is governed by Rule 5.

Committee Note

Rules 13 and 14 are amended to address the treatment of permissive interlocutory appeals from the Tax Court under 26 U.S.C. § 7482(a)(2). Rules 13 and 14 do not currently address such appeals;

[9] In more recent style comments, Professor Kimble suggests that this subsection could commence "If an appeal ..." instead of "If an appeal as of right from the Tax Court ..."

instead, those Rules address only appeals as of right from the Tax Court. The existing Rule 13 – governing appeals as of right – is revised and becomes Rule 13(a). New subdivision (b) provides that Rule 5 governs appeals by permission. The definition of district court and district clerk in current subdivision (d)(1) is deleted; definitions are now addressed in Rule 14. The caption of Title III is amended to reflect the broadened application of this Title.

Rule 14. Applicability of Other Rules to ~~the Review of a~~ Appeals from the Tax Court ~~Decision~~

All provisions of these rules, except Rules ~~4-9~~ 4, 6-9, 15-20, and 22-23, apply to ~~the review of a~~ appeals from the Tax Court ~~decision~~. References in any applicable rule[10] (other than Rule 24(a))[11] to the district court and district clerk are to be read as referring to the Tax Court and its clerk.

Committee Note

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[10] Professor Kimble's more recent style comments suggest that this sentence refer simply to "References in a rule ..." rather than to "References in any applicable rule ..."

[11] I added the parenthetical excluding Rule 24(a) from Rule 14's definitional provision because applying Rule 14's definitional provision to Rule 24(a) would, in effect, purport to authorize the Tax Court to grant motions to proceed on appeal in forma pauperis.

Rule 13 currently addresses appeals as of right from the Tax Court, and Rule 14 currently addresses the applicability of the Appellate Rules to such appeals. Rule 13 is amended to add a new subdivision (b) treating permissive interlocutory appeals from the Tax Court under 26 U.S.C. § 7482(a)(2). Rule 14 is amended to address the applicability of the Appellate Rules to both appeals as of right and appeals by permission. Because the latter are governed by Rule 5, that rule is deleted from Rule 14's list of inapplicable provisions. Rule 14 is amended to define the terms "district court" and "district clerk" in applicable rules (excluding Rule 24(a)) to include the Tax Court and its clerk. Rule 24(a) is excluded from this definition because motions to appeal from the Tax Court in forma pauperis are governed by Rule 24(b), not Rule 24(a).

Rule 24. Proceeding in Forma Pauperis

(a) Leave to Proceed in Forma Pauperis.

(1) **Motion in the District Court.** Except as stated in Rule 24(a)(3), a party to a district-court action who desires to appeal in forma pauperis must file a motion in the district court. The party must attach an affidavit that:

(A) shows in the detail prescribed by Form 4 of the Appendix of Forms the party's inability to pay or to give security for fees and costs;

(B) claims an entitlement to redress; and

(C) states the issues that the party intends to present on appeal.

(2) **Action on the Motion.** If the district court grants the motion, the party may proceed on appeal without prepaying or giving security for fees and costs, unless a statute provides otherwise. If the district court denies the motion, it must state its reasons in writing.

(3) **Prior Approval.** A party who was permitted to proceed in forma pauperis in the district-court action, or who was determined to be financially unable to obtain an adequate defense in a criminal

case, may proceed on appeal in forma pauperis without further authorization, unless:

(A) the district court — before or after the notice of appeal is filed--certifies that the appeal is not taken in good faith or finds that the party is not otherwise entitled to proceed in forma pauperis and states in writing its reasons for the certification or finding; or

(B) a statute provides otherwise.

(4) **Notice of District Court's Denial.** The district clerk must immediately notify the parties and the court of appeals when the district court does any of the following:

(A) denies a motion to proceed on appeal in forma pauperis;

(B) certifies that the appeal is not taken in good faith; or

(C) finds that the party is not otherwise entitled to proceed in forma pauperis.

(5) **Motion in the Court of Appeals.** A party may file a motion to proceed on appeal in forma pauperis in the court of appeals within 30 days after service of the notice prescribed in Rule 24(a)(4). The motion must include a copy of the affidavit filed in the district court and the district court's statement of reasons for its action. If no affidavit was filed in the district court, the party must include the affidavit prescribed by Rule 24(a)(1).

(b) Leave to Proceed in Forma Pauperis <u>on Appeal from the United States Tax Court or</u> on Appeal or Review of an Administrative-Agency Proceeding.[12] ~~When an~~

[12] The proposed amendment to Rule 24(b) reflects the substance of the Tax Court's second alternative proposal, as re-styled by Professor Kimble.

~~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~~ In the following circumstances,[13] 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):

(1) in an appeal from the United States Tax Court; and

(2) when an appeal or review of a proceeding before an administrative agency, board, commission, or officer proceeds directly in the court of appeals.

(c) Leave to Use Original Record. A party allowed to proceed on appeal in forma pauperis may request that

[13] Professor Kimble's most recent style comments suggest deleting "In the following circumstances," so that this subdivision would commence "A party may file ..."

the appeal be heard on the original record without reproducing any part.

Committee Note

Rule 24(b) currently refers to review of proceedings "before an administrative agency, board, commission, or officer (including for the purpose of this rule the United States Tax Court)." Experience suggests that Rule 24(b) contributes to confusion by fostering the impression that the Tax Court is an executive branch agency rather than a legislative court. (As a general example of that confusion, appellate courts have returned Tax Court records to the Internal Revenue Service, believing the Tax Court to be part of that agency.) To remove this possible source of confusion, the quoted parenthetical is deleted from subdivision (b) and appeals from the Tax Court are separately listed in subdivision (b)'s heading and in new subdivision (b)(1).

Encls.

UNITED STATES TAX COURT

WASHINGTON, DC 20217

March 12, 2010

Memorandum to: Judge Jeffrey S. Sutton, Chair of the Federal Appellate Rules Committee

From: Chief Judge John O. Colvin, United States Tax Court John O. Colvin

Judge Michael B. Thornton, Chair of the Rules Committee Michael B. Thornton

Re: Permissive Interlocutory Appeals and Proposed Amendments to F. R. App. P. 13, 14, and 24

Thank you for providing the Tax Court an opportunity to consider and comment on the proposed amendments to rules 13 and 14 of the Federal Rules of Appellate Procedure addressing permissive interlocutory appeals. The Tax Court generally agrees with the proposals outlined in your March 1, 2010, letter, and the memorandum attached thereto. While the Court agrees that section 7482(a)(2) of the Internal Revenue Code legitimately applies to only a small number of cases, it finds convincing the comment shared in Gilbert Rothenburg's March 25, 2009, memorandum that an amendment to the Federal Rules of Appellate Procedure seems appropriate given the fact that Congress thought section 7482(a)(2) useful enough to warrant enactment. With respect to the drafting approach proposed by the Federal Appellate Rules Committee, the Court agrees with the drafting proposals but also requests that the Committee consider an alternative draft proposed by the Court, a copy of which is attached.

The drafting proposals would adopt the terms used in rules 4 and 5 regarding appeals "as of right" and appeals "by permission", consolidate provisions relating to appeals as of right in a revised rule 13, and place new provisions relating to permissive interlocutory appeals in a revised rule 14. Revised rule 13 would add a new subdivision (e), setting forth the other rules of appellate procedure that are applicable to appeals as of right from the Tax Court, and possibly including a definition of district court and district clerk as meaning the Tax Court and its clerk. Revised rule 14 would also set forth the other applicable rules and include a definition of district court and district clerk.

The Court suggests that revised rule 13 contain the procedures for both types of appeals and that revised rule 14 continue to set forth the other rules applicable to appeals from the Tax Court. Structuring Title III so as to list only once the provisions applicable to the Tax Court would streamline the rules, eliminate redundancy, and provide more easily comprehensible information for pro se taxpayers.

In reviewing the Federal Appellate Rules Committee's drafting proposals and preparing the alternative draft, the Court considered the questions raised with respect to the inapplicable provisions in current rule 14 and to the location of the definition of district court and district clerk. After reviewing the excepted rules listed in the drafting proposal for revised rules 13 and 14, the Court is satisfied that it agrees those exclusions appropriately delineate which appellate rules should apply to appeals from the Tax Court. However, the Court suggests that the exclusion of rule 5(d)(1)(B) be eliminated, as that subdivision refers to bonds under rule 7, the application of which has already been excluded, and subdivisions in other rules that are clearly inapplicable have not been similarly carved out (e.g., rule 3(a)(1), referring to excluded rule 4). The Court agrees that it would be useful to provide a global definition instead of specifying only certain rules in which the terms district court and district clerk are to be read as the Tax Court and its clerk, and believes that the alternative approach found in rule 6(b)(1)(C), referring to "any applicable rule", is preferable.

The Court also notes it is grouped with administrative agencies, boards, commissions, and officers for purposes of leave to proceed in forma pauperis under rule 24(b). When rule 24 was adopted in 1967, the Tax Court was an independent agency in the Executive Branch of the Government, and, as the Committee note to subdivision (a) states, "[a]uthority to allow prosecution of an appeal in forma pauperis is vested in '[a]ny court of the United States' by 28 U.S.C. sec. 1915(a)." The Tax Court began in 1924 as the Board of Tax Appeals, and its Board members were appointed by the President, subject to Senate confirmation. Revenue Act of 1924, ch. 234, sec. 900(k), 43 Stat. 253, 338. In 1942, the name of the Board was changed to the Tax Court of the United States and its members became Judges, but the Court remained an independent agency in the Executive Branch. Revenue Act of 1942, ch. 619, sec. 504(a), 56 Stat. 798, 957.

In 1969, the Court was established as an Article I court and its name was changed to the United States Tax Court with the express purpose of removing the Court from the Executive Branch.

Tax Reform Act of 1969, Pub. L. 91-172, sec. 951, 83 Stat. 730, codified as 26 U.S.C. sec. 7441; see S. Rept. 91-552, at 303, 1969-3 C.B. 614, 615.

In 1991, the Supreme Court confirmed that the Tax Court is a court of law closely resembling the Federal District Courts, that the Tax Court exercises solely judicial powers, and that it remains independent of both the Executive and the Legislative Branches. Freytag v. Commissioner, 501 U.S. 868 (1991).

The Committee note to the 1979 amendment to rule 24(b) indicates that the amendment reflected the change in the title of the Tax Court to the "United States Tax Court", and the establishment of the Court under Article I of the Constitution, citing section 7441 of the Internal Revenue Code. However, continued inclusion of the Court in rule 24(b) may not accurately reflect the intent of the 1979 amendment to recognize the Court as independent of the Executive Branch, and causes confusion for both Courts of Appeals and appellants; e.g., appellate courts have returned Tax Court records to the Internal Revenue Service, believing the Court to be part of that agency.

The Court therefore proposes that the parenthetical "(including for the purpose of this rule the United States Tax Court)" be deleted from rule 24(b). Consistent with the proposed global definition of district court and district clerk as referring to the Tax Court and its clerk, motions for leave to proceed in forma pauperis in an appeal from the Tax Court would then be considered by the Tax Court under rule 24(a). In the alternative, the Court proposes that the title and the text of rule 24(b) be amended to distinguish appropriately its proceedings from administrative and agency proceedings. A copy of the proposed alternative amendments to rule 24(b) is attached.

Either of the suggested amendments to rule 24 would eliminate the inconsistency between the rule as promulgated in 1967 and the 1969 statutory change referred to above. The first of the two alternatives would result in the Tax Court's authorizing in forma pauperis appeals to the Courts of Appeals. The Court has experience with AO Form 240, the substance of which the Court uses in determining the financial need of taxpayers in connection with their requests for the Court to: (1) Waive the payment of filing fees, and (2) pay the costs of interpreters and posttrial transcripts. In the latter situation, the Court's guidelines require it to determine whether a case presents a substantial question and is not frivolous. Pursuant to 28 U.S.C. section 1915(a)(3) and rule 24(a), the trial court must certify in writing if an appeal is not taken in good faith. See Coppedge

v. United States, 369 U.S. 438, 444 n. 8 (1962) (quoting Senator Bacon of the Senate Judiciary Committee discussing the predecessor of section 1915, "[w]hen a judge has heard a case and it is about to be carried to an appellate court, he * * * is in a position to judge whether * * * the litigant is proceeding in good faith.") The Court would endorse a judgment by the Committee to follow that approach and assign the certification duty to our Court. The second of the two alternatives would leave that certification process at the Courts of Appeals.

TITLE III. ~~REVIEW OF A DECISION OF~~ APPEALS FROM THE UNITED STATES TAX COURT

Rule 13. ~~Review of a Decision of~~ Appeals From the Tax Court

(a) ~~How Obtained; Time for Filing Notice of Appeal~~ Appeal as of Right.

(1) How Obtained; Time for Filing Notice of Appeal.

(A) ~~Review of a decision of~~ An appeal as of right from 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)~~ **(B)** 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)~~ **(2) 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 section 7502 of the Internal Revenue Code, as amended, and the applicable regulations.

~~(c)~~ **(3) 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)~~ (4) **The Record on Appeal; Forwarding; Filing.**

~~(1)~~ (A) An appeal as of right from the Tax Court is governed by the applicable 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)~~ (B) If an appeal as of right from ~~a~~ the 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.

(b) **Appeal by Permission.** An appeal by permission is governed by Rule 5.

Rule 14. Applicability of Other Rules to ~~the Review of a~~ Appeals From the Tax Court ~~Decision~~

All provisions of these rules, except Rules ~~4-9,~~ 4, 6-9, 15-20, and 22-23, apply to ~~the review of a~~ appeals from the Tax Court ~~decision~~. References to the district court and district clerk in any applicable rule are to be read as referring to the Tax Court and its clerk.

Rule 24. Proceeding in Forma Pauperis

* * * * * * *

(b) Leave to Proceed in Forma Pauperis on Appeal or Review of an Administrative-Agency Proceeding. 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).

- Or, in the alternative -

Rule 24. Proceeding in Forma Pauperis

* * * * * * *

(b) Leave to Proceed in Forma Pauperis <u>on Appeal From the United States Tax Court or</u> on Appeal or Review of an Administrative-Agency Proceeding. <u>In an appeal from the United States Tax Court or</u> ~~When~~ <u>when</u> 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).

U. S. Department of Justice

Tax Division

Deputy Assistant Attorney General

Washington, D.C. 20530

JAD:GSR:DIP:ATSheehan
5-0

April 1, 2010

The Honorable Jeffrey S. Sutton
United States Court of Appeals
for the Sixth Circuit
85 Marconi Boulevard
Columbus, OH 43215

Re: Proposed Amendments to the Federal Rules of Appellate Procedure Regarding the United States Tax Court

Dear Judge Sutton:

We have received the February 25, 2010 memorandum from Professor Catherine T. Struve (on behalf of the Appellate Rules Committee) regarding proposed amendments to the Federal Rules of Appellate Procedure applicable to the United States Tax Court. We have also received the March 12, 2010 memorandum from Chief Judge John O. Colvin (on behalf of the Tax Court) regarding Federal Rules of Appellate Procedure 13, 14, and 24(b). We agree with the goals of the project — primarily to address permissive interlocutory appeals authorized by 26 U.S.C. § 7482(a)(2) — and we appreciate the opportunity to comment upon the proposals.

Regarding the proposed amendments to Federal Rules of Appellate Procedure 13 and 14, we have a preference for the proposal suggested by the Tax Court over the proposal suggested by the Appellate Rules Committee. Although both proposals are substantively the same, we believe that the Tax Court's proposal organizes the provisions in a manner that is easier to follow and that requires less repetition. Under the Tax Court's proposal, the provisions governing the taking of an appeal from the Tax Court are consolidated in Rule 13, and the provisions governing the applicability of the other Federal Rules of Appellate Procedure are consolidated in Rule 14. Under the Committee's proposal, Rule 13 governs appeals as of right, and Rule 14 governs permissive appeals. As a consequence, both of the

Committee's proposed rules contain a list of other applicable Federal Rules and a statement that references in the other applicable rules to a district court and its clerk are to be read as a reference to the Tax Court and its clerk. The Tax Court's approach requires only one list and one statement about courts and their clerks.

The Tax Court's memorandum also suggests two alternate proposals for an amendment to Federal Rule of Appellate Procedure 24, governing the granting of leave to proceed *in forma pauperis*. As discussed below, we have concerns about the existence of sufficient statutory underpinnings for the first proposal, and therefore prefer the second, alternative proposal.

Section 1915 of 28 U.S.C. empowers "any court of the United States" to authorize a litigant to proceed *in forma pauperis*. The definition of the term "court of the United States" in 28 U.S.C. § 451, however, would seem to exclude the Tax Court, the judges of which are not given lifetime appointments.* Consistent with 28 U.S.C. § 1915, Rule 24(a) gives the district courts (which *are* courts of the United States) a role in determining whether a litigant can proceed *in forma pauperis*, and current Rule 24(b) reserves to the courts of appeals the authority to make that determination when an appeal would be from the Tax Court or an administrative agency. As noted in the Tax Court memorandum (at page 3), the first proposal for an amendment to Rule 24 would allow the Tax Court to consider motions for leave to proceed *in forma pauperis* on appeal. We are concerned that such a purported authorization would conflict with the apparent denial of such

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* Section 451 of Title 28 provides in pertinent part:

§ 451. Definitions

As used in this title:

> The term "court of the United States" includes the Supreme Court of the United States, courts of appeals, district courts constituted by chapter 5 of this title, including the Court of International Trade and any court created by Act of Congress the judges of which are entitled to hold office during good behavior. . . .

authorization in 28 U.S.C. §§ 451 and 1915. The Tax Court's second proposal, on the other hand, addresses that court's justifiable interest in recognition of its status as a court (in contrast to an administrative agency, board, commission, or officer), while avoiding the potential conflict with 28 U.S.C. §§ 451 and 1915. For those reasons, we believe that the second, alternative proposal should be adopted.

Further questions or comments on these matters can be addressed to Acting Deputy Assistant Attorney General Gilbert S. Rothenberg, who can be reached at (202) 514-3361.

Sincerely yours,

JOHN A. DICICCO
Acting Assistant Attorney General
Tax Division

By: Gilbert S. Rothenberg
GILBERT S. ROTHENBERG
Acting Deputy Assistant Attorney General

5294656.1

TAB

V-A2

MEMORANDUM

DATE: September 16, 2010

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 08-AP-D

This memo discusses two proposals that have been considered by the Civil / Appellate Subcommittee: a proposal to amend Appellate Rule 4(a)(4), and a proposal to amend Civil Rule 58. The two proposals grew out of a set of comments[1] submitted in connection with the 2009 amendment to Appellate Rule 4(a)(4)(B)(ii).[2]

Part I of this memo discusses the Appellate Rule 4(a)(4) proposal, which is designed 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. Revisions to Rules 4(a)(4)(A) and (B) would address this problem.

Part II of the memo discusses the possibility of amending Civil Rule 58(a). The idea for this amendment grew out of the discussions concerning Mr. Batalden's suggestion, but the amendment itself is conceptually separable from the Appellate Rule 4(a)(4) amendment. There was some division on the Civil / Appellate Subcommittee concerning the desirability of the Civil

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[1] The full text of the comments is available at http://www.uscourts.gov/rules/2007_Appellate_Rules_Comments_Chart.html.

At its fall 2009 meeting, the Committee removed from its agenda two other suggestions that also were submitted in the same group of comments. These suggestions, by Public Citizen and by the Seventh Circuit Bar Association Rules and Practice Committee, advocated that Rule 4(a) be amended so that an original notice of appeal encompasses appeals from orders disposing of tolling motions. Members questioned the need for such an amendment, and the amendment would have been difficult to draft.

[2] The 2009 amendment made the following change to Rule 4(a)(4)(B)(ii):

(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.

Rule 58(a) amendment, and I expect that the Civil Rules Committee will discuss the matter further at its upcoming meeting.

Thus, the questions for the Appellate Rules Committee are (1) whether to seek an amendment to Appellate Rule 4(a)(4); (2) whether to express a view on the desirability of amending Civil Rule 58(a); and (3) whether the Appellate Rule 4(a)(4) amendment is desirable even if the Civil Rules Committee decides not to proceed with the proposed amendment to Civil Rule 58(a). This memo suggests that the Committee answer questions (1) and (3) in the affirmative.

I. Proposed amendments to Appellate Rule 4(a)(4)

Part I.A. below notes that 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, amending Rule 4(a)(4) is worthwhile. Part I.B. sets forth the proposed amendments.

A. The desirability of the proposed amendments

As Mr. Batalden pointed out, there may be some instances when more than 30 days elapse 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.[3] 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:

[3] 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 that (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.

(1) file the notice of appeal by Day 30 (and then withdraw the notice of appeal if the plaintiff rejects the reduced award);[4]

(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'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."

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 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).[5] Under Rule 4(a)(7)(A),

[a] judgment or order is entered for purposes of this Rule 4(a):

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[4] 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.

[5] 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 Supreme Court. Absent contrary action by Congress, that technical amendment will 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).[6] 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 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 Employers Ins. of Wausau v. Titan Intern., Inc.*, 400 F.3d 486, 489 (7th Cir. 2005) ("The only way to reconcile the requirement that an amended judgment be set forth in a separate document with the exception to that requirement for an order disposing of a Rule 59(e) motion is by reading 'disposing of a motion' as 'denying a motion.'"); *Kunz v. DeFelice*, 538 F.3d 667, 673 (7th Cir. 2008) (following *Wausau*). In the Seventh Circuit, and any circuit that might come to follow it, it would seem 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 the approach taken in *Wausau* and *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.)

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[6] 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.

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 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.

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. 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.[7]

B. The proposed amendments to Rule 4(a)(4)

Here are the proposed amendments to Appellate Rule 4(a)(4):

Rule 4. Appeal as of Right – When Taken

(a) Appeal in a Civil Case.

***

(4) **Effect of a Motion on a Notice of Appeal.**

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[7] The proposal shown in Part I.B. differs from Mr. Batalden's suggested approach. Under his approach, 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'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." 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).

(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[8] 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 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~~ 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.

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[8] Apart from the larger questions concerning the desirability of the possible changes discussed in this memo, there is a more technical consideration that would affect the drafting of any such 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 both of the amendments discussed in this memo, it will be necessary to decide whether to continue using these terms in the disjunctive; on the other hand, if Appellate Rule 4 is amended without any corresponding amendment of the Civil Rules, the Committee may prefer not to address this linguistic question.

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a 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 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. Proposed amendments to Civil Rule 58(a)

The Rule 4(a)(4) amendments discussed in Part I, if adopted, will remove the problem that Mr. Batalden has identified. But they would not address the questions that arise from the Seventh Circuit's interpretation of Civil Rule 58(a) in *Wausau* and *Kunz*. The question therefore arises whether it would also be advisable to amend Civil Rule 58(a).

The concerns expressed by the Seventh Circuit in *Wausau* and *Kunz* are understandable, and they can be traced to the linguistic problems identified in Part I.A – problems that would be removed by the proposed Appellate Rule 4(a)(4) amendments shown in Part I.B. But removing the root causes for the concerns that the Seventh Circuit sought to address would not remove the application issues lurking in the *Wausau* and *Kunz* decisions. To address the latter, the Civil Rules Committee is considering whether to amend Civil Rule 58(a).

To see why one could argue that the reasons underlying the Seventh Circuit's interpretation of Civil Rule 58(a) can be traced to the problem addressed in Part I of this memo, it is useful to take as an example a stylized version of the facts of *Wausau*.[9] On November 14, 2003, the district court entered judgment for plaintiff in the amount of $ 243,119. On February 4, 2004, the district court issued an order granting plaintiff's timely Rule 59(e) motion (which had pointed out that the original judgment omitted prejudgment interest). "On March 11, [2004,] the district court issued a judgment order captioned 'Amended Judgment in a Civil Case' and described in the body of the order as a judgment entered pursuant to Fed.R.Civ.P. 58. The judgment was for [$ 243,119, plus] the prejudgment interest, and the costs, all in the amounts specified in the February 4 order. The defendants appealed within 30 days of the March 11 judgment." *Wausau*, 400 F.3d at 488. The plaintiff contended "that since an order disposing of a Rule 59 motion is not required to be set forth on a separate document, the 30 days within which the defendants had to file a notice of appeal started to run on February 4." *Id.* at 489. The court of appeals rejected this contention based on the following reasoning:

> [T]he district judge entered an amended judgment on March 11; and Rule 58 requires, as we know, that every amended judgment be set forth on a separate document – and when a separate document is required, the time to appeal runs from the date on which that document was docketed, provided it is docketed within 150 days after the judgment, a condition satisfied here.
>
> The only way to reconcile the requirement that an amended judgment be set forth in a separate document with the exception to that requirement for an order disposing of a Rule 59(e) motion is by reading "disposing of a motion" as "denying a motion." The reading is supported, though muddily, by the Committee Note to the 2002 Amendment to Rule 58. The note states that "if disposition of the [Rule 59(e)] motion results in an amended judgment" – as it did here – "the amended judgment must be set forth on a separate document," as it was, on March 11. Granting a motion is one way of "disposing" of it, but when a motion to amend a judgment is granted, the result is an amended judgment, so the rule becomes incoherent if "disposing" is read literally, for then the order granting the motion both is, and is not, an order required to be set forth in a separate document.... So we are driven to interpret "disposing" as "denying," not "granting or denying," and thus we conclude that the defendants' appeal was timely, because it was an appeal from an amended judgment and thus from a grant rather than a denial of a Rule 59(e) motion.

Id.

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[9] The description of *Wausau*'s facts omits details that – for purposes of the discussion here – are inessential.

In this passage, the *Wausau* court conflated the order granting the Rule 59(e) motion with the resulting amended judgment. By contrast, the 2002 Committee Note to Civil Rule 58(a) distinguishes between the two: "The exemption [from the separate document requirement] of the order disposing of the motion does not excuse the obligation to set forth the judgment itself on a separate document. And if disposition of the motion results in an amended judgment, the amended judgment must be set forth on a separate document." Distinguishing the order from the amended judgment might have led the court in *Wausau* to conclude that a separate document was required for the March 11 amended judgment but not for the February 4 order granting the Rule 59(e) motion.

But such an interpretation (requiring a separate document for the amended judgment but not for the order granting the Rule 59(e) motion) would have raised a variant of the problem discussed in Part I of this memo: Under Rule 4(a)(4)(B)(ii), the defendants would have had to file their notice of appeal within 30 days from the entry of the February 4 order, even though the amended judgment had not yet been entered at that point. The *Kunz* court's discussion sounds a similar theme: "If orders disposing of this set of post-judgment motions, including motions under Rule 59, were not subject to the separate-document rule, there is a risk that we would effectively have read the separate-document requirement out of the rule for almost all amended judgments." *Kunz*, 538 F.3d at 673. The principal reason why reading Civil Rule 58(a)'s reference to orders "disposing" of tolling motions as including orders *granting* tolling motions would risk reading the separate-document requirement out of the rule for most amended judgments is that even if the amended judgment were not set forth in a separate document, under Appellate Rule 4(a)(4)(B)(ii) the time for appealing the amended judgment would run from entry of the order granting the motion (an order which, under this interpretation, would not be required to be set forth in a separate document).

It therefore seems likely that, in a circuit with no precedents akin to *Wausau* and *Kunz*, the Appellate Rule 4(a)(4) amendments set forth in Part I of this memo would solve any Civil Rule 58(a) problem. If we imagine the facts of *Wausau* arising after the adoption of the proposed Appellate Rule 4(a)(4) amendment, the appeal-time analysis would run as follows: The defendant's time to appeal (from both the order granting the Rule 59(e) motion and from the resulting amended judgment) ran "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" – or, in other words, from the latest of the date of entry of the February 4 order (let us suppose it was entered on February 4) or (since the motion's disposition did result in amendment of the judgment) entry of the March 11 amended judgment. In other words, under the proposed new language for Appellate Rule 4(a)(4)(B)(ii), it would be clear that the appeal time runs from entry of the March 11 judgment. And it would cause no logical problems (for purposes of appeal time) to read Civil Rule 58(a) as requiring a separate document for the March 11 judgment but not for the February 4 order, because in this hypothetical the relevant event (for appeal time purposes) would be entry of the March 11 judgment.

So the Appellate Rule 4(a)(4) amendment proposed in Part I of this memo may help solve the problem identified in *Wausau* and *Kunz*. Nonetheless, does the Seventh Circuit's future adherence to that approach provide a reason to consider amending Civil Rule 58(a)? Some may think that *Wausau* and *Kunz*'s interpretation of Civil Rule 58(a)'s reference to orders "disposing of" tolling motions to mean orders "denying" such motions departs from the intent of those who drafted the current Rule. The problem is that some orders may grant a tolling motion without entailing any amendment of the judgment:

> The simplest illustration of an order that grants a tolling motion without leading to an amended judgment is 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.

Minutes of the October 8-9, 2009 Civil Rules Committee Meeting, at 32.

It is possible that the Seventh Circuit may decide to interpret *Wausau* and *Kunz* so that they do not cover instances where the grant of the tolling motion results in no change to the judgment. One could certainly argue for that interpretation of the cases, because in both cases the court's concern centered on the effect of the Rule's language on cases in which grant of a tolling motion results in a change to the judgment. As the *Wausau* court put it:

> Granting a motion is one way of "disposing" of it, but *when a motion to amend a judgment is granted, the result is an amended judgment*, so the rule becomes incoherent if "disposing" is read literally, for then the order granting the motion both is, and is not, an order required to be set forth in a separate document. Nonsensical, or as here logically impossible, interpretations of statutes, rules, and contracts are unacceptable.... So we are driven to interpret "disposing" as "denying," not "granting or denying[]" ....

Wausau, 400 F.3d at 489 (emphasis added). If the Seventh Circuit were to clarify that *Wausau* and *Kunz* apply only to motion grants that result in changes to the underlying judgment, then those cases would no longer have the potential to confuse litigants concerning the operation of the separate document requirement in cases where a motion grant does not result in any changes to the underlying judgment.

If the Civil Rules Committee were to decide that, in the meantime, it is important to clarify the question, then it might decide to amend Civil Rule 58(a) along something like the following lines:

1 **Rule 58. Entering Judgment**

(a) Separate Document. Every judgment and [altered or[10]] 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~~sing~~s of a motion:[11]

(1) for judgment under Rule 50(b);

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[10] "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.

[11] Professor Cooper suggests that this wording – "when an order – without altering or amending the judgment – disposes ..." – is awkward. On further consideration, he suggests that any of the following would be preferable to the language set out in the text: "but unless it [alters or] amends the judgment, a separate document is not required for an order disposing of * * *"; "but, if it does not [alter or] amend the judgment, a separate document is not required for an order disposing of * * *"; "but a separate document is not required for an order that does not [alter or] amend the judgment and disposes ~~disposing~~ of * * *."

We have also discussed another possibility – namely, whether it would work to reframe Rule 58(a) to read:

> (a)(1) Every judgment and amended judgment must be set out in a separate document.
>
> (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?

(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

The 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.]

[A pending amendment to Appellate Rule 4 clarifies 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.]

III. Conclusion

For the reasons noted in Part I.A. of this memo, it seems worthwhile to amend Appellate Rule 4(a)(4) to address the concerns raised by Mr. Batalden. As discussed in Part II, the Civil Rules Committee is considering whether to amend Civil Rule 58(a) to clarify the operation of the separate document requirement in cases where the district court's grant of a tolling motion does not result in any change to the underlying judgment. It remains to be seen whether the Civil Rules Committee will decide in favor of such an amendment. The Appellate Rule 4(a)(4) proposal stands on its own and is worth pursuing whether or not the Civil Rules Committee decides to proceed with the Civil Rule 58(a) amendment.

TAB

VI-A

AGENDA ITEM 08-AP-G WILL BE AN ORAL REPORT

TAB

VI-B

MEMORANDUM

DATE: September 16, 2010

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 08-AP-H

The Civil / Appellate Subcommittee is currently considering the issues raised by Item 08-AP-H, which concerns the doctrine of "manufactured finality." Enclosed are Professor Cooper's notes from the Subcommittee's latest conference call. Although the Subcommittee as a whole has not reviewed these notes, they provide a sense of the Subcommittee's most recent discussions.

Encl.

Rough Notes, Civil-Appellate Conference Call
8 September 2010

The Civil-Appellate Rules Subcommittee convened by conference call on September 8, 2010, to discuss the subject of "manufactured finality." Participants included Subcommittee Chair Colloton, Subcommittee members Keisler, Letter, Mahoney, and Walker, as well as Reporters Struve and Cooper.

The call began with a reminder that discussion at the most recent prior call concluded with the suggestion that some simplified models be prepared to focus consideration of the core issues. The question for this call is whether the time has come to go to the full advisory committees, with a general request for reactions on the broad topic, with actual specific proposals for new rules, or with a recommendation to remove the topic from the active agenda.

The most recent simplified sketches of rules text were summarized. One would focus on creating finality by dismissing with prejudice everything that remains in an action. This approach could either remain silent on the possibility of manufacturing finality by dismissing without prejudice or by dismissing with "conditional prejudice," or it could aim to explicitly exclude those alternative paths to finality. Or a rule could expressly recognize the opportunity to create finality by a conditional dismissal with prejudice. The idea would be that the dismissal establishes absolute prejudice (preclusion) if the judgment is affirmed, but dissolves if the judgment is reversed. Any of these approaches could be adopted as an entirely new rule, or by adding to present rules. Civil Rules 41 and 54 would be the most likely places to amend a present rule.

Discussion began with the suggestion that it would be useful to adopt a rule recognizing the power to create a final judgment by dismissing all remaining parts of an action with prejudice. Although most courts recognize this rule, it would help to make it explicit and uniform. Some lawyers may not be aware of this opportunity. It would be useful to provide explicitly that dismissal without prejudice does not suffice to establish finality. And the question of conditional prejudice should be explored further.

Most of the discussion focused on dismissal with conditional prejudice. The view was expressed that on first examination, this seems an attractive idea. Suppose a plaintiff has four claims. Two are regarded as central, while the other two are regarded as peripheral. The defendant wins dismissal of the two central claims. The plaintiff may believe that the remaining two claims do not justify continuing the action, and is prepared to sacrifice them finally if it cannot on appeal overturn dismissal of the two central claims. Why not allow appeal on a "bet-the-case" basis? Affirmance means there is no further trouble for the courts or other parties. Reversal means the plaintiff was right, and should

be allowed whatever additional benefit may come from pursuing the peripheral claims on remand. The peripheral claims may add to the relief won on the central claims, or — if the central claims do not survive all the way to judgment — may provide the only relief.

These virtues of conditional-prejudice dismissals were expressed repeatedly.

Doubts were also expressed about the possibility of recognizing conditional prejudice in rule text. One common setting would involve a motion to dismiss all four claims, followed by a ruling that dismisses the two central claims but denies the motion to dismiss the two peripheral claims. In that setting an appeal by the plaintiff would support a cross-appeal by the defendant, so that if dismissal of the two central claims is reversed the court of appeals could address the refusal to dismiss the two peripheral claims and, perhaps, reverse. All of that seems efficient. But suppose the defendant did not move to dismiss the peripheral claims, perhaps judging that they did state a claim and also guessing that they would not support further litigation standing alone? Or suppose the defendant did move to dismiss the peripheral claims, but the court did not rule on the motion? Particularly in complex matters, the court may prefer to address the case in stages. For that matter, it may choose to dismiss the central claims on one ground without addressing alternative grounds — it might find a lack of subject-matter jurisdiction, deny standing, or the like, and not address the claims on the merits. In that setting the defendant is not in a position to raise on appeal the questions not yet decided in the district court. There is no harm if dismissal of the two central claims is affirmed, hardening the conditional prejudice into absolute prejudice, but if dismissal is reversed the defendant faces the prospect that there may be multiple piecemeal appeals on other points as the case progresses. That may be undesirable. Yet another complication was introduced. Suppose there are six claims. The trial court dismisses four, reserving rulings as to the remaining two. A conditional-prejudice appeal is taken, but only as to the first two, notwithstanding the opportunity to include the third and fourth claims in the appeal. Dismissal of the first two claims is reversed. What should be the effect of failure to appeal as to the third and fourth claims? Should the trial court remain free to depart from the law of the case if it finds good reason to do so, as affected by the fact that further proceedings are required as to claims one, two, five, and six? If the trial court chooses to stand firm as to claims three and four, should the plaintiff be allowed to resurrect them on appeal from a final judgment? Law-of-the-case doctrine is often employed to refuse consideration on a second appeal of matters open for review but not raised on the first appeal. So it is likely to be here. But need a rule address the problem?

Concerns were also expressed that even if a rule could be crafted for cases involving only one plaintiff and one defendant,

it may be difficult for a rule to address the complexities that arise with multiparty, multiclaim cases.

Given the risk of piecemeal appeals, it was suggested that perhaps Rule 54(b) should remain, without change, the only alternative to dismissing all remaining parts of the action with real prejudice. This alternative limits the opportunity to appeal when an adverse ruling severely affects a claim but does not finally dispose of it. A court might rule, for example, that conduct challenged under § 1 of the Sherman Act must be subjected to full-blown rule-of-reason proof, not per se or quick-look analysis. The claim survives, and Rule 54(b) is not available. But the impact on the claim can be immense. Or the court might exclude the most persuasive and important evidence on a claim, leaving the plaintiff with just enough to survive summary judgment and limp through trial. One way to frame the question is to ask whether Rule 54(b) might be expanded. Rule 54(b) has the advantage that it retains the role of the trial judge as "dispatcher," determining whether a present appeal makes sense for the most orderly management of the case going forward. A variation might be to designate all of present Rule 54(b) as a separate paragraph, Rule 54(b)(1), and add a new (b)(2) that authorizes the court to enter a partial final judgment if a party asks to dismiss a claim that has not been definitively disposed of for the purpose of appealing rulings affecting the claim. This provision could require dismissal of the designated claim with prejudice, so that no part of it could be revived in the event of affirmance, while remaining claims remain alive in the trial court. The trial judge's evaluation of the impact of an appeal on case management and on other parties might resolve the concerns about piecemeal appeals. To be sure, a trial judge's calculation may be influenced by vague intuitions about the progress and proper outcome of the case, and by insufficient regard for the impact on appellate workloads. It might be possible to require permission of both courts, as in § 1292(b), but that alternative may prove unduly cumbersome. Abuse of discretion would remain a safeguard, as it is now under Rule 54(b).

