ADVISORY COMMITTEE
ON
APPELLATE RULES

San Francisco, CA
April 6-7, 2011

Agenda for Spring 2011 Meeting of
Advisory Committee on Appellate Rules
April 6-7, 2011
San Francisco, CA

I. Introductions

II. Approval of Minutes of October 2010 Meeting

III. Report on January 2011 Meeting of Standing Committee

IV. Other Information Items

V. Action Items

A. For publication

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

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

VI. Discussion Items

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

B. Item No. 08-AP-D (FRAP 4(a)(4))

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

D. Item No. 08-AP-K (alien registration numbers)

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

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

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

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

VII. Additional Old Business and New Business

A. Item No. 10-AP-I (consider issues raised by redactions in appellate briefs)

B. Item No. 11-AP-A (exempt amicus statement of interest from length limit)

VIII. Joint Discussion with Advisory Committee on Bankruptcy Rules

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

B. Item No. 08-AP-L (FRAP 6(b)(2)(A) / *Sorensen* issue)

IX. Adjournment

ADVISORY COMMITTEE ON APPELLATE RULES

Chair:	**Reporter:**
Honorable Jeffrey S. Sutton United States Circuit Judge United States Court of Appeals 260 Joseph P. Kinneary U. S. Courthouse 85 Marconi Boulevard Columbus, OH 43215	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, Esq. Dowd Bennett LLP 7733 Forsyth Blvd., 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 655 First Avenue North - Suite 330 Fargo, ND 58102	Honorable Robert Michael Dow, Jr. United States District Court Everett McKinley Dirksen U. S. 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
Honorable Neal K. Katyal Acting Solicitor General (Ex-officio) Department of Justice 950 Pennsylvania Ave., N.W., Rm 5143 Washington, DC 20530	Douglas Letter, Esq. Appellate Litigation Counsel Civil Div., U.S. Department of Justice 950 Pennsylvania Ave., N.W., Rm 7513 Washington, DC 20530
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Representative:	**Liaison Member:**
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Secretary:	**Chief Counsel:**
Peter G. McCabe Secretary, Committee on Rules of Practice & Procedure Washington, DC 20544	Andrea Kuperman Chief Counsel to the Rules Committees 11535 Bob Casey U.S. Courthouse 515 Rusk Avenue Houston, TX 77002-2600

Advisory Committee on Appellate Rules

Members	Position	District/Circuit	Start Date		End Date
Jeffrey S. Sutton Chair	C	Sixth Circuit	Member: Chair:	2005 2009	---- 2012
Amy Coney Barrett	ACAD	Indiana		2010	2013
James Forrest 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 Circuit		2009	2012
Neal K. Katyal*	DOJ	Washington, DC		----	Open
Maureen E. Mahoney	ESQ	Washington, DC		2005	2011
Richard G. Taranto	ESQ	Washington, DC		2009	2012
Catherine T. Struve Reporter	ACAD	Pennsylvania		2006	Open
Principal Staff: Peter G. McCabe 202-502-1800					

* Ex-officio

LIAISON MEMBERS

Appellate:	
Dean C. Colson	(Standing Committee)
Bankruptcy:	
Judge James A. Teilborg	(Standing Committee)
Civil:	
Judge Arthur I. Harris	(Bankruptcy Rules Committee)
Judge Diane P. Wood	(Standing Committee)
Criminal:	
Judge Reena Raggi	(Standing Committee)
Evidence:	
Judge Judith H. Wizmur	(Bankruptcy Rules Committee)
Judge Paul S. Diamond	(Civil Rules Committee)
Judge John F. Keenan	(Criminal Rules Committee)
Judge Marilyn Huff	(Standing Committee)

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

Secretary: Peter G. McCabe Secretary, Committee on Rules of Practice & Procedure 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. Chianti D. Butler Staff Assistant Rules Committee Support Office Administrative Office of the U.S. Courts Washington, DC 20544
Ms. Rasheedah Henry Program Assistant Rules Committee Support Office Administrative Office of the U.S. Courts Washington, DC 20544

FEDERAL JUDICIAL CENTER

Joe Cecil (Rules of Practice & Procedure) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003	Marie Leary (Appellate Rules Committee) Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003
Molly T. Johnson (Bankruptcy Rules Committee) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003	Emery G. Lee (Civil Rules Committee) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003
Laural L. Hooper (Criminal Rules Committee) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003	Tim Reagan (Evidence Rules Committee) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003

TAB-I

REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

September 14, 2010

The Judicial Conference of the United States convened in Washington, D.C., on September 14, 2010, pursuant to the call of the Chief Justice of the United States issued under 28 U.S.C. § 331. The Chief Justice presided, and the following members of the Conference were present:

First Circuit:

Chief Judge Sandra L. Lynch
Chief Judge Mark L. Wolf,
District of Massachusetts

Second Circuit:

Chief Judge Dennis Jacobs
Chief Judge William K. Sessions III,
District of Vermont

Third Circuit:

Chief Judge Theodore A. McKee
Chief Judge Harvey Bartle III,
Eastern District of Pennsylvania

Fourth Circuit:

Chief Judge William B. Traxler, Jr.
Judge James P. Jones,
Western District of Virginia

Fifth Circuit:

Chief Judge Edith Hollan Jones
Judge Sim Lake III,
Southern District of Texas

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

FEDERAL RULES OF APPELLATE PROCEDURE

Rules Amendments. The Committee on Rules of Practice and Procedure submitted to the Judicial Conference proposed amendments to Appellate Rules 4 (Appeal as of Right — When Taken) and 40 (Petition for Panel Rehearing), together with committee notes explaining their purpose and intent. The Judicial Conference approved the proposed rules amendments and authorized their transmittal 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.

Statutory Amendment. The Committee also recommended seeking legislation to amend 28 U.S.C. § 2107, consistent with the proposed amendment to Appellate Rule 4, to clarify and make uniform the treatment of the time to appeal in all civil cases in which a federal officer or employee is a party. The Conference adopted the Committee's recommendation.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules Amendments. The Committee on Rules of Practice and Procedure submitted to the Judicial Conference proposed amendments to Bankruptcy Rules 2003 (Meeting of Creditors or Equity Security Holders), 2019 (Representation of Creditors and Equity Security Holders in Chapter 9 Municipality and Chapter 11 Reorganization Cases), 3001 (Proof of Claim), 4004 (Grant or Denial of Discharge), 6003 (Interim and Final Relief Immediately Following the Commencement of the Case — Applications for Employment; Motions for Use, Sale, or Lease of Property; and Motions for Assumption or Assignment of Executory Contracts), and new Rules 1004.2 (Petition in Chapter 15 Cases) and 3002.1 (Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence), together with committee notes explaining their purpose and intent. The Judicial Conference approved the proposed rules amendments and new rules and authorized their transmittal 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.

Forms Amendments. The Committee also submitted to the Judicial Conference proposed revisions to Official Forms 9A, 9C, 9I, 20A, 20B, 22A, 22B, and 22C. The Judicial Conference approved the revised forms to take effect on December 1, 2010.

FEDERAL RULES OF CRIMINAL PROCEDURE

The Committee on Rules of Practice and Procedure submitted to the Judicial Conference proposed amendments to Criminal Rules 1 (Scope; Definitions), 3 (The Complaint), 4 (Arrest Warrant or Summons on a Complaint), 6 (The Grand Jury), 9 (Arrest Warrant or Summons on an Indictment or Information), 32 (Sentencing and Judgment), 40 (Arrest for Failing to Appear in Another District or for Violating Conditions of Release Set in Another District), 41 (Search and Seizure), 43 (Defendant's Presence), and 49 (Serving and Filing Papers), and new Rule 4.1 (Complaint, Warrant, or Summons by Telephone or Other Reliable Electronic Means), together with committee notes explaining their purpose and intent. The Judicial Conference approved the proposed amendments and new rule and authorized their transmittal 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.

FEDERAL RULES OF EVIDENCE

The Committee on Rules of Practice and Procedure submitted to the Judicial Conference proposed restyled Evidence Rules 101-1103, together with committee notes explaining their purpose and intent. The restyling of the Evidence Rules is the fourth in a series of comprehensive style revisions to simplify, clarify, and make more uniform all of the federal rules of practice, procedure, and evidence. The Judicial Conference approved the proposed restyled rules amendments and authorized their transmittal 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.

COMMITTEE ACTIVITIES

The Committee on Rules of Practice and Procedure reported that it approved publishing for public comment proposed amendments to Bankruptcy Rules 3001, 7054, and 7056, proposed revisions of Bankruptcy Official Forms 10 and 25A, and a proposed new attachment and supplements to Bankruptcy Official Form 10, and proposed amendments to Criminal Rules 5 and 58, and a new Criminal Rule 37. The comment period expires on February 16, 2011.

Advisory Committee on Appellate Rules
Table of Agenda Items — March 2011

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 Approved by Judicial Conference 09/10
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
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-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

FRAP Item	Proposal	Source	Current Status
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
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 Discussed and retained on agenda 10/10
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 Discussed and retained on agenda 10/10
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 Discussed and retained on agenda 10/10
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 Discussed and retained on agenda 10/10
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 Draft approved 10/10 for submission to Standing Committee Approved for publication by Standing Committee 01/11
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

FRAP Item	Proposal	Source	Current Status
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 Discussed and retained on agenda 10/10
08-AP-R	Consider amending FRAP 26.1 (corporate disclosure) and the corresponding requirement in FRAP 29(c)	Hon. Frank H. Easterbrook	Discussed and retained on agenda 04/09
09-AP-A	Consider amending FRAP 26.1 (corporate disclosure) and the corresponding requirement in FRAP 29(c)	ABA Council of Appellate Lawyers	Discussed and retained on agenda 04/09
09-AP-B	Amend FRAP 1(b) to include federally recognized Indian tribes within the definition of "state"	Daniel I.S.J. Rey-Bear, Esq.	Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10
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 Discussed and retained on agenda 10/10
09-AP-D	Consider implications of Mohawk Industries, Inc. v. Carpenter	John Kester, Esq.	Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10
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 Discussed and retained on agenda 10/10
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 Discussed and retained on agenda 10/10
10-AP-D	Consider factors to be taken into account when taxing costs under FRAP 39	Hon. Jeffrey S. Sutton	Discussed and retained on agenda 10/10
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.	Discussed and retained on agenda 10/10
10-AP-G	Consider amending FRAP to address intervention on appeal	Douglas Letter, Esq.	Discussed and retained on agenda 10/10

FRAP Item	Proposal	Source	Current Status
10-AP-H	Consider issues relating to appellate review of remand orders	Committee on Federal-State Jurisdiction	Discussed and retained on agenda 10/10
10-AP-I	Consider issues raised by redactions in appellate briefs	Paul Alan Levy, Esq.	Awaiting initial discussion
11-AP-I	Exempt amicus statement of interest from length limit	R. Shawn Gunnarson, Esq., and Alexander Dushku, Esq.	Awaiting initial discussion

TAB-II

DRAFT

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

I. Introductions

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

Judge Sutton welcomed the meeting participants. He introduced two of the Committee's three new members, Justice Eid and Judge Dow. Judge Dow, of the United States District Court for the Northern District of Illinois, replaces Judge T.S. Ellis III as the district judge representative on the Committee. Judge Dow was educated at Yale, Oxford and Harvard and clerked for Judge Flaum on the Seventh Circuit. Judge Sutton noted that Judge Dow's experience with appellate work, prior to his appointment to the bench, would be an asset to the Committee. Justice Eid, a Justice on the Colorado Supreme Court, succeeds Justice Holland as the state high court representative on the Committee. Justice Eid attended Stanford and the University of Chicago and clerked for Judge Jerry Smith on the Fifth Circuit and then for Justice Thomas. She brings to the Committee not only her perspective as a member of Colorado's highest court but also her experience as an appellate practitioner, a law professor and Colorado's Solicitor General. Judge Sutton noted that the Committee's third new member, Professor Amy

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

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

Coney Barrett, replaces Dean McAllister. Professor Barrett was unable to be present in view of an impending due date and Judge Sutton stated that he looked forward to introducing her to the Committee at the spring 2011 meeting. Judge Sutton introduced Mr. Colson, who succeeds Judge Hartz as the liaison from the Standing Committee. Judge Sutton observed that Mr. Colson, whose law firm is located in Miami, graduated from Princeton and the University of Miami and clerked for Judge Fay and then-Justice Rehnquist. Judge Fay noted what a wonderful law clerk Mr. Colson had been.

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

II. Approval of Minutes of April 2010 Meeting

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

III. Report on June 2010 Meeting of Standing Committee

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

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

IV. Other Information Items

Judge Sutton invited the Reporter to describe Chief Judge Rader's proposal, on behalf of the judges of the Federal Circuit, that 28 U.S.C. § 46(c) be amended. Chief Judge Rader has proposed that Section 46(c) be amended to include in an en banc court any senior circuit judge "who participated on the original panel, regardless of whether an opinion of the panel has formally issued." The statute currently provides that a senior judge may participate in an en banc court that is "reviewing a decision of a panel of which such judge was a member."

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

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

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

Management.

Judge Sutton invited the Reporter to describe to the Committee Judge Baylson's update concerning Item No. 08-AP-Q. This item concerns the possibility of allowing the use of digital audio recordings in place of written transcripts for purposes of the record on appeal. The Committee discussed this question at its April 2009 meeting, and decided by consensus to retain the suggestion on its study agenda. This summer, Judge Baylson forwarded to the Committee an opinion that he filed following a bench trial in a complex case concerning allegations of racial bias in school redistricting. The opinion points out that the post-trial briefing proceeded entirely on the basis of digital audiorecordings, without any written transcript. Further filings in the case underscore the cost savings that can result from such an approach. But Judge Baylson's opinion points out that in the event of an appeal, the Appellate Rules have no provision permitting the use of the digital audiorecordings instead of a transcript. An attorney member asked how one would cite the trial record if no transcript existed. The Reporter responded that one could cite particular times in the recordings.

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

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

transparency and accessibility of the Rules Committees' activities. As initially adopted, the Civil Rules included only a small set of provisions – former Rules 72 to 76 – dealing with the topic of appeals. Work on the Appellate Rules began in the early 1960s, and those Rules took effect in 1968.

Professor Coquillette provided an erudite and illuminating overview of the history of local rulemaking in the federal courts. The First Circuit, he observed, adopted the earliest published set of local appellate rules, in the early nineteenth century. At the time, the Harvard Law School's faculty included Joseph Story and Simon Greenleaf. The latter was a pioneer in rulemaking. Greenleaf's theory of rulemaking, Professor Coquillette suggested, underpins the current efforts of the Rules Committees. Instead of ex post facto lawmaking, Greenleaf advocated prospective rulemaking. In 1638, Francis Bacon had said that one should make law from the bottom up: that is, one should articulate prospective rules based on what the courts actually do, and then one should test the resulting rules to see how they work in practice. (Members noted that Professor Coquillette has authored a volume on Francis Bacon's legal philosophy.) The Rules Committees, Professor Coquillette observed, are doing what Bacon recommended in 1638 and Greenleaf did with local rules in the 1830s. Turning his attention to the 20th century, Professor Coquillette shared with the Committee a photograph taken of the Civil Rules Committee at a time when the Committee's Chair was Dean Acheson and its Reporter was Benjamin Kaplan. The work of the Committee received great deference in those days. The dynamics of the rulemaking process have changed since then. Congress is very interested in the rulemaking process, and sometimes it will act in ways that affect that process – either by delegating particular responsibilities to the rulemakers or by enacting legislation that circumvents the REA process. Judge Sutton expressed his appreciation of Professor Coquillette's and the Reporter's presentations.

V. Action Items

A. For publication

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

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

(concerning requests to proceed on appeal in forma pauperis) that would reflect more accurately the nature of the Tax Court as a court rather than an agency.

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

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

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

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

Judge Sutton invited the Reporter to introduce this item, which grows out of Peder Batalden's observation that under Appellate Rule 4(a)(4)(B) the time to appeal from an amended judgment runs from the entry of the order disposing of the last remaining tolling motion. Mr. Batalden notes that in some cases there might be a delay between entry of the order disposing of the tolling motion and entry of the amended judgment that results from that disposition. One example would be an instance where the district court grants a motion for remittitur and gives the

plaintiff a long period of time within which to decide whether to accept the remitted amount or to reject the remitted amount and proceed to a new trial. In such an instance, a would-be appellant would need to decide whether to file a protective notice of appeal within 30 days after entry of the order disposing of the tolling motion, or seek an extension of the appeal time from the district judge, or simply wait to file the notice of appeal until after the plaintiff accepts the remitted award. The attractiveness of this third option would depend on whether a separate document is required for the order granting the motion for remittitur.

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

An appellate judge member voiced support for the proposed amendment to Rule 4(a)(4). An attorney member questioned whether it would be desirable for the rule to use the phrase "if a motion's disposition results in alteration or amendment of the judgment, entry of any altered or amended judgment." He suggested that there might be instances when a would-be appellant expects the motion's disposition to result in an altered judgment but no such judgment is ever entered. In such a case, the proposed amended rule might provide such a litigant with a false sense of security, and appeal rights might be lost through reliance on the prospect of an amended judgment that never materializes. The attorney member wondered whether it might be better to use the phrase "provides for" rather than the phrase "results in." A judge member wondered whether it would work to say, simply, "alters." The Reporter suggested that some dispositions of tolling motions will not themselves alter the judgment because any ensuing alteration of the judgment would be contingent on the occurrence of a future event.

The attorney member wondered what other types of fact patterns – beyond the remittitur example – would be affected by the proposed amendment. The Reporter suggested that one example could arise in connection with a request for complex injunctive relief. Suppose that the district court enters a judgment that includes an injunction. Suppose further that, in response to a timely tolling motion, the district court enters an order which grants the motion and directs the parties to attempt to agree on a proposed amended judgment embodying a less extensive grant of injunctive relief. And further suppose that it takes the parties longer than 30 days after the entry of the order to agree on the wording of the proposed amended judgment. A participant noted that this example would implicate Civil Rule 65. Another attorney member stated that he had encountered an example relating to attorney fees. Judgment was entered after a jury trial; subsequently, the judge ruled that there was a statutory entitlement to attorney fees (against a non-party attorney), fixed the amount of the fees, and awarded costs, but did not enter a judgment on a separate document or amend the existing judgment to memorialize these rulings. One of the

litigants asked the court to set out the fee and cost rulings in a separate document; though more than 30 days elapsed since the issuance of the fee and cost opinion, the court did not act on the request for entry of a judgment on a separate document reflecting the fee and cost awards. The opposing party filed a notice of appeal from the fee and cost opinion, without awaiting the entry of a judgment on a separate document.

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

The Reporter stated that she sympathizes with Professor Kimble's concerns about Rule 4(a)(4). The basic structure of that Rule, though, remains the same as when it was re-styled in 1998. And the Reporter argued that defining "motion" for purposes of the Rule carries the risk that a pro se litigant or a less careful lawyer might overlook the definition and simply read the Rule to give tolling effect to all sorts of motions. An attorney member asked whether it would be possible to use a shorthand term other than "motion" – perhaps "tolling motion" – to flag the fact that the reference is not to all motions. The Reporter responded that some courts have criticized the use of the term "tolling motion" because Rule 4(a)(4) re-starts the appeal period from scratch. "Tolling," as used in connection with statutes of limitations, typically refers to stopping the period and then providing only the remaining balance of the period when the time begins to run again.

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

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

The Committee members by voice vote tentatively approved the proposed amendment to Rule 4(a)(4) as shown in the agenda book memo, with the following style change: The phrase

"or, if a motion's disposition results in alteration or amendment of the judgment, entry of any altered or amended judgment" was replaced with "or entry of any altered or amended judgment resulting from such a motion." Some members expressed interest in pursuing further the question whether "resulting from such a motion" is the appropriate choice or whether that language would create a false sense of security in instances where an amended judgment might – but ultimately does not – result from a motion's disposition. The Committee decided to re-visit the language of the proposed amendment the next morning.

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

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

The Committee took these proposals up again on the morning of the 8th. The Reporter distributed copies of the proposed amendment to Rule 4(a)(4) as it was tentatively approved by the Committee the day before, along with copies of a newer version of Professor Kimble's restyling of the proposal. This newer version, the Reporter observed, helpfully addresses some of the objections raised to the earlier restyling proposal.

Returning to the concern that the proposed Rule's reference to "resulting from such a motion" might create a false sense of security in instances where an amended judgment might – but ultimately does not – result from a motion's disposition, an attorney member conceded that he had had difficulty thinking of an instance in which this uncertainty would actually arise. Another attorney member noted that the Committee is concerned about the possibility that there could be an order that would trigger the time for appeal before the litigants know whether there will be an amended judgment or not. But, this member said, in most of the hypotheticals that she could think of, one may question whether the order in question actually "disposes of" the tolling motion. Suppose, for example, that a party moves for a new trial on the ground that the district court improperly excluded the testimony of the party's expert without holding a *Daubert* hearing, and the judge agrees to hold the *Daubert* hearing in order to determine whether the testimony was properly excluded and states that if it turns out that the testimony should have been admitted then a new trial will be granted. The member suggested that such an order would not really be an order *disposing of* the motion for a new trial because the grant of the new trial in that situation is

conditional. Another example is a motion for additional findings under Civil Rule 52(b); the court could grant the motion for additional findings without immediately making the additional findings. Until the court makes the additional findings, it may be unclear whether an amended judgment will result. The member suggested that such an order, standing alone, has not truly disposed of the motion. Participants also noted the habit of some judges of stating that a motion is granted and that an opinion will follow. Usually the opinion follows within days, but not always. If the rulemakers amend Rule 4(a)(4) to provide the entry of an amended judgment as a new starting point for the appeal time, might a litigant be lulled into awaiting an amended judgment that might not come?

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

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

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

Judge Sutton observed that he had initially thought these questions might be addressed in the Committee Note without altering the text of the proposal. However, given that Committee members had expressed the wish to think more about both the text and the Note, he entertained a

motion to withdraw the Committee's tentative approval of the Rule 4(a)(4) proposal in order to provide an opportunity to consider the proposal further. The motion was made and seconded and passed by voice vote without opposition.

VI. Discussion Items

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

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

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

Judge Sutton invited Mr. Letter to introduce this item, which concerns the doctrines that govern a litigant's attempt to "manufacture" a final judgment – in order to appeal the disposition of one or more claims – by dismissing the remaining claims in a case. Mr. Letter – along with Judge Bye and Ms. Mahoney – represents the Appellate Rules Committee on the Civil / Appellate Subcommittee, which has been considering this item. Mr. Letter observed that this area of law would benefit from clarification but he noted that it is proving challenging to draft a proposal that accomplishes that clarification. The reason is that there are policy choices that must be made in order to proceed with the drafting process. Mr. Letter reviewed the existing law on manufactured finality. There is general consensus that if the remaining claims are dismissed with prejudice, a final appealable judgment results. The litigant might instead try to employ a "conditional dismissal with prejudice" – dismissing the remaining ("peripheral") claims with prejudice, but reserving the right to revive those claims if the litigant's appeal results in reversal of the dismissal of the non-peripheral claims. Such a conditional dismissal with prejudice produces a final appealable judgment in the Second Circuit but not in the Third and Ninth Circuits. There are further variations in the circuit caselaw concerning the dismissal of the peripheral claims under circumstances that prevent their reassertion, and concerning the dismissal of the peripheral claims without prejudice.

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

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

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

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

Judge Sutton reviewed the history of this item, which concerns a proposal that federally recognized Native American tribes be treated the same as states for purposes of the Appellate

Rules. The sense of the Committee, he observed, has been that the consideration of this proposal should focus on the treatment of tribes in Appellate Rule 29, which concerns amicus briefs. Proponents argue that tribes should be accorded the same dignity as states and the federal government, which can file amicus briefs without party consent or leave of court.

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

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

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

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

It was noted that the question of treating tribes the same as states and the federal government for purposes of Appellate Rule 29(a) will also have implications for the new authorship and funding disclosure requirement that will take effect on December 1, 2010 (absent contrary action by Congress). That requirement – which will be placed in a new subdivision of Appellate Rule 29(c) – exempts entities that can file amicus briefs without party consent or court leave under Appellate Rule 29(a).

A participant suggested that it would be good to include tribes in Appellate Rule 29(a) as a matter of political symbolism, unless there are arguments that would outweigh that benefit. He

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

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

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

An attorney member stated opposition to changing Appellate Rule 29(a). Another attorney member argued that if the Rule is to be changed, the amendment should encompass municipalities as well as Native American tribes; this member argued that tribes are not similar to states and that if the amicus-filing rules are to change, the Supreme Court should take the lead. An appellate judge member expressed strong support for amending Rule 29(a) to include Native American tribes. This member reported that two large Native American tribes within the state of Colorado believe the issue to be a very important one. Tribes, this member observed, are sovereign entities; including tribes within Rule 29(a) would not create a slippery slope and, the member suggested, there is no downside to including them. An attorney member asked the appellate judge member whether the Colorado state rules permit Native American tribes to file

amicus briefs without party consent or court leave; the member responded that the Colorado rules require all would-be amici – even the United States – to seek permission. Another appellate judge member asked whether it is burdensome to rule on such motions for leave to file amicus briefs; the appellate judge member from Colorado responded that it is not burdensome to rule on the motions and that she views the question as purely one of sovereignty and dignity. Another appellate judge member expressed agreement with this view; he noted that his home state – North Dakota – has a lot of Indian reservations, and he predicted that including tribes among the entities listed in Rule 29(a) would not create an added burden for the courts of appeals.

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

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

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

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

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

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

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

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

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

An attorney member advocated starting with the question of orders rejecting claims of

attorney-client privilege. Mr. Letter suggested that the topic of privilege be broadened to encompass the state secrets privilege. Another attorney member suggested that a district court's denial of a claim of state secrets privilege would likely be reviewable either via a permissive appeal under 28 U.S.C. § 1292(b) or via mandamus. An appellate judge member suggested that to the extent that the *Mohawk Industries* Court invited rulemaking attention to this topic, the invitation seems to focus on attorney-client privilege. Mr. Letter agreed that it makes sense to start with the question of the appealability of privilege rulings, leaving the question of appeals from immunity rulings for treatment in the longer term.

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

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

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

Judge Sutton observed that if it is possible for the rulemakers to design an elegant solution to this set of problems, it would be worth doing. An attorney member wondered whether the current Rule 4(a)(2)'s treatment of relation forward might instill false confidence among practitioners who lack familiarity with the cases applying Rule 4(a)(2). A district judge member agreed that the current rule might be a trap for the unwary; this member recalled a similar set of issues arising under Illinois Supreme Court Rules 303 and 304. An attorney member expressed support for considering revisions to Rule 4(a)(2), and wondered whether this

topic should be considered in tandem with the proposed revisions to Rule 4(a)(4). Another attorney member suggested that it might be useful to consider whether the solution employed with respect to the Illinois Supreme Court rules might be instructive. By consensus, the Committee retained this item on its agenda with a view to considering a more concrete set of proposals at the spring 2011 meeting.

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

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

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

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

Mr. Letter expressed support for pursuing the project, and suggested that following the Supreme Court's approach might be best. But he stressed that the judges are the audience for briefs, so the key question is what judges prefer. An attorney member agreed that the Committee should pursue the project. This member observed that the trouble with the current Rule is that it specifies the order in which the statements must be set forth and there is no logical place to

discuss the opinion below; the logical place for such a discussion, she suggested, would be at the end of the discussion of the facts and procedural history. This member expressed support for modeling the revisions on the Supreme Court's rule, but she agreed with Mr. Letter that it is important to discern what judges would prefer. Another attorney member noted that one difference between Supreme Court briefs and briefs filed in the courts of appeals is that Supreme Court briefs state, up front, the question presented. The statement of issues in a court of appeals brief, he observed, is often not informative. This member reiterated the importance of identifying the ruling that is being appealed.

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

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

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

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

would be useful, but one written by a poor lawyer would not. An attorney member noted that the Rule could limit such an introductory statement to one page.

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

VII. Additional Old Business and New Business

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

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

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

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

Snyder was the very large number of pages in the appendix.

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

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

Judge Sutton invited the Reporter to introduce this item, which arises from Howard Bashman's suggestion that the Committee consider issues raised by *Vanderwerf v. Smithkline Beecham Corp.*, 603 F.3d 842 (10th Cir. 2010). In *Vanderwerf*, the district court granted summary judgment dismissing the Vanderwerfs' claims. They timely filed a motion under Civil Rule 59(e). After almost seven months elapsed with no decision on the motion, the Vanderwerfs withdrew the motion and (on the same day) filed a notice of appeal. A divided panel of the court of appeals dismissed the appeal as untimely. The majority reasoned that Appellate Rule 4(a)(4) "requires entry of an 'order disposing of [the Rule 59] motion' to give the appealing party the benefit of Rule 4(a)(4)(A)(iv)," and that the Vanderwerfs' withdrawal of their motion "leaves the record as if they had never filed the motion in the first place." Judge Lucero dissented, arguing that "[b]ecause the district court did not rule on the motion to alter or amend the judgment, the thirty-day filing deadline has not begun to run."

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

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

the text of Rule 4(a)(4) does not indicate any basis for a distinction between motions based on the identity of the movant.

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

An attorney member stated that she agreed with the *Vanderwerf* majority's reading of Rule 4(a)(4). The Rule, she suggested, cannot reasonably be read to allow a party to give itself a unilateral extension; when the motion is withdrawn, there never is an "order disposing of" a tolling motion. The Reporter asked whether such a reading of Rule 4(a)(4) would also counsel denying tolling effect to a withdrawn motion when the would-be appellant is someone other than the movant. The member responded that in such a situation the would-be appellant could ask the court not to permit the movant to withdraw the motion. Another attorney member agreed that Rule 4(a)(4) might be read to imply the requirement that an order ultimately be entered with respect to a motion in order for the motion to have tolling effect; this member drew an analogy to the way the language of Civil Rule 50 has been read. An appellate judge member recalled a Georgia state statute that provided that an appeal not decided within six months was deemed denied; he suggested that an analogous approach might be considered for motions not ruled upon by the trial court. Possible formulations were noted – that a motion might be "deemed denied if withdrawn," or "deemed denied because disposed of." A member suggested the possibility of adopting a rule providing that no motion of the types described in Appellate Rule 4(a)(4) can be withdrawn without leave of court. It was noted that such a provision would be placed in the Civil Rules rather than the Appellate Rules.

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

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

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

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

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

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

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

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

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

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

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

foreign affairs. After the Ninth Circuit affirmed in large part, both Intertanko and the United States sought certiorari, and the Supreme Court granted review. Mr. Letter noted that in a more recent case, the United States moved to intervene both in the district court and in the court of appeals.

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

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

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

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

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

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

VIII. Schedule Date and Location of Fall 2011 Meeting

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

IX. Adjournment

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

Respectfully submitted,

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Catherine T. Struve
Reporter

TAB-III

Draft Minutes of the Standing Committee Meeting of January 6-7, 2011, will be provided at the meeting.

TAB-IV

Comparative Study of the Taxation of Costs in the Circuit Courts of Appeals Under Rule 39 of the Federal Rules of Appellate Procedure

Report to the Advisory Committee on Appellate Rules
of the Judicial Conference of the United States

Marie Leary

Federal Judicial Center

April 2011

This report was undertaken at the request of the Judicial Conference's Advisory Committee on Appellate Rules and is in furtherance of the Center's statutory mission to conduct and stimulate research and development for the improvement of judicial administration. The views expressed are those of the author and not necessarily those of the Federal Judicial Center.

Table of Contents

I. Introduction and Overview of the Report

At its Fall 2010 meeting, the Advisory Committee on Appellate Rules placed the practice of awarding costs under Rule 39 of the Federal Rule of Appellate Procedure [Fed. R. App. P. 39] on its study agenda in response to H.R. 5069, the "Fair Payment of Court Fees Act of 2010." Introduced in April 2010, H.R. 5069 proposed to amend Fed. R. App. P. 39 to require a waiver of court fees if the court determines that the interest of justice justifies such a waiver. In order to make this determination, H.R. 5069 proposes that the interest of justice includes "the establishment of constitutional or other important precedent."[1] H.R. 5069 was introduced by Representative Henry C. Johnson, Jr., following the Fourth Circuit's decision to tax costs totaling $16,510 against Albert Snyder after reversing the judgment in his favor against the Westboro Baptist Church for protesting near the funeral of Snyder's son, who died in Iraq.[2] H.R. 5069 was referred to the House Committee on the Judiciary, then referred to the Subcommittee on Courts and Competition Policy in June, 2010, but because no further action was taken before the 111th Session of Congress ended in December 2010, H.R. 5069 has expired subject to being reintroduced in the 112th Congress. The likelihood that Congress will take up this issue again may have increased in light of the Supreme Court's recent decision in *Snyder v. Phelps*, upholding the Fourth Circuit's judgment against Mr. Snyder and therefore reinstating the order requiring Mr. Snyder to pay the appellants $16, 510 in costs.[3]

Concerns raised about the taxation of costs by the Fourth Circuit following *Snyder v. Phelps*, the subsequent congressional proposal to amend Appellate Rule 39, and inquiries raised by Committee members as to whether the costs awards vary between the circuits led to the Committee's request that the Federal Judicial Center provide data in response to these inquiries. In order to identify inter-circuit differences in appellate costs awards under Fed. R. App. P. 39, the Center identified the unique framework of local rules and procedures implemented by each circuit for establishing costs awards, and identified in the courts of appeals' CM/ECF databases cases in which final costs appeared to have been awarded by the court.

Part II of this report presents a brief summary of the findings from our research, including the variations among the rules and procedures adopted by the circuits for taxing costs under Fed. R. App. P. 39 and highlights from the analyses of the costs awards identified by the CM/ECF search. Part III presents a comparison as to how the circuits have implemented Fed. R. App. P. 39. Part IV presents a comparative analysis of costs awards identified through our CM/ECF search. Part V offers some procedural and conclusory observations from our research. The Appendix contains individual profiles of each of the circuit courts of appeals, each of which consists of a summary reproduction of all of the rules, procedures, and forms adopted for taxing costs under Fed. R. App. P. 39, and a detailed analysis of the final costs awards identified in our docket search for that individual circuit. Because the maximum rates, maximum number of copies, filing

[1] H.R. 5069, 111th Cong. (2d Sess. 2010). H.R. 5069 also proposed to amend Civil Rule 68(d) regarding payment of costs after an offer is not accepted.
[2] *See Snyder v. Phelps*, 580 F.3d 206 (4th Cir. 2009), *cert. granted*, 130 S. Ct. 1737 (Mar. 8, 2010) (No. 09-751).
[3] *Snyder v. Phelps*, No. 09-751, slip op. (U.S. Mar. 2, 2011), *aff'g* 580 F.3d 206 (4th Cir. 2009) (ruling that noxious, highly offensive protests conducted outside solemn military funerals are protected by the First Amendment when the protests take place in public and address matters of public concern).

procedures, and methods for calculating costs are so varied among the circuits, an accurate interpretation of these costs awards requires that they be analyzed within the unique parameters established by each circuit.

II. Summary and Highlights of Findings

This section presents a brief summary of the findings, all of which are discussed more fully in Parts III and IV of this report.

Implementation of Appellate Rule 39[4]

- Several variables affect the final dollar amount awarded for costs under Fed. R. App. P. 39, including the costs of specific documents and fees that are recoverable, the rate per page, the number of copies of each document, and the calculation method used to arrive at the total amount requested. Because each circuit has adopted a unique combination of these variables, the average costs awarded under each of the four subprovisions of Fed. R. App. P. 39(a) differ across the circuits.

- Each circuit has adopted a maximum rate per page that a party can be reimbursed for copying the briefs, appendix, or record excerpts, ranging from a low of $0.08 per page to a high of $4.00 per page. The majority of the circuits (8) set their maximum rates at $0.10 per page or $0.15 per page. In addition, several circuits will reimburse at higher rates per page for document covers, binding fees, color copies, or for using a particular method of reproduction. Sales tax, tabs, and fasteners are reimbursed at actual cost in some circuits.

- Each circuit has adopted a maximum number of copies of briefs and appendices for which a party is allowed to request reimbursement. Most circuits start with a set number of copies of briefs for which costs are recoverable, ranging from 7 to 16 copies, allowing for additional copies for each separately represented party or party served in the case. Other circuits establish a fixed number of briefs and their allowable copies range from a low of 6 to a high of 15 copies. Similarly, for appendices or record excerpts, some circuits (3) have a fixed number recoverable ranging from 3 to 10 copies. The majority of circuits establish a maximum set number of copies of an appendix for which duplication costs are recoverable, ranging from a low of 2 to a high of 16 copies, which can be increased by the number of separately represented parties served in the case.

- The majority of appellate courts (10) will reimburse the $450 docketing fee when claimed as Fed. R. App. P. 39 costs. The Ninth, Eleventh, and Federal Circuits interpret

[4] Fed. R. App. P. 39(a) states that unless the law provides or the court orders otherwise: (1) if an appeal is dismissed, costs are taxed against the appellant, unless the parties agree otherwise; (2) if a judgment is affirmed, costs are taxed against the appellant; (3) if a judgment is reversed, costs are taxed against the appellee; (4) if a judgment is affirmed in part, reversed in part, modified, or vacated, costs are taxed only as the court orders.

Fed. R. App. P. 39(e)(4) as requiring the eligible party to seek reimbursement of the docketing fee from the district court.

- Nine circuits have a standard form for requesting Fed. R. App. P. 39 costs, and seven of the circuits will reject a bill of costs for filing unless it is submitted on this standard form. Although variations exist in level of specificity, these forms require the filer to show that the costs they are requesting adhere to the circuit's standards for maximum rate per page and maximum copies reimbursable. Except in the Seventh and Eighth Circuits, parties must seek reimbursement for their actual printing costs incurred if these are less than what would be permissible under the maximum rate per page in that circuit.

Results of Docket Search for Fed. R. App. P. 39 Costs Awards

- Except for the Federal Circuit, a CM/ECF search identified costs awards issued during calendar years 2009 and 2010 (extended to include appeals with costs awards through February 2011) in the circuit courts of appeals. The final numbers of costs awards identified in the Second and Eleventh Circuits were small because both circuits have only been live with CM/ECF since January 4, 2010, and their databases only include cases filed after their live date. The costs awarded in the Fifth Circuit during this period are underrepresented because only those costs awards in which the final dollar amount awarded was verifiable through the docket are included in our analysis of costs awards. Due to the large number of costs awards identified in the Ninth Circuit, only 26% of that circuit's awards during 2009-2010 are included in our analysis. In the Seventh Circuit, costs awarded in cases filed prior to its March 31, 2008, CM/ECF live date were not searchable and thus not included in the Seventh Circuit's final database of costs awards.

- Within these parameters, analysis of the costs awards identified in our docket search show that among the circuits included, the majority (65%) of all costs awards went to appellees under Fed. R. App. P. 39(a)(2) upon affirmance of the lower court's judgment. Awards upon dismissal under 39(a)(1) were the smallest group (2%), and costs awarded to the appellant upon reversal under 39(a)(3) (17%) were just slightly more frequent than court-ordered costs under 39(a)(4) when the final judgment was mixed, modified or vacated (16%).

- Although costs were awarded twice as frequently to appellees under Fed. R. App. P. 39(a)(1) and (a)(2), across all circuits average dollar amounts for costs awarded to appellants under Fed. R. App. P. 39(a)(3) and (a)(4) are higher than the average costs awarded to appellees. In fact, appellants received 82% of the costs awarded across the circuits pursuant to Fed. R. App. P. 39(a)(4). Leaving out the larger awards that were identified as outliers in several circuits, the data show that across all circuits average costs awarded to appellees under subsection 39(a)(1) ranged from $84.15 to $198.08 ($153.68 median average award); under subsection 39(a)(2) average costs awarded to appellees ranged from

$18.20 to $345.04 ($219.06 median average costs); under subsection (a)(3) average costs awarded to appellants ranged from $322.17 to $1,584.17 (median average costs $690.89); under subsection 39(a)(4) average costs awards to appellants ranged from $454.17 to $1,900.03 (median average costs award $807.50).

Analysis of Outlier Awards

- The $16,510 in costs awarded to appellants by the Fourth Circuit in *Snyder* is one of the costs awards identified from our search as an "outlier" costs award, or a costs award greater than the range established by the majority of awards issued in a particular circuit under one of the subprovisions of Fed. R. App. P. 39(a)(1)-(4). We identified 32 awards as outliers from the 1,380 total costs awards included in our analysis. Eighty-eight percent of these larger than normal outlier awards (26 out of 32) were issued to the appellant under Fed. R. App. P. 39(a)(3) and 39(a)(4). Reimbursements for the costs of copying a large appendix or record excerpt made up the largest percentage of the total costs award—between over 80% and 96% of the total amount awarded for the majority of these outlier awards.

- The average page length of the appendix in these outlier awards was 3,605 pages and the average number of copies of the appendix reimbursed was 11. Outlier awards resulting from large appendix costs were found in circuits with high ($4.00) and low ($0.10) maximum rates per page and with low (2 plus copies) and high (11 plus copies) numbers of appendices reimbursable.

The *Snyder* case and Taxation of Costs in the Fourth Circuit Court of Appeals

- The $16,510 fee for the appellants costs taxed against Mr. Snyder is an outlier in terms of dollar amount as well as the frequency with which such awards occurred. However, this dollar amount is much larger than the other outlier awards, which, with the exception of the Fourth Circuit, typically fall within the range of $2,000 and $6,000. Outlier awards in the Fourth Circuit ranged between $6,562 and $13,893. Excluding the outliers, average costs awards issued under Fed. R. App. P. 39(a)(3) ($1584.17) and 39(a)(4) ($1625.01) in the Fourth Circuit are significantly higher than average costs awarded in the other circuits. The $4.00 per page cap on recoverable costs is much higher than those maximum rates per page adopted by the other circuits, which range from $.08 to $.50 for normal copies.

- Under the Fourth Circuit's $4.00 per page cap, appellants in *Snyder* were permitted to recover their actual printing costs at $0.50 per page for 8 copies of their 3,840 page appendix plus costs of covers and binding totaling $15, 710.80 (95% of the total award). Under this $4.00 per page cap, prevailing parties in the Fourth Circuit could be reimbursed for actual printing charges up to $3.99 per page which could result in very large awards

against appellees in cases such as *Snyder* where appellants have filed a very large appendix.

- Viewed within this context the award in the *Snyder* case was a foreseeable result of and consistent with the implementation of Fed. R. App. P. 39 by the Fourth Circuit.

Taxation of Costs in the Sixth Circuit Court of Appeals

- In 2009, the Sixth Circuit revised its rule for awarding costs to take into account the reduced number of copies of briefs and appendices required to be filed under their new rules governing electronic filing. Under the new rule, which applies to cases filed on or after June 1, 2008, a represented party in a non-death penalty case or in a case that does not involve complaints of attorney misconduct, who filed their brief and appendix electronically as required, is not entitled to recover costs for any copies of briefs and appendices unless the court ordered paper filing or the documents were filed under seal. Upon reversal or if awarded costs under Fed. R. App. P. 39(a)(4), appellants are limited to claiming reimbursement for their filing fee. Under former Sixth Circuit Rule 39(b), the parties were allowed to recover costs for seven copies of each brief plus two for each party served and six copies of the joint appendix plus one copy for each party served.

- Because of this rule change, we analyzed costs data from cases filed before June 1, 2008, separately from costs data obtained from those cases filed afterwards. Our analysis shows that for cases filed before June 1, 2008, there was a wide range of costs awarded by the Sixth Circuit under Fed. R. App. P. 39(a)(2), (a)(3) and (a)(4). Although there were only 11 costs awards issued in cases filed in that circuit after June 1, 2008, signaling in part a decrease in awards issued overall, there appears to also be a downward shift in the dollar amount of costs awarded (awards ranged from $18.20 to $470 under Fed. R. App. P. 39(a)(3) and 39(a)(4) on or after June 1, 2008, compared to $166.38 to $890.28 before that date). Except for one award of $18.20 to an appellee under 39(a)(2) for copying the response brief, the remaining 10 awards were to appellants under either 39(a)(3) or (a)(4). Four of the ten appellants were pro se prisoners (who probably lacked the capacity to file electronically). Apart from the $450 filing fee, amounts awarded for copying costs in these 10 cases were very small, ranging from $4.75 to $56.42.

III. Implementation of Appellate Rule 39 in the Courts of Appeals

Several variables affect the final dollar amount awarded for costs pursuant to Fed. R. App. P. 39, and each appellate court has adopted a unique combination of these variables. The result is that a typical or average costs award in any one circuit results from a different "formula" than is applied in any of the other circuits.

Appellate Rule 39[5] establishes that "unless the court orders otherwise," when an appeal is dismissed, or a judgment is affirmed or reversed, costs will normally be taxed in favor of the prevailing party. If the judgment is mixed (affirmed in part, reversed in part), modified, or vacated, the court will determine whether and to whom costs will be awarded. Appellate Rule 39 requires each court of appeals to establish by local rule a maximum rate for taxing the costs of reproducing copies of briefs, appendices, or records.[6] Appellate Rule 39 requires a party seeking reimbursement for costs to file an itemized and verified bill of costs with the clerk within 14 days after judgment has been entered.[7] The clerk is required to prepare and certify an itemized statement of costs that should be inserted in the mandate at the same time the mandate is issued or added to the mandate at a later time.[8] Appellate Rule 39 also makes clear that certain costs of the appeal are not reimbursable to a party otherwise entitled to costs under Rule 39, and a separate request must be made in order to recover these costs in the district court.[9]

The variables that affect the final dollar amount awarded in a particular circuit, when the prevailing party asks to be reimbursed for their costs on appeal, include the specific documents and fees that are recoverable, the rate permitted for copying each page, the number of copies of each document allowed to be claimed, and the calculation method the requesting party must use to arrive at the final amount requested. Every circuit court has adopted local rules to further implement Appellate Rule 39, and some have gone further to address the issue in internal operating procedures and/or by providing a standard bill of costs form to parties eligible to claim costs. The individual circuit profiles in the Appendix summarily reproduce the specific local rules, procedures and forms (if any) for implementing Rule 39 in each individual circuit. The presentation of these sources identifies their relationship to the establishment of maximum rates, maximum numbers of copies, and procedural requirements for claiming costs. These local rules, procedures, and forms define the individual variables in each circuit's unique formula for awarding costs under Fed. R. App. P. 39. A summary comparison of the various approaches currently adopted by the circuits to define each of these variables in the Fed. R. App. P. 39 costs equation is presented below.

[5] Fed. R. App. P. 39(a)(1)-(4).
[6] Fed. R. App. P. 39(c).
[7] Fed. R. App. P. 39(d).
[8] *Id.*
[9] Fed. R. App. P. 39(e). Items not taxable as costs under FRAP 39 include the preparation and transmission of the record, the reporter's transcript, premiums paid for a supersedes bond or other bond to preserve rights pending appeal, and the $5 fee for filling notice of appeal in the district court.

A. Maximum Rates

As required by Fed. R. App. P. 39(c), every circuit has adopted maximum rates chargeable per page for making copies of briefs, appendices, and record excerpts where applicable. Fed. R. App. P. 39(c) cautions that the "rate must not exceed that generally charged for such work in the area where the clerk's office is located and should encourage economical methods of copying." Except for the Seventh and Eighth Circuits, which allow for recovery at the maximum rates established per page regardless of actual costs, the other circuit rules tax the costs of reproducing copies at actual costs or at the maximum rates established, whichever is less. As shown in Table 1 below, maximum rates per page range from a low of $0.08 per page to a high of $4.00 per page, with the majority of circuits (8 circuits) setting their maximum rates at $0.10 per page or $0.15 per page. Two circuits have adopted different rates depending upon the manner of reproduction. The Eleventh Circuit allows $0.15 per copy for "in-house" copying and up to $0.25 per copy for commercial reproduction supported by receipts. The Third Circuit will reimburse up to $4 per page if reproduction is by offset or typography. Several circuits allow taxation at different rates for the costs of copying distinct parts of the brief, appendix, or record excerpt. As shown below in Table 1, seven circuits allow parties to recover the costs of copying the covers of briefs, appendices, or record excerpts at a higher rate, ranging from $0.20 per copy to $2.00 per copy. In addition, the District of Columbia allows a higher fee for color copies, and the Federal Circuit will allow a maximum of $6.00 per page for the table of page numbers of designated materials, the originals of briefs, and the table of contents for the appendix. Several circuits permit recovery for the costs of binding briefs, appendices, and record excerpts and establish maximum rates per copy ranging from $1.50 per copy to $4. Miscellaneous items such as fasteners are reimbursed up to a maximum rate and tabs at actual cost. Finally, sales tax, if charged for commercial printing, is explicitly recoverable at actual cost in three circuits.

Table 1

Circuit	Maximum Rates Established in the Courts of Appeals for Taxation of Costs under Federal Rule of Appellate Procedure 39				
	For copies of briefs, appendices, or record excerpts	**For copies of covers of briefs, appendices, or record excerpts**	**For costs of binding for briefs, appendices, or record excerpts**	**Sales Tax Charged (if commercially copied)**	**Other Rates for Miscellaneous Items**
First	$0.10 per page	$0.20 for front and back cover per copy	$3.50 per copy	Not Recoverable	N/A
Second	$0.20 per page	Not Recoverable	Not Recoverable	Not Recoverable	N/A
Third	$0.10 per page for photocopying (in house or commercial) $4.00 per page for 20 copies or less for reproduction (by offset or typography)	$40 for 20 copies or less for photocopying (in house or commercial) $50 for 20 copies or less for reproduction (by offset or typography)	$4.00 per copy for photocopying (in house or commercial) $4.00 per copy for reproduction (by offset or typography)	Applicable Rate for both reproduction (by offset or typography)or photocopying (in house or commercial) *Sales tax must be actually paid to a commercial photocopying service.	N/A

Circuit	Maximum Rates Established in the Courts of Appeals for Taxation of Costs under Federal Rule of Appellate Procedure 39				
	For copies of briefs, appendices, or record excerpts	**For copies of covers of briefs, appendices, or record excerpts**	**For costs of binding for briefs, appendices, or record excerpts**	**Sales Tax Charged (if commercially copied)**	**Other Rates for Miscellaneous Items**
Fourth	$4.00 per page of photographic reproduction of typed material	Not Recoverable[10]	Not Recoverable	Not Recoverable	N/A
Fifth	$0.15 per page	$0.25 per page	$1.50 per required spiral binding	Applicable rate if commercially printed	*Actual costs of required tabs to separate portions of record excerpts
Sixth (rates apply to cases filed before and after 6/1/08)	$0.25 per page including covers, index and table of authorities	Not Recoverable	Not Recoverable	Not Recoverable	N/A
Seventh	$0.10 per page *includes costs of reproducing separate exhibits to appendices pursuant to FRAP 30(e)	$2.00 per copy	$2.00 per copy	Not Recoverable	N/A
Eighth	$0.15 per page *Includes costs of copying a separate addenda to brief under 8th Cir. R. 28A(b)(2)	$2.00 per copy	$2.00 per copy	At applicable rate	N/A
Ninth	$0.10 per page	Not Recoverable	Not Recoverable	Not Recoverable	N/A
Tenth	$0.50 per page	Not Recoverable[11]	Not Recoverable	Not Recoverable	N/A
Eleventh	$0.15 per page for in-house reproduction $0.25 per page for commercial reproduction *includes costs for reproduction of statutes, rules, and regulations when set out in separate addenda to brief under FRAP 28(f)	Not Recoverable	Not Recoverable	Not Recoverable	N/A
District of Columbia (rates effective 5/13/02 to 11/1/10)	$0.07 per page for text, index and tabular matter $1.02 per page for color matter	$0.20 per front cover $0.11 per back cover	Not Recoverable	Not Recoverable	$2.28 for fasteners (per volume)

[10] Although recovery of separate costs for covers, binding and sales tax is not permitted under Fourth Circuit policy, these costs were awarded as part of the requesting parties actual printing costs in several cases included in our analysis.

[11] Although separate recovery for costs of covers, binding and sales tax is not permitted according to the Tenth Circuit policy, and explicitly rejected in several cases, these costs were awarded as part of the requesting parties' actual printing costs in several cases included in our analysis.

Circuit	Maximum Rates Established in the Courts of Appeals for Taxation of Costs under Federal Rule of Appellate Procedure 39				
	For copies of briefs, appendices, or record excerpts	**For copies of covers of briefs, appendices, or record excerpts**	**For costs of binding for briefs, appendices, or record excerpts**	**Sales Tax Charged (if commercially copied)**	**Other Rates for Miscellaneous Items**
District of Columbia (rates effective 11/1/10)	$0.10 per page for text, index and tabular matter $0.51 per page for color matter	$0.57 per front cover $0.49 per back cover	Not Recoverable	Not Recoverable	$2.28 for fasteners (per volume)
Federal	$0.08 per page for copying and collating $6.00 per page for the table of page numbers of designated materials, the originals of briefs, and the table of contents for the appendix	$2.00 per copy	$2.00 per copy	Not Recoverable	N/A

B. Maximum Number of Copies

Although Appellate Rule 39 only limits the number of copies taxable to those that are "necessary," most circuits have set a maximum number of briefs, appendices, and record excerpts for which the party can seek reimbursement by explicitly providing numerical limits in their local rule. Others have adopted an approach similar to Fed. R. App. P. 39 by providing that the court will only reimburse for a "necessary,"[12] "required,"[13] or "reasonable"[14]number of copies. In those circuits using the latter approach, the local rules establish that the number of briefs, appendices, or record excerpts the parties are required to file with the court serves as the de facto limit for the maximum number of copies taxable as costs. If the required number of copies for filing for briefs and appendices is not addressed in the circuits' rules or if these rules have not adopted different requirements for pro se filers, the default numerical requirements established in Federal Rules of Appellate Procedure 30(a)[15] and 31(b)[16] apply.

[12] *See* Appendix, Summary of Materials Addressing FRAP 39 costs for the following circuits: Second, Fourth and Tenth.

[13] *See* Appendix, Summary of Materials Addressing FRAP 39 costs for the following circuits: Ninth, Eleventh, and District of Columbia.

[14] *See* Appendix, Summary of Materials Addressing FRAP 39 costs for the Seventh Circuit.

[15] Fed. R. App. P. 30(a) (3) establishes that unless the court by local rule or by order in a particular case requires the filing or service of a different number, the appellant must file 10 copies of the appendix with the brief and must serve one copy on counsel for each party separately represented. An unrepresented party proceeding *in forma pauperis* must file 4 legible copies with the clerk, and one copy must be served on counsel for each separately represented party.

[16] Fed. R. App. P. 31(b) establishes that unless the court by local rule or by order in a particular case requires the filing or service of a different number, 25 copies of each brief must be filed with the clerk and 2 copies must be served on each unrepresented party and on counsel for each separately represented party. An unrepresented party proceeding *in forma pauperis* must file 4 legible copies with the clerk, and one copy must be served on each unrepresented party and on counsel for each separately represented party.

Table 2

Circuit	Maximum Copies of Briefs and Appendices Recoverable in the Courts of Appeals as Costs under Federal Rule of Appellate Procedure 39[17]	
	Maximum Number of Briefs	**Maximum Number of Appendices**
First	9 copies of each brief plus • 1 for the filer and • 2 for each party required to be served with paper copies of the brief	5 copies of each appendix plus • 1 for the filer and • 1 for each unrepresented party and each separately represented party
Second	6 copies of each brief	3 copies of each appendix
Third	10 copies of each brief plus • 2 copies for each party separately represented *20 copies maximum for reproduction (by offset or typography)	4 copies of each appendix plus • 1 copy for each party separately represented *20 copies maximum for reproduction (by offset or typography)
Fourth	8 copies of the brief *6 copies if filer was court appointed counsel* *4 copies if filer was proceeding ifp and not represented by court-appointed counsel*	6 copies of the appendix plus • 1 for each copy served on counsel for each party separately represented *5 copies if filer was appointed counsel* *4 copies if filer was proceeding ifp and not represented by court-appointed counsel*
Fifth	15 copies of the brief	10 copies of an appendix or record excerpts
Sixth[18] (cases filed before 6/1/08)	7 copies of each brief plus • 2 copies for each party required to be served	6 copies of the joint appendix plus • 1 copy for each party required to be served
Sixth[19] (cases filed on or after 6/1/08)	0 copies unless the brief was filed by a party unrepresented by counsel, filed under seal or if the brief relates to complaints of attorney misconduct, and then recovery permitted only for 2 copies of briefs for each party required to be served	0 copies unless leave of court was granted to file a paper appendix or the case is a death penalty case, and then recovery permitted for only 1 copy of appendix for each party required to be served
Seventh[20]	15 copies of briefs, including if filed by appointed counsel	10 copies of the appendix plus • 1 for each copy served on counsel for each party separately represented *4 copies plus 1 for each copy served on counsel for each separately represented party if filer is an unrepresented party proceeding ifp*
Eighth	10 copies of each brief or separate addenda plus • 1 copy for each party separately represented	3 copies of each appendix plus • 1 copy for each party separately represented
Ninth	9 copies plus • any copies required to be served	5 copies of the excerpts of record plus • 1 copy for each party required to be served

[17] The numbers in this table apply unless the court orders a greater number of briefs, appendices or record excerpts to be filed in a particular case. *See* Appendix, Summary of Materials Addressing FRAP 39 costs for each of the circuit courts.

[18] Former 6 CIR Rule 39 (b) is in effect only for cases filed before 6/1/08.

[19] Current 6 CIR. R. 39(b) establishes the number of briefs and appendices reimbursable only if the court allows a paper brief or paper appendix to be filed. The Sixth Circuit's filing requirements for briefs and appendices are found in 6 Cir. Rules 25 & 30 and apply unless the court orders otherwise. *See* Appendix, Summary of Materials Addressing FRAP 39 costs for the Sixth Circuit.

[20] Brief numbers derived from the Seventh Circuit's filing requirements for briefs. Since Seventh Circuit Rule 30, which addresses requirements for appendices, makes no reference to the number of appendices required to be filed, the default rule for the required number of appendices established by Fed.R. App. P. 30(a)(3) is adopted.

Circuit	Maximum Copies of Briefs and Appendices Recoverable in the Courts of Appeals as Costs under Federal Rule of Appellate Procedure 39[17]	
	Maximum Number of Briefs	**Maximum Number of Appendices**
Tenth	7 copies of the brief	2 copies of the appendix plus • 1 copy for each party to the appeal that was served
Eleventh	7 copies of the brief plus • 2 copies for each party signing the brief plus • 1 copy for each copy served on counsel for each separately represented party *4 copies of the brief if filer is pro se proceeding ifp*	5 copies of record excerpts *1 copy of record excerpts if filer is pro se proceeding ifp* *0 copies of record excerpts if filer is incarcerated pro se party*
District of Columbia	12 copies of briefs (includes 1 copy for original brief) 9 copies of initial briefs(8 if filed electronically) and 9 copies of final brief (includes 1 copy for original brief) if deferred appendix method is used *1 copy of original brief if filer is unrepresented person proceeding ifp*	11 (10 if filed electronically) copies of the appendix plus • 1 copy for each copy served on counsel for each separately represented party
Federal Circuit	16 copies of briefs plus • 2 copies for each additional party plus • any copies required or allowed (e.g., confidential briefs) plus • 1copy for each copy of the table or physical compilation of the designated materials served on another party	16 copies of appendices plus • 2 copies for each additional party plus • any copies required or allowed (e.g., confidential appendices) plus • any copy of the table or physical compilation of the designated materials served on another party

1. Maximum Number of Copies—Briefs

As Table 2 above shows, several circuits have definitive numerical limitations on briefs that apply to all appeals, with the maximum number of reimbursable copies of briefs ranging from a low of 6 to a high of 15.[21] Other circuits have adopted more flexible limitations on the number of copies recoverable such that the maximum number of reimbursable copies of briefs will vary with the particular circumstances of each appeal. In addition to reimbursing the costs of a set number of briefs, ranging from 7 to 16 copies, these more flexible rules also allow costs for copies for each party separately represented or required to be served, or for costs of additional copies that are required or allowed by the court in a particular case.[22]

2. Maximum Number of Copies—Appendices

For appendices or record excerpts, only the Second Circuit (3 copies), the Fifth Circuit (10 copies), and the Eleventh Circuit (5 copies of record excerpts) have set a maximum number of copies for which costs can be recovered that applies to all appeals. The remaining circuits have a set number of appendices that can be claimed for reimbursement, ranging from a low of 2 to a high

[21] *See* Appendix, Summary of Materials Addressing FRAP 39 costs for the following circuits: Second (6 copies max), Tenth (7); Fourth (8) District of Columbia (12), Fifth (15), and Seventh (15).
[22] *See* Appendix, Summary of Materials Addressing FRAP 39 costs for the following circuits: First, Third, Eighth, Ninth, Eleventh, and the Federal Circuit.

of 16 copies,[23] but allow costs to be claimed for additional copies of appendices that are required or allowed by the court in particular cases.

3. The Sixth Circuit's Revised Formula for Awarding Fed. R. App. P. 39 Costs

The Sixth Circuit's rule was intentionally not included in the previous comparison of circuit awards of recoverable costs because that circuit's rule has been revised to reflect changes in practices due to electronic filing. For cases filed after June 1, 2008, Sixth Circuit Rule 39(b)[24] allows an eligible party to seek reimbursement for briefs up to a maximum of two copies for each party that was required to be served, but *only* if the court allowed paper briefs to be filed in that particular appeal. Sixth Circuit Rule 25 requires that all documents submitted in cases filed on or after June 1, 2008, must be filed electronically, unless they fall within Rule 25(b)'s listing of 11 documents that must be filed in paper form. Exceptions are made for documents filed by *pro se* parties, documents filed under seal, and documents relating to complaints of attorney misconduct. Similarly, under Rule 39(b) an eligible party is allowed to recover costs for one copy of an appendix for each party that was required to be served, but *only* if the court allowed a paper appendix to be filed in that appeal. Sixth Circuit Rule 30 makes it clear that leave of court is required before a paper appendix can be filed, except for death penalty cases, which require five copies of a paper appendix to be filed. Thus, a represented party in a non-death penalty case or a case that does not involve complaints of attorney misconduct who filed the brief and appendix not under seal but electronically as required (unless the court ordered otherwise) is not entitled to recover costs for any copies of briefs and appendices.

Under former Sixth Circuit Rule 39(b), the parties were allowed to recover costs for 7 copies of each brief plus two copies for each party required to be served and 6 copies of the joint appendix plus one copy for each party required to be served. Because of this significant decrease in the number of briefs and appendices parties are permitted to recover as costs, costs data from cases filed before June 1, 2008 were analyzed separately from costs data collected from cases filed on or after June 1, 2008, to identify any differences in the size of costs awards and identity of the party requesting costs.[25]

C. Reimbursable Costs

Consistent with Fed. R. App. P. 39(c), all circuits recognize Fed. R. App. P. 39 costs to include costs for reproducing the textual pages of briefs, appendices, and record excerpts. However, there are differences among the circuits with respect to whether or not additional items or fees are recognized as reimbursable Fed. R. App. P. 39 costs. Several circuits permit eligible parties to claim reimbursement at higher rates per page for the binding of briefs, appendices, and record excerpts, and for reproducing the covers of these documents, copying material such as statutes and regulations and exhibits set out as a separate addenda to a brief or appendix, sales tax if

[23] *See* Appendix, Summary of Materials Addressing FRAP 39 costs for the following circuits: First, Third, Fourth, Seventh, Eighth, Ninth, Tenth, District of Columbia and the Federal Circuit.
[24] *See* Appendix, Summary of Materials Addressing FRAP 39 costs for the Sixth Circuit for relevant parts of Sixth Circuit Rules 39, 25 and 30.
[25] *See* Appendix, Analysis of Costs Awards for the Sixth Circuit showing separate analysis of costs awards in the Sixth Circuit.

commercially copied, and miscellaneous items such as fasteners and tabs. These items are considered by these circuits to be incidental to the costs of producing copies of briefs, appendices and record excerpts specifically permitted under Appellate Rule 39(c).

Appellate Rule 39(e) specifically states that certain costs incidental to an appeal must be settled at the district court level. However, in arriving at the final amount allowable for taxation from the original amount requested in a motion for costs, Clerks in all circuits have denied requests for, among other things, reimbursement for transcripts, postage, courier, UPS, and FedEx fees, attorney fees, travel expenses, online research fees, paralegal fees, bond costs, copying of documents/motions other than briefs, appendices or excerpts (e.g., costs for petitions for panel or en banc rehearings, or for initial en banc hearings), and the costs of research or preparing the record. Although the items mentioned above are clearly not permitted to be recovered as costs under Fed. R. App. P. 39 and were denied recovery in the majority of cases, the examination of numerous costs awards showed that these nonpermissable costs are sometimes mistakenly reimbursed as part of actual costs incurred when included in a long listing of charges on commercial printing receipts. For example, in one Fourth Circuit case, the $8,005.98 reimbursement of the appellant's actual printing costs under Fed. R. App. P. 39(a)(4) included $450 for consultation fees and $49.43 for FedEX/UPS fees. Other items mistakenly reimbursed in other cases include transcript fees and costs for copying miscellaneous documents or motions not part of briefs, appendices, or record excerpts.

Apart from costs associated with copying and printing, the only other item the majority of circuit courts will reimburse is the $450 docketing fee.[26] Although normally the docket fee is awarded to the appellant(s), the appellee(s) may recover a docket fee in their capacity of a cross-appellant(s). Ten appellate courts identify the docket fee as recoverable costs,[27] by either listing it as a recoverable item on their required Bill of Costs Form[28] and/or specifically including the courts of appeals' docket fee as a recoverable costs in their local rule or internal procedures,[29] or by informal policy.[30] Although weighted heavily in favor of awarding the docket fee as costs, there appears to be a split as to whether Appellate Rule 39(e) permits the docketing fee to be reimbursed in the courts of appeal. The Ninth, Eleventh and the Federal[31] Circuits have interpreted Appellate Rule 39(e)(4), which states that the "fee for filing the notice of appeal" must be recoverable from the district court, to include the $450 docketing fee as well as the $5 fee imposed by 28 U.S.C. §1917 for filing a notice of appeal in the district court. The majority of circuits interpret Appellate Rule 39(e)(4) as only requiring the eligible party to seek reimbursement

[26] The docket fee is imposed by the Judicial Conference of the United States under its delegated authority in 28 U.S.C. Section 1913. The fee is $450 for appeals filed after 4/9/06. If the notice of appeal or petition was filed before 4/9/06, the docketing fee is $250.

[27] *See* Appendix, Summary of Materials Addressing FRAP 39 costs for the following circuits: First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, District of Columbia.

[28] See Appendix, Bill of Cost Forms in the following circuits: First, Second, Third, Fourth, Fifth and District of Columbia.

[29] *See* Appendix, Summary of Materials Addressing FRAP 39 costs for the following circuits: Fourth, Fifth, Sixth, Seventh, Eighth, and District of Columbia.

[30] *See* Appendix, Summary of Materials Addressing FRAP 39 costs for the Tenth Circuit.

[31] See Appendix, Eleventh Circuit Form 23 Bill of Costs Instruction Sheet which states that: "[d]ocketing fees paid in a District Court . . . must be claimed in those courts."

for the $5 notice of appeal filing fee from the district court, and these courts frequently deny this $5 amount when requesting parties include it with their request for reimbursement of the $450 docketing fee.

D. Additional Procedural Requirements for the Recovery of Costs

The majority of the requirements for recovering costs included variously in the circuits' local rules, within internal operating procedures, practice guides or practitioner's handbooks, "frequently asked questions" provided by the clerk, or general orders are largely restatements of the procedural requirements provided under Appellate Rule 39(d) and (e). The most significant additional requirement imposed by the majority of circuits (7)[32] is that in order to be accepted for filing by the clerk, parties must submit their bill of costs on a standard form, usually made available on the court's website, in the Clerk's Office and/or provided to the eligible parties upon issuance of the final judgment. Two additional circuits[33] provide a bill of costs form but will accept a similar form as long as it is itemized and verified with attached receipts for actual printing charges incurred. These forms vary in the level of specificity required, ranging from the very basic listing of costs per item on the Second Circuit's Bill of Costs Form to the very detailed forms required by the District of Columbia and Federal Circuits. Although these forms vary in their appearance and format, most of the forms require the requesting party to perform a similar calculation to arrive at the total costs requested. In these instances the requesting party must calculate the total costs for each item (brief, reply brief, appendix, or record excerpt) by entering the actual number of copies made, pages per copy, actual costs per page incurred, and costs per binding and cover (if permitted and incurred). The rates and the number of copies claimed cannot exceed the maximums established by each circuit. The overall total costs requested is the sum of the totals calculated for the individual items in addition to the filing fee if applicable.

One notable variation is the calculation required by the Fourth Circuit in its Bill of Costs Form: first, counsel is required to list the amount of actual printing charges incurred and attach the itemized bills; second, counsel must calculate the Fourth Circuit Rule 39(a) cap on taxable printing costs by multiplying the number of pages for each formal brief and appendix (based on the page count in the docket entry) by $4.00 per page; and, finally, counsel must enter the lesser of these two amounts as the total printing charges claimed.[34] For example, in *Snyder v. Phelps*[35] the appellants submitted receipts showing $16,060.80 in actually incurred charges for printing copies of their brief, reply, and appendix. The appellants claimed reimbursement for 10 copies of their 32 page brief, 10 copies of their 31 page reply brief, and 8 copies of their 3,840 page appendix (total of 31, 350 pages). Under the Local Rule 39(a) cap at $4.00 per page, appellants had to claim the lesser of $125,400 or $16,060.80 as their printing costs.

The Federal Circuit has adopted a unique procedural practice that requires parties to calculate the bill of costs on the court-provided form, serve this form on each party, and file an original and

[32] *See* Appendix, Summary of Materials Addressing FRAP 39 costs for the following circuits: First, Second, Third, Ninth, Eleventh, District of Columbia, and Federal Circuit.
[33] *See* Appendix, Summary of Materials Addressing FRAP 39 costs for the following circuits: Fourth and Fifth.
[34] *See* Bill of Costs Form for the Fourth Circuit reproduced in the Appendix.
[35] *Snyder v. Phelps*, No. 08-1026 (4th Cir. Oct. 6, 2009).

three copies with the court.[36] However, the Federal Circuit's Bill of Costs Instruction Sheet appears to suggest that counsel should bypass the entire calculation process involved with submitting the required form and stipulate to costs between themselves. Specifically, the Instruction Sheet states that "[i]f costs have been agreed upon by the parties, insert "stipulated costs" and enter the total and grand total billed, and disregard all other items on the form."[37]

IV. Results of the CM/ECF Search for Fed. R. App. P. 39 Costs and Identification of Average Costs Awards in the Circuit Courts of Appeals

A. Description and Limitations of the CM/ECF Search

After comparing the substantive and procedural variations among the circuits as to how Fed. R. App. P. 39 costs are calculated and awarded, we conducted a search of the CM/ECF database of the 12 courts of appeals with live systems[38] to respond to the Committee's inquiry as to what were "typical" costs award amounts under each of the 4 provisions of Fed. R. App. P. 39(a). In order that our analysis of average costs award amounts represent the most recent practices in each circuit, our search of CM/ECF records was limited to appeals that reached final disposition either on the merits or through procedural terminations during calendar years 2009 and 2010, later updated to reflect awards issued through February 2011. We were also restricted by the fact that many of the circuits are new to CM/ECF, but a full two years' worth of records was searchable in all circuits,[39] except for the Second and Eleventh Circuits, both of which went live with CM/ECF on January 4, 2010. The search in the Second and Eleventh Circuits was further constricted by the fact that their databases only include cases filed after their live date; thus, cases filed earlier that January 4, 2010, were not included in the searchable cases. Therefore, the final numbers of costs awards for the Second and Eleventh Circuits were small[40] as we were only able to search cases that were filed after January 4, 2010, reached final disposition, and awarded costs up through February 2011.

We were unable to collect a complete data set of every dollar amount awarded as Fed. R. App. P. 39 costs in calendar years 2009 and 2010 in three other circuits, in addition to the Second and Eleventh Circuits. Only those costs awards in which the final amount awarded was verifiable through the docket are included in the database of awards from which our analyses were con-

[36] *See* Appendix, Summary of Materials Addressing FRAP 39 costs for the Federal Circuit.

[37] *See* the Appendix for a copy of Form 23 Bill of Costs Instruction Sheet, Item (J) and Form 24. Bill of Costs Form for the Federal Circuit.

[38] As of March 2011, all circuits are live with their CM/ECF systems, except for the Federal Circuit. The Eighth Circuit went live in 2006; the Fourth, Sixth, and Tenth Circuits went live in 2007; the First, Third, Seventh, Ninth and DC Circuits went live in 2008; and the Fifth Circuit went live in 2009. Except for the Second, Seventh and Eleventh Circuits, all cases filed in a court after its "live date" along with any pending cases that had activity after the "live date" are included in its database. The Second, Seventh and Eleventh Circuit's databases include only cases filed after their "live date."

[39] Although the Fifth Circuit went live with CM/ECF on February 17, 2009, a full two years of records was searched because the search period was updated to extend through the end of February 2011.

[40] Six costs awards were identified in the Second Circuit, and 18 costs awards were identified in the Eleventh Circuit during our search period. *See* Appendix, Analysis of Costs Awards for the Second and Eleventh Circuits.

ducted. In the Fifth Circuit, there were a number of costs awards issued pursuant to each subsection of Fed. R. App. P. 39 that were identified as approved in the mandate without stating the amount of the award. The bill of costs is referenced as an attachment that was usually not accessible through the docket, therefore these approved costs awards were not included in the Fifth Circuit's database of costs awards because the final amount awarded could not be verified.[41] The Ninth Circuit's database of costs awards is also not complete in that it does not include the dollar amount of every costs award issued under Fed. R. App. P. 39 in 2009 and 2010 because the large number of costs awards identified in the CM/ECF search in the Ninth Circuit prohibited inclusion of each award amount due to time constraints. Our search identified a total of 1,050 awards granted for calendar years 2009 and 2010, including final approvals issued in January and February of 2011. The Ninth Circuit's database of costs awards includes 26% of the total costs awards issued, or approximately every fourth award issued.[42] Finally, since the Seventh Circuit does not convert their pending cases filed before their CM/ECF live date, our database of costs awards for the Seventh Circuit will not include awards issued in cases filed before March 31, 2008.

B. Methods Used to Analyze Fed. R. App. P. 39 Costs Awards and Definition of "Outlier" Costs Awards

A search of appeals in the CM/ECF database that reached final disposition during calendar years 2009 and 2010 (and updated through February 2011) produced a final database of costs awards for each circuit that consisted of verified dollar amounts approved by the court and included in the mandate. The unit of analysis is an individual costs award, not an individual case in which costs were awarded, because there could be more than one costs award issued in a single case. An example is the case of consolidated appeals in which the court may grant separate costs requests from two or more different prevailing parties. Including the award in the final database as an aggregate of total costs awarded in those appeals would result in a misleadingly higher costs award compared to cases with only one costs award issued. In each database, the costs awards were grouped according to the subdivision of Fed. R. App. P. 39(a) under which they were issued. Each subset of awards was analyzed separately. The full results of our analysis of costs awards for each circuit, for each of the four subsections of Appellate Rule 39(a), is presented in the individual circuit profiles in the Appendix. The analysis of costs awards issued pursuant to court order under Rule 39(a)(4) are presented in the aggregate, and then separately for costs awarded to the appellee(s) under Fed. R. App. P. 39(a)(4) and costs awarded to the appellant(s) under Fed. R. App. P. 39(a)(4).

For each subset of costs awards issued under Fed. R. App. P. 39(a)(1)-(4), we calculated the average and median costs awarded during the search period and identified the range of costs

[41] See Appendix, Analysis of Costs Awards for the Fifth Circuit which includes the number of awards issued under each section of FRAP 39(a) that were not included in the Fifth Circuit's final database of costs awards because the amount awarded could not be verified through the docket.

[42] *See* Appendix, Analysis of Costs Awards for the Ninth Circuit for a more detailed description of sampling method used to chose the costs awards included in our analysis of awards in the Ninth Circuit.

awards represented by the data.[43] For many of the circuits, we found it necessary to perform two calculations for the average and median and identify two ranges of costs awards: one including costs awards which we will call "outliers" and the other excluding these outliers. The term "outliers" is used in this context to describe an award that clearly fell outside the range established by the majority of the awards issued under one of the separately analyzed subsections of Fed. R. App. P. 39(a). However, identification of these "outlier" awards should not lead to the conclusion that these awards are not within the normal range for a particular circuit over a larger period of time than the short two-year period adopted for this study. For each circuit with one or more of these outlier awards, it was necessary to analyze the costs data in each subset of data without these outliers because these calculations much closer approximate the "typical" or average and median costs award and the range of costs established by the majority of awards within the timeframe of our study. These outlier awards are examined in greater detail later in this report.

C. Comparison of Costs Awarded in the Circuit Courts of Appeals

Table 3 below contains a between-circuit comparison of the distribution and average costs awarded (not including those costs awards identified as outliers) under each of the four subsections of Appellate Rule 39. Costs awards for the Second and Eleventh Circuits are not included in this table because of the small number of cases that reached final disposition in these circuits during our search period. Further, for reasons described previously, the numbers for the Fifth, Seventh, and Ninth Circuits do not represent all costs awards issued during 2009 and 2010 in these circuits.

Except for the Sixth Circuit's cases filed after June 1, 2008, which fall under their revised local rules, the majority (65%) of costs in all circuits were awarded to appellees under Appellate Rule 39(a)(2) upon affirmance of the lower courts' judgment. Awards upon dismissal under subsection (a)(1) were the smallest group (2%), and costs awarded to the appellant upon reversal under subsection (a)(3) (17%) were just slightly more frequent than court-ordered costs under subsection (a)(4) (16%) when the final judgment was mixed, modified, or vacated.

[43] *See* Appendix. The analysis of costs awards for each circuit court of appeals is presented in a table showing the average, mean and range of awards under each of the four subsections of FRAP 39(a)(1)-(4).

Table 3

Circuit	Costs Awarded Under FRAP 39 During 2009-2010 in the United States Courts of Appeals							
	Distribution of Costs Awards[44]				Average Costs Awards (without outliers)			
	FRAP 39(a)(1)	**FRAP 39(a)(2)**	**FRAP 39(a)(3)**	**FRAP 39(a)(4)**	**FRAP 39(a)(1)**	**FRAP 39(a)(2)**	**FRAP 39(a)(3)**	**FRAP 39(a)(4)**
First	5 (7%)	42 (60%)	11 (16%)	12 (17%)	$84.15	$219.06	$1,023.48	$824.07
Second[45]	—	—	—	—	—	—	—	—
Third	5 (2%)	252 (79%)	29 (9%)	31 (10%)	$179.75	$222.65	$870.13	$1093.20
Fourth	1 (1%)	67 (61%)	16 (15%)	25 (23%)	$180.00	$345.04	$1584.17	$1625.01
Fifth[46]	3 (2%)	96 (74%)	16 (12%)	16 (12%)	$185.30	$104.51	$690.89	$498.94
Sixth[47] (cases filed before 6/1/08)	0	17 (48%)	8 23%)	10 (29%)	N/A	$280.16	$443.83	$592.42
Sixth (cases filed on or after 6/1/08)	0	1 (9%)	3 (27%)	7 (64%)	N/A	$18.20	$322.17	$389.96
Seventh[48]	2 (1%)	125 (63%)	39 (20%)	32 (16%)	$142.91	$198.22	$627.47	$600.07
Eighth	1 (1%)	72 (70%)	18 (18%)	11 (11%)	$141.60	$269.32	$813.36	$874.88
Ninth[49]	4 (1%)	188 (69%)	57 (21%)	23 (9%)	$153.68	$241.49	$380.84	$460.49

[44] The unit of analysis is an individual costs award, not an individual case in which costs were awarded, because there could be more than one costs award issued in a single case (e.g., consolidated appeals). Including the award in the final database as an aggregate of total costs awarded in those appeals would result in a misleadingly higher costs award compared to cases with only one costs award issued.

[45] The Second Circuit went live with CM/ECF on January 4, 2010 and did not convert their pending cases from their old system. Thus, the final database of awards was small (only 6 costs awards identified) because we were only able to search for costs awards from cases that were filed after January 4, 2010, reached final disposition and awarded costs up through February 2011. *See* Appendix, Analysis of Costs Awards for the Second Circuit.

[46] Only those costs awards in which the final amount awarded could be verified through the docket are included in the analysis of costs awarded. In the Fifth Circuit, there were a number of costs awards approved under each subsection of FRAP 39 and referenced in the mandate but they were not included because the final amount awarded was not accessible for verification.

[47] For cases filed after June 1, 2008, the Sixth Circuit has revised its rules regarding the number of briefs and appendices recoverable as costs to take into account the Sixth Circuit's rules pertaining to electronic filing of cases. Thus, awards issued during the search period in cases filed prior to June 1, 2008 are analyzed separately from costs awards issued in appeals filed on or after June 1, 2008.

[48] The Seventh Circuit went live with CM/ECF on March 31, 2008, and since they are not converting their pending cases from their old system to CM/ECF, our database of costs awards will not include final costs awarded in cases filed before March 31, 2008.

Circuit	Costs Awarded Under FRAP 39 During 2009-2010 in the United States Courts of Appeals							
	Distribution of Costs Awards[44]				Average Costs Awards (without outliers)			
	FRAP 39(a)(1)	FRAP 39(a)(2)	FRAP 39(a)(3)	FRAP 39(a)(4)	FRAP 39(a)(1)	FRAP 39(a)(2)	FRAP 39(a)(3)	FRAP 39(a)(4)
Tenth	4 (6%)	40 (59%)	12 (17.5%)	12 (17.5%)	$96.06	$203.27	$537.91	$899.78
Eleventh[50]	—	—	—	—	—	—	—	—
District of Columbia	4 (9%)	20 (46%)	5 (12%)	14 (33%)	$198.08	$172.64	$800.70	$1021.91
Federal[51]	—	—	—	—	—	—	—	—

In all circuits average costs awarded to appellants were higher than those awarded to appellees. Average costs awarded under subsection (a)(1) ranged from $84.15 to $198.08, with a median average costs of $153.68. Under subsection (a)(2), average costs ranged from $18.20 (Sixth Circuit post June 1, 2008, cases) to $345.04, with a median average costs of $219.06. Average costs awarded under subsection (a)(3) ranged from $322.17 to $1,584.17, with a median average costs award of $690.89. Court-ordered costs under subsection (a)(4) ranged from $454.17 to $1,625.01, with a median average costs award of $824.07. As shown in the individual circuit analyses in the Appendix, when costs awards under subsection (a)(4) are separated between costs awarded to appellees and those awarded to appellants, costs were taxed in favor of appellants in 82% of these awards and in the appellees' favor in the remaining 18%. Our findings show that since most costs awards issued under subsection (a)(4) were taxed in favor of appellants, average costs awarded to appellants under subsections (a)(3) and (a)(4) are consistently higher than those awarded to appellees under subsections (a)(1) and (a)(2) in all circuits. In a typical appeal, the appellant files an opening brief, appendix, and reply brief in addition to paying the $450 docketing fee, and therefore on average the appellant has incurred a larger dollar amount of costs recoverable under Fed. R. App. P. 39. Thus, the results of our CM/ECF search across the circuits showing appellants receiving higher costs awards are consistent with normal expectations.

[49] The large number of costs awards identified in the Ninth Circuit prohibited inclusion of each award amount in the final analysis due to time constraints. For calendar year 2009, 559 costs awards were issued, and for calendar year 2010 (including approvals issued in January and February of 2011), 491 costs awards were issued. For the Ninth Circuit, the analysis of costs awards presented in this report includes approximately 25% of the awards issued in 2009 and 25% of the awards issued in 2010 through early 2011 (26% of total costs awards issued), or approximately every fourth award issued. Note: Costs awarded in the Ninth Circuit do not include the $450 docket fee because it is not reimbursable as costs in the Ninth Circuit.

[50] The Eleventh Circuit went live with CM/ECF on January 4, 2010 and did not convert their pending cases from their old system. Thus, the final database of awards was small (only 18 costs awards were identified) because we were only able to search for costs awards from cases that were filed after January 4, 2010, reached final disposition and awarded costs up through February 2011. *See* Appendix, Analysis of Costs Awards for the Eleventh Circuit.

[51] Costs data was not obtained from the Federal Circuit because the Federal Circuit is not live with CM/ECF.

As explained in Part III, the rate per page, number of copies, fees, and other recoverable items directly affect a costs award issued under Fed. R. App. P. 39. Costs awarded in a particular circuit are a product of the rates and copy limitations adopted as well as fees or costs for additional items recoverable. Therefore, we would expect average costs should be higher in those circuits that have a higher maximum rate per page and/or allow a greater number of copies of briefs and appendices to be recoverable as costs. In Table 4, the circuits are ranked from highest to lowest according to maximum rates, maximum number of briefs and appendices, and average Fed. R. App. P. 39 costs awards identified in our CM/ECF search. For all circuits, Column 2 indicates whether or not the docket fee is reimbursable.

Table 4

Circuit	Implementation of FRAP 39 and Average Costs Awarded Under FRAP 39 in 2009 and 2010 in the United States Courts of Appeals														
	Maximum Rates, Copies and Fees Recoverable under FRAP 39[52]							Average Costs Awards Under FRAP 39 in 2009 and 2010[53] (without outliers)							
	Docket Fee?	Max Fee/Page	Rank	Max # Copies Brief	Rank	Max # Copies Appendix	Rank	FRAP 39(a)(1)	Rank	FRAP 39(a)(2)	Rank	FRAP 39(a)(3)	Rank	FRAP 39(a)(4)	Rank
First	yes	$0.10	9	9 plus	8	5 plus	8	$84.15	9	$219.06	6	$1,023.48	2	$824.07	6
Second[54]	yes	$0.20	4	6	13	3	12	—	—	—	—	—	—	—	—
Third	yes	$0.10 $4.00[55]	8	10 plus	5	4 plus	10	$179.75	4	$222.65	5	$870.13	3	$1093.20	2
Fourth	yes	$4.00	1	8	9	6 plus	5	$180	3	$345.04	1	$1584.17	1	$1625.01	1
Fifth[56]	yes	$0.15	6	15	3	10	3	$185.30	2	$104.51	10	$690.89	6	$498.94	9

[52] The Circuits are ranked from highest to lowest (i.e., court with highest rate/page is ranked as 1) for the maximum rate per page, the maximum number of briefs and the maximum number of appendices established by that circuit for taxation of copying costs under FRAP 39. Two circuits with the same value for maximum rates or maximum number of briefs or appendices will be ranked consecutively according to circuit number (i.e., Third circuit will be ranked one higher than the Seventh if both have identical values for maximum rates or maximum briefs or appendices). A plus next to the maximum number of copies of briefs or appendices allowed indicates the circuit's rule permits additional copies depending upon circumstances of each case. *See* Tables 1 & 2 *infra* for a more detailed description of each circuit's rules with respect to maximum rates and maximum copies reimbursable as FRAP 39 costs. *See also* Appendix, Summary of Materials Addressing FRAP 39 Costs for each individual circuit court of appeals.

[53] Courts are ranked from highest to lowest according to average costs awards identified in our CM/ECF search (i.e., the court with the highest average costs is ranked as 1).

[54] The Second Circuit went live with CM/ECF on January 4, 2010 and did not convert their pending cases from their old system. Thus, the final database of awards was small (only 6 costs awards identified) because we were only able to search for costs awards from cases that were filed after January 4, 2010, reached final disposition and awarded costs up through February 2011. *See* Appendix, Analysis of Costs Awards for the Second Circuit.

[55] $4.00 per page for 20 copies or less for reproduction (by offset or typography). *See* Appendix, Summary of Materials Addressing FRAP 39 Costs for the Third Circuit.

Circuit	Implementation of FRAP 39 and Average Costs Awarded Under FRAP 39 in 2009 and 2010 in the United States Courts of Appeals														
	Maximum Rates, Copies and Fees Recoverable under FRAP 39[52]							Average Costs Awards Under FRAP 39 in 2009 and 2010[53] (without outliers)							
	Docket Fee?	Max Fee/Page	Rank	Max # Copies Brief	Rank	Max # Copies Appendix	Rank	FRAP 39(a)(1)	Rank	FRAP 39(a)(2)	Rank	FRAP 39(a)(3)	Rank	FRAP 39(a)(4)	Rank
Sixth[57] (cases filed before 6/1/08)	yes	$0.25	3	7 plus	11	6 plus	6	0	N/A	$280.16	2	$443.83	9	$592.42	8
Sixth (cases filed on or after 6/1/08)	yes	$0.25	3	0[58]	14	0[59]	14	0	N/A	$18.20	11	$322.17	11	$389.96	11
Seventh[60]	yes	$0.10	10	15	2	10 plus	4	$142.91	6	$198.22	8	$627.47	7	$600.07	7
Eighth	yes	$0.15	7	10 plus	6	3 plus	11	$141.60	7	$269.32	3	$813.36	4	$874.88	5
Ninth[61]	no	$0.10	11	9 plus	7	5 plus	7	$153.68	5	$241.49	4	$380.84	10	$460.49	10
Tenth	yes	$0.50	2	7	10	2 plus	13	$96.06	8	$203.27	7	$537.91	8	$899.78	4
Eleventh[62]	no	$0.15/ $0.25[63]	13	7 plus	12	5	9	—	—	—	—	—	—	—	—

[56] Only those costs awards in which the final amount awarded could be verified through PACER are included in the analysis of costs awarded. In the Fifth Circuit, there were a number of costs awards approved under each subsection of FRAP 39 and referenced in the mandate but they were not included because the final amount awarded was not accessible for verification.

[57] For cases filed after June 1, 2008, the Sixth Circuit has revised its rules regarding the number of briefs and appendices recoverable as costs to take into account the Sixth Circuit's rules pertaining to electronic filing of cases. Thus, awards issued during the search period in cases filed prior to June 1, 2008 are analyzed separately from costs awards issued in appeals filed on or after June 1, 2008.

[58] If the brief was filed by an unrepresented party, filed under seal or if the brief relates to complaints of attorney misconduct, then recovery is permitted for 2 copies of briefs for each party required to be served. *See* Appendix, Summary of Materials Addressing FRAP 39 costs for the Sixth Circuit.

[59] If leave of court was granted to file a paper appendix or if the case is a death penalty case, then recovery is permitted for 1 copy of the appendix for each party required to be served. *See* Appendix, Summary of Materials Addressing FRAP 39 costs for the Sixth Circuit.

[60] The Seventh Circuit went live with CM/ECF on March 31, 2008, and since they are not converting their pending cases from their old system to CM/ECF, our database of costs awards will not include final costs awarded in cases filed before March 31, 2008.

[61] The large number of costs awards identified in the Ninth Circuit prohibited inclusion of each award amount in the final analysis due to time constraints. For calendar year 2009, 559 costs awards were issued, and for calendar year 2010 (including approvals issued in January and February of 2011), 491 costs awards were issued. For the Ninth Circuit, the analysis of costs awards presented in this report includes approximately 25% of the awards issued in 2009 and 25% of the awards issued in 2010 through early 2011 (26% of total costs awards issued), or approximately every fourth award issued. Note: Costs awarded in the Ninth Circuit do not include the $450 docket fee because it is not reimbursable as costs in the Ninth Circuit.

[62] The Eleventh Circuit went live with CM/ECF on January 4, 2010 and did not convert their pending cases from their old system. Thus, the final database of awards was small (only 18 costs awards were identified) because we were only able to search for costs awards from cases that were filed after January 4, 2010, reached final disposition and awarded costs up through February 2011. *See* Appendix, Analysis of Costs Awards for the Eleventh Circuit.

Circuit	Implementation of FRAP 39 and Average Costs Awarded Under FRAP 39 in 2009 and 2010 in the United States Courts of Appeals														
	Maximum Rates, Copies and Fees Recoverable under FRAP 39[52]							Average Costs Awards Under FRAP 39 in 2009 and 2010[53] (without outliers)							
	Docket Fee?	Max Fee/Page	Rank	Max # Copies Brief	Rank	Max # Copies Appendix	Rank	FRAP 39(a)(1)	Rank	FRAP 39(a)(2)	Rank	FRAP 39(a)(3)	Rank	FRAP 39(a)(4)	Rank
District of Columbia	yes	$0.07 text[64] $0.10 text (after 11/1/10)	12	12	4	11 plus	2	$198.08	1	$172.64	9	$800.70	5	$1021.91	3
Federal[65]	no	$0.08 $6[66]	13	16 plus	1	16 plus	1	—	—	—	—	—	—	—	—

Focusing on the maximum rate per page, Table 4 shows that the Fourth Circuit had the highest maximum rate per page ($4.00), which resulted in the highest average costs awards issued under all subdivisions of Fed. R. App. P. 39(a), except for 39(a)(1). When the maximum rate drops to $0.50 per page (Tenth Circuit), there is no longer such a direct correlation as evidenced by the Tenth Circuit's ranking among average costs awards: eighth largest out of 9 circuits under 39(a)(1); seventh largest out of 11 circuits under 39(a)(2); eighth largest out of 11 circuits under 39(a)(3); and fourth largest out of 11 circuits under 39(a)(4). Similarly, circuits with higher rates per page, such as the Sixth Circuit ($0.25) and the Fifth Circuit ($0.15), rank lower among average costs awards issued than circuits with lower maximum page rates for all subprovisions of Fed. R. App. P. 39(a) except for 39(a)(2).

Looking only at maximum number of briefs and appendices permitted, we see that the Sixth Circuit (for cases filed after June 1, 2008) had the lowest maximum number of briefs and appendices reimbursable as Fed. R. App. P. 39 costs (zero if the brief or appendix was electronically filed), which resulted in the lowest average costs awards issued under all subdivisions of Fed. R. App. P. 39(a). Again, there doesn't appear to be a direct correlation between maximum brief and appendix numbers and average costs awards in the remaining circuits. For example, the Third Circuit, which allows for at least 10 copies of briefs and 4 copies of the appendix to be reimbursed, has higher average costs awards under all subprovisions of Fed. R. App. P. 39(a) except for 39(a)(1) than the District of Columbia, which allows 10 briefs and at least 11 appendices.

Although we do not have costs data from the Federal Circuit and our Eleventh Circuit costs data is very limited, the decision not to reimburse appellants for their $450 docketing fee may help to

[63] The maximum rate is $0.15 per page for copies produced in-house and $0.25 per page for commercial copies. *See* Appendix, Summary of Materials Addressing FRAP 39 Costs for the Eleventh Circuit.

[64] For cases filed before November 1, 2020, the maximum rate per page was $0.07 for test, and $1.02 for color. After November 1, 2010, the maximum rate per page is $0.10 for text and $0.51 for color. *See* Appendix, Summary of Materials Addressing FRAP 39 Costs for the District of Columbia Circuit.

[65] Costs data was not obtained from the Federal Circuit because the Federal Circuit is not live with CM/ECF.

[66] $6.00 Per page for the table of page numbers of designated materials, the originals of briefs, and the table of contents for the appendix. *See* Appendix, Summary of Materials Addressing FRAP 39 costs for the Federal Circuit.

explain the Ninth Circuit's low average costs awards compared to other circuits with similar maximum page rates and maximum numbers of briefs and appendices reimbursable. In addition, the absence of the ability of appellants to claim the docketing fee keeps the difference between average costs issued under the four subprovisions of Fed. R. App. P. 39(a) in the Ninth Circuit smaller than those seen among the other circuits.

D. Analysis of Outlier Costs Awards in the Courts of Appeals

Table 5

Costs Awarded under FRAP 39 during 2009-2010 Identified as Outliers in the United States Courts of Appeals					
Circuit		**FRAP 39(a)(1)**	**FRAP 39(a)(2)**	**FRAP 39(a)(3)**	**FRAP 39(a)(4)**
First	**Number of Individual Costs Awards**[67]	5	42	11	12
	Range of Costs Awards without outliers	$47.24 to $113.51	$24.00 to $906.90	$650.50 to $1929.20	$435.30 to $1552.50
	Outlier Costs Awards (6% of total awards)	$887.20	$3994.50	N/A	$3694.77 $4728.78
Third	**Number of Individual Costs Awards**	5	252	29	31
	Range of Costs Awards without outliers	$98.94 to $427.60	$20.40 to $1850.67	$529.43 to $1407.20	$204.80 to $2912.07
	Outlier Costs Awards (4% of total awards)	N/A	N/A	$2477.56 $2560.20	$4653.46 $10421.99 $10780.04
Fourth	**Number of Individual Costs Awards**	N/A	67	16	25
	Range of Costs Awards without outliers	N/A	$37.50 to $2686.60	$676.71 to $3511.00	$172.00 to $4410.00
	Outlier Costs Awards (5% of total awards)	N/A	N/A	$6562.00 $7086.30 $16510.80	$8005.98 $13893.00
Sixth[68] (before 6/1/08)	**Number of Individual Costs Awards**	0	17	8	10
	Range of Costs Awards without outliers	N/A	$16.50 to $896.45	$166.38 to $660.00	$296.10 to $890.28
	Outlier Costs Awards (11% of total awards)	N/A	N/A	$1261.76 $1478.25	$1933.00 $2263.12
Seventh[69]	**Number of Individual Costs Awards**	2	125	39	32

[67] The unit of analysis is an individual costs award, not an individual case in which costs were awarded, because there could be more than one costs award issued in a single case (e.g., consolidated appeals). Including the award in the final database as an aggregate of total costs awarded in those appeals would result in a misleadingly higher costs award compared to cases with only one costs award issued.

[68] For cases filed after June 1, 2008, the Sixth Circuit has revised its rules regarding the number of briefs and appendices recoverable as costs to take into account the Sixth Circuit's rules pertaining to electronic filing of cases. Thus, awards issued during the search period in cases filed prior to June 1, 2008 are analyzed separately from costs awards issued in appeals filed on or after June 1, 2008.

Costs Awarded under FRAP 39 during 2009-2010 Identified as Outliers in the United States Courts of Appeals					
Circuit		**FRAP 39(a)(1)**	**FRAP 39(a)(2)**	**FRAP 39(a)(3)**	**FRAP 39(a)(4)**
	Range of Costs Awards without outliers	$75.81 to $210.00	$20.00 to $963.60	$133.83 to $1604.60	$95.42 to $1912.40
	Outlier Costs Awards (1% of total awards)	N/A	N/A	$2536.00	$3798.46
Eighth	**Number of Individual Costs Awards**	1	72	18	11
	Range of Costs Awards without outliers	N/A	$50.40 to $1063.60	$87.10 to $2335.70	$332.81 to $1707.50
	Outlier Costs Awards (1% of total awards)	N/A	N/A	N/A	$6076.44
Ninth[70]	**Number of Individual Costs Awards**	4	188	57	23
	Range of Costs Awards without outliers	$48.00 to $259.50	$15.00 to $1302.10	$25.00 to $1668.35	$81.95 to $1399.20
	Outlier Costs Awards (2% of total awards)	N/A	$2171.25	$2374.10 $2666.10 $3050.00 $3812.20	$3239
Tenth	**Number of Individual Costs Awards**	4	40	12	12
	Range of Costs Awards without outliers	$46.80 to $146.30	$21.15 to $741.00	$84.90 to $839.19	$254.98 to $1678.24
	Outlier Costs Awards (3% of total awards)	$2810.61	$2383.60	$3236.70	$2810.61
District of Columbia	**Number of Individual Costs Awards**	4	20	5	14
	Range of Costs Awards without outliers	$46.80 to $146.30	$21.15 to $741.00	$84.90 to $839.19	$254.98 to $1678.24
	Outlier Costs Awards (8% of total awards)	N/A	N/A	N/A	$3314.48 $5342.30

As shown in Table 5, in nine[71] of the 12 circuits for which costs data were collected, we found awards issued under one or more of the separately analyzed subsections of Appellate Rule 39(a) that clearly fell outside of the range established by the majority of awards. For example, in the Fourth Circuit the range of costs awarded to 13 of 16 appellants pursuant to Fed. R. App. P. 39(a)(3) fell between a low of $676.71 to a high of $3,511; the three awards labeled "outliers"

[69] The Seventh Circuit went live with CM/ECF on March 31, 2008, and since they are not converting their pending cases from their old system to CM/ECF, our database of costs awards will not include final costs awarded in cases filed before March 31, 2008.

[70] The large number of costs awards identified in the Ninth Circuit prohibited inclusion of each award amount in the final analysis due to time constraints. For calendar year 2009, 559 costs awards were issued, and for calendar year 2010 (including approvals issued in January and February of 2011), 491 costs awards were issued. For the Ninth Circuit, the analysis of costs awards presented in this report includes approximately 25% of the awards issued in 2009 and 25% of the awards issued in 2010 through early 2011 (26% of total costs awards issued), or approximately every fourth award issued. Note: Costs awarded in the Ninth Circuit do not include the $450 docket fee because it is not reimbursable as costs in the Ninth Circuit.

[71] *See* Appendix, Analysis of Outliers for the following circuits: First, Third, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth, and Distinct of Columbia.

had awards of $6,562, $7,086.30, and $16,510.80. However, as cautioned previously, it should not be concluded that these awards are not within the normal range for a particular circuit over a period of time longer than the two-year period adopted for this study.

Implicit in the identification of these large awards as outliers is the idea that they are rare and represent a small percentage of the total awards issued under Fed. R. App. P. 39 in each of the circuits. Despite their infrequent occurrence, these outliers deserve closer analysis to determine how they fit within the rules and practices of the various circuits. Further, these relatively rare larger dollar amounts may signal a growing trend. If the intent behind H.R. 5069 was to prevent Fed. R. App. P. 39 from becoming a barrier to litigants pursuing legitimate appeals for fear of excessive penalties, any proposed reform should consider the factor(s) resulting in large awards.

These outlier awards were examined more closely, by circuit, to determine whether there was an identifiable factor or factors contributing to these large awards. The results are presented in the Appendix in tabular form that includes the nature-of-suit code for the specific case; whether the appeal was consolidated, and if so, the number of cases consolidated in the appeal; the number of days to final disposition after initial filing; and to the extent possible, the specific items reimbursed (docket fees, briefs, appendices, etc.).

Overall, a total of 32 outliers were identified in nine of the twelve circuits. As shown in Table 5, the total number of outliers in any one circuit and the total number of outliers attributable to each of the four subdivisions of Fed. R. App. P. 39(a) is very small and distributed as follows: 1 (3%) was issued under Fed. R. App. P. 39(a)(1), 3 (9%) under Fed. R. App. P. 39(a)(2), 13 (41%) under Fed. R. App. P. (a)(3), and 15 (47%) under Fed. R. App. P. 39(a)(4). All but two of the costs awards under Fed. R. App. P. 39(a)(4) were awarded to appellants. Thus, 88% of these large outlier costs awards were issued when the appellant was the prevailing party in the appeal.

In terms of nature of suit, these larger outlier awards were awarded in a wide range of civil appeals. There was minimal clustering among cases identified as "other civil rights" or involving state constitutional issues (7 awards), appeals characterized as contract or insurance cases (5), other personal injury (4), "jobs" (2), and appeals in bankruptcy cases (2). Therefore, we cannot conclude that substantive issues were a significant factor contributing to the size of the costs award.

Fourteen (44%) of the 32 awards identified as "large" outliers were consolidated appeals: nine awards consisted of two consolidated appeals, two awards involved three consolidated appeals, two awards included four consolidated appeals, and one award consisted of five consolidated appeals. One of these fourteen outliers was awarded under 39(a)(2), five were awarded under Rule 39(a)(3) and eight under 39(a)(4). In four of the six circuits with outliers from both consolidated appeals and nonconsolidated cases,[72] the awards issued in the consolidated cases were not the largest awards among the outliers.

[72] *See* Appendix, Analysis of Outliers for the following circuits: First, Third, Fourth, Sixth (pre-June 1, 2008), Ninth and Tenth.

Examining length of time from filing to final disposition, four outlier appeals were terminated in less than one year, 23 were disposed of between one and two years after filing, three were disposed of between two and three years after filing, one before the fourth year, and one appeal lasted over six years.

Finally, where the detailed information was available in CM/ECF, we examined the individual components of the outlier costs awards to gain a sense of the distribution of costs and whether any one reimbursable item comprised a larger percentage of the total award than the others. Of the 25 outlier costs awards with sufficient information to determine exact amounts for reimbursable items, reimbursements for copying the appendix or record excerpts was the single largest costs in 23 of the awards. In these 25 awards, copying costs for the appendix or record excerpts were at least 50% of the award; in 8 of these 25 awards, the copying costs made up 90% or more of the total award. Copying costs for appendices or record excerpts can be much greater than costs for copies of briefs, because while briefs must adhere to strict page limitations,[73] there are no page limitations when filing an appendix. In addition to the total number of pages, the variables that have a direct impact on the final costs of the appendix are the costs per page and the number of copies. As discussed earlier, circuits have placed maximum limits on the allowable rate per page and the number of copies of the appendix that they will permit parties to be reimbursed for. However, other than warnings that costs will not be reimbursed for a "lengthy appendix"[74] or portions that are deemed purposefully "irrelevant,"[75] there are no limitations on the number of pages claimable for each appendix.

We were able to obtain the number of pages per brief and per appendix for 19 of the 25 cases. We found that briefs averaged 90 pages in length and appendices averaged 3,605 pages in length. In addition, the average number of copies of the appendix reimbursed was 11. In the Fourth Circuit, it is clearly the $4.00 per page maximum allowable rate that has resulted in the largest outlier awards identified in our search. In the *Snyder* case, 95% of the total amount awarded ($15,710 of $16,510) was attributable to the costs of the appendix. Each appendix was 3,840 pages and the appellant requested costs for 8 copies or 30,720 total pages. Under Fourth Circuit Local Rule 39(a), the appellant had to calculate the cap on taxable printing charges (30,720 pages x $4.00 per page = $122,880), compare it to the actual incurred printing charges for the appendix ($15,710), and claim the lesser amount. Thus, the Fourth Circuit's cap established by the $4.00 per page maximum allowed the appellants to recover 8 copies, at a rate of .50 per page. Note that, under the Fourth Circuit's Rule 39(a) cap, the appellants in *Snyder* would have been allowed to claim up to $122,879 for the actual costs of printing copies of their appendix.

While a very high costs per page will result in higher than average costs awards in cases with extremely large appendices, such as occurred in the Fourth Circuit, even low rates will produce very large awards in cases when appendices run into thousands of pages. This is evidenced by

[73] Unless altered by local circuit rule, the default rule is that a principal brief cannot exceed 30 pages and a reply brief cannot exceed 15 pages. Fed. R. App. P. 32(a)(7)(A).

[74] Seventh Circuit Rule 30(e) & Seventh Circuit Practitioner's Handbook for Appeals (2003 Edition) § XIXIX. Costs.

[75] Ninth Circuit Local Rule 30-2(c).

the findings that in four other circuits with outlier awards issued to appellants pursuant to Fed. R. App. P. (a)(3) and (a)(4), and with the next highest average costs awards, their costs per page were low on average—ranging from .07 to .15. In these circuits, the outlier awards resulted from costs attributable to an extremely large appendix, the recovery of a large number of copies of the appendix, or both.[76]

The Sixth Circuit provides an opportunity to examine whether dramatically lowering the number of copies of an appendix permitted for recovery as costs affects the total dollar amounts of costs awarded under Fed. R. App. P. 39. During 2009 and 2010, 46 final costs awards were issued in the Sixth Circuit; 35 of those awards were issued in cases filed before June 1, 2008. These 35 costs awards ranged from a low of $16.50 to a high of $2,263.12, and since recovery was governed by the older version of Circuit Rule 39(b),[77] reimbursement was awarded for the costs of copies of proof and final briefs, appendices, and binding costs. In the Appendix, the first table in the analysis section of the Sixth Circuit's costs awards shows that there was a wide range of costs awarded under subsections (a)(2), (a)(3) and (a)(4) of Fed. R. App. P. 39. Of the eleven costs awards that were issued for cases filed after June 1, 2008, there was a shift in the amount of costs awarded, the party filing for costs, and the items included in the costs award. Four of the 11 awards went to appellant pro se prisoners under either Fed. R. App. P. (a)(3) or (a)(4): $56.52 (costs of copying 55-page brief); $470 (filing fee and copying costs); $455 (filing fee); and $4.75 (costs of copying brief). Six of the 11 awards went to appellants under either Fed. R. App. P. (a)(3) or (a)(4) and all were amounts of $450 or $455 as reimbursements for the appellants' filing fees only. The final costs award of $18.20 went to an appellee under Fed. R. App. P. 39(a)(2) for the costs of copying the response brief.

V. Procedural and Concluding Observations

A. Procedural Observations[78]

Extracting information on costs requested and awarded for the cases identified in CM/ECF provided an opportunity to also collect information on the informal practices of the circuits for awarding costs. Except for the Third and the Fifth Circuits, costs are not addressed in the final disposition, unless there is a mixed judgment, the lower court ruling is vacated, or the court orders recovery of costs other than that established by the default rules of Fed. R. App. P. 39(a)(1)-(3). Only then will the majority of courts actually state in the final opinion, the judgment, and/or through a docket entry which party costs are awarded to or whether the parties will bear their own costs on appeal. In the Third and Fifth Circuits, the court usually indicates in the final judgment whether costs will or will not be taxed and, if so, against whom they are taxed.

[76] *See* Appendix, Analysis of Outliers for following circuits: First, Third, Eighth, and District of Columbia.

[77] Former Sixth Circuit Rule 39(b) allowed parties to recover costs for 7 copies of each brief plus two copies for each party required to be served and for 6 copies of the joint appendix plus 1 copy for each party required to be served. *See* Appendix, Summary of Materials Addressing FRAP 39 costs for the Sixth Circuit.

[78] All observations noted in this section are intended as broad generalizations based upon my examination of the records in the data pool resulting from the targeted two-year search of the circuits' CM/ECF records. These observations have not been verified by circuit personnel.

Except in the First Circuit and the District of Columbia Circuit,[79] the original bill of costs was usually accessible through the docket. However, the practices for issuing the final award seemed to vary greatly among the circuits. In the First, Fourth, Eighth, Tenth, and District of Columbia[80] Circuits, the mandate makes no mention of costs at all. In these circuits, the clerk or the judge will issue a separate statement or order announcing whether and to whom costs have been awarded and the final amount awarded. Except in the First Circuit, this taxation of costs order just lists the final amount awarded without providing an itemized breakdown of the costs. Although the Second and the Seventh Circuits will issue a separate statement or order awarding costs, these circuits will also mention whether costs have been awarded and the final amount awarded in the mandate and/or will attach this separate order to the mandate. In the Third, Fifth, Sixth, Ninth, and Eleventh Circuits there is no separate order awarding costs. If costs are awarded, the mandate will indicate the party that is awarded costs and usually it will list the amount awarded with no itemization. The Third Circuit will provide an itemized breakout of the final award. The Fifth and Eleventh Circuits list the approved bill of costs on the mandate as an attachment without providing the final amount awarded. This was problematic in many cases where the attached bill of costs was not available through the docket. Therefore, we did not include in the analyses for these two circuits costs awarded that were listed on the mandate as approved, but where the final amount of the award could not be verified because the attached bill of costs was not accessible.

The final issue that deserves mention is the effort by the Clerk's Offices to address miscalculations on submitted bills of costs for items that were reimbursable (such as claiming an incorrect number of copies, page numbers, amount per page/cover/binding) and denying recovery for items not recoverable under Fed. R. App. P. 39 or the circuits' local rules. Some circuits make corrections directly on the original bill of costs, others issue an order directing the requesting party to file a corrected bill of costs, and one circuit issues a corrected statement of costs and gives the parties an opportunity to object. Often the court would indicate that costs were awarded in part and just list the revised amount awarded without any explanations. When there were discrepancies between the original amount requested and the final amount awarded, it was often not possible to determine which particular costs were rejected because, as indicated above, the final awarding of costs almost never included an itemization of the costs awarded. For the circuits for which it was possible to access both the original amount requested and final costs awarded, the discrepancies between the amount requested and the final amount awarded ranged from nominal amounts to much larger differences. Table 6 below describes the frequency with which discrepancies occurred in the circuits for which we were able to obtain this information.

[79] In the District of Columbia and the First Circuit Courts of Appeals, the original bill of costs was accessible through the docket in about half of the cases included in the database of awards for these circuits.

[80] The District of Columbia is included in this grouping although it was not possible to be certain that the mandate does not mention costs because the mandate was not accessible through the docket. In dockets examined in the District of Columbia, the clerk or the court issues a separate statement or order as to whether costs are granted and the amount awarded.

Table 6

Discrepancies Between Costs Requested and Costs Awarded under FRAP 39 During 2009-2010 in the United States Courts of Appeals[81]		
Circuit	**Total Number Of Individual Costs Awarded Under FRAP 39**	**Number of Costs Awards in which the Final Amount Awarded Was Less Than the Amount Requested in the Original Bill of Costs**
First	70	28 (40%)
Third	317	55 (17%)
Fourth	109	34 (31%)
Fifth[82]	131	96 (73%)
Sixth[83] (cases filed before 6/1/08)	35	6 (17%)
Sixth (cases filed after 6/1/08)	11	3 (27%)
Seventh[84]	198	111 (56%)
Eighth	102	23 (23%)
Ninth[85]	272	69 (25%)
Tenth	68	26 (38%)

These discrepancies between the amount requested and final amount awarded ranged from nominal amounts to much larger differences that were the result of miscalculations for reimbursable items (incorrect number of copies, page numbers, amount per page/cover/binding) or the inclusion of items in the bill of costs that were not recoverable under Fed. R. App. P. 39 or the circuit's local rules (transcripts, postage/courier/FedEx fees, attorney fees, travel expenses, fees for

[81] The Second and Eleventh Circuits have been live on CM/ECF only since January 4, 2010 and these circuits are not converting their pending cases. Thus information on discrepancies between original costs requested and final costs awarded was not provided for these circuits in this table due to the small number of costs awards identified. The Federal Circuit is not included because it is not live on CM/ECF.

[82] Only those costs awards in which the final amount awarded could be verified through the docket are included in the analysis of costs awarded. In the Fifth Circuit, there were a number of costs awards approved under each subsection of FRAP 39 and referenced in the mandate but they were not included because the final amount awarded was not accessible for verification.

[83] For cases filed after June 1, 2008, the Sixth Circuit has revised its rules regarding the number of briefs and appendices recoverable as costs to take into account the Sixth Circuit's rules pertaining to electronic filing of cases. Thus, awards issued during the search period in cases filed prior to June 1, 2008, are analyzed separately from costs awards issued in appeals filed on or after June 1, 2008.

[84] The Seventh Circuit went live with CM/ECF on March 31, 2008, and since they are not converting their pending cases from their old system to CM/ECF, our database of costs awards will not include final costs awarded in cases filed before March 31, 2008.

[85] The large number of costs awards identified in the Ninth Circuit prohibited inclusion of each award amount in the final analysis due to time constraints. For calendar year 2009, 559 costs awards were issued, and for calendar year 2010 (including approvals issued in January and February of 2011), 491 costs awards were issued. For the Ninth Circuit, the analysis of costs awards presented in this report includes approximately 25% of the awards issued in 2009 and 25% of the awards issued in 2010 through early 2011 (26% of total costs awards issued), or approximately every fourth award issued. Note: Costs awarded in the Ninth Circuit do not include the $450 docket fee because it is not reimbursable as costs in the Ninth Circuit.

online research, documents/motions other than briefs, appendices or excerpts, costs of research or preparing the record, cds, etc.).

B. Concluding Observations

The Fourth and Sixth Circuits represent opposite positions in what has developed into a de facto circuit split in the interpretive application of Fed. R. App. P. 39. The Fourth Circuit's decision to adopt a $4.00 maximum rate per page permits parties to recover their actual printing costs at much higher rates per page than would be approved in all other circuits except for the Tenth. Thus, except for the Tenth Circuit, which has adopted a maximum rate per page of $0.50, the rate under which the appellants in *Snyder* were reimbursed for their actual printing costs, the costs award in the *Snyder* case could not have been claimed by the appellants in any other circuit. However, the *Snyder* award is not an outlier because it is an intended and foreseeable consequence of the approach to awarding Fed. R. App. P. 39 costs adopted by the Fourth Circuit. Case law establishes that the Fourth Circuit could have refused to award appellants in the *Snyder* case any costs or a reduced amount of costs if it was felt that the costs award was excessive under the circumstances. Although not common, the $16,510 costs award was consistent with the approach adopted by the Fourth Circuit. However, it is subject to interpretation as to whether the award and the $4 per page rate is consistent with Fed. R. App. P. 39's direction for choosing the maximum rate as one which encourages "economical methods of copying" and a rate which does "not exceed that generally charged for such work in the area where the clerk's office is located."

The Sixth Circuit's 2009 revision to its local rules governing costs significantly limited the prevailing party's ability to claim printing costs. In fact, in the majority of cases in which the party was required to file their briefs and appendix electronically, neither the appellee nor the appellant can claim any printing costs. Where applicable, the appellant is limited to claiming their $450 docket fee as allowable costs. Exceptions to this nonrecovery approach is permitted for pro se filers and filers of briefs containing allegations of attorney misconduct and filers in death penalty cases. Thus, it appears that the Sixth Circuit has decided that Fed. R. App. P. 39 costs should not be routinely awarded to the prevailing parties since they were normally not required to file a paper copy of their brief or appendix under the circuit's rules on electronic filing. Allowing exceptions for certain types of filers and certain types of cases and then only allowing recovery for a small number of briefs and appendices signals an intent that costs should be kept to a minimum and reimbursable when paper copies are the only option.

Appendix

Implementation of Fed. R. App. P. 39
and
Analysis of Costs Awarded Pursuant to Fed. R. App. P. 39
in the Individual Circuit Courts of Appeals

United States Court of Appeals for the First Circuit

Summary of Materials Addressing Fed. R. App. P. 39 Costs[86]

Maximum Rates:

First Circuit Local Rule 39.0. Taxation of Reproduction Costs
Costs are taxed at the maximum rates set by the clerk (schedule posted on court's website or available in Clerk's Office) or at the actual cost—whichever is lower.

Maximum Rates for Taxation of Costs (effective 2/16/07) (posted on court's website or available in clerk's office)

- Reproduction per page, per copy $0.10
- Binding, per brief or appendix $3.50
- Front and back covers, two per brief or appendix $0.20

Maximum Number of Copies for Which Costs Are Recoverable:

First Circuit Local Rule 39.0. Taxation of Reproduction Costs
Costs may be recovered for reproducing the following number of copies, unless the court directs filing of a different number:

(1) **Briefs**: Nine copies of each brief plus one for the filer and two for each party required to be served with paper copies of the brief.
(2) **Appendices**: Five copies of each appendix plus one for the filer and one for each unrepresented party and each separately represented party.

Requirements for Recovery of Costs:

First Circuit Local Rule 39.0. Taxation of Reproduction Costs
Requests for taxation of costs must be made on the Bill of Costs form available on the court's website at www.ca1.uscourts.gov and by request to the Clerk's Office, and must be accompanied by a vendor's itemized statement of charges, if applicable, or a statement by counsel if reproduction was performed in-house. Bills of Costs must be filed in the Clerk's Office within fourteen days after entry of judgment, even if a petition for rehearing or other post-judgment motion is filed. Payment of costs should be made directly to the prevailing party or counsel, not to the Clerk's Office.

Bill of Costs Form. This form is available on the court's website or from the Clerk's Office. In order to calculate the total cost for the brief, reply brief, or appendix, the requesting party must enter the number of copies requested, pages per copy, cost per page, cost per binding, and cost per cover.

[86]The description of the local rules and internal court procedures in this report may be a paraphrasing of the actual language contained in the rules and procedures or may omit portions or subsections that are not relevant or merely restate provisions contained in FRAP 39 itself, and thus should not be quoted or cited as legal authority. For the official and complete version of the rules and procedures cited herein, consult the published compilation of each circuit court of appeals' local rules and procedures, available on their websites.

United States Court of Appeals
For the First Circuit

BILL OF COSTS FORM

Please see 1st Cir. R. 39.0 for instructions before completing this form. A request for costs must be filed within 14 days of judgment. Fed. R. App. P. 39(d)(1). Any opposition must be filed within 14 days after service of the request. Fed. R. App. P. 39(d)(2). A schedule of Maximum Rates for Taxation of Costs is posted on the court's website at www.ca1.uscourts.gov and is available by request to the clerk's office. See 1st Cir. R. 39.0. A copy of a vendor's bill showing actual costs incurred must be attached, if applicable. If the briefs were produced in-house, a statement from counsel must be attached specifying the actual cost for reproduction, binding and covers. Costs are taxed at the maximum rates set by the clerk or at the actual cost, whichever is lower. 1st Cir. R. 39.0(a). The maximum number of copies for which costs may be recovered is set forth in 1st Cir. R. 39.0(b).

Case No.: _____ Title: _____

Filed on behalf of: _____

The Clerk is requested to tax the following costs against: _____

IF SEEKING COSTS FOR OR AGAINST THE UNITED STATES, pursuant to Fed. R. App. P. 39(b), please specify statutory or other authority: _____

COSTS TAXABLE UNDER FED. R. APP. P. 39 and 1st CIR. R. 39.0	AMOUNT REQUESTED						*For internal use only*
	NO. OF COPIES	PAGES PER COPY	COST PER PAGE	COST PER BINDING	COST PER COVER	TOTAL COST	
DOCKETING FEE $450.00*							
BRIEF						0.00	
REPLY BRIEF						0.00	
APPENDIX						0.00	
TOTAL AMOUNT REQUESTED:						**$0.00**	

I, _____, do hereby declare under the penalty of perjury that the foregoing costs are true and correct and were necessarily and actually incurred in this action. A certificate of service is attached pursuant to Fed. R. App. P. 25(d).

Signed: _____ Dated: _____

* *If the notice of appeal or petition was filed before April 9, 2006, the docketing fee is $250. If it was filed on or after that date, the docketing fee is $450.*

Analysis of Costs Awards[87]

	Costs Awarded under FRAP 39 During 2009-2010 in the First Circuit Court of Appeals					
	FRAP 39(a)(1) appeal dismissed (costs in favor of appellee(s))	**FRAP 39(a)(2) judgment affirmed** (costs in favor of appellee(s))	**FRAP 39(a)(3) judgment reversed** (costs in favor of appellant(s))	**FRAP 39(a)(4) judgment affirmed in part, reversed in part, modified, or vacated** (costs taxed only as court orders)		
				overall	**Costs to appellee(s)**	**Costs to appellant(s)**
Total Number of Individual Costs Awards[88]	5	42	11	12	0	12
Average Costs Award: without outlier(s)	$84.15	$219.06	$1,023.48	$824.07	0	$824.07
Average Costs Award: with outlier(s)	$244.76	$308.95	N/A	$1388.69	0	$1388.69
Median Costs Award: without outlier(s)	$87.93	$114.00	$831.00	$721.55	0	$721.55
Median Costs Award: with outlier(s)	$97.59	$116.10	N/A	$804.42	0	$804.42
Range of Costs Awards: without outlier(s)	$66.27 [$47.24 to $113.51]	$882.90 [$24 to $906.90]	$1278.70 [$650.50 to $1929.20]	$1117.20 [$435.30 to $1552.50]	0	$1117.20 [$435.30 to $1552.50]
Range of Costs Awards: with outlier(s)	$839.96 [$47.24 to $887.20]	$3970.50 [$24.00 to $3994.50]	N/A	$4293.48 [$435.30 to $4728.78]	0	$4293.48 [$435.30 to $4728.78]
Outlier(s)	$887.20	$3994.50	N/A	$3694.77	0	$3694.77
				$4728.78	0	$4728.78

[87] The First Circuit went live with CM/ECF on March 31, 2008, and their database includes all cases filed after that date as well as any pending cases that had activity after the live date.

[88] The unit of analysis is an individual costs award, not an individual case in which costs were awarded, because there could be more than one costs award issued in a single case (e.g., consolidated appeals). Including the award in the final database as an aggregate of total costs awarded in those appeals would result in a misleadingly higher costs award compared to cases with only one costs award issued.

Analysis of Outliers

Analysis of Costs Awards Identified as Outliers in the First Circuit Court of Appeals					
Amount of Costs Award	**FRAP 39(a) Provision Costs Awarded Under**	**Nature of Suit**	**Consolidated appeal (Total # cases)**	**Days from filing to final disposition**	**Itemization of Costs Awarded[89]**
$887.20	FRAP 39(a)(1) dismissed for lack of jurisdiction	3950 Constitutionality of State Statutes	no	71 days	*Brief (14 copies; 111 pgs./copy)($155.40) *Appendix (7 copies; 937 pgs./copy) ($655.90) [74% of total award] *Covers ($8.40) *Binding ($73.50)
$3994.50	FRAP 39(a)(2)	4110 Insurance	yes (2 cases)	448 days	*Brief (21 copies, 66 pgs./copy) ($220.50—includes binding & covers) *Appendix ($3774) [94% of total award]
$3694.77	FRAP 39(a)(4) vacated; costs awarded to appellant	4360 Other Personal Injury	no	572 days	*Docket Fee ($450) *Brief (33 copies; 69 pgs./copy) ($165.99—includes covers) *Reply (33 copies; 30 pgs./copy) ($75.90—includes covers) *Appendix (17 copies; 2,484 pgs./copy @ .07/pg.) ($3002.88—includes binding & covers) [81% of total award]
$4728.78	FRAP39 (a)(4) vacated; costs awarded to appellants	3360 Other Personal Injury	no	617 days	*Docket Fee ($450) *Brief (21 copies; 62 pgs./copy) ($154.56—includes $50.40 binding & covers) *Reply brief (21 copies; 30 pgs./copy) ($94.50—includes $50.40 binding & covers) *Appendix (12 copies; 4,763 pgs./copy @ .07/pg.) ($4029.72--includes $28.80 binding & covers) [85% of total award]

[89] Where the information was available through the docket, costs awards are broken out to identify the items reimbursed—i.e., docket fee, brief, reply brief, and/or appendix. Where available, the number of copies, pages per copy, cost per page, and total costs per document are provided for briefs and appendices.

United States Court of Appeals for the Second Circuit

Summary of Materials Addressing Fed. R. App. P. 39 Costs[90]

Maximum Rates:

Second Circuit Local Rule 39.1. Reproduction Costs
The cost of reproducing necessary copies of briefs, appendices, or record excerpts is taxable at the lesser of the actual cost or $0.20 per page.

Maximum Number of Copies for Which Costs Are Recoverable: Local Rule 39.1 provides that the court will only reimburse for a "necessary" number of copies, requiring the party seeking costs to consult the circuit's requirements for filing briefs and appendices.

Second Circuit Local Rule 31.1 Brief; Number of Paper Copies requires that a party submit 6 paper copies of each brief.

Second Circuit Local Rule 30.1 Appendix requires a party to submit 3 paper copies of its appendix.

Requirements for Recovery of Costs:

Verified Itemized Bill of Costs Form. This form is available on the court's website and it is also included with the summary order and judgment sent to the parties. The form requires the requesting party to identify the necessary number of copies and the total cost of printing the brief, reply brief, and/or appendix.

[90]The description of the local rules and internal court procedures in this report may be a paraphrasing of the actual language contained in the rules and procedures or may omit portions or subsections that are not relevant or merely restate provisions contained in FRAP 39 itself, and thus should not be quoted or cited as legal authority. For the official and complete version of the rules and procedures cited herein, consult the published compilation of each circuit court of appeals' local rules and procedures, available on their websites.

United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, New York 10007

DENNIS JACOBS
CHIEF JUDGE

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

Date:
Docket Number:
Short Title:

DC Docket Number:
DC:
DC Judge:

VERIFIED ITEMIZED BILL OF COSTS

Counsel for

_____

respectfully submits, pursuant to FRAP 39 (c) the within bill of costs and requests the Clerk to prepare an itemized statement of costs taxed against the

_____

and in favor of

_____

for insertion in the mandate.

Docketing Fee _____

Costs of printing appendix (necessary copies _____) _____

Costs of printing brief (necessary copies _____ ____) _____

Costs of printing reply brief (necessary copies _____) _____

Verification here

_____

Signature

Analysis of Costs Awards[91]

	Costs Awarded under FRAP 39 During 2010 for Appeals filed after January 4, 2010 in the Second Circuit Court of Appeals					
	FRAP 39(a)(1) appeal dismissed (costs in favor of appellee(s))	**FRAP 39(a)(2) judgment affirmed** (costs in favor of appellee(s))	**FRAP 39(a)(3) judgment reversed** (costs in favor of appellant(s))	**FRAP 39(a)(4) judgment affirmed in part, reversed in part, modified, or vacated** (costs taxed only as court orders)		
				overall	**Costs to appellee(s)**	**Costs to appellant(s)**
Total Number of Individual Costs Awards[92]	1	5	0	0	0	0
Average Costs Award	$93.40	$120.69	N/A	N/A	N/A	N/A
Median Costs Award	$93.40	$114.00	N/A	N/A	N/A	N/A
Range of Costs Awards	N/A	$137.80 [$74.60 to $212.40]	N/A	N/A	N/A	N/A

[91] Because the Second Circuit has been live on CM/ECF only since January 4, 2010, and they are not converting their pending cases from their old system to CM/ECF, our targeted search for dispositions awarding costs during calendar years 2009-2010 did not yield many costs awards as it is rare for an appeal to be filed and reach final disposition with one year. Our search was limited to appeals that were filed after 1/4/10 and reached final disposition before 12/31/10, and we cannot report on costs awards granted for cases filed prior to 1/4/10 that reached final disposition during calendar year 2010.

[92] The unit of analysis is an individual costs award, not an individual case in which costs were awarded, because there could be more than one costs award issued in a single case (e.g., consolidated appeals). Including the award in the final database as an aggregate of total costs awarded in those appeals would result in a misleadingly higher costs award compared to cases with only one costs award issued.

United States Court of Appeals for the Third Circuit

Summary of Materials Addressing Fed. R. App. P. 39 Costs[93]

Maximum Rates:

Third Circuit Local Rule 39.3. Taxation of Reproduction Costs
(c) Costs of Reproduction of Briefs and Appendices. In taxing costs for printed or photocopied briefs and appendices, the clerk will tax costs at the following rates, or at the actual cost, whichever is less, depending upon the manner of reproduction or photocopying:

(1) Reproduction (whether by offset or typography):

Reproduction per page (for 20 copies or less)	$ 4.00
Covers (for 20 copies or less)	$50.00
Binding per copy	$ 4.00
Sales Tax	Applicable rate

(2) Photocopying (whether in house or commercial):

Reproduction per page per copy	$ .10
Binding per copy	$ 4.00
Covers (for 20 copies or less)	$40.00
Sales Tax	Applicable rate

(3) In the event a party subsequently corrects deficiencies in either a brief or appendix pursuant to 3d Cir. L.A.R. 107.3 and that party prevails on appeal, costs which were incurred in order to bring the brief or appendix into compliance may not be allowed.

(4) Other Costs. No other costs associated with briefs and appendices, including the costs of typing, word processing, and preparation of tables and footnotes, will be allowed for purposes of taxation of costs.

Committee Comments: Sales tax will be included in the costs only when actually paid to a commercial photocopying service.

Maximum Number of Copies for Which Costs Are Recoverable:

Third Circuit LAR 39.3(a) Number of Briefs. Costs will be allowed for ten (10) copies of each brief plus two (2) copies for each party separately represented, unless the court directs a greater number of briefs to be filed.

LAR 39.3(b) Number of Appendices. Costs will be allowed for four (4) copies of the appendix plus one (1) copy for each party separately represented, unless the court directs a greater number of appendices to be filed.

[93]The description of the local rules and internal court procedures in this report may be a paraphrasing of the actual language contained in the rules and procedures or may omit portions or subsections that are not relevant or merely restate provisions contained in FRAP 39 itself, and thus should not be quoted or cited as legal authority. For the official and complete version of the rules and procedures cited herein, consult the published compilation of each circuit court of appeals' local rules and procedures, available on their websites.

Requirements for Recovery of Costs:

Third Circuit Local Appellate Rule 39.4 Filing Date; Support for Bill of Costs

(a) The court will deny untimely bills of cost unless a motion showing good cause is filed with the bill.

(b) Parties must submit the itemized and verified bill of costs on a standard form to be provided by the clerk.

(c) An answer to objections to a bill of costs may be filed within 14 days of service of the objections

Post-Decision Practice Information Sheet.

(3) BILLS OF COSTS

(B) Form: A party who has been granted costs in the court's judgment must request the taxation of cost on the form provided by the clerk and must include either an itemized statement from a printer or an affidavit of counsel, as required by the clerk's bill of costs form. LAR 39.4 Proof of service of the bill must be attached.

Bill of Costs Form and Instructions for Filing A Bill of Costs. This form and accompanying one-page instructions sheet are available on the court's website. In order to calculate the total cost for the brief, reply brief, or appendix, the requesting party must enter the number of copies requested, pages per copy, cost per page, cost per binding, cost per cover, and any applicable sales tax.

INSTRUCTIONS
FOR FILING A BILL OF COSTS

A request for costs must be submitted on this form and received by the Clerk within 14 days of judgment. Fed. R. App. P. 39(d)(1) and 3rd Cir. LAR 39.4(b). A motion for leave to file out of time showing good cause must be submitted with any untimely bill of costs. Any opposition to the bill of cost must be filed within 10 days from the date of service of the bill of costs, unless the Court extends the time. The taxation of costs is governed by Fed. R. App. P. 39 and 3rd Cir. LAR 39; See also, 3rd Cir. LAR 28.1(a)(iii), 30.5 and Misc. 107.4. All rules are available on this Court's website www.ca3.uscourts.gov. Third Cir. LAR 39 sets forth the maximum number of copies and rates and are summarized below.

Number of Copies:

Briefs — Costs will be allowed for ten (10) copies of each brief plus two (2) copies for each party separately represented, unless the Court shall direct a greater number of briefs to be filed.

Appendices — Costs will be allowed for four (4) copies of the Appendix plus one (l) copy for each party separately represented, unless the Court shall direct a greater number of appendices to be filed.

Costs: In taxing costs for printed or photocopied briefs and appendices, the Clerk shall tax costs at the following rates, or at the actual cost, whichever is less, depending upon the manner of reproduction or photocopying:

Reproduction (whether by offset or typography):	
Reproduction per page (for 20 copies or less)	$ 4.00
Covers (for 20 copies or less)	$ 50.00
Binding per copy	$ 4.00
Sales tax	Applicable Rate
Photocopying (whether in house or commercial):	
Reproduction per page	$ .10
Binding per copy	$ 4.00
Covers (for 20 copies or less)	$ 40.00
Sales Tax	Applicable Rate

Other Costs. No other costs associated with briefs and appendices, including the costs of typing, word processing, and preparation of tables and footnotes, shall be allowed for purposes of taxation of costs.

In the event that a party corrects deficiencies pursuant to 3rd Cir. LAR Misc. 107.3, costs incurred in order to bring the document into compliance will not be allowed.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BILL OF COSTS

C.A. _____

Caption: _____

Cost Taxable	AMOUNT REQUESTED							COST ALLOWED To be Completed by Clerk
	No. of Copies	Pages per Copy	Cost Per Page	Cost Per Binding	Cost Per Cover	Sales Tax	Total Cost	
Docketing Fee $450.00								
Brief								
Reply Brief								
Appendix								
						TOTAL	$	$

Brief Produced by Reproduction: ☐ Brief Produced by Photocopy: ☐

In House: ☐

Commercial: ☐

Unless document was produced by in house photocopy, receipts must be attached.

I, _____, do hereby declare under the penalty of perjury that the foregoing costs are true and correct and were necessarily and actually incurred in this action.

_____ _____

Signature Date

Attorney for: _____

A certificate of service must accompany this form.

For Court Use Only

After review, it is ordered that costs will be taxed in the amount of $ _____.

Marcia M. Waldron, Clerk

By: _____

Deputy Clerk Date: _____

Analysis of Costs Awards[94]

	Costs Awarded under FRAP 39 During 2009-2010 in the Third Circuit Court of Appeals					
	FRAP 39(a)(1) appeal dismissed (costs in favor of appellee(s))	**FRAP 39(a)(2) judgment affirmed** (costs in favor of appellee(s))	**FRAP 39(a)(3) judgment reversed** (costs in favor of appellant(s)))	**FRAP 39(a)(4) judgment affirmed in part, reversed in part, modified, or vacated** (costs taxed only as court orders)		
				overall	**Costs to appellee(s)**	**Costs to appellant(s)**
Total Number of Individual Costs Awards[95]	5	252	29	31	3	28
Average Costs Award: without outlier(s)	$179.75	$222.65	$870.13	$1093.20	$611.20	$1151.04
Average Costs Award: with outlier(s)	N/A	N/A	$983.84	$1821.45	N/A	$1951.12
Median Costs Award: without outlier(s)	$116.20	$152.43	$857.50	$990.54	$569.58	$996.79
Median Costs Award: with outlier(s)	N/A	N/A	$868.56	$1059.21	N/A	$1096.60
Range of Costs Awards: without outlier(s)	$328.66 [$98.94 to $427.60]	$1830.27 [$20.40 to $1850.67]	$877.77 [$529.43 to $1407.20]	$2702.27 [$204.80 to $2912.07]	$854.41 [$204.80 to $1059.21]	$2640.67 [$271.40 to $2912.07]
Range of Costs Awards: with outlier(s)	N/A	N/A	$2030.77 [$529.43 to $2560.20]	$10575.24 [$204.80 to $10780.04]	N/A	$10508.64 [$271.40 to $10780.04]
Outlier(s)	N/A	N/A	$2477.56	$4653.46	N/A	$4653.46
			$2560.20	$10421.99		$10421.99
				$10780.04		$10780.04

[94] The Third Circuit went live with CM/ECF on February 4, 2008, and their database includes all cases filed after that date as well as any pending cases that had activity after the live date.

[95] The unit of analysis is an individual costs award, not an individual case in which costs were awarded, because there could be more than one costs award issued in a single case (e.g., consolidated appeals). Including the award in the final database as an aggregate of total costs awarded in those appeals would result in a misleadingly higher costs award compared to cases with only one costs award issued.

Analysis of Outliers

Analysis of Costs Awards Identified as Outliers in the Third Circuit Court of Appeals					
Amount of Costs Award	**FRAP 39(a) Provision Costs Awarded Under**	**Nature of Suit**	**Consolidated appeal (total # cases)**	**Days from filing to final disposition**	**Itemization of Costs Awarded[96]**
$2477.56	FRAP 39(a)(3)	3350 Motor Vehicle	no	685 days	*Docket Fee ($450) *Brief (14 copies; 78 pgs./copy) ($400.84) *Reply(14 copies; 32 pgs./copy) ($280.72) *Appendix (5 copies; 568 pgs./copy @ .40/page-Reproduction indicated) ($1346) [54% of total award]
$2560.20	FRAP 39(a)(3)	3850 Securities, Commodities Exchange	yes (4 cases)	1102 days	*Docket Fee ($450) *Brief (14 copies, 132 pgs./copy) ($186.20) *Reply (14 copies; 58 pgs./copy) ($82.60) *Appendix (6 copies; 3065 pgs./copy @ .10/pg.) ($1841.40) [72% of total award]
$4653.46	FRAP 39(a)(4) affirmed part, reversed part; costs awarded to appellants	3820 Copyright	yes (2 cases)	424 days	*Docket Fee($450) *Brief (14 copies; 82 pgs./copy) ($167.77) *Reply (14 copies; 73 pgs./copy) ($146.80) *Appendix (6 copies; 5110 pgs./copy @ .10/pg.) ($3319.14) [71% of total award]
$10421.99	FRAP 39(a)(4) vacated; costs awarded to appellants	3410 Antitrust	yes (3 cases)	213 days	*Docket Fee ($450) *Brief (14 copies; 207 pgs./copy) ($385.80) *Reply brief (14 copies; 38 pgs./copy) ($81.20) *Joint Appendix (6 copies; 14,950 pgs./copy @ .10/pg.) ($9034.00 includes cost for covers/binding) [87% of total award] *Sales Tax ($470.99)
$10780.04	FRAP 39(a)(4) vacated: costs awarded to appellants	4380 Other Personal Property Damage	yes (2 cases)	371days	*Docket Fee ($450) *Brief (14 copies; 80 pgs./copy) ($120.40) *Reply brief (14 copies; 55 pgs./copy) ($140) *Appendix (6 copies; 22,364 pgs./copy @ .07/pg.)($9410.88 includes costs for covers/ binding) [87% of total award] *Sales Tax ($974.42)

[96] Where the information was available through the docket, costs awards are broken out to identify the items reimbursed—i.e., docket fee, brief, reply brief, and/or appendix. Where available, the number of copies, pages per copy, costs per page, and total costs per document are provided for briefs and appendices.