The Second Circuit was identified as a court that has recognized conditional-prejudice finality for several years. It was recognized that experience of courts in the Second Circuit may provide a small-scale laboratory to test the fear that undesirable piecemeal appeals may be encouraged by this practice. One of the tasks to be addressed next will be an attempt to discover whether there indeed have been problems. If substantial problems are found, that will be an important caution. The apparent lack of substantial problems also will be interesting, but may not be as useful. It will not be clear how many lawyers are aware of this variation on manufactured finality. Adoption of a rule expressly recognizing the practice might easily encourage greater use — perhaps far greater use — than an appellate opinion known only to a few cognoscenti. A member did question, however, whether there

is sufficient demonstrated need for a conditional-prejudice rule if the matter has not arisen in a single published decision since the Second Circuit recognized the device in 2001.

A recurring theme was brought back for brief discussion. Comparable problems may arise in criminal cases. An example is conviction by conditional plea. The conditional plea explicitly preserves designated issues for appeal. If all of the rulings preserved for appeal are affirmed, the conviction stands. But if one or more are reversed, the first question is whether the defendant wishes to withdraw the plea on remand. If the plea is withdrawn, a question might arise whether the defendant can revive other issues that were not reserved in the conditional plea. It will be useful to pursue this question, with an eye to deciding whether any new provisions should be included in the Civil Rules and perhaps the Criminal Rules, or whether instead a combined provision might be included in the Appellate Rules.

Bringing these various strands together, discussion returned to the questions framed at the outset. There is substantial support for going forward to consider a new rule. It will be useful to establish a uniform and well-known rule, clearing up some of the inconsistencies among different circuit approaches. But the question is complicated even when approached from a perspective that focuses directly only on a two-party case with all claims advanced by the plaintiff. It may be possible to confine a rule to such cases. It may be wise to focus only on the simpler cases, leaving more complex cases to continued evolution in decisional law. Or it may be sensible to allow manufactured finality only in simple cases — an example would be a rule allowing manufactured finality only if the would-be appellant can engineer a complete dismissal with prejudice of all that remains in the action. A difficult question continues to be whether the conditional-prejudice approach can be adopted on terms that do enough good by securing prompt appellate review of rulings on "bet-the-case" terms to justify the risk of undesirable piecemeal appeals. Questions also remain about how frequently this situation arises, and whether it is common enough to warrant the attention of the rulemaking process and to justify the potential negative consequences.

These questions will be the subject of further deliberations. When it becomes better focused, it will be time enough to bring something to the Appellate and Civil Rules Committees. The first report may simply ask for broader discussion of a model, or competing models. Or it might ask review of a firm proposal. Work will continue toward these ends.

TAB

VI-C

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

LEE H. ROSENTHAL
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

JEFFREY S. SUTTON
APPELLATE RULES

LAURA TAYLOR SWAIN
BANKRUPTCY RULES

MARK R. KRAVITZ
CIVIL RULES

RICHARD C. TALLMAN
CRIMINAL RULES

ROBERT L. HINKLE
EVIDENCE RULES

August 25, 2010

The Honorable William Jay Riley
Chief Judge
United States Court of Appeals
for the Eighth Circuit
Roman L. Hruska United States Courthouse
111 South 18th Plaza, Suite 4303
Omaha, Nebraska 68102

Dear Chief Judge Riley:

In my capacity as the Chair of the Advisory Committee on the Federal Rules of Appellate Procedure, I write to ask for your input about a pending proposal concerning the filing of amicus curiae briefs in the courts of appeals.

Under FRAP 29(a), "[t]he 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. Otherwise, the entity must obtain the permission of all parties in the case or, failing that, seek permission from the court to file the amicus brief. The proposal under consideration is whether to extend the favorable treatment given to the United States and the States to Indian Tribes.

At least two questions arise in connection with the proposal. One is whether to change the rules simply as a matter of dignity—that the Tribes, as quasi-sovereigns, deserve the same treatment as the National Government and the States with respect to the filing of amicus briefs. The other is whether the current rule is creating any hardship. In considering the latter point, we looked at the Tribes' experiences—the number of requests made to file amicus briefs, the courts in which the requests were filed and the extent to which they were successful. The attached memo lays out the statistics.

As you will see, most of the relevant motions were filed in the Eighth, Ninth and Tenth Circuits. This reality prompted us to wonder two things: (1) how in general your circuit reacts to the proposal; and (2) whether it is worth amending your local rules to allow the Tribes to file amicus briefs without the permission of the parties or the court. As to the second point, we see nothing in the rule that would prohibit such a local rule and it might eliminate the need to amend the national rule.

I will follow up this letter with a phone call to see if you have reactions to these questions or any other thoughts about the matter. In the interim, thank you for your consideration.

Sincerely,

Jeffrey S. Sutton

JSS:jmf
Enclosure

cc: Catherine T. Struve, Reporter
Committee on Appellate Rules

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
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CRIMINAL RULES

ROBERT L. HINKLE
EVIDENCE RULES

August 25, 2010

The Honorable Alex Kozinski
Chief Judge
United States Court of Appeals
for the Ninth Circuit
Richard H. Chambers Court
of Appeals Building
125 South Grand Avenue, Room 200
Pasadena, California 91105-1621

Dear Chief Judge Kozinski:

In my capacity as the Chair of the Advisory Committee on the Federal Rules of Appellate Procedure, I write to ask for your input about a pending proposal concerning the filing of amicus curiae briefs in the courts of appeals.

Under FRAP 29(a), "[t]he 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. Otherwise, the entity must obtain the permission of all parties in the case or, failing that, seek permission from the court to file the amicus brief. The proposal under consideration is whether to extend the favorable treatment given to the United States and the States to Indian Tribes.

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Sincerely,

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cc: Catherine T. Struve, Reporter
Committee on Appellate Rules

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RICHARD C. TALLMAN
CRIMINAL RULES

ROBERT L. HINKLE
EVIDENCE RULES

August 25, 2010

The Honorable Mary Beck Briscoe
Chief Judge
United States Court of Appeals
for the Tenth Circuit
645 Massachusetts Street
Room 400
Lawrence, Kansas 66044-0906

Dear Chief Judge Briscoe:

In my capacity as the Chair of the Advisory Committee on the Federal Rules of Appellate Procedure, I write to ask for your input about a pending proposal concerning the filing of amicus curiae briefs in the courts of appeals.

Under FRAP 29(a), "[t]he 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. Otherwise, the entity must obtain the permission of all parties in the case or, failing that, seek permission from the court to file the amicus brief. The proposal under consideration is whether to extend the favorable treatment given to the United States and the States to Indian Tribes.

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As you will see, most of the relevant motions were filed in the Eighth, Ninth and Tenth Circuits. This reality prompted us to wonder two things: (1) how in general your circuit reacts to the proposal; and (2) whether it is worth amending your local rules to allow the Tribes to file amicus briefs without the permission of the parties or the court. As to the second point, we see nothing in

the rule that would prohibit such a local rule and it might eliminate the need to amend the national rule.

I will follow up this letter with a phone call to see if you have reactions to these questions or any other thoughts about the matter. In the interim, thank you for your consideration.

Sincerely,

Jeffrey S. Sutton

JSS:jmf
Enclosure

cc: Catherine T. Struve, Reporter
Committee on Appellate Rules

The National Congress of American Indians
Resolution #PSP-09-060

TITLE: Support for Amendment of the Federal Rules of Appellate Procedure to Treat Indian Tribes in the Same Manner as States and Territories

NCAI HEADQUARTERS
1516 P Street, N.W.
Washington, DC 20005
202.466.7767
202.466.7797 fax
www.ncai.org

WHEREAS, we, the members of the National Congress of American Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants the inherent sovereign rights of our Indian nations, rights secured under Indian treaties and agreements with the United States, and all other rights and benefits to which we are entitled under the laws and Constitution of the United States, to enlighten the public toward a better understanding of the Indian people, to preserve Indian cultural values, and otherwise promote the health, safety and welfare of the Indian people, do hereby establish and submit the following resolution; and

WHEREAS, the National Congress of American Indians (NCAI) was established in 1944 and is the oldest and largest national organization of American Indian and Alaska Native tribal governments; and

WHEREAS, the United States Constitution, U.S. Supreme Court decisions, and hundreds of treaties, federal statutes, and regulations all acknowledge the inherent sovereignty of Indian tribes and recognize that Indian Tribes are distinct, domestic, sovereign governments; and

WHEREAS, Indian Tribes have a greater status than territories of the United States, because Indian Tribes retain inherent sovereignty which has never been extinguished; and

WHEREAS, Indian Tribes, like states, may be subject to federal habeas corpus proceedings, may have declared holidays, may find the need to submit amicus curiae briefs in cases affecting their sovereign interests and should not be subject to burdensome requirements or disclosures for such filings, may have their laws challenged in federal court proceedings without being named as parties, and may have courts where qualified attorneys may be admitted to practice; and

WHEREAS, the Federal Rules of Appellate Procedure currently recognizes all the foregoing rights and privileges for states and territories, but not for Indian Tribes, and there is no material difference between the status, circumstances, or positions of Tribes and states and territories for all matters addressed in the Federal Rules of Appellate Procedure; and

WHEREAS, comments have been submitted on March 13, 2009 (Docket No. 08BAP-007) and October 11, 2009, to the Advisory Committee on Appellate Rules and the Committee on Rules of Practice and Procedure of the Administrative Office of the United States Courts, recommending that the Federal Rules of Appellate Procedure be amended to address the foregoing inequitable situation; and

WHEREAS, failure to recognize Indian Tribes as sovereign domestic governments for purposes of the Federal Rules of Appellate Procedure constitutes arbitrary, inequitable, and discriminatory treatment of Indian Tribes in comparison to states and territories.

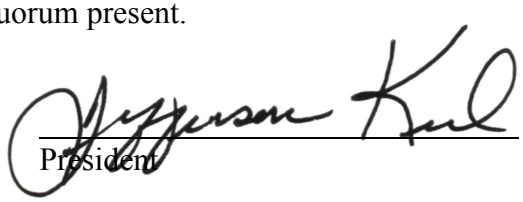
NOW THEREFORE BE IT RESOLVED, that the NCAI does hereby call on the Committee on Rules of Practice and Procedure of the Administrative Office of the United States Courts to include language in the Federal Rules of Appellate Procedure to treat Indian Tribes as sovereign governments, in the same manner as states and territories; and

BE IT FURTHER RESOLVED, that the NCAI supports the comments previously submitted to the Committee on Rules of Practice and Procedure of the Administrative Office of the United States Courts calling for the amendment of the Federal Rules of Appellate Procedure to treat Indian Tribes in the same manner as states and territories; and

BE IT FINALLY RESOLVED, that this resolution shall be the policy of NCAI until it is withdrawn or modified by subsequent resolution.

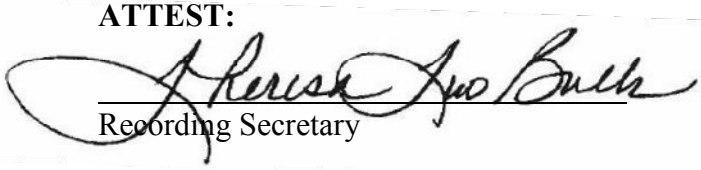
CERTIFICATION

The foregoing resolution was adopted by the General Assembly at the 2009 Annual Session of the National Congress of American Indians, held at the Palm Springs Convention Center in Palm Springs, California on October 11-16, 2009, with a quorum present.



President

ATTEST:



Recording Secretary

RESOLUTION SUPPORTING AN AMENDMENT OF THE FEDERAL RULES OF APPELLATE PROCEDURE TO TREAT INDIAN TRIBES IN THE SAME MANNER AS STATES AND TERRITORIES

WHEREAS the Coalition of Bar Associations of Color (CBAC), organized in 1993, is a coalition created to act as a collective voice for issues of common concern to its member organizations; and

WHEREAS the member organizations of the Coalition of Bar Associations of Color are the Hispanic National Bar Association (HNBA), National Asian Pacific American Bar Association (NAPABA), the National Bar Association (NBA), and the National Native American Bar Association (NNABA); and

WHEREAS, the United States Constitution, United States Supreme Court decisions, and hundreds of treaties, federal statutes, and regulations all acknowledge the inherent sovereignty of Indian tribes and recognize that Indian Tribes are distinct, domestic, sovereign governments; and

WHEREAS, Indian Tribes retain inherent sovereignty which has never been extinguished; and

WHEREAS, Indian Tribes, like states, may be subject to federal habeas corpus proceedings, may have declared holidays, may have their laws challenged in federal court proceedings without being named as parties, may have courts where qualified attorneys may be admitted to practice, and may find the need to submit amicus curiae briefs in cases affecting their sovereign interests and should not be subject to burdensome requirements or disclosures for such filings; and

WHEREAS, the Federal Rules of Appellate Procedure currently recognize the right of states and territories to all file amicus curie briefs without filing a motion for leave, but Indian Tribes are not afforded the same right;

WHEREAS there is no material difference between the status, circumstances, or positions of Tribes and states and territories for all matters addressed in the Federal Rules of Appellate Procedure; and

WHEREAS, failure to recognize Indian Tribes as sovereign domestic governments for purposes of the Federal Rules of Appellate Procedure constitutes arbitrary, inequitable, and discriminatory treatment of Indian Tribes in comparison to states and territories.

THEREFORE BE IT RESOLVED, that the Coalition of Bar Associations of Color urges the Committee on Rules of Practice and Procedure of the Administrative Office of the United States Courts to include language in the Federal Rules of Appellate Procedure to treat Indian Tribes as sovereign governments, in the same manner as states and territories.

CERTIFICATION

WE, the duly-elected Presidents of the Hispanic National Bar Association (HNBA), National Asian Pacific American Bar Association (NAPABA), National Bar Association (NBA), and National Native American Bar Association (NNABA), hereby certify that the foregoing Resolution was duly enacted by a duly-noticed meeting of the Board of Directors.

NNABA

President, Hispanic National Bar Association — Date: 5/26/10

President, National Bar Association — Date: 5/26/10

President, National Native American Bar Association — Date: 26 MAY 2010

President, National Asian Pacific American Bar Association — Date: 5-26-10

TAB

VI-D-E

MEMORANDUM

DATE: September 16, 2010

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item Nos. 09-AP-C and 08-AP-L

As the Committee discussed at its 2009 meetings, 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's Subcommittee on Privacy, Public Access, and Appeals held a conference call in August 2010 and plans to hold another such call in September 2010. The Subcommittee is currently aiming to place before the Bankruptcy Rules Committee a proposed re-draft of the Part VIII Rules that could (if approved) be sent out for public comment in August 2011. The Subcommittee has discussed the advisability of amending the Appellate Rules in order to ensure that those Rules dovetail with the amended Part VIII Rules. This memo sets forth a sketch of possible amendments along those lines. Guidance from both the Subcommittee and the Bankruptcy Rules Committee will be very welcome; in the meantime, this sketch serves as a preview of the sort of questions that the Appellate Rules Committee may be asked to consider at its spring 2011 meeting. Assuming that all aspects of this project remain on track, the goal would be to propose appropriate Appellate Rules amendments that could go out for comment – along with the Part VIII package – in summer 2011.

Part I of this memo sets out the sketch of the possible amendments to Appellate Rule 6. Part II discusses the possibility of amending Appellate Rule 6(b) to update the list of Appellate Rules provisions that are excluded from application to appeals covered by Rule 6(b), and to track recent and currently proposed amendments to Appellate Rule 4(a)(4). Part III discusses the possibility of adding a new Appellate Rule 6(c) to address the procedure for permissive direct appeals from the bankruptcy court to the court of appeals under 28 U.S.C. § 158(d)(2). Part IV concludes that close coordination with the Bankruptcy Rules Committee and its Subcommittee will be necessary in order to craft the proposed amendments to Appellate Rule 6.

I. Sketch of proposed amendments to Appellate Rule 6

The proposed amendments 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.

(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)~~ 12(c),[1] 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.[2]

(i) If a timely motion for rehearing under Bankruptcy Rule [8015] 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~~ all motions for rehearing--becomes effective ~~when~~ upon the latest of entry of

[1] See Part II.A.

[2] See Part II.B.

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.

(iii) No additional fee is required to file an amended notice.

(B) The record on appeal.

(i) Within 14 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 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.

(c) Permissive direct review under 28 U.S.C. § 158(d)(2).

(1) Applicability of Other Rules. These rules apply to a direct appeal by permission under 28 U.S.C. § 158(d)(2), but:

(A) Rules [3-4, 5(a)(3), 6(a), 6(b), 9, 10, 11, 12, 13-20, 22-23, and 24(b)][3] do not apply;

(B) the term "district court," as used in any applicable rule, includes – to the extent appropriate – a bankruptcy court or bankruptcy appellate panel, and the term "district clerk," as used in any applicable rule, includes – to the extent appropriate – the clerk of the bankruptcy court or of the bankruptcy appellate panel; and

(C) the reference to "Rules 11 and 12(c)" in Rule 5(d)(3) must be read as a reference to Rules 6(c)(2)(B) and (C).

(2) Additional Rules. In addition to the rules made applicable by Rule 6(c)(1), the following rules apply:

(A) **The record on appeal.** Bankruptcy Rule 8009 governs the record on appeal, with the following provisos:

[3] See Part III.B.

(1) The record on appeal must also include any certification under 28 U.S.C. § 158(d)(2).

(2) ["The district court or the bankruptcy appellate panel,"] ["The appellate court,"][4] as used in Bankruptcy Rule 8009, means the court of appeals. "The clerk of the appellate court," as used in Bankruptcy Rule 8009, means the circuit clerk.

(3) The last sentence of Bankruptcy Rule 8009(d) does not apply.

(B) **Transmitting the record.** Bankruptcy Rule 8010 governs the completion and transmission of the record, with the following provisos:

(1) As used in Bankruptcy Rules 8010(a), (b)(1) - (4), and (c), "the appellate court" means the court of appeals, and "the clerk of the appellate court" means the circuit clerk.

(2) [Bankruptcy Rule 8010(b)(5) does not apply. Subject to Bankruptcy Rule 8010(c), if a motion for leave to appeal has been filed with the bankruptcy clerk under Bankruptcy Rule 8004, the bankruptcy clerk may prepare and transmit the record only after the district court or the bankruptcy appellate panel grants leave to appeal or the court of appeals authorizes a direct appeal under 28 U.S.C. § 158(d)(2).][5]

(C) **Duties of circuit clerk.** Upon receiving the record the circuit clerk must [file it and immediately notify all parties of the filing date.] [note its receipt on the docket. The date noted on the docket shall serve as the filing date of the record for purposes of [these Rules] [Rules 28.1(f), 30(b)(1), 31(a)(1), and 44]. The circuit clerk shall immediately notify all parties of the filing date].[6]

[(D) **Filing a representation statement**. Unless the court of appeals designates another time, the attorney who sought leave to appeal must, within 14

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[4] The choice of wording for the relevant Part VIII Rules has not yet been finalized. For purposes of this draft, I will assume in other sections of proposed Rule 6(c) that the Part VIII Rules will refer, where appropriate, to "the appellate court."

[5] Proposed Rule 6(c)(2)(B)(2) serves as a very tentative place-holder, designed to indicate the need to consider how to tailor to the context of direct appeals the Part VIII Rules' treatment of transmission of the record.

[6] See Part III.D.

days after entry of the order granting permission to appeal, file a statement with the circuit clerk naming the parties that the attorney represents on appeal.][7]

Committee Note

Subdivision (b)(1). Subdivision (b)(1) is updated to reflect the renumbering of Rule 12(b) as Rule (12)(c).

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 [8015] 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."

[7] See Part III.B.

Subdivision (c). New subdivision (c) is added to govern permissive direct appeals from the bankruptcy court to the court of appeals under 28 U.S.C. § 158(d)(2).

Subdivision (c)(1). Subdivision (c)(1) provides for the general applicability of the Federal Rules of Appellate Procedure, with specified exceptions, to appeals covered by subdivision (c) and makes necessary word adjustments.

Subdivision (c)(2). Subdivision (c)(2)(A) provides that the record on appeal is generally governed by Bankruptcy Rule 8009. Bankruptcy Rule 8009 sets the procedures for compiling the bankruptcy court record for use on appeal. Because the focus of Bankruptcy Rule 8009 is on appeals to a district court or bankruptcy appellate panel, a few adjustments are necessary; these are stated in subdivisions (c)(2)(A)(1) - (3).

Subdivision (c)(2)(B) provides that the transmission of the record is generally governed by Bankruptcy Rule 8010. Subdivisions (c)(2)(B)(1) and (2) make the adjustments that are necessary to apply Bankruptcy Rule 8010 to appeals taken directly to a court of appeals.

Subdivision (c)(2)(C) sets the duties of the circuit clerk upon receipt of the record. [Because the record may be transmitted in electronic form, subdivision (c)(2)(C) does not direct the clerk to "file" the record. Rather, it directs the clerk to note the date of receipt on the docket and to notify the parties of that date, which shall serve as the date of filing the record for purposes of provisions in these Rules that calculate time from that filing date.]

[Subdivision (c)(2)(D) is modeled on Rule 12(b), with appropriate adjustments.]

II. Amending Appellate Rule 6(b)

The detailed consideration of bankruptcy appellate practice, in connection with the Part VIII project, provides a useful opportunity to consider the operation of Appellate Rule 6 generally. This section discusses three possible types of changes that could be made to Rule 6(b).

A. Updating the list of excluded provisions in Appellate Rule 6(b)(1)(A)

Appellate Rule 6(b)(1)(A) lists Appellate Rules provisions that do not apply to bankruptcy appeals from a district court or bankruptcy appellate panel to a court of appeals. This list of exclusions originated in 1989 as part of the new Appellate Rule 6 that was adopted in the wake of *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), and the Bankruptcy Amendments and Federal Judgeship Act of 1984.[8] The list of exclusions has

[8] Pub. L. No. 98-353, 98 Stat. 333.

been updated only once, as part of the 1998 restyling; at that point, references to Appellate Rules 3.1 and 5.1 were removed (due to the 1998 abrogation of those Rules). In the light of the other changes to Rule 6 that are under consideration, it seems useful to review the Appellate Rules to see whether any other changes that have been made since 1989 might warrant an adjustment to the list of exclusions. It turns out that only one such change appears necessary.[9]

Appellate Rule 6(b)(1)(A)'s reference to Appellate Rule 12(b) appears to need updating. In 1989, Appellate Rule 12(b) concerned the record and read as follows:

> (b) Filing the Record, Partial Record, or Certificate. Upon receipt of the record transmitted pursuant to Rule 11(b), or the partial record transmitted pursuant to Rule 11(e), (f), or(g), or the clerk's certificate under Rule 11(c), the clerk of the court of appeals shall file it and shall immediately give notice to all parties of the date on which it was filed.

In 1993, a new Appellate Rule 12(b) was added and the existing Appellate Rule 12(b) was re-numbered 12(c). Appellate Rule 6(b) was not amended to take account of this re-numbering. It seems useful to do so at this point so as to restore the original intent of this exclusion. I am assuming that it would be useful to apply Appellate Rule 12(b) to bankruptcy appeals from district courts or BAPs to a court of appeals; that provision requires the filing of a representation statement, and would seem equally useful in connection with bankruptcy appeals as it is in connection with other appeals as of right. I thus suggest replacing Rule 6(b)(1)(A)'s reference to Appellate Rule 12(b) with a reference to Appellate Rule 12(c).

B. Amending Appellate Rule 6(b)(2)(A) to track recent and proposed amendments to Appellate Rule 4(a)(4)

The sketch in Part I of this memo illustrates proposed changes to Appellate Rule 6(b)(2)(A) that would parallel both the 2009 amendment to Appellate Rule 4(a)(4) and the pending proposal to further amend Rule 4(a)(4) to address the possibility that time might elapse between the entry of an order disposing of the last remaining tolling motion and any ensuing alteration or amendment of the judgment. Parts II.B.1 and II.B.2 of this memo discuss each of those aspects of the sketch in turn. The change discussed in Part II.B.1 has received support, in principle, from the Bankruptcy Rules Committee's Subcommittee; the change discussed in Part II.B.2 has not yet benefited from the Subcommittee's guidance.

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[9] Appellate Rule 12.1 took effect in 2009 and formalizes the practice of indicative rulings. Though that practice may be more rare in the bankruptcy context, there seems to be no need to exclude the Rule from operating in that context. Thus, I do not suggest adding Rule 12.1 to the list of exclusions unless a reason emerges for doing so. 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.

1. Conforming Rule 6(b)(2)(A) to the 2009 amendment to Rule 4(a)(4)

Rule 6(b)(2)(A)(ii) contains an ambiguity similar to the ambiguity in former Rule 4(a)(4) that was pointed out in *Sorensen v. City of New York*, 413 F.3d 292 (2d Cir. 2005). A 2009 amendment to Rule 4(a)(4) removed the ambiguity in that rule by altering 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. The sketch in Part I of this memo reflects the Subcommittee's guidance on the drafting of this possible amendment.

2. Conforming Rule 6(b)(2)(A) to the pending proposal to amend Rule 4(a)(4)

As noted elsewhere in this agenda book,[10] 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

[10] See the memo on Item Nos. 08-AP-D, 08-AP-E, and 08-AP-F.

ensuing amendment or alteration of the judgment.[11] 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 14 days after entry of the judgment of the district court or the bankruptcy appellate panel. If a timely motion for rehearing is filed, the time for appeal to the court of appeals for all parties shall run from the entry of the order denying rehearing or the entry of subsequent judgment." 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

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[11] 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.

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 Subcommittee and 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).

It should also be noted that the Part VIII project may re-number Bankruptcy Rule 8015. Obviously, if that occurs, Appellate Rule 6's reference to Bankruptcy Rule 8015 would require revision.

III. Adopting a new Appellate Rule 6(c) to take account of permissive direct appeals under 28 U.S.C. § 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. The Part VIII project provides an opportune vehicle for crafting such changes to the Appellate Rules, because commentators on the Part VIII project can also focus their attention on ensuring that the Appellate Rules dovetail properly with the Part VIII rules.

The Appellate Rules will need to treat the record on direct appeals differently than the record on bankruptcy appeals from a district court or bankruptcy appellate panel. Appeals from the district court or BAP exercising appellate jurisdiction in a bankruptcy case are governed by Appellate Rule 6(b). That rule contains a streamlined procedure for redesignating and forwarding the record on appeal, because the appellate record will already have been compiled for purposes of the appeal to the district court or the BAP. In the context of a direct appeal, the record will generally require compilation from scratch. The closest model for the compilation and transmission of the bankruptcy court record would appear to be the rules chosen by the Part VIII project for appeals from the bankruptcy court to the district court or the BAP. Thus, the

sketch shown in Part I of this memo incorporates the relevant Part VIII rules by reference[12] while making some adjustments to account for the particularities of direct appeals to the court of appeals.

A. The background

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 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

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[12] I enclose a copy of the latest tentative draft of proposed Rules 8009 and 8010. A copy of the latest version of the Part VIII proposals will be available at the meeting.

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) was amended effective December 1, 2009 to adjust time periods as part of the time-computation project. The general thrust of the Rule continues 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)."[13] Current Rule 8001(f)'s 30-day time limit for the petition for

[13] 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

permission to appeal thus supersedes the 10-day time limit previously set in the interim statutory provision (Section 1233(b)(4)(A) of BAPCPA).[14] 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).[15] Those sections provide:

> (5) References in rule 5.--For purposes of rule 5 of the Federal Rules of Appellate Procedure--
>
> > (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.

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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.

[14] 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."

[15] 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).

Although these interim rules are useful, it seems worthwhile to consider whether to specify in more detail the way in which the Appellate Rules apply to direct appeals under Section 158(d)(2). The Part VIII project provides an opportune context in which to obtain input and guidance on this question. As a step in that direction, the sketch in Part I of this memo includes a new subdivision (c) dealing with such direct appeals.

B. The list of Appellate Rules that do not apply to direct appeals

The sketch of proposed Appellate Rule 6(c)(1) lists the Appellate Rules provisions that would not apply to direct bankruptcy appeals under Section 158(d)(2). The list is modeled roughly on the similar list of excluded provisions in existing Appellate Rule 6(b)(1)(A), with the following modifications:

- Appellate Rules 3 and 4 are excluded because they concern appeals as of right.

- Appellate Rule 5(a)(3) is excluded. That Rule provides: "If a party cannot petition for appeal unless the district court first enters an order granting permission to do so or stating that the necessary conditions are met, the district court may amend its order, either on its own or in response to a party's motion, to include the required permission or statement. In that event, the time to petition runs from entry of the amended order." This provision would cause confusion in the case of direct appeals from bankruptcy court, because the case may be in the bankruptcy court, the district court, or the bankruptcy appellate panel at the time the required certification is sought. The question of which court may make the certification is addressed in proposed Bankruptcy Rule 8006, and it seems better to leave the matter to that Rule and to exclude Appellate Rule 5(a)(3) from applying to such appeals.

- Appellate Rules 6(a) and (b) are excluded.

- Appellate Rule 12 is excluded. Rule 12(a) appears inapposite because, in the case of permissive appeals, docketing is accounted for in Appellate Rule 5(d)(3).[16] Rule 12(c) is supplanted, in this context, by proposed Rule 6(c)(2)(C). Rule 12(b) – which requires the filing of a representation statement – might be useful to apply in the context of direct appeals under Section 158(d)(2), but Rule 12(b) is awkwardly worded for use in such a context. Therefore, if participants wish to include the requirement of a representation

[16] That Rule provides: "The district clerk must notify the circuit clerk once the petitioner has paid the fees. Upon receiving this notice, the circuit clerk must enter the appeal on the docket. The record must be forwarded and filed in accordance with Rules 11 and 12(c)." The Rule 6 amendments sketched in Part I of this memo would direct that Rule 5(d)(3)'s reference to "Rules 11 and 12(c)" be read as referring to proposed Rules 6(c)(2)(B) and (C).

statement, I propose including that requirement as a separate Rule 12(c)(2)(D) (shown in brackets in the sketch in Part I of this memo).

C. Dealing with tolling motions

We saw in Part II.B.2 of this memo that there is an unresolved question (in the context of appeals from a district court or BAP) as to which set(s) of Rules – the Appellate Rules or the Part VIII rules, or both – should address the tolling effect of a rehearing motion under Bankruptcy Rule 8015. A somewhat similar question might arise with respect to tolling motions in the context of permissive direct appeals under Section 158(d)(2). The question is pertinent because Bankruptcy Rule 8006 – governing the process for initiating an attempt to appeal under Section 158(d)(2) – requires the taking of an appeal from the bankruptcy court "within the time allowed by Rule 8002." And Bankruptcy Rule 8002(b) provides for the effect of tolling motions on the time for taking appeals from the bankruptcy court. The matter is more complicated than the question discussed in Part II.B.2, however, because in the context of direct appeals under Section 158(d)(2) the sequence is more intricate: The process requires (1) a timely appeal from the bankruptcy court, (2) a certification (by a lower court or by all parties) under Section 158(d)(2), and (3) the filing of a request for permission to appeal in the court of appeals. Proposed Bankruptcy Rule 8006 will address events (1) and (2) in detail, and will set the time limit for event (3). Thus, the question of timing seems to be well covered by the proposed Part VIII rules, and I therefore suggest that it is unnecessary for Appellate Rule 6(c) to discuss the effect of tolling motions filed in the bankruptcy court. The matter is, for that reason, not addressed in the sketch set forth in this memo.

D. Dealing with electronic filing and transmission

Provisions relating to direct appeals from the bankruptcy court to the court of appeals will be interesting and challenging to draft, because they will highlight the changing treatment of the bankruptcy court record. In particular, the Part VIII project contemplates, as the default practice, that the record will be transmitted electronically rather than in paper form. The Appellate Rules have always assumed a contrary default rule – that the record will be forwarded and filed in paper form. The proposed Part VIII amendments, it should be noted, set default rules of electronic transmission, but also leave room for requirement of a paper record.

The sketch shown in Part I of this memo takes the default rule of electronic filing and transmission as a given, though the approach taken in the sketch should also accommodate the use of a paper record. Proposed Rule 6(c)(2)(C) treats the event that traditionally has been known as filing the record. If the record is transmitted in the form of electronic links to electronic docket entries, then it might seem odd to speak of the circuit clerk "filing" the record. Thus, the second bracketed option in Rule 6(b)(2)(C) speaks instead of the clerk noting the record's receipt on the docket. Because other parts of the Appellate Rules use the date of filing of the record for purposes of computing certain deadlines, proposed Rule 6(b)(2)(C) defines the receipt date as the filing date.

III. Conclusion

This memo collects the current questions relating to possible amendments to Appellate Rule 6. In the light of the current goal of publishing a package of proposals relating to bankruptcy appellate practice in Summer 2011, close coordination with the Bankruptcy Rules Committee and its Subcommittee will be invaluable.

Encl.

Rule 8009. Record and Issues on Appeal; Sealed Documents

(a) DESIGNATION AND COMPOSITION OF RECORD ON APPEAL; STATEMENT OF ISSUES ON APPEAL.

(1) *Appellant's Duties.* Within 14 days after filing a notice of appeal as prescribed by Rule 8003(a); entry of an order granting leave to appeal; entry of an order disposing of the last remaining motion of a kind listed in Rule 8002(b)(1); or entry of an altered or amended judgment, order, or decree; whichever is later, the appellant shall file with the bankruptcy 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. A designation and statement served prematurely shall be treated as served on the first day on which filing is timely under this paragraph.

(2) *Appellee's and Cross-Appellant's Duties.* Within 14 days after 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.* Within 14 days after service of the cross-appellant's designation and statement, a cross-appellee may 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 8009(d) and (e), the record on appeal shall include the following:

- items designated by the parties as provided by paragraphs (1)-(3);
- the notice of appeal;
- the judgment, order, or decree being appealed;
- 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 8009(b); and
- any statement required by Rule 8009(c).

Notwithstanding the parties' designations, the appellate court may order the inclusion of additional items from the record as part of the record on appeal.

(5) *Copies for the Bankruptcy Clerk*. A party filing a designation of items to be included in the record shall provide to the bankruptcy clerk a copy of any designated items that the bankruptcy clerk requests. If the party fails to provide the copy, the bankruptcy clerk shall prepare the copy at the party's expense.

(b) TRANSCRIPT OF PROCEEDINGS.

(1) *Appellant's Duty*. Within the time period prescribed by Rule 8009(a)(1), the appellant shall:

(A) order in writing from the reporter a transcript of any parts of the proceedings not already on file that the appellant considers necessary for the appeal, and file a copy of the order with the bankruptcy clerk; or

(B) file with the bankruptcy clerk a certificate stating that the appellant is not ordering a transcript.

(2) *Cross-Appellant's Duty*. Within 14 days after the appellant files with the bankruptcy clerk a copy of the transcript order or a certificate stating that appellant is not ordering a transcript, the appellee as cross-appellant shall:

(A) order in writing from the reporter a transcript of any parts of the proceedings not ordered by appellant and not already on file that the cross-appellant considers necessary for the appeal, and file a copy of the order with the bankruptcy clerk; or

(B) file with the bankruptcy clerk a certificate stating that the cross-appellant is not ordering a transcript.

(3) *Appellee's or Cross-Appellee's Right to Order*. Within 14 days after the appellant or cross-appellant files with the bankruptcy clerk a copy of a transcript order or certificate stating that a transcript will not be ordered, the appellee or cross-appellee may order in writing from the reporter a transcript of any parts of the proceedings not already ordered or on file that the appellee or cross-appellee considers necessary for the appeal. A copy of the order shall be filed with the bankruptcy clerk.

(4) *Payment*. At the time of ordering, a party shall 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 shall include in the record a transcript of all testimony and copies of all exhibits relevant to that finding or conclusion.

(c) STATEMENT OF THE EVIDENCE WHEN A TRANSCRIPT IS UNAVAILABLE. Within the time period prescribed by Rule 8009(a)(1), the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection, if a transcript of the hearing or trial is unavailable. The statement shall 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 shall then be submitted to the bankruptcy court for settlement and approval. As settled and approved, the statement shall be included by the bankruptcy clerk in the record on appeal.

(d) AGREED STATEMENT AS THE RECORD ON APPEAL. Instead of the record on appeal as defined in (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 shall 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, shall be approved by the bankruptcy court and certified to appellate court as the record on appeal. The bankruptcy

clerk shall then transmit it to the clerk of the appellate court within the time provided by Rule 8010(b)(1). A copy of the agreed statement may be filed instead of the appendix required by Rule 8018(b).

(e) CORRECTION OR MODIFICATION OF THE RECORD.

(1) If any dispute arises about whether the record truly discloses what occurred in the bankruptcy court, the dispute shall be submitted to and settled by the bankruptcy judge and the record conformed accordingly. If an item has been improperly designated as part of the record on appeal, a party may move to strike the improperly designated item.

(2) If anything material to either party is omitted from or misstated in the record by error or accident, the omission or misstatement 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 appellate court.

(3) All other questions as to the form and content of the record shall be presented to the appellate court.

(f) SEALED DOCUMENTS. A document placed under seal by the bankruptcy court may be designated as part of the record on appeal. In designating a sealed document, a party shall identify it without revealing confidential or secret information. The bankruptcy clerk shall not transmit a

sealed document to the clerk of the appellate court as part of the transmission of the record. Instead, a party seeking to present a sealed document to the appellate court for consideration as part of the record on appeal shall file a motion with the appellate court to accept the document under seal. If the motion is granted, the movant shall notify the bankruptcy court of the ruling, and the bankruptcy clerk shall promptly transmit the sealed document to the clerk of the appellate court.

(g) OTHER. All parties to an appeal shall take any other action necessary to enable the bankruptcy clerk to assemble and transmit the record.

COMMITTEE NOTE

This rule is derived from former Rule 8006 and F.R. App. P. 10 and 11(a). It retains the practice of former Rule 8006 of requiring the parties to designate items to be included in the record on appeal. In this respect the bankruptcy rule differs from the appellate rule. Among other things, F.R. App. P. 10(a) provides that the record on appeal consists of all the documents and exhibits filed in the case. This requirement would often be unworkable in a bankruptcy context because thousands of items might have been filed in the overall bankruptcy case.

Subdivision (a) provides the time period for the appellant's filing of a designation of items to be included in the record on appeal and a statement of the issues to be presented. It then provides for the designation of additional items by the appellee, cross-appellant, and cross-appellee, as well as for the cross-appellant's statement of the issues to be presented in its appeal. Subdivision (a)(4) prescribes the content of the record on appeal. Ordinarily, the bankruptcy clerk will not need to have paper copies of the designated items because the clerk will either transmit them to the appellate court electronically or otherwise make them available electronically. If the bankruptcy 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 parties must comply with the request.