United States Court of Appeals for the Fourth Circuit

Summary of Materials Addressing Fed. R. App. P. 39 Costs[97]

Maximum Rates:

Fourth Circuit Local Rule 39(a). Printing Costs
The cost of printing or otherwise producing necessary copies of briefs and appendices shall be taxable as costs at a rate equal to actual cost, but not higher than $4.00 per page of photographic reproduction of typed material.

Maximum Number of Copies for Which Costs Are Recoverable: Local Rule 39(a) provides that the court will only reimburse for a "necessary" number of copies, requiring the party seeking costs to consult the circuit's requirements for filing briefs and appendices.

Fourth Circuit Local Rule 31(d). Number of Copies requires each party to file 8 copies of the brief. Appointed counsel must file 6 copies and any party proceeding in forma pauperis who is not represented by court-appointed counsel has to file 4 copies.

Fourth Circuit Local Rule 30(b). Appendix Contents; Number of Copies requires the appellant to file 6 copies of the appendix with the opening brief and serve 1 copy on counsel for each party separately represented. Appointed counsel must file 5 copies and any party proceeding in forma pauperis who is not represented by court-appointed counsel needs to file 4 copies.

Requirements for Recovery of Costs:

Local Rule 39(b). Bill of Costs. The verified bill of costs may be that of a party or counsel, and should be accompanied by the printer's itemized statement of charges. When costs are sought for or against the United States, counsel should cite the statutory authority relied upon. Taxation of costs will not be delayed by the filing of a petition for rehearing or other post-judgment motion. A late affidavit for costs must be accompanied by a motion for leave to file. The clerk rules on all bills of costs and objections in the first instance.

Local Rule 39(c). Recovery of Costs in the District Court.
The only costs generally taxable in the court of appeals are: (1) the docketing fee if the case is reversed; and (2) the cost of printing or reproducing briefs and appendices, including exhibits.

Although some costs are "taxable" in the court of appeals, all costs are recoverable in the district court after issuance of the mandate. If the matter of costs has not been settled before issuance of the mandate, the clerk will send a supplemental "bill of costs" to the district court for inclusion in the mandate at a later date.

[97]The description of the local rules and internal court procedures in this report may be a paraphrasing of the actual language contained in the rules and procedures or may omit portions or subsections that are not relevant or merely restate provisions contained in FRAP 39 itself, and thus should not be quoted or cited as legal authority. For the official and complete version of the rules and procedures cited herein, consult the published compilation of each circuit court of appeals' local rules and procedures, available on their websites.

Various costs incidental to an appeal must be settled at the district court level. Among such items are: (1) the cost of the reporter's transcript; (2) the fee for filing the notice of appeal; (3) the fee for preparing and transmitting the record; and (4) the premiums paid for any required appeal bond. Application for recovery of these expenses by the successful party on appeal must be made in the district court, and should be made only after issuance of the mandate by the court of appeals. These costs, if erroneously applied for in the court of appeals, will be disallowed without prejudice to the right to reapply for them in the district court.

Bill of Costs Form: The form is available on the court's website and states in the directions that counsel for a prevailing party seeking costs must file this (or a like form) within fourteen days after entry of judgment. The form requires counsel to list the amount of actual printing charges incurred with attached itemized bills; calculate the Local Rule 39(a) cap on taxable printing costs ($4.00 per original page of formal briefs and appendices, based on the page count in the docket entry); and then calculate and enter the lesser of these two as total printing charges claimed.

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Directions: Counsel for a prevailing party seeking costs must file this (or like) form within fourteen days after entry of judgment, even if a petition for rehearing or other post-judgment motion is filed. A late bill of costs must be accompanied by a motion for leave to extend filing time. The docketing fee (if the appellant prevails) and the cost of reproducing formal briefs and appendices are the only costs taxable in the court of appeals. Other costs must be settled at the district court level, including the cost of the transcript, the fee for filing the notice of appeal, and the premiums for any required appeal bond. Any objections to costs must be filed within 14 days (plus three days for electronic service) of the bill of costs. Costs are paid directly to the prevailing party or counsel, not to the clerk's office.

BILL OF COSTS FORM

THE CLERK IS REQUESTED TO TAX COSTS IN FAVOR OF THE PREVAILING PARTY PURSUANT TO FRAP 39 AND LOCAL RULE 39(a) AND (b) AS FOLLOWS:

A. Case Number & Caption	
B. Prevailing Party Claiming Costs	
C. Docketing Fee Claimed ($450 for appeals filed on or after April 9, 2006)	
D. Actual Printing Charges Incurred by Counsel (attach bills)	
E. Local Rule 39(a) Cap on Taxable Printing Costs ($4.00 per original page of formal briefs & appendices, based on page count in docket entry)	Total original brief/appendix pages: [ ] x $4.00 / pg Total of Local Rule 39(a) Printing Cap [ ]
F. Lesser of Boxes D and E	
Total Costs Claimed (total of boxes C & F)	

1. Counsel must attach itemized bills if copying was done by a commercial printer. If copying was done in-house, counsel must attach a statement showing the total pages copied and the amount charged per page.

2. If costs are sought for or against the United States, or its agency or officer, counsel must cite statutory authority for the award of costs here: [ ].

3. Counsel must certify the accuracy of the bill of costs by signing below: I declare under penalty of perjury that the foregoing costs are true and correct and were necessarily incurred in this action.

Signature: s/_____ **Date:** _____

Certificate of Service

I certify that on this date I served this document as follows:

Signature: s/_____ **Date:** _____

Analysis of Costs Awards[98]

	Costs Awarded under FRAP 39 During 2009-2010 in the Fourth Circuit Court of Appeals					
	FRAP 39(a)(1) appeal dismissed (costs in favor of appellee(s))	**FRAP 39(a)(2) judgment affirmed** (costs in favor of appellee(s))	**FRAP 39(a)(3) judgment reversed** (costs in favor of appellant(s))	**FRAP 39(a)(4) judgment affirmed in part, reversed in part, modified, or vacated** (costs taxed only as court orders)		
				overall	**Costs to appellee(s)**	**Costs to appellant(s)**
Total Number of Individual Costs Awards[99]	1	67	16	25	5	20
Average Costs Award: without outlier(s)	$180	$345.04	$1584.17	$1625.01	$634.92	$1900.03
Average Costs Award: with outlier(s)	N/A	N/A	$3172.08	$2370.97	N/A	$2804.98
Median Costs Award: without outlier(s)	N/A	$224.00	$1274.00	$1334.00	$662.00	$1520.93
Median Costs Award: with outlier(s)	N/A	N/A	$1409.05	$1349.60	N/A	$1662.13
Range of Costs Awards: without outlier(s)	N/A	$2649.10 [$37.50 to $2686.60]	$2834.29 [$676.71 to $3511]	$4238.00 [$172.00 to $4410]	$1177.60 [$172.00 to $1349.60]	$4067.04 [$342.96 to $4410]
Range of Costs Awards: with outlier(s)	N/A	$3970.50 [$24.00 to $1850.67]	$15834.09 [$676.71 to $16510.80]	$13721 [$172.00 to $13893.00]	N/A	$13550.04 [$342.96 to $13893.00]
Outlier(s)	N/A	N/A	$6562.00	$8005.98	N/A	$8005.98
			$7086.30	$1389.00		$13893.00
			$16510.80			

[98] The Fourth Circuit went live with CM/ECF on November 13, 2007, and their database includes all cases filed after that date as well as any pending cases that had activity after the live date.

[99] The unit of analysis is an individual costs award, not an individual case in which costs were awarded, because there could be more than one costs award issued in a single case (e.g., consolidated appeals). Including the award in the final database as an aggregate of total costs awarded in those appeals would result in a misleadingly higher costs award compared to cases with only one costs award issued.

Analysis of Outliers

Analysis of Costs Awards Identified as Outliers in the Fourth Circuit Court of Appeals					
Amount of Costs Award	**FRAP 39(a) Provision Costs Awarded Under**	**Nature of Suit**	**Consolidated appeal (total # cases)**	**Days from filing to final disposition**	**Itemization of Costs Awarded[100]**
$6562.00	FRAP 39(a)(3)	3442 Jobs	no	340 days	*Docket Fee ($450) *Brief (10 copies) ($450) *Reply (12 copies) ($330) *Appendix (9 copies; 158 pgs./copy) ($5180.35--includes binding costs) [79% of total award]
$7086.30	FRAP 39(a)(3)	3893 Environmental Matters	yes (5 cases)	658 days	*Brief (17 copies, 98 pgs./copy) ($183.60) *Reply (17 copies; 54 pgs./copy) ($108.80) *Joint Appendix (13 copies; 4,831 pgs./copy @ .10/pg.; .50/pg. for color copies) ($6793.90—includes binding and cover costs) [96% of total award]
$16510.80[101]	FRAP 39(a)(3)	4360 Other Personal Injury	no	623 days	*Docket Fee ($450) *Brief (10 copies; 32 pgs./copy) ($177.50) *Reply (10 copies; 31 pgs./copy) ($172.50) *Appendix (8 copies; 3,840 pgs./copy @ .50/pg.) ($15710.80—included $180 for covers & $30 for binders) [95% of total award] **Note: Reimbursement of actual costs included $210 for covers, $35 for binders, $40 for 40 CDs with copies of trial exhibits; $100.80 for color copies
$8005.98	FRAP 39(a)(4) vacated; costs awarded to appellants	3422 Bankruptcy Appeals Rule 28 USC 158	no	651 days	*Docket Fee ($450) *Brief (11 copies; 44 pgs./copy) ($169.40) *Reply brief (11 copies; 23 pgs./copy) ($88.55) * Joint Appendix (9 copies; 494 pgs./copy @ .30/pg.) ($1333.80) *Supplemental Joint Appendices(6 copies; 2,944 pgs./copy @ .30/copy)(8 copies; 69 pgs./copy @ .30/copy) ($5464.80) [85% of total award] **Note: Reimbursement of actual costs included $450 for consultation fees & $49.43 FedEx/UPS fees.
$13893.00	FRAP 39(a)(4) vacated; costs awarded to appellants	3442 Jobs	no	525 days	*Docket Fee ($450) *Appellant's Bill of Cost statement consisted of: "67,215 required pages @ .20 page" Docket indicates appellant filed following but # copies of each not available:: *Brief (76 pgs.) *Reply (44 pgs.) *Appendix (9345 pgs.)

[100] Where the information was available through the docket, costs awards are broken out to identify the items reimbursed—i.e., docket fee, brief, reply brief, and/or appendix. Where available, the number of copies, pages per copy, costs per page, and total costs per document will be provided for briefs and appendices.

[101] *Snyder v. Phelps*, et al., No. 08-1026 (4th Cir. Oct. 6, 2009).

United States Court of Appeals for the Fifth Circuit

Summary of Materials Addressing Fed. R. App. P. 39 Costs[102]

Maximum Rates:

Fifth Circuit Local Rule 39.1 Taxable Rates. The cost of reproducing necessary copies of the briefs, appendices, or record excerpts shall be taxed at a rate of actual cost, or $.15 per page, whichever is less, including cover, index, and internal pages, for any form of reproduction costs.

The cost of the binding required by 5th CIR. R. 32.2.3 that mandates that briefs must lie reasonably flat when open shall be a taxable cost but not limited to the foregoing rate. This rate is intended to approximate the current cost of the most economical acceptable method of reproduction generally available; and the clerk will, at reasonable intervals, examine and review it to reflect current rates.

Clerk's Office, Most Frequently Asked Questions (rev. 5/08) (available on the court's website). Bills Of Costs. What is recoverable under a "bill of costs?" (p.10-11) In general, see 5th CIR. R. 39. If the court awards you costs, you may submit a bill of costs and recover:

- **a.** The $450 filing fee (if you are the appellant);
- **b.** Your costs for preparing up to 10 copies of the record excerpts at the lesser of actual cost or $0.15 per page; the cost of covers at up to $.25 per page; the cost of spiral binding up to $1.50 per binding; sales tax if the record excerpts are commercially printed and you attach a copy of the invoice;
- **c.** The actual costs of tabs used to separate portions of the record excerpts as required by 5th CIR R. 30.1.7(c);
- **d.** Your costs in preparing up to 15 copies of your brief at the lesser of actual cost or $0.15 per page and for covers, binding and sales tax as shown in b above.

Maximum Number of Copies for Which Costs Are Recoverable:

Fifth Circuit Local Rule 39.1 Taxable Rates. (cont.): . . . Taxable costs will be authorized for up to

15 copies for a brief and
10 copies of an appendix or record excerpts,
unless the clerk gives advance approval for additional copies.

Fifth Circuit Local Rule 39.2 Nonrecovery of Mailing and Commercial Delivery Service Costs. Mailing and commercial delivery fees incurred in transmitting briefs are not recoverable as taxable costs.

[102]The description of the local rules and internal court procedures in this report may be a paraphrasing of the actual language contained in the rules and procedures or may omit portions or subsections that are not relevant or merely restate provisions contained in FRAP 39 itself, and thus should not be quoted or cited as legal authority. For the official and complete version of the rules and procedures cited herein, consult the published compilation of each circuit court of appeals' local rules and procedures, available on their websites.

Clerk's Office, Most Frequently Asked Questions (rev. 5/08) (available on the court's website) Bills Of Costs. What costs are not recoverable? (p.11) You may not be reimbursed, inter alia, for:

a. The costs of trial transcripts;
b. UPS or FedEx, etc., costs;
c. Costs for petitions for panel or en banc rehearings, or for initial en banc hearing;
d. Costs for a "Rule 28(j) letter";
e. The costs of typing fees or general office overhead;
f. Attorney's fees.

Requirements for Recovery of Costs:

Fifth Circuit Local Rule 39.3 Time for Filing Bills of Costs. The clerk must receive bills of costs and any objections within the times set forth in Fed. R. App. P. 39(d).

Clerk's Office, Most Frequently Asked Questions (rev. 5/08) (available on the court's website).Bills Of Costs (pp. 11-12):
How many copies of a bill of costs do I have to submit? You must submit one bill of costs with an original signature.
Where do I send the bill of costs? (address of Fifth Circuit Clerk's Office in New Orleans, LA)
I have not received payment, what should I do? Contact the district court in which the action was filed.

Bill of Costs Form. This form is not available on the court's website; it must be requested from the Clerk's Office. The form requires the requesting party to state the number of copies, pages per copy, and cost per page in calculating the total cost for the appendix or record excerpts, appellant's brief, appellee's brief, or the appellant's reply brief.

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BILL OF COSTS

NOTE: The Bill of Costs is due in this office *within 14 days from the date of the opinion, See* FED. R. APP. P. & 5TH CIR. R. 39. Untimely bills of costs must be accompanied by a separate motion to file out of time, which the court may deny.

_____ **v.** _____ **No.** _____

The Clerk is requested to tax the following costs against: _____

COSTS TAXABLE UNDER Fed. R. App. P. & 5th Cir. R. 39	**REQUESTED**				**ALLOWED (If different from amount requested)**			
	No. of Copies	**Pages Per Copy**	**Cost per Page***	**Total Cost**	**No. of Documents**	**Pages per Document**	**Cost per Page***	**Total Cost**
Docket Fee ($450.00)								
Appendix or Record Excerpts								
Appellant's Brief								
Appellee's Brief								
Appellant's Reply Brief								
Other:								
				Total $ _____				**Costs are taxed in the amount of $** _____

Costs are hereby taxed in the amount of $ _____ **this** _____ **day of** _____, _____.

LYLE W. CAYCE, CLERK

State of
County of _____

By _____
Deputy Clerk

I _____, **do hereby swear under penalty of perjury that the services for which fees have been charged were incurred in this action and that the services for which fees have been charged were actually and necessarily performed. A copy of this Bill of Costs was this day mailed to opposing counsel, with postage fully prepaid thereon. This** _____ **day of** _____, _____.

_____
(Signature)

***SEE REVERSE SIDE FOR RULES GOVERNING TAXATION OF COSTS**

Attorney for _____

FIFTH CIRCUIT RULE 39

39.1 Taxable Rates. *The cost of reproducing necessary copies of the brief, appendices, or record excerpts shall be taxed at a rate not higher than $0.15 per page, including cover, index, and internal pages, for any for of reproduction costs. The cost of the binding required by 5TH CIR. R. 32.2.3that mandates that briefs must lie reasonably flat when open shall be a taxable cost but not limited to the foregoing rate. This rate is intended to approximate the current cost of the most economical acceptable method of reproduction generally available; and the clerk shall, at reasonable intervals, examine and review it to reflect current rates. Taxable costs will be authorized for up to 15 copies for a brief and 10 copies of an appendix or record excerpts, unless the clerk gives advance approval for additional copies.*

39.2 Nonrecovery of Mailing and Commercial Delivery Service Costs. *Mailing and commercial delivery fees incurred in transmitting briefs are not recoverable as taxable costs.*

39.3 Time for Filing Bills of Costs. *The clerk must receive bills of costs and any objections within the times set forth in FED. R. APP. P. 39(D). See 5TH CIR. R. 26.1.*

FED. R. APP. P. 39. COSTS

(a) ***Against Whom Assessed.*** The following rules apply unless the law provides or the court orders otherwise;

(1) if an appeal is dismissed, costs are taxed against the appellant, unless the parties agree otherwise;

(2) if a judgment is affirmed, costs are taxed against the appellant;

(3) if a judgment is reversed, costs are taxed against the appellee;

(4) if a judgment is affirmed in part, reversed in part, modified, or vacated, costs are taxed only as the court orders.

(b) ***Costs For and Against the United States.*** Costs for or against the United States, its agency or officer will be assessed under Rule 39(a) only if authorized by law.

©) ***Costs of Copies*** Each court of appeals must, by local rule, fix the maximum rate for taxing the cost of producing necessary copies of a brief or appendix, or copies of records authorized by rule 30(f). The rate must not exceed that generally charged for such work in the area where the clerk's office is located and should encourage economical methods of copying.

(d) ***Bill of costs: Objections; Insertion in Mandate.***

(1) A party who wants costs taxed must – within 14 days after entry of judgment – file with the circuit clerk, with proof of service, an itemized and verified bill of costs.

(2) Objections must be filed within 10 days after service of the bill of costs, unless the court extends the time.

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

(e) ***Costs of Appeal Taxable in the District Court.*** The following costs on appeal are taxable in the district court for the benefit of the party entitled to costs under this rule:

(1) the preparation and transmission of the record;

(2) the reporter's transcript, if needed to determine the appeal;

(3) premiums paid for a supersedeas bond or other bond to preserve rights pending appeal; and

(4) the fee for filing the notice of appeal.

Analysis of Costs Awards[103]

	Costs Awarded under FRAP 39 During 2009-2010 in the Fifth Circuit Court of Appeals					
	FRAP 39(a)(1) appeal dismissed (costs in favor of appellee(s))	**FRAP 39(a)(2) judgment affirmed** (costs in favor of appellee(s))	**FRAP 39(a)(3) judgment reversed** (costs in favor of appellant(s))	**FRAP 39(a)(4) judgment affirmed in part, reversed in part, modified, or vacated** (costs taxed only as court orders)		
				overall	**Costs to appellee(s)**	**Costs to appellant(s)**
Total Number of Individual Costs Awards[104]	3[105]	96[106]	16[107]	16[108]	4	12
Average Costs Award	$185.30	$104.51	$690.89	$498.94	$197.59	$599.38
Median Costs Award	$117.30	$79.00	$649.80	$518.83	$184.20	$559.55
Range of Costs Awards	$373.80 [$32.40 to $406.20]	$434.89 [$13.50 to $448.39]	$1010.30 [$408.20 to $1418.50]	$1018.65 [$27.60 to $1046.25]	$366.75 [$27.60 to $394.35]	$609.03 [$437.22 to $1046.25]

[103] The Fifth Circuit went live with CM/ECF on February 17, 2009, and their database includes all cases filed after that date as well as any pending cases that had activity after the live date. As noted for the total number of individual costs awards under each FRAP(a) provision, in the Fifth Circuit there were a number of costs approved and awarded where the final approved bill of cost was mentioned in and attached to the mandate, but not accessible through the docket. The data presented in this table for the Fifth Circuit are derived only from those costs awards in which the final approved bill of costs was accessible through the docket to allow verification of the final amount awarded.

[104] The unit of analysis is an individual costs award, not an individual case in which costs were awarded, because there could be more than one costs award issued in a single case (e.g., consolidated appeals). Including the award in the final database as an aggregate of total costs awarded in those appeals would result in a misleadingly higher costs award compared to cases with only one costs award issued.

[105] There were 10 additional costs awards approved under FRAP 39(a)(1) and referenced in the mandate but the final amount awarded could not be verified.

[106] There were 225 additional costs awards approved under FRAP 39(a)(2) and referenced in the mandate but the final amount awarded could not be verified.

[107] There were 36 additional costs awards approved under FRAP 39(a)(3) and referenced in the mandate but the final amount awarded could not be verified.

[108] There were 38 additional costs awards approved under FRAP 39(a)(4) and referenced in the mandate but the final amount awarded could not be verified. Costs were awarded to the appellee in 14 of these awards, and costs were awarded to the appellant in the remaining 24 awards.

United States Court of Appeals for the Sixth Circuit

Summary of Materials Addressing Fed. R. App. P. 39 Costs[109]

Maximum Rates:

6th Circuit Local Rule 39 Costs—Costs Recoverable for Filing of Required Paper Briefs

(a) Reproduction Costs. Costs shall be taxed at the lesser of the actual cost or a cost of .25 cents per page, including covers, index, and table of authorities, regardless of the reproduction process used.

Note: 6 CIR R. 39(a) is the same as former Rule 39(a), thus the same rate applies to cases filed before and after June 1, 2008.

Maximum Number of Copies for Which Costs Are Recoverable:

Former 6 CIR R. 39(b)—applies to cases filed before June 1, 2008

(b) Number of Briefs and Appendices. Costs shall be taxed for seven copies of each brief plus two copies for each party required to be served, and for six copies of the joint appendix plus one copy for each party required to be served, unless advance approval for additional copies is obtained from the clerk.

Revised 6 CIR. R. 39(b)—applies to cases filed on or after June 1, 2008

(b) Number of Briefs and Appendices. When the court allows paper briefs to be filed, costs may be taxed for two copies for each party required to be served. When the court allows a paper appendix, costs may be taxed for one copy for each party required to be served.

Comment: Rule 39(b) is revised to account for the reduced number of copies required when there are paper filings.

6 Cir. R. 25 Filing, Proof of Filing, Service, and Proof of Service-Acknowledgment of Filing; Electronic Case Filing

(a) Unless otherwise required by the Sixth Circuit Rules or by order of the court, all documents submitted in cases filed with the Sixth Circuit on or after June 1, 2008, shall be filed electronically, using the Electronic Case Filing (ECF) system. Electronic filings shall be governed by the Sixth Circuit Rules and by the Sixth Circuit Guide to Electronic Filing.

(b) **Exceptions to Electronic Filing.** The following documents shall not be filed electronically, but shall be filed in paper format:

(1) Any document filed by a party that is unrepresented by counsel;
(2) Petitions for permission to appeal under Fed. R. App. P. 5;
(3) Petitions for review of an agency order under Fed. R. App. P. 15;
(4) Petitions for a writ of mandamus or writ of prohibition under Fed. R. App. P. 21;
(5) Applications for any other extraordinary writ under Fed. R. App. P. 21;

[109] The description of the local rules and internal court procedures in this report may be a paraphrasing of the actual language contained in the rules and procedures or may omit portions or subsections that are not relevant or merely restate provisions contained in FRAP 39 itself, and thus should not be quoted or cited as legal authority. For the official and complete version of the rules and procedures cited herein, consult the published compilation of each circuit court of appeals' local rules and procedures, available on their websites.

(6) Any other document initiating an original action in the court of appeals;
(7) Motions to authorize the filing in the district court of a second or successive petition for a writ of habeas corpus under 6 Cir. R. 22;
(8) Documents filed under seal;
(9) Documents relating to complaints of attorney misconduct;
(10) Vouchers or other documents relating to claims for compensation and reimbursement of expenses incurred with regard to representation afforded under the Criminal Justice Act; and
(11) Documents that exceed any limit that the court may set for the size of electronic filings.

6 Cir. R. 30 Appendix to the Briefs requires leave of court before a paper appendix may be filed, except for death penalty cases (5 copies of paper appendix must be filed).

Requirements for Recovery of Costs:

6 CIR. R. 39 (c) How Recovered. An itemized and verified bill of costs must be filed within 14 days of the entry of judgment (unless time is enlarged by motion granted). An affidavit of counsel with bills attached as exhibits will usually suffice to prove costs.

6 Cir. Internal Operating Procedure 39 Costs-Bill of Costs-Motion to Extend Time

(a) **Bills of Costs.** Costs in this court include the court of appeals docket fee (where applicable) and production of the briefs and appendix, as limited by 6 Cir.R.39. This court does not look favorably upon commercial printing or other expensive methods of producing the briefs and appendix. Therefore, 6 Cir.R. 39 limits the costs which are recoverable for the production or reproduction of those documents. Attorney fees are generally not considered costs of appeal.
(b) **Motion to Extend Time to File Bill of Costs**. Uncontested motions for extensions of time to file a bill of costs are decided by the clerk. Contested motions are decided by a single judge.

Bill of Costs Form: The Sixth Circuit does not have an official Bill of Costs Form but requires the filing of "an itemized and verified" document to request costs.

Analysis of Costs Awards: Cases Filed Before June 1, 2008[110]

	Costs Awarded under FRAP 39 During 2009-2010 in the Sixth Circuit Court of Appeals (for cases filed before June 1, 2008)					
	FRAP 39(a)(1) appeal dismissed (costs in favor of appellee(s))	**FRAP 39(a)(2) judgment affirmed** (costs in favor of appellee(s))	**FRAP 39(a)(3) judgment reversed** (costs in favor of appellant(s))	**FRAP 39(a)(4) judgment affirmed in part, reversed in part, modified, or vacated** (costs taxed only as court orders)		
				overall	**Costs to appellee(s)**	**Costs to appellant(s)**
Total Number of Individual Costs Awards[111]	0	17	8	10	5	5
Average Costs Award: without outlier(s)	N/A	$280.16	$443.83	$592.42	$652.85	$532.00
Average Costs Award: with outlier(s)	N/A	N/A	$675.37	$893.55	$908.88	$878.22
Median Costs Award: without outlier(s)	N/A	$203.50	$455.00	$568.99	$712.50	$497.49
Median Costs Award: with outlier(s)	N/A	$N/A	$529.80	$658.00	$787.00	$499.98
Range of Costs Awards: without outlier(s)	N/A	$879.95 [$16.50 to $896.45]	$493.62 [$166.38 to $660.00]	$594.18 [$296.10 to $890.28]	$594.18 [$296.10 to $890.28]	$223.00 [$455.00 to $678.00]
Range of Costs Awards: with outlier(s)	N/A	N/A	$1311.87 [$166.38 to $1478.25]	$1967.02 [$296.10 to $2263.12]	$1636.90 [$296.10 to $1933.00]	$1808.12 [$455.00 to $2263.12]
Outliers	N/A	N/A	$1261.76	$1933.00	$1933.00	N/A
			$1478.25	$2263.12	N/A	$2263.12

[110] The Sixth Circuit went live with CM/ECF on August 20, 2007, and their database includes all cases filed after that date as well as any pending cases that had activity after the live date. Because costs awarded for cases filed prior to June 1, 2008, were governed by former Sixth Cir Rule 39(b) that has since been revised to incorporate the reduced number of copies required due to electronic filing, costs awarded in cases filed prior to June 1, 2008, are analyzed separately from costs awarded in cases filed on or after June 1, 2008.

[111] The unit of analysis is an individual costs award, not an individual case in which costs were awarded, because there could be more than one costs award issued in a single case (e.g., consolidated appeals). Including the award in the final database as an aggregate of total costs awarded in those appeals would result in a misleadingly higher costs award compared to cases with only one costs award issued.

Analysis of Outliers: Cases Filed Before June 1, 2008

Analysis of Costs Awards Identified as Outliers in the Sixth Circuit Court of Appeals (for cases filed before June 1, 2008)					
Amount of Costs Award	**FRAP 39(a) Provision Costs Awarded Under**	**Nature of Suit**	**Consolidated appeal (total # cases)**	**Days from filing to final disposition**	**Itemization of Costs Awarded[112]**
$1261.76	FRAP 39(a)(3)	3442 Civil Rights: Jobs	no	421 days	*Docket Fee ($455) * Proof brief (418 total pages) ($50.16) *Reply (798 total pages) ($138.60) *Appendix (4,218 total pages) ($421.80) [33% of total award]
$1478.25	FRAP 39(a)(3)	4110 Contract: Insurance	no	390 days	Bill of Cost not available: mandate indicated costs awarded as follows: *Filing Fee ($450) *Printing costs ($1028.25)
$1933.00	FRAP 39(a)(4) affirmed part, reversed part; costs awarded to appellee/ cross-appellant	3440 Civil Rights: Other	yes (2 cases)	419 days	*Bill of Cost not available: mandate indicated cost award of $1933.00 to be recovered by appellee
$2263.12	FRAP 39(a)(4) affirmed part, vacated part; costs awarded to appellants	4190 Contract: Other	no	517 days	*Proof Brief & Proof Reply ($135.40) *Final Brief (7 copies; 55 pgs/copy) ($209) *Final Reply brief (7 copies; 17 pgs/copy) ($64.60) *Joint Appendix (5 copies; 744 pgs. per copy) ($1636.80) [72% of total award] *Note: Reimbursement of actual costs included $18.20 for copies of misc. letters to court; $85.75 postage for service of filings; $81.49 FedEx delivery fees.

[112] Where the information was available through the docket, costs awards are broken out to identify the items reimbursed—i.e., docket fee, brief, reply brief, and/or appendix. Where available, the number of copies, pages per copy, cost per page, and total costs per document are provided for briefs and appendices.

Analysis of Costs Awards: Cases Filed After June 1, 2008

	Costs Awarded under FRAP 39 During 2009-2010 in the Sixth Circuit Court of Appeals (for cases filed on or after June 1, 2008)					
	FRAP 39(a)(1) appeal dismissed (costs in favor of appellee(s))	**FRAP 39(a)(2) judgment affirmed** (costs in favor of appellee(s))	**FRAP 39(a)(3) judgment reversed** (costs in favor of appellant(s))	**FRAP 39(a)(4) judgment affirmed in part, reversed in part, modified, or vacated** (costs taxed only as court orders)		
				overall	**Costs to appellee(s)**	**Costs to appellant(s)**
Total Number of Individual Costs Awards[113]	0	1	3	7	0	7
Average Costs Award:	N/A	$18.20	$322.17	$389.96	N/A	$389.96
Median Costs Award:	N/A	N/A	$455.00	$450.00	N/A	$450.00
Range of Costs Awards:	N/A	N/A	$398.48 [$56.52 to $455.00]	$465.25 [$4.75 to $470.00]	N/A	$465.25 [$4.75 to $470.00]

[113] The unit of analysis is an individual costs award, not an individual case in which costs were awarded, because there could be more than one costs award issued in a single case (e.g., consolidated appeals). Including the award in the final database as an aggregate of total costs awarded in those appeals would result in a misleadingly higher costs award compared to cases with only one costs award issued.

United States Court of Appeals for the Seventh Circuit

Summary of Materials Addressing Fed. R. App. P. 39 Costs[114]

Maximum Rates:

Seventh Circuit Rule 39. Costs of Printing Briefs and Appendices

The cost of printing or otherwise producing copies of briefs and appendices shall not exceed the maximum rate per page as established by the clerk of the court of appeals. If a commercial printing process has been used, a copy of the bill must be attached to the itemized and verified bill of costs filed and served by the party.

The Seventh Circuit does not have a formal fee schedule in writing; there is an informal policy established by the chief judge which currently reimburses a party to whom costs are awarded under FRAP 39:

$ .10 cents per page to copy briefs
$2 per brief for bindings and covers

Maximum Number of Copies for Which Costs Are Recoverable: Seventh Circuit Local Rule 39 does not set mention number of copies reimbursable, but the Seventh Circuit *Practitioner's Handbook for Appeals* provides that the court will only reimburse for a "reasonable" number of copies requiring the party seeking costs to consult the circuit's requirements for filing briefs and appendices.

Seventh Circuit Rule 31. Filing of Briefs and Failure to Timely File Briefs

. . . (b) **Number of Briefs Required**. The clerk of this court is authorized to accept 15 copies of briefs as substantial compliance with Fed. R. App. P. 31(b). Appointed counsel shall also file 15 copies.

Since Seventh Circuit Rule 30, which establishes requirements for appendices, does not establish the number of copies of an appendix a party must file, Federal Rule of Appellate Procedure 30(a)(3)'s default requirements will be adopted as the Seventh Circuit's filing requirements for appendices and thus establish the maximum number of copies recoverable as costs.

Federal Rule of Appellate Procedure 30:Appendix to the Briefs

(a) Appellant's Responsibility. (3) *Time to File; Number of Copies*. Unless filing is deferred under Rule 30(c), the appellant must file 10 copies of the appendix with the brief and must serve one copy on counsel for each party separately represented. An unrepresented party proceeding in forma pauperis must file 4 legible copies with the clerk, and one copy must be served on counsel for each separately represented party. The court may by local rule or by order in a particular case require the filing or service of a different number.

[114]The description of the local rules and internal court procedures in this report may be a paraphrasing of the actual language contained in the rules and procedures or may omit portions or subsections that are not relevant or merely restate provisions contained in FRAP 39 itself, and thus should not be quoted or cited as legal authority. For the official and complete version of the rules and procedures cited herein, consult the published compilation of each circuit court of appeals' local rules and procedures, available on their websites.

Requirements for Recovery of Costs:

Seventh Circuit Practitioner's Handbook for Appeals (2003 Edition)
XIXIX. Costs

A bill of costs must be filed within 14 days after entry of the judgment. If there is a reversal, the docket fee may be taxed against the losing party. The cost of printing or otherwise reproducing the briefs and appendix is also ordinarily recoverable by the successful party on appeal. Fed. R. App. P. 39(c); Cir. R. 39. So also is the cost of reproducing parts of the record pursuant to Fed. R. App. P. 30(f) and that of reproducing exhibits pursuant to Rule 30(e). However, costs for a lengthy appendix will not be awarded. Cir. R. 30(e).

The bill of costs must contain an affidavit itemizing allowable costs. The affidavit may be made by a party, counsel, or the printer with proof of service upon opposing counsel. A bill of costs filed after the 14 days will rarely be allowed and it must be accompanied by an affidavit showing that extraordinary circumstances prevented the filing of the bill on time. No court action is necessary on a timely filed bill of costs unless it is objected to by opposing counsel. The reasonableness of the charges contained in the affidavit is about the only reason for objection. Fed.R. App. P. 39(c), Cir. R. 39. The court must determine whether the costs are reasonable. Usually, the matter of costs in the court of appeals is settled before issuance of the mandate; but, if not, the clerk may send a supplemental bill of costs to the district court for inclusion in the mandate at a later date. The clerk prepares an itemized statement of costs for insertion in the mandate. Fed. R. App. P. 39(d).

Although taxable in the court of appeals, the costs are actually recoverable only in the district court after issuance of the mandate with its attached bill of costs. The money involved never physically changes hands at the court of appeals level.

Various costs incidental to appeal must be settled at the district court level. Among such items are: (1) the cost of the reporter's transcript ; (2) the fee for filing the notice of appeal; and (3) the premiums paid for any required appeal bond. Fed. R. App. P. 39(e). Application for recovery of these expenses by the successful party on appeal must be made in the district court after the mandate issues.

Bill of Costs Form: The Seventh Circuit does not have an official Bill of Costs Form. However, an affidavit itemizing allowable costs must be filed by the party requesting costs.

Analysis of Costs Awards[115]

	Costs Awarded under FRAP 39 During 2009-2010 in the Seventh Circuit Court of Appeals					
	FRAP 39(a)(1) appeal dismissed (costs in favor of appellee(s))	**FRAP 39(a)(2) judgment affirmed** (costs in favor of appellee(s))	**FRAP 39(a)(3) judgment reversed** (costs in favor of appellant(s))	**FRAP 39(a)(4) judgment affirmed in part, reversed in part, modified, or vacated** (costs taxed only as court orders)		
				overall	**Costs to appellee(s)**	**Costs to appellant(s)**
Total Number of Individual Costs Awards[116]	2	125	39	32	7	25
Average Costs Award: without outlier(s)	$142.91	$198.22	$627.47	$600.07	$327.26	$679.64
Average Costs Award: with outlier(s)	N/A	N/A	$676.41	$700.02	N/A	$804.39
Median Costs Award: without outlier(s)	$142.91	$144.00	$655.25	$592.50	$227.83	$676.60
Median Costs Award: with outlier(s)	N/A	N/A	$665.30	$613.05	N/A	$701
Range of Costs Awards: without outlier(s)	$134.19 [$75.81 to $210.00]	$943.60 [$20.00 to $963.60]	$1470.77 [$133.83 to $1604.60]	$1816.98 [$95.42 to $1912.40]	$838.65 [$121.80 to $960.45]	$1816.98 [$95.42 to $1912.40]
Range of Costs Awards: with outlier(s)	N/A	N/A	$2402.17 [$133.83 to $2536.00]	$3703.04 [$95.42 to $3798.46]	N/A	$3703.04 [$95.42 to $3798.46]
Outlier(s)	N/A	N/A	$2536.00	$3798.46	N/A	$3798.46

[115] The Seventh Circuit went live with CM/ECF on March 31, 2008, and their database only includes cases filed after that date because the Seventh Circuit is one of the three circuits that are not converting their pending cases from their old system to CM/ECF. Thus, our database of costs awards will not include final costs awarded in cases filed before March 31, 2008.

[116] The unit of analysis is an individual costs award, not an individual case in which costs were awarded, because there could be more than one costs award issued in a single case (e.g., consolidated appeals). Including the award in the final database as an aggregate of total costs awarded in those appeals would result in a misleadingly higher costs award compared to cases with only one costs award issued.

Analysis of Outliers

Analysis of Costs Awards Identified as Outliers in the Seventh Circuit Court of Appeals					
Amount of Costs Award	**FRAP 39(a) Provision Costs Awarded Under**	**Nature of Suit**	**Consolidated appeal (total # cases)**	**Days from filing to final disposition**	**Itemization of Costs Awarded[117]**
$2536.00	FRAP 39(a)(3)	4190 Other Contract Actions	yes (2 cases)	412 days	*Docket Fee ($900--consolidated appeals) *Brief (40 copies; 3,280 pgs. total) ($656) *Appendix (30 copies; 280 pgs/copy) ($840) [33% of total award] *Covers ($140)
$3798.46	FRAP 39(a)(4) affirmed part, reversed part; costs awarded to appellant /cross-appellee (Chapter 7 trus-tee)	Bankruptcy appeal	yes (2 cases)	246 days	Itemized Bill of Cost not available; mandate issued listing total amount of award "for reproduction of briefs." *Note: Docket shows appellant filed the following: *Brief (15 copies) *Appendix (10 copies; vols. 1-7) *Reply (15 copies)

[117] Where the information was available through the docket, costs awards are broken out to identify the items reimbursed—i.e., docket fee, brief, reply brief, and/or appendix. Where available, the number of copies, pages per copy, cost per page, and total costs per document are provided for briefs and appendices.

United States Court of Appeals for the Eighth Circuit

Summary of Materials Addressing Fed. R. App. P. 39 Costs[118]

Maximum Rates:

Eighth Circuit Local Rule 39A: Taxation of Costs

(a)Taxation of Reproduction Costs. The cost of printing or otherwise reproducing necessary copies of briefs, separate addenda, and appendices must be taxable as follows:

. . . .

(4) REPRODUCTION COSTS. The clerk will tax reproduction costs, regardless of reproduction method, at the following rate:

Reproduction per page per copy	$ .15
Binding per brief, separate addendum, or appendix	$2.00
Cover per brief, separate addendum, or appendix	$2.00
Sales tax (if any)	at applicable rate

(5) OTHER COSTS. The clerk will not allow taxation of other costs associated with preparation of the brief or appendix. Parties cannot recover costs for overnight or special delivery.

Maximum Number of Copies for Which Costs Are Recoverable:

Eighth Circuit Local Rule 39A: Taxation of Costs

(a)Taxation of Reproduction Costs. The cost of printing or otherwise reproducing necessary copies of briefs, separate addenda, and appendices must be taxable as follows:

(1) Briefs. Unless the court has directed the parties to file a greater number of briefs, the clerk will allow taxation of costs for only 10 copies of each brief, plus 1 copy for each party separately represented.

(2) Separate Addenda. Unless the court has directed the parties to file a greater number of separate addenda, the clerk will allow taxation of costs for only 10 copies of each separate addendum prepared under 8th Cir. R. 28A(b)(2), plus 1 copy for each party separately represented.

(3) Appendices. Unless the court has directed the parties to file a greater number of appendices, the clerk will allow taxation of costs for only 3 copies of each appendix, plus 1 copy for each party separately represented.

[118]The description of the local rules and internal court procedures in this report may be a paraphrasing of the actual language contained in the rules and procedures or may omit portions or subsections that are not relevant or merely restate provisions contained in FRAP 39 itself, and thus should not be quoted or cited as legal authority. For the official and complete version of the rules and procedures cited herein, consult the published compilation of each circuit court of appeals' local rules and procedures, available on their websites.

Requirements for Recovery of Costs:

Eighth Circuit Local Rule 39A: Taxation of Costs

(b) Filing Date. The prevailing party may file a bill of costs within 14 days after the entry of judgment. Untimely bills will be denied unless a motion showing good cause is filed with the bill. The losing party must file any objections to the bill of costs with 7 days after being served. If a party files a motion showing good cause, the clerk may grant a 7-day extension for filing either the bill of costs or the objections.

(c) Support for Bill of Costs. The bill of costs must be itemized and verified. Any receipts must be attached as exhibits to the bill of costs.

United States Court of Appeals for the Eighth Circuit, Internal Operating Procedures (rev 10/1/2010) E. COSTS

Costs taxable in the court of appeals are limited to the expense of reproduction of the briefs and designated record, and the docket fee, if the appellant prevails. See FRAP 39(c). The prevailing party normally is entitled to recover these costs after complying with FRAP 39(d).

The verified bill of costs required by FRAP 39(d) may be that of a party or counsel, or a printer's verified bill of costs evidencing payment of the bill for a specified brief. When an objection is filed the court must determine whether the costs are reasonable for the area where the clerk's office is located. See FRAP 39(c). The court will rule on a timely bill of costs if the opposing party objects; absent an objection, the clerk will approve a timely-filed and properly-supported bill of costs. If costs have not been settled before issuance of the mandate, the clerk proceeds as specified in FRAP 39(d).

Some costs of an appeal must be taxed in the district court. See FRAP 39(e). After the district court receives the court of appeals mandate, a party must apply to the district court for recovery of these costs within the time the district court rules prescribe.

Bill of Costs Form: The Eighth Circuit does not have an official Bill of Costs Form but requires the filing of "an itemized and verified" document with receipts attached.

Analysis of Costs Awards[119]

	Costs Awarded under FRAP 39 During 2009-2010 in the Eighth Circuit Court of Appeals					
	FRAP 39(a)(1) appeal dismissed (costs in favor of appellee(s))	**FRAP 39(a)(2) judgment affirmed** (costs in favor of appellee(s))	**FRAP 39(a)(3) judgment reversed** (costs in favor of appellant(s))	**FRAP 39(a)(4) judgment affirmed in part, reversed in part, modified, or vacated** (costs taxed only as court orders)		
				overall	**Costs to appellee(s)**	**Costs to appellant(s)**
Total Number of Individual Costs Awards[120]	1	72	18	11	0	11
Average Costs Award: without outlier(s)	$141.60	$269.32	$813.36	$874.88	N/A	$874.88
Average Costs Award: with outlier(s)	N/A	N/A	N/A	$1347.75	N/A	$1347.75
Median Costs Award: without outlier(s)	N/A	$212.84	$579.46	$927.38	N/A	$927.38
Median Costs Award: with outlier(s)	N/A	N/A	N/A	$1015.76	N/A	$1015.76
Range of Costs Awards: without outlier(s)	N/A	$1013.20 [$50.40 to $1063.60]	$2248.60 [$87.10 to $2335.70]	$1374.69 [$332.81 to $1707.50]	N/A	$1374.69 [$332.81 to $1707.50]
Range of Costs Awards: with outlier(s)	N/A	N/A	N/A	$5743.63 [$332.81 to $6076.44]	N/A	$5743.63 [$332.81 to $6076.44]
Outlier(s)	N/A	N/A	N/A	$6076.44	N/A	$6076.44

[119] The Eighth Circuit went live with CM/ECF on December 18, 2006, and their database includes all cases filed after that date as well as any pending cases that had activity after the live date.

[120] The unit of analysis is an individual costs award, not an individual case in which costs were awarded, because there could be more than one costs award issued in a single case (e.g., consolidated appeals). Including the award in the final database as an aggregate of total costs awarded in those appeals would result in a misleadingly higher costs award compared to cases with only one costs award issued.

Analysis of Outliers

Analysis of Costs Awards Identified as Outliers in the Eighth Circuit Court of Appeals					
Amount of Costs Award	**FRAP 39(a) Provision Costs Awarded Under**	**Nature of Suit**	**Consolidated appeal (total # cases)**	**Days from filing to final disposition**	**Itemization of Costs Awarded[121]**
$6076.44	FRAP 39(a)(4) affirmed part, reversed part; costs awarded to appellant	3110 Insurance	no	537	*Brief (16 copies; 138 pgs./copy) ($395.20—includes $64 for covers and binding) *Reply (16 copies; 52 pgs./copy) ($188—includes $64 for covers and binding) *Appendix (9 copies; 3497 pgs./copy @ .15/pg.) ($5296.95--includes $64 for covers and binding for 16 volumes) [87% of total award] *Sales tax ($195.49)

[121] Where the information was available through the docket, costs awards are broken out to identify the items reimbursed—i.e., docket fee, brief, reply brief, and/or appendix. Where available, the number of copies, pages per copy, cost per page, and total costs per document are provided for briefs and appendices.

United States Court of Appeals for the Ninth Circuit

Summary of Materials Addressing Fed. R. App. P. 39 Costs[122]

Maximum Rates:

9th Circuit Local Rule 39-1. Costs and Attorneys Fees on Appeal
39-1.3. Cost of Reproduction
In taxing costs for photocopying documents, the clerk shall tax costs at a rate not to exceed 10 cents per page, or at actual cost, whichever is less.

Maximum Number of Copies for Which Costs Are Recoverable:

9th Circuit Local Rule 39-1. Costs And Attorneys Fees On Appeal
39-1.2. Number of Briefs and Excerpts
Costs will be allowed for the required number of paper copies of briefs and one additional copy. Costs will also be allowed for any paper copies of the briefs that the eligible party was required to serve.

If excerpts of record were filed, costs will be allowed for 5 copies of the excerpts of record plus 1 copy for each party required to be served, unless the Court shall direct a greater number of excerpts to be filed than required under Circuit Rules 30-1.3 and 17-1.3.

Ninth Circuit Rule 31-1. Number of Briefs requires filing of 1 original and 7 copies of each brief.

Ninth Circuit Local Rule 30-2. Sanctions For Failure To Comply With Circuit Rule 30-1
If materials required to be included in the excerpts under these rules are omitted, or irrelevant materials are included, the court may take one or more of the following actions:

(a) strike the excerpts and order that they be corrected and resubmitted;
(b) order that the excerpts be supplemented;
(c) if the court concludes that a party or attorney has vexatiously or unreasonably increased the cost of litigation by inclusion of irrelevant materials, deny that portion of the costs the court deems to be excessive; and/or
(d) impose monetary sanctions.

Requirements for Recovery of Costs:

Ninth Circuit Local Rule 39-1. Costs and Attorneys Fees on Appeal
39-1.1. Bill of Costs
The itemized and verified bill of costs required by FRAP 39(d) shall be submitted on the standard form provided by this court. It shall include the following information:

(1) The number of copies of the briefs or excerpts of record reproduced; and

[122]The description of the local rules and internal court procedures in this report may be a paraphrasing of the actual language contained in the rules and procedures or may omit portions or subsections that are not relevant or merely restate provisions contained in FRAP 39 itself, and thus should not be quoted or cited as legal authority. For the official and complete version of the rules and procedures cited herein, consult the published compilation of each circuit court of appeals' local rules and procedures, available on their websites.

(2) The actual cost per page for each document.

39-1.4. Untimely Filing

Untimely cost bills will be denied unless a motion showing good cause is filed with the bill.

Unites States Court of Appeals for the Ninth Circuit, General Orders (December 2010)
Chapter IV: Dispositions
e. Costs

Every disposition in a civil case where there is a mixed judgment, the lower tribunal's judgment is vacated, or where the panel determines that costs shall be unequally divided among the losing parties shall indicate in its text or in a separate order which party or parties shall bear the costs. The Clerk's Office, before filing the disposition, shall determine whether the disposition makes that indication. If the disposition does not indicate which party or parties shall bear the costs, the Clerk's Office immediately shall request that information from the authoring judge, who will enter an appropriate order.

Bill of Costs Form: Ninth Circuit Form 10. Bill of Costs is available upon request from the clerk and on the court's website. A bill of cost must be submitted on the court provided form and must be accompanied by a motion showing good cause. The form has two parts, one for requested fees and the other for allowed fees. For each item seeking reimbursement (excerpt of record, opening brief, answering brief, reply brief or other), the submitting party must indicate the number of documents, pages per document, cost per page and the total costs. Form 10 makes it clear that attorneys' fees cannot be requested and that costs per page cannot exceed $ .10 or actual cost, whichever is less.

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

Note: If you wish to file a bill of costs, it MUST be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

_____ v. _____ 9th Cir. No. _____

The Clerk is requested to tax the following costs against: _____

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	REQUESTED Each Column Must Be Completed				ALLOWED To Be Completed by the Clerk			
	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST
Excerpt of Record			$	$			$	$
Opening Brief			$	$			$	$
Answering Brief			$	$			$	$
Reply Brief			$	$			$	$
Other**			$	$			$	$
			TOTAL:	$			TOTAL:	$

* Costs per page may not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

****** Other: Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys' fees **cannot** be requested on this form.

Continue to next page.

Form 10. Bill of Costs - *Continued*

I, _____ , swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature _____

("s/" plus attorney's name if submitted electronically)

Date _____

Name of Counsel: _____

Attorney for: _____

(To Be Completed by the Clerk)

Date _____ Costs are taxed in the amount of $ _____

Clerk of Court

By: _____ , Deputy Clerk

Analysis of Costs Awards[123]

	Costs Awarded under FRAP 39 During 2009-2010 in the Ninth Circuit Court of Appeals					
	FRAP 39(a)(1) appeal dismissed (costs in favor of appellee(s))	**FRAP 39(a)(2) judgment affirmed** (costs in favor of appellee(s))	**FRAP 39(a)(3) judgment reversed** (costs in favor of appellant(s))	**FRAP 39(a)(4) judgment affirmed in part, reversed in part, modified, or vacated** (costs taxed only as court orders)		
				overall	**Costs to appellee(s)**	**Costs to appellant(s)**
Total Number of Individual Costs Awards[124]	4	188	57	23	6	17
Average Costs Award: without outlier(s)	$153.68	$241.49	$380.84	$460.49	$363.23	$496.96
Average Costs Award: with outlier(s)	N/A	$251.76	$562.93	$581.29	N/A	$658.26
Median Costs Award: without outlier(s)	$153.60	$149.50	$300.70	$280.97	$278.35	$316.27
Median Costs Award: with outlier(s)	N/A	$149.75	$307.90	$288.80	N/A	$359.40
Range of Costs Awards: without outlier(s)	$211.50 [$48.00 to $259.50]	$1287.10 [$15.00 to $1302.10]	$1643.35 [$25.00 to $1668.35]	$1317.25 [$81.95 to $1399.20]	$598.70 [$116.40 to $715.10	$1317.25 [$81.95 to $1399.20]
Range of Costs Awards: with outlier(s)	N/A	$2156.25 [$15.00 to $2171.25]	$3787.20 [$25.00 to $3812.20]	$3157.05 [$81.95 to $3239.00]	N/A	$3157.05 [$81.95 to $3239.00]
Outlier(s)	N/A	$2171.25	$2374.10	$3239.00	N/A	$3239.00
			$2666.10			
			$3050.00			
			$3812.20			

[123] The large number of costs awards identified in the Ninth Circuit prohibited inclusion of each award amount in the final analysis due to time constraints. For calendar year 2009, 559 costs awards were issued, and for calendar year 2010 (including approvals issued in January and February of 2011), 491 costs awards were issued. For the Ninth Circuit, the analysis of costs awards presented in this report includes approximately 25% of the awards issued in 2009 and 25% of the awards issued in 2010 through early 2011 (26% of total costs awards issued), or approximately every fourth award issued. Note: Costs awarded in the Ninth Circuit do not include the $450 docket fee because it is not reimbursable as costs in the Ninth Circuit.

[124] The unit of analysis is an individual costs award, not an individual case in which costs were awarded, because there could be more than one costs award issued in a single case (e.g., consolidated appeals). Including the award in the final database as an aggregate of total costs awarded in those appeals would result in a misleadingly higher costs award compared to cases with only one costs award issued.

Analysis of Outliers

Analysis of Costs Awards Identified as Outliers in the Ninth Circuit Court of Appeals					
Amount of Costs Award	**FRAP 39(a) Provision Costs Awarded Under**	**Nature of Suit**	**Consolidated appeal (total # cases)**	**Days from filing to final disposition**	**Itemization of Costs Awarded[125]**
$2171.25	FRAP 39(a)(2)	3790 Other Labor Litigation	no	559 days	*Brief (20 copies) ($405) *Record Excerpt (7 copies) ($1766.25) [81% of total award]
$2374.10	FRAP 39(a)(3)	3240 Torts to Land	no	797 days	*Brief (20 copies, 57 pgs./copy) ($114) *Reply (20 copies; 37 pgs./copy) ($74) *Record Excerpt (7 copies; 3,123 pgs./copy) ($2186.10) [92% of total award]
$2666.10	FRAP 39(a)(3)	3360 Other Personal Injury	yes (2 cases)	616 days	*Brief (20 copies, 101 pgs./copy) ($202) *Redacted brief (20 copies, 101 pgs./copy) ($202) *Reply (20 copies; 74 pgs./copy) ($148) *Record Excerpt (7 copies; 2,901 pgs./copy) ($2030.70) [76% of total award]
$3050.00	FRAP 39(a)(3)	3470 Civil (Rico)	yes (2 cases)	728 days	*Brief (20 copies, 89 pgs./copy) ($178) *Reply (21 copies; 30 pgs./copy) ($63) *Record Excerpt (8 copies; 3,512 pgs./copy) ($2809) [92% of total award]
$3812.20	FRAP 39(a)(3)	3440 Other Civil Rights	no	614 days	*Brief (11 copies, 104 pgs./copy) ($114.40) *Reply (11 copies; 48 pgs. per copy) ($52.80) *Record Excerpt (5 copies; 7,290 pgs./copy) ($3645) [96% of total award]
$3239.00	FRAP 39(a)(4)—vacated; costs awarded to appellant	3442 Jobs	no	922 days	*Brief (20 copies, 63 pgs./copy) ($126) *Reply (20copies; 28 pgs./copy) ($56) *Record Excerpt (30 copies; 1,019 pgs./copy) ($3057) [94% of total award]

[125] Where the information was available through the docket, costs awards are broken out to identify the items reimbursed—i.e., docket fee, brief, reply brief, and/or appendix. Where available, the number of copies, pages per copy, cost per page, and total costs per document are provided for briefs and appendices. Pursuant to 9th Circuit Rule 30-1.1(a), the excerpts requirement supersedes the requirement for appendices and thus costs of reproducing the excerpts are recoverable.

United States Court of Appeals for the Tenth Circuit

Summary of Materials Addressing Fed. R. App. P. 39 Costs[126]

Maximum Rates:

Tenth Circuit Local Rule 39.1 Maximum rates.
Costs of making necessary copies of briefs, appendices, or other records are taxable at the actual cost, but no more than 50 cents per page.

Maximum Number of Copies for which Costs are Recoverable. Local Rule 39.1 provides that the court will only reimburse for a "necessary" number of copies requiring the party seeking costs to consult the circuit's requirements for filing briefs and appendices.

Tenth Circuit Local Appellate Rule 31.5 Opening brief for appellant/petitioner requires parties to file 7 hard copies with the court of all briefs filed.

Tenth Circuit Local Appellate Rule 30.1(D) Appellant's appendix requires the appellant to file 2 separately bound hard copies of the appendix with opening brief with the court, and serve 1 copy of the appendix on every other party to the appeal.

Requirements for Recovery of Costs:

United States Court of Appeals for the Tenth Circuit, Practitioners' Guide (7th revision Jan 2011) IX. DECISION—MANDATE—COSTS

The items that may be recovered as costs by a prevailing party in an appeal are limited to those set out in Fed. R. App. P. 39 and 10th Cir. R. 39. An itemized and verified bill of costs, along with proof of service on opposing counsel, must be filed with the clerk within 14 days after entry of the judgment. The verification of the bill of costs may be by a party or by counsel, and it should be accompanied by an itemized statement of charges sufficient to determine whether the item is taxable and whether it is within the limit for copy fees. Objections must be filed within 14 days of service on the party against whom the costs are to be taxed, unless the time is extended by the court. Usually the only reasons for objecting would be that the cost bill includes unreasonable charges or improper items.

Although "taxable" in the court of appeals, the money identified as "costs" does not physically changes hands at the court of appeals level. The circuit clerk prepares an order or an itemized statement of costs for insertion in the mandate. The costs may then be recovered in the district court after issuance of the mandate with its statement of costs. In some instances, the clerk may send a supplemental statement of costs to the district court for inclusion in the mandate after the mandate has issued. No time limit is specified for the court of appeals to send the statement of costs, and district courts are not authorized to impose such a time limit.

Bill of Costs Form: The Tenth Circuit does not have an official Bill of Costs form. A prevailing party is required to file an itemized and verified bill of costs.

[126]The description of the local rules and internal court procedures in this report may be a paraphrasing of the actual language contained in the rules and procedures or may omit portions or subsections that are not relevant or merely restate provisions contained in FRAP 39 itself, and thus should not be quoted or cited as legal authority. For the official and complete version of the rules and procedures cited herein, consult the published compilation of each circuit court of appeals' local rules and procedures, available on their websites.

Analysis of Costs Awards[127]

	Costs Awarded under FRAP 39 During 2009-2010 in the Tenth Circuit Court of Appeals					
	FRAP 39(a)(1) appeal dismissed (costs in favor of appellee(s))	**FRAP 39(a)(2) judgment affirmed** (costs in favor of appellee(s))	**FRAP 39(a)(3) judgment reversed** (costs in favor of appellant(s))	**FRAP 39(a)(4) judgment affirmed in part, reversed in part, modified, or vacated** (costs taxed only as court orders)		
				overall	**Costs to appellee(s)**	**Costs to appellant(s)**
Total Number of Individual Costs Awards[128]	4	40	12	12	3	9
Average Costs Award: without outlier(s)	$96.06	$203.27	$537.91	$899.78	$1315.05	$807.50
Average Costs Award: with outlier(s)	N/A	$268.45	$691.72	$1094.52	$1955.60	N/A
Median Costs Award: without outlier(s)	$95.58	$148.65	$581.52	$796.45	$1315.05	$700.00
Median Costs Award: with outlier(s)	N/A	$154.30	$646.86	$874.15	1678.24	N/A
Range of Costs Awards: without outlier(s)	$99.50 [$46.80 to $146.30]	$719.85 [$21.15 to $741.00]	$754.29 [$84.90 to $839.19]	$1423.26 [$254.98 to $1678.24]	$726.39 [$951.85 to $1678.24]	$1355.71 [$254.98 to $1610.69]
Range of Costs Awards: with outlier(s)	N/A	$2789.46 [$21.15 to $2810.61]	$2298.70 [$84.90 to $2383.60]	$2981.72 [$254.98 to $3236.70]	$2284.85 [$951.85 to $3236.70]	N/A
Outlier(s)	N/A	$2810.61	$2383.60	$3236.70	$3236.70	N/A

[127] The Tenth Circuit went live with CM/ECF on September 4, 2007, and their database includes all cases filed after that date as well as any pending cases that had activity after the live date

[128] The unit of analysis is an individual costs award, not an individual case in which costs were awarded, because there could be more than one costs award issued in a single case (e.g., consolidated appeals). Including the award in the final database as an aggregate of total costs awarded in those appeals would result in a misleadingly higher costs award compared to cases with only one costs award issued.

Analysis of Outliers

Analysis of Costs Awards Identified as Outliers in the Tenth Circuit Court of Appeals					
Amount of Costs Award	**FRAP 39(a) Provision Costs Awarded Under**	**Nature of Suit**	**Consolidated appeal (total # cases)**	**Days from filing to final disposition**	**Itemization of Costs Awarded[129]**
$2810.61	FRAP 39(a)(2)	3370 Other Fraud	no	786 days	*Court ordered brief (10 copies; 19 pgs./copy) ($47.50) *Court ordered Appendix (10 copies; 290 pgs./copy) *Brief (9 copies; 117 pgs./copy) ($205.45) *Appendix (9 copies; 1,589 pgs./copy) ($2605.16) [93% of total award]
$2383.60	FRAP 39(a)(3)	3440 Other Civil Rights	no	442 days	*Docket Fee ($450) *Brief (20 copies) & Appendix (5 copies) (Total pages for both—13,160) ($1660.04 for both—included $100 for binding, $125 for covers & $119.04 sales tax) *Reply (15 copies; 1590 pgs. total) ($183.56—included $75 for binding & $13.16 sales tax) *Docketing statement (10 copies; 45 pgs./copy) ($90)
$3236.70	FRAP 39(a)(4) affirmed part, reversed part; costs awarded to appellees/ cross-appellants	1610 Agricultural Acts	yes (3 cases)	553 days	Parties agreed that Appellant would pay following costs after court ordered parties to reach agreement over disputed costs: *Brief & Reply brief (8,802 pages total) ($880.20) *Appendix (18,465 pgs. total)($1846.50) [57% of total award] *Color copies (1,020 copies @ .50 per page) ($510)

[129] Where the information was available through the docket, costs awards are broken out to identify the items reimbursed—i.e., docket fee, brief, reply brief, and/or appendix. Where available, the number of copies, pages per copy, cost per page, and total costs per document are provided for briefs and appendices.

United States Court of Appeals for the Eleventh Circuit

Summary of Materials Addressing Fed. R. App. P. 39 Costs[130]

Maximum Rates

Eleventh Circuit Local Rule 39-1 Costs.
In taxing costs for printing or reproduction and binding pursuant to FRAP 39(c) the clerk shall tax such costs at rates not higher than those determined by the clerk from time to time by reference to the rates generally charged for the most economical methods of printing or reproduction and binding in the principal cities of the circuit, or at actual cost, whichever is less.

Eleventh Circuit Bill of Costs Form (12/07) [not available on website]
Instructions: In the grid below, multiply the number of original pages of each document by the total number of documents reproduced to calculate the total number of copies reproduced. Multiply this number by the cost per copy ($.15 per copy for "In-House," up to $.25 per copy for commercial reproduction, supported by receipts) showing the product as costs requested.

Maximum Number of Copies for Which Costs Are Recoverable:

Eleventh Circuit Local Appellate Rule 39-1 Costs.
Unless advance approval for additional copies is secured from the clerk, costs will be taxed only for the number of copies of a brief and record excerpts or appendix required by the rules to be filed and served, plus two copies for each party signing the brief.

Eleventh Circuit Rule 30-1 Record Excerpts-Appeals from District Court and Tax Court provides that instead of the appendix prescribed by FRAP 30, appellant is required to file 5 copies of record excerpts. Pro se parties proceeding in forma pauperis need only file 1 copy of record excerpts and incarcerated pro se parties are not required to file record excerpts.

Eleventh Circuit Rule 31-3 Briefs-Number of Copies establishes that in all appeals 1 originally signed brief and 6 copies (total of 7) must be filed, except that pro se parties proceeding in forma pauperis need only file one originally signed brief and 3 copies (total of 4). In addition, 1 copy has to be served on counsel for each separately represented party.

Requirements for Recovery of Costs:

Eleventh Circuit Local Appellate Rule 39-1 Costs.
All costs shall be paid and mailed directly to the party to whom costs have been awarded. Costs should not be mailed to the clerk of the court.

[130]The description of the local rules and internal court procedures in this report may be a paraphrasing of the actual language contained in the rules and procedures or may omit portions or subsections that are not relevant or merely restate provisions contained in FRAP 39 itself, and thus should not be quoted or cited as legal authority. For the official and complete version of the rules and procedures cited herein, consult the published compilation of each circuit court of appeals' local rules and procedures, available on their websites.

Eleventh Circuit Internal Operating Procedure

1. **Time-Extensions.** A bill of costs is timely if filed within 14 days of entry of judgment. Judgment is entered on the opinion filing date. The filing of a petition for rehearing or petition for rehearing en banc does not extend the time for filing a bill of costs. A motion to extend the time to file a bill of costs may be considered by the clerk.
2. **Costs for or Against the United States.** When costs are sought for or against the United States, the statutory or other authority relied upon for such an award must be set forth as an attachment to the Bill of Costs.
3. **Reproduction of Statutes, Rules, and Regulations.** Costs will be taxed for the reproduction of statutes, rules, and regulations in conformity with FRAP 28(f). Costs will not be taxed for the reproduction of papers not required or allowed to be filed pursuant to FRAP 28 and 30 and the corresponding circuit rules, even though the brief, appendix, or record excerpts within which said papers are included was accepted for filing by the clerk.

Bill of Costs Form: The Eleventh Circuit has a Bill of Costs form that is sent to the parties when judgment is entered and is available upon request from the clerk, but it is not available on the court's website. The form lists the appellant's brief, record excerpts, appellee's brief, and reply brief as reimbursable documents and requires the party requesting costs to indicate the reproduction method used, the number of original pages in each document, the total number of documents reproduced, the total number of copies, and the final amount of costs requested.

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
BILL OF COSTS

_____
Appellant

vs. Appeal No. _____

_____
Appellee

A Bill of Costs should only be filed when the Clerk's Office has advised a party that the party is entitled to costs. Fed.R.App.P. 39 and 11th Cir. R. 39-1 (see reverse) govern costs taxable in this court and the time for filing the Bill of Costs. A motion for leave to file out of time is required for a Bill of Costs not timely received.

INSTRUCTIONS

In the grid below, multiply the number of original pages of each document by the total number of documents reproduced to calculate the total number of copies reproduced. Multiply this number by the cost per copy ($.15 per copy for "In-House", up to $.25 per copy for commercial reproduction, supported by receipts) showing the product as costs requested.

DOCUMENT	Repro. Method (Mark One) In-House	Comm*	No. of Original Pages	Total No. Documents Reproduced	Total No. of Copies	COSTS REQUESTED	CT. USE ONLY COSTS ALLOWED
Appellant's Brief							
Record Excerpts							
Appellee's Brief							
Reply Brief							
*Note: If reproduction was done commercially, receipt(s) must be attached.					TOTAL	$	$
						REQUESTED	ALLOWED

I hereby swear or affirm that the costs claimed were actually and necessarily incurred or performed in this appeal and that I have served this Bill of Costs on counsel/parties of record.

Date Signed: _____ Signature: _____

Attorney for: _____ Attorney Name: _____
(Type or print name of client) (Type or print your name)

FOR COURT USE ONLY

Costs are hereby taxed in the amount of $ _____ against _____

and are payable directly to _____

John Ley, Clerk of Court

Issued on: _____ By: _____
Deputy Clerk

FRAP 39. Costs

(a) Against Whom Assessed. The following rules apply unless the law provides or the court orders otherwise:

(1) if an appeal is dismissed, costs are taxed against the appellant, unless the parties agree otherwise;

(2) if a judgment is affirmed, costs are taxed against the appellant;

(3) if a judgment is reversed, costs are taxed against the appellee;

(4) if a judgment is affirmed in part, reversed in part, modified, or vacated, costs are taxed only as the court orders.

(b) Costs For and Against the United States. Costs for or against the United States, its agency, or officer will be assessed under Rule 39(a) only if authorized by law.

(c) Costs of Copies. Each court of appeals must, by local rule, fix the maximum rate for taxing the cost of producing necessary copies of a brief or appendix, or copies of records authorized by Rule 30(f). The rate must not exceed that generally charged for such work in the area where the clerk's office is located and should encourage economical methods of copying.

(d) Bill of Costs: Objections; Insertion in Mandate.

(1) A party who wants costs taxed must — within 14 days after entry of judgment — file with the circuit clerk, with proof of service, an itemized and verified bill of costs.

(2) Objections must be filed within 14 days after service of the bill of costs, unless the court extends the time.

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

(e) Costs on Appeal Taxable in the District Court. The following costs on appeal are taxable in the district court for the benefit of the party entitled to costs under this rule:

(1) the preparation and transmission of the record;
(2) the reporter's transcript, if needed to determine the appeal;
(3) premiums paid for a supersedeas bond or other bond to preserve rights pending appeal; and
(4) the fee for filing the notice of appeal.

* * * *

11th Cir. R. 39-1 Costs. In taxing costs for printing or reproduction and binding pursuant to FRAP 39(c) the clerk shall tax such costs at rates not higher than those determined by the clerk from time to time by reference to the rates generally charged for the most economical methods of printing or reproduction and binding in the principal cities of the circuit, or at actual cost, whichever is less.

Unless advance approval for additional copies is secured from the clerk, costs will be taxed only for the number of copies of a brief and record excerpts or appendix required by the rules to be filed and served, plus two copies for each party signing the brief.

All costs shall be paid and mailed directly to the party to whom costs have been awarded. Costs should not be mailed to the clerk of the court.

* * * *

I.O.P. -

1. Time - Extensions. A bill of costs is timely if filed within 14 days of entry of judgment. Judgment is entered on the opinion filing date. The filing of a petition for rehearing or petition for rehearing en banc does not extend the time for filing a bill of costs. A motion to extend the time to file a bill of costs may be considered by the clerk.

2. Costs for or Against the United States. When costs are sought for or against the United States, the statutory or other authority relied upon for such an award must be set forth as an attachment to the Bill of Costs.

3. Reproduction of Statutes, Rules, and Regulations. Costs will be taxed for the reproduction of statutes, rules, and regulations in conformity with FRAP 28(f). Costs will not be taxed for the reproduction of papers not required or allowed to be filed pursuant to FRAP 28 and 30 and the corresponding circuit rules, even though the brief, appendix, or record excerpts within which said papers are included was accepted for filing by the clerk.

Analysis of Costs Awards[131]

	Costs Awarded under FRAP 39 During 2010 for Appeals filed after January 4, 2010 in the Eleventh Circuit Court of Appeals					
	FRAP 39(a)(1) appeal dismissed (costs in favor of appellee(s))	**FRAP 39(a)(2) judgment affirmed** (costs in favor of appellee(s))	**FRAP 39(a)(3) judgment reversed** (costs in favor of appellant(s))	**FRAP 39(a)(4) judgment affirmed in part, reversed in part, modified, or vacated** (costs taxed only as court orders)		
				overall	**Costs to appellee(s)**	**Costs to appellant(s)**
Total Number of Individual Costs Awards[132]	0	15	1	2	2	0
Average Costs Award	N/A	$63.98	$365.10	$41.40	$41.40	N/A
Median Costs Award	N/A	$47.25	N/A	$41.40	$41.40	N/A
Range of Costs Awards	N/A	$171.00 [$18.90 to $189.90]	N/A	$34.20 [$24.30 to $58.50]	$34.20 [$24.30 to $58.50]	N/A

[131]Because the Eleventh Circuit has been live on CM/ECF only since January 4, 2010, and they are not converting their pending cases from their old system to CM/ECF, our targeted search for dispositions awarding costs during calendar years 2009-2010 did not yield many costs awards as it is rare for an appeal to be filed and reach final disposition with one year. Our search was limited to appeals that were filed after 1/4/10 and reached final disposition before 12/31/10, and we cannot report on costs awards granted for cases filed prior to 1/4/10 that reached final disposition during calendar year 2010.

[132] The unit of analysis is an individual costs award, not an individual case in which costs were awarded, because there could be more than one costs award issued in a single case (e.g., consolidated appeals). Including the award in the final database as an aggregate of total costs awarded in those appeals would result in a misleadingly higher costs award compared to cases with only one costs award issued.

United States Court of Appeals for the District of Columbia Circuit

Summary of Materials Addressing Fed. R. App. P. 39 Costs[133]

Maximum Rates:

DC Circuit Local Rule 39 Costs

(a) Allowable Items. . . . The costs of reproducing the required copies of briefs and appendices will be taxed at actual cost or at a rate periodically set by the clerk to reflect the per page cost for the most economical means of reproduction available in the Washington metropolitan area, whichever is less. Charges incurred for covers and fasteners may also be claimed, at actual cost not to exceed a rate similarly determined by the clerk. The rates set by the clerk will be published by posting in the clerk's office and on the court's web site, and publication in The Daily Washington Law Reporter.

(b) No Costs Taxed for Briefs for Amici or Intervenors. 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.

(c) Costs of Producing Separate Briefs and Appendices Where Record Is Sealed. The costs under Circuit Rule 47.1 of preparing 2 sets of briefs, and/or 2 segments of appendices, may be assessed if such costs are otherwise allowable.

Photocopy Rates Set by Clerk effective from 5/13/02 to 11/1/10[134]

Text, index and tabular matter per page	$ .07
Color matter per page	$1.02
Front Cover (briefs and appendices)	$ .20
Back Cover (briefs and appendices)	$ .11
Fasteners (per volume)	$2.28

Photocopy Rates Set by Clerk effective from 11/1/10[135]

Text, index and tabular matter per page	$ .10
Color matter per page	$ .51
Front Cover (briefs and appendices)	$ .57
Back Cover (briefs and appendices)	$. 49
Fasteners (per volume)	$2.28

The costs of reproducing the required copies of briefs and appendices will be taxed at actual costs or at the above rate, whichever is less. Bills of costs not presented on forms furnished by the Clerk's Office or reasonable facsimiles thereof, or in which costs are not itemized and documented as required by the clerk, will not be accepted for filing.

All bills of costs received in the Clerk's Office shall be submitted on USCA Form 48 (Revised August 2009) and use no more than the costs listed above. Copies of USCA

[133] The description of the local rules and internal court procedures in this report may be a paraphrasing of the actual language contained in the rules and procedures or may omit portions or subsections that are not relevant or merely restate provisions contained in FRAP 39 itself, and thus should not be quoted or cited as legal authority. For the official and complete version of the rules and procedures cited herein, consult the published compilation of each circuit court of appeals' local rules and procedures, available on their websites.

[134] Notice dated May 9, 2002, from Mark J. Langer, Clerk, DC Circuit Court of Appeals.

[135] Notice dated September 21, 2010, from Mark J. Langer, Clerk, DC Circuit Court of Appeals.

Form 48 may be obtained from the Clerk's Office, Room 5523, or from the Court's Internet Web site at: www.cads.uscourts.gov.

Maximum Number of Copies for Which Costs Are Recoverable:

DC Circuit Local Rule 39 Costs

(a) Allowable Items. Costs will be allowed for the docketing fee and for the cost of reproducing the number of copies of briefs and appendices to be filed with the court or served on parties, intervenors, and amici curiae, plus 3 copies for the prevailing party. . . .

DC Circuit Rule 31 Serving and Filing Briefs requires the original and 8 copies of every brief to be filed, except an unrepresented person proceeding in forma pauperis must file 1 original brief and the clerk will duplicate necessary copies. If the deferred appendix method is used, 6 copies of the initial briefs must be filed (or 5 paper copies in addition to the electronic version if filed electronically) followed by the original and 8 copies in final form.

DC Circuit Rule 30 Appendix to the Briefs requires the appellant to file 8 copies of the appendix with the court and serve 1 copy on counsel for each separately represented party. When an appendix is filed electronically, 7 paper copies must be filed in addition to the electronic version.

Requirements for Recovery of Costs:

DC Circuit Local Appellate Rule 39 Costs

(b) Procedure for Requesting Taxation of Costs. Forms furnished by the Clerk's Office, or facsimiles thereof, must be used in requesting taxation of costs. Parties submitting bills of costs that are not itemized as required by the clerk or not presented on Clerk's Office forms or reasonable facsimiles thereof will be directed to provide a conforming request.

Handbook of Practice and Internal Procedures, United States Court of Appeals for the District of Columbia Circuit (as amended through May 10, 2010):

XIII. Post-Decision Procedures

A. Terminating The Case

4. Costs

(See Fed. R. App. P. 39; D.C. Cir. Rule 39)

Costs, when requested, are usually charged to the losing party or to an appellant who withdraws the appeal. When the government is party to a suit, costs are governed by statute. Costs are not taxed for briefs of amici curiae or intervenors or separate replies thereto except on motion granted by the court.

The items allowed as costs are set for the in Circuit Rule 39(a). Reimbursable printing costs are limited to the cost of the most economical means of reproduction. In addition to the docketing fee, costs are allowed for reproducing the number of copies of briefs and appendices that must be filed with court and served on parties, intervenors, and amici curiae, plus 3 for the submitting party.

Counsel has 14 days after entry of judgment to submit the bill of costs with service on opposing counsel. Printing and reproduction costs must be itemized and verified to show the charge per page. Opposing counsel may file objections. The Clerk's Office provides forms for itemizing bills of costs, and parties that submit bills not presented on

these forms (or reasonable facsimiles thereof) will be directed to provide a conforming request.

The clerk reviews the bill for compliance with the rules and then prepares a statement for inclusion in the mandate. Ordinarily, the directions as to costs are issued at the same time as the mandate. If the matter of costs has not been settled by that time, the Clerk's Office will at a later date send a supplemental statement to the district court or agency for insertion in the mandate.

Once a party is ordered to pay costs, there is usually no further action on the matter in this court. Any action to enforce an award of costs is brought in the district court. In addition, various expenses incidental to the appeal must be settled in the district court. Among these are the costs of the reporter's transcript, the filing fee for the notice of appeal, the clerk's fee for preparing and transmitting the record, and the premiums paid for any required appeal bond. The successful party on appeal must apply for recovery of these expenses in the district court after issuance of the mandate of this court.

Bill of Costs Form: Copies of USCA Form 48 may be obtained from the Clerk's Office, Room 5523, or from the Court's Internet Web site at www.cads.uscourts.gov. The 3-page form includes a separate calculation chart for the main brief, reply brief, and the appendix where the party requesting costs must indicate the total number of copies, pages per brief (text or color), covers (front and back) or fasteners per brief and the total requested amount for each type of brief.

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

333 Constitution Avenue, NW
Washington, DC 20001-2866
Phone: 202-216-7000 | Facsimile: 202-219-8530

(Type caption of lead case only)

Appeal No. _____

Consolidated Case Nos.

_____

_____

_____

The Clerk is directed to tax costs, pursuant to Fed. R. App. P. 39 and Local Rule 39, for the docketing fee (receivable only by appellant/petitioner), and for the cost of reproducing only the number of copies of briefs and appendices which have been required to be filed with the Court or served on parties, intervenors and amici curiae, plus three copies for the prevailing party. Bills of costs must be filed within fourteen (14) days after entry of judgement. The Court looks with disfavor upon motions to the file bills of costs out of time.

BILL OF COSTS

Comes now _____ (appellant, peitioner, appellee, or respondant), (the) (a) prevailing party in Appeal Nos. _____, by counsel, and states that costs have been incurred in said case(s) which should be taxed (solely) (jointly and severally) against the following (party) (parties)

NAME OF PARTY OR PARTIES	APPEAL NO.
(1) _____	_____
(2) _____	_____
(3) _____	_____
(4) _____	_____
(5) _____	_____

(Use per page, per cover or per volume charges where applicable.)

MAIN BRIEF

Total # copies of briefs		Pages, Covers or fasteners per brief		Total # of pages, covers or fasteners		Fee per page, cover or fastner		Subtotal
TEXT:								
	X		=		X		=	
COLOR:								
	X		=		X		=	
FRONT COVERS:								
	X		=		X		=	
BACK COVERS:								
	X		=		X		=	
FASTENERS:								
	X		=		X		=	

AMOUNT $ _____

REPLY BRIEF (if applicable)

Total # copies of briefs		Pages, Covers or fasteners per brief		Total # of pages, covers or fasteners		Fee per page, cover or fastner		Subtotal
TEXT:								
	X		=		X		=	
COLOR:								
	X		=		X		=	
FRONT COVERS:								
	X		=		X		=	
BACK COVERS:								
	X		=		X		=	
FASTENERS:								
	X		=		X		=	

AMOUNT $ _____

APPENDIX

Total # copies of briefs		Pages, Covers or fasteners per brief		Total # of pages, covers or fasteners		Fee per page, cover or fastner		Subtotal
TEXT:								
	X		=		X		=	
COLOR:								
	X		=		X		=	
FRONT COVERS:								
	X		=		X		=	
BACK COVERS:								
	X		=		X		=	
FASTENERS:								
	X		=		X		=	

AMOUNT $ _____

AMOUNT OF SUBTOTALS $ _____

DOCKETING FEE (if applicable) $ _____

TOTAL COSTS TO BE TAXED $ _____

It is understood that the Clerk will tax costs only against those parties specifically named herein and in the amount which does not exceed either the specific sum claimed or the total allowable amount determined in accordance with Circuit Rule 39.

The costs claimed as actual costs are the actual costs incurred. A copy of the printer's/duplicator's bill, or other sufficient documentation of actual costs incurred, is attached.

_____ _____

Typed Name of Counsel Signature of Counsel

_____

Counsel's Address

_____

(___) ____-____

Counsel's Telephone Number

VERIFICATION *

State of)
) SS:
County of)

COMES NOW _____, and being first duly sworn, does depose and state that (he) (she) signed the foregoing Bill of Costs, that the costs claimed therein were incurred in connection with the captioned appellate proceeding and, as set forth, are true and correct.

SUBSCRIBED AND SWORN TO before the undersigned, a Notary public, this ___ day of _____, 20___.

_____

Notary Public

(Notary seal or stamp)

COUNSEL SHALL ATTACH A CERTIFICATE OF SERVICE

_____

*In lieu of this sworn verification, an unsworn declaration in conformity with 28 U.S.C. 1746 may be substituted.

Analysis of Costs Awards[136]

	Costs Awarded under FRAP 39 During 2009-2010 in the District of Columbia Circuit Court of Appeals					
	FRAP 39(a)(1) appeal dismissed (costs in favor of appellee(s))	**FRAP 39(a)(2) judgment affirmed** (costs in favor of appellee(s))	**FRAP 39(a)(3) judgment reversed** (costs in favor of appellant(s))	**FRAP 39(a)(4) judgment affirmed in part, reversed in part, modified, or vacated** (costs taxed only as court orders)		
				overall	**Costs to appellee(s)**	**Costs to appellant(s)**
Total Number of Individual Costs Awards[137]	4	20	5	14	2	12
Average Costs Award: without outlier(s)	$198.08	$172.64	$800.70	$1021.91	$505.95	$1125.10
Average Costs Award: with outlier(s)	N/A	N/A	N/A	$1494.27	$505.95	$1658.99
Median Costs Award: without outlier(s)	$135.14	$106.41	$857.12	$1203.62	N/A	$1308.84
Median Costs Award: with outlier(s)	N/A	N/A	N/A	$1308.84	$505.95	$1398.44
Range of Costs Awards: without outlier(s)	$320.03 [$101.01 to $421.04]	$737.01 [$52.80 to $789.81]	$457.87 [$595.61 to $1053.48]	$1713.64 [$13.86 to $1727.50]	N/A	$1713.64 [$13.86 to $1727.50]
Range of Costs Awards: with outlier(s)	N/A	N/A	N/A	$5328.44 [$13.86 to $5342.30]	$876.77 [$67.56 to $944.33]	$5328.44 [$13.86 to $5342.30]
Outlier(s)	N/A	N/A	N/A	$3314.48	N/A	$3314.48
				$5342.30	N/A	$5342.30

[136] The District of Columbia Circuit went live with CM/ECF on March 17, 2008, and their database includes all cases filed after that date as well as any pending cases that had activity after the live date.

[137] The unit of analysis is an individual costs award, not an individual case in which costs were awarded, because there could be more than one costs award issued in a single case (e.g., consolidated appeals). Including the award in the final database as an aggregate of total costs awarded in those appeals would result in a misleadingly higher costs award compared to cases with only one costs award issued.

Analysis of Outliers

Analysis of Costs Awards Identified as Outliers in the District of Columbia Circuit Court of Appeals					
Amount of Costs Award	**FRAP 39(a) Provision Costs Awarded Under**	**Nature of Suit**	**Consolidated appeal (total # cases)**	**Days from filing to final disposition**	**Itemization of Costs Awarded[138]**
$3314.48	FRAP 39(a)(4) vacated; costs awarded to appellants	Appeal from EPA	yes (4 cases)	2428 days	*Petitioner's Bill of Costs not available *In a per curiam order filed after the mandate, court awarded costs to petitioner in amount of $3314.48.
$5342.30	FRAP 39(a)(4) vacated; costs awarded to appellants	2440 Other Civil Rights	yes (2 cases)	605 days	*Docket Fee ($450) *Briefs (69 copies, 5,113 pages total) ($536.62) *Statutory Addendum (69 copies; 8323 pgs. total) ($761.32) *Reply (68 copies; 2858 pgs. total) ($375.48) *Joint Appendices (98 copies; 42,358 pgs. Total @ .07/pg.) ($3218.88) [60% of total award] *Note: Appellant was permitted to recover costs for 25 extra copies of each of documents above ordered by the court. **Note: Costs for briefs, addendum, reply & appendices include costs for front/back covers & fasteners.

[138] Where the information was available through the docket, costs awards are broken out to identify the items reimbursed—i.e., docket fee, brief, reply brief, and/or appendix. Where available, the number of copies, pages per copy, cost per page, and total costs per document are provided for briefs and appendices.

United States Court of Appeals for the Federal Circuit[139]

Summary of Materials Addressing Fed. R. App. P. 39 Costs[140]

Maximum Rates

Federal Circuit Rule 39. Costs. Practice Notes.
Current Rates. The following rates are the current maximum allowable costs:
\$6.00 per page for the table of page numbers of designated materials, the originals of briefs, and the table of contents for the appendix (whether printed, typewritten, or word processed)
\$0.08 per page for copying and collating; and
\$2.00 per copy for covers and binding.

Allowable Costs. . . The total billed for any item must be limited to the lesser of actual or allowable costs. Actual cost of briefs and appendices prepared in-house includes word-processing, copying, and biding, at the amount normally billed to a client for these services. The United States may assume its actual costs are the allowable costs. The costs of correcting a nonconforming brief are not taxable. Counsel are urged to stipulate to costs.

Maximum Number of Copies for Which Costs Are Recoverable

Federal Circuit Rule 39. Costs. Practice Notes.
Allowable Costs. Costs may be billed for 16 copies of briefs and appendices, plus 2 copies for each additional party, plus any copies required or allowed, e.g., confidential briefs or appendices. The cost of service copies of the table or physical compilation of the designated materials may also be billed. Any other cost billed must be separately justified.

Requirements for Recovery of Costs

Federal Circuit Rule 39. Costs.
(a) Notice of Entitlement to Costs. When the clerk provides notice of judgment or order disposing of an appeal, the clerk must advise which party or parties are entitled to costs.
(b) Bill of Costs; Copies; Objection. A party must serve the bill of costs on the form prescribed by the court and must file an original and three copies with the court. An objection to a bill of costs must not exceed 5 pages and must be filed in an original and three copies and served on \the other parties.

Bill of Costs Form 24 and **Bill of Costs Instruction Sheet Form 23** are available on the court's website and must be used to claim costs. Counsel is instructed to calculate and enter the total billed for each item (after entering the number of copies and number of pages and choosing the lesser of the actual or allowable costs) and the grand total billed.

[139] At this time, the Federal Circuit does not participate with CM/ECF thus we were unable to conduct our search in order to identify final costs awarded under FRAP 39 in calendar years 2009-2010 in the Federal Circuit.
[140]The description of the local rules and internal court procedures in this report may be a paraphrasing of the actual language contained in the rules and procedures or may omit portions or subsections that are not relevant or merely restate provisions contained in FRAP 39 itself, and thus should not be quoted or cited as legal authority. For the official and complete version of the rules and procedures cited herein, consult the published compilation of each circuit court of appeals' local rules and procedures, available on their websites.

BILL OF COSTS (File original and three copies with the Clerk within 14 days of judgment.)

Docket No(s): A: _____ Caption: B: _____

The Clerk is requested to tax the following costs against: C:

ITEM	Number of copies	Number of pages	Actual cost	Allowable cost	Total billed	Total taxed
Docketing Fee (if paid in this court)	xxxxx	xxxxx	D:			
Table of Designated Materials (original)	xxxxx	E:	F:	6.00		
Table of Compilation of Designated Materials (copying and collating)	G:	H:		0.08		
Brief (original)	xxxxx	E:		6.00		
Brief (cover and binding)	G:	xxxxx		2.00		
Brief (copying and collating)	G:	H:		0.08		
Appendix (original - table of contents)	xxxxx	E:		6.00		
Appendix (covers and binding)	G:	xxxxx		2.00		
Appendix (copying and collating)	G:	H:		0.08		
Reply Brief (original)	xxxxx	E:		6.00		
Reply Brief (covers and binding)	G:	xxxxx		2.00		
Reply Brief (copying and collating)	G:	H:		0.08		
Other (describe):	I:	J:				
GRAND TOTALS						

City/County of _____) District/State of _____) SS

I, K: _____, swear under penalty of perjury that the services for which costs are taxed were necessarily performed. Itemized statements of the costs incurred or invoices are attached. Copies of this bill were served on all parties. The certificate of service is attached.

Signature: _____ Date: _____ Attorney for: L: _____

FORM 23. Bill of Costs Instruction Sheet

INSTRUCTIONS

Bill of Costs

Use this form to bill reimbursable costs for the table or compilation of designated materials (Fed. Cir. R. 30 (b)), briefs (Rule 28), appendices (Rule 30), and other items allowed or permitted.

Counsel should read Rule 39 before filing a bill of costs. Counsel are urged to agree upon the costs to be taxed. Costs must be claimed using this form. The total billed for each item must be limited to the lesser of actual or allowable costs. The additional costs of confidential briefs and appendices should be incorporated in the quantity billed, e.g., a 50-page brief that has 15 confidential pages will allow 65 original pages to be billed. Counsel must calculate and enter the total billed for each item and the grand total billed. Items on the form which do not apply should be marked N.A. The clerk will determine the total taxed for each item and the grand total taxed. Absent objection, costs will be taxed as billed.

The following items pertain to the letters appearing on the Bill of Costs form reprinted on the reverse side of these instructions:

(A) Insert docket number or numbers.
(B) Insert authorized abbreviated caption.
(C) Insert party to be taxed, e.g., ABC Inc., Plaintiff-Appellant.
(D) Docketing fees paid in a District Court, Court of International Trade or Court of Federal Claims must be claimed in those courts.
(E) Insert number of pages of original material in the master version. Do not bill as an original any page that is itself a photocopy of another document not created for this appeal.
(F) Attach copy of invoice or state in-house costs.
(G) Insert number of copies billable. See Rule 39.
(H) Insert number of photocopied pages in each copy.
(I) Any item not enumerated on the form but which has been filed at the request or with the leave of the court may be billed.
(J) If costs have been agreed upon by the parties, insert “Stipulated Costs” and enter the total and grand total billed, and disregard all other items on the form.
(K) Insert name of attorney verifying costs.
(L) Insert name of party claiming costs, e.g., XYZ Co., Defendant-Appellant.

To: Judge Sutton, Professor Struve
From: Heather Williams
Date: March 21, 2011
Re: Circuit Splits Update

In August 2010, I provided Judge Sutton with a memo exploring current circuit splits arising under the Federal Rules of Appellate Procedure. The research conducted for the August 2010 memo focused on cases decided between January 1, 2010 and August 19, 2010 that created a new rules-based circuit split, furthered an existing split, or articulated the existence of a split. My research produced only two cases decided in that time period that articulated an existing Appellate Rules-based circuit split. (The two cases that I located articulated the existence of a 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.)[1] No cases were decided between January 1, 2010 and August 19, 2010 that created a new circuit split or furthered an existing split.

In March 2011, Professor Struve expressed an interesting in having my memo updated. Accordingly, to update my memo, I conducted research on circuit splits arising under the Appellate Rules, focusing on cases decided between August 19, 2010, and March 21, 2011. (In my previous memo, I described the search methodology used to conduct my research. I used the same methodology to conduct my updated research, modifying only the span of dates searched.)

My research located no cases decided between August 19, 2010 and March 21, 2011 that created an Appellate Rules-based circuit split, furthered an existing split, or articulated the existence of a split. The two cases discussed in my previous memo appear to be the most recent articulations of any circuit split arising under the Federal Rules of Appellate Procedure.

[1] The two cases discussed in my previous memo were decided at the District Court-level: *In re American Investors Life Insurance Co. Annuity Marketing and Sales Practices Litigation*, 695 F. Supp. 2d 157 (E.D. Pa. 2010); *Taylor v. Horizon Distributors, Inc.*, No. CV-07-1984-PHX-DGC, 2010 U.S. Dist. LEXIS 11953 (D. Az. Jan. 22, 2010).

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

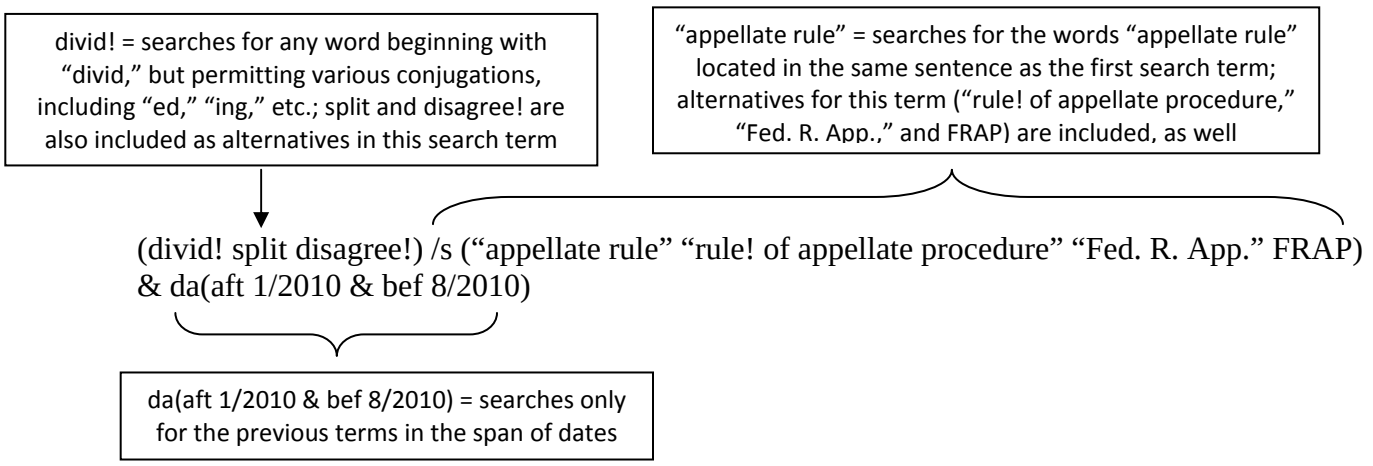
[1] In *Taylor*, the plaintiff was asked to file a $10,000 bond to guarantee payment of appeal costs, including attorneys' fees. *Taylor*, 2010 U.S. Dist. LEXIS 11953, at *1. Because the Court found that requiring Taylor, who had previously been granted *in forma pauperis* status based on his inability 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

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[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-A-1

MEMORANDUM

DATE: March 11, 2011

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 08-AP-G

Appellate Rule 24 requires a party seeking to proceed in forma pauperis ("i.f.p.") in the court of appeals to provide an affidavit that, inter alia, "shows in the detail prescribed by Form 4 ... the party's inability to pay or to give security for fees and costs." Likewise, a party seeking to proceed i.f.p. in the Supreme Court must use Form 4. *See* Supreme Court Rule 39.1. The privacy-related changes to Form 4 took effect December 1, 2010. During the Committee's discussions of those changes, it became clear that other possible changes to Form 4 are also worth considering. The most substantive of those changes concern Question 10 – which requests the name of any attorney whom the litigant has paid (or will pay) for services in connection with the case, as well as the amount of such payments – and Question 11 – which inquires about payments for non-attorney services in connection with the case.

Part I of this memo proposes amending Questions 10 and 11 to seek less information. Part II of the memo proposes technical amendments to Questions 1 through 4. The proposals set out in Parts I and II are illustrated in an addendum to the memo.

I. Revising Questions 10 and 11 to seek less information

During the discussions that led to the adoption of the 2010 privacy-related amendments to Form 4,[1] Committee members discussed other possible changes to the Form. The focus of many

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[1] The privacy rules, which took effect December 1, 2007, require redaction of social security numbers (except for the last four digits) and provide that references to an individual known to be a minor should include only the minor's initials. Criminal Rule 49.1(a)(5) also requires redaction of individuals' home addresses (so that only the city and state are shown).

The 2010 amendments made the following changes in Form 4:

7. *State the persons who rely on you or your spouse for support.*
Name [or, if under 18, initials only] Relationship Age

of those discussions has been on Questions 10 and 11.[2] In Part I.A., I summarize the critiques of those questions. Part I.B. investigates the assertion that Questions 10 and 11 might in some circumstances seek disclosure of information protected by attorney-client privilege and/or work product immunity, and concludes that though the information solicited by Questions 10 and 11 is relatively unlikely to be subject to attorney-client privilege, it may sometimes constitute protected work product. Part I.C. observes that, even if the information solicited by Questions 10 and 11 is not privileged or protected, its disclosure could as a practical matter disadvantage some i.f.p. litigants. Part I.D. notes that there seems to be no need for the details currently solicited by these questions, and suggests alternative language.

A. Criticisms of Questions 10 and 11

Questions 10 and 11 of Form 4 were adopted as part of the 1998 amendments.[3] Question 10 reads as follows:

> 10. Have you paid--or will you be paying--an attorney any money for services in connection with this case, including the completion of this form? [ ] Yes [ ] No
>
> If yes, how much? $_____

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* * * * *

13. *State the ~~address~~ <u>city and state</u> of your legal residence.*

Your daytime phone number: (____) _____
Your age: _____ Your years of schooling: _____
~~Your~~ <u>Last four digits of your</u> social-security number: _____

[2] The Committee also discussed the existence of two Administrative Office forms designed for use in the district courts – AO Form 239, which is very similar to Appellate Form 4, and AO Form 240, which is a much shorter and simpler form designed for use in cases (such as prisoner cases) where a lengthy statement of income, assets and expenses would be superfluous.

[3] The committee records do not explain the adoption of Questions 10 and 11 as part of the revised Form 4. The 1998 amendments transformed what had previously been a short and simple form into the detailed questionnaire that exists today. The amendments responded to two factors. One was a request from William Suter, the Clerk of the Supreme Court, who apparently suggested that Form 4 should require more detailed information. The other was the enactment in 1996 of the Prison Litigation Reform Act, which amended 28 U.S.C. § 1915. The committee minutes that address the Form 4 amendments do not specifically discuss Questions 10 and 11. It seems likely that Questions 10 and 11 were not prompted by the PLRA; nothing in Section 1915 (as amended) requires disclosures concerning attorney, paralegal or similar services.

If yes, state the attorney's name, address, and telephone number:

_____

Question 11 reads:

> 11. Have you paid--or will you be paying--anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?
>
> [ ] Yes [ ] No
>
> If yes, how much? $_____
>
> If yes, state the person's name, address, and telephone number:
>
> _____

Professor Coquillette has noted that the National Association of Criminal Defense Lawyers has argued that questions like Form 4's Question 10 intrude upon the attorney-client privilege. More recently, in connection with the Forms Working Group's publication of proposed new Form AO 239, the Working Group received comments from attorneys in the Pro Se Staff Attorneys Office for the District of Massachusetts, who state:

> [W]e are concerned with the specific information solicited by questions 10 and 11 related to a litigant's payment of money towards the services of an attorney and/or paralegal. These questions single out indigent litigants by requiring them to public[]ly disclose whether legal advice was sought, and if so, from whom. This could have a negative impact on the indigent litigants[']' efforts to prosecute their case - particularly when this information is available to opposing counsel and could be used in formulating litigation strategies. Perhaps a more generic question could be asked instead which would simply ask whether funds have been or will be used in the prosecution of the litigation for costs or attorney's fees.

B. Attorney-client privilege and work-product immunity

Questions 10 and 11 require certain disclosures that may reveal facts concerning the litigant's representation. If the litigant has hired a lawyer to perform any services in connection with the case and the lawyer is not representing the litigant pro bono, then Question 10 requires the litigant to disclose the fact of the retention, the name and contact information of the lawyer,

and the payment arrangement. Question 11 requires similar information concerning any paid nonlawyer assistant such as a paralegal or typist. Depending on the breadth with which Question 11 is interpreted, the question might in some cases elicit additional information concerning the litigant's strategy – for example, it seems possible that Question 11 might be interpreted to cover payments to investigators or expert witnesses. At first glance, a number of these pieces of information do not seem to implicate either attorney-client privilege or work product immunity. With respect to others, the analysis seems less straightforward.

1. Attorney-client privilege

The basic outlines of the attorney-client privilege[4] are well known:

> The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

United States v. United Shoe Machinery Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950).

In many cases, it seems likely that much of the information disclosed by answers to Questions 10 and 11 would be unprotected by attorney-client privilege. As to privilege, Comment (g) to Section 69 of the Restatement (Third) of the Law Governing Lawyers summarizes the caselaw as follows:

> g. Client identity, the fact of consultation, fee payment, and similar matters. Courts have sometimes asserted that the attorney-client privilege categorically does not apply to such matters as the following: the identity of a client; the fact that the client consulted the lawyer and the general subject matter of the consultation; the identity of a nonclient who retained or paid the lawyer to represent the client; the details of any retainer agreement; the amount of the agreed-upon fee; and the client's whereabouts. Testimony about such matters normally does not reveal the content of communications from the client. However, admissibility of such testimony should be based on the extent to which it reveals

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[4] As to state-law claims or defenses the elements of the attorney-client privilege would be governed by state law. *See* Fed. R. Evid. 501. The analysis of privilege doctrine sketched in the text is meant to be illustrative rather than exhaustive.

> the content of a privileged communication. The privilege applies if the testimony directly or by reasonable inference would reveal the content of a confidential communication. But the privilege does not protect clients or lawyers against revealing a lawyer's knowledge about a client solely on the ground that doing so would incriminate the client or otherwise prejudice the client's interests.

Restatement (Third) of Law Governing Law. § 69 cmt. g. The circumstances under which Questions 10 or 11 might elicit privileged information are not immediately apparent, and I have not found much caselaw directly on point. Much of the caselaw in this general area arose in other contexts: One such context concerns I.R.S. efforts to learn the identity of a client not named in a tax filing by a lawyer; another context concerns government efforts to learn the identity of persons who pay for the representation of a criminal defendant.

2. Work-product immunity

Like the contours of attorney-client privilege, the general contours of work product protection are also well established.[5] Civil Rule 26(b)(3) provides in part:

> (A) Documents and Tangible Things. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:
>
> (i) they are otherwise discoverable under Rule 26(b)(1); and
>
> (ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.
>
> (B) Protection Against Disclosure. If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

Although Civil Rule 26(b)(3) refers only to "documents and tangible things," the principles recognized in *Hickman v. Taylor*, 329 U.S. 495 (1947), also extend to intangibles; thus, a question designed to elicit information that would reveal a lawyer's legal theories or strategy would implicate work product protection even though it did not call for the production of a

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[5] The 2010 amendments to Civil Rule 26(b)(4) have revised the treatment of expert discovery under Civil Rule 26, but that change does not alter the analysis in this memo.

tangible item. *See, e.g.*, Restatement (Third) of the Law Governing Lawyers § 87(1) ("Work product consists of tangible material or its intangible equivalent in unwritten or oral form, other than underlying facts, prepared by a lawyer for litigation then in progress or in reasonable anticipation of future litigation.").

To the extent that Question 11 is read to encompass payments to investigators or to experts (especially non-testifying experts), it might elicit information that reveals litigation theories and strategy and that therefore qualifies as opinion work product. Obviously, the Civil Rules already require disclosure of such information in various contexts, but to the extent that Question 11 requires disclosure of information not otherwise required under the existing Rules, it could implicate work-product protection concerns.

Because it seems likely that many if not most of those who apply to appeal i.f.p. are unrepresented, one potentially relevant question is whether the scope of work product protection available to a pro se litigant differs from that available when the litigant is represented. Cases and other authorities addressing this question are rare – perhaps because pro se litigants may be less likely than lawyers are to raise claims of work-product protection.[6] But though it is possible to find statements suggesting that the work product of pro se litigants is unprotected,[7] it seems clear that a pro se litigant's work product should be protected under Rule 26(b)(3) and the

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[6] In fact, some of the caselaw bearing on this question arises from assertions by a represented party of work product protection for material created by the party before the party retained counsel. *See, e.g.*, *Moore v. Tri-City Hosp. Authority*, 118 F.R.D. 646, 650 (N.D.Ga. 1988) ("Plaintiff has demonstrated that these entries were made in contemplation of the litigation in this particular case.... The mere fact that plaintiff's assertion of work-product includes the month and a half period before plaintiff retained counsel is not determinative.").

[7] One example can be found in an opinion by the New York County Lawyer's Association Committee on Professional Ethics addressing the question "Is an attorney ethically permitted to search metadata ... in electronic documents sent by opposing counsel, which is not in the form of a document production?" The opinion appears to suggest that one reason why searching metadata in documents provided by a pro se litigant may be less problematic is that such litigants cannot invoke the same sort of work product protection as lawyers:

> [I]f a lawyer is facing a pro se litigant and suspects that a lawyer is nonetheless drafting the pleadings for the pro se litigant, the lawyer who searches the properties to see whether a lawyer has drafted the material is not likely to uncover attorney work product or client confidences or secrets and may not be intending to uncover such material because a pro se litigant does not have the attorney work product protection.

NYCLA Committee on Professional Ethics, Opinion Number 738, Searching Inadvertently Sent Metadata in Opposing Counsel's Electronic Documents, March 24, 2008.

principles of *Hickman v. Taylor*. Moreover, it can be argued that such work product should qualify, in appropriate circumstances, for heightened protection as opinion work product.

The work product of a pro se litigant clearly falls within the ambit of Rule 26(b)(3)(A), because that Rule refers to documents and things "prepared ... by or for [a] party or its representative." Rule 26(b)(3) dates back to the 1970 amendments to the Civil Rules, and the 1970 Committee Note sheds some light on the Rule's intended scope. *Hickman v. Taylor* had focused on *attorney* work product, and the 1970 Committee Note to Civil Rule 26 reported "confusion and disagreement as to the scope of the *Hickman* work-product doctrine, particularly whether it extends beyond work actually performed by lawyers." The cases cited in the Note suggest that the focus of that debate was not on lawyers versus pro se litigants, but rather on lawyers versus non-lawyer investigators of various types. *See* 1970 Committee Note to Civil Rule 26 (citing cases discussing FBI agents, claim agents, investigators and insurers). The Note also pointed out that under the pre-1970 framework a document request – even if it surmounted a work product objection – might founder on the "good cause" hurdle then included in Rule 34:

> A court may conclude that trial preparation materials are not work-product because not the result of lawyer's work and yet hold that they are not producible because "good cause" has not been shown.... When the decisions on "good cause" are taken into account, the weight of authority affords protection of the preparatory work of both lawyers and nonlawyers (though not necessarily to the same extent) by requiring more than a showing of relevance to secure production.

Id. Rule 26(b)(3), the Note advised,

> reflects the trend of the cases by requiring a special showing, not merely as to materials prepared by an attorney, but also as to materials prepared in anticipation of litigation or preparation for trial by or for a party or any representative acting on his behalf. The subdivision then goes on to protect against disclosure the mental impressions, conclusions, opinions, or legal theories concerning the litigation of an attorney or other representative of a party. The *Hickman* opinion drew special attention to the need for protecting an attorney against discovery of memoranda prepared from recollection of oral interviews. The courts have steadfastly safeguarded against disclosure of lawyers' mental impressions and legal theories, as well as mental impressions and subjective evaluations of investigators and claim-agents.

Though it does not appear that the drafters of the 1970 amendments were focusing on pro se litigants when they formulated Rule 26(b)(3), both the text of the Rule and its rationale support the inclusion of pro se litigants among those whose work product is protected. As a California court noted when reaching the same conclusion about California's work product provision, "[a pro se] litigant needs the same opportunity to research relevant law and to prepare his or her case without then having to give that research to an adversary making a discovery

request." *Dowden v. Superior Court*, 73 Cal.App.4th 126, 133, 86 Cal.Rptr.2d 180, 185 (Cal.App. 4th Dist. 1999). Not only should the pro se litigant's work product be seen to fall within Rule 26(b)(3)(A),[8] but one can also argue that Rule 26(b)(3)(B)'s heightened protection for opinion work product extends to the opinion work product of a pro se litigant, because that litigant is serving as his or her own attorney. The aphorism that a party should not be permitted to use wits borrowed from her adversary[9] seems all the more compelling when the adversary in question is a pro se litigant.

In some situations, a pro se litigant's dual role as advocate and witness may raise interesting questions concerning the scope of the protection. For example, a witness who uses a document to refresh his recollection while testifying in a deposition ordinarily renders the document discoverable,[10] but his lawyer's consultation of the same document during the same deposition would not. What if the witness is serving as his own lawyer?[11] Such questions may be thorny, but they seem unlikely to arise concerning the types of information that might be elicited by Form 4's Question 11. If, as seems true, work product protection extends to information that would reveal a self-represented party's litigation strategy, then in some circumstances full answers to Question 11 might reveal information that falls within that protection.

C. Strategic implications of disclosure

Apart from questions of privilege or protection, the disclosures required by Questions 10 and 11 may alter the strategic balance between the litigant seeking i.f.p. status and that litigant's opponent. Two possible issues arise in this regard. One concerns the possible strategic advantage an opponent might gain by learning the details of a represented applicant's fee

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[8] *See, e.g., Zimmerman v. Atlanta Hawks, Ltd.*, 1990 WL 58462, at *3 (N.D.Ga. Jan. 31, 1990) (holding that notes made by pro se plaintiff prior to appointment of counsel were work product and refusing to order production because defendant had failed to show substantial need).

[9] *See Hickman*, 329 U.S. at 516 (Jackson, J., joined by Frankfurter, J., concurring).

[10] *See* Fed. R. Evid. 612; John Kimpflen et al., 10 Fed. Proc., L. Ed. § 26:233 (citing cases that have held Rule 612 applicable to depositions).

[11] *See Nielsen v. Society of New York Hosp.*, 1988 WL 100197, at *2 (S.D.N.Y. Sept. 22, 1988) (pro se plaintiff's notes concerning prior portions of a deposition were protected work product as to which defendant had failed to show substantial need); *id.* (rejecting as unsupported by the record defendant's argument that plaintiff had waived the protection by using the notes to refresh his recollection while testifying, and reasoning that "If plaintiff were represented by counsel, his attorney's notes in similar circumstances would not be subject to production. A plaintiff appearing pro se is entitled to no less protection.").

arrangement with the applicant's lawyer. The other concerns the question of "unbundled" legal services and the debate over "ghost-written" pleadings.

The opponent of a represented litigant might gain strategic advantage by learning the details of the fee arrangement. For example, those details might assist the opponent in strategizing concerning settlement negotiations. Such an advantage might be particularly likely to arise to the extent that Question 10 requires the disclosure of the details of a contingent fee arrangement. This reflection raises a subsidiary question: If the litigant has a contingent fee arrangement with the lawyer, how would the litigant answer Question 10? It is not clear exactly how one who has a contingent-fee arrangement would answer the question "how much" "will you be paying" "for services in connection with this case". Of course, in analyzing this question, one might also ask how likely it is that a plaintiff with a contingent-fee arrangement would seek to proceed i.f.p. It seems quite possible that a plaintiff's lawyer who is operating on a contingent fee basis might simply advance the costs of the litigation rather than seeking i.f.p. status for the client.[12] At least occasionally, however, i.f.p. status might be important even if the lawyer can advance the ordinary costs of the appeal; this could be the case, for example, if the party would otherwise be required to post security for costs on appeal and the required amount of security is costly to provide.

The other issue has potentially more sweeping implications: Questions 10 and 11 may in some cases require the disclosure of information that raises questions concerning the practice of "unbundling" legal services. As the ABA's Standing Committee on Ethics and Professional Responsibility has explained, "[l]itigants appearing before a tribunal 'pro se' ... sometimes engage lawyers to assist them in drafting or reviewing documents to be submitted in the proceeding. This is a form of 'unbundling' of legal services, whereby a lawyer performs only specific, limited tasks instead of handling all aspects of a matter." ABA Formal Opinion 07-446, Undisclosed Legal Assistance to Pro Se Litigants (May 5, 2007). Proponents of unbundling argue that the practice increases access to courts and helps to level the playing field by enabling litigants who could not afford full representation to obtain specific types of episodic legal assistance. Opponents respond that such a practice is deceptive and undesirable because it allows litigants to obtain advantages by seeming to be "pro se" when they are not and because it allows the lawyer to avoid the strictures of Rule 11. If a litigant is using "unbundled" legal services – i.e., appearing pro se but paying a lawyer for advice on some aspects of the action – Question 10 would seem to require the disclosure of that fact. By requiring disclosure, Question 10 would permit the litigant's opponent to raise objections to the practice.

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[12] On a quick glance, such a course of action appears permissible. For example, Model Rule 1.8(e) provides: "(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that: (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client."

D. The details currently requested by Questions 10 and 11 are unnecessary

The purpose of Form 4 is to provide the court with the information it needs in order to determine whether to permit the applicant to proceed in forma pauperis. In the words of Rule 24(a)(1)(A), the information sought by the Form is needed to establish "the party's inability to pay or to give security for fees and costs." 28 U.S.C. § 1915(a)(1), likewise, requires the i.f.p. applicant to "submit[] an affidavit that includes a statement of all assets such prisoner possesses that the person is unable to pay such fees or give security therefor."[13]

For the first 30 years of its existence, Form 4 required little more in the way of information than Section 1915(a)(1) itself. The original form read:[14]

> I, _____ being first duly sworn, depose and say that I am the _____ in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present on appeal are the following:
>
> I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.
>
> 1. Are you presently employed?
> a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.
> b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.
>
> 2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?
> a. If the answer is yes, describe each source of income, and state the

---

[13] Additional specific details are required of prisoners bringing civil appeals: "A prisoner seeking to bring a civil action or appeal a judgment in a civil action or proceeding without prepayment of fees or security therefor, in addition to filing the affidavit filed under paragraph (1), shall submit a certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the 6-month period immediately preceding the filing of the complaint or notice of appeal, obtained from the appropriate official of each prison at which the prisoner is or was confined." 28 U.S.C. § 1915(a)(2).

[14] In the interests of conserving space, I omit the Form's caption and signature lines.

amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account?
   a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?
   a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

The original form, in other words, asked only about the applicant's employment, income, assets, and dependents. It did not inquire specifically into the applicant's expenses.

Since 1998, of course, Form 4 has taken a markedly different approach. Question 8 of the current Form requires detailed information concerning more than 15 different types of expenses (including dry-cleaning expenses), and includes a final catch-all category of "Other (specify)." One might argue that – when read in tandem with Question 8 – Questions 10 and 11 are superfluous, because any significant recurring expenses would be captured by Question 8's catch-all category. Although Question 8 would not uncover any past payments to a lawyer or investigator in connection with the case, that information is arguably irrelevant to the question of statutory eligibility for i.f.p. status: The statutory standard and the parallel test in Rule 24(a) appear to require simply that the applicant be presently unable to pay the relevant fees or provide the relevant security.

Assuming that the Committee agrees that change is warranted, one option would be to revise Form 4 to omit Questions 10 and 11. However, if Committee members feel that some information concerning litigation-related expenditures would be useful for the courts in making eligibility determinations, Questions 10 and 11 could be combined into one simplified question. For example, such a question might read:

> Have you spent – or will you be spending – any money for expenses or attorney fees in connection with this lawsuit?
>
> ☐ Yes ☐ No
>
> If yes, how much? $ _____

II. Technical amendments to Questions 1 through 4

It has come to our attention that the version of Form 4 in the December 1, 2009, House pamphlet (and prior such pamphlets) is not identical to the version of Form 4 transmitted by the Chief Justice to Congress on April 24, 1998.[15] The House pamphlets had reproduced the version of Form 4 that was approved by the Judicial Conference in fall 1997 for submission to the Supreme Court (I will call this version the "Committee Version") – rather than the version transmitted by the Supreme Court to Congress in spring 1998 (I will call this the "Transmitted Version").

The non-trivial discrepancies[16] are as follows:

Question 1. Question 1 in the Committee Version has four columns for stating income – two ("You" and "Spouse") for average past monthly income and two ("You" and "Spouse") for expected future income. Question 1 in the Transmitted Version has only two columns ("You" and "You"). An applicant closely reading question 1 of the Transmitted Version would see that it asks for estimated income "[f]or both you and your spouse," and would realize that the two columns do not encompass all the requested information. But some applicants might find this layout confusing.

Questions 2 and 3. Questions 2 and 3 in the Committee Version request the applicant's and spouse's "employment history for the past two years." Questions 2 and 3 in the Transmitted Version omit the phrase "for the past two years" and thus appear to impose no time limit on the scope of the request.

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[15] A Thomson Reuters (a.k.a. West) editor brought the discrepancies to the AO's attention this summer. The AO consulted Michèle K. Skarvelis, Assistant Counsel at the Office of the Law Revision Counsel of the U.S. House of Representatives, for her views on the discrepancies. Ms. Skarvelis reports that the version shown in the House pamphlet "has appeared in the published version of Appellate Form 4 since 1998," but that it "is not supported by House Document 105-269, nor the amendments as transmitted to Congress with Court Order (523 U.S. 1147)." She states that "LRC's usual editorial policy is to reproduce what appears on the face of the House Document (barring Congressional intervention), the Supreme-Court-transmitted final version of a rule or form, at the end of Congressional review period." After discussion with the AO, Ms. Skarvelis concluded that "LRC will include the Supreme-Court-transmitted version of Form 4, found on pp. 86--89 of House Document 105-269, as a correction in Supplement III to the 2006 Main Edition. We will revisit the form when preparing the December 1, 2010, amendments for inclusion in the next Federal Rules of Appellate Procedure pamphlet."

[16] There are also four differences in capitalization or hyphenation in Question 8; these discrepancies involve no substantive difference and will cause no confusion.

Question 4. Question 4 in the Committee Version directs the submission of certified institutional account statement(s) by any applicant who is "a prisoner seeking to appeal a judgment in a civil action or proceeding." Question 4 in the Transmitted Version omits the limiting phrase "seeking to appeal a judgment in a civil action or proceeding." The basis for the limiting phrase presumably is 28 U.S.C. § 1915(a)(2), which provides that "[a] prisoner seeking to bring a civil action or appeal a judgment in a civil action or proceeding without prepayment of fees or security therefor, in addition to filing the affidavit filed under paragraph (1), shall submit a certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the 6-month period immediately preceding the filing of the complaint or notice of appeal, obtained from the appropriate official of each prison at which the prisoner is or was confined." If the appellant is a criminal defendant who was determined to be financially unable to employ counsel, Appellate Rule 24(a)(3) permits that party to proceed on appeal i.f.p. "without further authorization" unless the district court (stating its reasons in writing) certifies the appeal as not taken in good faith or finds that the party is not otherwise entitled to proceed i.f.p. So perhaps the great majority of i.f.p. applications under Rule 24 are applications by litigants in civil cases, in which event the omission of the limiting phrase may not turn out to cause a great deal of confusion. On the other hand, the Advisory Committee's April 1997 minutes indicate that the Committee made a considered decision to include the limiting phrase.

Because I believe that the Committee Version is preferable to the Transmitted Version, I propose that the Committee amend Form 4 to bring it into conformance with the Committee Version. I think that this could be accomplished through the technical amendment process without the need for publication and comment, because the Committee Version was in fact the product of an earlier publication-and-comment process. Using the technical amendment process would carry the advantage that the Committee Version would once again be regarded as the official version of the Form as of December 1, 2012.

On the other hand, if the Committee is inclined to publish for comment additional changes to Form 4, then there is something to be said for including in that publication for comment all the proposed changes to Form 4, including those that reinstate the Committee Version in place of the Transmitted Version. Although that would insert an additional year's time lag – because proposals published for comment this summer would take effect, at the earliest, on December 1, 2013 – such a time lag would not necessarily pose a problem for litigants appealing to the courts of appeals. In the meantime, applicants seeking to proceed i.f.p. in the courts of appeals could still, I think, be told to use the Committee Version.[17] Appellate

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[17] The Committee may wish to consider asking our Liaison to the Appellate Clerks, Len Green, to confer with his colleagues in other circuits about the versions of Form 4 that the courts of appeals provide on their websites. In addition to conferring with them about the matters discussed in Part II of this memo, perhaps this might be a useful occasion to highlight the privacy-related changes in Form 4: A survey of the circuit websites as of March 3, 2011 disclosed that some circuits (the Sixth, Eighth, Tenth, and Eleventh) have not yet updated their versions of Form 4 to incorporate all of the privacy-related amendments that took effect

Rule 24 simply states that the applicant's affidavit must "show[] in the detail prescribed by Form 4 ... the party's inability to pay or to give security for fees and costs." Appellate Rule 24(a)(1)(A). I do not think that cutting off the employment histories demanded by Questions 2 and 3 at two years would violate Rule 24(a)(1)(A)'s directive; and in other respects the Committee Version provides space (in Question 1) to provide *more* detail than the Transmitted Version. However, those seeking to proceed i.f.p. in the Supreme Court would likely have to use the Transmitted Version. Supreme Court Rule 39.1 requires an affidavit "in the form prescribed by the Federal Rules of Appellate Procedure, Form 4," which appears to mandate the use of the official Form 4.

III. Conclusion

I propose that the Committee approve for publication proposed amendments to Form 4 as set forth in the addendum to this memo.[18]

December 1, 2010.

[18] No Committee Note accompanies the proposed amendments because the Appellate Rules' forms do not ordinarily seem to have Committee Notes. I have found only one such note, concerning the 2002 adoption of Form 6, and it states only: "Changes Made After Publication and Comments[:] No changes were made to the text of the proposed amendment or to the Committee Note." As a practical matter, for purposes of public comment the rationale for the proposed Form 4 amendments could be summarized in the AO's Brochure (which is distributed with the hard copies of the proposed amendments and posted on the AO's website). The rationale for the proposals would also be described in the excerpts of Judge Sutton's report to the Standing Committee which would be included among the materials published for comment. Thus, for the purposes of publication the functions that would be served by a Note would likely be served by the published materials taken as a whole.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE*

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

* * * * *

1. *For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.*

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Employment	$_____	$_____	$_____	$_____
Self-employment	$_____	$_____	$_____	$_____
Income from real property (such as rental income)	$_____	$_____	$_____	$_____
Interest and dividends	$_____	$_____	$_____	$_____
Gifts	$_____	$_____	$_____	$_____
Alimony	$_____	$_____	$_____	$_____
Child support	$_____	$_____	$_____	$_____
Retirement (such as social				

* New material is underlined; matter to be omitted is lined through.

security, pensions,				
annuities, insurance)	$_____	$_____	$_____	$_____
Disability (such as social				
security, insurance				
payments)	$_____	$_____	$_____	$_____
Unemployment payments	$_____	$_____	$_____	$_____
Public-assistance (such				
as welfare)	$_____	$_____	$_____	$_____
Other (specify): _____	$_____	$_____	$_____	$_____
Total monthly income:	$_____	$_____	$_____	$_____

2. *List your employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)*

Employer	Address	Dates of employment	Gross monthly pay
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

3. *List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)*

Employer	Address	Dates of employment	Gross monthly pay
_____	_____	_____	_____

_____	_____	_____	_____
_____	_____	_____	_____

4. *How much cash do you and your spouse have? $*_____

Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
_____	_____	$_____	$_____
_____	_____	$_____	$_____
_____	_____	$_____	$_____

If you are a prisoner seeking to appeal a judgment in a civil action or proceeding, you must attach a statement certified by the appropriate institutional officer showing all receipts, expenditures, and balances during the last six months in your institutional accounts. If you have multiple accounts, perhaps because you have been in multiple institutions, attach one certified statement of each account.

* * * * *

~~10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☐ No~~

~~If yes, how much? $_____~~

~~If yes, state the attorney's name, address, and telephone number:~~

_____

_____

~~11. Have you paid – or will you be paying – anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?~~

~~☐ Yes ☐ No~~

~~If yes, how much? $_____~~

~~If yes, state the person's name, address, and telephone number:~~

_____

_____

_____

10. *Have you spent – or will you be spending – any money for expenses or attorney fees in connection with this lawsuit?*

☐ Yes ☐ No

If yes, how much? $_____

~~12.~~ 11. *Provide any other information that will help explain why you cannot pay the docket fees for your appeal.*

~~13.~~ 12. *State the city and state of your legal residence.*

_____

Your daytime phone number: (____) _____

Your age: _____ Your years of schooling: _____

Last four digits of your social-security number: _____

TAB-V-A-2

MEMORANDUM

DATE: March 11, 2011

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 10-AP-B

At its spring and fall 2010 meetings, the Committee discussed the possibility of amending Rule 28(a)(6)'s requirement that briefs include "a statement of the case briefly indicating the nature of the case, the course of proceedings, and the disposition below." A number of commentators have indicated support for such an amendment.[1] The Committee discussed a variety of possible ways to revise Rule 28. This memo sets out three such possibilities as bases for further discussion. An appendix to this memo lists relevant local circuit rules. The Committee is now also in a position to benefit from research by Holly Sellers concerning state-court briefing requirements.

I. Adopting the Supreme Court's approach

Supreme Court Rule 24 does not separate the statement of the case and the statement of the facts; rather, Supreme Court Rule 24.1(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." Rule 28(a) could be amended to emulate this approach.[2] Here is a sketch of such an amendment; I also include a sketch of conforming amendments to Rule 28.1:

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[1] Most recently, the Committee received a letter from Peder Batalden. A copy of Mr. Batalden's letter is enclosed.

[2] Original Appellate Rule 28 treated both requirements in the same subdivision, but did seem to require them to be discussed seriatim. Specifically, original Rule 28(a)(3) required: "A statement of the case. The statement shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below. There shall follow a statement of the facts relevant to the issues presented for review, with appropriate references to the record (see subdivision (e))." The Committee Note explained that the rule was based upon Supreme Court Rule 40 (the predecessor to today's Supreme Court Rule 24).

Rule 28. Briefs

(a) Appellant's Brief. The appellant's brief must contain, under appropriate headings and in the order indicated:

(1) a corporate disclosure statement if required by Rule 26.1;

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

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

(4) a jurisdictional statement, including:

(A) the basis for the district court's or agency's subject-matter jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction;

(B) the basis for the court of appeals' jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction;

(C) the filing dates establishing the timeliness of the appeal or petition for review; and

(D) an assertion that the appeal is from a final order or judgment that disposes of all parties' claims, or information establishing the court of appeals' jurisdiction on some other basis;

(5) a statement of the issues presented for review;

(6) a concise statement of the case ~~briefly indicating the nature of the case, the course of proceedings, and the disposition below;~~

~~(7) a statement of~~ setting out the facts relevant to the issues submitted for review

with appropriate references to the record (see Rule 28(e));

~~(8)~~ (7) a summary of the argument, which must contain a succinct, clear, and accurate statement of the arguments made in the body of the brief, and which must not merely repeat the argument headings;

~~(9)~~ (8) the argument, which must contain:

(A) appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies; and

(B) for each issue, a concise statement of the applicable standard of review (which may appear in the discussion of the issue or under a separate heading placed before the discussion of the issues);

~~(10)~~ (9) a short conclusion stating the precise relief sought; and

~~(11)~~ (10) the certificate of compliance, if required by Rule 32(a)(7).

(b) Appellee's Brief. The appellee's brief must conform to the requirements of Rule 28(a)(1)-~~(9)~~ (8) and ~~(11)~~ (10), except that none of the following need appear unless the appellee is dissatisfied with the appellant's statement:

(1) the jurisdictional statement;

(2) the statement of the issues;

(3) the statement of the case and the facts;

~~(4) the statement of the facts;~~ and

~~(5)~~ (4) the statement of the standard of review.

* * *

Committee Note

Subdivision (a). Rule 28(a) is amended to remove the requirement of separate statements of the case and of the facts. Currently Rule 28(a)(6) provides that the statement of the case must "indicat[e] the nature of the case, the course of proceedings, and the disposition below," and it precedes Rule 28(a)(7)'s requirement that the brief include "a statement of facts." Experience has shown that these requirements have generated confusion and redundancy. Rule 28(a) is amended to consolidate subdivisions (a)(6) and (a)(7) into a new subdivision (a)(6) that provides for one "statement." This permits the lawyer to present the factual and procedural history in one place chronologically. Conforming changes are made by renumbering Rules 28(a)(8) through (11) as Rules 28(a)(7) through (10).

Subdivision (b). Rule 28(b) is amended to accord with the amendment to Rule 28(a). Current Rules 28(b)(3) and (4) are consolidated into new Rule 28(b)(3), which now refers to "the statement of the case and the facts." Rule 28(b)(5) becomes Rule 28(b)(4). And Rule 28(b)'s reference to certain subdivisions of Rule 28(a) is updated to reflect the renumbering of those subdivisions.

Rule 28.1. Cross-Appeals

* * *

(c) Briefs. In a case involving a cross-appeal:

(1) Appellant's Principal Brief. The appellant must file a principal brief in the appeal. That brief must comply with Rule 28(a).

(2) Appellee's Principal and Response Brief. The appellee must file a principal brief in the cross-appeal and must, in the same brief, respond to the principal brief in the appeal. That appellee's brief must comply with Rule 28(a), except that the brief need not include a statement of the case ~~or a statement of~~ and the facts unless the appellee is dissatisfied with the appellant's statement.

(3) Appellant's Response and Reply Brief. The appellant must file a brief that responds to the principal brief in the cross-appeal and may, in the same brief, reply to the response in the appeal. That brief must comply with Rule 28(a)(2)-~~(9)~~ (8) and ~~(11)~~ (10),

except that none of the following need appear unless the appellant is dissatisfied with the appellee's statement in the cross-appeal:

(A) the jurisdictional statement;

(B) the statement of the issues;

(C) the statement of the case and the facts;

~~(D) the statement of the facts;~~ and

~~(E)~~ (D) the statement of the standard of review.

(4) Appellee's Reply Brief. The appellee may file a brief in reply to the response in the cross-appeal. That brief must comply with Rule 28(a)(2)-(3) and ~~(11)~~ (10) and must be limited to the issues presented by the cross-appeal.

* * *

Committee Note

Subdivision (c). Subdivision (c) is amended to accord with the amendments to Rule 28(a). Rule 28(a) is amended to consolidate subdivisions (a)(6) and (a)(7) into a new subdivision (a)(6) that provides for one "statement of the case setting out the facts relevant to the issues submitted for review...." Rule 28.1(c) is amended to refer to that consolidated "statement of the case and the facts," and references to subdivisions of Rule 28(a) are revised to reflect the re-numbering of those subdivisions.

II. Revising Rule 28(a)(6) and switching the order of Rules 28(a)(6) and (7)

An alternative approach would be to retain the separate subdivisions of Rule 28(a) requiring statements of the case and the facts, but to reverse their order and to revise the reference to the "course of proceedings." Here is a sketch of that possible approach, along with a sketch of conforming amendments to Rule 28.1:

Rule 28. Briefs

(a) Appellant's Brief. The appellant's brief must contain, under appropriate headings

and in the order indicated:

(1) a corporate disclosure statement if required by Rule 26.1;

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

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

(4) a jurisdictional statement, including:

(A) the basis for the district court's or agency's subject-matter jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction;

(B) the basis for the court of appeals' jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction;

(C) the filing dates establishing the timeliness of the appeal or petition for review; and

(D) an assertion that the appeal is from a final order or judgment that disposes of all parties' claims, or information establishing the court of appeals' jurisdiction on some other basis;

(5) a statement of the issues presented for review;

~~(6) a statement of the case briefly indicating the nature of the case, the course of proceedings, and the disposition below;~~

~~(7)~~ (6) a statement of facts relevant to the issues submitted for review with appropriate references to the record (see Rule 28(e));

~~(6)~~ (7) a statement of the case briefly indicating the nature of the case, the relevant

course of proceedings, and the disposition below;

(8) a summary of the argument, which must contain a succinct, clear, and accurate statement of the arguments made in the body of the brief, and which must not merely repeat the argument headings;

(9) the argument, which must contain:

(A) appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies; and

(B) for each issue, a concise statement of the applicable standard of review (which may appear in the discussion of the issue or under a separate heading placed before the discussion of the issues);

(10) a short conclusion stating the precise relief sought; and

(11) the certificate of compliance, if required by Rule 32(a)(7).

(b) Appellee's Brief. The appellee's brief must conform to the requirements of Rule 28(a)(1)-(9) and (11), except that none of the following need appear unless the appellee is dissatisfied with the appellant's statement:

(1) the jurisdictional statement;

(2) the statement of the issues;

(3) the statement of the ~~case~~ facts;

(4) the statement of the ~~facts~~ case; and

(5) the statement of the standard of review.

* * *

Committee Note

Subdivision (a). Rule 28(a) is amended to reverse the order of current Appellate Rules 28(a)(6) and (a)(7) and to delete from current Rule 28(a)(6) the reference to the "course of proceedings." The current rule requires that the "statement of the case" precede the "statement of facts," and thus requires a recitation that does not follow a chronological order. By reversing the order of the "statement of facts" and "statement of the case," the amendment permits discussion of the facts before the discussion of the litigation that led to the appeal. The insertion of the word "relevant" before "course of proceedings" in the "statement of the case" requirement is designed to emphasize that the statement of the case should provide a succinct description of the rulings being appealed and any other relevant features of the proceeding below, not an exhaustive list of minutiae about those proceedings.

Subdivision (b). Rule 28(b) is amended to accord with the amendment to Rule 28(a) by reversing the order of subdivisions (b)(3) and (b)(4).

Rule 28.1. Cross-Appeals

* * *

(c) Briefs. In a case involving a cross-appeal:

(1) Appellant's Principal Brief. The appellant must file a principal brief in the appeal. That brief must comply with Rule 28(a).

(2) Appellee's Principal and Response Brief. The appellee must file a principal brief in the cross-appeal and must, in the same brief, respond to the principal brief in the appeal. That appellee's brief must comply with Rule 28(a), except that the brief need not include ~~a statement of the case or~~ a statement of the facts or a statement of the case unless the appellee is dissatisfied with the appellant's statement.

(3) Appellant's Response and Reply Brief. The appellant must file a brief that responds to the principal brief in the cross-appeal and may, in the same brief, reply to the response in the appeal. That brief must comply with Rule 28(a)(2)-(9) and (11), except that none of the following need appear unless the appellant is dissatisfied with the

appellee's statement in the cross-appeal:

(A) the jurisdictional statement;

(B) the statement of the issues;

(C) the statement of the ~~case~~ facts;

(D) the statement of the ~~facts~~ case; and

(E) the statement of the standard of review.

* * *

Committee Note

Subdivision (c). Rule 28(a) is amended to reverse the order of current Appellate Rules 28(a)(6) and (a)(7). Rules 28.1(c)(2) and (3) are amended to reflect that re-ordering.

III. Relocating the "course of proceedings" requirement and deleting the reference to "the disposition below"

A different approach would relocate the "course of proceedings" requirement from Rule 28(a)(6) to Rule 28(a)(7) so as to permit the description of the course of proceedings in chronological order (after the facts). In this approach, Rule 28(a)(6)'s reference to "the disposition below" can be deleted because the newly-expanded Rule 28(a)(7) statement would be the natural place to outline the disposition below. Here is a sketch of such an amendment, along with a sketch of a conforming amendment to Rule 28.1:

Rule 28. Briefs

(a) Appellant's Brief. The appellant's brief must contain, under appropriate headings and in the order indicated:

(1) a corporate disclosure statement if required by Rule 26.1;

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

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

(4) a jurisdictional statement, including:

(A) the basis for the district court's or agency's subject-matter jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction;

(B) the basis for the court of appeals' jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction;

(C) the filing dates establishing the timeliness of the appeal or petition for review; and

(D) an assertion that the appeal is from a final order or judgment that disposes of all parties' claims, or information establishing the court of appeals' jurisdiction on some other basis;

(5) a statement of the issues presented for review;

(6) a statement of the case briefly indicating the nature of the case~~, the course of proceedings, and the disposition below~~;

(7) a statement of the facts and course of proceedings relevant to the issues submitted for review with appropriate references to the record (see Rule 28(e));

(8) a summary of the argument, which must contain a succinct, clear, and accurate statement of the arguments made in the body of the brief, and which must not merely repeat the argument headings;

(9) the argument, which must contain:

(A) appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies; and

(B) for each issue, a concise statement of the applicable standard of review (which may appear in the discussion of the issue or under a separate heading placed before the discussion of the issues);

(10) a short conclusion stating the precise relief sought; and

(11) the certificate of compliance, if required by Rule 32(a)(7).

(b) Appellee's Brief. The appellee's brief must conform to the requirements of Rule 28(a)(1)-(9) and (11), except that none of the following need appear unless the appellee is dissatisfied with the appellant's statement:

(1) the jurisdictional statement;

(2) the statement of the issues;

(3) the statement of the case;

(4) the statement of the facts and proceedings; and

(5) the statement of the standard of review.

* * *

Committee Note

Subdivision (a). Rule 28(a) is amended to relocate the reference to the "course of proceedings" from subdivision (a)(6) to subdivision (a)(7), and to delete from subdivision (a)(6) the reference to "the disposition below." The statement of the case required by amended Rule 28(a)(6) should be a succinct description of the rulings being appealed rather than an exhaustive history of the proceedings below [– e.g., "This is an appeal from the grant of summary judgment to the defendant in a Title VII case."] The statement of facts and proceedings required by amended Rule 28(a)(7) can be ordered chronologically (first stating the pre-litigation facts and then the course of proceedings); it should address only those facts and proceedings that are relevant to the appeal, including the disposition below.

Rule 28.1. Cross-Appeals

* * *

(c) Briefs. In a case involving a cross-appeal:

(1) Appellant's Principal Brief. The appellant must file a principal brief in the appeal. That brief must comply with Rule 28(a).

(2) Appellee's Principal and Response Brief. The appellee must file a principal brief in the cross-appeal and must, in the same brief, respond to the principal brief in the appeal. That appellee's brief must comply with Rule 28(a), except that the brief need not include a statement of the case or a statement of the facts and proceedings unless the appellee is dissatisfied with the appellant's statement.

(3) Appellant's Response and Reply Brief. The appellant must file a brief that responds to the principal brief in the cross-appeal and may, in the same brief, reply to the response in the appeal. That brief must comply with Rule 28(a)(2)-(9) and (11), except that none of the following need appear unless the appellant is dissatisfied with the appellee's statement in the cross-appeal:

(A) the jurisdictional statement;

(B) the statement of the issues;

(C) the statement of the case;

(D) the statement of the facts and proceedings; and

(E) the statement of the standard of review.

* * *

Committee Note

Subdivision (c). Rule 28(a) is amended to relocate the reference to the "course of

proceedings" from subdivision (a)(6) to subdivision (a)(7), and to delete from subdivision (a)(6) the reference to "the disposition below." Rules 28.1(c)(2) and (3) are amended to reflect the fact that amended Rule 28(a)(7) requires a statement of facts and proceedings (which will include a statement of the disposition below).