Subdivision (b) governs the process for ordering a complete or partial transcript of the bankruptcy court proceedings. In situations in which a transcript is unavailable, subdivision (c) allows for the parties' preparation of a statement of the evidence or proceedings, which must be approved by the bankruptcy court.

Subdivision (d) adopts the practice of F.R. App. P. 10(d) of permitting the parties to agree on a statement of the case in place of the record on appeal. The statement must show how the issues raised on appeal arose and were decided in the bankruptcy court. It must be approved by the bankruptcy judge in order to be certified as the record on appeal.

Subdivision (e), modeled on F.R. App. P. 10(e), provides a procedure for correcting a record on appeal if an item is improperly designated, omitted, or misstated.

Subdivision (f) is a new provision that governs the handling of any document that was sealed by the bankruptcy court and that a party wants to include in the record on appeal. The party must request the appellate court to accept the document under seal, and that motion must be granted before the bankruptcy clerk may transmit it to the clerk of the appellate court.

Subdivision (g), which requires the parties' cooperation with the bankruptcy clerk in assembling and transmitting the record, retains the requirement of former Rule 8006, which was adapted from F.R. App. P. 11(a).

Rule 8010. Completion and Transmission of the Record

(a) DUTIES OF REPORTER TO PREPARE AND FILE TRANSCRIPT. The reporter shall prepare and file a transcript as follows:

(1) Upon receiving a request for a transcript, the reporter shall file in the appellate court an acknowledgment of the request, the date it was received, and the date on which the reporter expects to have the transcript completed.

(2) Upon completing the transcript, the reporter shall file it with the bankruptcy clerk and notify the clerk of the appellate court of the filing.

(3) If the transcript cannot be completed within 30 days of receipt of the request, the reporter shall seek an extension of time from the clerk of the appellate court. The action of that clerk shall be entered on the docket, and the parties shall be notified.

(4) If the reporter does not file the transcript within the time allowed, the clerk of the appellate court shall notify the bankruptcy judge.

(b) DUTY OF BANKRUPTCY CLERK TO TRANSMIT RECORD.

(1) Subject to Rules 8009(f) and 8010(b)(5), when the record is complete for purposes of appeal, the bankruptcy clerk shall transmit to the clerk of the appellate court either the record or a notice of the availability of the record and the means of accessing it electronically.

(2) If there are multiple appeals from a judgment or order, the bankruptcy clerk shall transmit a single record.

(3) Upon receiving the transmission of the record or notice of the

availability of the record, the clerk of the appellate court shall enter its receipt on the docket and give prompt notice to all parties to the appeal.

(4) If the appellate court directs that paper copies of the record be furnished, the clerk of that court shall notify the appellant and, if the appellant fails to provide the copies, the bankruptcy clerk shall prepare the copies at the appellant's expense.

(5) Subject to Rule 8010(c), if a motion for leave to appeal has been filed with the bankruptcy clerk under Rule 8004, the bankruptcy clerk shall prepare and transmit the record only after the appellate court grants leave to appeal.

(c) RECORD FOR PRELIMINARY MOTION IN APPELLATE COURT. If, prior to the transmission of the record as prescribed by (b), a party moves in the appellate court for any of the following relief:

- leave to appeal;
- dismissal;
- a stay pending appeal;
- approval of a supersedeas bond, or additional security on a bond or undertaking on appeal; or
- any other intermediate order –

the bankruptcy clerk shall transmit to the clerk of the appellate court any parts of the record designated by a party to the appeal or a notice of the availability of those parts and the means of accessing them electronically.

COMMITTEE NOTE

This rule is derived from former Rule 8007 and F.R. App. P 11.

Subdivision (a) retains the procedure of former Rule 8007(a) regarding the reporter's duty to prepare and file a transcript if one is requested by a party. It clarifies that, while the reporter must file the completed transcript with the bankruptcy clerk, it is the clerk of the appellate court who must receive the reporter's acknowledgment of the request for a transcript and statement of the expected completion date and who must grant an extension of time beyond 30 days for completion of the transcript.

Subdivision (b) requires the bankruptcy clerk to transmit the record to the clerk of the appellate court when the record is complete and, in the case of appeals under 28 U.S.C. § 158(a)(3), leave to appeal has been granted. This transmission will be made electronically, either by sending the record itself or sending notice of how the record can be accessed electronically. The appellate court may, however, require that a paper copy of some or all of the record be furnished, in which case the bankruptcy clerk will direct the appellant to provide the copies or will make the copies at the appellant's expense.

In a change from former Rule 8007(b), subdivision (b) of this rule no longer directs the clerk of the appellate court to docket the appeal upon receipt of the record from the bankruptcy clerk. Instead, under Rules 8003(d) and 8004(c), the clerk of the appellate court dockets the appeal upon receipt of the notice of appeal or, in the case of appeals under 28 U.S.C. § 158(a)(3), the notice of appeal and the motion for leave to appeal. Those documents are to be sent promptly to the appellate court by the bankruptcy clerk. Accordingly, by the time the clerk of the appellate court receives the record, the appeal will already be docketed in that court.

Subdivision (c) is derived from former Rule 8007(c) and F.R. App. P. 11(g) . It provides for the transmission of parts of the record designated by the parties for consideration by the appellate court in ruling on specified preliminary motions filed prior to the preparation and transmission of the record on appeal.

TAB

VI-F

MEMORANDUM

DATE: September 16, 2010

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 09-AP-D

Item No. 09-AP-D arises from John Kester's suggestion that the Committee consider whether the Supreme Court's decision in *Mohawk Industries, Inc. v. Carpenter*, 130 S. Ct. 599 (2009), warrants a rulemaking response. The Committee's discussion at the spring meeting yielded a number of possible avenues for exploration. This memo briefly maps those avenues;[1] further exploration of them will await guidance concerning the directions that the Committee wishes to pursue.

Attorney-client privilege rulings. There appeared to be substantial interest, at the Committee's spring meeting, in considering the question of immediate appeals from attorney-client privilege rulings. When exploring this question, it would seem helpful to consider the extent to which the Committee's work can be informed by empirical data. What data, for example, may exist or may be gathered concerning the extent to which fears of an erroneous district court rejection of attorney-client privilege decrease the frankness of attorney-client communications; or the extent to which erroneous district court rejections of attorney-client privilege provide discovering parties with undue settlement leverage; or the extent to which immediate appeals might be misused to inflict expense and delay on an opponent? What can data from the Third, Ninth, and D.C. Circuits (which, prior to *Mohawk Industries*, permitted collateral-order appeals from privilege rulings) tell us about the number of appeals that might be taken under a rule permitting immediate appeals from privilege rulings? What are district judges' views concerning the extent to which immediate appeals from such rulings might disrupt trial proceedings, and concerning possible ways to mitigate such a risk?

A proposed rule addressing this topic will raise scope questions. Should such a rule focus only on attorney-client privilege rulings? Should it also encompass orders rejecting claims of work product protection? Orders rejecting other types of privilege claims (such as marital privilege or doctor-patient privilege)? Other momentous discovery rulings?

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[1] The memo reflects both the Committee's discussions and some very helpful preliminary reflections provided by Professor Cooper.

Overall scope of inquiry. Discussion at the spring meeting noted two possible approaches. One would focus specifically on the question of appeals relating to attorney-client privilege rulings. The other would consider additional possible fields of inquiry, such as appeals from denials of official immunity.

One could, in fact, broaden the inquiry further still. For example, in a forthcoming article, Professor James Pfander and a co-author, David Pekarek Krohn, advocate the creation through rulemaking of an avenue for immediate appeal when all parties concur in seeking such an appeal and the district court agrees.[2] They summarize their argument as follows:

> We argue that the district court should be empowered to certify a question for interlocutory review (categorically) whenever the parties to the litigation so agree (in the exercise of joint discretion). Drawing on the case-selection literature, we show that the parties will often have a shared financial interest in interlocutory review in cases where they recognize that a decisive issue of law will survive any trial court disposition. Where the costs of preparing the case for trial are substantial and the risks of appellate invalidation significant, the parties have more to gain than lose through appellate review. What's more, the orders chosen by agreement of the parties make good candidates for immediate appellate review. Agreed-upon review will occur only as to orders that the parties regard as close and as unlikely to disappear into the black box of jury deliberations.[3]

Official-immunity rulings. As many have observed, the current doctrine governing the appealability of official-immunity rulings is rife with complexity and uncertainty. One area in which changes might be welcome concerns the scope of the appeal, and in particular, the question of whether the appellate court can examine the summary-judgment record when reviewing a denial of qualified immunity.[4] A host of other questions could also be addressed; for

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[2] *See* James E. Pfander and David R. Pekarek Krohn, *Interlocutory Review by Agreement of the Parties: A Preliminary Analysis*, __ Nw. U. L. Rev. __ (forthcoming 2011).

[3] *Id.* at 1.

[4] *See Johnson v. Jones*, 515 U.S. 304, 319-20 (1995) ("[A] defendant, entitled to invoke a qualified immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial."); *Behrens v. Pelletier*, 516 U.S. 299, 313 (1996) ("*Johnson* permits petitioner to claim on appeal that all of the conduct which the District Court deemed sufficiently supported for purposes of summary judgment met the *Harlow* standard of 'objective legal reasonableness.'"). *Compare Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1947 (2009) ("The concerns that animated the decision in *Johnson* are absent when an appellate court considers the disposition of a motion to dismiss a complaint for insufficient pleadings.").

example, what guidelines should govern the district court's decision whether to proceed pending the determination of the appeal?[5]

As with attorney-client privilege rulings, so too here, the question of the proposal's scope would arise. Should the rule cover other sorts of immunity rulings in addition to official immunity?[6] Sovereign immunity provides one possible candidate, and there exist a number of others.

Other types of rulings. Discovery-related and immunity-related rulings do not exhaust the list of rulings that might be considered for treatment in a rule addressing immediate appeals.[7] As this project moves forward, it will be necessary to decide whether to include any additional topics within its scope.

Benefits of the rulemaking process. The rulemaking process provides possible advantages that might not be as readily available to a court crafting avenues for immediate

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[5] *See, e.g.*, *Behrens*, 516 U.S. at 310-11 (noting that the district court "appropriately certified petitioner's immunity appeal as 'frivolous' in light of the Court of Appeals' (unfortunately erroneous) one-appeal precedent" and that "[t]his practice, which has been embraced by several Circuits, enables the district court to retain jurisdiction pending summary disposition of the appeal, and thereby minimizes disruption of the ongoing proceedings").

[6] In this memo, for the purposes of simplicity, I use the terms "official immunity" and "qualified immunity" interchangeably. The former term encompasses both qualified and absolute immunity, but it appears likely that qualified-immunity rulings generate far greater numbers of immediate appeals than absolute-immunity rulings. It may make sense for any rulemaking response that addresses qualified-immunity rulings to address absolute-immunity rulings as well. But that question merits further exploration if a project encompassing official-immunity rulings moves forward. For example, because absolute-immunity rulings tend to turn on the function that the defendant was performing when committing the alleged acts giving rise to the suit, *see, e.g.*, *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993) (prosecutorial immunity); *Stump v. Sparkman*, 435 U.S. 349, 362 (1978) (judicial immunity); *Tenney v. Brandhove*, 341 U.S. 367, 379 (1951) (legislative immunity), rulings on the applicability of absolute immunity seem intuitively less likely to be closely tied to the disputed merits of the underlying claims. If that is true, then absolute-immunity appeals may pose significantly fewer challenging policy issues than do qualified-immunity appeals concerning the appropriateness of an immediate appeal.

[7] For example, it was suggested at the spring meeting that one might consider addressing the appealability of orders remanding a matter to an administrative agency for further consideration. *See, e.g.*, *Occidental Petroleum Corp. v. S.E.C.*, 873 F.2d 325, 330 (D.C. Cir. 1989) (stating that such an order is immediately appealable "where the agency to which the case is remanded seeks to appeal and it would have no opportunity to appeal after the proceedings on remand").

appeal through the collateral-order doctrine. On one hand, rulemaking would not be constrained by the collateral-order doctrine's stated requirement that the subject matter of the appeal be separate from the underlying merits of the case. On the other hand, rulemaking would permit the calibration of immediate appeals; a rule could, for example, require permission from the district court or the court of appeals or both before a particular type of immediate appeal could be taken.[8] A rule could, perhaps, provide for an immediate appeal of a given type to be expedited, although this would raise questions concerning intrusion into the appellate courts' ability to manage their dockets. A rule could address the specter of multiple appeals by providing (for example) that only one pretrial appeal is permitted from rulings of a given type.[9] A rule might distinguish between different contexts; for example, it was suggested during the Committee's spring meeting that immediate appeals from privilege rulings might be more disruptive of trial-court proceedings in criminal cases than in civil cases.

Limitations of the rulemaking process. The most obvious limitation on the rulemaking process is that set by 28 U.S.C. § 2072(b), which provides that rules promulgated through the Rules Enabling Act process "shall not abridge, enlarge or modify any substantive right." To take one example of the implications of this limit, the way in which the Court has conceptualized immediate appeals from the denial of official immunity[10] could provide the basis for an argument that abolishing such appeals would abridge defendants' substantive rights.[11]

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[8] *See, e.g.*, Civil Rule 23(f); *cf.* 28 U.S.C. § 1292(b).

[9] For example, imagine that the district court denies a defendant's initial motion to dismiss on qualified-immunity grounds and later denies the defendant's summary-judgment motion on qualified-immunity grounds. Perhaps a rule might specify whether, having appealed from the first of these rulings, the defendant is entitled also to appeal from the second prior to trial. For current doctrine on this point, see *Behrens*, 516 U.S. at 301, 307 (rejecting the contention that "a defendant's immediate appeal of an unfavorable qualified-immunity ruling on his motion to dismiss deprives the court of appeals of jurisdiction over a second appeal, also based on qualified immunity, immediately following denial of summary judgment").

[10] *See, e.g.*, *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) ("The entitlement is an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial."); *see also id*. at 525-26 (stating that qualified immunity is founded on concerns about attracting capable people to government service, ensuring officials' zealous performance of their duties, and protecting such officials from undue distractions).

[11] *But cf. Johnson v. Fankell*, 520 U.S. 911, 921 (1997) (in the process of determining that a state court need not provide an immediate appeal from the denial of qualified immunity from suit under 42 U.S.C. § 1983, reasoning that "[t]he right to have the trial court rule on the merits of the qualified immunity defense presumably has its source in § 1983, but the right to immediate appellate review of that ruling in a federal case has its source in § 1291").

This is not to say that the Committee should necessarily avoid considering matters that approach this boundary; but such scope concerns might warrant discussion of whether any proposed solution is best achieved through rulemaking or through legislation. There are, of course, precedents for employing the rulemaking process to develop a proposed legislative solution to a given problem. And even if the Committee decided not to propose the idea of legislation, an immediate-appeals project could turn out to be a useful exercise to explore the current doctrinal landscape and to assess the possibilities for reform.

TAB

VI-G

MEMORANDUM

DATE: September 16, 2010

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 10-AP-A

At its spring 2010 meeting, the Committee discussed the complex caselaw concerning relation-forward of premature notices of appeal. Members suggested that it might be worthwhile to consider overhauling this doctrinal area through an amendment to Appellate Rule 4(a)(2),[1] but the Committee did not reach consensus on the policy choices that such an overhaul would entail.

As discussed in my March 13, 2010, memo, the Supreme Court's decision in *FirsTier Mortgage Co. v. Investors Mortgage Insurance Co.*, 498 U.S. 269 (1991), marked out a path for the application of Rule 4(a)(2), but the post-*FirsTier* caselaw displays some inter-circuit variation. The main points of variation[2] concern the application of Rule 4(a)(2) (as interpreted by *FirsTier*) in a range of situations. Those situations fall at different points upon a spectrum: In some instances, many circuits are likely to recognize the premature notice as relating forward, while in other instances, many circuits are likely to recognize the premature notice as ineffective.

In each instance, the salient question is whether a premature notice of appeal relates forward to the entry of the document that renders an appeal possible (i.e., either a Civil Rule

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[1] As it happens, after the agenda book for the spring 2010 meeting was compiled, a student note that advocates such an amendment became available on Westlaw. *See* Lexia B. Krown, Note, *Clarity as the Last Resort? Why Federal Rule of Appellate Procedure 4 Should and Could Stipulate Which Judgments Are "Final,"* 70 Ohio St. L.J. 1481 (2009).

[2] Another concerns the"cumulative finality" doctrine, under which some courts have held that a notice of appeal filed after an order disposing of some claims or issues but before another order or orders disposing of the remaining claims or issues relates forward to effect an appeal after the disposition of all remaining claims or issues. This doctrine was first enunciated prior to the 1979 promulgation of Appellate Rule 4(a)(2), and there currently exists a division among the circuits concerning whether the cumulative finality doctrine – as a principle separate from Rule 4(a)(2) – survives the adoption of that Rule and the Supreme Court's decision in *FirsTier*.

54(b) certification or a final judgment disposing of all claims with respect to all parties). In case it may be useful in framing the Committee's further discussions, here is a capsule summary[3] of the treatment of prematurity in a range of typical scenarios, roughly ordered from those that seem the easiest cases for recognizing relation forward to those that seem the easiest cases for denying relation forward:

- Decision announced, proposed findings yet to be submitted
    - This was the scenario in *FirsTier*, and the unanimous Court held that the notice of appeal related forward under Rule 4(a)(2). *FirsTier* presented few complications because the case involved a single plaintiff suing a single defendant, and the district court had announced its disposition of all the plaintiff's claims.
- Decision announced, contingent on a future event
    - A number of cases hold that a notice of appeal filed after the announcement of a contingent decision but before the expiration of the contingency period can relate forward.[4] A notice of appeal filed after the contingent decision but before the expiration of the contingency period should relate forward to the time when the contingency has occurred. Cases cited in the 1979 Committee Note to Rule 4(a)(2) and cited with approval in *FirsTier* provide support for such a view. For a contrary view, see one of the two alternative rationales in *Strasburg v. State Bar of Wisconsin*, 1 F.3d 468 (7th Cir. 1993), *overruled on other grounds by Otis v. City of Chicago*, 29 F.3d 1159 (7th Cir. 1994).
- Judgment as to fewer than all claims or parties, with belated certification under Civil Rule 54(b)
    - In this scenario, the notice of appeal is filed after the issuance of an order that would qualify for certification under Civil Rule 54(b), but no certification is provided until after the notice of appeal is filed. My preliminary search disclosed six or seven circuits that allow the notice of appeal to relate forward to the later certification and one circuit (the Eleventh) that has both a precedent that supports and a precedent that weighs against permitting relation forward in this context.

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[3] The details supporting this summary are set out in my March 13, 2010, memo.

[4] The most recent example (decided after the Committee's spring meeting) is *Lopez Dominguez v. Gulf Coast Marine & Assoc., Inc.*, 607 F.3d 1066, 1070 (5th Cir. 2010) (holding that a notice of appeal filed after a conditional forum non conveniens dismissal but before the defendants filed a stipulation acceptable to the plaintiffs in satisfaction of the conditions of dismissal and before the district court entered an order "formally dismissing the case" related forward to the date of the latter order).

- Judgment as to fewer than all claims or parties, with later disposition of all remaining claims with respect to all parties

    - In this scenario, the district court enters judgment as to fewer than all claims or parties but does not certify the judgment under Civil Rule 54(b); a notice of appeal is filed; and then the district court finally disposes of all remaining claims in the action. As to this scenario, authority from nine circuits supports the view that the premature notice relates forward to the date of entry of the final judgment. One of those circuits – the Seventh – has issued precedential opinions that might be read to take varying views on this issue. But as far as my preliminary searches disclose, only one circuit – the Eighth – has held unequivocally to the contrary in a precedential opinion.

- Amount of damages or interest yet to be determined

    - There is some diversity of views among the circuits concerning situations where damages or interest questions remain to be determined at the time the notice of appeal is filed. Some of the variations are reconcilable on closer examination, while others are not.

    - When the notice of appeal is filed after liability is determined but before the amount of damages has been set, there is division concerning whether the notice of appeal can ripen once the amount of damages has been fixed. The Third and Ninth Circuits have held that it does not. The Eighth Circuit has taken the view that a notice of appeal filed after an award of sanctions but before the reduction of that award to a sum certain ripened once the court determined the amount of the sanctions award. And the Tenth Circuit has held that a notice related forward, in the context of an appeal by a defendant wishing only to challenge the prior liability determination and not the subsequent damages determination.

    - The Eighth and Ninth Circuits have held that a notice of appeal filed after a liability determination but before the determination of pre-judgment interest did not relate forward. The Fourth Circuit has held, though, that a notice of appeal filed after the liability determination but before the determination of post-judgment interest did relate forward. Perhaps these contrasting views are reconcilable based on the notion that the calculation of post-judgment interest – though it may sometimes present difficult questions – ordinarily leaves less room for debate than might the calculation of pre-judgment interest.

- Magistrate judge's conclusions not yet reviewed by district court

    - Except when the parties have consented to trial before a magistrate judge, the magistrate judge is authorized only to make a report and recommendation

concerning the disposition of a civil case; it is the district judge who renders the final disposition. It is therefore unsurprising that the Fifth and Ninth Circuits have held that a notice of appeal filed after a magistrate judge issues recommendations but before the district court determines whether to adopt those recommendations does not relate forward to the final judgment entered by the district court. The Second Circuit has held to the contrary, but this holding may be explained by the particular facts of the case.

- Various clearly interlocutory orders that would not qualify for certification under Civil Rule 54(b)

  - In this category one may list, for example, discovery orders and Rule 11 sanctions rulings. There should be little confusion in those contexts; Rule 4(a)(2)'s relation forward provision cannot save an appeal when the only notice of appeal is filed after the interlocutory order and prior to the announcement of the final judgment.

  - Admittedly, even in this relatively straightforward corner of the doctrine, there may be outliers. Thus, a Tenth Circuit panel held – citing *FirsTier* with little discussion – that a notice of appeal from a Rule 11 sanctions order ripened after entry of the final judgment. But that decision is the only one of its kind of which I am aware (though I have not searched specifically for this sort of scenario).

TAB

VI-H

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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RICHARD C. TALLMAN
CRIMINAL RULES

ROBERT L. HINKLE
EVIDENCE RULES

August 26, 2010

Jerrold J. Ganzfried, Esq.
Howrey, LLP
1299 Pennsylvania Avenue, N.W.
Washington, DC 20004

Dear Jerry:

In my capacity as the Chair of the Advisory Committee on the Federal Rules of Appellate Procedure, I seek your input on a FRAP amendment proposal.

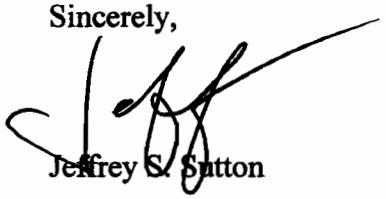
Our Committee is considering modifying FRAP 28(a)(6), the provision requiring a "statement of the case" in appellate briefs. As you know, the provision indicates that the statement must "indicat[e] the nature of the case, the course of proceedings, and the disposition below," and it precedes the requirement that the lawyer describe the "statement of the facts," *see* FRAP 28(a)(7). In the experience of some members of the committee, these requirements have generated confusion among appellate lawyers and considerable redundancy.

Should the rules instead merely provide for one "statement," as the Supreme Court rules provide, *see* S.Ct. R. 24(g), a statement that allows the lawyer to present the factual and procedural history in one place chronologically? Or should FRAP 28(a)(6) at a minimum be amended to remove the discussion of the "course of proceedings," which can be discussed under the statement of the facts and as a practical matter is usually repeated there anyway?

Before we move forward with any concrete proposals, we want to see if our intuition is correct: that other appellate lawyers and judges have been bothered by this feature of the rules. As I understand it, you are the chair of the Council of Appellate Lawyers for the American Bar Association and we would enjoy getting the feedback from you and other members of the Council.

I will follow up this letter with a telephone call to get your input. In the interim, thank you for your consideration of the proposal.

Sincerely,



Jeffrey S. Sutton

JSS:jmf

cc: Catherine T. Struve, Reporter
Committee on Appellate Rules

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
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EVIDENCE RULES

August 30, 2010

Donald B. Ayer, Esq.
Jones Day
51 Louisiana Avenue, N.W.
Washington, DC 20001-2113

Dear Don:

In my capacity as the Chair of the Advisory Committee on the Federal Rules of Appellate Procedure, I seek your input on a FRAP amendment proposal.

Our Committee is considering modifying FRAP 28(a)(6), the provision requiring a "statement of the case" in appellate briefs. As you know, the provision indicates that the statement must "indicat[e] the nature of the case, the course of proceedings, and the disposition below," and it precedes the requirement that the lawyer describe the "statement of the facts," *see* FRAP 28(a)(7). In the experience of some members of the committee, these requirements have generated confusion among appellate lawyers and considerable redundancy.

Should the rules instead merely provide for one "statement," as the Supreme Court rules provide, *see* S.Ct. R. 24(g), a statement that allows the lawyer to present the factual and procedural history in one place chronologically? Or should FRAP 28(a)(6) at a minimum be amended to remove the discussion of the "course of proceedings," which can be discussed under the statement of the facts and as a practical matter is usually repeated there anyway?

Before we move forward with any concrete proposals, we want to see if our intuition is correct: that other appellate lawyers and judges have been bothered by this feature of the rules. As I understand it, you are the President of the American Academy of Appellate Lawyers and we would enjoy getting feedback from you and your members. I will follow up this letter with a telephone call to get your input. In the interim, thank you for your consideration of the proposal.

Sincerely,

Jeffrey S. Sutton

JSS:jmf

TAB

VII-A

MEMORANDUM

DATE: September 16, 2010

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 10-AP-D

In April 2010, Representative Henry C. "Hank" Johnson, Jr., introduced H.R. 5069, the "Fair Payment of Court Fees Act of 2010."[1] The bill has been referred to the House Committee on the Judiciary, which referred it to the Subcommittee on Courts and Competition Policy.[2] H.R. 5069 would amend Civil Rule 68 and Appellate Rule 39 in response to concerns raised about the taxation of costs by the Fourth Circuit in the case of *Snyder v. Phelps*.

In September 2009, the court of appeals reversed a judgment in Albert Snyder's favor against the Westboro Baptist Church and certain of its members. *See Snyder v. Phelps*, 580 F.3d 206, 226 (4th Cir. 2009), *cert. granted*, 130 S. Ct. 1737 (Mar. 8, 2010) (No. 09-751). The judgment had awarded millions of dollars in damages on state-law tort claims arising from, inter alia, the Church's "protest" near the funeral of Snyder's son Matthew (a Marine who died in Iraq). *See id.* at 210-11. The court of appeals reversed the judgment on First Amendment grounds. *See id.* at 211. The opinion and judgment stated nothing concerning costs. The appellants timely moved for costs, and ten days later the court of appeals taxed the requested costs (over $16,000) against Snyder. Snyder (apparently belatedly) objected to the taxation of costs, arguing that appellants sought excessive sums and that the award posed a financial hardship. Snyder's annual income is $43,000 and Snyder's counsel was working pro bono. After a reply from the appellant, the court (in an order signed by the Clerk) denied the objections to the bill of costs. The court's ruling on costs triggered national news coverage,[3] and

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[1] Copies of the bill and of Representative Johnson's introductory remarks on the measure are enclosed.

[2] This Subcommittee is chaired by Representative Johnson.

[3] See, e.g., Slain Marine's Dad Ordered to Pay Anti-Gay Protesters, http://abcnews.go.com/GMA/video/father-ordered-pay-anti-gay-protesters-10258344 (last

Representative Johnson introduced H.R. 5069, explaining that the Civil and Appellate Rules currently "prevent litigants from pursuing legitimate appeals or encourage the parties to settle when they want a court to hear the case for fear of excessive penalties." The bill would add the following new subdivision (f) to Appellate Rule 39: "(f) WAIVER OF COSTS FOR CERTAIN APPEALS.— The court shall order a waiver of costs if the court determines that the interest of justice justifies such a waiver. For the purpose of making such a determination, the interest of justice includes the establishment of constitutional or other important precedent."[4] The Supreme Court granted certiorari in *Snyder*, *see* 130 S. Ct. 1737 (2010),[5] and the case is set for argument on October 6; if the Court were to reverse the court of appeals' judgment then the award of costs presumably would be vacated as well.[6]

Part I of this memo explains that the courts of appeals currently have discretion, under Appellate Rule 39, to refuse to award appeal costs to prevailing parties. Part II briefly analyzes H.R. 5069's proposed amendment to Rule 39 and suggests a possible alternative response to the concerns that led to the bill's introduction.

I. The courts of appeals already have discretion to deny costs to prevailing parties in appropriate cases

In resolving the request for appellate costs that followed its decision in *Snyder v. Phelps*, 580 F.3d 206 (4th Cir. 2009), the court of appeals applied Rule 39(a)(3)'s default rule that "if a judgment is reversed, costs are taxed against the appellee." Rule 39 sets default rules for the allocation of appeal costs, but those default rules are displaced if "the law provides or the court orders otherwise." Fed. R. App. P. 39(a). Because Rule 39(a) explicitly contemplates that

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visited Aug. 20, 2010).

[4] The bill would also amend Civil Rule 68(d) as follows: "Paying Costs After an Unaccepted Offer. If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made., unless the court determines that the interest of justice justifies waiving such payment. For the purpose of making such a determination, the interest of justice includes the establishment of constitutional or other important precedent."

[5] The questions presented in *Snyder* concern First Amendment issues and do not mention the matter of costs.

[6] *See, e.g.*, *Furman v. Cirrito*, 782 F.2d 353, 355 (2d Cir. 1986) ("[W]hen the Supreme Court reverses a circuit court order, which included an award of costs to the then successful appellee, and awards costs for the Supreme Court litigation to the now prevailing appellant[, the] award of costs by the circuit court must be vacated and costs awarded to the now successful appellant for appeals on both the circuit and Supreme Court levels, as well as for costs incurred in the district court.").

the court may "order[] otherwise," and does not specify on what basis such an order might issue, the Rule confers discretion on the court of appeals to depart from the default rules in appropriate circumstances. *See, e.g.*, *Moore v. County of Delaware*, 586 F.3d 219, 220 (2d Cir. 2009) (per curiam) ("[W]hile an award of costs to a prevailing party pursuant to Rule 39 is a customary and often routine procedure, this Court retains discretion to deny costs when, in the exercise of its discretion, it determines taxation is not appropriate."); *Tung Mung Dev. Co., Ltd. v. United States*, 354 F.3d 1371, 1382 (Fed. Cir. 2004) ("No decision of the Supreme Court or of our own court requires that costs be routinely awarded to the prevailing party."). The Fourth Circuit, like its sister circuits, has recognized that "[u]nder [Rule 39], an appellate court has wide discretion in the taxation of costs." *Square Constr. Co. v. Washington Metro. Transit Auth.*, 800 F.2d 1256, 1266 (4th Cir. 1986).

The exercise of discretion under Appellate Rule 39(a) resembles the analogous discretionary analysis under Civil Rule 54(d). *See, e.g.*, *Moore*, 586 F.3d at 221 ("[W]e look to many of the same factors that guide a district court's equitable discretion in awarding or denying costs pursuant to Fed.R.Civ.P. 54."); *cf.* 10 Fed. Prac. & Proc. Civ. § 2668 ("In keeping with the discretionary character of [Civil Rule 54(d)], the federal courts are free to pursue a case-by-case approach and to make their decisions on the basis of the circumstances and equities of each case."). So, for example, under Rule 39(a) "denial of costs may be appropriate where a losing party can demonstrate misconduct by a prevailing party, the public importance of the case, the difficulty of the issues presented, or its own limited financial resources." *Moore*, 586 F.3d at 221. In *Moore*, the plaintiff's "meager financial resources and his good faith prosecution of claims alleging government misconduct by appellants – misconduct significant enough to convince a state trial judge to suppress evidence and to lead a panel of this Court to find a constitutional violation" – led the court to deny costs to the successful appellants. *Id.* at 222.

In *Rural Housing Alliance v. U.S. Dept. of Agriculture*, 511 F.2d 1347 (D.C. Cir. 1974), Chief Judge Bazelon acquiesced in the panel's refusal to deny costs to the government, but wrote separately to emphasize considerations that could justify such denial. He argued that "the taxation of costs works as a penalty, which should not be imposed unless the loser can fairly be expected to have known at the outset that his position lacked substance." *Id.* at 1349 (Bazelon, C.J., concurring). Taking into account the "uncharted area" of law involved in Rural Housing Alliance's case, Chief Judge Bazelon viewed it as "harsh to allow the burden of costs to fall on the party against which the uncertainties were finally resolved – at least without consideration of the interests at stake in the litigation and the effect which this burden is likely to have on the party taxed." *Id.* at 1350. Noting that both sides in the litigation were representing important public interests (combating discrimination on the one hand, and protecting the privacy of minorities and low-income persons on the other), Chief Judge Bazelon did not attempt to determine "which policy is worthier of special treatment," but urged that the court should "exercise its discretion in a way which will not discourage representatives of divergent aspects of the public good from pursuing their claims in court." *Id.* These considerations would have led him to deny costs if the decision were up to him; but he acquiesced in the panel's refusal to deny costs after concluding that $ 425 in costs would not deter future litigation by the Rural Housing Alliance (which had a $ 380,000 budget and $ 130,000 in reserves). *See id.* at 1351.

Judges may disagree with each other concerning the proper exercise of discretion in a given case. Judge Friedman dissented in *Tung Mung* in terms that suggest that in the Federal Circuit, at least, the court of appeals is frequently willing to exercise its discretion to deny costs to the prevailing party. Judge Friedman stressed the need for a careful exercise of that discretion:

> I write on the issue ... because of what appears to me to be an increasing practice by the court routinely to deny costs to the prevailing party. Since the court does not explain the reason for such action, one can only guess. Perhaps the court denies costs when it views the case as a close one, or because the losing party's position seemed sufficiently sympathetic that subjecting that party not only to defeat but also to paying the other party's costs appears inappropriate.
>
> Whatever the reason, the routine denial of costs seems inconsistent with Rule 39. It also appears inconsistent with the reason for awarding costs – to reimburse a party for the expenses it incurred in litigation in which it prevails. Costs are awarded without regard to the merits of the losing party's arguments or to its financial situation.

Tung Mung, 354 F.3d at 1382-83 (Friedman, J., dissenting in part).

Though this is not a comprehensive survey of the caselaw under Rule 39, it strongly indicates that the courts of appeals already have discretion to deny costs to the prevailing party under Rule 39 based on a consideration of the equities of the case. That is not to say that all judges will exercise that discretion in similar ways; the cases noted above show that even within a given panel the judges' views of the equities may differ. Certainly, it seems to this writer that a strong case could have been made, on the equities, for denying costs in *Snyder v. Phelps*; but the court of appeals in that case took a different view.

II. H.R. 5069

The discussion above indicates that the courts of appeals already possess discretion to deny costs to the prevailing party. Though different judges may exercise that discretion in different ways, it seems fair to predict that the same would be true of judicial practice under the standard proposed in H.R. 5069. H.R. 5069 directs that the court of appeals "shall order a waiver of costs if the court determines that the interest of justice justifies such a waiver" and that "the interest of justice includes the establishment of constitutional or other important precedent." H.R. 5069's standard would require the court of appeals to consider a specific circumstance when exercising its discretion to deny costs: namely, it would require the court to consider whether the litigant was engaged in establishing constitutional or other important precedent.

It should be noted that, ordinarily, a litigant who is requesting that the court exercise its discretion to deny costs will be a litigant who has lost in the court of appeals – because Rule

39(a)'s default rules provide for the award of costs to prevailing parties. If such a litigant has established an important precedent, the litigant will have done so by obtaining a ruling that is the opposite of the litigant's own position – in other words, by losing on the relevant issue. That was the case, for example, in *Snyder*. In some instances, though, a litigant might win on an important legal question but lose on some other aspects of the appeal – in which event Rule 39(a) would not set any default rule for the award of costs.

H.R. 5069's requirement that the court consider whether the appeal established an important precedent would add a specific ingredient to the court of appeals' equitable analysis. But, as discussed above, that ingredient is one that courts already have discretion to take into account under Rule 39(a). And the bill as drafted might well not change the outcome in a given case, as compared to current law: A judge who believes, under the current discretionary standard set by Rule 39(a), that there is no reason to depart from the default rule may well also believe, under the "interests of justice" standard set by H.R. 5069, that there is no reason to order a waiver of costs.

To the extent that H.R. 5069's proponents believe that it is important to *ensure* (as opposed to merely *permit*, as current law does) that courts take into account the question of constitutional precedent formation when deciding whether to deny costs to the prevailing party, H.R. 5069 would constitute a change from current law. One might question, though, whether requiring consideration of one specific factor will necessarily improve the quality of the results that courts reach when exercising their discretion. Imagine, for example, that the proposed Rule 39(f) were in effect and that the plaintiff, rather than the defendants, had prevailed on appeal in *Snyder v. Phelps*. In that event, one could readily imagine the defendants opposing an award of costs to the prevailing appellee on the grounds that the decision set an important precedent – yet I suspect that the bill's proponents would not consider the equities to favor denying costs to Mr. Snyder in that scenario. (Or, if the equities did favor the denial of costs to the plaintiff in such a case, it would be on the basis of factors in addition to the setting of constitutional precedent – such as the fact that a very large jury award to the plaintiff would dwarf any appellate costs that might be taxed.)

Thus, it seems useful to consider whether the bill as drafted would speak clearly to the issues that it is designed to target.[7] The concerns giving rise to the introduction of H.R. 5069 are

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[7] I focus here on Section 3 of the bill, and I leave aside questions concerning the Civil Rules – such as why the bill focuses on Civil Rule 68 rather than on Civil Rule 54(d).

Apart from the basic questions discussed in the text of this memo, the bill raises smaller drafting questions as well. One such question concerns Section 3's reference to "the court." Under Appellate Rule 39(e), some appeal-related costs are to be sought from the district court rather than the court of appeals. It is unclear how Section 3 of the bill intends to allocate – as between the court of appeals and the district court – the authority to order a waiver of costs in the interests of justice. Another issue regards the bill's directive that "the interest of justice includes the establishment of constitutional or other important precedent." As noted above, in the light

understandable. But that does not establish that the proposed legislation is the best way to ensure that courts of appeals appropriately exercise the discretion that they already possess to deny costs to the prevailing party. Another possible response might be a study that could raise awareness of equitable factors – including those mentioned in Section 3 of the bill – that courts should take into account when exercising their discretion.