Encl.

Appendix: Local provisions in the federal courts of appeals

The table below sets forth local circuit rules concerning the statement of the case and/or the statement of facts.[3] Most circuits do not vary the requirements of Rules 28(a)(6) and (7). Perhaps the starkest variation is by the D.C. Circuit: D.C. Circuit Rule 28(a)(4) provides that "[t]he parties need not include in their briefs a statement of the case." Eighth Circuit Rule 28A(i) requires briefs to commence with a one-page statement "providing a summary of the case, the reasons why oral argument should or should not be heard, and the amount of time (15, 20, or 30 minutes, or in an extraordinary case, more than 30 minutes) necessary to present the argument." Eleventh Circuit Rule 28-1(i) directs that the statement of facts be included as part of the statement of the case, but the local rule orders the contents of the statement of the case in the same way as Appellate Rules 28(a)(6) and (7).

Circuit provision	Text
D.C. Circuit Rule 28(a)(4)	The parties need not include in their briefs a statement of the case.
Second Circuit Rule 28.1(b)	In the statement of the case, an appellant's brief must name the judge or agency official who rendered the decision appealed from and cite the decision or supporting opinion, if reported.
Third Circuit Local Appellate Rule 111.5	[Concerning death penalty cases:] In addition to requirements set forth in 3d Cir. L.A.R. 28 with respect to the contents of motions and briefs, any application, motion, or brief that may result in either a disposition on the merits or the grant or denial of a stay of execution must include: (a) A statement of the case delineating precisely the procedural history of the case ....

[3] The table does not include local provisions that require a statement concerning related cases.

Third Circuit Local Appellate Rule 112.6	[Concerning petitions for writs of certiorari to the Supreme Court of the Virgin Islands:] The petition for writ of certiorari must contain, in the following order: .... (5) the questions presented for review, expressed concisely in relation to the circumstances of the case. The statement of the questions should not be argumentative or repetitious. The statement of a question presented will be deemed to comprise every subsidiary question fairly included therein. Only the questions set forth in the petition or fairly included therein will be considered by the court; (6) A concise statement of the case containing the facts material to the consideration of the questions presented. The first paragraph of the statement of the case must specify the denomination of each of the parties as they appeared in the Supreme Court of the Virgin Islands and the Superior Court of the Virgin Islands. The statement of the case must specify, with appropriate citation to the record, the stage in the proceedings, both in the Superior Court and the Supreme Court of the Virgin Islands, at which the questions sought to be reviewed were raised and the ruling thereon; ....
Fourth Circuit Rule 28(f)	Every opening brief filed by appellants in this Court shall include a separate section, the title of which is STATEMENT OF FACTS. In this section the attorneys will prepare a narrative statement of all of the facts necessary for the Court to reach the conclusion which the brief desires. The said STATEMENT OF FACTS will include exhibit, record, transcript, or appendix references showing the source of the facts stated. An appellee's brief shall also include a STATEMENT OF FACTS so prepared unless appellee is satisfied with appellant's statement of facts.
Fifth Circuit Rules 28.3(g) & (h)	[These rules incorporate the requirements of Appellate Rules 28(a)(6) and (7).]
Seventh Circuit Rule 28(c)	The statement of the facts required by Fed. R. App. P. 28(a)(7) shall be a fair summary without argument or comment. No fact shall be stated in this part of the brief unless it is supported by a reference to the page or pages of the record or the appendix where that fact appears.

Eighth Circuit Rule 28A(i)	(1) SUMMARY OF THE CASE. Each appellant must file a statement not to exceed 1 page providing a summary of the case, the reasons why oral argument should or should not be heard, and the amount of time (15, 20, or 30 minutes, or in an extraordinary case, more than 30 minutes) necessary to present the argument. The summary must be placed as the first item in the brief. If appellee deems appellant's statement incorrect or incomplete, appellee may include a responsive statement in appellee's brief. (2) STATEMENT OF ISSUES. In addition to the requirement of FRAP 28(a)(5), the statement of issues shall include for each issue a list of the most apposite cases, not to exceed 4, and the most apposite constitutional and statutory provisions.
Eleventh Circuit Rule 28-1(i)	Statement of the Case. In the statement of the case, as in all other sections of the brief, every assertion regarding matter in the record shall be supported by a reference to the volume number (if available), document number, and page number of the original record where the matter relied upon is to be found. The statement of the case shall briefly recite the nature of the case and shall then include: (i) the course of proceedings and dispositions in the court below. IN CRIMINAL APPEALS, COUNSEL MUST STATE WHETHER THE PARTY THEY REPRESENT IS INCARCERATED; (ii) a statement of the facts. A proper statement of facts reflects a high standard of professionalism. It must state the facts accurately, those favorable and those unfavorable to the party. Inferences drawn from facts must be identified as such; (iii) a statement of the standard or scope of review for each contention. For example, where the appeal is from an exercise of district court discretion, there shall be a statement that the standard of review is whether the district court abused its discretion. The appropriate standard or scope of review for other contentions should be similarly indicated, e.g., that the district court erred in formulating or applying a rule of law; or that there is insufficient evidence to support a verdict; or that fact findings of the trial judge are clearly erroneous under Fed.R.Civ.P. 52(a); or that there is a lack of substantial evidence in the record as a whole to support the factual findings of an administrative agency; or that the agency's action, findings and conclusions should be held unlawful and set aside for the reasons set forth in 5 U.S.C. § 706(2).
Federal Circuit Rule 28(a)	[Appellants' briefs must] contain the following in the order listed: ... (7) the statement of the case, including the citation of any published decision of the trial tribunal in the proceedings; (8) the statement of the facts ....

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January 27, 2011

VIA ELECTRONIC MAIL

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

Re: Proposed modifications to Fed. R. App. P. 28(a)

Dear Mr. McCabe:

Horvitz & Levy is the largest law firm in the nation specializing exclusively in appellate litigation. We frequently handle appeals in the United States Courts of Appeals, and we take a keen interest in amendments to the rules governing federal procedure. The issues discussed in this letter concern the format and construction of appellate briefs, a subject of acute interest to every appellate lawyer, including us.

We understand that the Advisory Committee on Appellate Rules is presently considering whether to modify the requirement in Appellate Rule 28(a)(6) that briefs contain a separate statement of the case "indicating the nature of the case, the course of proceedings, and the disposition below." We strongly support modifying that Rule.

Everyone agrees that an appellate brief must describe the procedural events leading up to appeal. The question is where to put that description in the brief to avoid duplicating the description across multiple sections of the brief. In considering this question, we ask the Committee to consider two aspects of the relationship between current Rule 28(a)(6) and other portions of Rule 28(a) that present difficulties. We describe those difficulties below and offer suggestions for corrective modifications.

The first difficulty is created by Rule 28(a)'s strict ordering requirement. Under Rule 28(a), the separate sections of briefs must appear "in the order indicated." This means that a brief must present a statement of the case (item 6) before presenting the statement of facts (item 7). That order is seldom ideal, however. It is generally preferable to present matters in chronological order, but Rule 28(a) defeats that preference because the important procedural events of a case happen after the underlying events. Moreover, it is typically easier to describe and understand the procedural posture of an appeal after learning the key facts. For example, under the current Rule, in a complicated appeal with numerous parties playing different roles, it is necessary to begin the statement of the case by describing all parties, or else the procedural events will make no sense. If the statement of facts came first, however, this would be unnecessary because the factual recitation would already make clear the identities and roles of the various parties.

The best solution, we think, is to combine the requirements of Rules 28(a)(6) and (a)(7) into a single "statement of the case" that would embrace descriptions of both procedural and factual events. This modification would leave unchanged the requirement that a brief describe key procedural events, but it would allow lawyers to choose whether to present that information before, or after, reciting the facts, as befits their particular case.

A second difficulty is caused by the absence of any provision of Rule 28(a) addressing introductions to briefs. Nothing in Rule 28(a) expressly authorizes a brief to include an introduction, and the structure of the Rule defeats any argument by negative implication that one is permitted. The only logical place to house an introduction is before or after the jurisdictional statement, yet Rule 28(a) identifies *other* elements that must appear, "in the order indicated," both before and after the jurisdictional statement. An introduction can be an important and helpful part of a brief—as a prelude to a long brief, or to caution that certain arguments are conditioned on others, or to explain that different arguments lead to different relief. Most appellate lawyers want to include introductions, and so they seek another venue for the information that would otherwise be placed in an introduction. The inevitable resting place is the statement of the case, probably because Rule 28(a)(6) gives license to "indicat[e] the nature of the case." This marriage of convenience is often unhappy. The statement of the case has its own separate purpose—as Rule 28(a)(6) explains—and that purpose is not coextensive with a true introduction. Among other problems, an introduction ought to be the first, not the third, substantive component of a brief (after statements of jurisdiction and the issues).

We therefore suggest that the Committee revise Rule 28(a) to include a new subrule allowing a brief to include an introduction, and that the language from Rule 28(a)(6) concerning "the nature of the case" be relocated to that new subrule.

Sincerely,

HORVITZ & LEVY LLP

By: _____
Peder K. Batalden

PKB/klt

MEMO TO: Peter G. McCabe

FROM: Holly Taylor Sellers

RE: State Court Rules Governing Appellate Court Briefs

DATE: March 14, 2011

Introduction

At its October 2010 meeting, the Advisory Committee on Appellate Rules discussed a number of provisions in Federal Rule of Appellate Procedure 28, including the statement of the case and the order of the contents of briefs. Among the questions raised during the discussion were the logic of the current ordering and the intended scope of the "statement of the case" required by FRAP 28(a)(6). Inquiry was made as to the requirements set forth in the local rules of the federal courts of appeals and in state-court rules. This survey is in response to the state-court portion of that inquiry.

Not surprisingly, state court rules vary from FRAP 28 not just in content, but in the depth and breadth of their provisions generally. Some states, such as California, Louisiana and Rhode Island, have adopted rules that are relatively lean, while others such as Oregon, Illinois and Michigan are much more detailed. Focusing specifically on the areas of interest to the committee, a few general observations may be made.

First, 15 states have adopted briefing rules that mirror FRAP 28.[1] Four of those states[2] are

[1] No states have adopted a rule that parallels United States Supreme Court rule 24, although some states have provisions similar to some sections of that rule. Accordingly, and consistent with the Advisory Committee discussion, this analysis will focus on FRAP 28.

[2] Nevada's rule is nearly identical to FRAP 28. Moreover, Nevada's advisory committee note expressly states where - and why - the Nevada rule varies from FRAP. ("Federal rule has been revised to substitute "respondent" for "appellee" in accordance with Nevada tradition." *See*,

nearly identical to FRAP 28 with respect to the sections of the rule that are relevant to this survey. An additional 11 states may fairly be characterized as having briefing rules substantially similar to FRAP 28.[3] This first group of 15 states is least likely to vary the order of the contents of the brief, or to differ in the wording used to define the statement of the case.

A second group of 13 states[4] includes states whose rules are similar in content to, but not phrased or organized in a manner that closely parallels, FRAP 28. This group is more likely to vary the order of the contents of the brief, combine elements of the brief (e.g. statement of the case and statement of facts) into one section or one statement, and/or omit or make optional the summary of argument.

A third group of 22 states[5] encompasses those states whose rules are distinguished from FRAP 28 both in wording and content. Although it is difficult to generalize about this group, it is possible to identify features that inform a discussion of state court briefing rules with respect to

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Advisory Committee Note to Nev. Rule of App. Proc. 28.) North Dakota and Tennessee rules are also strikingly similar to FRAP 28. Minor differences include North Dakota's omission of the summary of argument, and Tennessee's provision that the summary of argument is optional. North Dakota also added a final admonition that "All briefs under this rule must be concise, presented with accuracy, logically arranged with proper headings, and free from burdensome, irrelevant or immaterial matters." North Dakota Rule of App. Proc. 28 (*l*).

Ohio tracks the language of FRAP 28, but provides that the summary of argument is optional, and requires a statement of the assignments of errors presented for review in addition to the statement of the issues. Ohio Rules of App. Proc. 16 (A)(3) and (4), respectively.

[3] Alabama, Alaska, Arizona, Colorado, Iowa, Massachusetts, Mississippi, Montana, Texas, Utah and Wyoming.

[4]Florida, Hawai'i, Idaho, Indiana, Maryland, Minnesota, New Hampshire, New Mexico, New York, North Carolina, South Dakota, Vermont and Wisconsin.

[5]Arkansas, California, Connecticut, Delaware, Georgia, Illinois, Kansas, Kentucky, Louisiana, Maine, Michigan, Missouri, Nebraska, New Jersey, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Virginia, Washington, and West Virginia.

the order of the contents of the brief, the requirement (if any) for a statement of the case, and what those rules direct be included in the statement. Analysis of the relevant portions of state court rules follows.

Statement of the Issues, of the Case, and of Facts

At its October, 2010 meeting, the advisory committee renewed its discussion of the content of the statements of the issue, of the case, and of facts – FRAP 28(a)(5), (6), and (7), respectively. Noting that separation of the latter two may lead brief writers to include some repetition between the two, the committee questioned whether the two should be combined or whether the order should be reversed to provide for a more logical, chronological account (facts preceding procedural history). It was also suggested that placing the statement of the issues before the statement of facts and procedural history may be less helpful to the reader than placing the issues after the other statements. Returning to the grouping of states described in the introduction, the three groupings of states – parallel to FRAP 28, similar to FRAP 28, and dissimilar to FRAP 28 – are used to provide context for this analysis.

The first group of 15 (parallel to rule 28) states yields no states that combine any of the statements. The second group of 13 (similar to rule 28) states includes five states[6] that have combined the statement of the case and statement of facts, and eight[7] that have not combined the

[6] Florida, Hawai'i, New Mexico, New York and Vermont

[7] Idaho, Indiana, Maryland, Minnesota, New Hampshire, North Carolina, South Dakota, and Wisconsin.

statements. The latter sub-group includes five states[8] whose rules require both a statement of the case and statement of facts, but do so in the same subsection of the rule. Three examples of separate statements required by the same subsection of a rule are provided by Minnesota and South Dakota[9], and by New Hampshire[10]. There is an admittedly fine distinction between separate statements required by a single subsection of a rule and combined statements, but the distinction is made for those rules that nevertheless appear to contemplate separate statements.[11]

For the five states in this group that have combined the statements of the case and of facts, they provide as follows:

• *Florida* Rule of Appellate Procedure 9.210 (b)(3) requires "A statement of the case and of the facts, which shall include the nature of the case, the course of the proceedings, and the disposition in the lower tribunal."

• *Hawai'i* Rule of Appellate Procedure 28 (b)(3) similarly requires "A concise statement

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[8] Idaho, Minnesota, New Hampshire, South Dakota and Wisconsin

[9] "A statement of the case and the facts. A statement of the case shall first be presented identifying the trial court and the trial judge and briefly indicating the nature of the case and its disposition. There shall follow a statement of facts relevant to the grounds urged for reversal, modification of other relief. The facts must be stated fairly, with complete candor, and as concisely as possible." Minn. Rules of Civil App. Proc. 128.02 (1)(c); South Dakota Rules of Civil App. Proc. 15-26A-60(4) (South Dakota's rule differs only in reversal of the words 'briefly indicating' in the first full sentence and by adding the words 'by the trial court' at the end of that sentence.

[10] "A concise statement of the case and a statement of facts material to the consideration of the questions to be presented...". Supreme Court of New Hampshire Rule 16 (3)(d).

[11] The distinction is supported by former Supreme Court rule 40 (now rule 24) that similarly required a statement of the case to first indicate the nature of the case, course of proceedings, and disposition below. The rule then stated that "[t]here shall follow a statement of the facts", which is the same phrase used in these state court rules.

of the case, setting forth the nature of the case, the course and disposition of proceedings in the court or agency appealed from, and the facts material to consideration of the questions and points presented, with record references supporting each statement of fact or mention of court or agency proceedings."

• *New Mexico* Rule of Appellate Procedure 12-213 (A)(3) requires "a summary of proceedings, briefly describing the nature of the case, the course of proceedings and the disposition in the court below, and including a summary of the facts relevant to the issues presented for review."[12]

• *New York* CPLR Rule 5528 (a)(3) requires "a concise statement of the nature of the case and of the facts which should be known to determine the questions involved...".[13]

• *Vermont* Rules of Appellate Procedure 28 requires "A concise statement of the case, including the subject of the litigation, the claims of the parties, the facts of the case and proceedings below, and the appellant's specific claims of error...".

The third group of 22 states – those characterized as dissimilar to FRAP 28 – is broken

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[12] It is not clear from the wording of this rule whether separate statements of the case and of facts are contemplated or whether the statement is combined. New Mexico is categorized as combined, but further inquiry into the actual content of appellate briefs might be advisable to confirm its placement.

[13] Note should also be made of the commentary to CPLR 5528 that references the U.S. Supreme Court rule as a source for the provisions in the New York rule, along with local rules of the 1st and 8th circuits.

down as follows: twelve states[14] do not combine the two statements; nine[15] combine the statements; and one[16] has no clear requirement regarding inclusion of a statement of the case. Addressing each in turn, it should first be noted that, despite the characterization of twelve states as having separate statements, the wording of each rule requiring such statements is not necessarily similar to FRAP 28. For example, Illinois requires "An introductory paragraph stating (i) the nature of the action and of the judgment appealed from and whether the judgment is based upon the verdict of a jury...". Illinois Supreme Court Rule 341(h)(2). While this element of the brief could also fairly be characterized as an introduction, it nonetheless is the sole section in the Illinois rule that refers to a statement of the nature of the case and therefore is included with those states that require such a statement. That same rule goes on to require a "Statement of Facts, which shall contain the facts necessary to an understanding of the case, stated accurately and fairly without argument or comment...". Ill. Supreme Court Rule 341 (h)(6). Accordingly, Illinois is categorized as a non-FRAP state that requires separate statements of the case and facts.[17]

A much different example of a state in this same category is provided by the quite detailed South Carolina rule:

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[14] California, Connecticut, Delaware, Illinois, Kansas, Nebraska, New Jersey, Oklahoma, Oregon, South Carolina, Virginia, and West Virginia.

[15] Arkansas, Georgia, Kentucky, Louisiana, Maine, Michigan, Rhode Island, Pennsylvania, and Washington.

[16] Missouri.

[17] The Illinois Supreme Court rules expressly provides that criminal appeals shall follow the civil rule for "Contents, form, length, number of copies, etc., of briefs...". Ill. Supreme Court Rule 612 (i).

> "Statement of the Case. The statement shall contain a concise history of the proceedings, insofar as necessary to an understanding of the appeal. The statement shall not contain contested matters and shall contain, as a minimum, the following information: the date of the commencement of the action or matter; the nature of the action or matter; the nature of the defense or of the response; the action of the court, jury, master, or administrative tribunal; the date(s) of trial or hearing, the mode of trial; the amount involved on appeal; the date and nature of the order, judgment, or decision appealed from, the date of the service of the notice of appeal; the date of and description of such orders, judgments, decisions and proceedings of the lower court or administrative tribunal that may have affected the appeal, or may throw light upon the questions involved in the appeal and any changes made in the parties by death, substitution or otherwise. Any matters stated or alleged in appellant's statement shall be binding on appellant."

South Carolina Appellate Court Rule 208 (b)(1)(c). Interestingly, South Carolina includes permission to include a statement of fact in the subsection that sets forth the requirements of the argument section of the brief.[18]

Turning to the nine non-FRAP states that do combine the statements of the case and facts, each state rule is distinct in its wording.

• *Arkansas* provides, in part, that "The 'Statement of the Case' shall[,] ordinarily not exceed two pages in length, and shall not exceed five page without leave of court... The statement of the case should be sufficient to enable the court to understand the nature of the case, the general fact situation and the action taken by the trial court...". Rules of the Supreme Court and the Arkansas Court of Appeals 4-2(a)(6).

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[18] "The brief shall be divided into as many parts as there are issues to be argued. At the head of each part, the particular issue to be addressed shall be set forth in distinctive type, followed by discussion and citations of authority. A party may also include a separate statement of facts relevant to the issue presented for review, with reference to the record on appeal, which may include contested matters and summarize the party's contentions." South Carolina Appellate Court Rule 208(b)(1)(D).

• *Georgia* states that "The brief of the appellant shall consist of three parts: 1. Part One shall contain a succinct and accurate statement of the proceedings below and the material facts relevant to the appeal and the citation of [relevant parts of the record or transcript] and a statement of the method by which each enumeration of error was preserved for consideration...". Georgia Court of Appeals Rule 25 (a)(1).

• *Kentucky* requires "A "STATEMENT OF THE CASE" consisting of a chronological summary of the facts and procedural events necessary to an understanding of the issues presented by the appeal...".[19] Kentucky Rules of Civil Procedure 76.12 (4)(c)(iv).

• *Maine* briefs must contain "A statement of the facts of the case, including its procedural history." Maine Rules of Appellate Procedure 9(a)(2).

• *Michigan* requires: "A statement of facts that must be a clear, concise, and chronological narrative.... The statement must contain, with specific page references ... (a) the nature of the action; (b) the character of pleadings and proceedings; (c) the substance of proof ...; (d) the dates of important instruments and events; (e) the rulings and orders of the trial court; (f) the verdict and judgment; and (g) any other matters necessary to an understanding of the controversy and the questions involved." Michigan Appellate Rules 7.212 (C)(6).

• *Rhode Island* states simply that: "The brief shall contain (1) a brief and concise statement of the facts and the prior proceedings in the case...". Supreme Court Rule 16 (a).

• *Washington* requires "A fair statement of the facts and procedure relevant to the issues presented for review, without argument." Rules of Appellate Procedure 10.3 (a)(5).

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[19] Kentucky also requires "A brief 'INTRODUCTION' indicating the nature of the case, and not exceeding two simple sentences...". Two examples are provided by the rule. *See* Kentucky Rules of Civil Procedure 76.12 (4)(c)(i).

As stated earlier, the distinct approach each of these states has taken to their requirements nonetheless places them in the same sub-group of states that require a combined statement of the case and of facts. The remaining two states' rules contain provisions that are not explicit in their requirements and thus provide less guidance for discussion of specific rules combining elements of an appellate brief.[20]

Order of Contents

Turning now to the order of the contents of the brief, FRAP 28(a) requires, in the following order:

(1) corporate disclosure statement;
(2) table of contents;
(3) table of authorities;
(4) jurisdictional statement;
(5) statement of the issues;
(6) statement of the case;
(7) statement of facts;
(8) summary of the argument;
(9) the argument;
(10) conclusion stating relief sought; and
(11) certificate of compliance.

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[20] See Louisiana Supreme Court rule VII which provides, in Section 4, that: "The brief for the appellant, applicant or relator, as the case may be, shall set forth (1) an index of the authorities cited; (2) a concise statement of the case; (3) a specification of the alleged errors complained of; and (4) an argument free from unnecessary repetition and confined strictly to the issue or issues of the case." The remaining sections of that rule address: the number of copies (section 1), format (section 2), cover (section 3), appellee's brief (section 5), cites to the record and transcript in criminal cases (section 6), use of courteous language and abstention from use of insulting criticism of any person (section 7, which also states that "Any violation of this rule shall subject the author or authors of the brief or document to the humiliation of having the brief or document returned, and to punishment for contempt of the authority of the court."), and time to file (section 8).

See also Pennsylvania Rules of Appellate Procedure 2111(a)(5) requiring only a statement of the case with no defined elements of that statement.

The Advisory Committee discussion focused on (5) – (7), and so the following description of state court rules is primarily focused on these three elements.

It should first be noted that a handful of states include a requirement that the assignments of error be specified in a separate statement.[21] Four of these five states also establish a different order for the contents of the brief with the statement of the case preceding the statement of issues and the assignments of error in three of the four. While the following description does not expressly address the statement of the assignment of errors, the inclusion of such a requirement may affect the logic of the order of the contents for those states.

Summarizing the order of contents for all 50 states yields the following[22]:

- thirty-one states follow the same order as FRAP 28 [I-C-F];
- nine require the statement of the case, then the statement of facts, followed by the statement of the issues [C-F-I];
- seven require the statement of the case, then the statement of issues, followed by the statement of facts [C-I-F];
- one state requires a statement of facts followed by the statement of issues, with no mention of a statement of the case [F-I]; and
- the remaining two states contain provisions that cannot be analogized to FRAP for purposes of this categorization.

Breaking the analysis down using the three categories of state rules described in the prior

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[21] Hawai'i, Nebraska, Ohio, Rhode Island, and West Virginia.

[22] In order to simply reference to the three statements, the statement of the issues is indicated by "I", the statement of the case is "C", and the statement of facts is "F".

analysis (FRAP 28, similar to FRAP 28, and non-similar states), it is not surprising that 12 of 15 states that fall into the first group follow the same order as FRAP 28. For the three states that follow FRAP 28 generally but vary the order of the statements, two states are C-I-F while one is C-F-I.

The second category of 13 states shows slightly more divergence from rule 28: Nine follow the order of FRAP, two are C-F-I, and one interjects the statement of the issues between the statements of the case and facts [C-I-F]. One state in the second group cannot fairly be included for this part of the analysis.[23]

Finally, categorization of the remaining 22 states to analyze the order of the contents is problematic given the wide variety of approaches taken in the state rules. Given that caution, however, and using the same categories: ten states follow the order of rule 28,[24] six states place the issue after the case/fact statement,[25] and four states interject the issue between the statement of the case and the statement of facts. As stated in the summary, one state (Missouri) does not include a provision for a statement of the case, but places the statement of the issues after the statement of facts. One state in this group cannot fairly be included for this part of the analysis.[26]

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[23] New Mexico does not require a statement of issues be included in the brief as the statement is included in a separate docketing statement.

[24] Six of these states have separate statements of the case and facts (California, Connecticut, New Jersey, Oklahoma, South Carolina, and Virginia) while four have combined statements (Arkansas, Michigan, Pennsylvania, and Washington).

[25] Two states place the issues statement after separate statements of the case and facts (Delaware and West Virginia), and four provide for combined statements of the case and facts followed by the statement of the issues (Georgia, Louisiana, Maine, and Rhode Island).

[26] Kentucky does not expressly require a statement of the issues; the rule does, however, provide for a combined statement of the case and facts.

Interestingly, for those states that interject the statement of issues between the statement of the case and statement of facts, two are rule 28 states,[27] one is similar to rule 28,[28] and four are categorized as non-FRAP states.[29] As noted in the discussion of 'combination statements', Illinois' rule is noteworthy as it requires an introductory paragraph which contains the nature of the action, and also provides an illustration embedded in the subsection of the rule requiring a statement of the issues.[30]

Discussion

States that are characterized as following the model of rule 28 are less likely to vary the order of the contents (only three of fifteen do so), and do not combine the statement of the case with the statement of facts. Roughly half the states with rules that are analogous to rule 28 (six of thirteen) vary neither the order nor the statement. Further, an additional three states in that group vary only by combining the statements of the case and of facts, netting nine of thirteen that follow the order of the contents of the brief. Finally, those states that are least similar to rule 28 are most likely to vary the order, combine the statements, or both. Only six of twenty-two states in this third group follow the order and provide for separate statements as set forth in rule 28. Four more vary only by combining the statement of the case and statement of facts. The remaining twelve contain provisions that do not track the language of rule 28, and also include

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[27] Alabama and Texas.

[28] Maryland.

[29] Illinois, Kansas, Nebraska, and Oregon.

[30] See p. 6.

different elements in their prescribed content.

A final note should be added regarding additional unique requirements of state court rules. Not one state perfectly mirrors the federal rule, although some are very close parallels. Beyond the elements addressed in this analysis, myriad provisions make each state rule governing the form and content of briefs as different as the states themselves. The differences include some as straightforward as a requirement that a statement be provided as to whether oral argument is requested,[31] or whether there is a request for attorneys fees.[32] Many states include provisions that relevant parts of any constitution, statute, rule or ordinance cited be set out 'verbatim' in the brief[33] or be 'reproduced'.[34]

State rules diverge regarding the manner of protecting the identity of parties with some expressly directing that references to parties by name be minimized[35] while others suggest that names be used to avoid use of the terms appellant and appellee.[36] Separate inquiry beyond the rules would be needed to determine the method of protecting the identity of juveniles, as many states include that protection in statute and, accordingly, do not necessarily repeat the statutory provision in their rules.

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[31] Alabama, Iowa, Kentucky, Michigan, new Hampshire, New Mexico, Texas, and Wisconsin.

[32] Colorado, Idaho and Utah.

[33] Alaska, New Hampshire and Utah.

[34] Colorado, Idaho, Maryland, Massachusetts, Michigan (addendum to the brief), North Dakota, Ohio, Tennessee and Vermont.

[35] Colorado, Idaho, Illinois, Montana, and Wisconsin.

[36] North Dakota, Tennessee, and Utah.

Many states include specific provisions for briefs that challenge land use regulations,[37] damage awards,[38] jury charge(s),[39] evidentiary or other rulings,[40] criminal sentences,[41] and dissolution matters.[42] Many states also are specific with respect to citation style, including which reporter series shall be cited.[43] Some states omit the summary of argument,[44] while others make the summary of argument optional rather than required.[45]

Few states expressly provide for an introduction.[46] Recognizing the art of drafting an appellate brief, however, it may be that some practitioners include an introduction regardless of whether the particular rule requires one. As noted in the discussion of the order of contents, Kentucky does require an introduction (that cannot exceed two sentences) to include the nature of

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[37] Connecticut.

[38] Missouri.

[39], Missouri and Washington.

[40] Connecticut, Colorado, Hawai'i, Indiana, New Mexico, South Dakota and Washington.

[41] Pennsylvania.

[42] Arkansas and Oregon.

[43] Hawai'i, Louisiana, Maryland, Massachusetts, Mississippi, Nebraska, New Hampshire, New Jersey, New Mexico, Oklahoma, Virginia, and Wisconsin.

[44] Arkansas, California, Connecticut, Georgia, New Mexico, New York, North Carolina, North Dakota, and South Dakota.

[45] Alaska, Arizona,, Florida, Hawai'i, Idaho, Massachusetts (but required if brief is more than 20 pages), Minnesota, Ohio, Tennessee, Vermont, Washington, and Wyoming.

[46] Kentucky, New Jersey, and Washington (optional).

the case. See footnote 19. The other two states, New Jersey[47] and Washington,[48] permit but do not require an introduction.

Perhaps the best example of a different approach to prescribed content is one state that establishes no particular arrangement for the brief, leaving it to the drafter to determine the most effective presentation of the argument.[49] Query whether the resultant brief would appear all that different from one produced pursuant to the provisions of rule 28.

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[47] "In addition to the foregoing, each brief may include an optional preliminary statement for the purpose of providing a concise overview of the case. The preliminary statement shall not exceed three pages and may not include footnotes or, to the extent practicable, citations." New Jersey Appellate Rule 26.2 (a)(6). This subsection of the New Jersey rule was effective September 3, 2002. The amendment followed an order of the Supreme Court, effective December 5, 2000, that relaxed the rule to provide that a preliminary statement was permitted, but not required.

[48] "*Introduction*. A concise introduction. This section is optional. The introduction need not contain citations to the record of authority." Washington Rules of Appellate Procedure 10.3(a)(3).

[49] Footnote 1 to rule 19 of the Rules of the Supreme Court of Georgia states:

> The Court prescribes no particular arrangement for briefs, motions, applications for appeal, petitions for certiorari, or other papers. However, Rules specifying certain paper, size, and spacing must be complied with and page references to the record (R-) and transcript (T-) are essential. The volume of cases necessarily requires that all matters be presented succinctly. Inclusion of extraneous facts and frivolous issues tends to obscure critical issues.
>
> Generally, a presentation by the moving party in the following order, where applicable, is the most efficient: Type of case showing Supreme Court jurisdiction, the judgment appealed, and date of entry; a brief statement of the facts showing the general nature of the case; the enumeration of errors; the argument in sequence with the enumeration of errors, including additional facts where essential, and citation of authorities; and the certification of service. Replies in the same order as presented by appellant are desirable.

TAB-VI-A

MEMORANDUM

DATE: March 11, 2011

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 07-AP-E

This memo briefly highlights developments, since the Committee's spring 2010 meeting, relating to *Bowles v. Russell*, 551 U.S. 205 (2007). Part I describes the Supreme Court's discussion, in *Dolan v. United States*, 130 S. Ct. 2533 (2010), of the typology of deadlines. Part II summarizes the Court's more recent holding, in *Henderson* ex rel. *Henderson v. Shinseki*, 2011 WL 691592 (U.S. March 1, 2011), that a statutory deadline for appealing from the Board of Veterans' Appeals to the United States Court of Appeals for Veterans Claims is non-jurisdictional. Part III briefly notes a certiorari petition currently pending before the Court in *United States* ex rel. *O'Connell v. Chapman University* (No. 10-810), in which the petitioner seeks to narrow *Bowles* through the application of 28 U.S.C. § 2106. Part IV reviews recent developments concerning the nature of Appellate Rule 4's criminal and civil appeal deadlines, with particular attention to the ongoing debate over the implications of *Bowles* for tolling of appeal deadlines under Appellate Rule 4(a)(4).

I. *Dolan* and the typology of deadlines

In *Dolan*, the Supreme Court resolved a circuit split concerning the nature of 18 U.S.C. § 3664(d)(5)'s 90-day deadline for determining crime victims' losses for restitution purposes. The closely-divided Court held that "a sentencing court that misses the 90-day deadline nonetheless retains the power to order restitution – at least where, as here, the sentencing court made clear prior to the deadline's expiration that it would order restitution, leaving open (for more than 90 days) only the amount." *Dolan*, 130 S. Ct. at 2537.[1]

Along the way, the majority offered the following typology of statutory deadlines:

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[1] *Dolan* may be of interest in connection with the Committee's future consideration of questions of finality in criminal cases (a topic that intersects, for example, with the ongoing discussion of the "manufactured finality" doctrine as well as with the question of premature notices of appeal). However, I focus here only on the *Dolan* Court's discussion of *Bowles*-related questions.

> Sometimes we have found that the statute in question imposes a "jurisdictional" condition upon, for example, a court's authority to hear a case, to consider pleadings, or to act upon motions that a party seeks to file. *See, e.g.*, *Bowles*.... The expiration of a "jurisdictional" deadline prevents the court from permitting or taking the action to which the statute attached the deadline. The prohibition is absolute. The parties cannot waive it, nor can a court extend that deadline for equitable reasons....
>
> In other instances, we have found that certain deadlines are more ordinary "claims-processing rules," rules that do not limit a court's jurisdiction, but rather regulate the timing of motions or claims brought before the court. Unless a party points out to the court that another litigant has missed such a deadline, the party forfeits the deadline's protection....
>
> In still other instances, we have found that a deadline seeks speed by creating a time-related directive that is legally enforceable but does not deprive a judge or other public official of the power to take the action to which the deadline applies if the deadline is missed. *See, e.g.*, *United States v. Montalvo-Murillo*, 495 U.S. 711, 722 ... (1990) (missed deadline for holding bail detention hearing does not require judge to release defendant); *Brock v. Pierce County*, 476 U.S. 253, 266 ... (1986) (missed deadline for making final determination as to misuse of federal grant funds does not prevent later recovery of funds); *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 171-172 ... (2003) (missed deadline for assigning industry retiree benefits does not prevent later award of benefits).

Dolan, 130 S. Ct. at 2538-39.

II. *Henderson*'s application of the *Arbaugh* clear statement rule

This Term once again presented a question that relates to *Bowles*. This time, the question concerned appeal deadlines, but it arose in a statutory and factual context that differed from that in *Bowles*. Thus, it is unsurprising that the decision – *Henderson* ex rel. *Henderson v. Shinseki* – does not affect the operation of the appellate deadlines set by 28 U.S.C. § 2107 and Appellate Rule 4. However, the case is noteworthy because it prompted the Court to provide some indications of the spheres covered, respectively, by *Bowles* and by *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006). And the case is of interest because it illustrates Congress's willingness, when the circumstances are compelling, to initiate a legislative response to a decision concerning litigation procedure.

After serving on active duty during the Korean War, David Henderson was diagnosed with service-related paranoid schizophrenia and was discharged. *See Henderson v. Shinseki*, 589 F.3d 1201, 1203 (Fed. Cir. 2009) (en banc), *rev'd*, *Henderson* ex rel. *Henderson v. Shinseki*,

2011 WL 691592 (U.S. March 1, 2011). Henderson's psychiatrist characterizes him as "'incapable of rational thought or deliberate decision-making' and 'incapable of understanding and meeting deadlines.'" *Id.* at 1232 (Mayer, J., joined by Michel, C.J., and Newman, J., dissenting). The Department of Veterans Affairs Regional Office denied Henderson's claim for reimbursement for the cost of in-home care. The Board of Veterans' Appeals denied Henderson's appeal, and Henderson appealed that decision to the U.S. Court of Appeals for Veterans Claims. *See id.* at 1203 (majority opinion). Citing "the clarity and forcefulness with which *Bowles* speaks regarding the jurisdictional importance of congressionally imposed periods of appeal," the Court of Appeals for Veterans Claims dismissed the appeal because Henderson had filed it 15 days after expiration of the 120-day deadline set by 38 U.S.C. § 7266(a). *Henderson v. Peake*, 22 Vet. App. 217, 221 (2008). The Federal Circuit decided sua sponte to hear Henderson's appeal en banc to determine whether *Bowles* should lead it to overturn prior circuit precedent holding Section 7266(a)'s time limit subject to equitable tolling. *See Henderson*, 589 F.3d at 1204. Based on *Bowles*, the en banc majority held "that 38 U.S.C. § 7266(a) is a notice of appeal, or time of review, provision in a civil case .... [,] that because § 7266(a) is a time of review provision, it is jurisdictional and that because Congress has not so provided, the statute is not subject to equitable tolling." *Id.* at 1212.

Judge Dyk, joined by Judges Gajarsa and Moore, concurred but wrote separately to note "that the rigid deadline of the existing statute can and does lead to unfairness," and to suggest that it might be advisable for Congress to "amend the statute to provide a good cause exception." *Id.* at 1220-21 (Dyk, J., joined by Gajarsa & Moore, JJ., concurring). Judge Mayer, joined by then-Chief Judge Michel and Judge Newman, dissented vigorously, arguing that the majority's ruling "creates a Kafkaesque adjudicatory process in which those veterans who are most deserving of service-connected benefits will frequently be those least likely to obtain them." *Id.* at 1221 (Mayer, J., joined by Michel, C.J., & Newman, J., dissenting). The dissenters argued that the court should have applied a principle of equitable tolling that is available when the federal government is the defendant – a principle, they asserted, that was "not ... at issue in *Bowles*." *See id.* at 1222 (citing *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95-96 (1990)).

The Federal Circuit's decision in *Henderson* prompted both legislative and Supreme Court action. In mid-April and late June 2010, four bills were introduced that respond to the decision. Two House bills and one Senate bill (S. 3192) would amend Section 7266(a) to provide that the 120-day period "shall be extended upon a showing of good cause for such time as justice may require."[2] The other Senate bill (S. 3517) includes – as one part of legislation that alters various procedures relating to veterans' claims – a provision that amends Section 7266(a) to provide for a 120-day extension of the appeal period if the appellant so moves within the

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[2] Fair Access to Veterans Benefits Act of 2010, S. 3192, 111th Cong § 2(a) (2010); Fair Access to Veterans Benefits Act of 2010, H.R. 5045, 111th Cong. § 2(a) (2010); Fair Access to Veterans Benefits Act of 2010, H.R. 5064, 111th Cong. § 2(a) (2010). H.R. 5064 would also provide that "it shall be considered good cause if a person was unable to file a notice of appeal within the 120-day period because of the person's service-connected disability." *Id.*

additional 120-day period and shows good cause for the extension.[3] Subcommittee hearings were held last summer on H.R. 5064 and it was forwarded by the relevant subcommittee to the House Committee on Veterans' Affairs. The Senate Committee on Veterans' Affairs held hearings on S. 3192 in May 2010 and reported favorably on S. 3517 (with an amendment) in August, and S. 3517 was placed on the Senate legislative calendar in November.

Meanwhile, the Supreme Court in late June granted certiorari to review the judgment in *Henderson*. *See Henderson v. Shinseki*, 130 S. Ct. 3502 (2010). The question presented was "whether the time limit in Section 7266(a) constitutes a statute of limitations subject to the doctrine of equitable tolling, or whether the time limit is jurisdictional and therefore bars application of that doctrine."

Earlier this month, all eight Justices who participated in the decision unanimously reversed. *See Henderson* ex rel. *Henderson v. Shinseki*, 2011 WL 691592, at *3 (U.S. March 1, 2011).[4] Justice Alito, writing for the Court, distinguished *Bowles* as addressing "an appeal from one court to another court," *id.* at *6, and stressed that *Henderson*, by contrast, involved "review by an Article I tribunal as part of a unique administrative scheme," *id.* at *7. The Court treated *Arbaugh*, not *Bowles*, as the governing precedent: "The question here, therefore, is whether Congress mandated that the 120-day deadline be 'jurisdictional.' .... Under *Arbaugh*, we look to see if there is any 'clear' indication that Congress wanted the rule to be 'jurisdictional.'" *Id.* at *6 (quoting *Arbaugh*, 546 U.S. at 515). Reviewing a number of factors, the Court found no such clear indication concerning the deadline at issue in *Henderson*. The provision setting the deadline does not refer to jurisdiction[5] and is located (within the overall legislation) outside the subchapter whose title refers to jurisdiction. *See id.* at *8. "Most telling[ly]" in the Court's view, the statutory scheme is markedly pro-claimant and non-adversarial. *Id.* at *9. Additionally, the Court cited "the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *Id.* (quoting *King v. St. Vincent's Hospital*, 502 U.S. 215, 220-221 n.9 (1991)). Holding that the deadline is non-jurisdictional, the Court reversed and remanded; presumably the Federal Circuit will address, on remand, the availability of equitable tolling. *See id.* at *10 & n.4 (noting that the Court had not addressed the question of equitable tolling).

Henderson does not have any direct implications for deadlines that affect practice in the

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[3] *See* Claims Processing Improvement Act of 2010, S. 3517, 111th Cong. § 212(a) (2010).

[4] Justice Kagan did not participate in the case's consideration or decision.

[5] Section 7266(a) provides: "In order to obtain review by the Court of Appeals for Veterans Claims of a final decision of the Board of Veterans' Appeals, a person adversely affected by such decision shall file a notice of appeal with the Court within 120 days after the date on which notice of the decision is mailed pursuant to section 7104(e) of this title."

courts of appeals. However, the *Henderson* Court's mode of distinguishing *Bowles* – as a case that concerned court/court review – might leave the door open in future cases for the argument that *Bowles* does not govern the nature of deadlines for seeking court of appeals review of an administrative agency decision. As the attorney for the United States had pointed out during oral argument, a court/court versus agency/court distinction might rest in tension with *Stone v. INS*, 514 U.S. 386 (1995), in which the Court held that the then-applicable statutory provision delineating the procedure for petitioning for court of appeals review of a final deportation order by the Board of Immigration Appeals was jurisdictional, *see id.* at 406. The *Henderson* Court characterized its holding in *Stone* as expressed "without elaboration," *Henderson*, 2011 WL 691592, at *7. Apart from *Stone*, the Court also observed "that lower court decisions have uniformly held that the Hobbs Act's 60-day time limit for filing a petition for review of certain final agency decisions, 28 U.S.C. § 2344, is jurisdictional." *Id.* But the Court did not attempt in *Henderson* to analyze systematically the nature of court of appeals review of agency decisions. It will be interesting to observe how that branch of doctrine continues to develop.

It seems likely (though I have not examined the question in detail) that a good argument can be made on remand for the application of equitable tolling in Mr. Henderson's case. Assuming that that turns out to be the case, the decision in *Henderson* appears likely to remove the impetus for the proposed legislation noted above.

III. The certiorari petition in *O'Connell*

The qui tam relators in *O'Connell* suffered the harsh effects of *Bowles* when their appeal turned out to be untimely in the wake of *United States* ex rel. *Eisenstein v. City of New York*, 129 S. Ct. 2230, 2237 (2009) (which held that qui tam actions in which the United States has not intervened are not cases to which the United States is a party for purposes of the longer appeal-time limits in 28 U.S.C. § 2107 and Appellate Rule 4(a)(1)). Their appeal – filed within 60 days after entry of judgment but outside the 30-day deadline – was dismissed as jurisdictionally barred. They have filed a petition for certiorari in which they make an ingenious argument, based on 28 U.S.C. § 2106, that the court of appeals could and should have vacated the judgment and remanded for the re-entry of a judgment from which they could take a timely appeal. *See* Petition for Writ of Certiorari at 5-6, *United States* ex rel. *O'Connell v. Chapman University*, No. 10-810 (Dec. 17, 2010).

Section 2106 provides: "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances." 28 U.S.C. § 2106. The petitioners argue that this provision authorizes the court of appeals – in circumstances such as those presented in *O'Connell* – to engage in "equitable vacatur" – to vacate the judgment below with directions for the district court to re-enter a judgment from which a timely appeal can be taken. The petitioners adduce as

support for this view the Supreme Court's own practice. As the Court noted in a 1944 decision,

> It is a familiar practice of this Court that where for any reason the Court may not properly proceed with a case brought to it on appeal, or where for any reason it is without power to proceed with the appeal, it may nevertheless, in the exercise of its supervisory appellate power, make such disposition of the case as justice requires.... When it is without jurisdiction to decide an appeal which should have been prosecuted to another court, it may vacate the judgment and remand the cause in order to enable the court below to enter a new judgment from which a proper appeal may be taken.

Walling v. James V. Reuter, Inc., 321 U.S. 671, 676-77 (1944). According to the petitioners, there are "at least 50 different cases from this Court, decided between 1934 and 1995, that implement this equitable practice of vacating the judgment below, notwithstanding the absence of appellate jurisdiction, solely in order to restart the clock for filing a jurisdictionally timely civil appeal." Petition for Writ of Certiorari at 12. The Petitioners, noting that the phrases "or any other court of appellate jurisdiction" and "vacate, set aside" were added to the statute in 1948 when it was codified as Section 2106, argue that these modifications show that Congress ratified the practice of equitable vacatur and extended it to the courts of appeals.

I will not attempt in this memo to offer an opinion on the strength of the petitioner's argument. The Supreme Court briefing in *O'Connell* is not yet complete: The respondent initially waived its right to file a response to the petition, but the Court in February requested a response (the response is due in April). It is interesting to note that Section 2106 was not cited in the briefing, argument, or decision in *Bowles*.

IV. Lower court treatment of tolling motions and other appeal-related issues

Bowles-related cases (decided by the courts of appeals since the spring 2010 agenda book was compiled) have unfolded largely along predictable lines; the most interesting area concerns the treatment of tolling motions.

I characterize as "predictable" a number of rulings that view purely rule-based deadlines as non-jurisdictional or that view statutory deadlines as jurisdictional. The Third, Seventh, and Eighth Circuits, following cases from other circuits that I have mentioned in prior memos, held that a criminal defendant's Rule 4(b)(1)(A) appeal deadline is non-jurisdictional.[6] A recent

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[6] *See United States v. Neff*, 598 F.3d 320, 323 (7th Cir. 2010) ("Since the prescribed deadline to file a notice of appeal in a criminal case promulgated in Rule 4(b) is not a Congressionally-created statutory limitation, we find that it is not jurisdictional and is merely a claim-processing rule that can be forfeited."); *Virgin Islands v. Martinez*, 620 F.3d 321, 328 (3d Cir. 2010) ("Because Rule 4(b) is not grounded in statute ... we are not deprived of appellate

Tenth Circuit decision, by contrast, characterized the government's Rule 4(b)(1)(B) deadline (which in the relevant case was also set by statute) as jurisdictional.[7] The Sixth Circuit held Rule 4(a)(5)'s 30-day deadline for seeking extension of civil appeal time to be jurisdictional.[8] And courts continue to hold the deadlines set by Rule 4(a)(1)(A) and (B) to be jurisdictional.[9]

The trickiest doctrinal area relating to appeal deadlines concerns the deadlines for motions that, under Appellate Rule 4(a)(4)(A), toll the time for taking an appeal. The newest entrants into this area – the Third Circuit's decision in *Lizardo v. United States*, 619 F.3d 273 (3d

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jurisdiction if a party fails to invoke the rule properly upon an untimely notice of appeal."), *cert. denied*, 2011 WL 588993 (Feb. 22, 2011); *United States v. Watson*, 623 F.3d 542, 545-46 (8th Cir. 2010) ("Rule 4(b) is not grounded in statute .... Rule 4(b) is thus a claim-processing rule .... [and] is not jurisdictional.").

[7] Quoting *Bowles*, the court characterized as "mandatory and jurisdictional" the 30-day deadline for government appeals set by 18 U.S.C. § 3731 and Appellate Rule 4(b)(1)(B). *United States v. Cook*, 599 F.3d 1208, 1212 (10th Cir. 2010), *cert. denied*, 131 S. Ct. 331 (2010). The government's appeal in *Cook*, however, was timely because the government's reconsideration motion had re-started the appeal time. *See id.* at 1212-13.

In In re *Grand Jury Proceedings*, 616 F.3d 1186 (10th Cir. 2010), the court of appeals concluded that the 30-day appeal time limit set for the government by 18 U.S.C. § 3731 is jurisdictional, but held that this deadline can be extended by the district court under Appellate Rule 4(b)(4). *See id.* at 1195-96.

[8] *See Ultimate Appliance CC v. Kirby Co.*, 601 F.3d 414, 416 (6th Cir. 2010) ("The district court found that the plaintiff's former counsel wholly abdicated her professional obligations by failing to notify the plaintiff that its suit had been dismissed, despite having received electronic notice and a telephone call from the court regarding the dismissal. Although we are sympathetic to the plaintiff's plight, we are not free to ignore Rule 4's restrictions.").

[9] *See Napoli v. Town of New Windsor*, 600 F.3d 168, 170-71 (2d Cir. 2010) (holding that Rule 4(a)(1)(A)'s 30-day deadline is jurisdictional and that a motion for clarification of some aspects of an interlocutory order did not toll the time for appealing that order's denial of summary judgment on qualified immunity); *Moses v. Howard Univ. Hosp.*, 606 F.3d 789, 795 (D.C. Cir. 2010); *St. Marks Place Hous. Co., Inc. v. U.S. Dept. of Hous. & Urban Dev.*, 610 F.3d 75, 79 (D.C. Cir. 2010) (citing *Bowles* and treating Rule 4(a)(1)(B)'s 60-day deadline as jurisdictional); *Harmston v. City of San Francisco*, 627 F.3d 1273, 1281 (9th Cir. 2010).

In a similar vein, the Fifth Circuit held that an appellant's failure to file a new or amended notice of appeal after the denial of his motion for reconsideration and leave to amend deprived the court of appeals of jurisdiction to review that denial. *Funk v. Stryker Corp.*, 2011 WL 207961, at *2 (5th Cir. Jan. 28, 2011).

Cir. 2010),[10] and the Eleventh Circuit's decisions in *Green v. DEA*, 606 F.3d 1296 (11th Cir. 2010), and *Advanced Bodycare Solutions, LLC v. Thione International, Inc.*, 615 F.3d 1352 (11th Cir. 2010)[11] – take the view that an untimely motion of a type otherwise listed in Appellate Rule 4(a)(4)(A) does not toll the time to take an appeal. As the Committee has previously discussed, this view has also been adopted by the Ninth Circuit,[12] while the Eighth Circuit has concluded that an untimely motion does not toll appeal time so long as the non-movant made a timeliness objection at the trial level (even if the objection came too late to permit the movant to file a

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[10] In *Lizardo*, the court held that this was true even though "Lizardo's untimely Rule 59(e) motion was decided, without objection, by the District Court[and the] Government, therefore, forfeited any timeliness objection it could have made at that stage of the litigation." *Lizardo*, 619 F.3d at 274. But for purposes of the trial court's power to decide the untimely Rule 59(e) motion, the *Lizardo* court considered Rule 59(e)'s deadline to be non-jurisdictional and thus waivable. *Id.* at 278. Judge Jordan agreed with the majority on these points but wrote separately, in part to state "that the Supreme Court's decision in *Bowles v. Russell* ... compels the conclusion that Appellate Rule 4(a)(4)(A) is a claims-processing rule and that defenses under that rule can, in certain instances, be waived." *Id.* at 280 (Jordan, J., concurring and dissenting).

[11] "Although *Kontrick* and *Eberhart* suggest that a district court has jurisdiction to hear an out-of-time Rule 59(e) motion if the non-moving party does not object promptly enough (and thus forfeits his ability to object to timeliness later), neither case would turn an untimely Rule 59(e) motion into a timely one. In short, these cases say nothing about appellate procedure and the jurisdictional elements of Appellate Rule 4(a)." *Green v. DEA*, 606 F.3d 1296, 1302 (11 Cir. 2010) (footnote omitted).

The *Advanced Bodycare* court held that the district court's attempt to extend the time for postjudgment motions was ineffective, and that the motions filed within the purportedly extended period were untimely and did not toll the appeal time. Thus, the appeal from the judgment was untimely. But the court of appeals also ruled that the district court, in the absence of an objection to the motions' timeliness, had the power to consider them, and an appeal from the disposition of the postjudgment motions was timely. *Advanced Bodycare Solutions, LLC v. Thione Intern.*, Inc., 615 F.3d 1352, 1359 n. 15 (11th Cir. 2010).

[12] "If Fed. R.App. P. 4(a)(4) is jurisdictional, the government's motion does not qualify for tolling because it was filed outside the time frame specified in that rule.... If Fed. R.App. P. 4(a)(4) is non jurisdictional, satisfaction of that provision (or forfeiture of a claim that the government failed to satisfy it) would not enable us to ignore the jurisdictional 60-day rule of Fed. R.App. P. 4(a)(1)." *United States v. Comprehensive Drug Testing, Inc.*, 513 F.3d 1085, 1101, *reh'g en banc granted*, 545 F.3d 1106 (9th Cir. 2008). *See United States v. Comprehensive Drug Testing, Inc.*, 621 F.3d 1162, 1167 (9th Cir. 2010) (en banc) (adopting panel's reasoning on this point).

timely appeal within the non-tolled deadline).[13] A divided Sixth Circuit panel, by contrast, has held that an untimely but unobjected-to Civil Rule 59(e) motion tolled appeal time,[14] and a divided D.C. Circuit panel has held that the Rule 4(a)(4) requirement of a "timely" motion is itself waivable.[15]

V. Conclusion

The *Dolan* decision discussed in Part I of this memo adds little to our understanding of how *Bowles* affects appeal deadlines, though it might in future be of interest due to the Court's discussion of finality in criminal cases. The decision in *Henderson* (discussed in Part II) held *Bowles* inapplicable and applied the *Arbaugh* clear statement rule; though *Henderson* does not affect deadlines for appealing from one Article III court to another, it seems possible that *Henderson*'s analysis might affect the arguments made in future cases concerning deadlines for seeking court of appeals review of agency decisions. The arguments raised by the petition in *O'Connell* (discussed in Part III) await further development in the briefing. The growing body of caselaw concerning tolling motions, discussed in Part IV, may warrant the Committee's consideration at some point.

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[13] *See Dill v. General Am. Life Ins. Co.*, 525 F.3d 612, 619-20 (8th Cir. 2008).

[14] *See National Ecological Found. v. Alexander,* 496 F.3d 466, 475-76 (6th Cir. 2007). Judge Sutton, concurring in the judgment, would have construed the untimely Rule 59(e) motion as a Rule 60(b) motion, and would have concluded that the appellant had timely appealed the denial of the Rule 60(b) motion but not the underlying judgment. *See id.* at 481-82 (Sutton, J., concurring in the judgment).

[15] *See Wilburn v. Robinson*, 480 F.3d 1140, 1147 (D.C. Cir. 2007). The panel decided *Wilburn* shortly prior to, and the court denied rehearing en banc shortly after, the Supreme Court's decision in *Bowles*.

TAB-VI-B

MEMORANDUM

DATE: March 11, 2011

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 08-AP-D

At its fall meeting, the Committee considered the possibility of amending Appellate Rule 4(a)(4) 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.

At the fall 2010 meeting, the Committee considered amending Rule 4(a)(4)(B) so that appeal time would run from the latest of entry of the order disposing of the last remaining tolling motion or, if a motion's disposition results in alteration or amendment of the judgment, entry of any altered or amended judgment. Concerns were expressed, however, that such language might create a false sense of security about extended appeal time if a litigant expects an amended judgment to result but none actually does result. The Committee considered other possible wording, but no option seemed to have a clear advantage.

The question for the Committee appears to be whether there is a need to amend Rule 4(a)(4) to address the issue identified by Mr. Batalden, and whether the benefits of addressing that issue outweigh any potential risks of unintended consequences that might follow from amending this important rule.[1]

Part I of this memo recapitulates Mr. Batalden's observations. Part II summarizes the alternative substantive drafting possibilities that the Committee has considered to date. Part III notes Professor Kimble's suggestion that if the substantive changes are made, then Rule 4(a)(4) should also be re-structured for stylistic reasons.

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[1] In the background, there is the question of whether the Civil Rules Committee might wish to propose an amendment to Civil Rule 58. That question is analytically separable from the Appellate Rule 4(a)(4) proposal, and during the Appellate Rules Committee's fall 2010 discussion some participants suggested that amending Appellate Rule 4(a)(4) could remove the need for an amendment to Civil Rule 58. However, as noted in this memo, some of the possible options for altering Appellate Rule 4(a)(4) could also affect Civil Rule 58.

I. The nature of the problem

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. Suppose that the district court conditionally grants a new trial unless the plaintiff agrees to accept a reduced award within 40 days from the date of entry of the court's order. Suppose further that as of Day 30 the plaintiff has not decided whether to accept the reduced award. If the plaintiff decides not to accept the reduced award, the case is headed to a new trial; thus, until the plaintiff makes a decision on this issue (or the 40-day time period runs out) there would seem to be no final judgment. In this scenario, the defendant's options appear to be:

> (1) file the notice of appeal by Day 30 (and then withdraw the notice of appeal if the plaintiff rejects the reduced award);[2]
>
> (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) might be read to require a contrary result, because it provides that "the time to file an appeal runs for all parties from the entry of the order disposing of the last ... remaining [tolling] motion."[3]

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[2] 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.

[3] One could also argue that the order granting remittitur does not finally "dispose of" the new-trial motion until the plaintiff decides whether to accept the reduced amount; but a court could well reject that argument.

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). Under Rule 4(a)(7)(A),

> [a] judgment or order is entered for purposes of this Rule 4(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).[4] 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.[5] 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.

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[4] 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.

[5] *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*).

Second, it might also be argued that (1) the order is not currently appealable and therefore (2) the order does not currently constitute a judgment within the terms of Civil Rule 54(a), which would mean that (3) Civil Rule 58(a)'s separate document requirement (which is cast in terms of "judgments") does not apply. The order would not be immediately appealable because the outcome depends on a contingency that has not yet occurred – namely, the plaintiff's decision whether to accept the reduced award. (An appealable judgment would result only when the plaintiff accepts the reduced award, or – if the plaintiff does not accept – after the new trial.) This, of course, illustrates the incongruous result that could be produced by a literal reading of Appellate Rules 4(a)(7) and 4(a)(4)(B)(ii): the reason a separate document is not required, in this view, is that the order is not currently appealable – yet the fact that the order is not currently appealable also means that, under Rule 4(a)(7)(A)(i), the order is deemed entered when it is 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.

Mr. Batalden has, thus, identified an incongruity in Rule 4.[6] The question does persist, though, how frequently this incongruity actually causes problems in practice. The Committee's discussions have produced some examples, but it is not clear that the problem arises often. As a Committee member pointed out at the fall 2010 meeting, in a number of instances where there might at first glance appear to be a time lag between entry of an order disposing of a tolling motion and entry of an amended judgment, the order in question arguably does not actually "dispose of" the motion.[7]

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[6] Similar wording also appears in Rule 6(b)(2)(A) (addressing the effect of a rehearing motion under Bankruptcy Rule 8015).

[7] The relevant passage in the minutes reads as follows:

> Suppose, for example, that a party moves for a new trial on the ground that the district court improperly excluded the testimony of the party's expert without holding a *Daubert* hearing, and the judge agrees to hold the *Daubert* hearing in order to determine whether the testimony was properly excluded and states that if it turns out that the testimony should have been admitted then a new trial will be granted. The member suggested that such an order would not really be an order *disposing of* the motion for a new trial because the grant of the new trial in that situation is conditional. Another example is a motion for additional findings under Civil Rule 52(b); the court could grant the motion for additional findings without immediately making the additional findings. Until the court makes the additional findings, it may be unclear whether an amended judgment will result. The member suggested that such an order, standing alone, has not truly disposed of the motion.

II. Amending Rule 4(a)(4) to take account of time elapsing between an order and an amended judgment

The difficulties discussed in Part I 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. It initially seemed that the best way to address that problem (assuming that a rules amendment is warranted) would be to amend those provisions to refer to that possibility.[8] However, drafting appropriate language has proven difficult. This section reviews the possibilities discussed to date.

The central proposal reflected in the agenda materials for the Fall 2010 meeting was to amend Rule 4(a)(4) so that the relevant re-starting date for appeal time (when a motion has tolled the appeal time) would be:

> 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.

That language would appear in Rule 4(a)(4)(A) and similar language would appear in Rules 4(a)(4)(B)(i) and (ii). The proposed Committee Note would read as follows:

> 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

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[8] Mr. Batalden suggested an approach that differs from those noted in the text of this memo. 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 in Part I of this memo, 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).

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 the order disposing of the last remaining tolling motion or the entry of any altered or amended judgment. To illustrate: Suppose that Defendant timely moves for judgment as a matter of law under Civil Rule 50(b) and wins an amended judgment. Plaintiff then timely 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.]

This proposal elicited style suggestions from Professor Kimble. Among his suggested changes[9] was to re-word the language to read:

> the latest of entry of the order disposing of the last such remaining motion or entry of any altered or amended judgment resulting from such a motion.

The proposal also elicited substantive concerns from Committee members. During the Committee's fall 2010 discussion, it was suggested that the proposed language – either as initially drafted or as re-styled by Professor Kimble – might give would-be appellants a false belief that the re-starting date for their appeal time extended past the entry of an order disposing of the last remaining tolling motion, because the would-be appellant expected that order to be followed by the entry of an amended judgment. If no such amended judgment did follow, the litigant's appeal rights could be lost. (Though it was not noted at the time of the meeting, it is interesting to observe that Rule 13(a), concerning review of Tax Court decisions, contains the following provision: "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." It might be useful to investigate whether this wording has produced the sort of confusion noted above.)

The Committee proceeded to discuss possible alternatives. One suggestion was to say "provides for" rather than "results in," thus:

> the latest of entry of the order disposing of the last such remaining motion or, if a motion's disposition **provides for** alteration or amendment of the judgment, entry of any altered or amended judgment.

It was not clear, however, that this would provide the necessary clarity to guard against the possible confusion noted by the Committee. A different suggestion was to say, simply, "alters,"

[9] Others are noted in Part III of this memo.

thus:

> the latest of entry of the order disposing of the last such remaining motion or, if a motion's disposition **alters** the judgment, entry of any altered or amended judgment.

But this phrasing might not accomplish the desired effect in all instances. When a order grants a new trial unless the plaintiff accepts a reduced award within X days, would courts conclude that that order itself alters the judgment?

A different tack was also suggested – one that would peg appeal time to entry of a "newly entered" judgment rather than an "altered or amended" judgment. For instance, such a provision might read:

> the latest of entry of the order disposing of the last such remaining motion or entry of any **newly entered judgment** [resulting from] [following the disposition of] such a motion.

This provision would permit a district judge to rescue the appeal of a litigant who had mistakenly relied upon the prospect of an amended judgment that never materialized. In such instances, the court could re-enter the original judgment and thus re-start the appeal time. Such an approach would grant the district court a power to re-start appeal time (by re-entering the judgment without alteration) that the district court does not possess outside this context. Ordinarily, a district court cannot re-start appeal time simply by re-entering the same judgment without change; depending the details of drafting, such a provision for a "newly entered" judgment would alter that long-standing doctrine in all cases where a tolling motion is filed. This approach also would leave the litigant at the mercy of the district court, because the decision to re-enter the same judgment would presumably rest within the district court's discretion.

The Committee also discussed the possibility of including a warning in the Committee Note to deter litigants from relying on the assumption that an amended judgment will follow the entry of an order concerning a tolling motion. The Note could, for example, advise litigants that to the extent they have any doubt as to whether there will in future be an amended judgment, they should assume that there will not be such an amendment and they should assume that the earlier possible starting point for appeal time under the proposed Rule 4(a)(4) – namely, entry of the order disposing of the last remaining tolling motion – is the relevant starting point. Committee members did not, however, seem to find sufficient comfort in the prospect of such Note language. Not all litigants will consult the Committee Notes when reading the Rules.

After the fall 2010 meeting, some participants in the discussion considered a different possible use of the Committee Note. The Note could include language clarifying the meaning of "disposing of". For instance, it could adopt the views suggested by Professor Cooper in an exchange after the meeting: "an order 'granting' a motion for additional or amended findings,

under Rule 52, without yet making the findings, does not 'dispose of' the motion. The same is true of an order stating that a motion is 'granted' and that an opinion will follow; such a motion is not 'disposed of' until the court says exactly how it is granting it." Two issues would arise if such Note language were adopted. One issue concerns the existence of parallel language in Civil Rule 58; that rule, too, refers to "an order disposing of" certain listed motions. Thus, the inclusion of Note language for Appellate Rule 4 would seem likely to work best if Civil Rule 58 is also amended so as to support the inclusion of parallel Note language for Civil Rule 58. A second issue is whether the problems that have troubled Committee members can be satisfactorily resolved through Note language; though many courts will be willing to look to a Committee Note, not all will do so. Perhaps it would be possible to include language in the Rule that would ground reliance on the Note's explanation. Instead of using merely the words "disposing of," the Rule could refer to "completely disposing of," "fully disposing of," or "finally disposing of." But to preserve the parallel in terminology between Appellate Rule 4(a)(4) and Civil Rule 58(a), the new term would need to be inserted in Civil Rule 58(a) – and as Professor Cooper has noted, there is little apparent reason to adopt such a term in the latter Rule.

III. Restyling Rule 4(a)(4)

Rule 4(a)(4), like the rest of Rule 4, already bears the marks of the 1998 restyling. However, Professor Kimble has expressed the view that the possible substantive changes to Rule 4(a)(4) (discussed above) would make that rule unduly cumbersome. He therefore has worked with us to propose style changes that could streamline the rule. Those style changes would require restructuring the rule and introducing new terminology. Here is an illustration (showing a possible way to incorporate Professor Kimble's suggestions, but with some changes not suggested by him). The example below adopts one of the possible substantive approaches noted in Part II, purely for the purposes of illustration; the goal in this part is to note the separate issue of the proposed re-styling changes.

Professor Kimble's approach would streamline Rule 4(a)(4) by defining a term and then using that term as shorthand in the rest of the rule. The term shown in the illustration is "re-starting motion." Other options have been noted: "tolling motion" or "suspending motion." "Tolling motion" is a widely-used term for timely motions of the types listed in Rule 4(a)(4), but that term has also been criticized because it suggests a mechanism different than that set by Rule 4(a)(4).[10]

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[10] Tolling under Rule 4(a)(4)(A) works differently than does tolling of a statute of limitations. When a statute of limitations is tolled and then re-starts, the lawsuit typically must be commenced within the remaining portion of the limitations period. By contrast, if a Rule 4(a)(4)(A) tolling motion suspends the running of the time to appeal, the appeal period re-starts upon entry of the order disposing of the last such remaining motion. Thus, for example, if the relevant appeal time limit is 30 days, the full 30 days will run starting from the date of entry of the order disposing of the last remaining Rule 4(a)(4)(A) tolling motion.

Rule 4. Appeal as of Right – When Taken

(a) Appeal in a Civil Case.

***

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

(A) In this Rule 4(a)(4)(A) and (B), "re-starting motion" means any timely motion made under the Federal Rules of Civil Procedure and listed in (A)(i)-(vi). If a party timely files a re-starting motion 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 entry of any altered or amended judgment resulting from such a motion. The included motions are:

(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)~~ a re-starting motion – the notice becomes effective to appeal a judgment or order, in whole or in part, ~~when the order disposing of the last such remaining motion is entered~~ upon the later of entry of the order disposing of the last remaining re-starting motion or entry of any altered or amended judgment resulting from a re-starting motion.

(ii) A party intending to challenge an order disposing of ~~any motion listed in Rule 4(a)(4)(A)~~ a re-starting motion, or a judgment's alteration or amendment upon ~~such a~~ a re-starting 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 re-starting motion or entry of any altered or amended judgment resulting from a re-starting motion.

(iii) No additional fee is required to file an amended notice.

IV. Conclusion

The Committee's diligent efforts have thus far failed to produce a clean and straightforward way of addressing the issue identified in Part I of this memo. As Part II recounts, each proposed solution has potential disadvantages. The question before the Committee is whether the issue that Mr. Batalden has raised creates a sufficiently widespread problem to justify adoption of one of the proposed amendments to Rule 4(a)(4). If such a substantive amendment is worth pursuing, then the Committee should also consider whether to restructure Rule 4(a)(4) to incorporate the style suggestions noted in Part III.

TAB-VI-C

Oral Report on the Work of the Appellate-Civil Subcommittee

TAB-VI-D

MEMORANDUM

DATE: March 11, 2011

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 08-AP-K

In May 2008, Public.Resource.Org submitted a letter raising concerns about the presence of social security numbers and alien registration numbers in federal appellate opinions. Enclosed with this memo are copies of that letter, Judge Rosenthal's response, and a follow-up letter by Public.Resource.Org submitted in October 2008.[1] Public.Resource.Org argued that the inclusion within appellate opinions of social security numbers or alien registration numbers raised privacy concerns, and Public.Resource.Org proposed a number of measures to address this concern.

After a preliminary discussion of these issues at the Appellate Rules Committee's fall 2008 meeting, the matter was referred to the Standing Committee's Privacy Subcommittee. The Privacy Subcommittee considered a variety of privacy-related questions concerning all of the national Rules. The Privacy Subcommittee reviewed the materials submitted by Public.Resource.Org; it commissioned the Federal Judicial Center to conduct a survey of court filings; it reviewed local rules concerning redaction; with the assistance of the FJC, it surveyed judges, clerks and attorneys about privacy-related issues; and it held a day-long conference at Fordham Law School in April 2010. One of the panels at the Fordham Conference focused specifically on immigration cases.

The Privacy Subcommittee's report is enclosed. The Subcommittee reached the following conclusions about alien registration numbers:

> In considering possible amendments to the Privacy Rules, the Subcommittee gave particular attention to the need to redact alien registration numbers insofar as they might be analogized to social-security numbers. After extensive discussion and debate, including consideration at the Fordham

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[1] I have redacted page 3 of Public.Resource.Org's May 2008 letter because in demonstrating the use of alien registration numbers in court opinions it includes an example from a real case. The specifics of the example seem unnecessary to include among the agenda materials, hence the redaction. I have also omitted the appendices to the May 2008 and October 2008 letters.

Conference, the Subcommittee concludes that redaction of alien registration numbers is not warranted at this time.

Disclosure of an alien registration number, unlike a social-security number, poses no significant risk of identity theft. Moreover, the Subcommittee heard from a number of court clerks and Department of Justice officials, all of whom stressed that redacting alien registration numbers would make it extremely difficult for the courts to distinguish among large numbers of aliens with similar or identical names and to ensure that rulings were being entered with respect to the correct person. Redaction would create a particularly acute problem in the Second and Ninth Circuits, which have heavy immigration dockets. Given the lack of any expressed support for the redaction of alien registration numbers, the Privacy Subcommittee sees no reason to add them to the list of information subject to redaction under subdivision (a) of the Privacy Rules.

In the light of the Privacy Subcommittee's report, I recommend that the Committee remove from its study agenda Item No. 08-AP-K.

Encls.

Operation of the Federal Privacy Rules

A Report to the Judicial Conference Standing Committee on the Rules of Practice and Procedure by the Subcommittee on Privacy

I. Introduction

A. The 2007 Adoption of the Privacy Rules

The E-Government Act of 2002 required the federal judiciary to formulate rules "to protect the privacy and security concerns relating to electronic filing of documents" in federal courts.[1] In response to this mandate, the Judicial Conference Committee on the Rules of Practice and Procedure (the "Standing Committee") established a Privacy Subcommittee, composed of a representative from each of the Advisory Rules Committees and representatives from the Committee on Court Administration and Case Management (CACM), to make rule recommendations. That Subcommittee's proposals for amendments to the Federal Rules of Civil Procedure,[2] Criminal Procedure,[3] Bankruptcy Procedure[4] and Appellate Procedure[5] (referred to collectively hereafter as "the "Privacy Rules") were adopted by the Standing Committee and went into effect on December 1, 2007. The Standing Committee recognized a likely need to review the operation of the Privacy Rules in the near future given the challenges of implementation, rapid technological advances, and ongoing concerns about the proper balance between public access to court proceedings and various claims to privacy.

B. Request for a Status Report on the Operation of the Privacy Rules

Since the Privacy Rules took effect, members of all three branches of government and of the public have raised questions about implementation and operation. Meanwhile, courts and litigants have gained practical experience in using the Privacy Rules in the context of expanding electronic access to court proceedings under CM/ECF and PACER. Thus, when in 2009, the Executive Committee of the Judicial Conference directed the Standing

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[1] Pub. L. 107-347, § 205(c)(3).

[2] Fed. R. Civ. P. 5.2.

[3] Fed. R. Crim. P. 49.1.

[4] Fed. R. Bankr. P. 9037.

[5] Fed. R. App. P. 25(a)(5).

Committee to report on the operation of the Privacy Rules, the Standing Committee revived its Privacy Subcommittee to conduct the necessary investigation. Once again, each Advisory Committee designated a member to serve on the Privacy Subcommittee, with the Advisory Committee Reporters serving as consultants. CACM also designated four members to serve on the Subcommittee, with former CACM Chair, Judge John Tunheim, serving as a member-at-large.

C. Principles Controlling Review

In undertaking its review, the Privacy Subcommittee recognized that its task was discrete. It was not charged with developing new policy, but only with assessing how the Privacy Rules operate consistent with existing policy established by the Judicial Conference (largely on the basis of extensive research and consideration by CACM). This policy generally favors making the same information that is available to the public at the courthouse available to the public electronically.[6]

In urging this "public is public" policy, CACM was mindful of an irony: that a system of public access that required a trip to the courthouse to see court filings, while outdated, may have afforded litigants, witnesses, and jurors more privacy – "practical obscurity" – than a system of easy electronic access. CACM further recognized that some persons availing themselves of electronic access might have illegitimate motives: identity theft, harassment, and even obstruction of justice. Nevertheless, CACM concluded that the judiciary's access policy should generally draw no distinction between materials available at the courthouse and online. This policy not only promotes long-standing principles of judicial transparency; it ensures against profiteering in information available only at the courthouse by entrepreneurs who could gather such information and market it over the Internet. CACM determined that privacy interests in electronically available information could be protected sufficiently by imposing redaction obligations on parties filing documents containing private information, specifically, social-security numbers, financial-account numbers, dates of birth, names of minor children, and, in criminal cases, home addresses.

The Standing Committee implemented these policy determinations in drafting the Privacy Rules. The Privacy Subcommittee's review of the operation of these rules is

[6] The Judicial Conference's privacy policy incorporated several policies, including those adopted by the Conference in 2001 and 2003 regarding electronic public access to appellate, bankruptcy, civil, and criminal case files (JCUS-SEP/OCT 01, pp. 48-50; JCUS-SEP 03, pp. 15-16), as well as guidance with respect to criminal case files (JCUS-MAR 04, p. 10).

informed by the judiciary's continued adherence to the stated policy.[7]

II. Organization and Work of the Privacy Subcommittee

A. Subjects Addressed By Working Groups

The Privacy Subcommittee quickly identified four general subjects for consideration and constituted itself into corresponding working groups to address each matter.

1. Implementation of the Privacy Rules

Members of Congress and of the public have questioned how effectively the courts have implemented the Privacy Rules, with particular concern for the appearance of unredacted social-security numbers in some court filings. The Privacy Subcommittee has reviewed this matter. It has further reviewed the efforts of individual courts and the Administrative Office to educate attorneys about their redaction responsibilities. The Subcommittee has reviewed local court rules addressing privacy concerns to determine their compliance with the national Privacy Rules. Finally, the Subcommittee has considered other procedures that might be implemented better to protect private information in court files.

2. Privacy Concerns in Criminal Cases

In criminal cases, a particular privacy concern has arisen with respect to electronic access to plea and cooperation agreements, aggravated by the emergence of various websites publicizing such information, of which *whosarat.com* is simply one example. In response to a Department of Justice request for a judicial policy denying any electronic access to plea agreements, CACM issued a March 2008 report to the Judicial Conference recommending against such a policy because it would deny public access to all plea agreements, including those that did not disclose cooperation.[8] In so reporting, CACM noted that the district courts vary widely in affording public access to plea and cooperation agreements. Thus, the Privacy Subcommittee has reviewed and evaluated these approaches with a view toward facilitating any future consideration of a uniform policy or rule.

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[7] The Privacy Rules provide exceptions for Social Security cases and immigration cases. These cases are not subject to the redaction requirements, but non-parties can obtain access only at the courthouse. The Privacy Subcommittee reviewed the continuing viability of these exceptions, and its conclusions are stated later in this report.

[8] *See* Report of CACM to Judicial Conference, March 2008 at 9.

3. Electronic Access to Court Transcripts

Consistent with the E-Government Act, clerks of court are responsible for placing transcripts of court proceedings on PACER. The Judicial Conference has made clear that it is the parties, not the clerks, who are responsible for making necessary redactions from such transcripts. The Privacy Subcommittee has considered the operation of this division of labor in practice as well as the efforts made by courts and parties to minimize references to private information in records that will eventually be transcribed. Special attention has been given to *voir dire* transcripts containing private information about jurors.

4. Possible Amendments to the Privacy Rules

The Privacy Subcommittee was asked to consider whether the redaction requirements of the existing Privacy Rules needed to be expanded to include more information, such as alien registration numbers, driver's license numbers, mental health matters, etc. At the same time, the Subcommittee was asked to consider whether the Privacy Rules should be contracted to eliminate or modify two exceptions to the basic "public is public" policy for social security and certain immigration cases.

B. Information Obtained by the Privacy Subcommittee

In conducting its review, the Privacy Subcommittee made extensive efforts to obtain information about how the Privacy Rules were working and how they might be improved. In addition to considering existing sources of information, the Subcommittee conducted its own surveys of court filings and of persons experienced with the operation of the Privacy Rules. Finally, the Subcommittee conducted a conference at which it heard from over thirty persons – judges, court personnel, attorneys, legal scholars, and media representatives – who expressed diverse views on the issues of public access to court filings and the need to protect private information. The results of the Subcommittee's efforts, which should assist in the future development of policies and rules regulating access to private information in court filings, are detailed in multiple attachments to this report. The Subcommittee here briefly describes its research efforts.

1. Review of Existing Report on Court Filings by PublicResource.org

A report published at PublicResource.org indicates that social-security numbers remain unredacted in a number of publicly available court files. With the assistance of Henry Wigglesworth of the Administrative Office, the Subcommittee conducted an in-depth analysis of the data contained in the PublicResource.org report. That analysis is attached to this Report. As the attachment indicates, very few cases (relative to the large number of

court filings) in fact revealed unredacted social-security numbers. Most of the disclosures cited by PublicResource.org related to filings made before the Privacy Rules were enacted, while others reflected a common disclosure made multiple times in the same case.

2. Survey of Court Filings for Unredacted Social-Security Numbers

At the request of the Privacy Subcommittee, the Federal Judicial Center conducted its own survey of court filings from a two-month period in 2010 to determine the frequency with which unredacted social-security numbers appear in court filings. The FJC found roughly 2400 documents — out of 10 million documents searched — with unredacted social-security numbers that did not appear to be subject to the exceptions to redaction provided by the Privacy Rules. Joe Cecil, who conducted the principal research, concluded that while the number of unredacted documents should not be ignored, it was proportionally minimal and did not indicate a widespread failure in the implementation of the Privacy Rules.[9]

3. Review of Local Rules

With the assistance of Heather Williams of the Administrative Office, the Privacy Subcommittee collected and reviewed all local rules governing redaction of private information in court filings. The Subcommittee determined that most local rules are intended to educate attorneys about their redaction obligations consistent with the Privacy Rules. The Subcommittee identified only a few local rules that conflict with the Privacy Rules, generally by requiring more redactions than the national rules. Such conflicts are easily addressed by an appropriate communication from the Standing Committee to the district chief judge.

4. Survey of Practical Experience with Privacy Rules

The Subcommittee early determined a need to know how those who regularly work with the Privacy Rules view their operation. With the assistance of Joe Cecil and Meghan Dunn of the FJC, the Subcommittee prepared and sent out surveys to a large number of

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[9] Joe Cecil provides the following illustration:

> If those 2,400 documents were the equivalent of one sheet of paper, and those papers were piled on top of each other, the stack of 2,400 sheets of paper would be just over nine and a half inches high. That sounds like a lot, but keep in mind that if we stack up 10 million sheets of paper to represent the almost 10 million documents that we searched, the stack of 10 million sheets of paper would be well over twice the height of the Empire State Building.

randomly selected district judges, clerks of court, and attorneys with electronic filing experience. The survey sought experiential information and invited opinions on the need for any rules changes. The results of this survey – including a description of methodology — are attached to this report. The survey data indicates that the Privacy Rules are generally working well and do not require amendment, but that continuing education efforts are necessary to ensure compliance.

5. Fordham Conference

The Privacy Subcommittee asked its reporter, Fordham Professor Daniel Capra, to identify persons with diverse views on the four areas of identified interest and to secure their participation at an all-day conference at Fordham Law School on April 13, 2010. Thanks to Professor Capra's efforts and Fordham's hospitality, the Subcommittee heard panel discussions on

- the broad question of transparency and privacy relating to court filings by a judge and various legal scholars;
- the exemption of immigration cases from electronic filing by private and public attorneys, a legal scholar, a member of the media, and a court representative;
- the present implementation of the Privacy Rules by a judge, a legal scholar, a member of the media, an AO representative, and a clerk of court;
- electronic access to plea and cooperation agreements and the need for a uniform rule on this subject by a prosecutor, criminal defense lawyers, a legal scholar, and a Bureau of Prisons official;
- the same subject by judges from districts affording different degrees of public access to such information; and
- electronic access to transcripts, including *voir dire* transcripts by a judge, two United States Attorneys, a First Amendment lawyer, and a jury clerk.

A transcript of these proceedings is attached to this report and will be published in the Fordham Law Review. Insights gained at the Fordham Conference inform all aspects of the findings and recommendations contained in this Subcommittee report.

III. Findings

A. Implementation of the Privacy Rules

1. Overview

The Privacy Subcommittee was charged with reviewing and reporting on the operation of the existing Privacy Rules throughout the federal courts, with particular attention to protection of the specified private identifier information in electronic filings available on PACER. The Subcommittee reports considerable success in the implementation of these Rules. At the same time, the Subcommittee identifies a continuing need for education efforts, monitoring, and study to ensure continued effective implementation.

2. Specific Findings

a. Administrative Office Efforts

The Privacy Subcommittee reports that the Administrative Office has made significant and effective efforts to implement the Privacy Rules' redaction requirements, while still providing the public with remote electronic access to court filings. For example:

- In 2003, the AO modified CM/ECF so that only the last four digits of a social security-number can be seen on the docket report in PACER. In the same vein, in May 2007 the AO's Forms Working Group, comprising judges and clerks of court, reviewed over 500 national forms to ensure that they did not require personal-identifier information. The Working Group identified only six forms that required personal identifier information, and those forms were revised or modified to delete those fields.

- In August 2009, the AO asked the courts to implement a new release of CM/ECF specifically designed to heighten a filer's awareness of redaction requirements. The CM/ECF log-in screen now contains a banner notice of redaction responsibility and provides links to the federal rules on privacy. CM/ECF users must check a box acknowledging their obligation to comply with the Privacy Rules redaction requirements in order to complete the log-in process. CM/ECF also displays another reminder to redact each and every time a document is filed.

- The Judicial Conference approval of a pilot project providing PACER access to audio files of court hearings raised concerns about audio disclosure of personal information. The eight courts participating in the pilot project employ various means

to discourage attorneys and litigants from introducing personal identifier information except where absolutely necessary. Lawyers and litigants are also warned that they could and should request that recorded proceedings containing information covered by the Privacy Rules or other sensitive matters not be posted, with the final decision made by the presiding judge. The AO has endeavored to ensure that courts and litigants are mindful of their redaction obligations as they participate in this project.

b. Efforts by the Courts

(1) Generally

All aspects of the Subcommittee's review confirm that federal courts throughout the country are undertaking vigorous and highly effective efforts to ensure compliance with the Privacy Rules generally and with the requirement that personal identifier information be redacted from or never included in court filings in particular. These efforts include:

- ECF training programs for both lawyers and non-attorney staff at law firms. The extension of training to staff is important because experience indicates that redaction failures, while infrequent, are frequently the result of filings made by staff who are unaware of the Rules requirements.

- ECF newsletters containing reminders about the redaction requirements.

- Making counsel aware of the Privacy Rules at the initial court conference and at evidentiary hearings, and also specifically advising counsel against unnecessary use of personal identifiers.

- Discouraging counsel from asking questions that would elicit testimony that would disclose private identifier information.

- Requiring redaction of exhibits containing personal identifier information as a condition of admissibility.

- Providing notices at counsel's table that describe the Rules' redaction requirements and that caution counsel not to put unredacted personal identifier information into the record.

- Reading a prepared statement to witnesses cautioning against disclosure of private identifier information.

- Assisting *pro se* filers, especially in bankruptcy cases, in redacting personal identifier information.

- Remedial action by clerks and courts when unredacted private identifiers are found, including consultation with filers who are repeat violators.[10]

(2) Social-Security Numbers in Court Filings

As discussed in an earlier section of this Report, surveys conducted by the AO and the FJC found only a small number of instances in which unredacted social-security numbers have been accessible online in violation of the Privacy Rules. Of the 10 million recently filed documents that the FJC researchers reviewed, less than .03 percent were found to contain unredacted social-security numbers. And of those, 17 percent appeared to be subject to some exception to redaction, such as waiver by the filing party.

The results indicate that such redaction failures as do occur are generally inadvertent. Some lawyers and staff remain unaware of the redaction policy. The results also indicate that the number of redaction failures is decreasing with time as courts continue and expand education efforts. The Privacy Subcommittee concludes that no redaction system can be error-free; nevertheless, continued education efforts should ensure that mistakes are rare and that almost all information subject to redaction is in fact removed from court filings.

(3) Implementation Challenges in Bankruptcy Cases

The Subcommittee's research indicates that most identified Privacy Rules violations occurred in bankruptcy cases. That is not surprising given the high number of first-time bankruptcy filers, the need for disclosure of substantial personal information in bankruptcy filings, and the probability that exhibits and proofs of claim will contain private identifiers. The Privacy Subcommittee reports that while the number of disclosures of unredacted personal identifiers is proportionately higher in bankruptcy cases, the actual number of

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[10] The Privacy Subcommittee unanimously agrees with the basic premise of the Privacy Rules — that the redaction obligation is on the parties, not clerks or judges. Nonetheless, the Subcommittee notes and applauds the efforts of clerks and courts in taking remedial action when a failure to redact has been discovered.

disclosures remains small.[11] This is a tribute to the court efforts described generally in the preceding subsection, which include efforts by the bankruptcy courts.[12] The Subcommittee is, therefore, confident that, as educational efforts continue and other initiatives are pursued, the instances of errors in filing unredacted personal identifier information in bankruptcy cases will be reduced even further.

(4) Use of Local Rules

The Privacy Subcommittee conducted a comprehensive review of local court rules intended to implement the national Privacy Rules. The Subcommittee recognizes that local rules can have some value in educating filers about their redaction obligations. But local rules cannot impose obligations inconsistent with national rules. *See, e.g.*, Fed.R.Civ.P. 83(a). The Privacy Subcommittee has identified a few local rules inconsistent with the national Privacy Rules, notably, local rules demanding the redaction of *more* information than required by the national rules. National rules are a product of a carefully considered policy that calibrates the balance between the judiciary's commitment to public access and its protection of personal privacy. Local rules requiring more information to be redacted alter that balance.

An attached report identifies local rules that the Privacy Subcommittee finds inconsistent with the Privacy Rules. It recommends that the procedure employed in the last local rules project be employed here: the Standing Committee should inform the chief judge of a district with an inconsistent rule, and the Standing Committee should work together with the chief judge to remedy the situation.

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[11] Notably, Bankruptcy Rule 1005, as amended in 2003, now provides that the petitioner disclose only the last four digits of the petitioner's social-security number. Other Bankruptcy Rules require disclosure of the full social-security number, but that information is not available to the public. See, e.g., Bankruptcy Rule 1007(f), which requires an individual debtor to "submit" to the clerk, rather than "file" a verified statement containing an unredacted social-security number. At this point, in a bankruptcy case as in any other, unredacted social-security numbers are not accessible to the public unless permitted by one of the exceptions to the Privacy Rules.

[12] A paper prepared by Hon. Elizabeth Stong and submitted for the Fordham Privacy Conference provides a helpful description of how the Privacy Rules are implemented in the Eastern District of New York Bankruptcy Court. That paper is attached to this Report.

3. Possible Future Initiatives

Given inevitable advances in technology, the Subcommittee suggests that future attention be given to two possible developments.

- Current technology permits detection of unredacted social-security numbers in court filings, as the Federal Judicial Center did in the attached report. Current technology does not permit a comparable search for other unredacted personal identifiers, such as names of minor children. Nevertheless, at the Fordham Conference, Professor Edward Felten predicted that future technological developments might well provide such capacity. The Privacy Subcommittee recommends that the AO continue to monitor the state of search technology.

- Technology might also make it easier for a filing party to search for material to redact in a transcript or in a document that the party is going to file. For example, a pdf document is obviously easier to search if it is in searchable format. More broadly, as stated above, software might be developed in the future that would make it easier to search exhibits, immigration records, or indeed any document. While it is not the obligation of the courts to redact filings for litigants, to the extent the courts are already engaged in extensive and highly effective educational efforts, they might be encouraged to include relevant technological advances in the information conveyed.

While such future initiatives should be pursued, the Privacy Subcommittee concludes that the most important means of ensuring effective implementation of the Privacy Rules is to continue the current efforts to educate filers and other court participants about the need (a) to redact private identifiers from documents that must be filed, and (b) to avoid disclosure of private identifiers except when absolutely necessary.

Finally, the Subcommittee suggests continued monitoring of the implementation of the Privacy Rules. Specifically, a study of court filings for unredacted personal identifiers, such as that conducted by the Federal Judicial Center for this report, should be conducted on a regular basis, possibly every other year.

B. Criminal Cases: Affording Electronic Access to Plea and Cooperation Agreements

1. Overview

The Privacy Subcommittee quickly identified electronic public access to plea and

cooperation agreements in criminal cases as an area warranting careful review. Survey information and the Fordham Conference indicate that easy electronic access to such information, coupled with Internet sites committed to its collection and dissemination, have heightened concerns about retaliation against cooperators and prosecutors' ability to secure cooperation.

The Privacy Subcommittee views the recruitment and protection of cooperators as matters generally committed to the executive branch. At the same time, it recognizes judicial responsibility to minimize opportunities for obstruction of justice. How to do so without compromising public access to court proceedings – especially proceedings that may be of particular public interest, including the treatment of defendants who cooperate with the prosecution – admits no easy answer.

The Subcommittee has identified varied approaches by the district courts to the public posting of plea and cooperation agreements and general court resistance to a uniform national rule. To the extent the Department of Justice, some defense attorneys, and legal scholars support a national rule, the Subcommittee has identified no consensus on what that rule should be. Nor can it presently identify a "best practice."

The Subcommittee suggests that CACM and the Standing Committee encourage district courts to continue the discussion begun at the Fordham Conference about the relative advantages of various practices in order to determine if a consensus emerges in favor of a particular practice or rule. It further suggests that courts might consider methods, where appropriate, to avoid permanent sealing of plea or cooperation agreements — possibly by providing for such orders to expire at a fixed time subject to extension by the court upon further review.

2. Specific Findings

a. Existing District Court Practices for Posting Plea and Cooperation Agreements

The Privacy Subcommittee identified various approaches by the district courts in publicly posting plea and cooperation agreements,[13] which are summarized here in

[13] A chart of the various approaches, prepared by Susan Del Monte of the Administrative Office, is attached to this Report.

descending order of accessibility:

- Full electronic access to plea and cooperation agreements, except when sealed on a case-by-case basis.

- No remote electronic access to plea or cooperation agreements, but with such agreements fully available at the courthouse unless sealed in an individual case.

- Full electronic access to plea agreements, but with a separate sealed document filed in every case indicating whether or not the defendant has entered into a cooperation agreement.[14]

- No public access to plea or cooperation agreements either electronically or at the courthouse, because these documents are not made part of the case file.

b. Concerns with the Identified District Court Practices

At the Fordham Conference, prosecutors, defense counsel, and legal scholars expressed concerns about the various district court approaches. Again, working from the least to most restrictive approach, these concerns are summarized as follows:

- Full remote access to plea agreements with sealing of cooperation information in individual cases means a sealing order effectively raises a red flag signaling cooperation.

- Prohibiting electronic access to plea and cooperation agreements but allowing courthouse access to such documents encourages the development of cottage industries to acquire and post such information (often for sale), the very concern that prompted the Judicial Conference to adopt the "public is public" policy.

- Posting plea agreements that say nothing about any cooperation, or posting documents that use the same boilerplate language whether a party is cooperating or not, result in misleading court documents and preclude public scrutiny of how the judicial system treats cooperating defendants.

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[14] This approach is intended to minimize the ability to identify a cooperating defendant from the presence on the public record of sealed document. The Subcommittee notes the possibility of such identification from other public record entries, such as delayed or frequently adjourned sentencing proceedings.

- Not posting plea or cooperation agreements at all hampers public scrutiny not only of the treatment of cooperators but of the process by which guilty pleas are obtained.

Some Conference participants also raised a general concern: that as defendants from different districts found themselves housed together in the federal prison system, some might misconstrue records from districts with which they were not familiar. For example, a prisoner from a district where individual sealing signaled likely cooperation might mistakenly infer that every prisoner with a sealed record entry was a cooperator without realizing that some districts made a sealed entry in every case to ensure no difference between the dockets of cooperators and non-cooperators.

c. Support for a Uniform Rule

While prosecutors, most defense attorneys, and legal scholars urged a uniform rule for posting plea and cooperation agreements, they did not agree as to the content of that rule. Some urged few, if any, limits on public access to such agreements, while others supported strict limitations.[15]

The Subcommittee has considered the uniform rule proposal recommended by Professor Caren Myers in her article, *Privacy, Accountability, and the Cooperating Defendant: Towards a new Role for Internet Access to Court Records,* 62 Vand. L. Rev. 921 (2009), a copy of which is attached to this Report. Professor Myers, a former federal prosecutor, urges a rule that would (1) generally deny public access to individual plea and cooperation agreements except where ordered by the court on a case-by-case basis; and (2) provide public access to plea and cooperation information in the aggregate, without identifying individual defendants. As Professor Myers explained at the Fordham Conference, she thinks that in most cooperation cases, the risk to a defendant from public disclosure of the defendant's cooperation far outweighs any public interest in knowing that the defendant decided to cooperate. To the extent there is a public interest in knowing what kinds of deals the government is making with cooperators and what kinds of benefits they are receiving from the courts, Professor Myers submits that information can be provided anonymously or in the aggregate.

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[15] Because the Department of Justice has historically supported a uniform rule with strict limitations, the Subcommittee, early in its work, invited DOJ to propose a draft rule as a basis for Subcommittee discussion. DOJ continues to work on the issue, including the viability of a national rule, but has not at this time submitted draft language.

Some participants at the Fordham Conference questioned the sweep of Professor Myers's proposal, which would severely limit public access to plea and cooperation agreements in individual cases. They also questioned the effectiveness of such a rule in protecting cooperators, given the ability to infer cooperation from delayed or adjourned sentences or from the sealing of sentencing minutes, in whole or in part.

d. Judicial Opposition to a Uniform National Rule

At the Fordham Conference, the Subcommittee also heard the views of judges drawn from districts pursuing each of the identified approaches. Their thoughtful responses to the concerns and suggestions of lawyers and legal scholars and their explanations for how and why their courts employed various approaches to posting plea and cooperation agreements were particularly informative. This discussion revealed that the various practices employed by courts with respect to plea and cooperation agreements were not casually developed. Rather, district courts have carefully considered the question of public access to such agreements, with individual courts soliciting the views of attorneys and other interested parties and engaging in substantial internal discussion before settling on an approach. The discussion further revealed that each district is strongly committed to its chosen approach, convinced that the approach satisfactorily balances the twin concerns of public access and cooperator safety, and resistant to the idea of a uniform national rule (particularly if it would differ from its own practice).

e. Subcommittee Conclusions

The Subcommittee concludes that no best practice has yet emerged supporting a uniform national rule with respect to granting public access to plea and cooperation agreements. The Subcommittee suggests that CACM and the Standing Committee encourage district courts to continue the discussion begun at the Fordham Conference as to the relative benefits of various practices, with a view toward determining if a consensus emerges in the coming years as to a best practice that might provide a basis for a uniform national rule.

At the same time, the Subcommittee is of the view that the rationale for limiting public access to such agreements – cooperator safety – does not necessarily support the permanent sealing of most cooperation agreements, much less plea agreements. Courts limiting access to such agreements might consider whether it is appropriate to include a "sunset" provision that allows sealing orders within a time prescribed either automatically for every case or specifically in individual cases with further sealing dependent on a court determination of a continued need.

C. Redacting Electronic Transcripts

1. Overview

Judicial Conference policy requires that court transcripts be posted on PACER within 90 days of delivery to the court clerk.[16] The Privacy Subcommittee has considered the judiciary's ability to comply with this policy while ensuring the redaction of personal identifier information as required by the Privacy Rules. The Subcommittee reports that the redaction of private information from transcripts on PACER is still a work in progress. Nevertheless, that work appears to be going well. Because the process relies on the vigilance and sensitivity of lawyers, judges, and court staff, continuing education is important to ensure these persons' awareness of the need to minimize record references to private identifier information and to redact such information when it appears in transcripts.

The Privacy Subcommittee has separately considered the privacy issues implicated by the electronic posting of *voir dire* transcripts, which may reveal personal information about potential jurors not required to be redacted by the Privacy Rules. Such information could be used to retaliate against jurors and could compromise the identification of prospective jurors able to serve without fear or favor. Because the Judicial Conference has recently provided the courts with guidance as to how to balance the competing interests in public access to *voir dire* and juror privacy, the Subcommittee suggests that the Standing Committee request CACM to monitor the operation of these guidelines to determine the need for any further policy action.

2. Specific Findings

a. The Redaction of Electronically Posted Transcripts

(1) Judicial Conference Policy for Electronic Filing

Consistent with the mandate of the E-Government Act to create a complete electronic file in the CM/ECF systems for every federal case, in 2003, the Judicial Conference, as stated above, adopted a policy requiring courts electronically to post transcripts of court proceedings within 90 days of their receipt by the clerk of court. In the 90-day period preceding electronic filing, each party's attorney (or each *pro se* party) must work with the

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[16] See JCUS Sep. 07 at 7. Extensive guidance on the implementation of the transcripts policy is found in a letter to clerks from Robert Lowney of the AO, dated January 30, 2008. See also Report of CACM to the Judicial Conference on Electronic Transcripts, June 2008.

court reporter according to a prescribed schedule to ensure that any electronically filed transcript is properly redacted of personal identifier information consistent with the requirements of the Privacy Rules.

(2) Survey Results Indicate General Compliance with Transcript Policy

The FJC survey reveals that, as of December 2009, all bankruptcy courts and all but a few district courts are posting trial transcripts on PACER, though most courts do not routinely post deposition transcripts. A majority of the surveyed courts have established local rules or policies to address privacy concerns arising from the electronic posting of trial transcripts. The number of clerks and judges who reported complaints about personal identifier information appearing in electronically filed transcripts is small.

The survey further revealed that clerks of court, judges, and lawyers are actively engaged in ensuring proper redaction of electronically filed transcripts. Specifically, a significant number of clerks reported that their courts require that transcripts be filed as text-searchable PDFs to facilitate redactions. Other clerks reported using software programs specifically developed to identify personal identifier information. Still more clerks expressed interest in the development of such programs.

The survey revealed that judges employ various means to educate counsel about their redaction obligations with respect to electronically filed transcripts. A common practice is to provide counsel with a card urging that personal identifier information not be elicited on the record and that any such information that appears in transcripts be redacted. Similar guidance is provided to counsel at the initial case conference, in formal written orders, and through communication with chambers staff. Judges also intervene to cut off a line of questions that appears to be eliciting personal identifier information. Judges report that they also rely on chambers staff and docket clerks to alert them to the appearance of personal identifier information in a transcript that will require redaction.

The survey confirms general attorney awareness of the Privacy Rules' redaction requirements. Two-thirds of attorneys responding reported that they redacted personal identifier information before transcripts were electronically filed. Half of attorneys surveyed reported that they actively sought to avoid eliciting personal identifier information on the record. Nevertheless, because 17% of responding attorneys reported that they made no effort to redact transcript before electronic filing, there is plainly a need for continuing education and monitoring in this area.

(3) The Fordham Conference

Participants at the Fordham Conference reinforced the conclusions drawn from the survey: (a) that courts and attorneys are striving to avoid disclosure of personal identifying information on the record, and (b) that the redaction procedure for electronic transcripts adopted by the Judicial Conference is generally working as intended.

Two United States Attorneys stated that although the redaction requirements were initially met with some displeasure by their Assistants, experience had shown that the required procedures were workable and not unduly burdensome. One of the United States Attorneys reported developing a standard form to facilitate the specification of pages and line numbers where personal identifier information needed to be redacted.

Both government and private attorneys stated that they generally sought to avoid eliciting personal identifier information in proceedings that could be transcribed. They agreed that there was rarely a need for such information, and that attorneys could usually avoid personal information coming into the record by applying some forethought to questions asked and documents introduced into evidence. The lawyers discussed the value of reaching advance agreements with opposing counsel to minimize the introduction of personal identifier information.

Some Conference participants identified concern that parties in civil cases were urging court reporters to redact from transcripts confidential information – such as proprietary information – not falling within the categories specified in Fed. R. Civ. P. 5.2(a). Parties and court reporters need to be made aware that redactions beyond those specified in Rule 5.2(a) require a court order pursuant to Rule 5.2 (e) and its counterparts.

b. The Electronic Filing of *Voir Dire* Transcripts

(1) Concerns Attending *Voir Dire* Transcripts

Electronic filing of *voir dire* transcripts raises unique concerns and, thus, was considered separately by the Privacy Subcommittee. *Voir dire* may elicit a range of personal, sensitive, or embarrassing information from a juror that need not be redacted under the Privacy Rules. The possibility of such information making its way from PACER access to broad disclosure on the Internet poses real risks for juror harassment or even retaliation. Many jurors may presently be unaware that *voir dire* transcripts will be electronically filed. With such awareness, courts may find it more difficult to identify potential jurors able to serve without fear or favor.

Because it is the court that summons persons for jury service, the judiciary's responsibility to safeguard jurors is arguably stronger than its responsibility to safeguard persons who enter into cooperation agreements with the executive branch. Nevertheless, some circuit precedent holds that *voir dire* proceedings should generally be open to public scrutiny. Further, if the transcript of an open *voir dire* proceeding is available at the courthouse, the judiciary's "public is public" policy suggests that it should also be electronically accessible.

(2) Judicial Conference Guidance for *Voir Dire*

Mindful of these competing concerns, the Judicial Conference, at its March 2009 session, provided courts with guidance on how to balance the public nature of jury selection with the protection of juror privacy.[17] Under the policy, Judges should inform jurors that they may approach the bench to share personal information in an on-the-record *in camera* conference with the attorneys, and should make efforts to limit references on the record to potential jurors' names by, for example, referring to them by their juror number. The policy further states that in deciding whether to release a *voir dire* transcript, a judge should balance the public's right of access with the jurors' right to privacy – consistent with applicable circuit precedent – and, only if appropriate, seal the transcript.[18]

Such guidance necessarily informs the Subcommittee's review of how courts and parties treat *voir dire* transcripts and juror privacy.

(3) Survey Results Respecting *Voir Dire* Transcripts

Courts presently vary widely in their policies on posting *voir dire* transcripts. Sixty percent of courts surveyed indicated that they did not place *voir dire* transcripts on PACER. Thirty-two percent indicated that they posted such transcripts in both civil and criminal cases.

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[17] JCUS-MAR 09, pp. 11-12.

[18] In the event the court seals the entire *voir dire* proceeding, the policy provides that the transcript should be docketed separately from the rest of the trial transcript. In the event the court seals only bench conferences with potential jurors, that part of the transcript should be docketed separately from the rest of the *voir dire* transcript. The parties should be required to seek permission of the court to use the *voir dire* transcript in any other proceeding.

Only a handful of clerks and judges reported problems or complaints about the proper redaction of personal identifier information in *voir dire* transcripts. The reason why few problems arise appears to be judicial vigilance. Over 70 percent of district and magistrate judges reported using one or more procedures to protect juror privacy during *voir dire* proceedings and in resulting transcripts. The most frequent procedure used is *in camera* conferences pursuant to the Judicial Conference policy. Judges also report the following procedures designed to protect juror privacy:

- sealing juror questionnaires or *voir dire* transcripts,
- referring to jurors by numbers rather than names,
- reminding court reporters that *voir dire* proceedings are to be transcribed only if the appropriate section of the transcript request form is completed, and
- limiting transcript accessibility to the courthouse.

Significantly, most judges reported that they considered the measures available to them adequate to protect juror privacy.

(4) The Fordham Conference

Participants at the Fordham Conference expressed some concern that posting *voir dire* transcripts could make it more difficult to select juries. They discussed various efforts to protect juror privacy, which generally tracked the methods reported by judges in the survey results, described above. Some additional procedures suggested included:

- using juror questionnaires to reduce courtroom questioning,
- providing for the automatic redaction of juror personal identification information from *voir dire* transcript by the court reporters,
- providing the names of persons selected for jury pools only upon request, with such a request denied if the court determines that the interests of justice require confidentiality, and
- withholding the names of jurors until the conclusion of trial and releasing them only on order of the court.

c. Subcommittee Conclusions

The Privacy Subcommittee concludes that the policies and practices for protecting personal identifier information in electronically filed transcripts are in place and, on the whole, being effectively applied by litigants and the courts. The Subcommittee suggests that CACM regularly review these policies and practices in light of constant technological advances. The Subcommittee also suggests continuing and expanding education efforts by the courts to raise attorneys' awareness of their redaction obligations with respect to electronically filed transcripts. Attorneys and court reporters also need to be made aware that the redaction of material not specified in subsection (a) of the Privacy Rules requires a court order.

With respect to *voir dire* transcripts, the Judicial Conference has recently provided guidance for courts in balancing the right of public access – including electronic access – to such transcripts with juror claims to privacy. The Subcommittee suggests that the Standing Committee request CACM to monitor whether this guidance is adequate to ensure the selection of fair and impartial jurors from a broad pool of persons and to safeguard against retaliation and harassment.

D. The Need For Rule Changes

1. Overview

Upon careful review of the survey data and the information provided at the Fordham Conference, the Privacy Subcommittee reports that, with the possible exception of the rules' treatment of immigration cases, there is no significant call by the bench or bar for changes to the Privacy Rules. Users of the rules generally agree that existing redaction requirements are manageable and provide necessary protection against identity theft and other threats to privacy presented by remote public access. Such complaints or suggestions as were heard derive from the necessary learning curve involved in recent implementation of the Privacy Rules. The Subcommittee thus concludes that the data collected do not support either expansion or contraction of the types of information subject to redaction requirements.

2. Areas Specifically Considered for Changes to the Rules

a. Alien Registration Numbers

In considering possible amendments to the Privacy Rules, the Subcommittee gave

particular attention to the need to redact alien registration numbers insofar as they might be analogized to social-security numbers. After extensive discussion and debate, including consideration at the Fordham Conference, the Subcommittee concludes that redaction of alien registration numbers is not warranted at this time.

Disclosure of an alien registration number, unlike a social-security number, poses no significant risk of identity theft. Moreover, the Subcommittee heard from a number of court clerks and Department of Justice officials, all of whom stressed that redacting alien registration numbers would make it extremely difficult for the courts to distinguish among large numbers of aliens with similar or identical names and to ensure that rulings were being entered with respect to the correct person. Redaction would create a particularly acute problem in the Second and Ninth Circuits, which have heavy immigration dockets. Given the lack of any expressed support for the redaction of alien registration numbers, the Privacy Subcommittee sees no reason to add them to the list of information subject to redaction under subdivision (a) of the Privacy Rules.

b. The Exemption for Social Security Cases

The Privacy Subcommittee considered the continued need for exempting Social Security cases from the redaction requirements of the Privacy Rules. The Subcommittee reports no call for a change to that exemption. Further, the reason for the exemption identified in 2007 pertains equally today: Social Security cases are rife with private information, individual cases hold little public interest, and redaction would impose unusually heavy burdens on filing parties.

c. The Exemption for Immigration Cases

The Privacy Subcommittee also considered the continued need for exempting immigration cases from the redaction requirements of the Privacy Rules.[19] Participants at the Fordham Conference vigorously argued both sides of the question. The argument for abrogating the exemption and affording remote public access to immigration case files was that the current system gives "elite access" to those with resources to go to a courthouse that,

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[19] It should be noted that the Judicial Conference policy drafted by CACM provided an exemption from the redaction requirements for Social Security cases but not for immigration cases. During the process of drafting the Privacy Rules, the Department of Justice made arguments and provided data that persuaded the Privacy Subcommittee and eventually the Standing Committee that an exemption for immigration cases was warranted.

especially in transfer cases, might be hundreds of miles away from a party interested in the information. It was argued that limiting access to the courthouse was particularly burdensome for members of the media. Under the current rule, the media must often depend on the parties to get information about habeas petitions and complaints in an immigration matter. It was also suggested that the exemption is ineffectual in that certain information in immigration cases *is* available over PACER — including the docket, identity of the litigants, and the orders and decisions, which will frequently contain sensitive information about asylum applicants. Thus, the media argues that the current system of access impairs First Amendment interests without providing much privacy protection.

On the other hand, the Privacy Subcommittee also heard forceful arguments from DOJ and court personnel in favor of the current system of limiting remote public access to immigration cases. They note the explosion of immigration cases since 2002, particularly in the Second and Ninth Circuits, and argue that immigration cases, especially asylum cases, are replete with private information on a par with or greater than Social Security cases. That personal and private information is necessary to the court's disposition, so there is no way to keep it out of the record. Moreover, it is woven throughout the record, precluding easy redaction.[20] Further, the burden of redaction would inevitably fall on the government because many petitioners are unrepresented, and imposing redaction requirements on *pro bono* counsel could discourage such representation. DOJ represents that there is no simple technological means presently available to redact all personal information in all the immigration cases. It urges that any change to current limitations on remote public access be deferred until technological advances facilitate redaction.

A compromise solution emerged at the Fordham Conference: maintaining existing limitations on remote public access for immigration cases most likely to include sensitive information, such as cases seeking asylum or relief under Convention Against Torture, but removing the exemption for immigration cases involving transfer, detention, or deportation. The Privacy Subcommittee agrees that a more nuanced approach to exempting immigration cases from remote public access warrants further consideration. One area for investigation is the plausibility of segregating cases by subject. For example, removal cases often present claims for asylum. Another factor to be considered is a possible decline in the volume of immigration cases, or types of immigration cases, which could lessen the burdens of redaction. A third factor — referred to earlier in other sections of this Report – is the possibility that advances in technology will ease the burdens of redaction.

The Privacy Subcommittee urges further research and consultation with interested

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[20] A DOJ official estimated that one FOIA officer would have to spend an entire work day with one case to get the average asylum case moved to the Court of Appeals in redacted form.

parties before any decision is made to abrogate the exemption for immigration cases. But, mindful of the significant public interest in open access generally, and in immigration policy in particular, the Subcommittee suggests that the current approach to immigration cases be subject to future review and possible modification.

III. Summary of Findings and Recommendations

The Privacy Subcommittee summarizes its findings and recommendations as follows:

1. The Privacy Rules are in place and are generally being implemented effectively by courts and parties.

2. To ensure continued effective implementation, every other year the FJC should undertake a random review of court filings for unredacted personal identifier information.

3. Also to ensure continued effective implementation of the Privacy Rules, the courts should continue to educate their own staffs and members of the bar about (a) redaction obligations under the Privacy Rules, (b) steps that can be taken to minimize the appearance of private identifier information in court filings and transcripts, and (c) the need to secure a court order under Fed. R. Civ. P. 5.2(e) or its counterparts before redacting any information beyond that specifically identified in the Privacy Rules.

4. The AO should monitor technological developments and make courts and litigants aware of software that would make it easier to search documents, transcripts, and court records for unredacted personal identifier information.

5. At present, no best practice can be identified to support a uniform national rule with respect to making plea and cooperation agreements publicly available. District courts should, however, be encouraged to continue discussing their different approaches, and the Standing Committee might request CACM to monitor these approaches to see if, at some future time, a best practice emerges warranting a uniform rule.

6. To the extent district courts seal plea or cooperation agreements, consideration might be given, where appropriate, to a "sunset provision" providing for their expiration unless sealing is extended after further review and order of the court.

7. There is no need to amend the Privacy Rules either to expand or to contract the type of information subject to redaction.

8. The exemption for Social Security cases should be retained in its current form.

9. The exemption for immigration cases should be retained in its current form. Nevertheless, this exemption should be subject to future review in light of possible changes in technology and case volumes that could ease the burden of redaction. Such review should also consider whether the exemption might be narrowed to particular types of immigration cases.

December, 2010

Judicial Conference Standing Committee on the Federal Rules
Subcommittee on Privacy

Hon. Reena Raggi, Chair

Hon. Robert L. Hinkle (Chair of Working Group on Rules Changes)

Hon. John G. Koeltl (Chair of Working Group on Transcripts)

Hon. Ronald B. Leighton (Chair of Working Group on Implementation)

Hon. Steven D. Merryday (Chair of Working Group on Criminal Cases)

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Leo P. Cunningham, Esq.

Elizabeth J. Shapiro, Esq., Department of Justice

Jonathan Wroblewski, Esq., Department of Justice

Professor Sara Sun Beale

Professor Edward H. Cooper

Professor S. Elizabeth Gibson

Professor Catherine T. Struve

Professor Daniel J. Capra, Reporter

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Public Works Projects for the Internet

To: The Honorable Lee H. Rosenthal, Chairman
Judicial Conference Committee on Rules and Procedure

Cc: The Honorable Alex Kozinski, Chief Judge, Ninth Circuit
The Honorable Edith H. Jones, Chief Judge, Fifth Circuit
The Honorable Dennis Jacobs, Chief Judge, Second Circuit
The Honorable J.L. Edmondson, Chief Judge, Eleventh Circuit
The Honorable Karen J. Williams, Chief Judge, Fourth Circuit

From: Public.Resource.Org

Date: May 3, 2008

Subj: **Confidential - 1,718 Personal Identifiers Found in Appellate Opinions**

Examination of appellate decisions reveals 1,718 cases with Alien Numbers or Social Security Numbers published in the opinions. The issue applies across all circuits and many of the opinions in question are still available on court web sites. This memorandum explains the problem and suggests corrective actions to be taken.

Background: Personal Identifiers in Court Opinions

The E-Government Act of 2002 and Appellate Rule 25 "require that personal identification information be redacted from from documents filed with the court." While the focus of the Privacy Rules are on lawyers, requiring them to redact personal identification numbers from documents filed with the courts, there is also an obligation for the courts themselves to do their part, particularly when the appearance of personal identification materials in court opinions is the result of the opinion publication process or is inherent in the procedures established by the courts for submitting appeals.

In a recent Memorandum Describing the Privacy Rules and Judicial Conference Privacy Policy issued by the Rules Committee, special note was made of immigration and Social Security cases:

> Cases That Are Not Subject to the Redaction Requirement
>
> In addition, the new Civil Rules becoming effective on December 1, 2007, do not apply the redaction requirements to certain categories of cases that are exempted from remote public access. These categories are immigration cases and Social Security cases.
>
> The parties have remote electronic access to filings in these cases, but the public has access to the filings only at the courthouse.

It is clear that Alien Numbers and Social Security Numbers are not meant to be made available for general public access as publication of these numbers poses a substantial and real threat of identity theft for the individuals involved.

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Opinions Found Containing Personal Identifiers

Public.Resource.Org is a 501(c)(3) nonprofit corporation dedicated to making public information more readily available on the Internet. As part of our mission, we recently obtained 50 years of Courts of Appeals decisions from a commercial vendor, reformatted this data to be compliant with modern Internet standards such as XML markup, SHA1-based document integrity checks, and explicit labels indicating the public domain status of the underlying data.

We then made this data available in bulk, and it is now being used by numerous for-profit and non-profit organizations providing access to the general public and legal professionals.

In April, we were notified by an individual that his Alien Number, the personal identifier used on the Green Card, had been published on the Internet. We investigated the issue and determined that the Immigration and Naturalization Service routinely used the Alien Number as the Docket Number for their cases, and this information is present in 1,499 published opinions, many of which are currently available on court web sites.

In addition, we scanned the corpus for Social Security Numbers and found those present in 219 published opinions. All told, 1,718 published opinions contain these personal identifiers. These opinions are distributed among all the circuits, as detailed in Table 1.

Court	Number of Cases with Personal Identifiers in the Published Opinion
Ninth Circuit	990
Fifth Circuit	171
Second Circuit	93
Eleventh Circuit	85
Fourth Circuit	81
Seventh Circuit	64
Eighth Circuit	54
Sixth Circuit	53
Third Circuit	42
Tenth Circuit	40
First Circuit	22
DC Circuit	16
Federal Circuit	6
Court of Claims	1

Table 1: Number of Cases by Circuit

The Problem Is Ongoing

Table 2 shows the number of opinions found over time. As can be seen from the continuing high volume of incidents, the problem is ongoing and not just historical.

Year	Number of Cases with Personal Identifiers in the Published Opinion
1949-1979	53
1980-1989	154
1990-1994	210
1995-1999	816
2000-2004	370
2005	60
2006	82
2007	26

Table 2: Number of Cases by Year

Appendix A contains a detailed listing of each case found. The table contains the citation in the National Reporter Series, any docket numbers found, the date (which in some cases is date submitted and in others is date filed), and indicators if the case contains an Alien Number or a Social Security Number and if the case appears to be accessible via the court's own web site.

We would be happy to make available additional information from our database of cases found, such as names of judges (or *en banc* status), URLs to access the pages, and the specific patterns and resulting matches.

It is important to note that these identification numbers are present in the opinions delivered by the courts, not just in briefs submitted by the appellants. In many cases, the summary information is embedded in the prefatory information generated by the courts. For example, take the case of [redacted] in the Court of Appeals for the Tenth Circuit:

[redacted]

As can be seen, directly after the named Petitioner and Respondent, the docket number is followed by [redacted] Mr. Nasser's Alien Number:

[redacted]

Petitioner,

v.

IMMIGRATION & NATURALIZATION SERVICE,

Respondent.

No. 96-9529
(Petition for Review)

[redacted]

Corrective Steps

A series of specific actions have been mandated for all Executive Branch agencies in OMB Memorandum M-07-16, "Safeguarding Against the Breach of Personally Identifiable Information," where breach is defined as "the loss of control, compromise, unauthorized disclosure, unauthorized acquisition, unauthorized access, or any similar term referring to situations where persons other than authorized users and for an other than authorized purpose have access or potential access to personally identifiable information, whether physical or electronic." That policy goes on to state:

> "Safeguarding personally identifiable information in the possession of the government and preventing its breach are essential to ensure the government retains the trust of the American public. ... this memorandum requires agencies to develop and implement a breach notification policy **within 120 days.**" [emphasis in original.]

Upon discovery of a breach of personal identifiers, a series of steps are considered Best Current Practices, both in industry and in government:

1. Mitigate the immediate damage by fixing the breach.
2. Notify upstream sources and downstream users of the data.
3. Investigate the cause and implement corrective steps to prevent reoccurrence.

Upon discovery of breach, Public.Resource.Org took the following steps:

1. We algorithmically scanned all court cases to find Alien Numbers and Social Security Numbers, then individually checked all numbers flagged. We then scrambled the identifiers, substituting random alphabetic characters for the numbers.
2. Bulk users of our data ("downstream users") were notified of the specific cases found. Per this memorandum, we are notifying the courts ("upstream sources").
3. We have implemented a policy of scanning all databases we post for personal identifiers, even if those databases are public records produced by the government. We have also implemented a policy which allows users to notify us if they discover information.

We believe the courts should take a similar set of steps:

1. Active steps should be taken to redact the personal identifiers, particularly the ones found on your web sites, as well as scanning for additional materials such as briefs containing this information.
2. Best Current Practices require the notification of affected parties of the breach. We believe it is incumbent on you to notify all of the individuals who were exposed. In addition you should notify your downstream users, particularly the major legal services such as West, Lexis, and AltLaw.
3. The presence of personal identifiers, particularly in immigration cases, is well known and documented as evidenced by Judicial Conference reports. An investigation as to why that did not translate into concrete actions by the courts and how to prevent further breaches is thus recommended.

We realize that mitigating this breach will require time and money, but this is essential to "ensure the government retains the trust of the American Public," a principle that applies equally to all three branches of our government.

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

July 16, 2008

Mr. Carl Malamud
Public.Resource.Org, Inc.
1005 Gravenstein Highway North
Sebastopol, CA 95472

Dear Mr. Malamud:

Thank you for the materials you provided on personal identifiers in appellate opinions. It is enormously helpful to have the benefit of the empirical research that you have done. As you know, the Judicial Conference Rules Committees and the Committee on Court Administration and Case Management have implemented the E-Government Act requirements by developing rules and procedures to protect personal identifiers from being included in court filings, particularly those that are remotely accessible electronically. We are continuing to work to ensure that this implementation is effective and efficient. I hope you will keep us informed about your ongoing work.

I am sending a copy of your materials to Judge Carl Stewart, Chair of the Appellate Rules Committee, as well. Thank you for your commitment to improving the court system.

Very truly yours,

Lee H. Rosenthal

cc: The Hon. Carl Stewart
Peter McCabe, Esq.
John Rabiej, Esq.

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Public Works Projects for the Internet

October 3, 2008

08-AP-B

The Honorable Lee H. Rosenthal
Chair, Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Washington, D.C. 20544

08-CV-D

Dear Judge Rosenthal:

I would like to thank you for your letter of July 16, 2008 on the subject of personal identifiers in appellate opinions. Your kind words are very much appreciated and I am pleased to report that the Clerks of the Courts of the Second, Fifth, and Ninth Circuits wrote to me indicating they were in the process of redacting social security numbers.

One issue in regards to appellate opinions that I would like to bring to your attention is the status of Alien Identification Numbers. It is the position of the Clerks of the Courts that Alien Identification Numbers do not fall within the enumerated list of "individuals' Social Security and taxpayer identification numbers, names of minor children, financial account numbers, dates of birth, and, in criminal cases, home addresses." I do understand that a literal reading of the list might preclude Alien Identification Numbers and thus bring it to your attention in case the issue had not been previously considered.

I am also writing to you today to report on preliminary results of an audit of documents submitted to the United States District Courts. A social security number scan of these documents shows approximately 2,282 suspect documents in 32 different districts. The social security numbers are present in documents filed in earlier years, but also in many documents filed in 2008. In some cases, it appears that the social security numbers for attorneys and state employees are being disclosed.

While most documents contain the social security number for a single individual, we have found lists of dozens of individuals. In some cases, the name, date of birth, social security number, and even financial account numbers are present, making this "one-stop shopping" for potential identity theft.

I have enclosed for your reference a DVD of the 2,282 suspect documents. You will find attached to this letter as Appendix A a detailed analysis of 13 of the District Courts based a systematic manual scan of the documents flagged by our program. We will be completing the same detailed analysis of the remaining 19 districts for which we have data, and would be happy to forward that information to you if you wish.

It is worth mentioning that the number of privacy incidents varies widely by district. For example, we were unable to find any social security numbers for the Southern District of Texas or the District of Oregon, and the District of Minnesota had only 6 cases with problems, all from 2005 and 2006.

After working with government data for two decades, I am always impressed by the impact the Internet has on the dissemination of public data. The process of learning how to disseminate public databases effectively is one of trial and error and of progressively perfecting the process. The rules and procedures to protect personal identifiers developed by the Committee on Rules of Practice and Procedure are, I believe, a very important step in this regard.

Based on our experience with scanning District Court documents, I hope you will permit me to offer three suggestions that might provide additional support to the goal of broad dissemination of public information while protecting the privacy of individuals.

First, there is no obvious way for a member of the public or a nonprofit research group such as ours to alert the Administrative Office of the Courts to privacy issues. No system is perfect, and the feedback from users of the system is an essential step in finding mistakes before they spread. Many organizations have found that appointing a Chief Privacy Officer provides a single point of contact for the public.

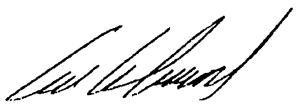
Second, when problems are found, there does not appear to be a systematic way of alerting the providers of legal information. Even though the social security numbers from appellate opinions were removed from court web sites, they are still present on West Law and Lexis Nexis. A notification mechanism when cases are withdrawn or changed would be extremely useful. Such a system should go beyond the commercial services to include the large number of nonprofit groups that disseminate the law. Our own computers at Public.Resource.Org, for example, serve 1 million unique visitors per month, and that number is far larger when we include other sites that copy our data.

Third, while the first line of defense for protection of privacy is with the lawyers who file documents in the PACER system, we must assume that no system is perfect. I have attached as Appendix B a simple one-line PERL program based on open source tools which we use to scan for social security numbers. We scan a database for potential hits and then look at each case manually. If we find a social security number, we use redaction tools to remove that information.

There are no doubt far more sophisticated tools available, but I offer this simple mechanism as an example and would be more than happy to discuss these tools with technical staff if that is useful.

Thank you again for your responsiveness and quick action on the matter of Appellate decisions. It is gratifying to see the commitment towards the protection of personal privacy, both in the Judicial Conference and in the day-to-day operations of the Clerks of the Court.

Very truly yours,



Carl Malamud
President & CEO
Public.Resource.Org

cc: Mr. Peter McCabe, Esq.
The Honorable James C. Duff

TAB-VI-E

MEMORANDUM

DATE: March 11, 2011

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 10-AP-A

At the spring and fall 2010 meetings, the Committee discussed the caselaw concerning relation forward of premature notices of appeal. Part I of this memo briefly summarizes that caselaw and notes relevant recent decisions. Of particular note are decisions from the Seventh and Eleventh Circuits that appear to move those circuits closer to the majority view on certain applications of the relation-forward doctrine. Part II offers some possible options – formulated by Judge Sutton and his law clerks – that can serve as a basis for further discussion.

I. Overview of caselaw concerning relation forward

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[1] 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 54(b) certification or a final judgment disposing of all claims with respect to all parties). Here is a capsule summary 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

[1] 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*.

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 to the time when the contingency has occurred.[2] Cases cited in the 1979 Committee Note to Rule 4(a)(2) and cited with approval in *FirsTier* provide support for such a view.

  - In a prior memo, I observed that the Seventh Circuit had expressed a contrary view (as one of two alternative rationales for its ruling) 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).[3] More recently (and without citing

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[2] For a recent example, see *Smith v. Veterans Administration*, 2011 WL 692969 (10th Cir. March 1, 2011). The district court denied Smith's request to proceed in forma pauperis; the order denying the request concluded by stating: "He is ORDERED to pay the entire $350 statutory filing fee within thirty days from the date of this order. Failure to do so will result in the dismissal of the complaint." Memorandum Decision and Order, *Smith v. Veterans Administration*, No. 2:10-CV-3-CW (D. Utah Jan. 29, 2010), at 2. The court of appeals held that it had jurisdiction to hear the appeal although the notice of appeal was filed prematurely: "Although Mr. Smith filed his notice of appeal after the district court entered its order denying IFP, which was premature, his appeal ripened when the court dismissed the unfiled complaint for nonpayment of the filing fee." *Smith*, 2011 WL 692969, at *1 n.1.

[3] In *Strasburg*, the district court in mid-November issued an order dismissing the complaint but granting the plaintiffs a limited time to re-file the complaint and to serve certain defendants. The plaintiffs did not re-file the complaint within the deadline, but instead filed a notice of appeal. The district court then entered final judgment dismissing the complaint with prejudice. The court of appeals relied on two alternative theories to hold that the prior notice of appeal did not relate forward to the entry of final judgment. The first rationale was that "[t]he plaintiffs could not reasonably have thought that the result was settled: the order expressly conditioned the final disposition of the suit," *id.* at 472. The *Strasburg* court's second rationale was that "[e]ven if the plaintiffs' initial belief as to the appealability of the November 15 order was reasonable when they filed their notice of appeal, their refusal to refile became unreasonable

Strasburg), the Seventh Circuit applied the majority approach in *Roe v. Elyea*, 2011 WL 256978 (7th Cir. Jan. 28, 2011).[4]

- 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. Most recently, the Eleventh Circuit noted the conflicting lines of precedent and followed the precedent permitting relation forward.[5]

- 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

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when they were expressly informed by the district court on December 27 that the November 15 order was not a final judgment and that their notice of appeal was a 'nullity.'" *Id.*

[4] In *Roe*, the district court granted remittitur as to the punitive damages award to one of the plaintiffs; its February 18 order stated that the plaintiff "shall file a pleading within 14 days of the entry of this order stating whether [it] accepts or rejects the proposed remittitur of the jury's punitive damage award. Failure to file said pleading shall be deemed an acceptance of the remittitur." *Roe*, 2011 WL 256978, at *6. The plaintiff did not file such a pleading; instead, on March 18 it filed a notice of appeal. On March 24, the district court "entered a further order confirming that Mr. Roe's Estate had failed to respond and was deemed to have accepted the remittitur." *Id.* The court of appeals held "that the Estate's mistaken belief about the automatic effectiveness of the conditional order was reasonable and that its error is correctable by this court under Rule 4(a)(2)." *Id.* at *8.

[5] *See National Ass'n of Boards of Pharmacy v. Board of Regents of the University System of Georgia*, 2011 WL 649951, at *6 & n.19 (11th Cir. Feb. 24, 2011).

judgment.[6] One of those circuits – the Seventh – has issued precedential opinions that might be read to take varying views on this issue.[7] 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

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[6] In *Capitol Sprinkler Inspection, Inc. v. Guest Services, Inc.*, 630 F.3d 217 (D.C. Cir. 2011), the D.C. Circuit followed its earlier decision in *Outlaw v. Airtech Air Conditioning and Heating, Inc.*, 412 F.3d 156, 158 (D.C. Cir. 2005). Unlike in *Outlaw*, in *Capitol Sprinkler* the district court had denied the appellant's request for entry of partial final judgment under Civil Rule 54(b). The court of appeals rejected the appellee's contention that the denial of the Rule 54(b) request made it unreasonable for the appellant to file a notice of appeal from the order dismissing its third-party claim while another party's claim remained pending against the appellant: "[an] objective understanding of Rule 4(a)(2) is more appropriate to a jurisdictional analysis than would be a flexible standard focusing upon reasonableness.... Applying this objective test, Capitol's notice of appeal was timely under Rule 4(a)(2)." *Capitol Sprinkler*, 630 F.3d at 223.

[7] A recent Seventh Circuit decision, *Arrow Gear Co. v. Downers Grove Sanitary Dist.*, 629 F.3d 633 (7th Cir. 2010), accords with the majority view. The district court dismissed Arrow's claims against some but not all defendants, after which Arrow dismissed its claims against the remaining defendants without prejudice. On Arrow's appeal from the involuntary dismissal of its claims against the first group of defendants, the court of appeals pointed out to Arrow that the voluntary dismissal without prejudice did not produce a final and appealable judgment, but the court offered a solution: "So at argument we gave Arrow's lawyer the following choice: stand your ground and we'll dismiss the appeal, or convert your dismissal of the other two defendants to dismissal with prejudice, which will bar your refiling your claims against them. He quickly chose the second option, committing not to refile the suit against them, and so, because the final judgment in the district court is now definitive, we have jurisdiction of the appeal." *Id.* at 637.

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, as noted in a prior memo, 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.[8]

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[8] More recently, the Tenth Circuit issued another decision, *Hafed v. Federal Bureau of Prisons*, 2011 WL 338417 (10th Cir. Feb. 4, 2011), that might be read to apply relation forward on the basis of a theory that other circuits would not endorse. In February 2009 Hafed filed a notice of appeal from the district court's "interlocutory order overruling his objections to the magistrate judge's orders striking three of his motions for preliminary injunctive relief and

II. Possible Amendments to Appellate Rule 4(a)(2)

CURRENT VERSION

Filing Before Entry of Judgment. A notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry.

PROPOSAL #1

Filing Before Entry of Judgment. A notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry, *if and only if the decision or order, as announced, would otherwise be appealable*.

Advantages:

- The rule would be clear and its application consistent.
- It would clearly indicate that the "cumulative finality" rule no longer applies.

Disadvantages:

- The rule would be narrower than any current construction of Rule 4(a)(2), and would be harsh for unpracticed litigants.
- Particularly in complex litigation, parties may often find it difficult to determine and to track which orders and decisions are appealable. This rule would eliminate the safety nets courts have created to address this concern through Rule 4(a)(2).

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denying a motion for reconsideration." *Id.* at *1. The case, however, did not end until August 2009 when the district court dismissed Hafed's complaint. *See id.*

It might have been possible for appellate jurisdiction over the orders concerning injunctive relief to rest on 28 U.S.C. § 1292(a)(1). Moreover, the fourth of the orders at issue in the interlocutory appeal denied Hafed's motion to restore certain previously withdrawn motions, and at least some of those motions also appear to have sought injunctive relief.

However, the court of appeals made no mention of Section 1292 when addressing its jurisdiction over Hafed's appeal from the February 2009 order. Rather, the court of appeals held that the February 2009 notice of appeal related forward to the August 2009 dismissal of the case: "Although this appeal is from a non-final order; this appeal ripened once the district court entered its final ruling which dismissed appellant's first amended complaint." *Hafed*, 2011 WL 338417, at *6. This application of relation forward does not seem to me to fit any of the well-established categories discussed in the text.

PROPOSAL #2

Filing Before Entry of Judgment. A notice of appeal filed after the court announces a decision or order, *including a decision or order as to one or more, but fewer than all, claims or parties*—but before the entry of *an appealable* judgment or order—is treated as filed on the date of and after the entry.

Advantages:

- The rule would be clearer and would resolve the issue in *CHF Industries*.
- It would provide a safety net for some litigants.

Disadvantages:

- The rule might encourage the filing of numerous premature notices of appeal. "Claims" is broad and would be difficult to define more narrowly.
- It would not necessarily resolve all of the other current circuit splits.

PROPOSAL #3

Filing Before Entry of Judgment. A notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry, *including when a notice is filed after entry of a decision or order disposing of all claims as to a particular party but before the district court enters a final judgment under Federal Rule of Civil Procedure 54(b) or otherwise.*

Advantages:

- The rule would clearly resolve one of the circuit splits in favor of the majority position.
- For a party who no longer has any live claims before the court, the rule would relieve the obligation to monitor the docket actively.

Disadvantages:

- The rule would not address several other issues that have divided the courts of appeals.
- Since all parties already receive notification of a final order, the change may solve a largely illusory problem.

PROPOSAL #4

Filing Before Entry of Judgment. A notice of appeal filed after the court announces a decision or order—but before the entry of *an appealable* judgment or order—is treated as filed on the date of and after the entry, *including when a notice is filed*

(A) *after the district court announces a decision or order but before the parties submit proposed findings of fact;*

(B) *after a determination of liability but before a determination of damages, interest, etc.;*

(C) *after the district court announces a contingent decision or order, provided that the contingent event occurs; or*

(D) *after the district court announces a decision or order as to one or more, but not all, claims or parties but before the district court enters a final judgment under Federal Rule of Civil Procedure 54(b) or otherwise.*

Advantages:

- The rule would clearly address issues that have divided the courts of appeals in favor of the majority position on each issue.

Disadvantages:

- If the list is treated as non-exhaustive, then it does nothing to foreclose future issues.
- If it is treated as exhaustive (which could be made explicit), then it may fail to capture all the right scenarios.
- The rule may become prescriptive—encouraging parties to file early and often—when it is meant only to provide a safety net.

TAB-VI-F

MEMORANDUM

DATE: March 11, 2011

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," which 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*. The Committee discussed *Snyder* and Rule 39 at its fall 2010 meeting, and asked Marie Leary of the Federal Judicial Center to research the typical amount of appellate costs awarded under Appellate Rule 39. That research should be available by the time of the spring meeting. In the meantime, this memo briefly recapitulates the developments to date.

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, and 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."[1]

Earlier this month, the Supreme Court affirmed in *Snyder* by a vote of eight to one, holding that the defendants' picketing activities were protected by the First Amendment. *See Snyder v. Phelps*, 2011 WL 709517, at *3 (U.S. March 2, 2011). The opinions in *Snyder* make no mention of costs. It would appear that the affirmance leaves the Fourth Circuit's award of costs undisturbed.[2]

As noted in my September 2010 memo, Appellate 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 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. My survey of caselaw available on Westlaw supports the view 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. Marie Leary's research will provide valuable insights into the size of cost awards under Rule 39.

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[1] 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."

[2] Under Supreme Court Rule 43, Mr. Snyder will also be presumptively liable for costs in the Supreme Court unless the Court otherwise orders; the Court's determination of that issue will presumably become apparent when it sends to the Fourth Circuit Clerk a certified copy of the opinion and judgment.

TAB-VI-G

MEMORANDUM

DATE: March 11, 2011

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 10-AP-E

At its fall 2010 meeting, the Committee discussed Howard Bashman's suggestion that the Committee consider issues raised by *Vanderwerf v. SmithKline Beecham Corp.*, 603 F.3d 842 (10th Cir. 2010), in which the majority held that the withdrawal of a Civil Rule 59(e) motion deprived that motion of tolling effect and rendered the movant's appeal untimely.[1]

No consensus emerged, at the fall 2010 meeting, in favor of a rulemaking response to *Vanderwerf*. Members did express interest in considering further the situation faced by a non-movant who has relied on the tolling effect of a post-judgment motion that is subsequently withdrawn. One might question whether the *Vanderwerf* holding extends to cases in which the movant and the appellant are different parties. In distinguishing an unpublished Sixth Circuit decision that construed a withdrawn motion as denied on the date of withdrawal, the *Vanderwerf* majority stressed that in the Sixth Circuit case "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 would not seem to 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. Admittedly, 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. However, there has as yet been no decision that applies *Vanderwerf* to an appeal by a non-movant. The Committee may wish to consider whether, in the absence of such a decision, it is worthwhile to maintain this item on the student agenda.

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[1] In the interests of brevity, my September 2010 memo on *Vanderwerf* is omitted from the spring agenda materials; please let me know if you would like a copy.

TAB-VI-H

MEMORANDUM

DATE: March 11, 2011

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 10-AP-G

At the fall 2010 meeting, the Committee discussed whether it would be useful for the Appellate Rules to address the question of intervention on appeal. The discussion arose from Douglas Letter's observation 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.[1]

The Committee's discussion did not produce any suggestions for moving forward with a rulemaking proposal on this item; on the other hand, the discussion did not explicitly result in the formal removal of the item from the Committee's agenda. The Committee may wish to return to this item at the spring meeting to determine whether it should remain on the study agenda.

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[1] In the interests of brevity, my September 2010 memo on the topic of intervention on appeal is omitted from the spring agenda materials; please let me know if you would like a copy of that memo.