Encls.

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of the context that gave rise to the bill, it seems clear that "establishment of ... precedent" is meant to include cases in which the decision establishes a precedent that is contrary to the position of the litigant who is arguing for a waiver of costs. Without knowing the context that led to the bill, however, courts might not find this reading intuitive.

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111TH CONGRESS
2D SESSION

H. R. 5069

To amend the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure to ensure access to the Federal judiciary in cases where the interest of justice so requires, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

APRIL 20, 2010

Mr. JOHNSON of Georgia introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To amend the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure to ensure access to the Federal judiciary in cases where the interest of justice so requires, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Fair Payment of Court Fees Act of 2010''.

SEC. 2. AMENDMENT TO THE FEDERAL RULES OF CIVIL PROCEDURE.

Rule 68(d) of the Federal Rules of Civil Procedure is amended by striking the period at the end and inserting ", unless the court determines that the interest of justice justifies waiving such payment. For the purpose of making such a determination, the interest of justice includes the establishment of constitutional or other important precedent.".

SEC. 3. AMENDMENT TO THE FEDERAL RULES OF APPELLATE PROCEDURE.

Rule 39 of the Federal Rules of Appellate Procedure is amended by adding at the end the following new subdivision:

"(f) WAIVER OF COSTS FOR CERTAIN APPEALS.—The court shall order a waiver of costs if the court determines that the interest of justice justifies such a waiver. For the purpose of making such a determination, the interest of justice includes the establishment of constitutional or other important precedent.".

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me in recognizing the outstanding contributions of Carl D. Bocchicchio to his profession and to this great nation.

INTRODUCTION OF H.R. —, THE ''FAIR PAYMENT OF COURT FEES ACT OF 2010''

HON. HENRY C. "HANK" JOHNSON, JR.

OF GEORGIA

IN THE HOUSE OF REPRESENTATIVES

Tuesday, April 20, 2010

Mr. JOHNSON of Georgia. Madam Speaker, I rise today to introduce H.R. —, the Fair Payment of Court Fees Act of 2010. This legislation is vital to preserve democracy and fair access to the courts.

It has come to my attention that provisions in the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure, while well intentioned to discourage abuses to the appeal process and encourage settlement, have been shown in practice to unfairly and indiscriminately punish parties for declining an offer for settlement made before trial or seeking appellant review.

That policy quite simply goes too far, creating perverse results, and inevitably will prevent litigants from pursuing legitimate cases or appeals for fear of excessive penalties.

Recently, there was a national outcry when a Federal court ordered the family of a fallen soldier, Marine Lance Cpl. Matthew Synder of Westminster, Maryland, to pay $16,000 to the people who picketed the funeral of this hero who died in service to his country in Iraq.

You heard me correctly, the dead soldier's family was ordered to pay thousands of dollars to the people who picketed their son's funeral and who shouted ''You're going to Hell'' and ''Thank God for dead soldiers.''

This is not adding insult to injury; this is outrageous and cannot be allowed to stand.

The family of Matthew Synder's supposed ''fault'' was to defend the decision of the lower court when the picketers appealed.

Preposterous and outrageous. As Chairman of the Judiciary Committee Subcommittee on Courts and Competition policy, I cannot wait for the multi-year process of the Rules Enabling Act to correct this injustice. This problem must be corrected now.

The rules, as they stand, are a blanket policy to discourage pursuit of justice through the appeals process. That policy quite simply goes too far, creating perverse results, and inevitably will prevent litigants from pursuing legitimate appeals or encourage the parties to settle when they want a court to hear the case for fear of excessive penalties.

The bill I have introduced today will stop this travesty and open the court house doors to parties who are acting in the interest of justice.

Specifically, the ''Fair Payment of Court Fees Act of 2010'' would amend two procedural rules to ensure access to the Federal courts. My bill would amend Rule 39 of the Federal Rules of Appellate Procedure and Rule 68 of the Federal Rules of Civil Procedure, to give a court discretion to evaluate whether the payment should be waived in the interest of justice including instances where constitutional or other important precedent are at issue.

Strict application of the Rules has been detrimental to the public interest. So we would allow our Judges to use their discretion to determine when these fees should be waived. Our courthouse doors must remain open to pursue legitimate claims.

I hope that my colleagues will support this legislation.

IN HONOR OF HARRIET BEEKMAN

HON. DENNIS J. KUCINICH

OF OHIO

IN THE HOUSE OF REPRESENTATIVES

Tuesday, April 20, 2010

Mr. KUCINICH. Madam Speaker, I rise today in honor of Harriet Beekman, a dedicated advocate on behalf of veterans and the founder of We Do Care.

In 1968, Ms. Beekman received a letter from U.S. Marine Pfc. Steve Sarossy who had expressed his concern that ''no one seemed to care'' about service personnel overseas. Ms. Beekman was so disturbed by the sentiment that she wrote back in bold letters: STEVE, WE DO CARE. Tragically, Pfc. Sarossy was killed in the Quang Tri Republic of Vietnam later that year, but his words were not forgotten. Harriet Beekman took it upon herself to set up We Do Care, a support organization for our troops worldwide. Since the Vietnam conflict, We Do Care has sent more than 60,000 letters and 21,000 packages to service personnel. For more than four decades Ms. Beekman has led the charge in collecting, organizing and shipping several hundred tons of donated items to service personnel all over the world. We Do Care has sent goods to service members in places such as Vietnam, Bosnia-Herzegovina, Haiti, Somalia, Afghanistan and Iraq.

We Do Care has brought communities together in support of the men and women who risk their lives everyday. People of all ages and backgrounds gather together at dances, talent shows, community collection drives, recycling projects, rummage sales and dinners in order to raise funds and collect item donations to send our troops. In response to her efforts, Ms. Beekman has received more than 5,000 letters of appreciation from service personnel around the world.

Madam Speaker and colleagues, please join me in honoring Harriet Beekman, often referred to as the ''Florence Nightingale of Fairview Park.'' She continues to show our troops that, indeed, we do care. Even as she approaches her ninetieth birthday this July, Ms. Beekman continues to show the indomitable spirit of youth in continuing her work. Her volunteer spirit and dedication to those who serve our country uplifts and inspires resolve to live a more peaceful life.

HONORING RUTH ARDEN

HON. MARCY KAPTUR

OF OHIO

IN THE HOUSE OF REPRESENTATIVES

Tuesday, April 20, 2010

Ms. KAPTUR. Madam Speaker, I rise today in remembrance of Ruth Arden, a Toledoan, a pioneer, and tireless advocate for our most vulnerable people. Ruth passed away unexpectedly in December and her passing was noted by the well known and the unknown. Today those she served with and among gather to honor her efforts, pay special tribute, and remember a very fine lady.

Ruth Arden was the executive director of St. Paul's Community Center for many years. St. Paul's serves people who are homeless and mentally ill, and under Ruth's extraordinary vision and leadership the shelter served hundreds of people with respect. She and her team gave people dignity and the tools to navigate a difficult life. Ruth was an advocate for people who are homeless and mentally ill, and challenged leaders at the local, State and National levels to see their need. Jesus Christ reminded all that ''whatever you do to the least among you, that you do unto me.'' Few people follow His words as did Ruth, and her work inspired all around her.

Ruth Arden was an ardent advocate for the poor and downtrodden, but she was also an advocate of the arts. She enjoyed music—especially jazz—and supported local artists. Her support, advice and wise counsel were most appreciated, and in her quiet way Ruth moved mountains. Her life leaves an imprimatur on our community which stands well past her leave-taking, and her voice still echoes among those with whom she worked. She had an unforgettable spirit of caring and drive that we are guided by her spirit to carry forth.

PERSONAL EXPLANATION

HON. JEFF MILLER

OF FLORIDA

IN THE HOUSE OF REPRESENTATIVES

Tuesday, April 20, 2010

Mr. MILLER of Florida. Madam Speaker, I missed roll call Vote Nos. 204–211 on April 15, 2010. Had I been present, I would have voted:

Roll Call Vote No. 204, Providing for consideration of the bill H.R. 4715, ''nay.''

Roll Call Vote No. 205, Recognizing the Coast Guard Group Astoria's more than 60 years of service to the Pacific Northwest, ''aye.''

Roll Call Vote No. 206, On Motion to Refer the Resolution, ''aye.''

Roll Call Vote No. 207, On Agreeing to the Amendment to H.R. 4715, ''nay.''

Roll Call Vote No. 208, On Motion to Recommit H.R. 4715 with Instructions, ''aye.''

Roll Call Vote No. 209, Final passage of H.R. 4715, the Clean Estuaries Act of 2010, ''nay.''

Roll Call Vote No. 210, Congratulating the Duke University men's basketball team for winning the 2010 NCAA Division I Men's Basketball National Championship, ''aye.''

Roll Call Vote No. 211, On Motion to Concur in the Senate Amendment to H.R. 4851, ''nay.''

A TRIBUTE TO JIM SEELEY IN RECOGNITION OF HIS RETIREMENT AFTER 34 YEARS OF SERVICE TO THE CITY OF LOS ANGELES

HON. LUCILLE ROYBAL-ALLARD

OF CALIFORNIA

IN THE HOUSE OF REPRESENTATIVES

Tuesday, April 20, 2010

Ms. ROYBAL-ALLARD. Madam Speaker, on behalf of those of us who represent the great

TAB

VII-B

MEMORANDUM

DATE: September 16, 2010

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 10-AP-E

Howard Bashman has suggested that the Committee consider issues raised by *Vanderwerf v. SmithKline Beecham Corp.*, 603 F.3d 842 (10th Cir. 2010).[1] After the district court granted summary judgment dismissing the Vanderwerfs' claims, they filed a timely motion under Civil Rule 59(e). After almost seven months elapsed with no decision on the motion, the Vanderwerfs withdrew the motion and (on the same day) filed a notice of appeal. A divided panel of the court of appeals dismissed the appeal as untimely. The majority reasoned that Appellate Rule 4(a)(4) "requires entry of an 'order disposing of [the Rule 59] motion' to give the appealing party the benefit of Rule 4(a)(4)(A)(iv)," 603 F.3d at 846, and that the Vanderwerfs' withdrawal of their motion "leaves the record as if they had never filed the motion in the first place," *id.* (quoting appellee's brief). Judge Lucero dissented, arguing that "[b]ecause the district court did not rule on the motion to alter or amend the judgment, the thirty-day filing deadline has not begun to run." *Id.* at 849 (Lucero, J., dissenting).[2]

Appellate Rule 4(a)(4) does not explicitly address the effect on appeal time of the withdrawal of a motion listed in Appellate Rule 4(a)(4)(A)(i) - (vi), and there is little caselaw on point. The *Vanderwerf* decision appears to be the first decision to have denied tolling effect to such a motion because it was withdrawn. The Second Circuit held in *United States v. Rodriguez*, 892 F.2d 233 (2d Cir. 1989), that a motion for reconsideration had tolling effect despite being withdrawn.[3] The Seventh Circuit took the same approach *Rutledge v. United States*, 230 F.3d 1041, 1046 n.2 (7th Cir. 2000).[4] Likewise, in *Brae Transportation, Inc. v. Coopers & Lybrand*,

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[1] The majority and dissenting opinions in *Vanderwerf* are enclosed.

[2] Rehearing en banc was denied and the Vanderwerfs did not petition for certiorari.

[3] The *Rodriguez* court found it unnecessary to decide whether the appeal time began to run when the government withdrew its motion or when the district court later endorsed on that motion the statement "[m]otion denied as withdrawn." 892 F.2d at 235-36.

[4] Rutledge withdrew his timely-filed Civil Rule 59(e) motion on November 25, 1998. The Seventh Circuit ruled that "Rutledge should have filed his notice of appeal with the district court no more than sixty days after November 25," but – applying the unique circumstances doctrine – relieved Rutledge of the effects of his failure to do so because he had relied on directions from the district court. *Rutledge*, 230 F.3d at 1046 n.2. The Supreme Court's

790 F.2d 1439, 1442 (9th Cir. 1986), the Ninth Circuit rejected the appellees' contention that "because the [appellant's] Rule 59 motion was withdrawn, no Rule 4(a)(4) order was issued, and therefore the appeals period was never suspended by this short-lived Rule 59 motion." And the Sixth Circuit, in an unpublished opinion, "construe[d]" an appellee's "motion for reconsideration as 'denied' as of the date of the withdrawal, thereby permitting the [appellants] thirty days from that date in which to appeal." *Chrysler Motors Corp. v. Country Chrysler, Inc.*, 884 F.2d 578, 1989 WL 100084, at *1 (6th Cir. July 31, 1989) (unpublished opinion).[5]

Admittedly, the facts of these cases differed, to varying degrees, from those of *Vanderwerf*. *Chrysler*, for example, besides being unpublished, concerned a prior version of Appellate Rule 4(a)(4) and involved a reconsideration motion by the opponent of the would-be

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rejection of the unique circumstances doctrine as applied to jurisdictional appeal deadlines, *see Bowles v. Russell*, 551 U.S. 205 (2007), does not call into question the aspect of *Rutledge* that dealt with the effect of the tolling motion.

[5] The Tenth Circuit's decision in *OXY USA, Inc. v. Babbitt*, 230 F.3d 1178, 1183 n.5 (10th Cir. 2000), *opinion vacated on other grounds*, 268 F.3d 1001 (10th Cir. 2001), *abrogated on other grounds by BP Am. Prod. Co. v. Burton*, 549 U.S. 84 (2006), appears inapposite to the questions presented in *Vanderwerf*. In *OXY*, Shell – the party seeking to bring the relevant appeal – had filed a post-judgment motion within 10 days after the entry of summary judgment in its favor. Evidently Shell filed two notices of appeal – one before or while the post-judgment motion was pending, and the other at or after the time that the litigant withdrew the post-judgment motion. The court of appeals expressed the view that the motion was not a Rule 59(e) motion, and then ruled that the motion's existence created no problems of appellate jurisdiction: "[N]one of the authorities cited in the government's brief demonstrate that the motion deprived this court of appellate jurisdiction. Cf. Fed.R.Civ.P. 60(a) .... In any event, even if Shell's post-judgment motion did implicate Rule 59(e), Shell later withdrew the motion and filed a new notice of appeal." *OXY*, 230 F.3d at 1183 n.5. The *OXY* panel appears to have believed that the motion was akin to one under Rule 60(a) and that Rule 60(a) motions lack tolling effect under Appellate Rule 4(a)(4). In that view, if the first notice of appeal had been filed outside the time set by Appellate Rules 4(a)(1) and (3) as measured from the entry of judgment, the appeal would have been untimely; thus, I infer (from the fact that the court held Shell's appeal timely) that the first notice of appeal was filed within the time set by Appellate Rules 4(a)(1) and (3) as measured from the initial judgment. The court of appeals' alternative theory appears to have been that, even if the post-judgment motion qualified as a tolling motion under Appellate Rule 4(a)(4) – i.e., as a motion that under Appellate Rule 4(a)(4)(B)(i) suspended the effect of the original notice of appeal – the withdrawal of the motion permitted the exercise of appellate jurisdiction. Such a ruling would not, however, be apposite to the issues presented in *Vanderwerf*: Because, as noted above, there appears to have been an initial, timely notice of appeal in *OXY* (and there is no indication that the initial notice of appeal was withdrawn), the result in *OXY* would not have differed whether or not the withdrawn motion had tolling effect.

appellants. The then-applicable version of Rule 4(a)(4)[6] provided that "[a] notice of appeal filed before the disposition of any of [the listed tolling motions] shall have no effect";[7] thus, the appellants could not have filed their notice of appeal while the appellee's reconsideration motion was still outstanding. In *Brae* and *Rodriguez*, the district court entered an order that in some way assented to the movant's request to withdraw the motion; in *Brae*, the appeal time ran from the date of the district court's order that "referred to the Motion to Vacate as 'Having been withdrawn,'" *Brae*, 790 F.2d at 1442, while in *Rodriguez*, the district court responded to the government's letter withdrawing the reconsideration motion by "endors[ing] the motion ... with the words '[m]otion denied as withdrawn.'" *Rodriguez*, 892 F.2d at 235.

Apart from the caselaw, there is a good deal of textual appeal to the position taken by Judge Lucero in his *Vanderwerf* dissent. Appellate Rule 4(a)(4)(A)'s tolling provision is triggered by the "timely fil[ing]" of one of the listed motions, and the Civil Rule 59(e) motion in *Vanderwerf* was timely filed. Under Appellate Rule 4(a)(4)(A), "the time to appeal" in *Vanderwerf* was to run "from the entry of the order disposing of the last ... remaining" tolling

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[6] At the time, Appellate Rule 4(a)(4) provided in relevant part: "If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above."

[7] Under this version of Rule 4(a)(4), some appellants tried without success to argue that by withdrawing their tolling motion they could avoid the nullification of a notice of appeal filed before the tolling motion was withdrawn. That stratagem was rejected by the Fifth Circuit in an unpublished opinion: "The question remains whether Hatten's unilateral and unacknowledged attempt to withdraw his rule 52 motion amounts to a 'disposition' of his motion and thereby divested the district court of jurisdiction and created appellate jurisdiction.... There has, in fact, been no acknowledgement at all by the district court of Hatten's attempt to withdraw his rule 52 motion. We conclude that Hatten's unilateral motion does not constitute a 'disposition' of the motion and we still have no jurisdiction over this appeal." *Hatten v. United States*, 1993 WL 373520, at * 2 (5th Cir. Sept. 10, 1993) (unpublished opinion). Similarly, the Second Circuit held that Rule 4(a)(4) nullified notices of appeal filed after the date of a party's letter seeking to withdraw its tolling motion but before the district court's order granting the request to withdraw the motion: "A notice of appeal is ineffective unless filed after 'entry of the order' disposing of a timely rule 59 motion.... Accordingly, because the district court's order granting withdrawal of the rule 59 motion was not entered until August 31, 1990, each of the five notices of appeal filed in August was a nullity." *Northwestern Nat'l Ins. Co. of Milwaukee, Wisconsin v. Alberts*, 937 F.2d 77, 82 (2d Cir. 1991).

motion; because no such order was ever entered, it seems reasonable to argue that the Vanderwerfs' appeal time limit had not yet begun to run.

In assessing the implications of such an interpretation, it makes sense to consider both the policy goals of Rule 4(a)(4) and the policy concerns suggested by the appellee in *Vanderwerf*. The purpose of Rule 4(a)(4) is, presumably, to permit parties to hold off on taking appeals until any timely post-judgment motions are resolved. Because such motions might lead to modification of the judgment (and might even obviate the need for an appeal), Rule 4(a)(4) fosters an efficient division of labor between the trial and appellate courts. There is no particular reason to think that the ultimate withdrawal of a motion of the type described in Rule 4(a)(4)(A) nullifies those policy concerns. Prior to the motion's withdrawal, the possibility exists that the district court will decide the motion, and such a decision may alter the judgment and may obviate the need for an appeal. Once the motion is withdrawn, it is true that, in hindsight, we can see that the motion did not result in a change in the judgment and did not obviate the need for an appeal; but the same is true when such a motion is denied, and no one would argue that a denied motion lacks tolling effect because it was denied.[8]

The appellee in *Vanderwerf* nonetheless contended that a withdrawn motion should lack tolling effect because a contrary view could enable a would-be appellant to enlarge its appeal time by making, and then later withdrawing, a tolling motion with no intention that the district court actually rule on the motion. Such maneuvering, the *Vanderwerf* appellee argued, not only would permit appellants unilaterally to extend applicable appeal times but also would waste the effort of the opposing party and the district judge, who might in the interim expend resources (respectively) responding to or adjudicating the motion. These are valid concerns; on the other hand, there would seem to be a number of ways to take account of these concerns, short of holding that the withdrawal of the Vanderwerfs' motion deprived the motion of tolling effect. One could rule that the motion should lack tolling effect in cases where it can be shown that the

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[8] The *Vanderwerf* majority relied on an Am. Jur. entry stating that "[t]he effect of a withdrawal of a motion is to leave the record as it stood prior to filing as though the motion had never been made." *Vanderwerf*, 603 F.3d at 846 (quoting Appellees' Br. at 6 (quoting 56 Am. Jur. 2d Motions, Rules, and Orders § 32 (2008))). I have reviewed the current equivalent of this section. *See* 56 Am. Jur. 2d Motions, Rules, and Orders § 31 (database updated 2010) (stating as a "Practice Tip" that "[t]he effect of withdrawal of a motion is to leave the record as it stood prior to the filing, that is, as though the motion had never been made"). As support for its proposition concerning withdrawn motions the current Am. Jur. section cites two state-court decisions, neither of which addresses appeal time or the effectiveness (or lack thereof) of a tolling motion. *See Stoute v. City of New York*, 91 A.D.2d 1043, 1044, 458 N.Y.S.2d 640 (2d Dep't 1983) (holding that a litigant could not reinstate a previously withdrawn application for leave to serve a late notice of claim, and that a later application was untimely); *Hammons v. Table Mountain Ranches Owners Ass'n, Inc.*, 72 P.3d 1153, 1156-57 (Wyo. 2003) (refusing to address arguments that had been made in the court below only in motions that were later withdrawn).

would-be appellant filed the motion with no intent that it be adjudicated and, rather, with the intent only to extend its appeal time.[9] Or one could hold that the withdrawal of the motion never deprives the motion of tolling effect, and leave to provisions such as Fed. R. Civ. P. 11[10] and 28 U.S.C. § 1927[11] the function of policing filings that are made for an improper purpose.

But if one might question the persuasiveness of the majority opinion in *Vanderwerf*, one might also pause over the implications of Judge Lucero's *Vanderwerf* dissent. Under Judge Lucero's reading of Appellate Rule 4(a)(4), if a tolling motion is withdrawn and the court never enters an order disposing of that motion (e.g., an order denying the motion as having been withdrawn), the parties' time to appeal would never begin to run. To the extent that this outcome seems undesirable, the issue seems somewhat reminiscent of the pre-2002 dispute over the effect, on appeal time, of the district court's failure to provide a separate document when required by Civil Rule 58. Prior to the 2002 amendments to Civil Rule 58 and Appellate Rule 4(a)(7), a number of circuits held that where a separate document was required and the district court failed to provide it, the time for appeal never began to run.[12] In so doing, courts rejected appellees' policy arguments[13] as inconsistent with the text of the relevant rules.[14] The First

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[9] The Second Circuit, in *Rodriguez*, might be read to have suggested such an approach when it noted that it found the appeal timely "in the absence of evidence that the government filed and then withdrew its motion for reconsideration in bad faith, as part of some sort of hardball litigation strategy, or that the government was guilty of neglect." *Rodriguez*, 892 F.2d at 236.

[10] Civil Rule 11(b)(1) provides that "[b]y presenting to the court a pleading, written motion, or other paper--whether by signing, filing, submitting, or later advocating it--an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation."

[11] Section 1927 provides that "[a]ny attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."

[12] *See, e.g.*, *United States v. Haynes*, 158 F.3d 1327, 1328-29 (D.C. Cir. 1998).

[13] *See, e.g.*, *Haynes*, 158 F.3d at 1329 (noting the government's contention that "application of the separate document requirement to post-judgment motions provides a boon for tardy appellants").

[14] *See, e.g.*, *Haynes*, 158 F.3d at 1329 (holding that the government's arguments "do not come within a country mile of the sort of incoherence or inconsistency in the literal language of the rules that under *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240-41 ... (1989),

Circuit, by contrast, decided on policy grounds to engraft a judicially-created time limit on this principle:

> If we were to hold without qualification that a judgment is not final until the court issues a separate document, we would open up the possibility that long dormant cases could be revived years after the parties had considered them to be over.... We hasten to shut off that prospect. It is well-established that parties may waive technical application of the separate document requirement.... We believe it appropriate, absent exceptional circumstances, to infer waiver where a party fails to act within three months of the court's last order in the case. When a party allows a case to become dormant for such a prolonged period of time, it is reasonable to presume that it views the case as over. A party wishing to pursue an appeal and awaiting the separate document of judgment from the trial court can, and should, within that period file a motion for entry of judgment. This approach will guard against the loss of review for those actually desiring a timely appeal while preventing resurrection of litigation long treated as dead by the parties.

Fiore v. Washington County Cmty. Mental Health Ctr., 960 F.2d 229, 236 (1st Cir.1992). In 2002, the rulemakers, agreeing with the policy reasons for capping appeal time in such circumstances, amended Appellate Rule 4(a)(7) and Civil Rule 58. As the 2002 Committee Note to Appellate Rule 4(a)(7) explains:

> Both Rule 4(a)(7)(A) and Fed. R. Civ. P. 58 have been amended to impose such a cap. Under the amendments, a judgment or order is generally treated as entered when it is entered in the civil docket pursuant to Fed. R. Civ. P. 79(a). There is one exception: When Fed. R. Civ. P. 58(a)(1) requires the judgment or order to be set forth on a separate document, that judgment or order is not treated as entered until it is set forth on a separate document (in addition to being entered in the civil docket) or until the expiration of 150 days after its entry in the civil docket, whichever occurs first. This cap will ensure that parties will not be given forever to appeal (or to bring a postjudgment motion) when a court fails to set forth a judgment or order on a separate document in violation of Fed. R. Civ. P. 58(a)(1).

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would allow a court to go beyond the rules' plain meaning"); *Hammack v. Baroid Corp.*, 142 F.3d 266, 270 (5th Cir. 1998) ("Under the plain language of Fed. R.App. P. 4(a)(1) and Fed. R. Civ. P. 58, the thirty-day period for taking an appeal does not begin to run until the court has issued a separate document and records entry of the final judgment in its civil docket."); *Rubin v. Schottenstein, Zox & Dunn*, 110 F.3d 1247, 1253 (6th Cir. 1997) ("[I]n order to prevent loss of the right of appeal rather than facilitate loss, we apply the mechanical requirements of Rule 58 and conclude that the time for appeal has not run."), *opinion vacated*, 120 F.3d 603 (6th Cir. 1997) (en banc), *and opinion reinstated in relevant part*, 143 F.3d 263, 270 (6th Cir. 1998) (en banc).

2002 Committee Note to Appellate Rule 4(a)(7).

Thus far, *Vanderwerf* appears unique in its ruling that a withdrawn motion (when made by the would-be appellant) lacks tolling effect.[15] For litigants in the Tenth Circuit who are unaware of the *Vanderwerf* rule, the decision may have harsh effects (as it did in *Vanderwerf* itself). But for litigants familiar with *Vanderwerf*, there are work-arounds; for example, the litigant can file a notice of appeal while the motion is pending, and then ask the district court to approve the withdrawal of the motion.[16] Outside the Tenth Circuit, the effect of *Vanderwerf* will depend on whether other courts decide to follow it; in any event, as in the Tenth Circuit, so too in other circuits the careful litigant presumably can avoid trouble by filing the notice of appeal while the motion is pending and seeking district court approval for the motion's withdrawal. Thus, rulemaking in response to *Vanderwerf* would seem most warranted if the goal is to protect less sophisticated litigants from the loss of their appeal rights through ignorance of the *Vanderwerf* rule (which is not readily derived from the text of Appellate Rule 4(a)(4)). To the extent that other courts in the future reject the rule in *Vanderwerf* and, instead, adopt Judge Lucero's view that without a court order a withdrawn motion continues to have tolling effect indefinitely, one might wonder whether it would be desirable to set a cut-off in Appellate Rule 4(a)(4) (in the same way that the 2002 amendments dealt with a similar issue under Appellate Rule 4(a)(7)). Whether one contemplates rulemaking to reject the majority view in *Vanderwerf* or to address the possible adoption (by future courts) of the dissenting view in *Vanderwerf*, it will be worth considering whether the question arises often enough to warrant an amendment to the Rule.

Encl.

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[15] In distinguishing *Chrysler*, the *Vanderwerf* majority stressed that "in *Chrysler* the parties seeking to appeal ... were not in control of the litigation, because they did not file the post-trial motion." *Vanderwerf*, 603 F.3d at 847. It certainly would not make sense to extend the *Vanderwerf* holding to situations in which the tolling motion is made (and then withdrawn) by a litigant other than the would-be appellant. But the *Vanderwerf* court did not indicate a textual basis in Appellate Rule 4(a)(4) for distinguishing between appeals by the litigant that made the withdrawn motion and appeals by other litigants.

[16] The *Vanderwerf* majority stated that "the best option may have been for the Vanderwerfs to have moved to withdraw the motion, in hopes that the district court would rule on that motion thereby triggering a 30-day period for the filing of a timely appeal." *Vanderwerf*, 603 F.3d at 848.

603 F.3d 842
(Cite as: 603 F.3d 842)

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United States Court of Appeals,
Tenth Circuit.
Debra VANDERWERF, individually and as next friend for Riley Vanderwerf and Tanner Vanderwerf, minors; Estate of William K. Vanderwerf, Plaintiffs-Appellants,
v.
SMITHKLINE BEECHAM CORPORATION, d/b/a Glaxosmithkline, Defendant-Appellee.
No. 08-3218.

April 27, 2010.

Background: Family and estate of patient who committed suicide brought products liability action against manufacturer of antidepressant and antipsychotic drug that patient was taking at time of his death. Manufacturer moved for summary judgment and to exclude certain testimony. The United States District Court for the District of Kansas, Kathryn H. Vratil, J., 529 F.Supp.2d 1294, sustained manufacturer's motions, and plaintiffs appealed.

Appeal dismissed.

Lucero, J., filed dissenting opinion.

***842** Brian J. Madden (with Timothy L. Sifers and Derek H. Potts, The Potts Law Firm, Kansas City, MO, on the briefs), Wagstaff & Cartmell LLP, Kansas City, MO, for Plaintiffs-Appellants.

Andrew Bayman (with Chilton Davis Varner, Stephen B. Devereaux, Todd P. Davis, and Jennifer C. Kane, King & ***843** Spalding, Atlanta, GA, and Thomas N. Sterchi, and Elizabeth Raines, Baker Sterchi Cowden & Rice L.L.C., Kansas City, MO, on the briefs), King & Spalding, Atlanta, GA, for Defendant-Appellee.

Before HENRY, Chief Judge, BRISCOE and LUCERO, Circuit Judges.

HENRY, Chief Judge.

The plaintiffs, the Vanderwerf family and the estate of William K. Vanderwerf, appeal the district court's grant of summary judgment to SmithKline Beecham Corporation ("SKB"), the pharmaceutical company who manufactured paroxetine, under the label Paxil, a medication prescribed to the decedent, who later committed suicide. We are unable, however, to overlook the ill-timed filing of the Vanderwerfs' notice of appeal, because without a timely notice of appeal, we are deprived of jurisdiction to review the merits of the action. As a result of the plaintiffs' sua sponte withdrawal of their motion for reconsideration, their appeal is from an order entered seven months earlier. We must grant SKB's motion to dismiss this appeal as untimely filed.

I. BACKGROUND

The Vanderwerfs suffered a tragic loss when their family's father, William, who suffered from clinical depression, committed suicide in 2003. The family brought suit seeking damages from SKB, the manufacturer of Paxil, which Mr. Vanderwerf had been prescribed to reduce his depression and anxiety. In various claims asserting strict liability, negligence and breach of implied warranty, the complaint alleged that SKB failed to warn or instruct about the risks of Paxil. The Vanderwerfs further alleged that SKB did not adequately warn Mr. Vanderwerf's treating physicians that Paxil increases the risk of suicidal behavior and/or suicide precursors across all psychiatric disorders for adults of all ages. Under this theory, had the treating physicians received such warnings, they would have (1) not prescribed Paxil; (2) monitored Mr. Vanderwerf more closely; and/or (3) warned Mr. Vanderwerf and his family of the increased risk. The Vanderwerfs claimed that had any of these three events taken place, Mr. Vanderwerf would not have committed suicide.

SKB moved for summary judgment, arguing that (1) the court should exclude the testimony of the Vanderwerfs' proffered witness, Dr. Peter Breggin; (2) without an expert's testimony the Vanderwerfs cannot methodologically prove general or specific causation; and (3) the Vanderwerfs could not demonstrate proximate causation because, had SKB provided additional warnings to the treating physicians, the doctors would not have changed their course of treatment.

On January 9, 2008, the district court, in a thirty-one page order, granted summary judgment to SKB. The court first noted that because suicidality occurs in many people who are not exposed to Paxil or any other medicine, the plaintiffs needed to present expert testimony to meet their burden of proving medical causation that Paxil can cause suicide (general causation) and that Paxil more likely than not caused Mr. Vanderwerf's suicide (specific causation). The court excluded Dr. Breggin's testimony "[f]or substantially the reasons stated in [SKB's motion to exclude Dr. Breggin's testimony and its reply brief in support of that motion]." [FN1] Aplts' App. vol. ***844** XII, at 2354 (Dist. Ct. Order, filed Jan. 9, 2008).

> FN1. While the district court apparently adopted wholesale SKB's arguments, we acknowledge that the district court also supplied its independent reasoning and a thorough analysis of the issues and arguments in its order.

As to general causation, the district court also found that (1) Dr. Breggin did not put forth an accepted methodology for determining general causation (i.e., that Paxil can cause suicide); (2) failed to account for the substantial body of evidence indicating no causal link between Paxil and suicide or suicidal behavior in adults, particularly those beyond the age of thirty; and (3) did not sufficiently distinguish statistical "association" from causation. *Id.*

The court similarly concluded that because Dr. Breggin could not testify, the Vanderwerfs could not establish that Paxil more likely than not caused Mr. Vanderwerf's suicide (i.e., specific causation). *Id.* at 2358. The court stated that even given SKB expert Dr. John Kraus's testimony, any conclusion that Paxil more likely than not caused Mr. Vanderwerf's suicide "would be sheer speculation." *Id.* Because the Vanderwerfs offered no evidence of specific causation aside from the testimony of Dr. Breggin, the court sustained SKB's motion for summary judgment on this alternative ground.

[1] Finally, the district court determined that even had the Vanderwerfs established general and specific causation, they could not establish proximate causation. Under Kansas's learned intermediary doctrine,[FN2] the court first assumed that SKB should have provided labeling and warnings that (1) Paxil increased the risk of suicidal behavior and (2) Paxil increased the risk of suicide precursors such as activation, overstimulation, anxiety, insomnia and agitation. Additionally, the court assumed that Paxil could have provided a warning consisting of information that SKB disclosed in 2006 in the DHCP letter that there existed a "possible increase in risk of suicidal behavior" in adults who took Paxil. Aplts' App. at 2345.

> FN2. Under Kansas's learned intermediary doctrine, "the manufacturer's duty to warn its customers is satisfied when the prescribing physician is made aware of the risks and dangers of the product, since the patient cannot obtain the medical product except through the physician." *Ralston v. Smith & Nephew Richards, Inc.*, 275 F.3d 965, 974 (10th Cir.2001). Under this doctrine:
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> > Where a product is available only through the services of a physician, the physician acts as a learned intermediary between the manufacturer or seller and the patient. *It is his duty to inform himself of the qualities and characteristics of those products which he prescribes for or administers to or uses on his patients, and to exercise an independent judgment, taking into account his knowledge of the patient as well as the product.* The patient is expected to and, it can be presumed, does place primary reliance upon that judgment.... Thus, if the product is properly labeled and carries the necessary instructions and warnings to fully apprise the physician of the proper procedures for use and the dangers involved, *the manufacturer may reasonably assume that the physician will exercise the informed judgment thereby gained in conjunction with his own independent learning, in the best interest of the patient.* It has also been suggested that the rule is made necessary by the fact that it is ordinarily difficult for the manufacturer to communicate directly with the consumer.
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> *Id.* (quoting *Humes v. Clinton*, 246 Kan. 590, 792 P.2d 1032, 1039 (1990) (quoting *Terhune v. A.H. Robins Co.*, 90 Wash.2d 9, 577 P.2d 975, 978 (1978))).

The court acknowledged the Vanderwerfs' argument that if there had been a warning that Paxil increased the risk of suicide in adults, Dr. John Crane, Mr. Vanderwerf's treating physician at the time of the suicide, would have passed along the additional warning and "watched [Mr.Vanderwerf] considerably closer." *Id.* at 2364. Dr. Crane testified that he might "not even have used [Paxil] in a certain individual," had he known of the risks involved. *Id.* But given the positive results ***845** Mr. Vanderwerf had shown while on Paxil, however, the court understood that the treating physicians would still prescribe Paxil for Mr. Vanderwerf. Thus, the court concluded that the argument that the treating physicians "may not have used [Paxil] in a certain individual" was speculative and did not raise a genuine issue of fact as to the prescription for Mr. Vanderwerf.

In granting summary judgment to SKB, the district court concluded that "[s]peculation about how this tragedy might have been avoided is absolutely understandable and perhaps inevitable, but [the Vanderwerfs] cannot escape summary judgment based on speculation." *Id.* at 2367.

On January 17, 2008, eight days after the district court granted summary judgment to SKB, the Vanderwerfs filed a Rule 59(e) Motion to Reconsider arguing that the district court incorrectly granted summary judgment based on the flawed determination that the Vanderwerfs had presented insufficient evidence of general, specific and proximate causation. Despite the passage of about seven months, the district court did not act on the motion to reconsider. Counsel for the Vanderwerfs report they telephoned the district court judge's chambers and spoke to a law clerk on two occasions, each time inquiring into the status and likelihood of a ruling on the motion. But on August 8, 2008, counsel decided to file a notice of withdrawal of the Rule 59 motion, and also filed a Notice of Appeal. Unfortunately, the timing of this Notice of Appeal deprives this court of jurisdiction.

II. DISCUSSION

The Vanderwerfs argue that their withdrawal of their Rule 59(e) motion and their filing of a notice of appeal satisfied the Federal Rules of Appellate Procedure's requirements. We disagree.

The Vanderwerfs withdrawal of their Rule 59(e) motion and filing of a notice of appeal do not satisfy the Federal Rules of Appellate Procedure's requirements

[2][3] As Federal Rule of Appellate Procedure 3 notes, "[a]n appeal permitted by law as of right from a district court to a court of appeals may be taken *only* by filing a notice of appeal with the district clerk within the time allowed by Rule 4." (emphasis supplied). Rule 4 in turn provides that "the notice of appeal required by Rule 3 *must* be filed with the district clerk within 30 days after the judgment or order appealed from is entered." Fed. R.App. P. 4(a)(1)(A) (emphasis supplied); *see* 28 U.S.C. § 2107(a) ("Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review *unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.*") (emphasis supplied). We strictly construe statutes conferring jurisdiction. *United States v. Pethick*, 513 F.3d 1200, 1202 (10th Cir.2008) ("Statutes conferring jurisdiction must be strictly construed.") (citing *United States ex rel. Precision Co. v. Koch Indus., Inc.*, 971 F.2d 548, 552 (10th Cir.1992); *F & S Constr. Co. v. Jensen*, 337 F.2d 160, 161 (10th Cir.1964)). Compliance with filing requirements "is mandatory and jurisdictional." *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 203, 108 S.Ct. 1717, 100 L.Ed.2d 178 (1988); *see Alva v. Teen Help*, 469 F.3d 946, 948 (10th Cir.2006).

[4] The Vanderwerfs failed to comply with the jurisdictional requirements of Rules 3, 4 and § 2107. Federal Rule of Appellate Procedure 4(a)(4)(A)(iv) provides that "[i]f a party timely files" a motion "to alter or amend the judgment under ***846**Rule 59" "the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion." *See Warren v. Am. Bankers Ins. of Fla.*, 507 F.3d 1239, 1244-45 (10th Cir.2007) ("[I]f a party timely files a Rule 59(e) motion, the time to file an appeal runs from the date the court enters the order disposing of the motion"). The timely filing of a Rule 59 motion thus suspends the thirty-day time clock for filing a notice of appeal, and the time to file an appeal runs from the time the district court enters an order disposing of the Rule 59 motion. *See Searles v. Dechant*, 393 F.3d 1126, 1129 (10th Cir.2004) (noting that a timely Rule 59 "motion would have extended the time for filing a notice of appeal until the motion

was decided" and observing that " '[i]f a party timely files' [a] tolling motion, it extends [the] time to file notice of appeal until entry of order disposing of such motion") (quoting Fed. R.App. P. 4(a)(4)(A)); Fed. R.App. P. 4(a)(1) (Advisory Note: "The amendment is intended to alert readers to the fact that paragraph (a)(4) extends the time for filing an appeal when certain posttrial motions are filed. The Committee hopes that awareness of the provisions of paragraph (a)(4) will prevent the filing of a notice of appeal when a posttrial tolling motion is pending.").

[5] Here, the Vanderwerfs' withdrawal of the Rule 59 motion on August 8, 2008, without the entry of an order by the district court left the January 9, 2008 order as the order being appealed. Because that order was seven months old, the time for filing a notice of appeal expired approximately six months before, in February 2008. Federal Rule of Appellate Procedure 4 requires entry of an "order disposing of [the Rule 59] motion" to give the appealing party the benefit of Rule 4(a)(4)(A)(iv). The Vanderwerfs' "withdrawal of their Rule 59 motion leaves the record as if they had never filed the motion in the first place." SKB's Motion to Dismiss Appeal at 6 (citing 56 Am.Jur.2d Motions, Rules and Orders § 32 (2009) ("The effect of a withdrawal of a motion is to leave the record as it stood prior to filing as though the motion had never been made.")).

The Vanderwerfs' notice of appeal designated the January 9, 2008 judgment granting summary judgment to SKB as the judgment being appealed: "[the Vanderwerfs] appeal ... from the final judgment of the District Court for the District of Kansas, entered in this case on January 9, 2008." Notice of Appeal filed Aug. 8, 2008. The notice of appeal acknowledges that the Vanderwerfs "timely filed a Motion to Alter or Amend Judgment with Memorandum in Support and then withdrew this Motion on August 8, 2008, before the District Court ruled on it." *Id.* The Vanderwerfs argue that the filing, and subsequent withdrawal, of a Rule 59(e) motion tolled Federal Rule of Appellate Procedure 4(a)(1)(A)'s thirty-day filing period, such that they may appeal from the district court's grant of summary judgment, filed seven months earlier. [FN3]

FN3. The Vanderwerfs also seek to argue similar issues as those raised in the Rule 59(e) motion, arguing that the district court should not have excluded Dr. Breggin and that the court incorrectly determined that the Vanderwerfs had presented insufficient evidence of general, specific and proximate causation.

The Vanderwerfs point to several circuit cases for support, but their arguments are unpersuasive. At oral argument, when asked for its strongest Tenth Circuit case, counsel for the Vanderwerfs pointed to *OXY USA, Inc. v. Babbitt*, 230 F.3d 1178, 1183 n. 5 (10th Cir.2000), *vacated on other grounds*, 268 F.3d 1001 (10th Cir.2001) (en banc). In *OXY*, after the district court ***847** granted summary judgment to plaintiff, the plaintiff filed a motion to "clarify or correct" the judgment. The plaintiff then subsequently moved to withdraw the motion, and the district court judge *granted the motion* to withdraw and noted that the motion was moot. 230 F.3d at 1183 n. 5; *see* Aple's Reply in Support of its Motion to Dismiss Appeal, Ex. 2.[FN4] Within ten days of that ruling, the defendant timely appealed, and this court properly took jurisdiction. *Id.* We have no comparable district court ruling here.

FN4. There was some dispute as to whether the motion was filed under Fed.R.Civ.P. 59(e) or 60(a). We found this to be a distinction without a difference. 230 F.3d at 1183 n. 5.

The remaining cases relied upon by the Vanderwerfs similarly fail to convince us that the timing of their notice of appeal bestows jurisdiction on this court. The cases primarily focus on when the thirty-day clock should be reset for purposes of determining the timeliness of a party's notice of appeal, and indicate that the proper indicator is the date of the filing of the order acknowledging the withdrawal of or denying the Rule 59 motion.

The Vanderwerfs' strongest case appears to be *United States v. Rodriguez*, 892 F.2d 233, 234 (2d Cir.1989), where the government filed a Rule 59 motion, and then sent a letter withdrawing it. Eleven days later, the district court acknowledged the letter in a ruling stating "motion denied as withdrawn," which the Second Circuit construed as "a denial of the government's [Rule 59] motion." *Id.* The Second Circuit ruled that the withdrawn motion tolled the time limitation on bringing an appeal under Rule 4(b), but indicated it would not "decide whether the time period was tolled

only until ... the motion was withdrawn, or until ... the district court acknowledged that the motion was withdrawn and denied it on that basis." *Id.* at 236. Here, by contrast the Vanderwerfs' counsel did not wait until the district court had the opportunity to rule, and thus we have no order disposing of the Rule 59(e) motion to restart the clock. *See Brae Transp. v. Coopers & Lybrand*, 790 F.2d 1439, 1442 (9th Cir.1986) (clarifying that the clock began ticking for the filing of the notice of appeal when the "order was issued disposing of the Rule 59 motion," not when the Rule 59 order was withdrawn).

The Vanderwerfs also point to the Sixth Circuit's brief unpublished disposition involving a variety of parties and claims in *Chrysler Motors Corp. v. Country Chrysler, Inc.*, No. 89-1472, 1989 WL 100084, at *1 (6th Cir. July 31, 1989),[FN5] where the party seeking to appeal after the withdrawal of a Rule 59 motion was allowed to do so. The case did not explain whether or not there was a separate ruling from the district court, merely noting that the pending motion was deemed "denied" as of the date of the withdrawal. The key distinguishing factor is that in *Chrysler* the parties seeking to appeal (the defendants-counterclaimants-third-party plaintiffs) were not in control of the litigation, because they did not file the post-trial motion. *See id.* Rather the quite distinct third-party defendant-appellee filed the Rule 59 motion. Thus, the defendants-counterclaimants-third-party plaintiffs "were effectively prohibited from filing a notice of appeal" while the third-party defendant-appellee's motion was pending, ***848** and the motion was deemed "denied" as of the date of the withdrawal. *See id.* Here, by contrast, the Vanderwerfs were in control of the litigation and were solely responsible for ensuring that the deadlines were met.

> FN5. The Federal Rules of Appellate Procedure have been amended since *Chrysler Motors Corp.* The Advisory Committee Notes to Rule 4(a)(4)'s 1993 amendments explain that: "A notice [of appeal] filed before the filing of one of the specified motions [including a Rule 59(e) motion] ... is, in effect, suspended until the motion is disposed of, whereupon, the previously filed notice effectively places jurisdiction in the court of appeals."

Although we note that there is no suggestion that the Vanderwerfs acted in bad faith, we are hamstrung by the mandatory procedural rules. The Vanderwerfs had other options, which may have allowed this court to take jurisdiction. First, the Vanderwerfs could have filed a motion requesting a ruling. Second, they could have continued to wait for a ruling, or sought a writ of mandamus in this court, which, if granted would compel the district court to rule on the Rule 59 motion. Third, they might have filed a motion for an extension of time under Federal Rule of Appellate Procedure 4(a)(5)(A)(ii), provided that they might show good cause or excusable neglect underlying the untimely notice. Fourth, they might have filed a premature notice of appeal that would ripen into a timely notice of appeal when the district court finally ruled. *See Fields v. Okla. State Penitentiary*, 511 F.3d 1109, 1111 (10th Cir.2007). Finally, it seems the best option may have been for the Vanderwerfs to have moved to withdraw the motion, in hopes that the district court would rule on that motion thereby triggering a 30-day period for the filing of a timely appeal. We conclude that none of the Vanderwerfs' cases help them establish that their appeal was timely; we thus must dismiss this appeal.

III. CONCLUSION

We recognize the severity of today's holding, and empathize with the plight of parties who are effectively prohibited from filing a notice of appeal because of the inaction of a district court. But we must rely upon the unambiguous standard we have consistently applied to the timeliness requirements of Rule 4. Quite simply, "[t]he time to file an appeal in a civil case is tolled by the timely filing of a motion listed in Rule 4(a)(4)(A), and begins to run anew from the entry of the order disposing of the last such remaining motion." 16A Charles Alan Wright, Arthur R. Miller, Edward H. Cooper & Catherine T. Struve, Federal Practice & Procedure § 3950.4 (4th ed.2008) (footnotes omitted). The order from which the Vanderwerfs appeal was filed in January 2008, seven months earlier. Because timely notice of appeal is mandatory and jurisdictional, we lack jurisdiction to consider this appeal. *See Browder*, 434 U.S. at 264, 98 S.Ct. 556. Accordingly, we hold that the Vanderwerfs' untimely filing of the notice of appeal of the order granting summary judgment divested this court of jurisdiction, and we GRANT SKB's motion to dismiss and we DISMISS the appeal.

603 F.3d 842
(Cite as: 603 F.3d 842)

LUCERO, Circuit Judge, dissenting.
My colleagues in the majority conclude that we lack jurisdiction because the notice of appeal was untimely. Yet the plain language of Federal Rule of Appellate Procedure 4 provides that the thirty-day deadline for the Vanderwerfs to file their notice of appeal has not even begun to run. Thus I respectfully dissent.

As the majority notes, under the Federal Rules of Appellate Procedure, a party may appeal from a district court judgment by filing a notice of appeal within thirty days of the entry of the order or judgment. (Majority Op. 845 (citing Fed. R.App. P. 3, 4(1)(A)).) Our circuit treats the timely filing of a notice of appeal as "mandatory and jurisdictional." *Alva v. Teen Help*, 469 F.3d 946, 955 (10th Cir.2006). Rule 4, however, tolls the thirty-day deadline under certain circumstances. If a party timely files a motion to alter or amend a ***849** judgment under Federal Rule of Civil Procedure 59(e), then "the [thirty-day deadline] to file an appeal runs for all parties from the entry of the order disposing of" that motion or any other motion that tolls the deadline under Rule 4. Fed. R.App. P. 4(a)(4)(A)(iv).

Summary judgment was entered for SmithKline Beecham ("SKB") on January 9, 2008. The Vanderwerfs filed a motion to alter or amend the judgment on January 17, 2008, well within the filing deadline under Rule 59(e). After the district court failed to rule on the motion for nearly seven months, the Vanderwerfs withdrew their motion and filed their notice of appeal on August 8, 2008. Any delay in this case was caused by the district court, not the Vanderwerfs.[FN1]

> FN1. The majority suggests the Vanderwerfs should have filed a motion requesting a ruling on their Rule 59(e) motion, filed a motion requesting an extension of time under Fed. R.App. P. 4(a)(5)(A)(ii), or moved to withdraw their Rule 59(e) motion. (Majority Op. 848.) Given the district court's delay on their initial motion, however, we can hardly fault the Vanderwerfs for rejecting the idea of requesting relief from the very court that caused the delay they sought to relieve.

According to the majority, the filing of a Rule 59(e) motion did not toll the deadline to file a notice of appeal because the district court never ruled on the motion. (Majority Op. 846.) Thus, the Vanderwerfs had thirty days from the entry of summary judgment in favor of SKB to file their notice of appeal. Because they failed to do so, they did not file a timely notice of appeal.

Under the language of Rule 4, however, it is not a district court's order disposing of a Rule 59(e) motion that *triggers* tolling. Instead, the thirty-day filing deadline does not even begin to run *until* the district court files an order: "If a party timely files in the district court [a motion to alter or amend the judgment under Rule 59(e)], the time to file an appeal runs for all parties from the entry of the order disposing of" the Rule 59(e) motion. Fed. R.App. P. 4(a)(4)(A)(iv). By the plain language of the rule, the timely filing of the motion to alter or amend triggers tolling. Because the district court did not rule on the motion to alter or amend the judgment, the thirty-day filing deadline has not begun to run.[FN2] It follows that the Vanderwerfs' notice cannot be rejected as untimely.

> FN2. The record of the district court states that this case is closed, but no order closing the case has been entered by the assigned judge.

My reasoning is in accord with pertinent authorities. My colleagues have not cited to any cases holding that a party's withdrawal of a Rule 59(e) motion somehow nullifies tolling under Rule 4 such that the thirty-day deadline runs from the entry of the original judgment. Indeed, courts addressing similar issues have rejected the majority's interpretation. In *United States v. Rodriguez*, 892 F.2d 233 (2d Cir.1989), a party withdrew a Rule 59 motion, and the district court later ruled on the motion. *Id.* at 235-36. Although the Second Circuit declined to choose which date restarted the filing deadline, it rejected the argument that withdrawal of the motion prevented tolling of the thirty-day deadline. *Id.* at 236. Similarly, in *Brae Transportation, Inc. v. Coopers & Lybrand*, 790 F.2d 1439 (1986), the Ninth Circuit decided that a "Notice of Intent to Dismiss" did not nullify tolling that started when the party filed a Rule 59 motion. *Id.* at 1442. Instead, the thirty-day deadline began to run only when the district court issued an order disposing of the Rule 59 motion as withdrawn. *Id.*

SKB makes two equitable arguments in favor of its proposal that the Rule 4 filing ***850** deadline should

not be tolled unless or until the district court issues an order on the motion that triggers tolling. First, it argues that it was unfairly forced to spend time and money briefing the Rule 59(e) motion, only for the Vanderwerfs to withdraw it unilaterally. Had the district court ruled on the motion and upheld its earlier decision, however, SKB would have expended exactly the same costs. Thus SKB's costs arose because the Vanderwerfs filed a motion, not because they withdrew it. Second, SKB argues that the rule proposed in this dissent would allow abuse: A party could file a motion to alter or amend the judgment in order to extend its time to file a notice of appeal, and then withdraw the motion and file the notice. These actions would artificially extend the filing deadline, drive up the other party's legal fees, and waste the district court's time. Such a scheme would fail, however, if the district court ruled on the underlying motion in a timely fashion, as we expect district courts will do. In this case, there is no accusation that the Vanderwerfs acted in bad faith. A better rule would sanction only those parties who seek to abuse the system, rather than punishing innocent parties who simply want what they deserve: their day in court.

For the foregoing reasons, I dissent. I would entertain the present appeal, or remand this case to allow the district court an opportunity to rule on the Vanderwerf's Rule 59(e) motion or enter an order approving withdrawal of the motion.

C.A.10 (Kan.),2010.
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TAB

VII-C

MEMORANDUM

DATE: September 16, 2010

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 10-AP-F

The course taken by the Fifth Circuit in *Comer v. Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009), *reh'g en banc granted*, 598 F.3d 208 (5th Cir. 2010), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010),[1] has raised questions about the application of 28 U.S.C. §§ 46(c)[2] and (d) and – at least obliquely – about Appellate Rule 35(a) as amended in 2005. Part I of this memo summarizes the *Comer* litigation.

Part II discusses the facts that *Comer* highlights unresolved questions about the meaning of Section 46(d)'s quorum requirement, and that the quorum requirement, in turn, has implications for the nature of the vote required to take a case en banc. The Appellate Rules Committee, in the deliberations leading to the 2005 amendments, considered an "absolute majority" approach, a "case majority" approach, and a "modified case majority" approach. The 2005 amendments purported to adopt the "case majority" approach. But the 2005 Committee Note to Rule 35(a) explicitly left open the possibility that Section 46(d) might deprive the en banc court of appeals of a quorum in cases as to which half or more of the active judges are disqualified;[3] in effect, such an interpretation of Section 46(d) leads to the application of the

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[1] I enclose copies of the opinions that issued upon dismissal of the appeal.

[2] A separate memo and enclosure in this agenda book concern a legislative proposal by the judges of the Federal Circuit to address inter-circuit variation in the interpretation of Section 46(c) as it applies to senior judges.

[3] For the purposes of this memo, I treat recusal and disqualification as synonymous. But see 28 U.S.C. § 46(b) (referring separately to recusal and disqualification). Regarding disqualification, see 28 U.S.C. § 47 ("No judge shall hear or determine an appeal from the decision of a case or issue tried by him."); *id.* § 455 (listing other grounds that require disqualification).

"modified case majority" approach. Thus, the 2005 amendments did not fully impose nationwide uniformity concerning the voting requirements to take a case en banc. On the other hand, the "case majority" and "modified case majority" approaches only produce differing results in those cases where at least half of the active judges on a court of appeals are disqualified – and though I have not attempted to determine the frequency with which such widespread disqualifications occur, they may be relatively rare.[4]

Even more rare than the cases with such widespread disqualifications should be the cases in which there is a quorum at the time of the initial vote to take the case en banc, but in which that quorum is lost before the en banc court can decide the case. *Comer*, of course, also highlights the dilemma that arises when that – presumably rare – sequence of events unfolds. Part III reviews the possible approaches to that dilemma.

Part IV concludes that though *Comer* highlights inter-circuit variation in the treatment of Section 46(d)'s quorum requirement, this variation was contemplated by the drafters of the 2005 amendments to Rule 35(a). And Part IV notes that though *Comer* also highlights uncertainty concerning the proper outcome in cases where a quorum is lost after the grant of rehearing en banc and before the en banc decision, such instances are likely to be rare.

I. The *Comer* case

In *Comer*, Mississippi Gulf Coast landowners and residents sued various corporate defendants, alleging"that defendants' operation of energy, fossil fuels, and chemical industries in the United States caused the emission of greenhouse gasses that contributed to global warming, *viz.*, the increase in global surface air and water temperatures, that in turn caused a rise in sea levels and added to the ferocity of Hurricane Katrina, which combined to destroy the plaintiffs' private property, as well as public property useful to them." *Comer v. Murphy Oil USA*, 585 F.3d 855, 859 (5th Cir. 2009), *reh'g en banc granted*, 598 F.3d 208 (5th Cir. 2010), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010). The district court dismissed, holding that the plaintiffs lacked standing and that some or all of the claims presented political questions. *See Comer v.*

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[4] The issue may be a recurrent one in the Fifth Circuit, however. *See Hall v. Federal Energy Regulatory Comm'n*, 700 F.2d 218 (5th Cir. 1983) (Clark, C.J., dissenting from denial of panel rehearing) (noting that "only four members of this now thirteen active judge court could initiate or participate in" the en banc poll in that case, that the Fifth Circuit had "administratively created a special panel of judges whose property ownership would not regularly cause disqualification in Federal Power Commission and Federal Energy Regulatory Commission cases," and that only four judges were then eligible to sit on that panel). Another FERC-related case produced a large number of disqualifications by D.C. Circuit judges. *See American Paper Inst., Inc. v. American Elec. Power Serv. Corp.*, 461 U.S. 402, 412 n.6 (1983) (noting that "A suggestion for rehearing en banc was denied by a vote of three to two, with six of the 11 active Circuit judges not participating.").

Murphy Oil USA, Inc., 2007 WL 6942285 (S.D. Miss. Aug. 30, 2007) (unpublished opinion). A panel of the Fifth Circuit reversed and remanded, holding that some of the claims were justiciable. *See* 585 F.3d 855, 879-80; *see also id.* at 880 (Davis, J., specially concurring) (stating that he deferred to the panel's decision to reverse but that he personally would have affirmed on a ground not reached by the district court – namely, failure to state a claim). A 6-3 majority of the non-recused active Fifth Circuit judges voted to hear the case en banc. *See* 598 F.3d 208, 210 n.1 (noting that "Chief Judge Jones, and Judges King, Wiener, Garza, Benavides, Southwick and Haynes are recused and did not participate"); *Comer*, 607 F.3d at 1058 (Dennis, J., dissenting) (noting the vote count).

28 U.S.C. § 46(d) provides that "[a] majority of the number of judges authorized to constitute a court or panel thereof, as provided in paragraph (c), shall constitute a quorum." Section 46(c) provides in relevant part that "[a] court in banc shall consist of all circuit judges in regular active service."[5] From the time of the panel decision in *Comer* to the present,[6] there have

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[5] The statute provides an alternative and an exception, neither of which was relevant in *Comer*.

The alternative reads: ", or such number of judges as may be prescribed in accordance with section 6 of Public Law 95-486 (92 Stat. 1633)." That law provides that "[a]ny court of appeals having more than 15 active judges may constitute itself into administrative units complete with such facilities and staff as may be prescribed by the Administrative Office of the United States Courts, and may perform its en banc function by such number of members of its en banc courts as may be prescribed by rule of the court of appeals." Act of October 20, 1978, Pub. L. No. 95-486, § 6, 92 Stat. 1629, 1633. Like the Ninth Circuit, the Fifth Circuit qualifies to employ this provision, but unlike the Ninth Circuit, the Fifth Circuit has not chosen to perform its en banc function with fewer than all its active judges. *Compare* Fifth Circuit Rule 35.6 ("The en banc court will be composed of all active judges of the court plus any senior judge of the court who participated in the panel decision who elects to participate in the en banc consideration. This election is to be communicated timely to the chief judge and clerk. Any judge participating in an en banc poll, hearing, or rehearing while in regular active service who subsequently takes senior status may elect to continue participating in the final resolution of the case.") *with* Ninth Circuit Rule 35-3 ("The en banc court, for each case or group of related cases taken en banc, shall consist of the Chief Judge of this circuit and 10 additional judges to be drawn by lot from the active judges of the Court. In the absence of the Chief Judge, an 11th active judge shall be drawn by lot, and the most senior active judge on the panel shall preside.…. In appropriate cases, the Court may order a rehearing by the full court following a hearing or rehearing en banc.").

The exception reads: "except that any senior circuit judge of the circuit shall be eligible (1) to participate, at his election and upon designation and assignment pursuant to section 294(c) of this title and the rules of the circuit, as a member of an in banc court reviewing a decision of a panel of which such judge was a member, or (2) to continue to participate in the decision of a case or controversy that was heard or reheard by the court in banc at a time when such judge was in regular active service." The panel that initially decided *Comer* was composed of three active

been 16 active judges on the Fifth Circuit.[7] At the time of the original vote to take the case en banc, seven active judges were recused, leaving nine non-recused active judges – i.e., a majority of the judges authorized to constitute the en banc court. But after the vote to rehear the case en banc, an eighth active judge – Judge Elrod – recused herself, leaving only eight non-recused active judges.[8] The court of appeals requested supplemental letter briefs from the parties; the court's letter stated in relevant part:

> The parties are requested to submit one letter brief per side of no more than twelve pages responding to this court's notification of April 30 that this en banc court has lost its quorum and cannot act on the merits of this case.
>
> The parties may address the matter as they think appropriate. However, the court would direct their attention to Fed. R. App. P. 35(a), 28 U.S.C. § 46(c) and (d), Fed. R. App. P. 41(a) and (d)(1), 5th Cir. Local Rule 41.3, and Fed. R. App. P. 2, and the interplay of these rules and the statute in resolving the disposition of this appeal and this case. The parties may also consider the applicability of Chrysler Corp. v. United States, 314 U.S. 583 (1941); North American Co. v. Securities & Exchange Comm'n, 320 U.S. 708 (1943); and the Rule of Necessity. Each of these arguments assumes the absence of a quorum unless Fed. R. App. P. 35(a) may be construed to provide a quorum.[9]

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judges, so this exception was inapplicable.

[6] The panel heard oral argument in *Comer* in August and November 2008, and issued its decision in October 2009. (One of the original panel judges missed the initial oral argument for family reasons and another of the original panel judges recused himself, leading the court to re-schedule the case for argument before a new panel. *See Comer*, 607 F.3d at 1058 (Dennis, J., dissenting).)

[7] In the most recent changes to the roster of active Fifth Circuit judges, Judge Barksdale took senior status in August 2009 and Judge Haynes was confirmed in April 2008.

[8] An April 30, 2010 letter from the court reads: "The parties are hereby notified that since the en banc court was constituted, new circumstances have arisen that make it necessary for another judge to recuse, leaving only eight members of the court able to participate in the case. Consequently, this en banc court has lost its quorum, precluding the court from acting on the merits of the case. Accordingly, arguments scheduled for May 24, 2010, are canceled. Further notification to the parties will follow."

[9] May 6, 2010 letter from Allison G. Lopez, Deputy Clerk.

At the end of May, the court of appeals, by a vote of five to three,[10] dismissed the appeal. The unsigned order dismissing the appeal states in part:

> In arriving at our decision, directing the clerk to dismiss this appeal, this en banc court has considered and rejected each of the following options:
>
> 1. Asking the Chief Justice to appoint a judge from another Circuit pursuant to 28 U.S.C. § 291. We have rejected this argument as precluded by our precedent, United States v. Nixon, 827 F.2d 1019 (5th Cir.1987), and because § 291 provides an inappropriate procedure, unrelated to providing a quorum for the en banc court of a circuit.
>
> 2. Declaring that there is a quorum under the provisions of Federal Rule of Appellate Procedure 35(a). We believe that a quorum is properly defined under 28 U.S.C. § 46 as constituting a majority of the judges of the entire court who are in regular active service, and not as a body of the non-recused judges of the court, however few.
>
> 3. Adopting the Rule of Necessity. The Rule of Necessity – allowing disqualified judges to sit – is not applicable in this case because it would be inappropriate to disregard the disqualification of the judges of this Court when the appeal may be presented to the Supreme Court of the United States for decision. Moreover, there is no established rule providing that an en banc court lacking a quorum, may disregard recusals and disqualifications of all judges so that an en banc court may be formed. Nor is there any method to select one particular judge among the several disqualified judges in order to provide a bare minimum for a quorum.
>
> 4. "Dis-enbancing" the case and ordering the panel opinion reinstated, and issuing the mandate thereon. This case was properly voted en banc. The panel opinion and the judgment of the panel were lawfully vacated. Without a quorum to conduct any judicial business, this en banc court has no authority to rewrite the established rules of the Fifth Circuit for this one case and to order this case, properly voted en banc, "dis-enbanced." Moreover, we have no authority to interpret a plainly applicable rule as simply a blank, on grounds that "it was not designed to apply" to a situation where its terms have undisputed application.
>
> 5. Holding the case in abeyance until the composition of the court changes. It is purely speculative as to when the current vacancy on this court will be filled and it is, of course, unknown whether that judge may also be recused.

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[10] *See Comer*, 607 F.3d at 1055 (Davis, J., joined by Stewart, J., dissenting) (stating the vote count).

> Furthermore, we have no way of knowing when another sitting judge in regular active service of the Court may become "undisqualified" or indeed whether another judge of this en banc court may become disqualified to sit further. The Wright and Miller treatise has observed:
>
> > Any decision of this character, however, should be made *as promptly as possible*; delay that spans several months and the addition of new judges, and that creates at least the appearance of a decision that could not have been reached earlier, *should be avoided at all costs*.
>
> 16AA WRIGHT & MILLER § 3981.3, at 448 (2008) (emphasis added).
>
> In sum, a court without a quorum cannot conduct judicial business. This court has no quorum. This court declares that because it has no quorum it cannot conduct judicial business with respect to this appeal. This court, lacking a quorum, certainly has no authority to disregard or to rewrite the established rules of this court. There is no rule that gives this court authority to reinstate the panel opinion, which has been vacated. Consequently, there is no opinion or judgment in this case upon which any mandate may issue. 5TH CIR. R. 41.3.
>
> Because neither this en banc court, nor the panel, can conduct further judicial business in this appeal, the Clerk is directed to dismiss the appeal.

Comer, 607 F.3d at 1054-55.

The three judges who had served on the original panel dissented; Judges Davis and Dennis filed dissenting opinions, and Judge Stewart joined Judge Davis's dissent. Judge Davis criticized the majority's reliance Fifth Circuit Rule 41.3, which states: "Effect of Granting Rehearing En Banc. Unless otherwise expressly provided, the granting of a rehearing en banc vacates the panel opinion and judgment of the court and stays the mandate." This local rule, Judge Davis argued, "was never designed to apply in this situation .... It is a provisional, practical rule that alerts practitioners and courts of the fact that the panel opinion is not precedential pending consideration of the merits of the case by the en banc court." *Comer*, 607 F.3d at 1055 (Davis, J., joined by Stewart, J., dissenting). Judge Davis also questioned how the majority could "have the authority to dismiss the appeal" when they had "no authority to do anything except literally apply our Local Rule 41.3 strictly as written." *Id.* at 1056. Judge Davis decried the consequences of the dismissal, asserting that "dismissal of this appeal based on a local rule has the effect of depriving appellants of their right to an appeal and allows the local rule to trump federal statutes." *Id.* And he pointed out that the original vote to go en banc did not necessarily indicate how the en banc court would have voted:

> It makes no sense to allow a vote to take a case en banc to dictate the result on the merits. Judges vote for en banc consideration for any number of reasons other than the fact that they conclude that the panel has reached an erroneous result.

> They may vote for en banc simply because they believe it presents a serious question that the full court should consider or simply because they have some question about the correctness of the result. Judges are rarely prepared to definitively decide the merits of the case when they vote for or against en banc reconsideration.

Id. at 1055-56. To avoid the need to dismiss the appeal, Judge Davis argued, the court should have turned to 28 U.S.C. § 291(a), which provides that "the Chief Justice of the United States may, in the public interest, designate and assign temporarily any circuit judge to act as circuit judge in another circuit upon request of the chief judge or circuit justice of such circuit."

Judge Dennis expressed agreement with Judge Davis's dissent in all but one respect: Judge Dennis argued that the court need not be viewed as lacking a quorum. *See Comer*, 607 F.3d at 1057 n.2 (Dennis, J., dissenting). He framed his dissent within the overarching principle that the lower federal courts have a duty to decide cases within their jurisdiction, and he identified several rationales under which the court, in his view, could have discharged that duty:

> (1) we do have a quorum under the correct reading of § 46(c)-(d), which is also supported by Fed. R.App. P. 35(a); (2) the acting chief judge of this court has the authority to seek the designation and assignment of a judge from another circuit under 28 U.S.C. §§ 291 & 296; (3) we can follow the Supreme Court's example in *North American Co. v. SEC*, 320 U.S. 708, 64 S.Ct. 73, 88 L.Ed. 415 (1943), and hold the case over until the President and the Senate fill this court's current vacancy and give us nine out of seventeen active judges who can decide the case; and if all else fails, (4) we should comply with the ancient common-law doctrine known as the Rule of Necessity, which overrides the federal statute governing judicial recusals, as the Supreme Court held in [*United States v.*] *Will*, 449 U.S. [200,] 217, 101 S.Ct. 471 [(1980)].

Id. at 1057.

II. The question of the quorum

Appellate Rule 35(a) sets the voting requirement for a court of appeals to decide to hear or rehear a case en banc: Such a course of action requires the assent of "[a] majority of the circuit judges who are in regular active service and who are not disqualified." Fed. R. App. P. 35(a). Section 46(d) sets the quorum requirement for the courts of appeals. "The word quorum as therein used means such a number of the members of the court as may legally transact judicial business." *Tobin v. Ramey*, 206 F.2d 505, 507 (5th Cir. 1953).[11] Thus, to the extent that Section

[11] *See also* Jonathan Remy Nash, *The Majority That Wasn't: Stare Decisis, Majority Rule, and the Mischief of Quorum Requirements*, 58 Emory L.J. 831, 846 (2009) ("It goes

46(d) imposes any requirements additional to those stated in Appellate Rule 35(a), the two provisions must be read together in order to discern the requirements for deciding to hear or rehear a case en banc.[12] *Comer* highlights an apparent circuit split concerning the meaning of Section 46(d).

Rule 35(a)'s current formulation was adopted in 2005 in order to address the circuit split that had arisen under the prior version of Rule 35(a), which – similarly to 28 U.S.C. § 46(c)[13] – employed the formulation "a majority of the circuit judges who are in regular active service." Citing Marie Leary's study on the subject, the 2005 Committee Note to Rule 35(a) explains:

> In interpreting that phrase, 7 of the courts of appeals follow the "absolute majority" approach.... Under this approach, disqualified judges are counted in the base in calculating whether a majority of judges have voted to hear a case en banc. Thus, in a circuit with 12 active judges, 7 must vote to hear a case en banc. If 5 of the 12 active judges are disqualified, all 7 non-disqualified judges must vote to hear the case en banc. The votes of 6 of the 7 non-disqualified judges are not enough, as 6 is not a majority of 12.
>
> Six of the courts of appeals follow the "case majority" approach.... Under this approach, disqualified judges are not counted in the base in calculating whether a majority of judges have voted to hear a case en banc. Thus, in a case in which 5 of a circuit's 12 active judges are disqualified, only 4 judges (a majority of the 7 non-disqualified judges) must vote to hear a case en banc. (The First and Third Circuits explicitly qualify the case majority approach by providing that a case cannot be heard en banc unless a majority of all active judges – disqualified and non-disqualified – are eligible to participate.)

The Committee Note explains that the goal of the amendment was "to adopt the case majority approach as a uniform national interpretation of § 46(c)." The Note provides two sorts of arguments in support of this choice – an argument based on the statutory text of Section 46(c)

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without saying that an applicable quorum requirement sets a minimum bar for taking actions with respect to cases.").

[12] *See, e.g.*, James J. Wheaton, Note, *Playing with Numbers: Determining the Majority of Judges Required to Grant En Banc Sittings in the United States Courts of Appeals*, 70 Va. L. Rev. 1505, 1534 (1984) (arguing that "the quorum statute establishes a lower limit on the number of judges who could authorize an en banc sitting, for if a large number of judges are disqualified, the number of judges remaining might not suffice to constitute a quorum, and even a majority of eligible judges would be unable to order rehearing").

[13] Then, as now, Section 46(c) provided for the courts of appeals to sit in panels "unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service."

and an argument based on policy considerations. The argument based on statutory text runs as follows:

> The case majority approach represents the better interpretation of the phrase "the circuit judges ... in regular active service" in the first sentence of § 46(c). The second sentence of § 46(c) – which defines which judges are eligible to participate in a case being heard or reheard en banc – uses the similar expression "all circuit judges in regular active service." It is clear that "all circuit judges in regular active service" in the second sentence does not include disqualified judges, as disqualified judges clearly cannot participate in a case being heard or reheard en banc. Therefore, assuming that two nearly identical phrases appearing in adjacent sentences in a statute should be interpreted in the same way, the best reading of "the circuit judges ... in regular active service" in the first sentence of § 46(c) is that it, too, does not include disqualified judges.

The policy arguments are of two kinds:

> First, under the absolute majority approach, a disqualified judge is, as a practical matter, counted as voting against hearing a case en banc. This defeats the purpose of recusal. To the extent possible, the disqualification of a judge should not result in the equivalent of a vote for or against hearing a case en banc.
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> Second, the absolute majority approach can leave the en banc court helpless to overturn a panel decision with which almost all of the circuit's active judges disagree. For example, in a case in which 5 of a circuit's 12 active judges are disqualified, the case cannot be heard en banc even if 6 of the 7 non-disqualified judges strongly disagree with the panel opinion. This permits one active judge – perhaps sitting on a panel with a visiting judge – effectively to control circuit precedent, even over the objection of all of his or her colleagues. .... Even though the en banc court may, in a future case, be able to correct an erroneous legal interpretation, the en banc court will never be able to correct the injustice inflicted by the panel on the parties to the case. Moreover, it may take many years before sufficient non-disqualified judges can be mustered to overturn the panel's erroneous legal interpretation. In the meantime, the lower courts of the circuit must apply – and the citizens of the circuit must conform their behavior to – an interpretation of the law that almost all of the circuit's active judges believe is incorrect.

The 2005 amendment of Rule 35(a) has uncertain significance for the application of Section 46(d)'s quorum requirement at the stage of en banc rehearing. The 2005 Committee Note concludes by disclaiming any intent to take a position on the meaning of that requirement: "The amendment to Rule 35(a) is not meant to alter or affect the quorum requirement of 28 U.S.C. § 46(d). In particular, the amendment is not intended to foreclose the possibility that §

46(d) might be read to require that more than half of all circuit judges in regular active service be eligible to participate in order for the court to hear or rehear a case en banc."[14]

Accordingly, the Committee Note explicitly indicates that the amendment to Rule 35(a) does not foreclose the interpretation of Section 46(d) adopted by the *Comer* majority. On the other hand, the *Comer* majority's interpretation of Section 46(d) might seem to rest in some degree of tension with the views expressed elsewhere in the 2005 Committee Note to Rule 35(a). As noted previously, the Committee Note argues that the first and second sentences of Section 46(c) should be interpreted in the same way; because it would not make sense to interpret the second sentence's reference to "all circuit judges in regular active service" to include disqualified judges, the Note argues, neither should one interpret the first sentence's reference to "a majority of the circuit judges ... who are in regular active service" to include disqualified judges. If the Committee Note is correct that Section 46(c)'s reference excludes disqualified judges, that might seem to have implications for the interpretation of Section 46(d), because Section 46(d) incorporates by reference the definition in the second sentence of Section 45(c): "A majority of the number of judges authorized to constitute a court or panel thereof, as provided in paragraph (c), shall constitute a quorum."