TAB-VII-A

MEMORANDUM

DATE: March 11, 2011

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 10-AP-I

Paul Alan Levy, an attorney at Public Citizen Litigation Group, has submitted the following inquiry:

> Has the advisory committee on appellate rules looked at the problem of redactions in appellate briefs (and Joint Appendices) that are based on consensual district court orders that allow either side to stamp discovery materials as confidential? Then the parties get up to the Court of Appeals and file heavily redacted papers without the slightest effort to justify the decision that concealment of particular items meets the high standard for non-disclosure of arguments, and factual materials, filed in support of dispositive proceedings.
>
> Two problems result -- in cases of great public importance, the ability of others to participate amicus curiae is reduced because even if the parties eventually unredact, that likely comes too late for meaningful briefing by amici in light of the actual record. And many cases no doubt slide by because nobody files a motion to unseal. It used to be we could count on the media bar to file these motions, but the media are so pressed economically they p[ic]k their shots much more carefully. Methinks we need a better system.

The issue arose most recently for Mr. Levy in connection with an appeal in the Fourth Circuit in *Rosetta Stone Ltd. v. Google Inc.* (No. 10-2007), but he characterizes the problem as more general.[1]

This memo very briefly surveys existing local circuit provisions concerning the treatment on appeal of materials sealed in the court below. The survey focuses on provisions that would be relevant to a would-be amicus seeking access to unredacted briefs for the purposes of drafting an amicus submission. For an excellent general overview of common law and constitutional doctrines concerning the public's right of access to judicial records and proceedings, see ROBERT

[1] I enclose a copy of Mr. Levy's email.

TIMOTHY REAGAN, SEALING COURT RECORDS AND PROCEEDINGS: A POCKET GUIDE 2-5 (Federal Judicial Center 2010).

Though all circuits have one or more local provisions dealing with sealed materials, not all circuits specify whether materials sealed below presumptively remain sealed on appeal. Seven circuits have provisions that state or imply (with varying degrees of explicitness) that materials sealed below presumptively remain sealed on appeal.[2] However, two of those seven

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[2] Those provisions are as follows:

D.C. Circuit Rule 47.1(a) ("Any portion of the record that was placed under seal in the district court or before an agency remains under seal in this court unless otherwise ordered."); *see also* D.C. Circuit Handbook III.K.

First Circuit Rule 11.0(c)(1) ("Motions, briefs, transcripts, and other materials which were filed with the district court or agency under seal and which constitute part of the record transmitted to the court of appeals shall be clearly labeled as sealed when transmitted to the court of appeals and will remain under seal until further order of court.").

Fourth Circuit Rule 25(c)(1) ("At the time of filing any appendix, brief, motion, or other document containing or otherwise disclosing materials held under seal by another court or agency, counsel or a pro se party shall file a certificate of confidentiality. (A) Record material held under seal by another court or agency remains subject to that seal on appeal unless modified or amended by the Court of Appeals....").

Sixth Circuit Rule 25(j)(2) ("Documents filed under seal in the court from which an appeal is taken shall continue to be filed under seal on appeal to this court."); Sixth Circuit IOP 11(d) ("Where a record has been transmitted to this court which has been sealed, in whole or in part, by order or other direction of the district court, this court will accord the record the same confidential treatment during the pendency of the appeal. The sealed item(s) will be unsealed and made a part of the public record only upon the order of the district court or this court."). *See also* Sixth Circuit Rule 30(f)(5) (regarding contents of appendix).

Tenth Circuit Rule 11.3(D) ("(1) When materials sealed by district court order are sent as part of the record, the district clerk must: (a) separate the sealed materials from other portions of the record .... (2) A party who needs to view a sealed document must file a motion giving the reasons why access is required.").

The least explicit of these provisions are **Second Circuit** Rule 25.1(a)(1)(E) ("'Sealed document' means all or any portion of a document placed under seal by order of a district court or an agency or by order of this court upon the filing of a motion.") and **Ninth Circuit** Rule 27-13(b) ("If the filing of any specific document or part of a document under seal is required by statute or a protective order entered below, the filing party shall file the materials or affected

circuits – the First and the Sixth – also provide that a party wishing to file a sealed brief must move for leave to do so.[3]

Two circuits take a different approach: When records have been sealed below, these circuits maintain the seal only for a limited period to afford an opportunity for a party to move in the court of appeals to seal the materials. If no such motion is made or granted, the materials are not sealed on appeal. The Seventh Circuit takes this approach in all cases, except where a statute or procedural rule provides otherwise.[4] The Third Circuit takes this approach in appeals in civil

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parts under seal together with an unsealed and separately captioned notification setting forth the reasons the sealing is required.").

[3] *See* First Circuit Rule 11.0(c)(2) ("In order to seal in the court of appeals materials not already sealed in the district court or agency (e.g., a brief or unsealed portion of the record), a motion to seal must be filed in paper form in the court of appeals; parties cannot seal otherwise public documents merely by agreement or by labeling them 'sealed.'"); First Circuit Rule 28.1 ("Briefs filed with the court of appeals are a matter of public record. In order to have a brief sealed, counsel must file a specific and timely motion...."); Sixth Circuit Rule 28(g) ("Briefs filed with this court are a matter of public record. If counsel finds it necessary to refer in a brief to information that has been placed under seal, counsel should not assume that the brief itself also will be placed under seal. In order to have all or part of a brief sealed, counsel must file a specific and timely motion seeking such relief."). *See also* First Circuit Rule 30.0(g) ("If counsel conclude that it is necessary to include sealed material in appendix form, then, in order to maintain the confidentiality of materials filed in the district court or agency under seal, counsel must designate the sealed material for inclusion in a supplemental appendix to be filed separately from the regular appendix and must file a specific and timely motion in compliance with Local Rules 11.0(c)(2), 11.0(c)(3), and 11.0(d) asking the court to seal the supplemental appendix.").

[4] Seventh Circuit IOP 10 provides: "(a) Requirement of Judicial Approval. Except to the extent portions of the record are required to be sealed by statute (e.g., 18 U.S.C. §3509(d)) or a rule of procedure (e.g., Fed. R. Crim. P. 6(e), Circuit Rule 26.1(b)), every document filed in or by this court (whether or not the document was sealed in the district court) is in the public record unless a judge of this court orders it to be sealed. (b) Delay in Disclosure. Documents sealed in the district court will be maintained under seal in this court for 14 days, to afford time to request the approval required by section (a) of this procedure."

cases,[5] and also provides that a litigant must move for leave to file a sealed brief.[6]

Mr. Levy did not specify how he would suggest amending the Appellate Rules to address the issue that he identifies; he stated that if the Committee were inclined to consider the matter further, he would write at greater length. The approach taken by the Seventh Circuit and (in civil cases) by the Third Circuit would seem to address his concern by requiring parties to affirmatively seek the continued sealing in the court of appeals of matters that were sealed below. The requirement in the First and Sixth Circuits that a party seek leave in order to file a brief under seal would also seem to address his concern. Other measures that might address his concern could include providing for extensions of the time to file an amicus brief in instances where there is a delay in unsealing a party's brief. Each of these measures would carry possible costs as well as benefits, and it is not surprising to see some degree of inter-circuit variation in the treatment of sealed records.

The Committee may wish to consider both whether Mr. Levy's suggestion warrants further inquiry and, if so, whether it would be useful to coordinate the Committee's inquiries with the Civil Rules Committee. The Civil Rules Committee possesses a great deal of relevant expertise, arising in part from its in-depth study of Rule 26 and protective orders.

Encl.

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[5] *See* Third Circuit Local Appellate Rule 106.1(c)(2) ("When the district court impounds part or all of the documents in a civil case, they will remain under seal in this court for 30 days after the filing of the notice of appeal to give counsel an opportunity to file a motion to continue the impoundment, setting forth the reasons therefor."). *Compare* Third Circuit Local Appellate Rule 30.3(b) ("Records sealed in the district court and not unsealed by order of the court must be not be included in the paper appendix.").

[6] *See* Third Circuit Local Appellate Rule 106.1(a) ("If a party believes a portion of a brief or other document merits treatment under seal, the party must file a motion setting forth with particularity the reasons why sealing is deemed necessary.").

From: Paul Levy [mailto:plevy@citizen.org]
Sent: Tuesday, November 30, 2010 11:36 AM
To: Catherine T Struve
Subject: Suggested topic for the Advisory Committee of Appellate Rules

Has the advisory committee on appellate rules looked at the problem of redactions in appellate briefs (and Joint Appendices) that are based on consensual district court orders that allow either side to stamp discovery materials as confidential? Then the parties get up to the Court of Appeals and file heavily redacted papers without the slightest effort to justify the decision that concealment of particular items meets the high standard for non-disclosure of arguments, and factual materials, filed in support of dispositive proceedings.

Two problems result -- in cases of great public importance, the ability of others to participate amicus curiae is reduced because even if the parties eventually unredact, that likely comes too late for meaningful briefing by amici in light of the actual record. And many cases no doubt slide by because nobody files a motion to unseal. It used to be we could count on the media bar to file these motions, but the media are so pressed economically they pcik their shots much more carefully. Methinks we need a better system.

I address that here, in the context of a particular appeal (Rosetta Stone v. Google in the Fourth Circuit), but we see the problem increasingly in our practice.

http://pubcit.typepad.com/clpblog/2010/11/continuing-issues-of-redactions-of-the-judicial-records-in-the-rosetta-stone-trademark-appeal.html

We may well intervene in this case but again, the problem strikes me as more general.

Paul Alan Levy
Public Citizen Litigation Group
1600 - 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

TAB-VII-B

MEMORANDUM

DATE: March 11, 2011

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 11-AP-[A]

R. Shawn Gunnarson and Alexander Dushku, shareholders in Kirton & McConkie, have proposed that Appellate Rule 32(a)(7)(B)(iii) be amended to "provide that the statement of interest by an amicus curiae, required by Rule 29(c)(4), is not included in the word count for purposes of the type-volume limitation of Rule 32(a)(7)(B)."[1] They argue that amici's statements of interest are more similar to items already excluded from Rule 32(a)(7)(B)'s limits than to other items that must be counted under those limits. They report that counting the statement of interest for purposes of Rule 32(a)(7)(B)'s limits is burdensome when a brief is filed by a large consortium of amici. And they state that the interpretations of the current Rule by clerk's offices vary from circuit to circuit.

Part I of this memo assesses the arguments made by Gunnarson and Dushku, and concludes that their arguments are strong ones. However, Part I notes that the change they propose could carry a downside: Exempting the statement of interest might tempt amici to smuggle argument into the statement of interest in order to skirt length limits. Part II briefly notes that Gunnarson and Dushku are correct in stating that local circuit rules, by and large, do not address the question. Part III concludes by suggesting that if anything, a simpler case might be made for excluding the new authorship-and-funding disclosure requirement from the length limits.

I. Assessing the argument for excluding the statement of interest from the length limit

The problem identified by Gunnarson and Dushku is relatively new: The page limit for amicus briefs and the requirement of a statement of interest (now described in Rule 29(c)(4)) were both added to Rule 29 in 1998. Prior to that, Rule 29 imposed neither a disclosure requirement nor a page limit.[2]

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[1] A copy of their letter is enclosed.

[2] The 1998 amendments to Rule 29 also subjected amici to the corporate disclosure requirement set by Rule 26.1, but that did not affect calculations of length because corporate

The list of exclusions from the length limit – now contained in Rule 32(a)(7) – has always appeared to target items that are non-discretionary and unlikely to contain argument. From 1968 to 1989, the list (then set in Rule 28(g)) excluded "pages containing the table of contents, tables of citations and any addendum containing statutes, rules, regulations, etc." The list was augmented by the addition in 1989 of the corporate disclosure statement and in 1994 by the addition of the proof of service. In 1998 the list was moved to its current place (in Rule 32(a)(7)(B)(iii)); it was revised to refer to "certificates of counsel" (which presumably includes both proofs of service and certificates of compliance with Rule 32(a)); and it was augmented by the addition of statements with respect to oral argument. The current list of exclusions reads:

> The corporate disclosure statement, table of contents, table of citations, statement with respect to oral argument, any addendum containing statutes, rules or regulations, and any certificates of counsel do not count toward the limitation.

In this list of exclusions, the only item that might contain argument is the statement with respect to oral argument. Rule 34(a)(1) provides that "[a]ny party may file, or a court may require by local rule, a statement explaining why oral argument should, or need not, be permitted." It is possible that such a statement might include some argument concerning the legal issues in the case. Apart from that, however, the other items on the list will not enable a party to lengthen its argument outside the strictures of the length limits.

The statement of interest required by Rule 29(a)(4) has three components, two of which seem clearly to resemble the items already in the list of exclusions. A statement of "the identity of the amicus curiae" and a statement of "the source of [the amicus's] authority to file" are both mechanical exercises; excluding those items from the length limit would provide no opportunity for clever amici to expand their arguments beyond the permitted length. However, I am less certain that this is the case with the third component – the statement of the amicus's "interest in the case." In many instances, amicus briefs appear to state this interest very concisely (as, indeed the Rule directs). But in others, the explanation of the amicus's interest in the case appears to verge on argument.

To get a sense of the range of lengths of statements of interest,[3] I searched the CTA-BRIEFS database on Westlaw for the terms [AMICUS /S INTEREST /S AUTHORITY]. I skimmed the results to look for statements of interest in amicus briefs; I excluded those in motions, and included only those in briefs. I copied each statement of interest into a Word document and counted the words using Word's word-counting function. Some recent briefs consolidated the statement of interest with the authorship-and-funding disclosure; in those briefs, I did not count words that went only to authorship and funding. I stopped after my sample size

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disclosure statements are excluded from those calculations.

[3] For the sake of brevity, I will use "statement of interest" to encompass all the components required by Rule 29(c)(4), including the amicus's identity and its authority to file.

reached 30. Thus, the sample is a small one, but it includes briefs filed in a range of different circuits.

I enclose a spreadsheet showing the results of the analysis. Briefs were filed by widely varying numbers of amici: The median number of amici on a brief was one, but the numbers ranged from 1 to 20 and the average number of amici on a single brief was 2.73 (with a standard deviation of 3.88). There was a wide variation in word length: The median number of words in the statement of interest was 318.5,[4] but the number of words ranged from 85 to 2,313. The average number of words in the statement of interest was 409.1 (with a standard deviation of 406.2). The numbers also vary widely if one looks at the number of words *per amicus* in each statement of interest: The median number of words per amicus was 200.75, but the range ran from 31.17 words per amicus to 478 words per amicus. The average number of words per amicus was 217.14 (with a standard deviation of 117.73).

In other words, many briefs in the sample kept their statements relatively concise, and in the longer statements of interest much of the length can be explained by the number of amici on the brief. To that extent, Gunnarson and Dushku make a persuasive argument that including the statement of interest in the length calculation disadvantages amicus briefs joined by multiple amici. *Cf.* 1994 Committee Note to Appellate Rule 28(g) ("The amendment adds proof of service to the list of items in a brief that do not count .... When a number of parties must be served, the listing of addresses may run to several pages and those pages should not count for purposes of the page limitation.").

However, not all the length in the statements within the sample can be explained in this way. In some instances, the added length resulted from the inclusion of what could be viewed as argument on the merits. As examples, I reproduce in the enclosure to this memo the statements of interest from the three briefs, within the sample, that had the greatest number of words per amicus. The existence of argument within the statement of interest suggests that excluding the statement of interest from the length limit might offer some amici an opportunity to smuggle in extra argument beyond what would otherwise be allowed. I wonder whether circuit clerks would welcome the task of policing whether a statement of interest was sufficiently "concise."

II. Local circuit rules tend not to address the issue

Gunnarson and Dushku do not discuss in any detail whether circuits have local rules that may bear on the question that they raise. Rather, they state: "In our 30 years' combined experience before the U.S. Courts of Appeals, it is the interpretation of individual clerks' offices on this point, not the demands of local rules, that produces contradictory results when filing in

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[4] Evidently the median includes a fraction because the sample included an even number of results; the program appears to have split the difference between 311 and 326 (the two middle numbers).

different circuits." A quick (and perhaps incomplete) survey of local rules from different circuits indicates that most circuits' local rules do not address the question.[5] The Third Circuit does have a provision that appears intended to exclude the statement of interest from the word count.[6]

III. Conclusion

Gunnarson and Dushku identify an issue that is well worth discussing. Failure to exclude the statement of interest for purposes of the length limit does create a difficulty in the case of briefs in which large numbers of entities join as amici. On the other hand, excluding the statement of interest from the length limit might tempt unscrupulous or undisciplined amici to include argument in the statement under the guise of explaining the amicus's "interest."

If anything, a simpler case could be made for excluding Rule 29(c)(5)'s new authorship-and-funding disclosure statement for purposes of the length limit. That disclosure is unlikely to be long in any brief, so perhaps there is little need for the exclusion. But the authorship-and-funding disclosure seems more similar to the types of non-discretionary, non-argumentative items that tend to be on the list of exclusions.

Encls.

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[5] Eleventh Circuit Rule 26.1-1 requires briefs (including amicus briefs) to include a certificate "which contains a complete list of the trial judge(s), all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of the particular case or appeal, including subsidiaries, conglomerates, affiliates and parent corporations, including any publicly held corporation that owns 10% or more of the party's stock, and other identifiable legal entities related to a party," to the extent that the entities on the list have not already been listed in previously-filed briefs. Eleventh Circuit Rule 32-4 provides that this certificate "do[es] not count towards page limitations or type-volume limitations."

Federal Circuit Rule 47.4(a) requires attorneys to file a "certificate of interest" – used to determine recusals – that states whom the attorney represents (and any real parties in interest) and identifies all firms and lawyers who have appeared or will appear for the party. Federal Circuit Rule 32(b)(1) excludes the certificate of interest from Rule 32(a)(7)(B)'s type-volume limitation.

Neither of these certificates appears to be the same as the statement of interest required by Rule 29(c)(4).

[6] Third Circuit Local Appellate Rule 29.1(b), adopted in 2008, provides: "The statement required by FRAP 29(c)(3) does not count toward the word limitations of FRAP 32(a)(7)." Presumably the Third Circuit will wish to amend its cross-reference now that Rule 29(c)(3) has become Rule 29(c)(4).

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February 17, 2011

10-AP-C

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 Sir/Madam:

We are writing to propose an amendment to Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure. The purpose of the amendment would be to clarify the permissible length of a brief *amicus curiae*. In particular, it would provide that the statement of interest by an *amicus* curiae, required by Rule 29(c)(4), is not included in the word count for purposes of the type-volume limitation of Rule 32(a)(7)(B). To make that clarification, Rule 32(a)(7)(B)(iii) should be amended as follows:

> Headings, footnotes, and quotations count toward the word and line limitations. The corporate disclosure statement, table of contents, table of citations, statement with respect to oral argument, statement of interest by an amicus curiae, any addendum containing statutes, rules or regulations, and any certificates of counsel do not count toward the limitation.

Fed. R. App. P. 32(a)(7)(B)(iii) (proposed amendment in underscored text).

Three reasons support amending the rule as proposed.

First, as a matter of textual analysis, an *amicus* statement of interest more closely resembles the corporate disclosure statement or statement with respect to oral argument already excluded from the word count in Rule 32(a)(7)(B)(iii) than it does the headings and quotations of a brief's argument. A statement of interest consists of "a *concise* statement."

For that reason, there is little danger that excluding the statement from the word count will invite counsel to include legal argument in it improperly. Indeed, we presume that an *amicus* brief whose statement of interest includes legal argument should be stricken as nonconforming for not being "concise."

Second, it will clarify a point of uncertainty on which individual circuits vary. Rule 29(c)(4) requires an *amicus* brief to include a statement of interest, but Rule 32(a)(7)(B)(iii) does not say whether that statement should be included within the type-volume limitation. In our 30 years' combined experience before the U.S. Courts of Appeals, it is the interpretation of individual clerks' offices on this point, not the demands of local rules, that produces contradictory results when filing in different circuits. The proposed amendment would secure the uniformity evidently intended by those who adopted Rule 32's type-volume limitation.

Third, as a practical matter, counting an *amicus* statement of interest within the type-volume limitation has the perverse effect of discouraging exactly those *amicus* briefs that would be of most assistance to the court. Counting the length of a statement of interest toward the total number of words permitted in a brief effectively subtracts an equal number of words from the legal argument. Although that subtraction is insubstantial in a brief filed by one or two *amici curiae*, it may amount to pages of text in an *amicus* brief filed by several organizations. Such briefs, joined by many groups, tend to bring to the court those considerations that do not merely echo the parties' arguments and to reduce the number of *amicus* briefs filed in a single case. Yet such briefs bear the heaviest burden if an individual clerk's office interprets Rule 32(a)(7)(B)(iii) to include statements of interest in the word count permitted by Rule 32(a)(7)(B). Adopting the proposed amendment would remove this burden and, with it, any impediment to furnishing the courts with the most useful *amicus* briefs.

Thank you for considering our request. Please contact R. Shawn Gunnarson at (801) 426-2125 or sgunnarson@kmclaw.com if you have any questions or concerns.

Sincerely,

R. Shawn Gunnarson

R. Shawn Gunnarson
Alexander Dushku
Kirton & McConkie

Westlaw citation	Number of amici on brief	Number of words	Words / amici
2011 WL 287007	1	220	220
2010 WL 5778048	3	345	115
2010 WL 5778047	2	182	91
2010 WL 5672712	1	140	140
2010 WL 5644696	1	478	478
2010 WL 5777059	1	424	424
2010 WL 5808756	10	710	71
2010 WL 4717483	3	453	151
2010 WL 5580716	2	261	130.5
2010 WL 4317119	20	2,313	115.65
2010 WL 4853319	2	616	308
2010 WL 4853321	1	154	154
2010 WL 4622573	6	187	31.16667

Westlaw citation	Number of amici on brief	Number of words	Words / amici
2010 WL 4717449	7	361	51.57143
2010 WL 5145927	2	628	314
2010 WL 5622173	1	248	248
2010 WL 4163578	1	163	163
2010 WL 5650006	1	311	311
2010 WL 5162523	4	943	235.75
2010 WL 4084581	1	190	190
2010 WL 4720744	1	234	234
2010 WL 3949911	2	326	163
2010 WL 5269789	1	266	266
2010 WL 5672663	2	423	211.5
2010 WL 3948648	1	384	384
2010 WL 3965877	1	175	175

Westlaw citation	Number of amici on brief	Number of words	Words / amici
2010 WL 4641938	1	267	267
2010 WL 4057999	1	85	85
2010 WL 3842742	1	373	373
2010 WL 4851678	1	413	413
	2.733333	409.1	217.1379 Mean
	3.87684	406.1986	117.7273 Standard deviation
	1	318.5	200.75 Median
	20	2313	478 Largest number
	1	85	31.16667 Smallest number

The statements of interest with the greatest number of words per amicus:

2010 WL 5644696:

STATEMENT OF IDENTITY, INTEREST AND AUTHORITY TO FILE OF AMICUS CURIAE

I. IDENTITY OF AMICUS CURIAE AND ITS MEMBERSHIP

The American Short Line and Regional Railroad Association ('ASLRRA') is a tax exempt trade association operating under § 501(c)(6) of the Internal Revenue Code. 26 U.S.C. § 501(c)(6). Its membership includes 458 Class II and Class III railroads located throughout the United States and almost 900 vendor organizations who supply goods and services to the small railroad industry. Its members are subject to and will be significantly impacted by the Federal Railroad Administration rules which are the subject of the present action. ASLRRA files its brief as amicus curiae under FRAP 29(a) with the consent of both Petitioner and Respondent.

II. SMALL RAILROADS PLAY AN IMPORTANT ROLE IN RAIL TRANSPORTATION AND WILL BE HURT BY THE COST OF IMPLEMENTING THE FRA'S RULES AT ISSUE HERE.

Class II railroads ('regional railroads' are defined by the Surface Transportation Board as freight carriers with revenues between $32.1 million and $401.4 million. Class III Railroads ('short lines') are those carriers with revenues of $32.1 million or less.[FN1] Typically Class III short lines operate over fewer than 100 miles of right of way. Class II regional railroads may operate in multiple states over hundreds of miles of right of way. Collectively they comprise the 'small railroad' industry.

FN1. after applying the railroad revenue deflator formula. 49 C.F.R. § 120, Subpart A, General Instructions 1-1 and Note A.

These small freight rail carriers play an important role in the nation's transportation network. They provide rail service to shippers on low density lines, often in remote rural locations, which cannot be operated efficiently or profitably by the seven huge class I railroads in the United States. Short lines and regional railroads operate approximately 51,500 miles of track, which represent 32.4% of the total national rail network, and they employ over 19,000 workers. Short Line and Regional Facts and Figures, 2009 Edition. In 2008, the latest year for which data is available, Class II and Class III railroads handled over 12 million carloads of freight. Id.

The small railroad industry is diverse, with 'mom and pop' carriers at the bottom end of the revenue scale and publicly held holding companies who operate dozens of small railroads at the other end. Nevertheless, even the largest of them are minute in comparison with the multibillion dollar revenue class I railroads, and consequently their financial structure is much more fragile. Most do not have access to public financial

markets and must rely on bank lending and state and local government grants to maintain their right of way and related infrastructure. For that reason unfunded mandates of statutory and regulatory origin such as the Positive Train Control ('PTC') requirements contained in the Rail Safety Improvement Act of 2008 ('RSIA') always represent a magnified threat to the existence of these small businesses.

2010 WL 5777059:

I. IDENTITY, INTEREST AND AUTHORITY OF AMICUS CURIAE

The National Association of Retail Collection Attorneys ("NARCA") is a nationwide, not-for-profit trade association comprised of attorneys and law firms engaged in the practice of debt collection law. NARCA members include over 700 law firms located in all fifty states, all of whom must meet association standards designed to ensure experience and professionalism. Members are also guided by NARCA's code of ethics, which imposes an obligation of self-discipline beyond the requirements of state laws and regulations that govern attorneys.

NARCA members are regularly engaged by creditors to lawfully collect delinquent consumer debts, and thus must interpret and comply with federal and state laws governing debt collection, including the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, et seq. (the "FDCPA" or the "Act"). As the only national trade association dedicated solely to the needs of consumer collection attorneys, NARCA has a significant interest in ensuring that the FDCPA is interpreted in a manner that allows collection attorneys to discharge their ethical duty to zealously and lawfully advance their client's legitimate interests.[FN1]

FN1. NARCA has previously participated as amicus curiae in other cases involving the interpretation of the FDCPA. See, e.g., Jerman v. Carlisle, 130 S. Ct. 1605 (2010); Heintz v. Jenkins, 514 U.S. 291 (1995); Ellis v. Solomon & Solomon, P.C, 591 F.3d 130 (2d Cir. 2010); Guerrero v. RJM Acquisitions LLC, 499 F.3d 926 (9th Cir. 2007).

NARCA respectfully submits that the district court erred, and that its ruling, if adopted, would be extremely disruptive to the relationships between collection attorneys and their clients throughout this circuit. The FDCPA prohibits attorneys from making materially false or misleading statements to consumers, but it does not regulate the way that attorneys interact with their clients. The district court incorrectly: 1) created an entirely new "attorney intent" disclosure requirement which is unsupported by the plain language of the FDCPA, 2) construed the FDCPA in a way that improperly interferes with a collection attorney's ability to practice law, and 3) unfairly penalized an attorney for sending truthful, non-threatening settlement letters to a consumer. The decision should be reversed.

NARCA also respectfully requests that the Court take this opportunity to reject the judicially-created "meaningful involvement" doctrine, adopted by certain other circuits. A collection letter may not falsely state that it is from an attorney. But there is nothing in

the plain language of the FDCPA which supports imposing a requirement upon collection attorneys to conduct some amorphous level of review of their client's files before communicating with a consumer.

2010 WL 4851678:

STATEMENT OF INTEREST OF THE AMICUS CURIAE

MPAA urges correction of a fundamental error of law in the panel's opinion ("the Opinion") that would adversely effect the businesses of the MPAA's members. MPAA is a not-for-profit trade association founded in 1922 to address issues of concern to the motion picture industry. MPAA's members produce or distribute the vast majority of the filmed entertainment in the domestic theatrical, television, and home entertainment markets, and are among the leading distributors of motion pictures internationally. Increasingly, MPAA members distribute those copyrighted works in digital form, protected by technological measures, to consumers and businesses in more formats than ever before, including on DVDs and Blu-Ray discs, and digitally through cable, satellite television, downloads and streaming. MPAA members rely heavily on the robust protections of the Digital Millennium Copyright Act ("DMCA"), 17 U.S.C. §1201, to benefit not only MPAA members' businesses, but also consumers. MPAA therefore has a strong interest in this case, which involves the scope and application of §1201.

The panel concluded that under §1201(a), "[m]erely bypassing a technological protection that restricts a user from viewing or using a work is insufficient to trigger the DMCA's anti-circumvention provision. The DMCA prohibits only forms of access that would violate or impinge on the protections that the Copyright Act otherwise affords copyright owners." Slip Op. at 6.[FN1] MPAA respectfully submits that this interpretation is inconsistent with the DMCA's plain language and legislative history, as well as with the weight of the case law, which make clear that the DMCA does prohibit circumvention for the purpose of viewing or using a copyrighted work even where circumvention does not necessarily impinge on the protections of the Copyright Act.[FN2] Because the Opinion could have a materially adverse effect on content owners, and ultimately, consumers of copyrighted works, MPAA has a strong interest in the outcome of this case. MPAA therefore submits this brief in support of Appellant MGE UPS Systems, Inc.'s Petition for Rehearing En Banc.

FN1. The panel also concluded that Appellant MGE UPS Systems, Inc. was unable to prove that cross-appellant GE/PMI "actually circumvented the technology." Slip Op. at 7. MPAA takes no position on the panel's ruling on that issue.

FN2. For example, the Netflix service allows consumers to stream movies to their computers or televisions in exchange for a fee. A person who circumvents Netflix's access controls to view movies for free violates the DMCA even if he or she does not (or cannot) copy the movie.

TAB-VIII-A

MEMORANDUM

DATE: March 8, 2011

TO: Advisory Committees on Bankruptcy and Appellate Rules

FROM: S. Elizabeth Gibson, Reporter
Catherine T. Struve, Reporter

RE: Part VIII Revision Project and Related Appellate Rules Amendments

I. Introduction and Overview

This memorandum is prepared by the reporters in preparation for the joint meeting of the two Advisory Committees on April 7, 2011. The purpose of the meeting is to provide an opportunity for both Committees to discuss the proposed revision of the bankruptcy appellate rules – Part VIII of the Bankruptcy Rules – and related proposed amendments to Appellate Rule 6, which governs bankruptcy appeals in the court of appeals.

The discussion will largely focus on the aspects of the Part VIII draft that directly impact the Appellate Rules. For the most part, the Part VIII rules apply to appeals from bankruptcy courts to district courts and bankruptcy appellate panels under 28 U.S.C. § 158(a) and (b). To that extent, they do not directly affect practice in the courts of appeals and are likely of lesser interest to the Appellate Rules Committee. Several Part VIII rules do, however, govern or affect appeals of bankruptcy proceedings to courts of appeals. These rules include ones governing a direct appeal to the court of appeals under 28 U.S.C. § 158(d)(2) [Rule 8006]; indicative rulings [Rule 8008]; designation and preparation of the record on appeal, including the handling of documents under seal [Rule 8009]; and motions for rehearing in the district court or bankruptcy appellate panel [Rule 8023].[1] The Committees' discussion of these rules and related Appellate Rules will help to ensure that the two sets of rules address all necessary procedural details and do so without redundancy or inconsistency.

Another aspect of the Part VIII draft that the Committees may want to discuss is the effort to take existing Appellate Rules that assume the use and physical transmittal of paper documents and to draft Part VIII rules that incorporate electronic filing and transmittal technology. As

[1] Except as otherwise indicated, references in this memorandum to Part VIII rules use the rule numbers designated in the current working draft of the revision. For many rules these section numbers differ from the existing rule numbers in Part VIII, because one of the purposes of the proposed revision is to follow more closely the organization of the Appellate Rules.

discussed below, one of the goals of the Part VIII revision project is to modernize the bankruptcy appellate rules to take advantage of existing technology – such as the electronic filing and storage of documents – while also allowing for future technological advancements. Because decisions made in revising these Bankruptcy Rules may pave the way for a similar recognition of electronic technology in other federal rules, including the Appellate Rules, the Bankruptcy Rules Committee hopes to obtain the input of members of the Appellate Rules Committee on this aspect of the Part VIII draft.

Finally, the joint meeting will provide an opportunity for the Bankruptcy Rules Committee to obtain the benefit of the thinking underlying the Appellate Rules Committee's drafting and revision of some of the rules on which the draft Part VIII rules are based.

This memorandum is intended to provide necessary background information for both Committees in preparation for these discussions. Part II provides information about the origins, development, and current status of the Part VIII revision project. Parts III and IV discuss proposed amendments to Appellate Rule 6 that are currently under consideration by the Appellate Rules Committee. Then in Part V the memo discusses a series of issues that have arisen in the initial drafting of the Part VIII revision and the amendments to Appellate Rule 6. A draft of proposed amendments to Appellate Rule 6 and the current working draft of the Part VIII revision are included in the agenda materials following this memo.

II. Background Information on the Part VIII Revision Project

At the spring 2008 meeting of the Bankruptcy Rules Committee, then-member Eric Brunstad, an experienced bankruptcy appellate practitioner, proposed that the Committee undertake a thorough revision of Part VIII of the Bankruptcy Rules to bring them into closer alignment with the Appellate Rules. The Chair referred the matter to the Subcommittee on Privacy, Public Access, and Appeals for further consideration. Under the Subcommittee's supervision, Mr. Brunstad produced a draft of a complete revision of Part VIII , along with annotations indicating the source of each rule and the differences from the existing Part VIII rules. This draft was presented to the Committee at its fall 2008 meeting, and it approved proceeding further with the project.

Because of the relatively specialized nature of bankruptcy appeals, the Bankruptcy Rules Committee held two special subcommittee meetings with judges, lawyers, professors, and court personnel who have experience with bankruptcy appeals and the current Part VIII rules. The purpose of the meetings was to provide a forum for discussion of the current operation of the appellate rules and the desirability of revising Part VIII, as well as to obtain specific feedback on the draft revision.

The meetings were held in March 2009 in San Diego and in September 2009 in Boston. Participants at both meetings expressed support for a revision of Part VIII, including

incorporating into the rules recognition of modern technology for the handling of court papers. Further revisions of the initial draft were made in response to the comments received at the meetings.

At the spring 2010 Bankruptcy Rules Committee meeting, the Committee formally approved the following goals for the project:

- Make the bankruptcy appellate rules easier to read and understand by adopting the clearer and more accessible style of the Federal Rules of Appellate Procedure.
- Incorporate into the Part VIII rules useful Appellate Rule provisions that currently are unavailable for bankruptcy appeals.
- Retain distinctive features of the Part VIII rules that address unique aspects of bankruptcy appeals or that have proven to be useful in that context.
- Clarify existing Part VIII rules that have caused uncertainty for courts or practitioners or that have produced differing judicial interpretations.
- Modernize the Part VIII rules to take advantage of existing technology – such as the electronic filing and storage of documents – while also allowing for future technological advancements.

Since last spring's meeting, the reporter, with valuable input from the Subcommittee and Professor Struve, has revised the earlier draft of the Part VIII revision and drafted Committee Notes for each rule. This current working draft will be the subject of the discussion at the joint meeting of the Committees. Following this meeting, the Subcommittee anticipates engaging in a careful editing, review, and style process that will include incorporation of changes suggested by the two Committees. The Bankruptcy Rules Committee will then carefully review the draft with the aim of presenting it to the Standing Committee for approval of its publication for comment in August 2012.

III. 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 possible changes that could be made to Rule 6(b), which governs bankruptcy appeals from district courts and bankruptcy appellate panels to courts of appeals.

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.[2] The list of exclusions has 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.[3]

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. It seems reasonable to assume 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. Accordingly, Rule 6(b)(1)(A)'s reference to Appellate Rule 12(b) should become a reference to Appellate Rule 12(c).

B. Amending Appellate Rule 6(b)(2)(A) to track Appellate Rule 4(a)(4)

The sketch of a possible revision of Appellate Rule 6 that is included in these materials illustrates proposed changes to subdivision (b)(2)(A) that would parallel the 2009 amendment to Appellate Rule 4(a)(4). These changes – which are discussed in Part III.B.1 below – have received support, in principle, from the Bankruptcy Rules Committee's Subcommittee on Privacy, Public Access, and Appeals. A pending proposal to further amend Rule 4(a)(4) would

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[2] Pub. L. No. 98-353, 98 Stat. 333.

[3] 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, it appears that Rule 12.1 should not be added 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.

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. The latter proposal to amend Appellate Rule 4(a)(4) has not yet taken final shape, and thus a parallel proposal to amend Appellate Rule 6(b)(2)(A) is not reflected in the proposed rule. Issues relating to that pending proposal to amend Rule 4(a)(4) are summarized in Part III.B.2 below.

1. Paralleling the 2009 amendment to Appellate 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 current 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 its fall 2008 meeting, the Appellate Rules 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 the attachment reflects the Subcommittee's guidance on the drafting of this possible amendment.

2. The pending proposal to amend Rule 4(a)(4)

As noted elsewhere in the Appellate Rules Committee's agenda book,[4] 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

[4] See the memo on Item No. 08-AP-D.

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.[5] 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 entry of any altered or amended judgment resulting from such a motion." 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.

The Appellate Rules Committee discussed the Rule 4(a)(4) proposals at its fall 2010 meeting. That discussion revealed a number of drafting issues and consideration of those issues is still ongoing. Thus, it may be premature to ask the Bankruptcy Rules Committee to consider this question at this time. But regardless of the outcome of the discussions concerning Appellate Rule 4(a)(4), the two Committees will need to coordinate their approaches to the question of tolling motions.

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). It 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.

This inconsistency is eliminated in the working draft of revised Part VIII. Proposed Rule 8023 governs motions for rehearing in bankruptcy appeals filed in the district court and BAP, thus replacing current Rule 8015. Following the example of Civil Rules 50, 52 and 59, proposed Rule 8023 does not address the question of when the appeal time re-starts after disposition of a tolling motion. Instead, it leaves the issue to be addressed by Appellate Rule 6(b)(2)(A)(i).

Despite the potential elimination of the direct conflict between the Bankruptcy and Appellate Rules on this issue, coordination should continue between the two Committees concerning the re-start of appeal time following the resolution of tolling motions. That issue also

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[5] Such time delays might arise, for example, where remittitur is ordered.

is presented in the context of an appeal from the bankruptcy court to the district court or BAP. Proposed Rule 8002(b)(1) addresses the issue of when the appeal time starts to run, and the two Committees may decide that it would be beneficial to adopt a uniform approach to this issue throughout both sets of rules.

It should also be noted that because the Part VIII project will re-number Bankruptcy Rule 8015, Appellate Rule 6's reference to Bankruptcy Rule 8015 will require revision.

IV. 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 the appendix to this memo incorporates the relevant Part VIII rules by reference 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 uncodified BAPCPA provision setting forth those interim procedures – specifies that "[a] provision of this subsection shall apply to appeals under section 158(d)(2) of title 28, United States Code, until a rule of practice and procedure relating to such provision and such appeals is promulgated or amended under chapter 131 of such title [28 U.S.C.A. § 2071 et seq.]."

Effective December 1, 2008, a new subdivision (f) was added to Bankruptcy Rule 8001 to address appeals under Section 158(d)(2). Thus, as to the matters covered in Rule 8001(f), the interim BAPCPA procedures no longer apply. Rule 8001(f) 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 current 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)."[6] Current Rule 8001(f)'s 30-day time limit for the petition for permission to appeal thus supersedes the 10-day time limit previously set in the interim statutory provision (Section 1233(b)(4)(A) of BAPCPA).[7] 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).[8] Those sections provide:

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[6] Current Rule 8001(f)(1), in turn, provides that "[a] certification of a judgment, order, or decree of a bankruptcy court to a court of appeals under 28 U.S.C. § 158(d)(2) shall not be effective until a timely appeal has been taken in the manner required by subdivisions (a) or (b) of this rule and the notice of appeal has become effective under Rule 8002." The concept of the notice of appeal becoming effective appears to refer to Rule 8002's treatment of the effect of tolling motions.

[7] 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."

[8] 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).

(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.

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 the appendix to 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).[9] 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 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

As discussed in Part III.B.2 of this memo, there is currently an inconsistency (in the context of appeals from a district court or BAP) between the Appellate Rule 6(b)(2)(A)(i) and current Bankruptcy Rule 8015 about the re-start of appeal time after the resolution of a tolling motion. Although proposed Bankruptcy Rule 8023 would eliminate that inconsistency, consideration should be given to whether a 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 proposed Bankruptcy Rule 8006 – governing the process for initiating an attempt to appeal under Section 158(d)(2) – requires the taking of "a timely appeal ... in accordance with Rule 8003 or 8004," and proposed Bankruptcy Rules 8003 and 8004 require the filing of a notice of appeal with the bankruptcy clerk "within the time allowed by Rule 8002." Proposed Bankruptcy Rule 8002(b) provides for the effect of tolling motions on the time for taking appeals from the bankruptcy court.

The process for taking a direct appeal under § 158(d)(2) requires (1) a timely appeal from

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[9] 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 the appendix to 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).

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 it seems 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 the appendix to this memo. As noted in Part III.B.2, however, the Committees may want to ensure that the provision in Bankruptcy Rule 8002(b) regarding the re-start of the appeal time is worded in the same manner as parallel provisions in the Appellate Rules.

V. Other Issues of Coordination Between the Appellate Rules and the Proposed Revision of Part VIII of the Bankruptcy Rules

A. Dealing with electronic filing and transmission

At the urging of participants at the special subcommittees meetings on a revision of Part VIII, the working draft of the revised bankruptcy appellate rules assumes as a default rule the use of electronic means of transmission of documents. Section 8001(e) defines the term "transmit" to mean "to send electronically unless the governing rules of the court permit or require mailing or other means of delivery of the document in question." This terminology is used with respect to the filing and service of briefs and other documents (Rule 8011) and the sending of the record to the appellate court (Rule 8010). In light of this reorientation to electronic transmission, references to "writings" and "copies" have been avoided. In taking this approach, the Part VIII revision would be following the path already taken by some federal courts on a local basis.

This approach of the Part VIII rules presents some challenges to the drafting of provisions relating to direct appeals from the bankruptcy court to the court of appeals. The Appellate Rules have always assumed a contrary default rule – that the record will be forwarded and filed in paper form. The sketch of Rule 6(c) included in these materials takes the default rule of electronic filing and transmission as a given, while also accommodating the use of a paper record. Proposed Rule 6(c)(2)(C) addresses 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(c)(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(c)(2)(C) defines the receipt date as the filing date. Assuming that such an approach is appropriate, it would also be a good idea to consider similar modifications to Appellate Rule 6(b)(2)(B), (C) and (D), which concern the treatment of the record on appeal from a judgment of a district court or BAP exercising appellate jurisdiction in a bankruptcy case.

On a broader level, the Bankruptcy Rules Committee recognizes that incorporating the use of electronic technology into a set of federal rules presents its own challenges. Among the issues that must be considered are the need to accommodate courts and judges who prefer to receive paper copies of documents; the application of the rules to persons who lack access to electronic technology; and the need to draft the rules in a manner that is not tied to any existing form of technology and that can accommodate further technological advancements. The joint meeting of the two Committees will provide an opportunity for discussion of whether the working draft has sufficiently met these challenges. The Bankruptcy Rules Committee will be especially interested in hearing the experiences of members of the Committees who sit on or practice before courts that have adopted rules for the electronic submission of briefs and records.

B. Dealing with stays pending direct appeals

The working draft of Part VIII uses the term "appellate court" to mean "either the district court or the BAP – whichever is the court in which the bankruptcy appeal is pending or to which the appeal will be taken." Rule 8001(d). In light of that definition, proposed Rule 8007 as currently drafted does not address the procedure for seeking a stay pending a direct appeal under Section 158(d)(2).[10] Under proposed Appellate Rule 6(c)(1)(A), Appellate Rule 8 would apply to requests for stays pending direct appeal. The procedures set out in Appellate Rule 8 and in proposed Rule 8007 are generally but not entirely similar.

One notable difference is that Appellate Rule 8(b) provides for a proceeding against a surety and provides for the enforcement of the surety's liability in the "district court." Proposed Appellate Rule 6(c)(1)(B) would define "district court" to "include[] – to the extent appropriate – a bankruptcy court or bankruptcy appellate panel." Would the translation of the surety-proceeding practice into the context of the bankruptcy court pose any jurisdictional problems? It would seem to be a practical measure, and it is consistent with the approach taken in Bankruptcy Rule 9025. That rule provides as follows:

> Whenever the Code or these rules require or permit the giving of security by a party, and security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits to the jurisdiction of the court, and liability may be determined in an adversary proceeding governed by the rules in Part VII.

A proceeding against a surety is not one of the matters expressly listed as a core proceeding under 28 U.S.C. § 157(b)(2), but that provision states that the list is not exhaustive. Perhaps it is properly considered a proceeding arising in a case under title 11 and thus a core

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[10] For a discussion of the potential importance of stays in this context, see generally Lindsey Freeman, Comment, *BAPCPA and Bankruptcy Direct Appeals: the Impact of Procedural Uncertainty on Predictable Precedent*, 159 U. PA. L. REV. 543 (2011).

proceeding. If not, would it be appropriate to adopt wholesale the procedure currently specified in Appellate Rule 8(b)? Would there be need for a consent provision in the Appellate Rules similar to Rule 9025 (or should Rule 9025 be made applicable when Appellate Rule 8(b) applies to direct bankruptcy appeals)?[11] One might argue that the jurisdictional question need not be resolved, given that proposed Appellate Rule 6(c)(1)(B)'s definition of "district court" to include bankruptcy courts applies only "to the extent appropriate." But if it is possible to clarify this jurisdictional issue, that would seem desirable.

C. Dealing with indicative rulings

Under the proposals as currently drafted, both Appellate Rule 12.1 and proposed Bankruptcy Rule 8008 would govern indicative-ruling practice in the context of direct appeals under Section 158(d)(2). Because Rule 8008 operates differently depending on whether an appeal is pending in an "appellate court" (defined in Rule 8001(d) as either the district court or bankruptcy appellate panel) or a court of appeals, the rule needs to be considered carefully to ensure that it and the Appellate Rule 12.1 work together properly when an indicative ruling is sought in the bankruptcy court while a direct appeal under § 158(d)(2) is pending in the court of appeals.

Rule 8008 is modeled on Civil Rule 62.1 and Appellate Rule 12.1. When appeals are pending in the district court or bankruptcy appellate panel, this rule governs the indicative-ruling procedure in both the bankruptcy court and the appellate court. When, however, an appeal is pending in the court of appeals under § 158(d)(2), Rule 8008 specifies only the bankruptcy court's options and the notice that must be provided to the clerk of the court of appeals.[12] Thus in this context it operates in a similar fashion to Civil Rule 62.1. The procedures applicable to the court of appeals are then specified by Appellate Rule 12.1, which would be made applicable in the case of a direct bankruptcy appeal by proposed Rule 6(c)(1).

An issue that should be considered is whether the procedures set out in Bankruptcy Rule 8008 and Appellate Rule 12.1 should also apply when an indicative ruling is sought in the bankruptcy court while a non-direct appeal is pending in the court of appeals under 28 U.S.C. § 158(d)(1). The text of Rule 8008(a) and (b) is broad enough to cover this situation, and Rule 12.1 is made applicable to such appeals by Rule 6(b)(1). If that is the correct approach, the Committee Note to Rule 8008 should be revised to reflect that it is applicable to all bankruptcy

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[11] *See* 28 U.S.C. § 157(c)(2) ("Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.").

[12] In subdivisions (a) and (b), the term "court in which the appeal is pending" is used to include the court of appeals as well as the district court or BAP.

appeals in the court of appeals.

D. Dealing with documents under seal

Proposed Bankruptcy Rule 8009(f) deals with the treatment (for purposes of the record on appeal) of documents that were filed in the bankruptcy court under seal. The Appellate Rules do not include any similar provision, but the circuits have a number of local rules that address the treatment of sealed documents. Proposed Appellate Rule 6(c), as currently drafted, would apply proposed Bankruptcy Rule 8009(f) to direct appeals under Section 158(d)(2). It is worth considering whether that is the most desirable approach.

E. Dealing with BAP local rules

Proposed Bankruptcy Rule 8027 addresses the promulgation of local rules for bankruptcy appeals in district courts and bankruptcy appellate panels. The existing provision – Rule 8018 – refers to rulemaking by circuit councils that have authorized BAPs, and it also provides that Civil Rule 83 "governs the procedure for making and amending rules to govern appeals." This wording presented two issues in revising the rule.

First, it seemed questionable that the district court's authority to promulgate local rules is the proper authority to apply to local BAP rules. Since bankruptcy appellate panels are established by the judicial council of a circuit, Appellate Rule 47 seems the more relevant authority for BAP rules. But if that conclusion is correct, that raises the second question. What is the appropriate rulemaking authority for BAP local rules – the circuit council or the court of appeals?[13] Appellate Rule 47 authorizes each court of appeals to "make and amend rules governing its practice." Should proposed Rule 8027 therefore refer to the promulgation of BAP local rules by the court of appeals? Or because a BAP is created by the judicial council of a

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[13] 28 U.S.C. § 2071 authorizes rulemaking by "all courts established by Act of Congress." Would a BAP count as such? One could argue that the answer should be yes, because 28 U.S.C. § 158(b)(1) appears to direct the establishment of BAPs unless the relevant judicial council makes certain findings. On the other hand, one might argue the answer should be no, because the statute itself didn't actually establish the BAPs. For an example of a BAP citing Section 2071 as rulemaking authority, see In re Adoption of Interim Procedural Rules, 332 B.R. 199 (9th Cir. BAP 2005). The most recent order of the Judicial Council of the Ninth Circuit continuing the Ninth Circuit BAP, however, provides that the BAP may establish rules governing practice and procedure before it, but that such rules must be submitted to and approved by the Judicial Council of the Circuit. *See* Amended Order Continuing the Bankruptcy Appellate Panel of the Ninth Circuit (effective Nov. 18, 1988; as amended May 4, 2010) (http://207.41.19.15/web/bap.nsf/BAPDocumentView/judicial+council+order/$file/baporderrevised.pdf).

circuit, is the circuit council the proper authority to promulgate the BAP's rules?

March 2011 draft

FEDERAL RULES OF BANKRUPTCY PROCEDURE

PART VIII. BANKRUPTCY APPEALS

Rule 8001. Scope of Part VIII Rules; Definitions

(a) GENERAL SCOPE. These Part VIII rules govern the procedure in United States district courts and bankruptcy appellate panels for appeals taken from judgments, orders, and decrees of bankruptcy judges. They also govern the procedure for certification of appeals directly to courts of appeals under 28 U.S.C. § 158(d)(2).

(b) PROCEDURE IN OTHER COURTS. When these rules provide for filing a document in a bankruptcy court or a court of appeals, the procedure shall comply with the practice of the court in which the document is filed.

(c) "BAP." As used in these Part VIII rules, "BAP" means a bankruptcy appellate panel established by the judicial council of a circuit and authorized to hear appeals from the bankruptcy court for the district in which an appeal under 28 U.S.C. § 158 is taken.

(d) "APPELLATE COURT." As used in these Part VIII rules, "appellate court" means either the district court or the BAP – whichever is the court in which the bankruptcy appeal is pending or to which the appeal will be taken.

(e) "TRANSMIT." As used in these Part VIII rules, "transmit" means to send electronically unless the governing rules of the court permit or require mailing or other means of delivery of

the document in question.

COMMITTEE NOTE

These Part VIII rules apply to appeals under 28 U.S.C. § 158(a) from bankruptcy courts to district courts and BAPs. As provided in subdivision (d) of this rule, the term "appellate court" is used in Part VIII to refer to the court – district court or BAP – to which a bankruptcy appeal is taken.

Subsequent appeals to courts of appeals are governed by the Federal Rules of Appellate Procedure. Five of the Part VIII rules do, however, relate to appeals to courts of appeals. Rule 8006 governs the procedure for certification under 28 U.S.C. § 158(d)(2) of a direct appeal from a judgment, order, or decree of a bankruptcy judge to a court of appeals. Rule 8008 authorizes a bankruptcy court to issue an indicative ruling while an appeal is pending in a court of appeals. Rules 8009 and 8010 govern the record on appeal in a direct appeal allowed under 28 U.S.C. § 158(d)(2). And Rule 8026 governs the granting of a stay of an appellate court judgment pending an appeal to the court of appeals.

These rules take account of the evolving technology in the federal courts for the electronic filing, storage, and transmission of documents. The term "transmit" is used to encompass the electronic conveyance of information. Unless these or local rules require or permit another means of sending a particular document, a provision in the Part VIII rules to transmit a document requires it to be sent electronically.

Rule 8002. Time for Filing Notice of Appeal

(a) FOURTEEN-DAY PERIOD.

(1) Except as provided in Rule 8002 (b) and (c), the notice of appeal required by Rule 8003 or 8004 shall be filed with the bankruptcy clerk within 14 days after entry of the judgment, order, or decree being appealed.

(2) If one party files a timely notice of appeal, any other party may file a notice of appeal with the bankruptcy clerk within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise allowed by this Rule 8002, whichever period ends later.

(3) A notice of appeal filed after a bankruptcy court announces a decision or order, but before entry of the judgment, order, or decree, shall be treated as filed after entry of the judgment, order, or decree and on the date of entry.

(4) If a notice of appeal is mistakenly filed with the appellate court or the court of appeals, the clerk of that court shall indicate on the notice the date on which it was received and transmit it to the bankruptcy clerk. The notice of appeal is deemed filed with the bankruptcy clerk on the date so indicated.

(b) EFFECT OF MOTION ON TIME FOR APPEAL.

(1) If a party timely files in the bankruptcy court

any of the following motions, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion, or the entry of any judgment, order, or decree altered or amended upon such motion, whichever is later:

(A) to amend or make additional findings under Rule 7052, whether or not granting the motion would alter the judgment;

(B) to alter or amend the judgment under Rule 9023;

(C) for a new trial under Rule 9023; or

(D) for relief under Rule 9024 if the motion is filed no later than 14 days after entry of the judgment.

(2)(A) If a party files a notice of appeal after the court announces or enters a judgment, order, or decree – but before it disposes of any motion listed in Rule 8002(b)(1) – the notice becomes effective to appeal a judgment, order, or decree, in whole or in part, when the order disposing of the last such remaining motion is entered, or when any judgment, order, or decree altered or amended upon such motion is entered, whichever is later.

(B) A party intending to challenge on appeal an order disposing of any motion listed in Rule 8002(b)(1), or the alteration or amendment of a judgment, order, or decree upon such

a motion, shall file a notice of appeal or an amended notice of appeal. The notice of appeal or amended notice of appeal shall be filed in compliance with Rule 8003 or 8004 and within the time prescribed by this Rule 8002, measured from the entry of the order disposing of the last such remaining motion, or the entry of any judgment, order, or decree altered or amended upon such motion, whichever is later. No additional fee is required to file an amended notice of appeal.

(c) APPEAL BY AN INMATE. The provisions of Rule 4(c)(1) and (c)(2) F.R. App. P. apply to an appeal taken by an inmate from a judgment, order, or decree of a bankruptcy judge to an appellate court. The reference in Rule 4(c)(2) F.R. App. P. to "the 14-day period provided in Rule 4(a)(3)" shall be read as a reference to the 14-day period in Rule 8002(a)(2), and the term "district court" in Rule 4(c)(2) F.R. App. P. 4(c)(2) means "bankruptcy court."

(d) EXTENSION OF TIME FOR APPEAL.

(1) The bankruptcy court may extend the time for filing a notice of appeal by a party unless the judgment, order, or decree appealed from:

(A) grants relief from an automatic stay under § 362, § 922, § 1201, or § 1301 of the Code;

(B) authorizes the sale or lease of property or the use of cash collateral under § 363 of the Code;

(C) authorizes the obtaining of credit under § 364 of the Code;

(D) authorizes the assumption or assignment of an executory contract or unexpired lease under § 365 of the Code;

(E) approves a disclosure statement under § 1125 of the Code; or

(F) confirms a plan under § 943, § 1129, § 1225, or § 1325 of the Code.

(2) A request to extend the time for filing a notice of appeal shall be made by motion filed with the bankruptcy clerk before the time for filing a notice of appeal has expired, but such a motion filed no later than 21 days after the expiration of the time for filing a notice of appeal may be granted upon a showing of excusable neglect. An extension of time for filing a notice of appeal may not exceed 21 days after the time otherwise prescribed by this Rule 8002, or 14 days after the date the order granting the motion is entered, whichever is later.

COMMITTEE NOTE

This rule is derived from former Rule 8002 and F.R. App. P. 4(a). With the exception of subdivision (c), the changes to the former rule are stylistic. The rule retains the former rule's 14-day time period for filing a notice of appeal, as opposed to the longer periods permitted for appeals in civil cases under F.R. App. P. 4(a).

Subdivision (a) continues to allow any other party to file a notice of appeal within 14 days after the first notice of appeal is filed, or thereafter to the extent otherwise authorized by this rule. Subdivision (a) also retains provisions of the former rule that prescribe the date of filing of the notice of appeal if the appellant files it prematurely or in the wrong court.

Subdivision (b), like former Rule 8002(b) and F.R. App. P. 4(a), tolls the time for filing a notice of appeal when certain post-judgment motions are filed, and it provides the effective date of a notice of appeal that is filed before the court disposes of all of the specified motions. As under the former rule, a party that wants to appeal the court's disposition of such a motion or the alteration or amendment of a judgment, order, or decree in response to such a motion must file a notice of appeal or, if it has already filed one, an amended notice of appeal. Although Rule 8003(a)(3)(C) requires a notice of appeal to be accompanied by the required fee, no additional fee is required for the filing of an amended notice of appeal under subdivision (b) of this rule.

Subdivision (c) incorporates the provisions of F.R. App. P. 4(c)(1) and (2), which specify timing rules for a notice of appeal filed by an inmate confined in an institution. The inmate's filing of a notice of appeal is timely if it is deposited in the institution's internal mail system on or before the last date for filing. If the institution has a special system for legal mail, it must be used. When the inmate is the first party to file a notice of appeal, the 14-day period for any other party to file a notice of appeal runs from the bankruptcy court's docketing of the inmate's notice.

Subdivision (d) continues to allow the court to grant an extension of time to file a notice of appeal, except with respect to certain specified judgments, orders, and decrees.

Rule 8003. Appeal as of Right – How Taken; Docketing of Appeal

(a) FILING THE NOTICE OF APPEAL.

(1) Except as provided by Rule 8002(c), an appeal from a judgment, order, or decree of a bankruptcy judge to a district court or a BAP as permitted by 28 U.S.C. § 158(a)(1) or (a)(2) may be taken only by filing a notice of appeal with the bankruptcy clerk within the time allowed by Rule 8002.

(2) An appellant's failure to take any step other than timely filing a notice of appeal does not affect the validity of the appeal, but is ground for such action as the appellate court deems appropriate, including dismissal of the appeal.

(3) The notice of appeal shall:

(A) conform substantially to the appropriate Official Form;

(B) attach the judgment, order, or decree, or part thereof, being appealed; and

(C) be accompanied by the prescribed fee.

(4) If requested by the bankruptcy clerk, each appellant shall promptly file the number of copies of the notice of appeal that the bankruptcy clerk needs for compliance with Rule 8003(c).

(b) JOINT OR CONSOLIDATED APPEALS.

(1) When two or more parties are entitled to appeal from a judgment, order, or decree of a bankruptcy judge and their interests make joinder practicable, they may file a joint notice of appeal. They may then proceed on appeal as a single appellant.

(2) When parties have separately filed timely notices of appeal, the appeals may be joined or consolidated by the appellate court.

(c) SERVING THE NOTICE OF APPEAL.

(1) The bankruptcy clerk shall serve the notice of appeal by transmitting it to counsel of record for each party to the appeal other than the appellant or, if a party is not represented by counsel, to the party at its last known address.

(2) The bankruptcy clerk's failure to serve notice does not affect the validity of the appeal.

(3) The bankruptcy clerk shall give to each party served notice of the date of the filing of the notice of appeal and shall note on the docket the names of the parties served and the date and method of the transmission.

(4) The bankruptcy clerk shall promptly transmit the notice of appeal to the United States trustee, but failure to transmit notice to the United States trustee does not affect the

validity of the appeal.

(d) TRANSMITTING THE NOTICE OF APPEAL TO THE BAP OR DISTRICT COURT; DOCKETING THE APPEAL.

(1) The bankruptcy clerk shall promptly transmit the notice of appeal to the BAP clerk if a BAP has been established for appeals from that district and the appellant has not elected to have the appeal heard by the district court. Otherwise, the bankruptcy clerk shall promptly transmit the notice of appeal to the district clerk.

(2) Upon receiving the notice of appeal, the clerk of the appellate court shall docket the appeal under the title of the bankruptcy court action with the appellant identified – adding the appellant's name if necessary – and promptly give notice of the date on which the appeal was docketed to all parties to the appealed judgment, order, or decree.

COMMITTEE NOTE

This rule is derived in part from former Rule 8001(a) and F.R. App. P. 3. It makes stylistic changes to the former provision governing appeals as of right. In addition it addresses joint and consolidated appeals and incorporates and modifies provisions of former Rule 8004 regarding service of the notice of appeal. The rule changes the timing of the docketing of an appeal in the district court or BAP.

Subdivision (a) incorporates much of the content of former Rule 8001(a) regarding the taking of an appeal as of right under 28 U.S.C. § 158(a)(1) or (2). The rule now requires that the judgment, order, or decree

being appealed be attached to the notice of appeal.

Subdivision (b), which is an adaptation of F.R. App. P. 3(b), permits the filing of a joint notice of appeal by multiple appellants that have sufficiently similar interests that their joinder is practicable. It also provides for the appellate court's consolidation of appeals taken separately by two or more parties.

Subdivision (c) is derived from former Rule 8004 and F.R. App. P. 3(d). By using the term "transmitting," it modifies the former rule's requirement that service of the notice of appeal be accomplished by mailing and allows for service by electronic transmission **[to counsel]** by the bankruptcy clerk.

Subdivision (d) modifies the provision of former Rule 8007(b), which delayed the docketing of an appeal by the appellate court until the record was complete and transmitted by the bankruptcy clerk. The new provision, adapted from F.R. App. P. 3(d) and 12(a), requires the bankruptcy clerk to promptly transmit the notice of appeal to the clerk of the appellate court. Upon receipt of the notice of appeal, the clerk of the appellate court must docket the appeal. Under this procedure, motions filed in the appellate court prior to completion and transmission of the record can generally be placed on the docket of an already pending appeal.

Rule 8004. Appeal by Leave – How Taken; Docketing of Appeal

(a) NOTICE OF APPEAL AND MOTION FOR LEAVE TO APPEAL. An appeal from an interlocutory judgment, order, or decree of a bankruptcy judge as permitted by 28 U.S.C. § 158(a)(3) may be taken only by filing with the bankruptcy clerk a notice of appeal of the judgment, order, or decree – as prescribed by Rule 8003(a) and within the time allowed by Rule 8002 – accompanied by a motion for leave to appeal prepared in accordance with Rule 8004(b) and, unless served electronically using the court's transmission equipment, with proof of service in accordance with Rule 8011(d).

(b) CONTENT OF MOTION; RESPONSE.

(1) A motion for leave to appeal under 28 U.S.C. § 158(a)(3) shall contain:

(A) a statement of the facts necessary to understand the questions presented;

(B) a statement of those questions and the relief sought;

(C) a statement of the reasons why leave to appeal should be granted; and

(D) an attachment of the interlocutory

judgment, order, or decree from which appeal is sought, and any related opinion or memorandum.

(2) Within 14 days after the motion is served, a party may file with the clerk of the appellate court a cross-motion or a response.

(c) TRANSMITTING THE NOTICE OF APPEAL AND MOTION; DOCKETING THE APPEAL; DETERMINING THE MOTION.

(1) The bankruptcy clerk shall promptly transmit the notice of appeal and the motion for leave to appeal, together with any statement of election under Rule 8005, to the clerk of the appellate court.

(2) Upon receiving the notice of appeal and motion for leave to appeal, the clerk of the appellate court shall docket the appeal under the title of the bankruptcy court action with the movant-appellant identified – adding the movant-appellant's name if necessary – and promptly give notice of the date on which the appeal was docketed to all parties to the interlocutory judgment, order, or decree from which appeal is sought.

(3) The motion and any response or cross-motion are submitted without oral argument unless the appellate court orders otherwise. If the motion for leave to appeal is denied, the

appellate court shall dismiss the appeal.

(d) FAILURE TO FILE A MOTION. If an appellant does not file a required motion for leave to appeal an interlocutory judgment, order, or decree, but does timely file a notice of appeal, the appellate court may:

- direct that a motion for leave to appeal be filed; or
- treat the notice of appeal as a motion for leave to appeal and either grant or deny leave.

If the court directs that a motion for leave to appeal be filed, the appellant shall file the motion within 14 days after the order directing the filing is entered, unless the order provides otherwise.

(e) DIRECT APPEAL TO COURT OF APPEALS. If leave to appeal an interlocutory judgment, order, or decree is required under 28 U.S.C. § 158(a)(3) and has not been granted by the district court or the BAP, an authorization by the court of appeals of a direct appeal under 28 U.S.C. § 158(d)(2) satisfies the requirement for leave to appeal.

COMMITTEE NOTE

This rule is derived from former Rules 8001(b) and 8003 and F.R. App. P. 5. It retains the practice for interlocutory bankruptcy appeals of requiring a notice of appeal to be filed along with a motion for leave to appeal. Like current Rule 8003, it alters the timing of the docketing of the appeal in the appellate court.

Subdivision (a) requires a party seeking leave to appeal under 28 U.S.C. § 158(a)(3) to file with the bankruptcy clerk both a notice of appeal and a motion for leave to appeal.

Subdivision (b) prescribes the contents of the motion, retaining the requirements of former Rule 8003(a). It also continues to allow another party to file a cross-motion or response to the appellant's motion. Because of the prompt docketing of the appeal under the current rule, the cross-motion or response must be filed in the appellate court, rather than in the bankruptcy court as the former rule required.

Subdivision (c) requires the bankruptcy clerk to transmit promptly the notice of appeal and the motion for leave to appeal to the appellate court. Upon receipt of the notice and the motion, the clerk of the appellate court must docket the appeal. Unless the appellate court orders otherwise, no oral argument will be held on the motion.

Subdivision (d) retains the provisions of former Rule 8003(c) that state the appellate court's options if the appellant timely files a notice of appeal but fails to file a motion for leave to appeal. The court can either direct that a motion be filed or treat the notice of appeal as the motion and either grant or deny leave.

Subdivision (e), like former Rule 8003(d), treats the authorization of a direct appeal by the court of appeals as a grant of leave to appeal under 28 U.S.C. § 158(a)(3) if the district court or BAP has not already granted leave to appeal. Thus a separate order granting leave to appeal is not required. If the court of appeals grants permission to appeal, the record must be assembled and transmitted in accordance with Rules 8009 and 8010.

Rule 8005. Election to Have Appeal Heard by District Court Instead of BAP

(a) FILING OF THE STATEMENT OF ELECTION. An election under 28 U.S.C. § 158(c)(1) to have an appeal heard by the district court may be made only by a statement of election that conforms substantially to the appropriate Official Form and is filed within the time prescribed by 28 U.S.C. § 158(c)(1).

(b) TRANSFER OF THE APPEAL. Upon receiving an appellant's timely statement of election, the bankruptcy clerk shall transmit all documents related to the appeal to the district court. Upon receiving a timely statement of election by a party other than the appellant, the BAP clerk shall promptly transfer the appeal and any pending motions to the district court.

(c) DETERMINING THE VALIDITY OF AN ELECTION. No later than 14 days after the statement of election is filed, a party seeking a determination of the validity of an election shall file a motion in the court in which the appeal is then pending.

(d) APPEAL BY LEAVE – TIMING OF ELECTION. If an appellant moves for leave to appeal under Rule 8004 and fails to file a separate notice of appeal concurrently with the filing of its motion, the motion shall be treated as if it were a notice of appeal

for purposes of determining the timeliness of the filing of a statement of election.

COMMITTEE NOTE

This rule is derived from former Rule 8001(e), and it implements 28 U.S.C. § 158(c)(1).

As was required by the former rule, subdivision (a) requires an appellant that elects to have its appeal heard by a district court, rather than the BAP established in its circuit, to file with the bankruptcy clerk a statement of election when it files its notice of appeal. The statement must conform substantially to Official Form __. If a BAP has been established for appeals from the bankruptcy court and the appellant does not file a timely statement of election, any other party that elects to have the appeal heard by the district court must file a statement of election with the BAP clerk no later than 30 days after service of the notice of appeal.

Subdivision (b) requires the bankruptcy clerk to transmit all appeal documents to the district clerk if the appellant files a timely statement of election. If the appellant does not make that election, the bankruptcy clerk must transmit the appeal documents to the BAP clerk, and upon a timely election by any other party, the BAP clerk must promptly transfer the appeal to the district court.

Subdivision (c) provides a new procedure for the resolution of disputes regarding the validity of an election. A motion challenging the validity of an election must be filed no later than 14 days after the statement of election is filed. Nothing in this rule prevents a court from determining the validity of an election on its own motion.

Subdivision (d) provides that, in the case of an appeal by leave, if the appellant files a motion for leave to appeal but fails to file a notice of appeal, the filing of the motion will be treated for timing purposes under this rule as the filing of the notice of appeal.

Rule 8006. Certification of Direct Appeal to Court of Appeals

(a) EFFECTIVE DATE OF CERTIFICATION. Certification of a judgment, order, or decree of a bankruptcy judge for direct review in a court of appeals under 28 U.S.C. § 158(d)(2) is effective when the following events have occurred: (i) the certification has been filed; (ii) a timely appeal has been taken from the judgment, order, or decree in accordance with Rule 8003 or 8004; and (iii) the notice of appeal has become effective under Rule 8002.