One might also consider the policy arguments advanced in the 2005 Committee Note to be somewhat in tension with the *Comer* majority's reading of Section 46(d). Take first the Note's argument that recusals should not be counted as votes against rehearing en banc. Imagine a court with twelve active judges, six of whom are recused at the time that the party who lost before the panel petitions for rehearing en banc. Under the *Comer* majority's interpretation of Section 46(d), the recusals determine that rehearing en banc is unavailable, because the en banc court lacks a quorum and therefore cannot act to vote rehearing en banc. Next, take the Note's argument that "the absolute majority approach can leave the en banc court helpless to overturn a panel decision with which almost all of the circuit's active judges disagree." Using the hypothetical stated above, one can see that the same can be said of the *Comer* majority's reading of Section 46(d): in the hypothetical where six of 12 active judges are disqualified, the *Comer* majority's interpretation of the quorum requirement leaves the court "helpless to overturn" the panel decision because there is no quorum and therefore the en banc court cannot act to vote the case en banc.

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[14] This language was added to the Note after publication. *See* Minutes of April 13-14, 2004, Appellate Rules Committee Meeting, at 26 (recounting Reporter's suggestion "that the Committee accommodate the request of one commentator that language be added to the Note to clarify that nothing in the proposed amendment is intended to foreclose courts from interpreting 28 U.S.C. § 46(d) to provide that a case cannot be heard or reheard en banc unless a majority of all judges in regular active service – disqualified or not – are eligible to participate." (Footnote omitted.)). The commentator in question was presumably then-Chief Judge Michael Boudin; none of the other comments on proposed Rule 35(a) addressed the significance of Section 46(d). Chief Judge Boudin's comments are enclosed.

The *Comer* majority's interpretation of Section 46(d) effectively produces what the drafters of the 2005 amendment to Rule 35(a) referred to as the "modified case majority approach." The Advisory Committee initially voted to adopt the "modified [or qualified] case majority approach,"[15] but later discarded that approach in favor of the pure "case majority approach." The minutes from the fall 2002 Advisory Committee meeting reflect the discussion that preceded the Advisory Committee's change of course. Those minutes state in part:

> 1. At its April 2002 meeting, the Committee agreed that the qualified case majority approach represented the best approach on the merits. Several members of the Committee said that they continue to hold that view, but a couple of members said that they had changed their minds. One argued in favor of the case majority approach, pointing out that this approach would provide the most protection against a panel with only one active judge – perhaps in dissent – setting a precedent with which most of the circuit's judges disagree. The Reporter responded that, although the case majority approach provides the most protection against "outlier" panel precedents, it provides the least protection against "outlier" en banc opinions. If, for example, 9 of a circuit's 12 judges were disqualified, the case majority approach would permit 2 of the 3 non-disqualified judges to issue an en banc decision overturning years of panel decisions that had been joined at one time or another by all 10 of the other judges.

Minutes of November 18, 2002, Appellate Rules Committee meeting at 9. This passage suggests that, at least during this fall 2002 discussion, at least some participants understood the pure case majority approach to permit a court to go en banc even if half or more of the active judges were disqualified.

It appears, however, that the input provided during the comment period persuaded members that the policy concerns noted above should not lead the rulemakers to preempt a circuit's use of the modified case majority approach. In particular, Chief Judge Boudin's comments provided a counter-argument: "Whatever may be true of large circuits, in my circuit the possibility of having several active judges recused is not trivial and for obvious policy reasons, we would not care to be in a situation in which someone could argue that we were *compelled* to entertain petitions for rehearing en banc if favored by two out of three eligible judges."[16] Committee members may have reasoned that though the modified case majority approach might sometimes give a recusal the effect of a "no" vote and might sometimes prevent a court of appeals from rehearing en banc a case as to which most active judges disagreed with the panel, the modified case majority approach was less likely to do so than the absolute majority approach. In other words, it would not be irrational to adopt the case majority approach in Rule 35(a) while leaving it open for a circuit to take the view (either by local rule or by its

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[15] *See* Minutes of April 22, 2002 Appellate Rules Committee Meeting, at 20.

[16] October 10, 2003 Letter from Chief Judge Michael Boudin to Peter McCabe.

interpretation of Section 46(d)) that a court could not go en banc in a case in which half or more of its active judges were disqualified. That is to say, reading the 2005 amendment's history and Note, it is possible to infer why the Committee decided to add to the Note the limiting language that preserves a circuit's ability to take the modified case majority approach through its interpretation of Section 46(d).

The Committee's apparent decision not to preempt the modified case majority approach meant that the 2005 amendment to Rule 35(a) succeeded only partly in producing national uniformity. That is to say, the 2005 amendment explicitly preserved the possibility of national variation in the interpretation of Section 46(d)'s quorum requirement (and thus preserved the possibility that some circuits would follow the modified case majority approach even after 2005). And, in fact, such variation exists today: More than half the circuits appear to follow the pure case majority approach to en banc votes,[17] while two circuits instead follow the modified case majority approach,[18] and the approach taken by other circuits is unclear.[19]

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[17] *See* Third Circuit Local Appellate Rule 35.3 ("For purposes of determining the majority number necessary to grant a petition for rehearing, all circuit judges currently in regular active service who are not disqualified will be counted."); Fourth Circuit Rule 35 ("A majority of the circuit judges who are in regular active service and who are not disqualified may grant a hearing or rehearing en banc."); Eighth Circuit IOP IV.D ("A rehearing en banc is granted if a majority of judges in regular active service and who are not disqualified vote affirmatively. "); Ninth Circuit General Order 5.5(d) ("If a majority of the judges eligible to vote on the en banc call votes in favor of en banc consideration, the Chief Judge shall enter an order taking the case en banc pursuant to Circuit Rule 35-3."); Tenth Circuit Rule 35.5 ("A majority of the active judges who are not disqualified may order rehearing en banc."); Eleventh Circuit IOP 35.8 ("A recused or disqualified judge is not counted in the base when calculating whether a majority of circuit judges in regular active service have voted to rehear an appeal en banc. If, for example, there are 12 circuit judges in regular active service on this court, and five of them are recused or disqualified in an appeal, rehearing en banc may be granted by affirmative vote of four judges (a majority of the seven non-recused and non-disqualified judges)."); D.C. Circuit Handbook XIII.B.2 ("[O]nly active judges of the Court may vote, and a majority of all active judges who are not recused must approve rehearing en banc in order for it to be granted."). See also Seventh Circuit IOP 5(d)(1) ("A simple majority of the voting active judges is required to grant a rehearing en banc.").

[18] *See* First Circuit Rule 35.0(a) ("Rehearing en banc shall be ordered only upon the affirmative votes of a majority of the judges of this court in regular active service who are not disqualified, provided that the judges who are not disqualified constitute a majority of the judges who are in regular active service."); Fed. Cir. R. 47.11 ("A quorum is a simple majority of a panel of the court or of the court en banc. In determining whether a quorum exists for en banc purposes, more than half of all circuit judges in regular active service, including recused or disqualified judges, must be eligible to participate in the en banc process."); see also Fed. Cir. IOP 13.2 ("Upon the concurrence of the majority of active judges, the court will, for any

I will not attempt, in this memo, to settle the question of Section 46(d)'s interpretation,[20] though I will be glad to research the question further if the Committee feels that this would be helpful. Rather, my goal here is to note that *Comer* highlights apparent division among the circuits on this point.

III. The case of the vanishing quorum

The judges in *Comer* confronted an unusual situation in which a quorum existed at the time of the vote to rehear the case en banc, but (in the view of the majority of those voting) did not exist at the time of the vote to dismiss the appeal. The question of what to do in such a

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appropriate reason, conduct an en banc hearing, rehearing, or reconsideration. Judges who are recused or disqualified from participating in an en banc case are not counted as active judges for purposes of this IOP.").

[19] The Second Circuit's Internal Operating Procedures state simply that "[a] quorum is a majority of a panel or of the court en banc. See 28 U.S.C. § 46." Second Circuit IOP E(a). Similarly, the Sixth Circuit's rules cite Section 46 and state that "[a] majority of the number of judges authorized to constitute the court or a panel thereof shall constitute a quorum." Sixth Circuit Rule 203.

The Fifth Circuit's Internal Operating Procedures appear to subscribe to the case majority approach. See Fifth Circuit IOP following Fifth Circuit Rule 35 ("If a majority of the judges in active service who are not disqualified, vote for en banc hearing or rehearing, the chief judge instructs the clerk as to an appropriate order. The order indicates a rehearing en banc with or without oral argument has been granted, and specifies a briefing schedule for filing of en banc briefs.") However, the opinion issued by the judges who voted to dismiss the appeal in *Comer* would be more consistent with the modified case majority approach.

[20] On a quick glance, it appears that reasonable arguments could be made either way. The argument that a quorum requires only a majority of the non-disqualified judges might commence by citing the 2005 Committee Note's discussion of the first two sentences in Section 46(c). As that Note argues, "It is clear that 'all circuit judges in regular active service' in the second sentence does not include disqualified judges, as disqualified judges clearly cannot participate in a case being heard or reheard en banc." Because Section 46(d) refers to "the number of judges authorized to constitute a court ... as provided in paragraph (c)," one could argue that Section 46(d)'s quorum requirement should be calculated by reference to the set of active judges who are not disqualified. The contrary argument might look to the question of the quorum requirement's intended effect. If disqualified judges are not to be counted in determining the existence of a quorum, it might be argued that the quorum requirement will always be met. There is, however, a counter-argument: As Judge Dennis pointed out in his dissent in *Comer*, "a quorum can be lost through circumstances other than disqualification, such as illnesses or family emergencies that may render judges temporarily unable to participate." 607 F.3d at 1059 n.4.

circumstance is not definitively resolved by statute and is not explicitly addressed by the Appellate Rules.[21]

A number of circuits have local provisions similar to Fifth Circuit Rule 41-3.[22] That rule provides that "[u]nless otherwise expressly provided, the granting of a rehearing en banc vacates the panel opinion and judgment of the court and stays the mandate." Though I have not researched the origin of this rule, it seems unlikely that it was designed to address circumstances like those in *Comer*. Indeed, the opening phrase indicates an expectation that there might be circumstances in which the grant of rehearing en banc might *not* operate as stated in the local

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[21] Neither Rule 35 nor Rule 41 provides an answer. Rule 41(d)(1) states that "[t]he timely filing of a ... petition for rehearing en banc ... stays the mandate until disposition of the petition ... , unless the court orders otherwise." But Rule 41 does not discuss the effect of the grant of rehearing en banc on the panel opinion or judgment.

[22] See, e.g., First Circuit IOP X ("Usually when an en banc rehearing is granted, the previous opinion and judgment will be vacated."); Third Circuit IOP 9.5.9 (" If a majority of the active judges of the court who are not disqualified, votes for rehearing en banc, the chief judge enters an order which grants rehearing as to one or more of the issues, vacates the panel's opinion in full or in part and the judgment entered thereon, and assigns the case to the calendar for rehearing en banc."); Fourth Circuit Rule 35 ("Granting of rehearing en banc vacates the previous panel judgment and opinion; the rehearing is a review of the judgment or decision from which review is sought and not a review of the judgment of the panel."); Sixth Circuit Rule 35 ("The grant of a rehearing en banc vacates the previous opinion and judgment of this court, stays the mandate and restores the case on the docket as a pending appeal."); Seventh Circuit IOP 5(e) ("An order granting rehearing en banc should specifically state that the original panel's decision is thereby vacated."); Eleventh Circuit Rule 35-11 ("Unless otherwise expressly provided, the effect of granting a rehearing en banc is to vacate the panel opinion and to stay the mandate."); Eleventh Circuit Rule 41-1 (same). *See also* Ninth Circuit General Order 5.5(d) ("The three-judge panel opinion shall not be cited as precedent by or to this court or any district court of the Ninth Circuit, except to the extent adopted by the en banc court."). *Compare* Tenth Circuit Rule 35 ("The grant of rehearing en banc vacates the judgment, stays the mandate, and restores the case on the docket as a pending appeal. The panel decision is not vacated unless the court so orders."); D.C. Circuit Rule 35(d) ("If rehearing en banc is granted, the panel's judgment, but ordinarily not its opinion, will be vacated, and the petition for panel rehearing may be acted upon without awaiting final termination of the en banc proceeding."); Fed. Circuit IOP 14.4(b) (providing that upon sua sponte grant of rehearing en banc, "[t]he clerk shall provide notice that a majority of the judges in regular active service has acted under 28 U.S.C. § 46(c) and Fed. R. App. P. 35(a) to order the appeal to be heard en banc, enter an order for the court vacating the judgment and withdrawing the opinion(s) filed by the panel that heard the appeal, and indicate any questions the court may wish the parties and amici to address.").

rule.[23] Quite apart from the unusual circumstances of *Comer*, there might be several purposes that such a local provision might serve.[24] It could set a default rule to prevent the panel opinion from serving as precedent pending the decision of the en banc court. It could frame the task of the en banc court by pointing out that (at least as a formal matter) the latter is to review the decision below and not the panel decision.[25] Thus, some courts faced with a situation like *Comer* might have decided, as the dissenters suggested, to consider the case to merit an exception to the general practice of vacatur, and might have chosen to reinstate the panel opinion.[26]

28 U.S.C. § 291(a) provides that "[t]he Chief Justice of the United States may, in the public interest, designate and assign temporarily any circuit judge to act as circuit judge in

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[23] One example of a circumstance in which the default rule would not ultimately govern is if the court of appeals, en banc, reinstated some or all of the panel opinion. *See, e.g., Soffar v. Cockrell*, 300 F.3d 588, 598 (5th Cir. 2002) (en banc) (reinstating some of the panel's rulings).

[24] *See also Igartua de la Rosa v. United States*, 407 F.3d 30, 31 (1st Cir. 2005) (en banc per curiam opinion) ("For some years, it has been the practice of this court, when granting rehearing en banc, to vacate the panel decision in the same order.... A reason for this practice is that a grant of rehearing en banc almost invariably results in a new decision, whether the outcome differs from or duplicates the result reached by the panel.").

[25] One could, of course, dispute whether such a description reflects the reality of en banc review:

> [A]n en banc decision, following a panel decision, is in substance reviewing the work of the panel regardless of whether the panel opinion has or has not been formally withdrawn at the time of the rehearing. *See, e.g., JOM, Inc. v. Adell Plastics, Inc.*, 193 F.3d 47, 49 (1st Cir.1999) (en banc) (reinstating portion of vacated panel opinion). The issue on rehearing en banc virtually always turns on something the panel decided or failed to decide. Whether the panel decision is withdrawn at the beginning or end of the en banc process, the en banc court's action is in its essence one that either reaffirms or alters what the panel has decided.

Igartua, 407 F.3d at 32. *See also* 28 U.S.C. § 46(c) (referring to "an in banc court reviewing a decision of a panel"); *compare* Fourth Circuit Rule 35(c) ("The circuit takes the position that the change of wording in 28 U.S.C. § 46(c) referring to participation in en banc decisions does not alter the long-standing rule that the en banc court reviews the decision from which review is sought in this Court, not the decision of a panel.").

[26] On the other hand, one might instead roughly analogize the situation in *Comer* to one in which the en banc court is equally divided. In the latter situation, the court presumably would affirm the decision below rather than reinstating the panel opinion.

another circuit upon request by the chief judge or circuit justice of such circuit." A prior version of this statute has been used to assign out-of-circuit judges as a means of dealing with widespread disqualifications. So, for example, appeals in the case of former governor and then-judge Otto Kerner, Jr., generated recusals by all the Seventh Circuit judges and resulted in the designation of three judges from the Second, Eighth and Tenth Circuits. *See United States v. Isaacs*, 493 F.2d 1124, 1168 (7th Cir. 1974). The Supreme Court has not addressed the intersection of Section 291(a) and Sections 46(c) and (d). It seems possible that the Court would draw a distinction between eligibility to vote to decide to rehear a case en banc and eligibility to participate in the rehearing en banc, and might be more willing to contemplate outsiders participating in the latter context than in the former. As to the decision *whether* to rehear a case en banc, the Court has stated that "Congress appears to have contemplated the need for an intimate and current working knowledge of, among other things, the decisions of the circuit, its pending cases, and the magnitude and nature of its future workload." *Moody v. Albemarle Paper Co.*, 417 U.S. 622, 626-27 (1974). The *Moody* Court distinguished the question of participation in the en banc decision itself: "voting on the merits of an in banc case is quite different from voting whether to rehear a case in banc, which is essentially a policy decision of judicial administration." *Id.* at 627; *see also United States v. Nixon*, 827 F.2d 1019, 1021-22 (5th Cir. 1987) (citing *Moody* for the proposition that "only judges of the Circuit who are in regular active service may make the determination to rehear a case en banc," and rejecting the argument that Section 291(a) could be employed to assign out-of-circuit judges to participate in decision whether to grant rehearing en banc). However, as noted in Part I, the *Comer* majority viewed *Nixon* as extending to the question of participation in the en banc merits determination.

Judge Dennis also argued in *Comer* that the Rule of Necessity should prompt some or all of the disqualified judges to sit to rehear the case en banc in order to avoid depriving the appellant[s] of the chance to have the appeal determined on the merits. I will not undertake a review of the scope of the Rule of Necessity in this memo (though of course I would be glad to do so if the Committee feels it would be useful). I will simply note that the judges voting to dismiss the appeal in *Comer* took a narrower view of the Rule of Necessity than did Judge Dennis.

There also existed the option of holding the appeal in abeyance until the court regained a quorum for purposes of the *Comer* case. On occasion, when the Supreme Court lacked a quorum, it has continued the case on the docket until there was a quorum. *See Engineers Pub. Serv. Co. v. SEC*, 322 U.S. 723 (1944) (granting certiorari); *Engineers Pub. Serv. Co. v. SEC*, 66 S. Ct. 1018 (1946) (a May 13, 1946 order stating that "The death of the late CHIEF JUSTICE having deprived the Court of a quorum in this case, it is restored to the docket and assigned for reargument during the week of October 14th"); *Engineers Pub. Serv. Co. v. SEC*, 332 U.S. 788 (1947) (October 20, 1947 per curiam order vacating court of appeals judgment and remanding for dismissal of the petition as moot, on joint motion of the parties). *See also North Am. Co. v. SEC*, 320 U.S. 708, 708-09 (1943) ("As four Justices have disqualified themselves from participating in the decision in this case, the Court is unable to make final disposition of it because of the absence of a quorum of six Justices as prescribed by 28 U.S.C.A. § 321. This case will accordingly be transferred to a special docket and all further proceedings in it postponed

until such time as there is a quorum of Justices qualified to sit in it, when it will be restored to the regular docket for such further proceedings as may be appropriate."). The current statute dealing with Supreme Court quorum issues, 28 U.S.C. § 2109, appears to contemplate such a procedure on a limited basis – i.e., only if the case can be resolved by a quorum "at the next ensuing term."[27] Reasoning by analogy, and given that there are 17 authorized judgeships on the Fifth Circuit, another option was (as Judge Dennis pointed out) to hold the case on the docket until the seventeenth Fifth Circuit judgeship was filled – which (assuming that the new judge was not recused) would yield 9/17, i.e., indisputably a quorum. Admittedly, as the judges who voted to dismiss the appeal in *Comer* noted, delay has disadvantages,[28] so it may be unsurprising that this option was not selected.

IV. Conclusion

Part III of this memo discussed the fact that *Comer* highlights inter-circuit variation in the interpretation of Section 46(d)'s quorum requirement. Though the 2005 amendment to Rule 35(a) was designed to promote national uniformity in en banc voting requirements, the drafters of that amendment explicitly disclaimed any intent to preempt inter-circuit variation in the interpretation of Section 46(d). Thus, to the extent that this aspect of *Comer* raises a question for the Committee, it is whether there are reasons to re-visit the resolution reached in drafting the 2005 amendment.

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[27] Section 2109 states in part: "In any other case brought to the Supreme Court for review, which cannot be heard and determined because of the absence of a quorum of qualified justices, if a majority of the qualified justices shall be of opinion that the case cannot be heard and determined at the next ensuing term, the court shall enter its order affirming the judgment of the court from which the case was brought for review with the same effect as upon affirmance by an equally divided court."

[28] The *Comer* majority's quote from 16AA Fed. Prac. & Proc. Juris. § 3981.3 was not squarely on point, as the quoted matter dealt with the treatment of cases in which "participation of an ineligible judge is discovered during the ordinary period for rehearing or Supreme Court review" after a court of appeals has reached a determination on the merits of the appeal.

Making an administrative determination about timing with an eye to affecting the substantive outcome of an appeal is usually undesirable. *See, e.g.*, H. R. Rep. No. 104–697, 104th Cong., 2nd Sess. 1996, 1996 WL 421818, 1996 U.S.C.C.A.N. 1345, 1346 (explaining the amendment of Section 46(c) to provide for the continued participation of a senior judge who had been active status at the time that a particular case "was heard or reheard by the court in banc" by stating that the amendment "will eliminate any possibility of an in banc opinion's being held up because of the effect of a vote from a judge who may be near the time to take senior status"). The question in relation to *Comer* was whether the same is true when the decision-maker's substantive goal is to provide a quorum, rather than to alter the merits determination of a court that already has a quorum.

Part IV noted that the Appellate Rules fail to settle the uncertainty – illustrated in *Comer* – concerning the appropriate course of action when a quorum exists at the time of a decision to rehear a case en banc but then is lost prior to the en banc court's decision. As the *Comer* dissenters noted, in cases where this scenario occurs it raises serious questions. There is a statutory right to appeal to the court of appeals,[29] and the result of the disposition in *Comer* is to foreclose any resolution by the court of appeals of the merits of the appeal. Admittedly, as the *Comer* majority pointed out, the appellants could petition for U.S. Supreme Court review, but the chances of such review are always slim. Although this situation therefore is troubling, it is also worth noting that the chances of the situation itself arising also seem slim; so the question for the Committee is whether this presumably rare scenario warrants rulemaking attention.

Encls.

[29] *See* 28 U.S.C. § 1291. Except perhaps in capital cases, there is no federal constitutional right to an appeal. *See, e.g.*, *Halbert v. Michigan*, 545 U.S. 605, 610 (2005) ("The Federal Constitution imposes on the States no obligation to provide appellate review of criminal convictions."); *McKane v. Durston*, 153 U.S. 684, 687 (1894) ("A review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law, and is not now, a necessary element of due process of law."). Once Congress has provided the statutory right to appeal, though, there are constitutional constraints on how the appeal may be processed. *Cf., e.g.*, *M.L.B. v. S.L.J.*, 519 U.S. 102, 110 (1996) ("Although the Federal Constitution guarantees no right to appellate review …, once a State affords that right …, the State may not 'bolt the door to equal justice.'") (quoting *Griffin v. Illinois*, 351 U.S. 12, 24, 76 S. Ct. 585, 593 (1956) (Frankfurter, J., concurring in judgment)).

607 F.3d 1049, 70 ERC 1808
(Cite as: 607 F.3d 1049)

H

United States Court of Appeals,
Fifth Circuit.

Ned COMER; Brenda Comer; Eric Haygood, husband of Brenda Haygood; Brenda Haygood; Larry Hunter, husband of Sandra L. Hunter; Sandra L. Hunter; Mitchell Kisielweski, husband of Johanna Kisielweski; Johanna Kisielweski; Elliott Roumain, husband of Rosemary Roumain; Rosemary Roumain; Judy Olson; David Lain, Plaintiffs-Appellants,

v.

MURPHY OIL USA; Universal Oil Products (UOP); Shell Oil Company; Exxonmobil Corp.; AES Corp.; Allegheny Energy, Inc.; Alliance Resource Partners LP; Alpha Natural Resources, Inc.; Arch Coal, Inc.; BP America Production Company; BP Products North America, Inc.; Cinergy Corp.; ConocoPhillips Company; Consol. Energy, Inc.; The Dow Chemical Company; Duke Energy Corp.; EON AG; E.I. Dupont De Nemours & Co.; Entergy Corp.; Firstenergy Corp.; Foundation Coal Holdings, Inc.; FPL Group, Inc.; Honeywell International, Inc.; International Coal Group, Inc.; Massey Energy Co.; Natural Resource Partners LP; Peabody Energy Corp.; Reliant Energy, Inc.; Tennessee Valley Authority; Westmoreland Coal Co.; Xcel Energy, Inc.; Chevron USA, Inc.; The American Petroleum Institute, Defendants-Appellees.

No. 07-60756.

May 28, 2010.

Background: Owners of lands and property along Mississippi Gulf coast brought putative class action against oil companies and energy companies alleging the operation of their companies caused emission of greenhouse gasses that contributed to global warming and added to ferocity of hurricane that destroyed their property. The United States District Court for the Southern District of Mississippi, Louis Guirola, Jr., J., granted defendants' motion to dismiss. Owners appealed. The Court of Appeals, Dennis, Circuit Judge, 585 F.3d 855, reversed and remanded.

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Mary S. Johnson, Johnson Gray McNamara, L.L.C., Mandeville, LA, Damiel Paul Collins, Munger, Tolles & Olson, L.L.P., Los Angeles, CA, David Lee Martindale, Cypress, TX, Thomas M. McNamara, Johnson Gray McNamara, L.L.C., Lafayette, LA, for Shell Oil Co.

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Appeal from the United States District Court for the Southern District of Mississippi.

Before JOLLY, Acting Chief Judge, and DAVIS, SMITH, STEWART, DENNIS, CLEMENT, PRADO and OWEN, Circuit Judges.[FN*]

FN* Chief Judge Jones and Judges King, Wiener, Garza, Benavides, Elrod, Southwick, and Haynes are recused.

ORDER:

This case was voted en banc by a duly constituted quorum of the court consisting of nine members in regular active service who are not disqualified. Fed. R.App. P. 35(a); 28 U.S.C. § 46(d).

The grant of rehearing en banc in this case "vacate[d] the panel opinion and judgment of the court and stay[ed] the mandate." 5th Cir. R. 41.3.; *see also* *Thompson v. Connick*, 578 F.3d 293 (5th Cir.2009) (en banc) (same).

[1][2] After the en banc court was properly constituted, new circumstances ***1054** arose that caused the disqualification and recusal of one of the nine judges, leaving only eight judges in regular active service, on a court of sixteen judges, who are not disqualified in this en banc case. Upon this recusal, this en banc court lost its quorum. Absent a quorum, no court is authorized to transact judicial business. *See* *Nguyen v. United States*, 539 U.S. 69, 82 n. 14, 123 S.Ct. 2130, 156 L.Ed.2d 64 (2003) (quoting *Tobin v. Ramey*, 206 F.2d 505, 507 (5th Cir.1953)).

The absence of a quorum, however, does not preclude the internal authority of the body to state the facts as they exist in relation to that body, and to apply the established rules to those facts.

[3][4][5][6][7] In arriving at our decision, directing the clerk to dismiss this appeal, this en banc court has considered and rejected each of the following options:

1. *Asking the Chief Justice to appoint a judge from another Circuit pursuant to 28 U.S.C. § 291*. We have rejected this argument as precluded by our precedent, *United States v. Nixon*, 827 F.2d 1019 (5th Cir.1987), and because § 291 provides an inappropriate procedure, unrelated to providing a quorum for the en banc court of a circuit.

2. *Declaring that there is a quorum under the provisions of Federal Rule of Appellate Procedure 35(a)*. We believe that a quorum is properly defined under 28 U.S.C. § 46 as constituting a majority of the judges of the entire court who are in regular active service, and not as a body of the non-recused judges of the court, however few.

3. *Adopting the Rule of Necessity*. The Rule of Necessity-allowing disqualified judges to sit-is not applicable in this case because it would be inappropriate to disregard the disqualification of the judges of this Court when the appeal may be presented to the Supreme Court of the United States for decision. Moreover, there is no established rule providing that an en banc court lacking a quorum, may disregard recusals and disqualifications of all judges so that an en banc court may be formed. Nor is there any method to select one particular judge among the several disqualified judges in order to provide a bare minimum for a quorum.

4. *"Dis-enbancing" the case and ordering the panel opinion reinstated, and issuing the mandate thereon*. This case was properly voted en banc. The panel opinion and the judgment of the panel were lawfully vacated. Without a quorum to conduct any judicial business, this en banc court has no authority to rewrite the established rules of the Fifth Circuit for this one case and to order this case, properly voted en banc, "dis-enbanced." Moreover, we have no authority to interpret a plainly applicable rule as simply a blank, on grounds that "it was not designed to apply" to a situation where its terms have undisputed application.

5. *Holding the case in abeyance until the composition of the court changes.* It is purely speculative as to when the current vacancy on this court will be filled and it is, of course, unknown whether that judge may also be recused. Furthermore, we have no way of knowing when another sitting judge in regular active service of the Court may become "undisqualified" or indeed whether another judge of this en banc court may become disqualified to sit further. The Wright and Miller treatise has observed:

> Any decision of this character, however, should be made *as promptly as possible;* delay that spans several months and the addition of new judges, and that creates at least the appearance of a decision that could ***1055** not have been reached earlier, *should be avoided at all costs.*

16AA WRIGHT & MILLER § 3981.3, at 448 (2008) (emphasis added).

In sum, a court without a quorum cannot conduct judicial business. This court has no quorum. This court declares that because it has no quorum it cannot conduct judicial business with respect to this appeal. This court, lacking a quorum, certainly has no authority to disregard or to rewrite the established rules of this court. There is no rule that gives this court authority to reinstate the panel opinion, which has been vacated. Consequently, there is no opinion or judgment in this case upon which any mandate may issue. 5TH CIR. R. 41.3.

Because neither this en banc court, nor the panel, can conduct further judicial business in this appeal, the Clerk is directed to dismiss the appeal.

The right of individual judges to write further after entry of this Order is preserved.

The parties, of course, now have the right to petition the Supreme Court of the United States.

W. EUGENE DAVIS, Circuit Judge, dissents with reasons, joined by CARL E. STEWART, Circuit Judge.

DENNIS, Circuit Judge, dissents with reasons.

W. EUGENE DAVIS, Circuit Judge, joined by CARL E. STEWART, Circuit Judge, Dissenting:

I dissent from the order dismissing this appeal for the following reasons.

As the order states, we do not have a quorum of the court to act in this case. By way of background, a panel of this court, after full consideration of the briefs and oral argument, decided appellant's appeal. Appellee then applied for en banc rehearing and a vote was taken. Only nine of the seventeen active judges were unrecused and qualified to participate in a vote. By 6 to 3, the nine qualified judges voted to grant rehearing en banc. Shortly after the case was voted en banc, one of the six judges voting for en banc declared herself recused thereby causing the court to lose its quorum. Instead of declaring that the loss of a quorum automatically dis-en banced the case causing the case to return to its status before it was voted en banc, five of the eight remaining unrecused judges voted to enter the attached order dismissing the appeal. The five

judges who entered this order reasoned that this result was mandated by our Local Rule 41.3, which provides: "Unless otherwise expressly provided, the granting of a rehearing en banc vacates the panel opinion and judgment of the court and stays the mandate."

1. Local Rule 41.3 was never designed to apply in this situation where the court, after voting a case en banc, loses its quorum and the en banc court never considers the appeal on its merits. It is a provisional, practical rule that alerts practitioners and courts of the fact that the panel opinion is not precedential pending consideration of the merits of the case by the en banc court.

It makes no sense to allow a vote to take a case en banc to dictate the result on the merits. Judges vote for en banc consideration for any number of reasons other than the fact that they conclude that the panel has reached an erroneous result. They may vote for en banc simply because they believe it presents a serious question that the full court should consider or simply because they have some question about the correctness of the result. Judges are rarely prepared to definitively decide the ***1056** merits of the case when they vote for or against en banc reconsideration.

2. Appellants in this case have a statutory right to appeal the adverse judgment of the district court to this court. The dismissal of this appeal based on a local rule has the effect of depriving appellants of their right to an appeal and allows the local rule to trump federal statutes.

3. Moreover, I find an inexplicable disconnect between the notion that a majority of the eight unrecused judges has no authority to do anything except literally apply our Local Rule 41.3 strictly as written; yet they do have the authority to dismiss the appeal.

4. Alternatively, 28 U.S.C. § 291 provides an avenue that would avoid depriving appellant of his direct appeal. Section 291 permits the Chief Justice to appoint a judge from another circuit to allow this court to have a quorum to consider the case en banc. 28 U.S.C. § 291 provides that: "(a) the Chief Justice of the United States may, in the public interest, designate and assign temporarily any circuit judge to act as circuit judge in another circuit upon request of the chief judge or circuit justice of such circuit." Acting Chief Judge E. Grady Jolly indicated his willingness to request the Chief Justice to designate such a temporary judge if a majority of the eight judges had requested it. We are aware that it would be an unusual request to appoint a judge from another circuit to constitute a quorum of the en banc court but we believe such a request is justified here where the alternative is the appellant must completely lose his right to a direct appeal.

DENNIS, Circuit Judge, dissenting:
I respectfully dissent from the decision by the majority of this en banc court to refuse to hear oral argument or to decide this appeal on its merits, but to take the shockingly unwarranted actions of ruling that the panel decision has been irrevocably vacated and dismissing the appeal without adjudicating its merits. The majority's decision to declare that we no longer have a quorum, and to take the drastic action of dismissing the appeal without hearing its merits, but with the intention of reinstating the district court's judgment, is manifestly contrary to law and Supreme Court precedents. The majority's action is deeply lamentable because it was forewarned of the reasons militating against its erroneous rush to judgment by the parties' letter briefs and by internal memoranda. If the five-judge en banc majority's precipitous summary dismissal of the appeal is not corrected, it will cause the sixteen-active judge body of this United States Court of Appeals to default on its absolute duty to hear and decide an appeal of right properly taken from a final district court judgment.

The majority's order mischaracterizes itself as merely stating the facts and "apply[ing] the established rules to those facts." In truth, however, the majority is making the fully informed *choice* to dismiss this unadjudicated appeal and finally terminate this litigation, even while turning a blind eye to several legally viable alternative courses of action and claiming to have no power to take any further action in the case due to the supposed lack of a quorum.[FN1]

FN1. The language of the order of dismissal underscores the contradiction inherent in issuing such an order while simultaneously claiming to lack the power to take any action in this case. The order asserts the authority "to state the facts as they exist ... and to apply the established rules to those facts." But United States circuit judges have no independent authority to apply law to facts and issue orders thereupon. We can issue orders

> only through a properly constituted quorum (with limited exceptions not relevant here, *see* Fed. R.App. P. 27(c)). A quorum is "the minimum number of members ... who must be present for a deliberate assembly to legally transact business." *Black's Law Dictionary* (8th ed.2004).
>
> If we lack a quorum, then the group of judges who are purporting to issue the order of dismissal cannot issue such an order any more than a single circuit judge can dismiss a case on behalf of a three-judge panel.
>
> I believe that we do have a quorum under 28 U.S.C. § 46 and must decide the appeal, but since the majority believes we lack a quorum, they contradict themselves by asserting that they have the power to dismiss the case.

***1057** The majority's decision to dismiss this appeal rests, first of all, on an implausible interpretation of the statute that defines a quorum of an en banc court of appeals, 28 U.S.C. § 46(c)-(d). Second, it contravenes the long-established rule that "federal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred." *New Orleans Public Service, Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 358, 109 S.Ct. 2506, 105 L.Ed.2d 298 (1989). There are several affirmative grounds that authorize us to fulfill "the absolute duty of judges to hear and decide cases within their jurisdiction." *United States v. Will*, 449 U.S. 200, 215, 101 S.Ct. 471, 66 L.Ed.2d 392 (1980). These grounds are as follows: (1) we do have a quorum under the correct reading of § 46(c)-(d), which is also supported by Fed. R.App. P. 35(a); (2) the acting chief judge of this court has the authority to seek the designation and assignment of a judge from another circuit under 28 U.S.C. §§ 291 & 296; (3) we can follow the Supreme Court's example in *North American Co. v. SEC*, 320 U.S. 708, 64 S.Ct. 73, 88 L.Ed. 415 (1943), and hold the case over until the President and the Senate fill this court's current vacancy and give us nine out of seventeen active judges who can decide the case; and if all else fails, (4) we should comply with the ancient common-law doctrine known as the Rule of Necessity, which overrides the federal statute governing judicial recusals, as the Supreme Court held in *Will*, 449 U.S. at 217, 101 S.Ct. 471. The Rule of Necessity, and not dismissal, is the appropriate last resort in this situation because it fulfills this court's absolute duty to decide cases within its jurisdiction. The majority's action flouts that duty.

Last but not least, the dismissal of this appeal-with the apparent intention to effectively reinstate the district court's order dismissing the case, even though a panel of this court has already held that the district court erred, 585 F.3d 855 (5th Cir.2009)-is contrary to common sense and fairness. Indeed, it is injudiciously mechanistic and arbitrary. For example, if the most recently recused judge had become recused three months earlier, the outcome of this case would have been precisely the opposite: the court could not have granted rehearing en banc (at least not while following the majority's current definition of an en banc quorum), so the panel's decision reversing the district court's dismissal of the case would have remained in effect. Thus, because of the majority's erroneous interpretation of 28 U.S.C. § 46(c)-(d) and its refusal to discharge this court's absolute duty to decide cases within its jurisdiction, the particular timing of one single judge's recusal is being allowed to conclusively determine the outcome of this case.[FN2]

> FN2. I agree with almost all of Judge Davis's dissent, including his well-considered view that if the en banc court lacks a quorum, then it is effectively dissolved and Fed. R.App. P. 41(d)(1) requires the panel's mandate to issue notwithstanding anything in our local rules to the contrary. The panel's decision is the most recent and authoritative decision concerning the issues raised in this appeal; that decision, not the district court's overruled decision, should control if the en banc court is unable to act.
>
> Despite my agreement with Judge Davis, at some points in this opinion I will assume for the sake of argument that the panel's decision has been irrevocably vacated under 5th Cir. R. 41.3 and that its mandate cannot issue.
>
> My only point of disagreement with Judge Davis concerns his view that the en banc court lacks a quorum. As I explain herein, that view is based on an erroneous reading of 28 U.S.C. § 46.

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***1058** I. FACTS

The district court dismissed this case on the grounds that the plaintiffs lacked standing and that the case presented a nonjusticiable political question. The plaintiffs filed their notice of appeal in September 2007. The case was assigned to a three-judge panel of this court. Oral argument was held before a quorum of two judges because the third judge had a family emergency. One of the two remaining judges then recused himself, depriving the panel of a quorum. The case was then rescheduled for oral argument before a second three-judge panel. That panel issued its ruling in October 2009, reversing the district court's dismissal of the case. 585 F.3d 855 (5th Cir.2009).

The defendants-appellees petitioned for rehearing en banc. The nine active circuit judges who were not recused at that time granted rehearing en banc by a vote of six to three. 598 F.3d 208 (5th Cir.2010). Then, in April 2010, one of those nine judges became recused, leaving eight out of sixteen active judges still able to participate in the case, and forcing the eight nondisqualified judges to decide whether we still have a quorum and, if not, what is to be done. We asked the parties to submit letter briefs on the issue. Now, a majority of the nondisqualified judges-five out of eight-have voted to dismiss the case.

II. ANALYSIS

A. This en banc court has a quorum as defined by 28 U.S.C. § 46.

The majority's reading of the statutory quorum requirement as requiring nine out of sixteen active judges for an en banc quorum is erroneous. 28 U.S.C. § 46(c) defines an en banc court as follows: "A court in banc shall consist of all circuit judges in regular active service," with certain exceptions that are not relevant here. The majority reads "all circuit judges in regular active service" as including judges who are disqualified from taking part in a particular case. But if it really meant that, then the statute would necessarily require all disqualified active judges to sit as part of the en banc court in every case that is heard or reheard en banc.[FN3] However, no one thinks that Congress wanted to require disqualified judges to sit in en banc cases, so we do not read the statute that way. Instead, we routinely conduct en banc hearings and rehearings while excluding disqualified judges. Thus, our ordinary understanding of the category "all circuit judges in regular active service" excludes disqualified judges.

> FN3. This seemingly self-evident point is also made by the Advisory Committee Notes to the 2005 amendment to Fed. R.App. P. 35(a): "It is clear that 'all circuit judges in regular active service' in the second sentence [of § 46(c)] does not include disqualified judges, as disqualified judges clearly cannot participate in a case being heard or reheard en banc."

The statute goes on to define a quorum as "[a] majority of the number of judges authorized to constitute a court or panel thereof, as provided in paragraph (c)." *Id.* § 46(d). Thus, a quorum of an en banc court is a majority of "all circuit judges in regular active service," a category that has ***1059** to exclude disqualified judges because the alternative would be absurd. Therefore, in this case, "all circuit judges in regular active service" under § 46(c) simply means the eight judges who are not disqualified, and a quorum is a majority of those judges.[FN4]

> FN4. This reading of the statute does not render the quorum requirement meaningless; it only defines a quorum as a majority of the nondisqualified active judges. A majority of the qualified active judges still must be present in order for the court to conduct business. Thus, a quorum can be lost through circumstances other than disqualification, such as illnesses or family emergencies that may render judges temporarily unable to participate.

That has always been the most logical reading of the statute. The 2005 amendment to Fed. R.App. P. 35(a)[FN5] effectively did away with our circuit's former version of a local rule, 5th Cir. R. 35.6, which had followed a contrary reading.[FN6] After the 2005 amendment was passed, we did not adopt a rule (like those the First, Third, and Federal Circuits have adopted) defining a quorum for conducting en banc court business as a majority of all active judges including disqualified judges.[FN7] Despite the absence of any such rule in this circuit, the majority is proceeding as if we actually had a local rule defining a quorum as

a majority of all active judges including disqualified judges. Because we have no such rule, we must instead simply follow the statute itself, which requires only a majority of nondisqualified judges to constitute a quorum.

> FN5. The 2005 amendment clarified that only a majority of nondisqualified judges is needed in order to vote a case en banc. The history and reasons behind it are explained in the Advisory Committee Notes. The amended version of Rule 35(a) adopts a uniform national interpretation of § 46(c) and requires us to read the phrase "the circuit judges of the circuit who are in regular active service" in the first sentence of § 46(c) to *exclude* disqualified judges. Nonetheless, the majority in this case insists on reading the phrase "all circuit judges in regular active service" in the second sentence of § 46(c) to *include* disqualified judges.

> FN6. The pre-2005 version of 5th Cir. R. 35.6 said, "Judges in regular active service who are disqualified for any reason or who cannot participate in the decision of an en banc case nevertheless shall be counted as judges in regular active service."

> FN7. *See* 1st Cir. R. 35.0(a); 3d Cir. I.O.P. 9.5.3; Fed. Cir. R. 47.11. Such local rules appear to be permitted by the final paragraph of the Advisory Committee Notes to the 2005 amendment to Rule 35(a), which states, "the amendment is not intended to foreclose the possibility that § 46(d) might be read to require that more than half of all circuit judges in regular active service be eligible to participate in order for the court to hear or rehear a case en banc."

The majority's erroneous interpretation of § 46(c) is simply inconsistent with our routine practice of excluding disqualified judges from participating in rehearing en banc. We should accept that we have a quorum, as defined by § 46(c)-(d), and decide the case.

B. The dismissal of this case violates the rule that federal courts have an absolute duty to render decisions in cases over which they have jurisdiction.

1. The Absolute Duty to Decide Cases

The Supreme Court's "cases have long supported the proposition that federal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred. For example: 'We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution.' " *New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 358, 109 S.Ct. 2506, 105 L.Ed.2d 298 (1989) ***1060** (quoting *Cohens v. Virginia*, 19 U.S. 264, 404, 6 Wheat. 264, 5 L.Ed. 257 (1821)). There is a good reason why this rule has been in place for two centuries: society depends on the courts to resolve disputes in accordance with the laws.[FN8] The political branches should be able to count on the federal courts to decide *all* the cases over which they have been given jurisdiction.[FN9] This court has jurisdiction over this case because it is an appeal from a final order of a federal district court, in a suit between parties from different states, in which more than $75,000 is at stake. *See* 28 U.S.C. §§ 1291, 1332. The majority does not and cannot deny that this court has jurisdiction[FN10]-yet it chooses not to exercise that jurisdiction, in the face of two centuries of jurisprudence dating back to Chief Justice Marshall.[FN11]

> FN8. "Law ... must resolve disputes finally and quickly." *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). "The province of the court is, solely, to decide on the rights of individuals...." *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 170, 2 L.Ed. 60 (1803). "The fundamental role of the courts is to resolve concrete and present disputes between parties." *Principal Life Ins. Co. v. Robinson*, 394 F.3d 665, 671 (9th Cir.2005).

> FN9. "Only Congress may determine a lower federal court's subject-matter jurisdiction." *Kontrick v. Ryan*, 540 U.S. 443, 454, 124 S.Ct. 906, 157 L.Ed.2d 867 (2004). "[T]he judicial power of the United States ... is (except in enumerated instances, applicable exclusively to [the Supreme] Court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon

the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court) ... and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good." *Ankenbrandt v. Richards*, 504 U.S. 689, 698, 112 S.Ct. 2206, 119 L.Ed.2d 468 (1992) (quoting *Cary v. Curtis*, 44 U.S. 236, 245, 3 How. 236, 11 L.Ed. 576 (1845)).

FN10. *See United States v. Will*, 449 U.S. 200, 211, 101 S.Ct. 471, 66 L.Ed.2d 392 (1980) (explaining that the federal statute governing judicial recusals, 28 U.S.C. § 455, "does not affect the jurisdiction of a court").

Because this appeal involves the standing and political question doctrines, one side argues that the federal courts ultimately do not have jurisdiction over this case. Nonetheless, there is no doubt that the panel had jurisdiction and that we still have jurisdiction to decide this appeal, because "it is familiar law that a federal court always has jurisdiction to determine its own jurisdiction." *United States v. Ruiz*, 536 U.S. 622, 628, 122 S.Ct. 2450, 153 L.Ed.2d 586 (2002).

FN11. *E.g.*, *Marshall v. Marshall*, 547 U.S. 293, 298-99, 126 S.Ct. 1735, 164 L.Ed.2d 480 (2006) ("Chief Justice Marshall famously cautioned: 'It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should.... We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.' "(quoting *Cohens*, 19 U.S. at 404, 6 Wheat. 264)); *Pierson v. Ray*, 386 U.S. 547, 554, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967) ("It is a judge's duty to decide all cases within his jurisdiction that are brought before him...."); *Kline v. Burke Const. Co.*, 260 U.S. 226, 234, 43 S.Ct. 79, 67 L.Ed. 226 (1922) ("[The plaintiff] had the undoubted right ... to invoke the jurisdiction of the federal court and that court was bound to take the case and proceed to judgment."); *Willcox v. Consol. Gas Co. of N.Y.*, 212 U.S. 19, 40, 29 S.Ct. 192, 53 L.Ed. 382 (1909) ("When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction...."); *Chicot County v. Sherwood*, 148 U.S. 529, 534, 13 S.Ct. 695, 37 L.Ed. 546 (1893) ("[T]he courts of the United States are bound to proceed to judgment and to afford redress to suitors before them in every case to which their jurisdiction extends.") (quoting *Hyde v. Stone*, 61 U.S. 170, 175, 20 How. 170, 15 L.Ed. 874 (1857)).

Just as courts have an "absolute duty ... to hear and decide cases within their jurisdiction," *United States v. Will*, 449 U.S. 200, 215, 101 S.Ct. 471, 66 L.Ed.2d 392 (1980), litigants have a corresponding ***1061** due process right to have their cases decided when they are properly before the federal courts. "The parties to a civil action may appeal 'as a matter of right' under Fed. R.App. P. 3 from the final judgment of a district court to the circuit court of appeals except where direct review may be had in the Supreme Court." *Matter of McLinn*, 739 F.2d 1395, 1398 (9th Cir.1984) (en banc). "The right of appeal is statutory, and the grant is subject to due process requirements." *United States v. DeLeon*, 444 F.3d 41, 58 (1st Cir.2006) (citing *Evitts v. Lucey*, 469 U.S. 387, 393, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985)). The right to appeal would be of little value if the courts of appeals were not required to render decisions in cases that are properly brought before them.

This court initially fulfilled its duty to decide this case when the panel rendered its decision in this appeal. 585 F.3d 855 (5th Cir.2009). If the panel's decision had been allowed to take effect, then the court's duty would have been discharged.[FN12] But the court's decision to rehear the case en banc had the effect of vacating the panel's decision under Fifth Circuit Rule 41.3.[FN13] Because the panel's decision has been vacated, the court is now back in the position it was in before the panel rendered its decision: it has an absolute duty to hear and decide the appeal. The only difference is that now the en banc court, rather than the panel, has control over the case and therefore has the duty to render a decision.

FN12. If the court had believed it could not grant rehearing en banc due to lack of a qu-

> orum, there would have been no violation of the court's duty or of the parties' rights because there is no statutory or constitutional right to rehearing en banc. *See United States v. Nixon*, 827 F.2d 1019, 1022 (5th Cir.1987) (per curiam).
>
> FN13. I agree with Judge Davis's reading of Rule 41.3, under which the panel's decision should be treated as having been only provisionally vacated pending the outcome of rehearing en banc, and the panel's mandate should therefore issue pursuant to Fed. R.App. P. 41(d)(1) because of the dissolution of the en banc court.
>
> Here, however, I nonetheless assume for the sake of argument that we should treat the panel's decision as having been vacated.

2. The Rule of Necessity

Assuming for the sake of argument that the en banc court lacks a quorum, and also assuming that all other possible means of carrying out this court's duty have been ruled out, this court's last resort should be to decide that the Rule of Necessity applies and, accordingly, ask the active circuit judges who have recused themselves from this case to consider setting aside their recusals in order to decide this appeal. The Supreme Court in *United States v. Will* explained the Rule of Necessity as follows: it is the "well-settled principle at common law that ... 'although a judge had better not, if it can be avoided, take part in the decision of a case in which he has any personal interest, yet he not only may but must do so if the case cannot be heard otherwise.' " 449 U.S. at 213, 101 S.Ct. 471 (quoting Frederick Pollock, *A First Book of Jurisprudence* 270 (6th ed.1929)). The Court held in *Will* that the Rule of Necessity overrides the federal statute providing for the disqualification of judges, 28 U.S.C. § 455. *Id.* at 217, 101 S.Ct. 471 ("We therefore hold that § 455 was not intended by Congress to alter the time-honored Rule of Necessity."). If there is no other way for this court to carry out its duty, then we are required to follow *Will* and recognize that the Rule of Necessity requires some or all of our fellow active circuit judges to set aside their recusals.

***1062** As the Court explained in *Will*, the Rule of Necessity arises directly from the rule that federal courts cannot decline to exercise their jurisdiction:

> Chief Justice Marshall's exposition in *Cohens v. Virginia* could well have been the explanation of the Rule of Necessity; he wrote that a court "must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by, because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. *We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.* The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid; but we cannot avoid them."

Id. at 216 n. 19, 101 S.Ct. 471 (citation omitted) (quoting *Cohens*, 19 U.S. at 404, 6 Wheat. 264). Moreover, the Rule goes back more than five centuries, *id.* at 213, 101 S.Ct. 471, and "has been consistently applied in this country in both state and federal courts," *id.* at 214.

The Rule of Necessity is often invoked when every judge, or all the judges of a particular court, would otherwise be disqualified. For example, *Will* involved a challenge to the validity of statutes that affected the salaries of all federal judges, *see id.* at 209-10, 101 S.Ct. 471, and the Second Circuit applied the Rule in *Tapia-Ortiz v. Winter* when a litigant had sued every judge in the circuit, 185 F.3d 8, 10 (2d Cir.1999) (per curiam). But the Rule is not limited to such extreme cases; it also applies to situations in which even a single judge's disqualification would have the effect of preventing a properly brought case from being heard. This point is clearly established by the Supreme Court's opinion in *Will* and the cases quoted and cited therein.

For instance, the *Will* Court approvingly quoted the following passage from a Kansas Supreme Court case in which only one justice's disqualification was at issue:

> [I]t is well established that actual disqualification of *a member* of a court of last resort will not excuse *such member* from performing his official duty if failure to do so would result in a denial of a litigant's constitutional right to have a question, properly

presented to such court, adjudicated.

Will, 449 U.S. at 214, 101 S.Ct. 471 (emphasis added) (quoting *State ex rel. Mitchell v. Sage Stores Co.*, 157 Kan. 622, 143 P.2d 652, 656 (1943)). The disqualification issue in *Mitchell* was that one justice had previously been involved in the case while serving as the state's attorney general.[FN14]

> FN14. That justice preferred not to participate but had to do so, in compliance with the Rule of Necessity, because the court was unable to reach a decision without him. 143 P.2d at 656.

Will also gave the example of " *Mooers v. White*, 6 Johns.Ch. 360 (N.Y.Ch.1822), [in which] Chancellor Kent continued to sit despite his brother-in-law's being a party; New York law made no provision for a substitute chancellor. *See In re Leefe*, 2 Barb. Ch. 39 (N.Y.Ch.1846)." *Will*, 449 U.S. at 214 n. 15, 101 S.Ct. 471. In addition, *Will* approvingly cited *Moulton v. Byrd*, in which the Alabama Supreme Court held that the Rule of Necessity compelled a justice of the peace who had previously acted as an attorney for the plaintiff not to recuse himself from deciding the case. 449 U.S. at 214 n. 16, 101 S.Ct. 471 (citing *Moulton v. Byrd*, 224 Ala. 403, 140 So. 384 (1932)). Each of these situations-***1063** a judge's previous involvement in a case as a government official, a judge being a party's brother-in-law, or a judge's previous service as a party's attorney-concerned the disqualification of a single judge, not of all judges. But the Supreme Court in *Will* held them all up as examples of the proper application of the Rule of Necessity, because each of them met the essential criterion for the Rule's applicability: "the case cannot be heard otherwise." *Will*, 449 U.S. at 213, 101 S.Ct. 471.

The Rule of Necessity is also not limited to courts of last resort. The cases cited in *Will* make that clear: neither *Mooers* nor *Moulton*, for instance, involved a judge of a court of last resort. This court has also invoked the Rule before, in *Duplantier v. United States*, 606 F.2d 654, 662-63 (5th Cir.1979).[FN15]

> FN15. Moreover, as a practical matter, "the circuit courts of appeal ... are the courts of last resort in the run of ordinary cases." *Textile Mills Sec. Corp. v. Comm'r of Internal Revenue*, 314 U.S. 326, 335, 62 S.Ct. 272, 86 L.Ed. 249 (1941).

Thus, under *Will*, the Rule of Necessity clearly applies to cases in which the court is deprived of a quorum by the recusals of some (rather than all) judges, and it applies even if the court is not a court of last resort. If the en banc court lacks a quorum in this case, and if we have no other way of making it possible to decide this appeal, then the bottom line is that this court is required to invoke the Rule of Necessity rather than dismissing the case.[FN16]

> FN16. The decision whether to invoke the Rule of Necessity properly rests with each of the active judges who are currently recused, rather than with the eight nondisqualified judges. Only they have the power to set aside their own recusals; we cannot order them to do so.
>
> Each recused judge would need to address the debatable issue of exactly which judges should set aside their recusals. Perhaps they should all do so, because they each owe a duty to prevent this court from defaulting on its duty to decide this appeal which is properly within its jurisdiction. Or perhaps only those judges who have relatively small interests in the case, such as owning small amounts of stock which can easily be sold, should unrecuse themselves.
>
> But, regardless of how this issue is resolved, it remains clear that "the absolute duty of judges to hear and decide cases within their jurisdiction," *Will*, 449 U.S. at 215, 101 S.Ct. 471, requires that at least some recused judges participate in the case if there is no other means of carrying out the court's duty to render a decision.

The only authority that anyone has offered in opposition to the Rule of Necessity is *Chrysler Corp. v. United States*, 314 U.S. 583, 62 S.Ct. 356, 86 L.Ed. 471 (1941) (mem.), in which five Justices of the Supreme Court dismissed a case on direct appeal [FN17] because they lacked a quorum of six Justices as required by statute. *Chrysler* is a memorandum opinion containing no reasoning or authorities, so it is unknown why the Supreme Court did not apply the Rule

of Necessity in that case. But the dismissal of the case in *Chrysler* was plainly inconsistent with the Rule of Necessity as the Court subsequently explained it in *Will:* the recusals of four Justices meant the case could not be heard otherwise,[FN18] so under *Will,* the Rule ought ***1064** to have overridden the recusals that deprived the *Chrysler* Court of a quorum. Thus, *Chrysler* and *Will* appear to be inconsistent. The question for this court, therefore, is which of the two we should follow. *Chrysler* is a bare memorandum opinion issued in 1941 by five Justices without a quorum, whereas *Will* is a fully reasoned, unanimous opinion joined by eight Justices and issued in 1980. The fact that *Will* is more recent than *Chrysler* should be enough to tell us what to do: when two Supreme Court precedents disagree, the more recent one obviously controls. If there were any remaining doubt about whether to follow *Will* or *Chrysler,* it should be erased by the fact that the Supreme Court's decision in *Will* rested on more than five hundred years of precedent, 449 U.S. at 213, 101 S.Ct. 471, whereas the *Chrysler* decision was supported by no explanation whatsoever.[FN19] Nonetheless, the majority ignores *Will* and follows *Chrysler.*

FN17. In most cases, the Supreme Court has discretion as to whether to hear a case at all, so the Rule of Necessity does not come into play when the Court affirms a lower court's decision due to lack of a quorum. *See, e.g., Am. Isuzu Motors, Inc. v. Ntsebeza,* 553 U.S. 1028, 128 S.Ct. 2424, 171 L.Ed.2d 225 (2008) (mem.). But the *Chrysler* case cannot be distinguished in this way because it came to the Supreme Court on direct appeal from a district court, rather than on a writ of certiorari.

FN18. If the situation in *Chrysler* arose today, the Court could instead remit the case to a court of appeals as provided by 28 U.S.C. § 2109, but that statute had not yet been enacted in 1941.

FN19. Additionally, two years after dismissing the appeal in *Chrysler,* the Supreme Court in *North American Co. v. SEC,* 320 U.S. 708, 64 S.Ct. 73, 88 L.Ed. 415 (1943) (mem.), followed a different approach which was consistent with the Rule of Necessity. *See infra* section B(4).

In summary, under *Will,* a judge is obligated to take part in the decision of a case, even if he or she has a personal interest in it, if the case cannot be heard otherwise. 449 U.S. at 213, 101 S.Ct. 471. This obligation overrides the federal statute on disqualification. *Id.* at 217, 101 S.Ct. 471. It arises from "the absolute duty of judges to hear and decide cases," *id.* at 215, 101 S.Ct. 471, and from the rule that federal courts cannot decline to exercise their jurisdiction, *id.* at 216 n. 19, 101 S.Ct. 471. Therefore, if the en banc court lacks a quorum and if we can find no other way of carrying out our duty to decide this case, then as a last resort we must apply the Rule of Necessity rather than dismissing the appeal.

3. Inviting a Judge from Another Circuit

As Judge Davis has also observed, another way to fulfill our duty to decide this appeal would be to follow the procedure set out in 28 U.S.C. § 291: "The Chief Justice of the United States may, in the public interest, designate and assign temporarily any circuit judge to act as circuit judge in another circuit on request by the chief judge or circuit justice of such court." In accordance with § 291, Judge Jolly, the acting chief judge in this case, can request the designation and assignment of a judge from another circuit to give us a quorum.[FN20] He does not need the authorization or votes of any other judges in order to make that request, and he ought to do so: it would surely be "in the public interest," since it would enable this court to avoid defaulting on its duty to hear and decide this appeal. [FN21] Indeed, it is not uncommon ***1065** for active circuit judges to sit by designation in other circuits, even without the kind of exigent circumstances that have arisen here. *E.g., Fleming v. Yuma Reg'l Med. Ctr.,* 587 F.3d 938 (9th Cir.2009) (Tymkovich, J., of the Tenth Circuit, sitting by designation); *E.I. DuPont de Nemours & Co. v. United States,* 508 F.3d 126 (3d Cir.2007) (Michel, C.J., of the Federal Circuit, sitting by designation).

FN20. This court's previous decision not to use § 291 in *United States v. Nixon,* 827 F.2d 1019 (5th Cir.1987) (per curiam), does not control here. In *Nixon,* after a three-judge panel had decided the appeal, the defendant-appellant sought rehearing en banc and was denied. There were not enough nondisqualified active circuit judges to make up an

> en banc quorum as defined under this circuit's old Rule 35.6. However, in that case, the court was not obligated to invite outside judges to make up an en banc quorum, because a litigant has no statutory or constitutional right to rehearing en banc. *See id.* at 1022. The difference between *Nixon* and this case is that here, the panel's decision has been vacated by the granting of rehearing en banc, so this court has not fulfilled its duty to decide the appeal.
>
> FN21. The Chief Justice might have denied the request and pointed out that we already have a quorum under 28 U.S.C. § 46(c)-(d), as discussed above. That, too, would have helped us to decide this case.

The idea that a judge of another circuit could take part in an en banc rehearing of this court may seem counterintuitive to some, but it is authorized by statute: "Such justice or judge shall have *all the powers* of a judge of the court, circuit, or district to which he is designated or assigned," subject to minor exceptions that are not relevant here. 28 U.S.C. § 296 (emphasis added). Moreover, that "judge shall discharge, during the period of his designation and assignment, all judicial duties for which he is designated and assigned" and "[h]e may be required to perform any duty which might be required of a judge of the ... circuit to which he is designated and assigned." *Id.* Thus, a judge temporarily assigned to the Fifth Circuit becomes, for all intents and purposes, a full-fledged member of this court.[FN22]

> FN22. Furthermore, the same statute expressly allows a judge who is designated and assigned to another circuit to participate in the rehearing en banc of any matter that has come before him or her:
>
> > A justice or judge who has sat by designation and assignment in another district or circuit may, notwithstanding his absence from such district or circuit or the expiration of the period of his designation and assignment, decide or join in the decision and final disposition of all matters submitted to him during such period *and in the consideration and disposition of applications for rehearing or further proceedings in such matters.*
>
> 28 U.S.C. § 296 (emphasis added).

For the acting chief judge to seek the designation and assignment of a judge to participate in the en banc rehearing of this case would certainly be an unusual step upon a rare occasion, but it is authorized by the relevant statutes. Moreover, such a step would be no more unusual than the situation that calls for it, in which the en banc court has (supposedly) lost its quorum after granting rehearing en banc and thereby vacating the panel opinion. We therefore ought to make use of § 291 in order to enable us to carry out our absolute duty to render a decision in this case.

4. Holding the Case Over Until We Have a Quorum

One more way in which we could fulfill our duty to decide this case would be to follow the example set by the Supreme Court in *North American Co. v. SEC*, 320 U.S. 708, 64 S.Ct. 73, 88 L.Ed. 415 (1943) (mem.). In that case, the Supreme Court, which was one Justice short of a quorum, decided to hold the case over until such time as it had a quorum. Eventually the Court obtained a quorum and was able to decide the case. 327 U.S. 686, 66 S.Ct. 785, 90 L.Ed. 945 (1946).

The circumstances of *North American Co.* were similar to those of this case in an important way. In 1943, the Supreme Court had reason to believe that Congress would soon amend the relevant statute in order to make it possible for the Court to obtain a quorum. *See* John P. Frank, *Disqualification of Judges*, 56 Yale L.J. 605, 626 & nn. 82-84 (1947). (Ultimately Congress did not amend the statute, but Chief Justice Stone withdrew his recusal to allow the Court to decide the case. *See id.*) In the instant case, there is no indication that Congress will alter our quorum requirement, but there is an eight-month-old vacancy on this court. When the President***1066** and the Senate fill the vacancy, then nine out of seventeen active judges of this court-a majority-will be able to hear and decide this case (provided that the judge who is appointed is not disqualified). Thus, like the Supreme Court in *North American Co.*, we have reason to believe that the political branches will soon give us a quorum, and we can wait for them to do so. It is unlikely that this court's current vacancy will continue for more than the two and a half years that the Supreme Court waited in *North American Co.*

The majority has chosen to follow the Supreme Court's example in *Chrysler* while ignoring the Court's more recent example in *North American Co.* This is the wrong choice because following *North American Co.* would allow us to fulfill our absolute duty to decide this case, whereas dismissing the case contravenes that duty.

* * *

In closing, it is worth emphasizing once more that the majority's dismissal of this case is a *decision* to reject several legally valid courses of action, not a merely ministerial application of settled rules as the majority suggests. It is therefore inconsistent with the majority's own rationale, which is predicated on the claim that we lack a quorum and therefore lack the power to take any action in this case. Despite our supposed lack of power, the majority has made the decision not to recognize that we have a quorum under 28 U.S.C. § 46; not to follow the example of the Supreme Court in *North American Co.;* not to invite an outside judge under 28 U.S.C. § 291; and not to apply the Rule of Necessity under *Will.* The majority has instead decided to dismiss a case over which we have jurisdiction, thereby violating the longstanding rule, dating back to *Cohens v. Virginia,* that we lack the power to decline to exercise the jurisdiction that has been conferred on us. Because this court has an absolute duty to render a decision in this appeal, I respectfully dissent.

C.A.5 (Miss.),2010.
Comer v. Murphy Oil USA
607 F.3d 1049, 70 ERC 1808

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UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

CHAMBERS OF
MICHAEL BOUDIN
CHIEF JUDGE

JOHN JOSEPH MOAKLEY
UNITED STATES COURTHOUSE
1 COURTHOUSE WAY, SUITE 7710
BOSTON, MA 02210
(617) 748 - 4431

October 10, 2003

03-AP-009

Peter McCabe, Secretary
Committee of Rules of Practice and Procedure
One Columbus Circle, N.E.
Thurgood Marshall Judicial Building
Washington, D.C. 20544

Re: Proposed Amendment to Fed. R. App. P. 35(a)

Dear Mr. McCabe:

My court is currently publishing for comment a proposed local rule change that would amend our local rule on en bancs. That rule currently provides that an absolute majority of the active judges must vote in favor of hearing or rehearing en banc. The proposed new rule would permit a majority of the unrecused active judges to order a hearing or rehearing en banc so long as the unrecused judges represented a majority of all active judges in the circuit. A copy of each version is attached.

Under our present rule, our circuit which has six active judges could not--in a case in which one judge was recused--order a rehearing en banc by a three-to-two vote; but if the rule were altered as proposed, a three-to-two vote in favor of rehearing en banc would prevail. However, because of the quorum proviso in our proposed rule, a rehearing en banc could not be authorized unless at least four active judges were unrecused; accordingly, if three judges were recused, a two to one vote in favor of rehearing en banc would not be permitted.

The basic choice--to use a case rather than an absolute majority approach--accords with your own proposed rule, and my court's present inclination (our proposed rule is subject to public comment) thus supports your proposed rule in principal part. My own court previously had a decision en banc to the effect that the absolute majority approach was required by 46 U.S.C. § 46(c); but on reflection, the active judges now take the view that the statute permits a case majority approach; quite probably Congress never thought about the issue. A uniform rule among circuits has much to be said in its favor, and your proposed rule would achieve that end as well as make certain that the approach we would like to take is clearly authorized.

One concern remains. The Advisory Committee, we are told, debated the question whether to endorse the case majority rule without more or also to include a quorum requirement. My own court is disposed to adopt a quorum requirement;* but after drafting the language to this end, I concluded that something like this quorum is arguably required by 28 U.S.C. § 46(d), whether or not embodied in the rule. Indeed, in the end it may be we will omit the proviso language as unnecessary in light of section 46(d).

Your proposed rule does not have a quorum requirement and, to me, this is not a problem so long as the committee notes to any such proposal, as ultimately adopted, make clear that the unqualified rule you propose is not intended to override any existing quorum requirement embodied in section 46(d) or--if I have misread that section--any quorum requirement that a court of appeals might reasonably adopt. Whatever may be true of large circuits, in my circuit the possibility of having several active judges recused is not trivial and for obvious policy reasons, we would not care to be in a situation in which someone could argue that we were compelled to entertain petitions for rehearing en banc if favored by two out of three eligible judges.

I am sure the committee had no such aim for its rule, but it would be desirable to have this non-preemptive intent spelled out at least in the notes. Accordingly, the active judges of my court support the committee approach but with the clarification in the notes just suggested.

Sincerely yours,

Michael Boudin

Attachments

*As described in the committee note, the quorum rule apparently considered by the committee provided that the case could not be heard en banc unless "a majority of all active judges--disqualified or non-disqualified--are eligible to participate in the case"--a qualification that looks as if it is directed to the en banc merits decision. Our own concern is instead with the question of what constitutes a quorum for purposes of the initial determination whether or not to hear a case en banc.

Proposed Amended Local Rule 35(a)

(Additions in *italics*; deletions in ~~strike-out~~ print)

Local Rule 35. En Banc Determination

(a) Who May Vote; Composition of En Banc Court. The decision whether a case should be heard or reheard en banc is made solely by the circuit judges of this circuit who are in regular active service. ~~For the purposes of determining a majority under 28 U.S.C. § 46(c) and Fed. R. App. P. 35(a), the term "majority" means more than one-half of all the judges of the Court in regular active service, without regard to whether a judge is disqualified. See United States v. Beichter, 167 F.3d 667 (1st Cir. 1999) (order of court denying petition for rehearing en banc in United States v. Beichter, 160 F.3d 33 (1st Cir. 1998)).~~ *Rehearing en banc shall be ordered only upon the affirmative votes of a majority of the judges of this court in regular active service who are not disqualified, provided that the judges who are not disqualified constitute a majority of the judges who are in regular active service.* A court en banc consists solely of the circuit judges of this circuit in regular active service except that any senior circuit judge of this circuit shall be eligible to participate, at that judge's election, in the circumstances specified in 28 U.S.C. § 46(c).

(3) For purposes of the page limit in Rule 35(b)(2), if a party files both a petition for panel rehearing and a petition for rehearing en banc, they are considered a single document even if they are filed separately, unless separate filing is required by local rule.

(c) **Time for Petition for Hearing or Rehearing En Banc.** A petition that an appeal be heard initially en banc must be filed by the date when the appellee's brief is due. A petition for a rehearing en banc must be filed within the time prescribed by Rule 40 for filing a petition for rehearing.

(d) **Number of Copies.** The number of copies to be filed must be prescribed by local rule and may be altered by order in a particular case.

(e) **Response.** No response may be filed to a petition for an en banc consideration unless the court orders a response.

(f) **Call for a Vote.** A vote need not be taken to determine whether the case will be heard or reheard en banc unless a judge calls for a vote.

Local Rule 35. En Banc Determination

(a) Who May Vote; Composition of En Banc Court. The decision whether a case should be heard or reheard en banc is made solely by the circuit judges of this circuit who are in regular active service. For the purposes of determining a majority under 28 U.S.C. § 46(c) and Fed. R. App. P. 35(a), the term "majority" means more than one-half of all the judges of the Court in regular active service, without regard to whether a judge is disqualified. See United States v. Leichter, 167 F.3d 667 (1st Cir. 1999) (order of court denying petition for rehearing en banc in United States v. Leichter, 160 F.3d 33 (1st Cir. 1998)). A court en banc consists solely of the circuit judges of this circuit in regular active service except that any senior circuit judge of this circuit shall be eligible to participate, at that judge's election, in the circumstances specified in 28 U.S.C. § 46(c).

*(b) **Petitions for Panel Hearing or Rehearing En Banc.** If a petitioner files a petition for panel rehearing and a petition for rehearing en banc addressed to the same decisions or order of the court, the two petitions must be combined into a single document and the document is subject to the 15-page limitation contained in Fed. R. App. P. 35 (b)(2), (3). However, the page limit may be enlarged on motion for good cause shown.*

*(c) **Sanctions.** If a petition for rehearing or for rehearing en banc is found on its face to be wholly without merit, vexatious, multifarious, or filed principally for delay, the court may tax a sum not exceeding $250 as additional costs, payable to the clerk of the court or the opposing party, as the court may direct. At the court's order, counsel may be required personally to pay all or any part of these costs.*

*(d) **Number of Copies.** Pursuant to Fed. R. App. P. 35(d), ten copies of a petition for a panel rehearing, rehearing en banc, or combined Fed. R. App. P. 35(b)(3) document must be filed with the clerk, including one copy on a computer generated disk. The disk must be filed regardless of page length but otherwise in accordance with Local Rule 32.*

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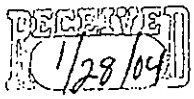
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT



CHAMBERS OF
MICHAEL BOUDIN
CHIEF JUDGE

JOHN JOSEPH MOAKLEY
UNITED STATES COURTHOUSE
1 COURTHOUSE WAY, SUITE 7710
BOSTON, MA 02210
(617) 748 - 4431

January 21, 2004

03-AP-192

Peter G. McCabe, Secretary
Committee on Rules of Practice
and Procedure
Administrative Office of the
United States Courts
One Columbus Circle, N.E.
Washington, D.C. 20544

Dear Peter:

I am writing to bring the committee up to date on two changes in the Local Rules of the First Circuit that correspond in most but not in all respects to new Federal Rules of Appellate Procedure now under consideration.

Proposed FRAP 32.1. Citation of Judicial Dispositions. My court recently adopted a new local rule, a copy of which is attached, dealing with citations to unpublished opinions. Our own new rule disfavors but effectively permits the citation of unpublished opinions in any case where it is likely to matter. Our approach, including the requirement that there be no published opinion of the court that adequately addresses the issue, appeared to almost all of the court's judges to be a reasonable local limitation.

Proposed FRAP Rule 35(a). En Banc Determination. My court has also recently adopted a new local rule, a copy of which is attached, altering our practice. Our old rule required an absolute majority of active circuit judges for a grant of rehearing en banc; our new rule, like the one proposed by the committee, requires a majority only of active judges who are not disqualified. However, our new rule, unlike the committee version, specifies that the grant of en banc requires that the judges who are not disqualified constitute a majority of the judges who are in regular active service. Cf. 28 U.S.C. § 46(d). It would be helpful if the commentary made clear that the proposed FRAP rule is not intended to address or negate quorum requirements.

Sincerely yours,

M. L. Boudin

Attachments
MB:DCD

Local Rule 32.3. Citation of Unpublished Opinions

(a) An unpublished opinion of this court may be cited in this court only in the following circumstances:

(1) When the earlier opinion is relevant to establish a fact about the case. An unpublished opinion of this court may be cited to establish a fact about the case before the court (for example, its procedural history) or when the binding or preclusive effect of the opinion, rather than its quality as precedent, is relevant to support a claim of res judicata, collateral estoppel, law of the case, double jeopardy, abuse of the writ, or other similar doctrine.

(2) Other circumstances. Citation of an unpublished opinion of this court is disfavored. Such an opinion may be cited only if (1) the party believes that the opinion persuasively addresses a material issue in the appeal; and (2) there is no published opinion from this court that adequately addresses the issue. The court will consider such opinions for their persuasive value but not as binding precedent.

(3) Procedure. A party must note in its brief or other pleading that the opinion is unpublished, and a copy of the opinion or disposition must be included in an accompanying addendum or appendix.

(4) Definition. Almost all new opinions of this court are published in some form, whether in print or electronic medium. The phrase "unpublished opinion of this court" as used in this subsection and Local Rule 36(c) refers to an opinion (in the case of older opinions) that has not been published in the West Federal Reporter series, e.g., F., F.2d, and F.3d, or (in the case of recent opinions) bears the legend "not for publication" or some comparable phraseology indicating that citation is prohibited or limited.

(b) Unpublished or non-precedential opinions of other courts, as defined or understood by those courts, may be cited in the circumstances set forth in subsection (a)(1) above. Such opinions may also be cited in circumstances analogous to those set forth in subsection (a)(2) above, unless prohibited by the rules of the issuing court. If an unpublished or non-precedential opinion of another court is cited, the party must comply with the procedure set forth in subsection (a)(3) above.

Local Rule 35. En Banc Determination

(a) Who May Vote; Composition of En Banc Court. The decision whether a case should be heard or reheard en banc is made solely by the circuit judges of this circuit who are in regular active service. Rehearing en banc shall be ordered only upon the affirmative votes of a majority of the judges of this court in regular active service who are not disqualified, provided that the judges who are not disqualified constitute a majority of the judges who are in regular active service. A court en banc consists solely of the circuit judges of this circuit in regular active service except that any senior circuit judge of this circuit shall be eligible to participate, at that judge's election, in the circumstances specified in 28 U.S.C. § 46(c).

TAB

VII-D

MEMORANDUM

DATE: September 16, 2010

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 10-AP-G

Douglas Letter has suggested that the Committee consider whether it would be useful for the Appellate Rules to address the question of intervention on appeal. He points out that Civil Rule 24 sets standards for intervention in the district courts, but that no comparable provision covers the general question of intervention in the courts of appeals. (As he notes, "FRAP 15(d) covers intervention when a case challenging agency action has been filed directly in a court of appeals, and FRAP 44 covers the special situation when the US Attorney General or a state has the right to intervene when the constitutionality of a statute has been challenged.")

Part I of this memo sets forth Rules 15(d) and 44 and observes that there is no apparent evidence that the Committee has previously considered adopting a Rule that would provide generally applicable guidance concerning intervention on appeal. Part II's survey of local circuit provisions relating to intervention reveals that those local provisions tend to address the procedural incidents of intervention (e.g., briefing requirements) rather than the standards that govern whether and under what conditions intervention will be permitted. Part III surveys appellate caselaw concerning intervention in the courts of appeals. Part IV concludes by briefly considering the types of matters that might be addressed by an Appellate Rule concerning intervention on appeal.

I. The existing Appellate Rules do not address intervention generally

As Doug points out, the Appellate Rules treat intervention only obliquely or in the specialized circumstances addressed by Rules 15(d) and 44. The only Appellate Rules applicable to appellate intervention generally are Rules 28.1(d) and 32(a)(2), which provide that intervenors' briefs shall have green covers.

With respect to petitions for review or enforcement of an agency order, Rule 15(d) provides:

> Unless a statute provides another method, a person who wants to intervene in a proceeding under this rule must file a motion for leave to intervene with the circuit clerk and serve a copy on all parties. The motion – or other notice of

> intervention authorized by statute – must be filed within 30 days after the petition for review is filed and must contain a concise statement of the interest of the moving party and the grounds for intervention.

With respect to cases involving constitutional challenges to federal or state statutes, Rule 44 provides:

> (a) Constitutional Challenge to Federal Statute. If a party questions the constitutionality of an Act of Congress in a proceeding in which the United States or its agency, officer, or employee is not a party in an official capacity, the questioning party must give written notice to the circuit clerk immediately upon the filing of the record or as soon as the question is raised in the court of appeals. The clerk must then certify that fact to the Attorney General.
>
> (b) Constitutional Challenge to State Statute. If a party questions the constitutionality of a statute of a State in a proceeding in which that State or its agency, officer, or employee is not a party in an official capacity, the questioning party must give written notice to the circuit clerk immediately upon the filing of the record or as soon as the question is raised in the court of appeals. The clerk must then certify that fact to the attorney general of the State.

This Rule implements 28 U.S.C. § 2403. Section 2403(a) provides that

> [i]n any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The United States shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

Section 2403(b) makes similar provision for intervention by a state when "the constitutionality of any statute of that State affecting the public interest is drawn in question."

I have found no indications in the minutes of prior Appellate Rules Committee meetings that the Committee has previously considered adopting a rule that would govern intervention on appeal generally (as distinct from the specialized provisions noted above).[1] In the years leading

[1] I looked in the minutes that are searchable on Westlaw (those go back to 1994) and also in the minutes of Appellate Rules Committee meetings prior to the initial adoption of the

up to the adoption of the Appellate Rules, it appears that local circuit rules in most circuits required a motion for leave to intervene on appeal.[2] I survey the current local circuit provisions in Part II, below.

II. Local circuit provisions concerning intervention address surrounding procedural implications of intervention rather than the standards governing intervention

I surveyed local circuit provisions relating to intervention. Leaving aside provisions pertaining only to intervention on review of administrative determinations, I found 33 provisions from 11 circuits (the First and Second Circuits appeared to have no relevant provisions). Relatively few provisions treat the procedure for seeking leave to intervene: One provision specifies that a motion is required,[3] and some provisions address the question of who is authorized to grant such a motion.[4] Some provisions concern preliminary requirements when an

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Appellate Rules. I did not look at minutes for the period from 1968 to 1994, though I can of course do so if the Committee feels it would be useful.

[2] A 1965 Supreme Court decision gives an idea of the local circuit provisions that were in existence just prior to the adoption of the Appellate Rules. The Court noted that "[t]he Rules of the Courts of Appeals typically provide: 'A person desiring to intervene in a case where the applicable statute does not provide for intervention shall file with the court and serve upon all parties a motion for leave to intervene.'" *International Union, United Auto., Aerospace and Agric. Implement Workers of Am. AFL-CIO, Local 283 v. Scofield*, 382 U.S. 205, 209-10 (1965); *id.* n. 2 (citing Second Circuit Rule 13(f) and Seventh Circuit Rule 14(f), and stating that "[t]he other circuits which provide for intervention have substantively identical rules: First Circuit Rule 16(6); Third Circuit Rule 18(6); Fourth Circuit Rule 27(6); Sixth Circuit Rule 13(6); Eighth Circuit Rule 27(f); Ninth Circuit Rule 34(6); Tenth Circuit Rule 34(6); District of Columbia Circuit Rule 38(f)").

[3] *See* Fourth Circuit Rule 12(e) ("A party who appeared as an intervenor in a lower court proceeding shall be considered a party to the appeal upon filing a notice of appearance. Otherwise, a motion for leave to intervene must be filed with the Court of Appeals.").

[4] *See* Third Circuit Local Appellate Rule 27.5 ("[O]rdinarily a single judge will not entertain and grant or deny ... a motion for leave to intervene, or a motion to postpone the oral argument in a case which has been included by the clerk in the argument list for a particular weekly session of the court...."); Third Circuit IOP 10.5.2 ("Without limiting IOP 10.5.1, this court as a matter of practice refers to a single judge, the following motions: ... (g) motions to intervene...."); Seventh Circuit IOP 1(c)(2) ("Routine motions ... will be given to court staff .... The designated staff member is then authorized, acting pursuant to such general directions and criteria as the court prescribes, to prepare an order in the name of the court either granting or denying the motion or requesting a response .... If the designated staff member has any questions about what action should be taken, the motions judge will be consulted. Once a panel has been

entity seeks leave to intervene – for example, requiring that the intervenor be represented,[5] that the intervenor's attorney file an appearance,[6] or that the intervenor comply with disclosure requirements.[7] A relatively large number of provisions concern briefs – addressing whether the

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assigned for the oral argument or submission of an appeal, or after an appeal has actually been orally argued or submitted for decision without oral argument, the court staff should consult the presiding judge on motions that would otherwise be considered routine."); Seventh Circuit IOP 1(c)(7) (characterizing a motion to intervene as of right as routine); Ninth Circuit Adv. Cttee. Note to Rule 27-1 ("[T]he Appellate Commissioner rules on most ... motions for leave to intervene .... "); Eleventh Circuit Rule 27-1(c) ("The clerk is authorized, subject to review by the court, to act for the court on the following unopposed procedural motions: .... (17) to intervene in a proceeding seeking review or enforcement of an agency order; (18) to intervene pursuant to 28 U.S.C. § 2403; ...."); Practice Notes to Federal Circuit Rule 27 ("The clerk's authority to act on procedural or unopposed nonprocedural motions includes the authority to grant or deny the requested relief in whole or in part or to refer the motion to a judge or a panel.... Examples of nonprocedural motions include ... motions for leave to intervene .... Once a case is assigned to a merits panel, the clerk refers all motions to the merits panel.").

[5] *See* Federal Circuit Rule 47.3(a) ("An individual (not a corporation, partnership, organization, or other legal entity) may choose to be represented by counsel or to represent himself or herself pro se, but may not be represented by a nonattorney. An individual represented by counsel, each other party in an action, each party seeking to intervene, and each amicus curiae must appear through an attorney authorized to practice before this court ....").

[6] *See* Federal Circuit Rule 47.3(c)(1).

[7] *See* D.C. Circuit Rule 12(f) ("Any disclosure statement required by Circuit Rule 26.1 must accompany a motion to intervene, a written representation of consent to participate as amicus curiae, or a motion for leave to participate as amicus."); Fourth Circuit Rule 26.1; Eleventh Circuit Rule 26.1-1; Federal Circuit Rule 47.4(a) ("To determine whether recusal by a judge is necessary or appropriate, an attorney – except an attorney for the United States – for each party, including a party seeking or permitted to intervene, and for each amicus curiae, must file a certificate of interest. ").

intervenor is permitted to file a brief,[8] the brief's cover,[9] contents,[10] length,[11] and appendix,[12] and

[8] See D.C. Circuit Rule 28(d)(4) ("Intervenors on the same side must join in a single brief to the extent practicable. This requirement does not apply to a governmental entity...."); Fourth Circuit Rule 12(e) ("Intervenors are required to join in the brief for the side which they support unless leave to file a separate brief is granted by the Court."); Fourth Circuit Rule 28(a); Tenth Circuit Rule 31.3(A) ("In civil cases involving more than one appellant or appellee, including consolidated cases, all parties on a side (including intervenors) must – to the extent practicable – file a single brief.").

[9] *See* Eleventh Circuit IOP 2 foll. Rule 28.1-2; Eleventh Circuit IOP 1 foll. Rule 32-4.

[10] *See* D.C. Circuit Rule 28(d)(2).

[11] *See* D.C. Circuit Rules 28(d)(1) and 32(a)(2).

[12] *See* D.C. Circuit Handbook IX.B.2 ("Intervenors may ask the appellant or the petitioner to include certain material in the appendix, or intervenors may include that material as an addendum to their brief or submit it as a separate volume of the appendix.").

its timing.[13] Other provisions address argument time,[14] costs,[15] the case caption,[16] service on intervenors,[17] and electronic filing.[18]

III. Caselaw concerning intervention on appeal reflects both the influence of Civil Rule 24 and concerns specific to the appellate process

In the absence of any national or local appellate rule governing the standards for intervention on appeal, those standards have been developed in the caselaw. The courts of

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[13] *See* D.C. Circuit Rule 28(d)(3) ("Except as otherwise directed by the court, the brief must be filed in accordance with the time limitations described in FRAP 29."); D.C. Circuit Rule 28(d)(5) ("A reply brief may be filed for an intervenor on the side of appellant or petitioner at the time the appellant's or petitioner's reply brief is due."); D.C. Circuit Handbook IX.A.1 ("To avoid repetition of factual statements or legal arguments made in the principal briefs, the Clerk's Office will stagger the briefing so that intervenors and amici curiae file their briefs 15 days after the brief of the party they support."); Fifth Circuit Rule 31.2 ("The time for filing the brief of the intervenor or amicus is extended until 7 days after the filing of the principal brief of the party supported by the intervenor or amicus."); Eighth Circuit IOP App. A(13) & (16) (absent court leave for later filing, intervenors and amici must file their briefs within 7 days after the due date of the brief of the party supported).

[14] *See* D.C. Circuit Rule 34(d) ("Unless otherwise ordered, counsel for an intervenor will be permitted to argue only to the extent that counsel for the party whose side the intervenor supports is willing to share allotted time."); D.C. Circuit Handbook XI.D ("An intervenor may argue only to the extent that counsel whose side the intervenor supports is willing to share argument time. If counsel wishes to share time with an intervenor in a case in which at least 15 minutes per side has been allotted for argument, no leave of the Court is necessary. Counsel should inform the Clerk's Office of such arrangements no less than 7 days before the date of argument. The counsel for the intervenor will be counted as one of the two counsel per side permitted under the rules."); Sixth Circuit Rule 34(e) ("An intervening party wishing to participate in oral argument shall make a request in writing stating whether the named party[ies] have consented and the reason why separate argument is needed.").

[15] *See* D.C. Circuit Rule 39(c) ("No taxation of costs for briefs for intervenors or amici curiae or separate replies thereto will be assessed unless allowed by the court on motion.").

[16] *See* Practice Notes to Federal Circuit Rule 12.

[17] *See* Federal Circuit Rule 31(b).

[18] *See* Ninth Circuit Admin. Order Regarding Electronic Filing, Rule 5(c) ("An electronic filer may file documents only in cases where he or she is a party, counsel of record, or court reporter, or where the filer seeks leave to participate as an intervenor or as an amicus.").

appeals vary somewhat in their statement of the relevance of Civil Rule 24 to the question of intervention on appeal. Some courts suggest that Civil Rule 24 governs intervention on appeal.[19] Other courts, in line with Civil Rule 1's statement that the Civil Rules govern procedure in "district courts," state that Civil Rule 24 does not apply to intervention on appeal.[20] But the caselaw suggests that this is more a semantic than a substantive difference: Courts that suggest Civil Rule 24 is applicable nonetheless adapt it to the concerns that are specific to the appellate context, while courts that treat Civil Rule 24 as inapplicable nonetheless consider the same sorts of factors as a court would consider under Civil Rule 24.[21] In this section, I first set forth very briefly the relevant provisions in Civil Rule 24, and I then discuss the themes that appear in the caselaw concerning intervention on appeal.[22]

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[19] *See, e.g., Bates v. Jones*, 127 F.3d 870, 873 (9th Cir. 1997) ("Intervention on appeal is governed by Rule 24 of the Federal Rules of Civil Procedure."); *Elliott Indus. Ltd. P'ship v. BP Am. Prod. Co.*, 407 F.3d 1091, 1102 (10th Cir. 2005) ("[A] party seeking intervention on appeal must satisfy the prerequisites of Rule 24(a).").

[20] *See, e.g., Amalgamated Transit Union Int'l, AFL-CIO v. Donovan*, 771 F.2d 1551, 1553 n.3 (D.C. Cir. 1985) ("[Civil] Rule 24 ... only applies to intervention at the district court level.... Although the Supreme Court has recognized that 'the policies underlying intervention may be applicable in appellate courts,' courts of appeals have developed their own standards of intervention in order to take account of the unique problems caused by intervention at the appellate stage.") (quoting *International Union, UAW, Local 283 v. Scofield*, 382 U.S. 205, 217 n.10 (1965)).

[21] *See International Union, UAW, Local 283 v. Scofield*, 382 U.S. 205, 217 n.10 (1965) ("The Federal Rules of Civil Procedure, of course, apply only in the federal district courts. Still, the policies underlying intervention may be applicable in appellate courts."); *Building and Constr. Trades Dep't, AFL-CIO v. Reich*, 40 F.3d 1275, 1282-83 (D.C. Cir. 1994) ("We see no reason to relax the standards for intervention applicable in the district court. Therefore, for the same reasons that we affirm the district court's decision to deny intervention, we deny ABC's application to intervene before this court.").

[22] In the interests of focusing the memo's discussion, I have limited the scope of this review of the caselaw in several ways. The memo does not discuss the practice of intervening in the district court for the purpose of taking an appeal from the district court judgment. *See, e.g., Marino v. Ortiz*, 484 U.S. 301, 304 (1988) (per curiam) (stating the general rule "that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment"). The memo also does not discuss the caselaw concerning the application, on appeal, of other joinder principles – such as those reflected in Civil Rule 19 (necessary and indispensable parties) or Civil Rule 21 (misjoinder and nonjoinder of parties). *See, e.g., California Credit Union League v. City of Anaheim*, 190 F.3d 997, 999 (9th Cir. 1999) ("Although Rule 21 is not directly applicable to the courts of appeals, courts have consistently recognized that appellate courts can join parties pursuant to Rule 21 when a case is pending on appeal."). Nor does the memo discuss questions of intervenor standing, *see, e.g., Mangual v. Rotger-Sabat*, 317 F.3d 45, 61 (1st Cir.

Except in cases where a federal statute confers a right to intervene, Civil Rule 24(a)'s standards for intervention as of right focus on whether the would-be intervenor has a sufficient interest in the subject of the action, whether that interest may as a practical matter be affected by the litigation, and whether "existing parties adequately represent that interest."[23] Except in cases where a federal statute confers a conditional right to intervene[24] or cases involving certain intervention requests by government officers or agencies,[25] Civil Rule 24(b)'s standard for permissive intervention requires that the would-be intervenor have "a claim or defense that shares with the main action a common question of law or fact." Civil Rule 24(b)(3) provides that "[i]n exercising its discretion [under Rule 24(b)], the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Rule 24(c) provides that "[a] motion to intervene must be served on the parties as provided in Rule 5. The motion must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought." The requirement that motions under both Civil Rule 24(a) and Civil Rule 24(b) be "timely" means, in practice, that even motions to intervene as of right are subject to some discretionary evaluation by the district court.[26]

The question of timeliness looms especially large when someone seeks to intervene on appeal, because the natural question is why this person did not seek leave to intervene when the

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2003) ("It is clear that an intervenor, whether permissive or as of right, must have Article III standing in order to continue litigating if the original parties do not do so.... However, the circuits are split on the question of whether standing is required to intervene if the original parties are still pursuing the case and thus maintaining a case or controversy, as they are here."), or questions of subject matter jurisdiction.

[23] Civil Rule 24(a) authorizes intervention as of right, "[o]n timely motion," by one who has a federal statutory right to intervene, see Civil Rule 24(a)(1), or who "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest," Civil Rule 24(a)(2).

[24] Civil Rule 24(b)(1)(A) provides that the district court has discretion to permit intervention, "[o]n timely motion," by on who has a conditional federal statutory right to intervene.

[25] Civil Rule 24(b)(2) provides that "[o]n timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on: (A) a statute or executive order administered by the officer or agency; or (B) any regulation, order, requirement, or agreement issued or made under the statute or executive order."

[26] *See* 7C Fed. Prac. & Proc. Civ. § 1913 (3d ed.) ("[I]ntervention, under either branch of the rule, can only be had on a timely application. The question of timeliness requires a discretionary balancing of interests and in this sense all intervention is discretionary." (Footnote omitted)).

case was in the district court.[27] This may be one reason that a fair number of cases state that intervention on appeal is reserved for exceptional circumstances.[28] However, in some instances the would-be intervenor is able to satisfy the court that it has a good explanation for its failure to seek intervention earlier[29] – as, for example, when a late-breaking shift in the parties' positions leaves the intervenor's interests suddenly unrepresented.[30]

As the preceding example suggests, successful applicants for intervention on appeal typically have demonstrated that the existing parties to the appeal do not adequately represent

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[27] *See, e.g.*, *Hutchinson v. Pfeil*, 211 F.3d 515, 519 (10th Cir. 2000) ("The proposed plaintiffs lacked standing to obtain direct appellate review and, thus, do not seek intervention to excuse a failure to perfect a proper appeal. Their request, however, is undercut by a different omission. As noted above, they never moved to intervene in the district court."); *Hall v. Holder*, 117 F.3d 1222, 1231 (11th Cir. 1997); *Consolidated Gas Elec. Light & Power Co. of Baltimore v. Pennsylvania Water & Power Co.*, 194 F.2d 89, 91 (4th Cir. 1952) ("[T]he Commission has been fully apprised of these proceedings ... , and yet it took no steps to intervene until a short time before the argument of this appeal. There was no attempt in the District Court to comply with Rule 24 ....").

[28] *See, e.g.*, In re *Grand Jury Investigation Into Possible Violations of Title 18, U. S. Code, Sections 201, 371, 1962, 1952, 1951, 1503, 1343 and 1341*, 587 F.2d 598, 601 (3d Cir. 1978) ("While there is no express provision for such intervention in the Federal Rules of Appellate Procedure, neither is there any prohibition. Those courts which have considered the question have recognized that while a court of appeals has power to permit intervention that power should be exercised only in exceptional circumstances for imperative reasons."); *Bates v. Jones*, 127 F.3d 870, 873 (9th Cir. 1997) ("Intervention at the appellate stage is, of course, unusual and should ordinarily be allowed only for 'imperative reasons.'") (quoting *Landreth Timber Co. v. Landreth*, 731 F.2d 1348, 1353 (9th Cir. 1984), *rev'd on other grounds*, 471 U.S. 681 (1985)).

[29] *See, e.g.*, *United States v. Bursey*, 515 F.2d 1228, 1238 n.24 (5th Cir. 1975) (approving intervention on appeal "where the senior Burseys assert a significant stake in the matter on appeal, where it is evident that their interest cannot adequately be represented by Brett Bursey ... , and where their lack of timely intervention below may be justified by the district court's action without notice").

[30] *See, e.g.*, *Elliott Indus. Ltd. P'ship v. BP Am. Prod. Co.*, 407 F.3d 1091, 1103-04 (10th Cir. 2005) ("Prior to the district court's entry of final judgment it was reasonable for Dichter to rely on Appellees to argue the issue of subject matter jurisdiction."); *Bates v. Jones*, 127 F.3d 870, 873 (9th Cir. 1997) (timeliness inquiry focuses on when the intervenor first learned that the parties would not adequate represent its interests).

their interests[31] – an analysis that echoes that conducted (with respect to intervention in the trial court) under Civil Rule 24(a). An applicant for intervention on appeal may also expect to be questioned as to why participation as an amicus would not suffice to protect the applicant's interests.[32] One possible rejoinder to this inquiry is that the intervenor wishes to seek rehearing en banc[33] or U.S. Supreme Court review[34] – actions that can only be taken by parties, not amici;[35] but not all courts will be persuaded that the desire to seek further review justifies an intervention request made only after the court of appeals' decision has issued.[36] Timeliness inquiries – and

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[31] *See, e.g., Goodman v. Heublein, Inc.*, 682 F.2d 44, 47 (2d Cir. 1982) ("Because Goodman has assigned his interest in attorney's fees to Sikorsky & Mott, he addresses in this court only those issues relating to prejudgment interest.... We grant the motion to intervene because Goodman can not adequately safeguard Sikorsky & Mott's interest in the fee award."); *Alstom Caribe, Inc. v. George P. Reintjes Co., Inc.*, 484 F.3d 106, 111 (1st Cir. 2007) ("Because it has become apparent that St. Paul has a substantial stake in the outcome and that its interests are not fairly represented by any other party, we today grant St. Paul's motion and authorize its intervention in these proceedings as an appellee.").

[32] *See, e.g., Morin v. City of Stuart*, 112 F.2d 585, 585 (5th Cir. 1939) (denying intervention but stating that "[c]ounsel for petitioners may, if they desire, file a brief as amicus curiae on any question before us on the appeal in the decision of which he is interested"); *Bates v. Jones*, 127 F.3d 870, 874 (9th Cir. 1997) ("U.S. Term Limits offers no reason why it cannot sufficiently protect its interest as an advocate for term limits laws by its filing of amicus briefs.").

[33] *See* Appellate Rule 35(b) ("A party may petition for a ... rehearing en banc.").

[34] *See* 28 U.S.C. § 1254(1) ("Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.").

[35] *See, e.g., Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 30, 34 (1993) (would-be intervenor can seek U.S. Supreme Court review of a court of appeals' denial of intervention request; but absent review of that denial, one who was denied intervention in the court of appeals is not a party and cannot seek Supreme Court review on the merits); *Day v. Apoliona*, 505 F.3d 963, 965 (9th Cir. 2007) ("That the State has participated previously in this action as amicus curiae does not mean that its interest is protected now, as its ability to seek further review is conditioned on attaining party status.").

[36] *See, e.g., Amalgamated Transit Union Intern., AFL-CIO v. Donovan*, 771 F.2d 1551, 1553 (D.C. Cir. 1985) ("[I]f intervention is allowed after appellate argument and decision, both the judicial panel and the parties before the court are denied any meaningful opportunity to respond to any new arguments raised by a claimant who seeks to intervene.").

analyses of appellate intervention generally – typically include consideration of whether existing parties would be prejudiced by the intervention.[37]

A number of facets of the appellate-intervention analysis reflect typical principles of appellate jurisdiction and practice. Parties to the litigation in the district court cannot make an end-run around the time limits for filing a notice of appeal by belatedly seeking "intervention" on appeal.[38] Such a party will be allowed to defend the judgment below, but not to attack it[39] – or, at any rate, not to attack it by raising issues not already raised by an existing appellant.[40] More generally, courts of appeals are likely to assess whether the would-be intervenor seeks to inject into the appeal issues not raised below[41] or not raised by the existing parties to the

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[37] *See, e.g.*, *Bates*, 127 F.3d at 874 (observing that lack of prejudice to existing parties is an important factor).

[38] *See, e.g.*, *S.E.C. v. Dunlap*, 253 F.3d 768, 774 (4th Cir. 2001) (denying a request to "intervene" by a party who did not "appeal the district court's Injunction Order or its Contempt Order, as it was entitled to do under § 1292(a)(1)"); *Hutchinson v. Pfeil*, 211 F.3d 515, 519 (10th Cir. 2000) ("[T]he [intervention] motion is, in effect, an attempt to obtain appellate review lost by her failure to timely appeal the denial of her motion to intervene in district court. Appellate intervention is not a means to escape the consequences of noncompliance with traditional rules of appellate jurisdiction and procedure."). *Compare* In re *Grand Jury Proceedings (Malone)*, 655 F.2d 882, 886 (8th Cir. 1981) ("We need not decide what the result would be if the motion for leave to intervene had been made in this court after the time for appeal had expired. We hold only that we have jurisdiction of a client's appeal from an order directing his attorney to comply with a grand-jury subpoena, where the attorney has unsuccessfully asserted the attorney-client privilege, and where the client has asked to become a party to the appeal within the time for filing a notice of appeal in the District Court.").

[39] *See, e.g.*, *Corroon v. Reeve*, 258 F.3d 86, 91-92 (2d Cir. 2001) ("Having declined to file an appeal from the August and September Orders, and its appeal deadline having passed, Berger & Montague could not secure the resurrection of its appeal time ... , by simply seeking to intervene. Accordingly, when Berger & Montague moved for permission to intervene, we granted its motion only to the extent of allowing it to defend the district court's reduction of its liability for sanctions.").

[40] *See, e.g.*, *United States v. Ahmad*, 499 F.2d 851, 854 (3d Cir. 1974) ("In the peculiar circumstances here, Davidon's intervention is necessarily limited. He cannot circumvent the requirements for taking an appeal in his own right by a later petition for intervention in an effort to present contentions applicable only to him.").

[41] *See, e.g.*, *Day v. Apoliona*, 505 F.3d 963, 965-66 (9th Cir. 2007) ("[H]ere the State's intervention does not ... threaten to broaden the scope of the case going forward"); *Landreth Timber Co. v. Landreth*, 731 F.2d 1348, 1353 (9th Cir. 1984) (refusing "to allow intervention at this late date" and noting that "intervention would raise new issues of fact and law not before the

appeal,[42] though these failures will not impede an intervenor seeking to raise objections that go to subject matter jurisdiction.[43] The concern about broadening the issues is particularly salient on appeal, given that the record on appeal may prove insufficient to assess new issues belatedly raised by the would-be intervenor. In some instances, limits on interlocutory appeals may lead a court to deny appellate intervention when the intervenor would lack the right to appeal at the present stage in the litigation.[44]

The fact that the intervention analysis is (to varying degrees) discretionary means that a court of appeals may sometimes grant intervention on appeal without disturbing a district court's denial of intervention below.[45] Likewise, a court of appeals that views the district court's

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district court"), *rev'd on the merits*, 471 U.S. 681 (1985). In *Warren v. Commissioner*, 302 F.3d 1012 (9th Cir. 2002), a taxpayer and the IRS were litigating the amount of an exclusion from income; on appeal, the Ninth Circuit appointed Erwin Chemerinsky as an amicus to address whether the exclusion itself was unconstitutional. After Congress passed legislation designed to resolve the taxpayer's dispute in order to head off the expected Ninth Circuit decision on the question of the exclusion's constitutionality, Professor Chemerinsky sought to intervene as a taxpayer party to press a constitutional challenge to the exclusion. The court denied intervention:
"Given the weighty nature of Prof. Chemerinsky's constitutional arguments, they are better suited for consideration in the first instance in a traditional procedural posture before a district court." *Id.* at 1015.

[42] *See, e.g., In re Grand Jury Investigation Into Possible Violations of Title 18, U. S. Code, Sections 201, 371, 1962, 1952, 1951, 1503, 1343 and 1341*, 587 F.2d 598, 601 (3d Cir. 1978) ("[T]he issues which the petitioners for intervention seek to litigate are quite unrelated to those presented by the appellants.").

[43] *See, e.g., Duplan v. Harper*, 188 F.3d 1195, 1203 (10th Cir. 1999) ("We affirm our provisional granting of Dr. Harper's motion to intervene on appeal with respect to the issues of subject matter jurisdiction, which we must address sua sponte, and Dr. Harper's status as employee or independent contractor, which the government raised on appeal. We deny the motion to intervene on appeal with respect to the issue of Dr. Harper's negligence, which was not raised on appeal and which Dr. Harper did not seek to present in the district court.").

[44] *See, e.g., United States v. Dorfman*, 690 F.2d 1217, 1223 (7th Cir. 1982) ("Because the ability of the defendants and nondefendants to protect their respective privacy interests arguably are not the same and because the legal questions raised by the two sets of appellants in this case – defendants and nonparty interceptees – are not the same, we cannot agree that the interlocutory review of one set of interests compels the simultaneous review of the other.").

[45] *See, e.g., Ruthardt v. United States*, 303 F.3d 375, 386 (1st Cir. 2002) ("The would-be intervenors candidly admit that their present concern is with the future. Rehearing en banc might be sought as to Garcia and the possibility exists of Supreme Court review. Given the magnitude

analysis of an intervention request as erroneous might choose, pragmatically, to permit intervention on appeal rather than remanding for re-consideration of the intervention request by the district court.[46]

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of the stakes and the helpful advocacy the funds have provided to us, we choose in these unusual circumstances to exercise our own discretion to allow the guaranty funds to intervene in the case at this time on a going-forward basis."); *National Ass'n of Chain Drug Stores v. New England Carpenters Health Benefits Fund*, 582 F.3d 30, 40 (1st Cir. 2009) ("[W]e here exercise the same option that the court exercised in *Ruthardt* and, bypassing the question whether intervention was properly denied in the district court, permit it on appeal to those who sought intervention below.").

[46] *See, e.g.*, *Mangual v. Rotger-Sabat*, 317 F.3d 45, 62 (1st Cir. 2003) ("[B]ecause we go on to resolve the merits, there is no point in remanding this issue.... [W]e have the discretion to permit intervenors at the appellate level, and we choose to do so here.").

IV. Conclusion

This memo's survey of local provisions and caselaw concerning intervention on appeal suggests a number of topics that might be candidates for treatment in an Appellate Rule. Such a rule could, in theory, address some or all of the following: the standards for intervention as of right or by permission; the timing of requests to intervene; the identity of the decisionmaker; disclosure requirements for intervenors; the timing and content of intervenors' briefs; intervenors' participation (or not) in oral argument; and matters of costs. Part III's survey of the appellate caselaw suggests that the standards for intervention would need to be flexible (as are those set by Civil Rule 24), and perhaps also that some flexibility might be advisable in the timing requirements. Part II's roster of local circuit provisions suggests that circuits may have local preferences concerning the details of intervenors' briefing, raising the question whether a national rule on the subject would be welcome.

More generally, the caselaw noted in Part III of this memo may provide a possible clue to the omission of intervention on appeal from the topics treated thus far by the Appellate Rules: If such belated intervention is disfavored and meant to be rare, then perhaps some have been reluctant to address it by general rule for that reason. But even if that provides a possible explanation for the omission, it would not preclude rulemaking on the topic if experience has shown that national rules would be useful.

TAB

VII-E

MEMORANDUM

DATE: September 16, 2010

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 10-AP-H

This summer we received an inquiry forwarded to us by John Rabiej from Karen Kremer at the AO, asking whether any of the Rules Advisory Committees are looking at the issue of the appealability of remand orders. Ms. Kremer mentioned that this is an issue that the Committee on Federal / State Jurisdiction has discussed in the past and she expressed interest in knowing if the rules committees are also looking at this issue.

The question of appellate review of remand orders is one to which Professor James Pfander (the Reporter for the Federal / State Jurisdiction Committee) has given thoughtful attention.[1] My understanding is that this question falls within the primary jurisdiction of the Federal / State Jurisdiction Committee. Should the Appellate Rules Committee be interested in considering this topic further, it would undoubtedly be helpful to work closely with the Federal / State Jurisdiction Committee and (in addition) to obtain the benefit of the materials on this topic that have previously been considered by that Committee.[2]

Even before obtaining the benefits of the Federal / State Committee's views on this topic, it can readily be seen why the area's intricacies have prompted calls for reform.[3] If one were re-

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[1] Professor Pfander's article on this topic will soon be published in the Penn Law Review. *See* James E. Pfander, *Collateral Review of Remand Orders: Reasserting the Supervisory Role of the Supreme Court*, 159 U. Pa. L. Rev. __ (forthcoming 2010).

[2] Additional sources of information would include the deliberations and proposals of the ALI's Federal Judicial Code Revision Project.

[3] For example, in *Carlsbad Technology, Inc. v. HIF Bio, Inc.*, 129 S. Ct. 1862 (2009), the Court held that 28 U.S.C. § 1447(d) does not bar appellate review of remand orders when the remand is occasioned by the district court's decision under 28 U.S.C. § 1367(c) not to exercise supplemental jurisdiction over the remanded claims. *See id.* at 1867. Justice Breyer, joined by Justice Souter, concurred but wrote separately to note the odd landscape of appellate review of remand orders. In particular, Justice Breyer noted that the Court had held that Section 1447(d) bars appellate review of a district court order remanding claims that had been removed under the Foreign Sovereign Immunities Act, and he contrasted that holding with *Carlsbad*'s holding: "[W]e have held that § 1447 permits review of a district court decision in an instance where that

thinking the area from scratch, one might wish to consider certain basic, over-arching questions, such as:

- In what sorts of circumstances should federal appellate review of orders remanding a case to state court be available? The values that may be served by barring such review include showing respect for state courts, avoiding interference with the progress of the remanded case in state court, and relieving the federal appellate courts of the responsibility for reviewing routine rulings on subject-matter jurisdiction or removal procedure. Are those values equally salient in all the situations[4] currently covered by 28 U.S.C. § 1447(d)'s general bar on appellate review of remand orders?[5]

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decision is unlikely to be wrong and where a wrong decision is unlikely to work serious harm. And we have held that § 1447 forbids review of a district court decision in an instance where that decision may well be wrong and where a wrong decision could work considerable harm." *Id.* at 1869 (Breyer, J., joined by Souter, J., concurring). Justice Breyer concluded by "suggest[ing] that experts in this area of the law reexamine the matter with an eye toward determining whether statutory revision is appropriate." *Id.* at 1869-70.

[4] *See, e.g.*, *Powerex Corp. v. Reliant Energy Services, Inc.*, 551 U.S. 224, 237 (2007) ("A foreign sovereign defendant whose case is wrongly remanded is denied not only the federal forum to which it is entitled ... , but also certain procedural rights that the FSIA specifically provides foreign sovereigns only in federal court.").

[5] Cases applying Section 1447(d)'s appeal bar include *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 129 (1995) ("If an order remands a bankruptcy case to state court because of a timely raised defect in removal procedure or lack of subject-matter jurisdiction, then a court of appeals lacks jurisdiction to review that order under § 1447(d), regardless of whether the case was removed under § 1441(a) or § 1452(a)."); *Kircher v. Putnam Funds Trust*, 547 U.S. 633, 648 (2006) (holding that the Securities Litigation Uniform Standards Act of 1998 "does not exempt remand orders from 28 U.S.C. § 1447(d) and its general rule of nonappealability"); *Powerex*, 551 U.S. at 239 (holding "that § 1447(d) bars appellate consideration of petitioner's claim that it is a foreign state for purposes of the [Foreign Sovereign Immunities Act]").

Cases *not* applying Section 1447(d)'s appeal bar include *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 340-41, 352 (1976) (holding that Section 1447(d) did not bar appellate review of district court order remanding diversity suit due to docket pressures); *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996) (holding that Section 1447(d) did not bar appellate review of an "abstention-based remand order"); and *Carlsbad*, 129 S. Ct. at 1867 ("When a district court remands claims to a state court after declining to exercise supplemental jurisdiction, the remand order is not based on a lack of subject-matter jurisdiction for purposes of §§ 1447(c) and (d).").

- If the reviewability of a remand order should continue to depend on the reasons for the remand, should appellate courts be able to question the district court's stated reasons for the remand?[6]

- If Congress were to lift or narrow its ban on appellate review of remand orders, what mode of appellate review would be most appropriate for them – appeal as of right, or by permission? And if by permission, should the gatekeeper be the district court, the court of appeals, or both?

- What should be the availability and scope of federal appellate review when a federal district court renders a ruling on one or more claims in a lawsuit and then remands the remaining claims to state court?[7]

- In what circumstances should immediate appellate review of orders denying remand be available? When immediate appellate review is not sought (or permission to take such an appeal is denied), what remedy should be afforded if – on appeal from a final judgment – the court of appeals determines that the case should have been remanded? How should the answer to the latter question be affected by the basis for the determination that the district court erred in refusing to remand?

- How should any re-shaping of appellate jurisdiction over remand orders treat specialized areas of law for which Congress has provided separately?[8]

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[6] *See, e.g.*, *Powerex*, 551 U.S. at 233 (assuming for argument's sake "that § 1447(d) permits appellate courts to look behind the district court's characterization").

[7] *See, e.g.*, *City of Waco, Tex. v. U.S. Fidelity & Guaranty Co.*, 293 U.S. 140, 142-44 (1934) (district court had dismissed cross-complaint and remanded case because (with cross-complaint dismissed) there was no diversity; Supreme Court held that the dismissal of the cross-complaint was reviewable).

[8] *See, e.g.*, 28 U.S.C. § 1452 (bankruptcy removal); *id.* § 1443 (civil rights removal); *id.* § 1447(d) (exempting cases removed under Section 1443 from remand appeal bar); 12 U.S.C. § 1819(b)(2)(B) (authorizing removal by FDIC); *id.* § 1819(b)(2)(C) (authorizing FDIC to "appeal any order of remand entered by any United States district court"); 28 U.S.C. § 2679(d)(2) (Westfall Act certification "shall conclusively establish scope of office or employment for purposes of removal"); *Osborn v. Haley*, 549 U.S. 225, 231-32 (2007) (holding "that § 1447(d)'s bar on appellate review of remand orders does not displace § 2679(d)(2), which shields from remand an action removed pursuant to the Attorney General's certification"); 28 U.S.C. § 1453(c)(1) (exempting CAFA removals from Section 1447(d)'s remand appeal bar); *id.* § 1441(e)(3) (special provision for appeal of liability determinations prior to remand under Multiparty, Multiforum Trial Jurisdiction Act).

It should be noted that re-thinking all of the above questions from scratch would seem to venture beyond the rulemaking authority conferred by 28 U.S.C. §§ 2072(c) and 1292(e). Those statutes would authorize rulemaking on some aspects of the topics noted above, but not all of them. Activity by the rules committees in this area would entail cooperation with the Federal / State Jurisdiction Committee, with a view to proposing possible statutory changes. The project would present a host of challenging questions, but rationalizing this area of law would provide a service to practitioners and courts.

TAB

VIII

August 2011						
S	M	T	W	T	F	S
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November 2011						
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September 2011

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