(b) FILING OF CERTIFICATION. A certification that a circumstance specified in 28 U.S.C. § 158(d)(2)(A)(i)-(iii) exists shall be filed with the clerk of the court in which a matter is pending. For purposes of this rule, a matter is pending in the bankruptcy court for 30 days after the filing of the first notice of appeal from the judgment, order, or decree for which direct review in the court of appeals is sought, or the entry of the order disposing of the last remaining motion specified in Rule 8002(b), whichever is later. A matter is pending in the appellate court thereafter.

(c) JOINT CERTIFICATION BY ALL APPELLANTS AND APPELLEES. A joint certification by all the appellants and appellees that a circumstance specified in 28 U.S.C.

§ 158(d)(2)(A)(i)-(iii) exists shall be made by executing the appropriate Official Form and filing it with the clerk of the court in which the matter is pending. The certification may be supplemented by a short statement of the basis for the certification, which may include the information listed in Rule 8006(f)(3).

(d) COURT THAT MAY MAKE CERTIFICATION.

(1) Only the bankruptcy court may make a certification on request of parties or on its own motion while the matter is pending before it as provided in Rule 8006(b).

(2) Only the district court or the BAP may make a certification on request of parties or on its own motion while the matter is pending before it as provided in Rule 8006(b)

(e) CERTIFICATION ON THE COURT'S OWN MOTION.

(1) A certification on the court's own motion that a circumstance specified in 28 U.S.C. § 158(d)(2)(A)(i)-(iii) exists shall be set forth in a separate document served on the parties in the manner required for service of a notice of appeal under Rule 8003(c)(1). The certification shall be accompanied by an opinion or memorandum that contains the information required by Rule 8006(f)(3)(A)-(D).

(2) Within 14 days after the court's certification, a

party may file with the clerk of the certifying court a short supplemental statement regarding the merits of certification.

(f) CERTIFICATION BY THE COURT ON REQUEST.

(1) A request by a party for certification that a circumstance specified in 28 U.S.C. § 158(d)(2)(A)(i)-(iii) exists, or a request by a majority of the appellants and a majority of the appellees, shall be filed with the clerk of the court in which the matter is pending within the time specified by 28 U.S.C. § 158(d)(2)(E).

(2) A request for certification shall be served in the manner required for service of a notice of appeal under Rule 8003(c)(1).

(3) A request for certification shall include the following:

(A) the facts necessary to understand the question presented;

(B) the question itself;

(C) the relief sought;

(D) the reasons why the appeal should be allowed and is authorized by statute and rule, including why a circumstance specified in 28 U.S.C. § 158(d)(2)(A)(i)-(iii) exists; and

(E) an attached copy of the judgment, order, or decree that is the subject of the requested certification and any related opinion or memorandum.

(4) A party may file a response to a request for certification within 14 days after the request is served, or such other time as the court in which the matter is pending may fix. A party may file a cross-request for certification within 14 days after notice of the request is served, or within 60 days after the entry of the judgment, order, or decree, whichever occurs first.

(5) The request, cross-request, and any response are not governed by Rule 9014 and are submitted without oral argument unless the court in which the matter is pending otherwise directs.

(6) A certification of an appeal under 28 U.S.C. § 158(d)(2) in response to a request shall be made in a separate document served on the parties in the manner required for service of a notice of appeal under Rule 8003(c)(1).

(g) PROCEEDING IN THE COURT OF APPEALS FOLLOWING CERTIFICATION. A request for permission to take a direct appeal to the court of appeals under 28 U.S.C. § 158(d)(2) shall be filed with the circuit clerk within 30 days after the date the certification becomes effective under subdivision (a).

COMMITTEE NOTE

This rule is derived from former Rule 8001(f), and it provides the procedures for the certification of a direct appeal of a judgment, order, or decree of a bankruptcy judge to the court of appeals under 28 U.S.C. § 158(d)(2). Once a case has been certified in the bankruptcy court or the appellate court for direct appeal and a request for permission to appeal has been timely filed, the Federal Rules of Appellate Procedure govern any further proceedings in the court of appeals.

Subdivision (a), like the former rule, requires that an appeal must be properly taken – now under Rule 8003 or 8004 – before a certification for direct review in the court of appeals takes effect. This rule requires the timely filing of a notice of appeal under Rule 8002 and takes into account the delayed effectiveness of a notice of appeal filed before all motions specified under Rule 8002(b) have been resolved by the bankruptcy judge.

Subdivision (b) provides that a certification must be filed in the court in which the matter is pending, as determined by this subdivision. This provision modifies the former rule. Because of the prompt docketing of appeals in the appellate court under Rules 8003 and 8004, a matter is deemed – for purposes of this rule only – to remain pending in the bankruptcy court for 30 days after the filing of the notice of appeal from the judgment, order, or decree being appealed, or the disposition of the last remaining motion specified in Rule 8002(b), whichever is later. This provision will in appropriate cases give the bankruptcy judge, who will be familiar with the matter being appealed, an opportunity to decide whether certification of direct review is appropriate. Similarly, subdivision (d) provides that, when certification is made by the court, only the court in which the matter is then pending according to (b) may make the certification.

Section 158(d)(2) provides three different ways in which an appeal may be certified for direct review. Implementing these options, the rule provides in subdivision (c) for the joint certification by all appellants and appellees, in subdivision (e) for the bankruptcy or appellate court's certification on its own motion, and in subdivision (f) for the bankruptcy or appellate court's certification on request of a party or of a majority of appellants and a majority of appellees.

Subdivision (g) requires that, once a certification for direct review has been made, a request of the court of appeals for permission to take a

direct appeal to that court must be filed with the circuit clerk no later than 30 days after the effective date of the certification. Rule 6(c) of the Federal Rules of Appellate Procedure, which incorporates all of F.R. App. P. 5 except subdivision (a)(3), prescribes the procedure for requesting the permission of the court of appeals, and it governs any proceedings that take place thereafter in that court.

Rule 8007. Stay Pending Appeal; Bonds; Suspension of Proceedings

(a) INITIAL MOTION IN THE BANKRUPTCY COURT; TIME TO FILE.

(1) A party shall ordinarily move first in the bankruptcy court for the following relief:

(A) a stay of a judgment, order, or decree of a bankruptcy judge pending appeal;

(B) approval of a supersedeas bond;

(C) an order suspending, modifying, restoring, or granting an injunction while an appeal is pending; or

(D) the suspension or continuation of proceedings in a case or other relief permitted by Rule 8007(e).

(2) A motion for a type of relief specified in (1) may be made in the bankruptcy court either before or after the filing of a notice of appeal of the judgment, order, or decree appealed from.

(b) MOTION IN THE APPELLATE COURT; CONDITIONS ON RELIEF.

(1) A motion for a type of relief specified in Rule 8007(a)(1), or to vacate or modify an order of the bankruptcy court granting such relief, may be made in the appellate court.

(2) When the motion is made in the appellate court, the motion shall:

(A) show that it would be impracticable to move first in the bankruptcy court if the moving party has not sought relief in the first instance in the bankruptcy court; or

(B) state that the bankruptcy court denied the motion or failed to afford the relief requested and state any reasons given by the bankruptcy court for its action or inaction.

(3) If the motion is made in the appellate court, it shall also include:

(A) the reasons for granting the relief requested and the pertinent facts;

(B) originals or copies of affidavits or other sworn statements supporting facts subject to dispute; and

(C) relevant parts of the record.

(4) If the motion is made in the appellate court, the movant shall give reasonable notice of the motion to all parties.

(c) FILING OF BOND OR OTHER SECURITY. The appellate court may condition relief under this rule on the filing of a bond or other appropriate security with the bankruptcy court.

(d) REQUIREMENT OF BOND FOR TRUSTEE OR THE UNITED STATES. When a trustee appeals, a bond or other

appropriate security may be required. When an appeal is taken by the United States, its officer, or its agency or by direction of any department of the federal government, a bond or other security shall not be required.

(e) CONTINUATION OF PROCEEDINGS IN THE BANKRUPTCY COURT. Notwithstanding Rule 7062 and subject to the authority of the appellate court, the bankruptcy court may:

(1) suspend or order the continuation of other proceedings in the case; or

(2) make any other appropriate orders during the pendency of an appeal on terms that protect the rights of all parties in interest.

COMMITTEE NOTE

This rule is derived from former Rule 8005 and F.R. App. P. 8. The changes from the former rule are primarily stylistic.

Subdivision (a), like the former rule, requires a party ordinarily to seek relief pending an appeal in the bankruptcy court. Subdivision (a)(1) expands the list of relief enumerated in F.R. App. P. 8(a)(1) to reflect bankruptcy practice. It includes the suspension or continuation of other proceedings in the bankruptcy case, as authorized by subdivision (e). Subdivision (a)(2) clarifies that a motion for a stay pending appeal, approval of a supersedeas bond, or any other relief specified in paragraph (1) may be made in the bankruptcy court before or after the filing of a notice of appeal.

Subdivision (b) continues to authorize a party to seek the relief specified in (a)(1) by means of a motion filed in the appellate court. Accordingly, a notice of appeal need not be filed with respect to a bankruptcy court's order granting or denying such a motion. The motion for relief in the appellate court must state why it was impracticable to seek

relief initially in the bankruptcy court, if a motion was not filed there, or why the bankruptcy court denied the relief sought.

Subdivisions (c) and (d) retain the provisions of the former rule that permit the appellate court to condition the granting of relief on the posting of a bond by the appellant, except when that party is a federal government entity. Rule 9025 governs proceedings against sureties.

Rule 8008. Indicative Rulings

(a) RELIEF PENDING APPEAL. If a party files a timely motion in the bankruptcy court for relief that the bankruptcy court lacks authority to grant because an appeal has been docketed and is pending, the bankruptcy court may:

(1) defer consideration of the motion;

(2) deny the motion; or

(3) state that the court would grant the motion if the court in which the appeal is pending remands for that purpose, or state that the motion raises a substantial issue.

(b) NOTICE TO COURT IN WHICH THE APPEAL IS PENDING. If the bankruptcy court states that it would grant the motion, or that the motion raises a substantial issue, the movant shall promptly notify the clerk of the court in which the appeal is pending.

(c) REMAND AFTER INDICATIVE RULING. If the bankruptcy court states that it would grant the motion or that the motion raises a substantial issue and the appeal is pending in an appellate court, the appellate court may remand for further proceedings, but it retains jurisdiction unless it expressly dismisses the appeal. If the appellate court remands but retains jurisdiction, the parties shall promptly notify the clerk of that court when the

bankruptcy court has decided the motion on remand.

COMMITTEE NOTE

This rule is an adaptation of F.R. Civ. P. 62.1 and F.R. App. P. 12.1. It provides a procedure for the issuance of an indicative ruling when a bankruptcy court determines that, because of a pending appeal, the court lacks jurisdiction to grant a request for relief that the court concludes is meritorious or raises a substantial issue. The rule, however, does not attempt to define the circumstances in which an appeal limits or defeats the bankruptcy court's authority to act in the face of a pending appeal. (Rule 8002(b) identifies motions that, if filed within the relevant time limit, suspend the effect of a notice of appeal filed before the last such motion is resolved. In these circumstances, the bankruptcy court has authority to resolve the motion without resorting to the indicative ruling procedure.)

Subdivision (b) requires the movant to notify the court in which an appeal is pending if the bankruptcy court states that it would grant the motion or that it raises a substantial issue. This provision applies to appeals pending in the district court, the BAP, or the court of appeals under 28 U.S.C. § 158(d)(2).

Federal Rules of Appellate Procedure 6(c) and 12.1 govern the procedure in the court of appeals following notification of the bankruptcy court's indicative ruling.

Subdivision (c) of this rule governs the procedure in the district court or BAP upon notification that the bankruptcy court has issued an indicative ruling. The appellate court may remand to the bankruptcy court for a ruling on the motion for relief. The appellate court may also remand all proceedings, thereby terminating the initial appeal, if it expressly states that it is dismissing the appeal. It should do so, however, only when the appellant has stated clearly its intention to abandon the appeal. Otherwise, the appellate court may remand for the purpose of ruling on the motion, while retaining jurisdiction to proceed with the appeal after the bankruptcy court rules, provided that the appeal is not then moot and any party wishes to proceed.

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 last, 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 certification under 28 U.S.C. § 158(d)(2);
- 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.* If paper copies are needed, 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 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. 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 the 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 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.

(h) DIRECT APPEALS TO COURT OF APPEALS. Rules 8009 and 8010 apply to appeals taken directly to the court of appeals under 28 U.S.C. § 158(d)(2). A reference in Rules 8009 and 8010 to the "appellate court" includes the court of appeals when it has authorized a direct appeal under 28 U.S.C. § 158(d)(2). In direct appeals to the court of appeals, the reference in Rule 8009(d) to Rule 8018(b) means Appellate Rule 30.

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 remains 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 the sealed document 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).

Subdivision (h) is new. It makes the provisions of this rule and Rule 8010 applicable to appeals taken directly to a court of appeals under 28 U.S.C. § 158(d)(2). See F.R. App. P. 6(c)(2)(A) and (B).

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.

Rule 8009(h) makes this rule applicable to direct appeals to the court of appeals under 28 U.S.C. § 158(d)(2). It also provides that, for purposes of this rule and Rule 8009,"appellate court" includes the court of appeals when it has authorized a direct appeal under § 158(d)(2).

Rule 8011. Filing and Service; Signature

(a) FILING.

(1) *Filing with the Clerk.* A document required or permitted to be filed in the appellate court shall be filed with the clerk of that court.

(2) *Filing: Method and Timeliness.*

(A) *In general.* Filing may be accomplished by transmission to the clerk of the appellate court, but, except as provided in (B), filing is not timely unless the clerk receives the document within the time fixed for filing.

(B) *Brief or appendix.* A brief or appendix is timely filed if, on or before the last day for filing, it is:

(i) transmitted to the clerk of the appellate court in accordance with applicable electronic transmission procedures for the filing of documents in that court;

(ii) mailed to the clerk of the appellate court by first-class mail – or other class of mail that is at least as expeditious – postage prepaid, if the court's procedures permit or require a brief or appendix to be filed by mailing; or

(iii) dispatched to a third-party commercial carrier for delivery within three days to the clerk of the

appellate court, if the court's procedures permit or require a brief or appendix to be filed by delivery to the clerk.

(C) *Inmate filing.* Rule 25(a)(2)(C) F.R. App. P. applies to an appeal taken by an inmate from a judgment, order, or decree of a bankruptcy judge to an appellate court.

(D) *Electronic filing.* The appellate court may by local rule permit or require documents to be filed, signed, or verified by electronic means that are consistent with any technical standards that the Judicial Conference of the United States establishes. A local rule requiring filing by electronic means shall allow reasonable exceptions, including for individuals who are not represented by counsel.

(E) *Copies.* If a document is filed electronically in the appellate court, no paper copy is required. If a document is filed by mail or delivery in the district court, an original and one copy of the document shall be filed. If a document is filed by mail or delivery in the BAP, an original and three copies shall be filed. The district court or BAP may, however, require by local rule or order in a particular case the filing or furnishing of a specified number of paper copies of a document filed electronically or a different number of copies than required by this subparagraph.

(3) *Filing a Motion with a Judge.* In appeals to the BAP, if a motion requests relief that may be granted by a single judge, a judge of that court may permit the motion to be filed with the judge if authorized by local rule. The judge shall note the filing date on the motion and transmit it to the BAP clerk.

(4) *Clerk's Acceptance of Documents.* The clerk of the appellate court shall not refuse to accept for filing any document transmitted for that purpose solely because it is not presented in proper form as required by these rules or by any local rule or practice. The appellate court may, by order, direct the correction of any deficiency in any document that does not conform to the requirements of these rules or applicable local rule, and may prescribe such other relief as the court deems appropriate.

(5) *Privacy Protection.* Rule 9037 applies to an appeal to the appellate court taken from a judgment, order, or decree of a bankruptcy judge.

(b) SERVICE OF DOCUMENTS REQUIRED. Copies of all documents filed by any party and not required by these Part VIII rules to be served by the clerk of the appellate court shall, at or before the time of filing, be served on all other parties to the appeal by the party making the filing or a person acting for that party.

Service on a party represented by counsel shall be made on counsel.

(c) MANNER OF SERVICE.

(1) Service may be made by any of the following methods:

(A) personal, including delivery to a responsible person at the office of counsel;

(B) mail;

(C) third-party commercial carrier for delivery within three days; or

(D) electronic means, if the party being served consents in writing, or as otherwise permitted or required by applicable local procedure.

(2) If authorized by local rule, a party may use the appellate court's transmission equipment to make the electronic service under Rule 8011(c)(1)(D).

(3) When it is reasonable, considering such factors as the immediacy of the relief sought, distance, and cost, service on a party shall be by a manner at least as expeditious as the manner used to file the document with the appellate court. Service by electronic means shall be used when feasible and otherwise permitted.

(4) Service by mail or by commercial carrier is complete on mailing or delivery to the carrier. Service by electronic means is complete on transmission, unless the party making service receives notice that the document was not transmitted successfully to the party attempted to be served.

(d) PROOF OF SERVICE.

(1) Documents presented for filing shall contain either:

(A) an acknowledgment of service by the person served; or

(B) proof of service in the form of a statement by the person who made service certifying:

(i) the date and manner of service;

(ii) the names of the persons served; and

(iii) for each person served, the mail or electronic address, facsimile number, or the address of the place of delivery, as appropriate for the manner of service.

(2) The clerk of the appellate court may permit documents to be filed without acknowledgment or proof of service at the time of filing, but shall require the acknowledgment or proof of service to be filed promptly thereafter.

(3) When a brief or appendix is filed by mailing, delivery, or electronic transmission in accordance with Rule 8011(a)(2)(B), the proof of service shall also state the date and manner by which the document was filed.

(e) SIGNATURE. If filed electronically, every motion, response, reply, brief, or submission authorized by these Part VIII rules shall include the electronic signature of the person filing the document or, if the person is represented, the electronic signature of counsel. The electronic signature shall be provided by electronic means that are consistent with any technical standards that the Judicial Conference of the United States establishes. If filed in paper form, every motion, response, reply, brief, or submission authorized by these rules shall be signed by the person filing the document or, if the person is represented, by counsel.

COMMITTEE NOTE

This rule is derived from former Rule 8008 and F.R. App. P. 25. It adopts some of the additional details of the appellate rule, and it provides greater recognition of the possibility of electronic filing and service.

Subdivision (a) governs the filing of documents in the appellate court. Consistent with other provisions of these Part VIII rules, subdivision (a)(2) requires electronic filing of documents, including briefs and appendices, unless the appellate court's procedures permit or require filing by mail or personal delivery. An electronic filing is timely if it is received by the clerk of the appellate court within the time fixed for filing. No paper copies need be submitted when documents are filed electronically, unless the appellate court requires them.

Subdivision (a)(5) clarifies that Rule 9037, which requires redaction of certain personally identifying information, applies to documents filed in the appellate court.

Subdivisions (b) and (c) address the service of documents in the appellate court. Except for documents that the clerk of the appellate court must serve, a party who makes a filing must serve copies of the document on all other parties to the appeal. Service on represented parties must be made on counsel. The methods of service are listed in subdivision (c). Electronic service is authorized upon a party who has consented to that type of service in writing or when permitted or required by the appellate court.

Subdivision (d) retains the former rule's provisions regarding proof of service of a document filed in the appellate court. In addition it provides that, when service is made electronically, a certificate of service must state the mail or electronic address or facsimile number to which service was made.

Subdivision (e) is a new provision that requires an electronic signature of counsel or an unrepresented filer for documents that are filed electronically in the appellate court. The method of providing an electronic signature may be specified by a local court rule that is consistent with any standards established by the Judicial Conference of the United States. Paper copies of documents filed in the appellate court must bear an actual signature of counsel or the filer.

Rule 8012. Corporate Disclosure Statement

(a) WHO SHALL FILE. Any nongovernmental corporate party to an appeal shall file in the appellate court a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation.

(b) TIME FOR FILING; SUPPLEMENTAL FILING. A party shall file the statement prescribed by subdivision (a) with its principal brief or upon filing a motion, response, petition, or answer in the appellate court, whichever occurs first, unless a local rule requires earlier filing. Even if the statement has already been filed, the party's principal brief shall include a statement before the table of contents. A party shall supplement its statement whenever the information that shall be disclosed under subdivision (a) changes.

COMMITTEE NOTE

This rule is derived from F.R. App. P. 26.1. It requires the filing of corporate disclosure statements and supplemental statements in order to assist appellate court judges in determining whether they have interests that should cause recusal. If filed separately from a brief, motion, response, petition, or answer, the statement must be filed and served in accordance with Rule 8011. Under Rule 8015(a)(7)(B)(iii), the corporate disclosure statement is not included in calculating applicable word-count limitations.

Rule 8013. Motions; Intervention

(a) CONTENTS OF MOTION; RESPONSE; REPLY.

(1) *Application for Relief.* A request for an order or other relief, including an extraordinary writ, shall be made by filing with the clerk of the appellate court a motion for that order or relief, with proof of service on all other parties to the appeal.

(2) *Contents of a Motion.*

(A) *Grounds and relief sought.* A motion shall state with particularity the grounds for the motion and the order or relief sought.

(B) *Motion to expedite appeal.* A motion to expedite the consideration of an appeal shall explain why expedition is warranted and what circumstances justify the appellate court considering the appeal ahead of other matters. If a motion to expedite is granted, the appellate court may accelerate the transmission of the record, the deadline for filing briefs and other documents, oral argument, and resolution of the appeal. Under appropriate circumstances, a motion to expedite the consideration of an appeal may be filed as an emergency motion under Rule 8013(d).

(C) *Accompanying documents.*

(i) Any affidavit, declaration, brief, or other document necessary to support a motion shall be served and filed with the motion.

(ii) An affidavit or declaration shall contain only factual information, not legal argument.

(iii) A motion seeking substantive relief from a judgment, order, or decree of a bankruptcy court shall include a copy of the bankruptcy court's order, and any accompanying opinion, as a separate exhibit.

(D) *Documents not required.* Neither a notice of motion nor a proposed order is required.

(3) *Response and Reply; Time to File.* Unless the appellate court shortens or extends the time to file, any party to the appeal may file a response to the motion within seven days after service of the motion. The movant may file a reply to a response within seven days after service of the response. A reply shall be limited to matters addressed by the response.

(b) DETERMINATION OF A MOTION FOR A PROCEDURAL ORDER. Notwithstanding Rule 8013(a)(3), the appellate court may act on a motion for a procedural order, including a motion under Rule 9006(b) or (c), at any time without awaiting a response. Any party affected by such action may move

for reconsideration, vacation, or modification of the action within seven days after service of the procedural order.

(c) ORAL ARGUMENT. A motion will be decided without oral argument unless the appellate court orders otherwise.

(d) EMERGENCY MOTION.

(1) Whenever a movant requests expedited action on a motion on the ground that, to avoid irreparable harm, relief is needed in less time than would normally be required for the appellate court to receive and consider a response, the word "Emergency" shall precede the title of the motion.

(2) The emergency motion shall

(A) be accompanied by an affidavit or declaration setting forth the nature of the emergency;

(B) state whether all grounds advanced in support of it were submitted to the bankruptcy judge and, if any grounds relied on were not submitted, why the motion should not be remanded for reconsideration by the bankruptcy judge;

(C) include, when known, the email addresses, office addresses, and telephone numbers of moving and opposing counsel; and

(D) be served as prescribed by Rule 8011.

(3) Before filing an emergency motion, the movant shall make every practicable effort to notify opposing counsel in time for counsel to respond to the motion. The affidavit or declaration accompanying the emergency motion shall also state when and how opposing counsel was notified, or, if opposing counsel was not notified, why it was impracticable to do so.

(e) POWER OF A SINGLE BAP JUDGE TO ENTERTAIN A MOTION.

(1) A single judge of a BAP may grant or deny any request for relief that under these rules may properly be sought by motion, except that a single judge may not dismiss or otherwise decide an appeal, deny a motion for leave to appeal, or deny a motion for a stay pending appeal if denial would result in mootness of the appeal.

(2) The BAP may review the action of a single judge, either on its own motion or on the motion of a party.

(f) FORMAT OF DOCUMENT; PAGE LIMITS; COPIES.

(1) *Format of Paper Document.* Rules 27(d)(1) and 32(a)(1)-(6) F.R. App. P. apply in the appellate court to a paper version of a motion, response, reply, or brief that is permitted or required to be filed.

(2) *Format of Electronically Filed Document.* A motion, response, reply, or brief filed electronically shall comply with the requirements made applicable to a paper copy under (1) regarding covers, line spacing, margins, typeface, and type styles. It shall also comply with the length requirements under (3).

(3) *Page Limits.* Unless the appellate court permits or directs otherwise, the following page limits apply:

(A) a motion or a response to a motion shall not exceed 10 pages, exclusive of the corporate disclosure statement and accompanying documents authorized by Rule 8013(a)(2)(C);

(B) a reply to a response shall not exceed 5 pages;

(C) a brief in support of a motion or in support of a response to a motion shall not exceed 20 pages, exclusive of accompanying documents authorized by Rule 8013(a)(2)(C); and

(D) a brief in support of a reply shall not exceed 10 pages.

(4) *Copies.* Copies shall be provided as required by Rule 8011(a)(2)(E).

(g) INTERVENTION. Unless a statute provides another method, a person who wants to intervene in an appeal pending in the appellate court shall file a motion for leave to intervene with the clerk of the appellate court and serve a copy on all parties to the appeal. The motion, or other notice of intervention authorized by statute, shall be filed within 30 days after the appeal is docketed and shall contain a concise statement of the movant's interest and ground for intervention.

COMMITTEE NOTE

Rule 8013 is derived from current Rule 8011 and F.R. App. P. 15(d), 27, and 32(a). It adopts many of the provisions of the appellate rules that specify the form and page limits of motions and accompanying documents, while also adapting those requirements for the context of electronic filing. In addition, it prescribes the procedure for seeking to intervene in the appellate court.

Subdivision (a) retains much of the content of former Rule 8011(a) regarding the contents of a motion, response, and reply. It also specifies the documents that may accompany a motion. Unlike F.R. App. P. 27, which bars the filing of briefs supporting or in response to a motion, subdivision (a) continues the bankruptcy appellate practice of permitting briefs in support of a motion, a response to a motion, and a reply.

Subdivision (a)(2)(B) clarifies procedures for a motion to expedite the consideration of an appeal. This motion seeks to expedite the time for the disposition of the appeal as a whole, whereas an emergency motion – which is addressed by subdivision (d) – typically involves an urgent request for relief short of disposing of the entire appeal (for example, an emergency request for a stay pending appeal to prevent imminent mootness). In appropriate cases – such as when there is an urgent need to resolve the appeal quickly to prevent harm to a party – a motion to expedite the consideration of an appeal may be filed as an emergency motion.

Subdivision (b) retains the substance of former Rule 8011(b). It authorizes the appellate court to act on a motion for a procedural order without awaiting a response to the motion. It specifies that a party seeking reconsideration, vacation, or modification of the order must file such a motion within seven days after service of the order.

Subdivision (c) continues the practice of former Rule 8011(c) and F.R. App. P. 27(e) of dispensing with oral argument of motions in the appellate court unless the court orders otherwise.

Subdivision (d), which carries forward the content of former rule 8011(d), governs emergency motions that the appellate court may rule on without awaiting a response when necessary to prevent irreparable harm. A party seeking expedited action on a motion in the appellate court must explain the nature of the emergency, whether all grounds in support of the motion were first presented to the bankruptcy court, and, if not, why a remand for reconsideration should not be ordered. The moving party must

also explain the steps taken to notify opposing counsel in advance of filing the emergency motion and, if counsel was not notified, why it was impracticable to do so.

Subdivision (e), like former Rule 8011(e) and similar to F.R. App. P. 27(c), authorizes a single BAP judge to rule on certain motions. This authority, however, does not extend to issuing rulings that would dispose of the appeal. For that reason the rule now prohibits a single BAP judge from denying a motion for a stay pending appeal when the effect of that ruling would be to require dismissal of the appeal as moot. A ruling by a single judge is subject to review by the BAP.

Subdivision (f) incorporates by reference the formatting and appearance requirements of F.R. App. P. 27(d)(1) and 32(a). When paper copies of the listed documents are filed, they must comply with the specified requirements of the Federal Rules of Appellate Procedure regarding reproduction, covers, binding, appearance, and format. When these documents are filed electronically, they must comply with the relevant requirements of the appellate rules regarding covers and format. Subdivision (f) also specifies page limits for motions and related documents, which was a matter not addressed by former Rule 8011.

Subdivision (g) clarifies the procedures for seeking to intervene in a case that has been appealed. It adopts the provisions of F.R. App. P. 15(d). The former Part VIII rules did not address intervention.

Rule 8014. Briefs

(a) APPELLANT'S BRIEF. The appellant's brief shall contain under appropriate headings and in the order here indicated:

(1) a corporate disclosure statement, if required by Rule 8012;

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

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

(4) a jurisdictional statement, including:

(A) the basis for the bankruptcy court's subject matter jurisdiction, with citations to applicable statutory provisions and a brief discussion of the relevant facts establishing jurisdiction;

(B) the basis for the appellate court's jurisdiction, with citations to applicable statutory provisions and a brief discussion of the relevant facts establishing jurisdiction;

(C) the filing dates establishing the timeliness of the appeal; and

(D) an assertion that the appeal is from a final judgment, order, or decree, or information establishing the appellate court's jurisdiction on another basis;

(5) a statement of the issues presented and the applicable standard of appellate review;

(6) a statement of the case, which shall contain a brief discussion of the nature of the case and the facts relevant to the issues presented on appeal, including the course of the proceedings and the disposition in the bankruptcy court, with appropriate references to the record;

(7) an argument, which may be preceded by a summary, and which shall contain the appellant's contentions with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes, and parts of the record relied on;

(8) a short conclusion stating the precise relief sought; and

(9) the certificate of compliance, if required by Rule 8015(a)(7) or (b).

(b) APPELLEE'S BRIEF. The appellee's brief shall conform to the requirements of Rule 8014 (a)(1)-(7) and (9), except that none of the following need appear unless the appellee is dissatisfied with the appellant's statement:

(1) the jurisdictional statement;

(2) the statement of the issues and the applicable standard of appellate review; and

(3) the statement of the case.

(c) REPLY BRIEF. The appellant may file a brief in reply to the appellee's brief. A reply brief shall contain a table of contents, with page references, and a table of authorities listing cases alphabetically arranged, statutes, and other authorities, with references to the pages of the reply brief where they are cited.

(d) NO FURTHER BRIEFS. Unless the appellate court permits, no further briefs shall be filed.

(e) REFERENCES TO PARTIES. In briefs and at oral argument, counsel should minimize use of the terms "appellant" and "appellee." To make briefs clear, counsel should use the parties' actual names or the designations used in the bankruptcy court, such as "the debtor" or "the trustee."

(f) REFERENCES TO THE RECORD. References to the parts of the record contained in the appendix filed with the appellant's brief shall be to pages of the appendix.

(g) STATUTES, RULES, REGULATIONS, OR SIMILAR AUTHORITY. If determination of the issues presented requires reference to the Code or other statutes, rules, regulations,

or similar authority, relevant parts thereof shall be set out in the brief or in an addendum.

(h) BRIEFS IN A CASE INVOLVING MULTIPLE APPELLANTS OR APPELLEES. In a case involving more than one appellant or appellee, including consolidated cases, any number of appellants or appellees may join in a brief, and any party may adopt by reference a part of another's brief. Parties may also join in reply briefs.

(i) SUBMISSION OF SUPPLEMENTAL AUTHORITIES. If pertinent and significant authorities come to a party's attention after the party's brief has been filed, or after oral argument but before a decision, the party may promptly advise the clerk of the appellate court by a signed submission setting forth the citations. The submission, which shall also be transmitted to the other parties to the appeal, shall state the reasons for the supplemental citations, referring either to the pertinent page of a brief or to a point argued orally. The body of the submission shall not exceed 350 words. Any response shall be made promptly and shall be similarly limited.

COMMITTEE NOTE

Rule 8014 is derived from former Rule 8010(a) and (b) and F.R. App. P. 28. Adopting much of the content of Rule 28, it provides greater detail regarding appellate briefs than former Rule 8010 contained.

Subdivision (a) prescribes the content and structure of the appellant's brief. It largely follows former Rule 8010(a)(1), but, in order to ensure national uniformity, it eliminates the provision of authority for an appellate court to alter these requirements. Implementing Rule 8012, subdivision (a)(1) directs the placement of a corporate disclosure statement, when required to be filed, at the beginning of an appellant's brief. Subdivision (a)(9) is also new. It implements the requirement under Rule 8015(a)(7) and (b) for the filing of a certificate of compliance with the limit on the number of words or lines allowed to be in a brief.

Subdivisions (b) carries forward the provisions of former Rule 8010(a)(2).

Subdivisions (c) and (d) are derived from F.R. App. P. 28(c). They explicitly authorize an appellant to file a reply brief, which filing will generally complete the parties' briefing process.

Subdivisions (e) and (f) are derived from F.R. App. P. 28 (d) and (e). Because Rule 8018, unlike F.R. App. P. 30(c), does not authorize a deferred filing of the appendix, subdivision (f) of this rule does not include provisions concerning references to the record when the appendix is prepared after the briefs are filed.

Subdivision (g) is similar to former Rule 8010(b), but it is reworded to reflect the likelihood that briefs will generally be filed electronically rather than in paper form.

Subdivision (h) adopts the procedures of F.R. App. P 28(j) with respect to the filing of supplemental authorities with the appellate court after a brief has been filed or after oral argument. The supplemental submission must comply with the signature requirements of Rule 8011(e).

Rule 8015. Form of Briefs, Appendices, and Other Papers.

(a) PAPER COPIES OF BRIEFS. If a paper copy of a brief may or must be filed, the following requirements apply:

(1) *Reproduction.*

(A) A brief may be reproduced by any process that yields a clear black image on light paper. The paper shall be opaque and unglazed. Only one side of the paper may be used.

(B) Text shall be reproduced with a clarity that equals or exceeds the output of a laser printer.

(C) Photographs, illustrations, and tables may be reproduced by any method that results in a good copy of the original. A glossy finish is acceptable if the original is glossy.

(2) *Cover.* Except for filings by unrepresented parties, the cover of the appellant's brief shall be blue; the appellee's, red; an intervenor's or amicus curiae's, green; any reply brief, gray; and any supplemental brief, tan. The front cover of a brief shall contain:

(A) the number of the case centered at the top;

(B) the name of the court;

(C) the title of the case as prescribed by Rule 8003(d)(2) or 8004(c)(2);

(D) the nature of the proceeding and the name of the court below;

(E) the title of the brief, identifying the party or parties for whom the brief is filed; and

(F) the name, office address, telephone number, and email address of counsel representing the party for whom the brief is filed.

(3) *Binding*. The brief shall be bound in any manner that is secure, does not obscure the text, permits the brief to lie reasonably flat when open, and is easy to scan.

(4) *Paper Size, Line Spacing, and Margins*. The brief shall be on 8½ by 11 inch paper. The text shall be double-spaced, but quotations more than two lines long may be indented and single-spaced. Headings and footnotes may be single-spaced. Margins shall be at least one inch on all four sides. Page numbers may be placed in the margins, but no text may appear there.

(5) *Typeface*. Either a proportionally spaced or monospaced face may be used.

(A) A proportionally spaced face shall include serifs, but sans-serif type may be used in headings and captions. A proportionally spaced face shall be 14-point or larger.

(B) A monospaced face may not contain more than 10½ characters per inch.

(6) *Type Styles.* A brief shall be set in plain, roman style, although italics or boldface may be used for emphasis. Case names shall be italicized or underlined.

(7) *Length.*

(A) *Page limitation.* A principal brief of the appellant or appellee shall not exceed 30 pages, or a reply brief 15 pages, unless it complies with (B) and (C).

(B) *Type-volume limitation.*

(i) A principal brief of the appellant or appellee is acceptable if:

- it contains no more than 14,000 words; or
- it uses a monospaced face and contains no more than 1,300 lines of text.

(ii) A reply brief is acceptable if it contains no more than half of the type volume specified in (i).

(iii) Headings, footnotes, and quotations count toward the word and line limitations. The corporate disclosure statement, table of contents, table of citations, statement with respect to oral argument, any addendum containing statutes, rules, or regulations, and any certificates of counsel do not count toward the limitation.

(C) *Certificate of Compliance.*

(i) A brief submitted under Rule 8015(a)(7)(B) shall include a certificate signed by the attorney, or an unrepresented party, that the brief complies with the type-volume limitation. The person preparing the certificate may rely on the word or line count of the word-processing system used to prepare the brief. The certificate shall state either:

- the number of words in the brief; or
- the number of lines of monospaced type in the brief.

(ii) A certificate of compliance that conforms substantially to the appropriate Official Form shall be regarded as sufficient to meet the requirements of (i).

(b) ELECTRONICALLY FILED BRIEFS. A brief that is filed electronically shall comply with (a), other than (a)(1) and

(a)(3), the color requirements of (a)(2), and the paper requirement of (a)(4).

(c) PAPER COPIES OF APPENDICES. If a paper copy of an appendix may or must be filed, it shall comply with Rule 8014(a)(1), (2), (3), and (4), with the following exceptions:

(1) The cover of a separately bound appendix shall be white.

(2) An appendix may include a legible photocopy of any document found in the record or of a printed decision.

(3) When necessary to facilitate inclusion of odd-sized documents such as technical drawings, an appendix may be a size other than 8½ by 11 inches, and need not lie reasonably flat when opened.

(d) ELECTRONICALLY FILED APPENDICES. An appendix that is filed electronically shall comply with Rule 8014(a)(2) and (4), other than the color requirements of (a)(2) and the paper requirement of (a)(4).

(e) OTHER DOCUMENTS.

(1) Motion. The form of a motion, response, or reply is governed by Rule 8013(f).

(2) Paper Copies of Other Documents. If a paper copy of any other document may or must be filed, other than a

submission under Rule 8014(i), it shall comply with Rule 8015(a), with the following exceptions:

(A) A cover is not necessary if the caption and signature page of the paper together contain the information required by Rule 8015(a)(2). If a cover is used, it shall be white.

(B) Rule 8015(a)(7) does not apply.

(3) Other Documents that Are Electronically Filed. Any other document that is filed electronically, other than a submission under Rule 8014(i), shall comply with the appearance requirements under (2).

(f) LOCAL VARIATION. Every appellate court shall accept documents that comply with the applicable requirements of this rule. By local rule or order in a particular case, an appellate court may accept documents that do not meet all of the requirements of this rule.

COMMITTEE NOTE

This rule is derived primarily from Fed. R. App. P. 32. Former Rule 8010(c) prescribed page limits for principal briefs and reply briefs. Those limits are now addressed by subdivision (a)(7) of this rule. In addition, the rule incorporates the considerable detail of Appellate Rule 32 regarding the appearance and format of briefs, appendices, and other documents, along with new provisions that apply when those documents are filed electronically.

Subdivision (a) prescribes the form requirements for briefs that are filed in paper form. It incorporates Fed. R. App. P. 32(a) in all respects

except the following: Rule 8015(a)(2)(F) requires the cover of a brief to include counsel's email address; (a)(3) requires that a brief be bound in a way that facilitates scanning of the document; and cross-references to the appropriate bankruptcy rule are substituted for references to other Federal Rules of Appellate Procedure.

Subdivision (a)(7) decreases the page limits that were permitted by former Rule 8010(c) – from 50 to 30 pages for a principal brief and from 25 to 15 for a reply brief – to achieve consistency with Fed. R. App. P. 32(a)(7). It also permits the limits on the length of a brief to be measured by a word or line count, as an alternative to a page limit. By adopting the same limits on brief length that are imposed by the Federal Rules of Appellate Procedure, the amendment seeks to prevent a party whose case is eventually appealed to the court of appeals from having to substantially reduce the length of its brief at that appellate level.

Subdivision (b) adapts for briefs that are electronically filed subdivision (a)'s form requirements. With the use of electronic filing, the method of reproduction, color of covers, method of binding, and use of paper become irrelevant. Information required on the cover, formatting requirements, and limits on brief length remain the same, however.

Subdivisions (c) and (d) prescribe the form requirements for appendices. Subdivision (c), applicable to appendices in paper form, is derived from Fed. R. App. P. 32(b), and subdivision (d) adapts those requirements for appendices that are electronically filed.

Subdivision (e), which is based on Fed. R. App. P. 32(c), addresses the form required for documents – in paper form or electronically filed – that are not otherwise covered by these rules.

Subdivision (f), like Fed. R. App. P. 32(e), is intended to provide assurance to lawyers and parties that compliance with the form requirements of this rule will allow a brief or other document to be accepted by any appellate court. A court may, however, by local rule or by order in a particular case choose to accepts briefs and documents that do not comply with all of this rule's requirements.

Under Rule 8011(e), all briefs and other submissions must be signed by the party filing the document or, if represented, by counsel. If the document is filed electronically, an electronic signature must be provided in accordance with Rule 8011(e).

Rule 8016. Cross-Appeals

(a) APPLICABILITY. This rule applies to a case in which a cross-appeal is filed. Rules 8014(a)-(d), 8015(a)(2), 8015(a)(7)(A)-(B), and 8018(a) do not apply to such a case, except as otherwise provided in this rule.

(b) DESIGNATION OF APPELLANT. The party who files a notice of appeal first is the appellant for purposes of this rule and Rules 8018(b) and 8019. If notices are filed on the same day, the plaintiff, petitioner, applicant, or movant in the proceeding below is the appellant. These designations may be modified by the parties' agreement or by court order.

(c) BRIEFS. In a case involving a cross-appeal:

(1) *Appellant's Principal Brief.* The appellant shall file a principal brief in the appeal. That brief shall comply with Rule 8014(a).

(2) *Appellee's Principal and Response Brief.* The appellee shall file a principal brief in the cross-appeal and shall, in the same brief, respond to the principal brief in the appeal. That brief shall comply with Rule 8014(a), except that the brief need not include a statement of the case or a statement of the facts unless the appellee is dissatisfied with the appellant's statement.

(3) *Appellant's Response and Reply Brief.* The appellant shall file a brief that responds to the principal brief in the cross-appeal and may, in the same brief, reply to the response in the appeal. That brief shall comply with Rule 8014(a)(2)-(7) and (9), except that none of the following need appear unless the appellant is dissatisfied with the appellee's statement in the cross-appeal:

(A) the jurisdictional statement;

(B) the statement of the issues and the applicable standard of appellate review; and

(C) the statement of the case.

(4) *Appellee's Reply Brief.* The appellee may file a brief in reply to the response in the cross-appeal. That brief shall comply with Rule 8014(a)(2)-(3) and (9) and shall be limited to the issues presented by the cross-appeal.

(5) *No Further Briefs.* Unless the appellate court permits, no further briefs shall be filed in a case involving a cross-appeal.

(d) COVER. If a paper copy may or must be filed, except for filings by unrepresented parties, the cover of the appellant's principal brief shall be blue; the appellee's principal and response brief, red; the appellant's response and reply brief, yellow; the

appellee's reply brief, gray; an intervenor's or amicus curiae's brief, green; and any supplemental brief, tan. The front cover of a brief shall contain the information required by Rule 8015(a)(2).

(e) LENGTH.

(1) *Page Limitation.* Unless it complies with (2) and (3), the appellant's principal brief shall not exceed 30 pages; the appellee's principal and response brief, 35 pages; the appellant's response and reply brief, 30 pages; and the appellee's brief, 15 pages.

(2) *Type-Volume Limitation.*

(A) The appellant's principal brief or the appellant's response and reply brief is acceptable if:

(i) it contains no more than 14,000 words; or

(ii) it uses a monospaced face and contains no more than 1,300 lines of text.

(B) The appellee's principal and response brief is acceptable if:

(i) it contains no more than 16,500 words; or

(ii) it uses a monospaced face and contains no more than 1,500 lines of text.

(C) The appellee's reply brief is acceptable if it contains no more than half of the type volume specified in (A).

(3) *Certificate of Compliance.* A brief submitted either electronically or in paper form under (2) shall comply with Rule 8015(a)(7)(C).

(f) TIME TO SERVE AND FILE A BRIEF. Briefs shall be served and filed as follows:

(1) The appellant shall serve and file its principal brief within 30 days after the docketing of the notice of transmission of the record or notice of availability of the record pursuant to Rule 8010(b)(3).

(2) The appellee shall serve and file its principal and response brief within 30 days after service of the appellant's principal brief.

(3) The appellant shall serve and file its response and reply brief within 30 days after service of the appellee's principal and response brief.

(4) The appellee shall file its reply brief within 14 days after service of the appellant's response and reply brief, or seven days before scheduled argument, whichever is earlier, unless the appellate court, for good cause, allows a later filing.

(5) If an appellant or appellee fails to file a principal brief within the time provided by this rule, or within an extended time authorized by the appellate court, the appeal or cross-appeal may be dismissed. An appellee who fails to file a responsive brief will not be heard at oral argument on the appeal, and an appellant who fails to file a responsive brief will not be heard at oral argument on the cross-appeal unless the appellate court grants permission.

COMMITTEE NOTE

This rule is modeled on F.R. App. P. 28.1. It governs the timing, content, length, filing, and service of briefs in bankruptcy cases in which there is a cross-appeal. The former Part VIII rules did not separately address the topic of cross-appeals.

Subdivision (b) prescribes which party is designated the appellant when there is a cross-appeal. Generally, the first to file a notice of appeal will be the appellant.

Subdivision (c) specifies the briefs that are permitted to be filed by the appellant and the appellee. Because of the dual role of the parties to the appeal and cross-appeal, each party is permitted to file a principal brief and a response to the opposing party's brief, as well as a reply brief. For the appellee, the principal brief in the cross-appeal and the response in the appeal are combined into a single brief. The appellant, on the other hand, initially files a principal brief in the appeal and later files a response to the appellee's principal brief in the cross-appeal, along with a reply brief in the appeal. The final brief that may be filed is the appellee's reply brief in the cross-appeal.

Subdivision (d) adopts the provisions of F.R. App. P. 28.1(d) for covers of briefs that are filed in paper form in cases in which there is a cross-appeal.

Subdivision (e), which prescribes page limits for briefs, is adopted from F.R. App. P. 28.1(e). It applies to briefs that are filed electronically, as well as those filed in paper form. Like Rule 8015(a)(7), it imposes limits measured either by number of pages or number of words or lines of text.

Subdivision (f) governs the time for filing briefs in cases in which there is a cross-appeal. It adopts the provisions of F.R. App. P. 28.1(f). It further authorizes the dismissal of an appeal or cross-appeal if the appellant or cross-appellant fails to timely file a principal brief, and it denies oral argument to a party who fails to file a responsive brief, unless the appellate court orders otherwise.

Rule 8017. Brief of an Amicus Curiae

(a) WHEN PERMITTED. The United States or its officer or agency, or a State, Territory, Commonwealth, or the District of Columbia may file an amicus-curiae brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing. On its own motion, and with notice to all parties to an appeal, the appellate court may request a brief by an amicus curiae.

(b) MOTION FOR LEAVE TO FILE. The motion shall be accompanied by the proposed brief and state:

(1) the movant's interest; and

(2) the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the appeal.

(c) CONTENT AND FORM. An amicus brief shall comply with Rule 8015. In addition to the requirements of Rule 8015, the cover of an amicus brief that may or must be filed in paper form shall identify the party or parties supported and indicate whether the brief supports affirmance or reversal. If an amicus curiae is a corporation, the brief shall include a disclosure

statement like that required by Rule 8012. An amicus brief need not comply with Rule 8014, but shall include the following:

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

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

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

(4) unless the amicus curiae is one listed in the first sentence of Rule 8017(a), a statement that indicates:

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

(B) whether a party or a party's counsel contributed money that was intended to fund preparation or submission of the brief; and

(C) the name of any person other than the amicus curiae, its members, or its counsel who contributed money that was intended to fund preparation or submission of the brief;

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

(6) a certificate of compliance, if required by Rule 8015(a)(7)(C), 8015(b), or 8016(e)(3).

(d) LENGTH. Except by the court's permission, an amicus brief shall be no more than one-half the maximum length authorized by these rules for a party's principal brief. If the court grants a party permission to file a longer brief, that extension does not affect the length of an amicus brief.

(e) TIME FOR FILING. An amicus curiae shall file its brief, accompanied by a motion for filing when necessary, no later than seven days after the principal brief of the party being supported is filed. If an amicus curiae does not support either party, it shall file its brief no later than seven days after the appellant's brief is filed. A court may grant leave for later filing, specifying the time within which an opposing party may answer.

(f) REPLY BRIEF. Except by the court's permission, an amicus curiae shall not file a reply brief.

(g) ORAL ARGUMENT. Except by the court's permission, an amicus curiae shall not participate in oral argument.

(h) SUBMISSION OF SUPPLEMENTAL AUTHORITIES. If pertinent and significant authorities come to the attention of an amicus curiae after its brief has been filed, or after oral argument but before a decision, the amicus curiae may

promptly advise the clerk of the appellate court by a signed submission setting forth the citations. The submission, which shall also be transmitted to the other parties to the appeal, shall state the reasons for the supplemental citations, referring either to the pertinent page of a brief or to a point argued orally. The body of the submission shall not exceed 350 words. Any response shall be made promptly and shall be similarly limited.

COMMITTEE NOTE

This rule is derived from F.R. App. P. 29. The former Part VIII rules did not address the participation by an amicus curiae in a bankruptcy appeal.

Subdivision (a) adopts the provisions of F.R. App. P. 29(a). In addition, it authorizes the court on its own motion – with notice to the parties – to request the filing of a brief by an amicus curiae.

Subdivisions (b)-(g) adopt F.R. App. P. 29(b)-(g).

Subdivision (h) provides authority for an amicus curiae to submit supplemental citations, just as Rule 8014(i) authorizes a party to do.

Rule 8018. Serving and Filing Briefs; Appendices

(a) TIME TO SERVE AND FILE A BRIEF. Unless the appellate court by order excuses the filing of briefs or specifies different time limits:

(1) The appellant shall serve and file a brief within 30 days after the docketing of the notice of transmission of the record or notice of availability of the record pursuant to Rule 8010(b)(3).

(2) The appellee shall serve and file a brief within 30 days after service of the appellant's brief.

(3) The appellant may serve and file a reply brief within 14 days after service of the appellee's brief, or three days before scheduled argument, whichever is earlier, unless the appellate court, for good cause, allows a later filing.

(4) If an appellant fails to file a brief within the time provided by this rule, or within an extended time authorized by the appellate court, the appeal may be dismissed. An appellee who fails to file a brief will not be heard at oral argument unless the appellate court grants permission.

(5) If the appellate court has a mediation procedure applicable to bankruptcy appeals, the clerk of the appellate court shall notify the parties promptly after docketing the appeal what

effect the mediation procedure has on the time for filing briefs in the appeal and the requirements of the mediation procedure.

(b) DUTY TO SERVE AND FILE APPENDIX TO BRIEF

(1) Subject to Rules 8009(d) and 8018(e), the appellant or cross-appellant shall serve and file with its principal brief excerpts of the record as an appendix, which shall include the following:

(A) the relevant entries in the bankruptcy docket;

(B) the complaint and answer or other equivalent filings;

(C) the judgment, order, or decree from which the appeal is taken;

(D) any other orders, pleadings, jury instructions, findings, conclusions, or opinions relevant to the appeal;

(E) the notice of appeal; and

(F) any relevant transcript or portion thereof.

(2) The appellee or cross-appellee may also serve and file with its brief an appendix that contains material required to

be included by the appellant or cross-appellant, or relevant to the appeal or cross-appeal, but omitted by appellant or cross-appellant.

(c) FORMAT OF APPENDIX. The appendix shall begin with a table of contents identifying the page at which each part begins. The relevant docket entries shall follow the table of contents. Other parts of the record shall follow chronologically. When pages from the transcript of proceedings are placed in the appendix, the transcript page numbers shall be shown in brackets immediately before the included pages. Omissions in the text of documents or of the transcript shall be indicated by asterisks. Immaterial formal matters, such as captions, subscriptions, acknowledgments, and the like, shall be omitted.

(d) APPENDIX EXHIBITS. Exhibits designated for inclusion in the appendix may be reproduced in a separate volume or volumes, suitably indexed.

(e) APPEAL ON THE ORIGINAL RECORD WITHOUT AN APPENDIX. The appellate court may, either by rule for all cases or classes of cases or by order in a particular case, dispense with the appendix and permit an appeal to proceed on the original record, with the submission of any relevant parts of the record that the appellate court orders the parties to file.

COMMITTEE NOTE

This rule is derived from former Rule 8009 and F. R. App. P. 30 and 31. Like former Rule 8009, it addresses the timing of serving and filing briefs and appendices, as well as the content and format of appendices. It retains the bankruptcy practice of permitting the appellee to file its own appendix, rather than requiring the appellant to include in the appendix it files matters designated by the appellee.

Subdivision (a) retains the provision of former Rule 8009 that allows the appellate court to dispense with briefing or to provide different time periods than the ones specified by this rule. It increases some of the time periods for filing briefs from the periods prescribed by the former rule, while still retaining shorter time periods than some provided by F.R. App. P. 31(a). The time for filing the appellant's brief is expanded from 14 to 30 days after the docketing of the notice of the transmission of the record or notice of the availability of the record. That triggering event is equivalent to the docketing of the appeal under former Rule 8007. Appellate Rule 31(a)(1), by contrast, provides the appellant 40 days after the record is filed to file its brief. The shorter time period for bankruptcy appeals reflects the frequent need for greater expedition in the resolution of bankruptcy appeals, while still providing the appellant a more realistic time period to prepare its brief than the former rule provided.

Subdivision (a)(2) similarly expands the time period for filing the appellee's brief from 14 to 30 days after the service of the appellant's brief. This period is the same as the period provided by F.R. App. 31(a)(1).

Subdivision (a)(3) retains the 14-day time period for filing a reply brief that the former rule prescribed, but it qualifies that period to ensure that the final brief is filed at least seven days before oral argument.

Subdivision (a)(4) is new. Based on F.R. App. P. 31(c), it provides for actions that may be taken – dismissal of the appeal or denial of participation in oral argument – if the appellant or appellee fails to file its brief.

Subdivision (a)(5) is also new. If an appellate court has a mediation procedure that is applicable to bankruptcy appeals, the clerk of the appellate court must advise the parties – promptly after the docketing of the appeal – that such a procedure applies, what its requirements are, and how the procedure affects that timing of the filing of briefs in the appeal.

Subdivisions (b) and (c) govern the content and format of the appendix to a brief. Subdivision (b) is similar to former Rule 8009(b), and subdivision (c) is derived from F.R. App. P. 30(d).

Subdivision (d), which addresses the inclusion of exhibits in the appendix, is derived from F.R. App. P. 30(e).

Rule 8011 governs the methods of filing and serving briefs and appendices. It prescribes the number of copies of paper documents that must be filed and authorizes the appellate court to require the submission of paper copies of documents that are filed electronically.

Rule 8019. Oral Argument

(a) PARTY'S STATEMENT. Any party may file a statement explaining why oral argument should, or need not, be allowed.

(b) PRESUMPTION OF ORAL ARGUMENT AND EXCEPTION. Oral argument shall be allowed in every case unless the appellate court determines after examination of the briefs and record that oral argument is unnecessary for any of the following reasons:

(1) the appeal is frivolous;

(2) the dispositive issue or issues have been authoritatively decided; or

(3) the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.

(c) NOTICE OF ARGUMENT; POSTPONEMENT. The appellate court shall advise all parties of the date, time, and place for oral argument, and the time allowed for each side. A motion to postpone the argument or to allow longer argument shall be filed reasonably in advance of the hearing date.

(d) ORDER AND CONTENTS OF ARGUMENT. The appellant opens and concludes the argument. Counsel shall not read at length from briefs, the record, or authorities.

(e) CROSS-APPEALS AND SEPARATE APPEALS. If there is a cross-appeal, Rule 8016(b) determines which party is the appellant and which is the appellee for the purposes of oral argument. Unless the appellate court directs otherwise, a cross-appeal or separate appeal shall be argued when the initial appeal is argued. Separate parties should avoid duplicative argument.

(f) NONAPPEARANCE OF A PARTY. If the appellee fails to appear for argument, the appellate court may hear appellant's argument. If the appellant fails to appear for argument, the appellate court may hear the appellee's argument. If neither party appears, the case will be decided on the briefs, unless the appellate court orders otherwise.

(g) SUBMISSION ON BRIEFS. The parties may agree to submit a case for decision on the briefs, but the appellate court may direct that the case be argued.

(h) USE OF PHYSICAL EXHIBITS AT ARGUMENT; REMOVAL. Counsel intending to use physical exhibits other than documents at the argument shall arrange to place them in the courtroom on the day of the argument before the court convenes.

After the argument, counsel shall remove the exhibits from the courtroom, unless the appellate court directs otherwise. The clerk may destroy or dispose of the exhibits if counsel does not reclaim them within a reasonable time after the clerk gives notice to remove them.

COMMITTEE NOTE

This rule generally retains the provisions of former Rule 8012 and adds much of the additional detail of F.R. App. P. 34. By incorporating the more detailed provisions of the appellate rule, Rule 8019 promotes national uniformity regarding oral argument in bankruptcy appeals.

Subdivision (a), like F.R. App. P. 34(a)(1), now allows a party to submit a statement explaining why there is no need for oral argument. Former Rule 8012 authorized only statements about why oral argument should be allowed.

Subdivision (b) retains the reasons set forth in former Rule 8012 for the appellate court to conclude that oral argument is not needed.

The remainder of this rule adopts the provisions of F.R. App. P. 34(b)-(g), with one exception. Rather than requiring the appellate court to hear appellant's argument if the appellee does not appear, subdivision (e) authorizes the appellate court to go forward with the argument in the appellee's absence. Should the court decide, however, to postpone the oral argument in that situation, it would be authorized to do so.

Rule 8020. Disposition of Appeal; Weight Accorded Bankruptcy Judge's Findings of Fact and Conclusions of Law

(a) DISPOSITION OF APPEAL. The appellate court may affirm, modify, vacate, or reverse a bankruptcy judge's judgment, order, or decree, or remand with instructions for further proceedings.

(b) ACCORDED WEIGHT. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy judge to assess the credibility of the witnesses. Questions of law are subject to de novo review. A matter committed to the discretion of the bankruptcy judge is reviewed for abuse of discretion unless the bankruptcy judge applied an incorrect standard of law. Any matter may be reviewed for clear error.

COMMITTEE NOTE

This rule is derived from former Rule 8013. It specifies the possible actions that the appellate court may take in ruling on an appeal and the appropriate standards of appellate review. It does not apply to the district court's review of a bankruptcy judge's proposed findings of fact and conclusions of law in a non-core matter under 28 U.S.C. § 157(c)(1). Proposed findings of fact and conclusions of law as to which a party has timely and specifically objected are subject to the provisions of Rule 9033 and the review that it prescribes.

Rule 8021. Damages and Costs for Frivolous Appeal

If the appellate court determines that an appeal from a judgment, order, or decree of a bankruptcy judge is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee. The relief authorized by this rule does not limit any other relief or power available to the appellate court.

COMMITTEE NOTE

This rule is derived from F.R. App. P. 38. The second sentence is added to clarify that the authority conferred by this rule does not affect the appellate court's exercise of any inherent or other authority over the conduct of parties or counsel.

Rule 8022. Costs

(a) AGAINST WHOM ASSESSED. The following rules apply unless the law provides or the appellate court orders otherwise:

(1) if an appeal is dismissed other than as provided in Rule 8024, costs are taxed against the appellant, unless the parties agree otherwise;

(2) if a judgment, order, or decree is affirmed, costs are taxed against the appellant;

(3) if a judgment, order, or decree is reversed, costs are taxed against the appellee;

(4) if a judgment, order, or decree is affirmed or reversed in part, modified, or vacated, costs are taxed only as the court orders.

(b) COSTS FOR AND AGAINST THE UNITED STATES. Costs for or against the United States, its agency, or officer may be assessed under (a) only if authorized by law.

(c) COSTS TAXABLE ON APPEAL. The bankruptcy clerk shall tax the following costs in favor of the party entitled to costs under this rule:

(1) costs incurred in the production of any required copies of a brief, appendix, exhibit, or the record;

(2) costs incurred in the preparation and transmission of the record;

(3) the cost of the reporter's transcript if necessary for the determination of the appeal;

(4) premiums paid for supersedeas bonds or other bonds to preserve rights pending appeal; and

(5) the fee for filing the notice of appeal.

(d) RATES. Each appellate court shall, by local rule, fix the maximum rate for taxing the cost of producing required copies of a brief, appendix, exhibit, or the record. The rate shall not exceed that generally charged for such work in the area where the office of the clerk of the appellate court is located and should encourage economical methods of copying.

(e) BILL OF COSTS; OBJECTIONS. A party who wants costs taxed shall, within 14 days after entry of judgment on appeal, file with the clerk of the appellate court, with proof of service, an itemized and verified bill of costs. Objections shall be filed within 14 days after service of the bill of costs, unless the court extends the time. The clerk of the appellate court shall prepare and certify an itemized statement of costs.

COMMITTEE NOTE

This rule is derived from former Rule 8014 and F.R. App. P. 39. It retains the former rule's authorization for taxing appellate costs against the losing party and its specification of the costs that may be taxed. Taxable costs do not include attorney's fees. The rule also incorporates some of the additional details regarding the taxing of costs contained in F.R. App. P. 39. Consistent with former Rule 8014, all costs are taxed by the clerk of the bankruptcy court. Subdivision (b) is added to clarify that additional authority is required for the taxation of costs by or against federal governmental parties.

Rule 8023. Motion for Rehearing.

(a) TIME TO FILE; CONTENTS; ANSWER; ACTION BY THE APPELLATE COURT.

(1) *Time.* Unless the time is shortened or extended by order or local rule, any motion for rehearing by the appellate court shall be filed within 14 days after entry of judgment on appeal.

(2) *Contents.* The motion shall state with particularity each point of law or fact that the movant believes the appellate court has overlooked or misapprehended and shall argue in support of the motion. Oral argument is not permitted.

(3) *Answer.* Unless the appellate court requests, no answer to a motion for rehearing is permitted. But ordinarily, rehearing will not be granted in the absence of such a request.

(4) *Action by the Appellate Court.* If a motion for rehearing is granted, the appellate court may do any of the following:

(A) make a final disposition of the appeal without reargument;

(B) restore the case to the calendar for reargument or resubmission; or

(C) issue any other appropriate order.

(b) FORM OF MOTION; LENGTH. The motion shall comply in form with Rule 8015(a)(1)-(6) and 8015(b). Copies shall be served and filed as provided by Rule 8011. Unless the appellate court by local rule or order provides otherwise, a motion for rehearing shall not exceed 15 pages.

COMMITTEE NOTE

This rule is derived from former Rule 8015 and F.R. App. P. 40. It deletes the provision of former Rule 8015 regarding the time for appeal to the court of appeals because the matter is addressed by F.R. App. P. 6(b)(2)(A)(i).

Rule 8024. Voluntary Dismissal

(a) DISMISSAL IN THE BANKRUPTCY COURT. If an appeal has not been docketed in the appellate court, the appeal may be dismissed by the bankruptcy court on the filing of a stipulation for dismissal signed by all the parties, or on motion and notice by the appellant.

(b) DISMISSAL IN THE APPELLATE COURT. If an appeal has been docketed in the appellate court, and the parties to the appeal sign and file with the clerk of the appellate court an agreement that the appeal be dismissed and pay any court costs or fees that may be due, the clerk of the appellate court shall enter an order dismissing the appeal. An appeal may also be dismissed on the appellant's motion on terms and conditions fixed by the appellate court.

COMMITTEE NOTE

This rule is derived from former Rule 8001(c), which was adapted from F.R. App. P. 42. It retains the requirement of the former rule that the clerk of the appellate court dismiss an appeal upon the parties' agreement that the appeal be dismissed and their payment of any required costs or fees. The bankruptcy and appellate courts continue to have discretion to dismiss an appeal under the circumstances specified in the rule. Nothing in the rule prohibits an appellate court from dismissing an appeal for other reasons authorized by law, such as the failure to prosecute an appeal.

Rule 8025. Duties of Clerk on Disposition of Appeal

(a) ENTRY OF JUDGMENT ON APPEAL. Unless the appellate court by local rule provides otherwise, the clerk of the appellate court shall prepare, sign, and enter the judgment following receipt of the opinion of the appellate court or, if there is no opinion, following the instruction of the appellate court. The notation of a judgment in the docket constitutes entry of judgment.

(b) NOTICE OF AN ORDER OR JUDGMENT; RETURN OF RECORD. Immediately upon the entry of a judgment or order, the clerk of the appellate court shall transmit a notice of the entry to each party to the appeal, to the United States trustee, and to the bankruptcy clerk, together with a copy of any opinion respecting the judgment or order, and shall make a note of the transmission in the docket. If any original documents were transmitted as the record on appeal, they shall be returned to the bankruptcy clerk on disposition of the appeal.

COMMITTEE NOTE

This rule is derived from former Rule 8016, which was adapted from F.R. App. P. 36 and 45 (c) and (d). The rule is reworded to reflect that often the record will not be physically transmitted to the appellate court and thus there will be no documents to return to the bankruptcy clerk. Other changes to the former rule are stylistic.

Rule 8026. Stay of Appellate Court Judgment

(a) AUTOMATIC STAY OF JUDGMENT ON APPEAL. Unless the appellate court orders otherwise, its judgment is stayed for 14 days after entry of the judgment.

(b) STAY PENDING APPEAL TO THE COURT OF APPEALS.

(1) On motion and notice to the parties to the appeal, the appellate court may stay its judgment pending an appeal to the court of appeals.

(2) The stay shall not extend beyond 30 days after the entry of the judgment of the appellate court unless the period is extended for cause shown.

(3) If before the expiration of a stay entered pursuant to this subdivision there is an appeal to the court of appeals by the party who obtained the stay, the stay continues until final disposition by the court of appeals.

(4) A bond or other security may be required as a condition of the grant or continuation of a stay of the judgment.

(5) A bond or other security may be required if a trustee obtains a stay, but a bond or security may not be required if a stay is obtained by the United States or its officer or agency or at

the direction of any department of the Government of the United States.

(c) AUTOMATIC STAY OF ORDER, JUDGMENT, OR DECREE OF BANKRUPTCY COURT. If the appellate court enters a judgment affirming an order, judgment, or decree of the bankruptcy court, a stay of the appellate court's judgment automatically stays the bankruptcy court's order, judgment, or decree for the duration of the stay, unless otherwise ordered.

(d) POWER OF COURT OF APPEALS NOT LIMITED. This rule does not limit the power of a court of appeals or any of its judges to do the following:

(1) stay a judgment pending appeal;

(2) stay proceedings during the pendency of an appeal;

(3) suspend, modify, restore, vacate, or grant a stay or an injunction during the pendency of an appeal; or

(4) make any order appropriate to preserve the status quo or the effectiveness of any judgment to be entered.

COMMITTEE NOTE

This rule is derived from former Rule 8017. Most of the changes to the former rule are stylistic. Subdivision (c) is new. It provides generally for the automatic stay of a bankruptcy court order, judgment, or

decree that is affirmed on appeal if the appellate court judgment is stayed, even if the bankruptcy court's ruling itself was not stayed.

Rule 8027. Rules by Courts of Appeals and District Courts; Procedure When There is No Controlling Law

(a) LOCAL RULES BY COURTS OF APPEALS AND DISTRICT COURTS.

(1) Courts of appeals for circuits that have authorized a BAP pursuant to 28 U.S.C. § 158(b) and district courts may make and amend rules governing practice and procedure for appeals from judgments, orders, or decrees of bankruptcy judges to the BAP or district court. Local rules shall be consistent with, but not duplicative of, Acts of Congress and these Part VIII rules.

(2) Local rules shall conform to any uniform numbering system prescribed by the Judicial Conference of the United States. Rule 83 F.R.Civ.P. and Rule 47 F.R.App. P. respectively govern the procedure for making and amending rules to govern appeals in district courts and BAPs.

(3) A local rule imposing a requirement of form shall not be enforced in a way that causes a party to lose any right because of a nonwillful failure to comply.

(b) PROCEDURE WHEN THERE IS NO CONTROLLING LAW.

(1) A district judge or BAP may regulate practice in any manner consistent with federal law, these Rules, the Official Forms, and local rules of the circuit council or the district court.

(2) No sanction or other disadvantage shall be imposed for noncompliance with any requirement not in federal law, applicable federal rules, the Official Forms, or the local rules of the circuit council or district court unless the alleged violator has been furnished in the particular case with actual notice of the requirement.

COMMITTEE NOTE

This rule is derived from former Rule 8018. The changes to the former rule are primarily stylistic.

Subdivision (a)(2) recognizes the authority given courts of appeals under F.R. App. P. 47 to promulgate local rules. Some courts of appeals have delegated rule-making authority to the BAP within the circuit to make and amend local rules governing practice and procedure before the BAP. **[Is this correct?]**

Rule 8028. Suspension of Rules in Part VIII

In the interest of expediting decision or for other cause in a particular case, the appellate court may suspend the requirements or provisions of the rules in Part VIII, except Rules 8001, 8002, 8003, 8004, 8005, 8006, 8007, 8012, 8020, 8021, 8025, 8026, 8027, and 8028.

COMMITTEE NOTE

This rule is derived from former Rule 8019 and F.R. App. P. 2. In order to promote uniformity of practice and compliance with statutory authority, the rule includes a more extensive list of requirements that may not be suspended than either the former rule or the Rules of Appellate Procedure provide. Rules that may not be suspended are those governing the following:

- scope of the rules and definitions;
- time for filing a notice of appeal;
- taking an appeal as of right;
- taking an appeal by leave;
- election to have appeal heard by district court instead of BAP;
- certification of direct appeal to court of appeals;
- stay pending appeal;
- corporate disclosure statement;
- disposition of appeals and weight to be accorded bankruptcy judge's findings of fact and conclusions of law;
- sanctions for frivolous appeals;
- clerk's duties on disposition of appeal;
- stay of appellate court's judgment;
- local rules; and
- suspension of Part VIII rules.

TAB-VIII-B

Sketch of proposed amendments to Appellate Rule 6

The proposed amendments to Appellate Rule 6 might read as follows:[1]

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), 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]

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[1] This sketch is similar but not identical to that presented in the Fall 2010 Appellate Rules agenda materials.

[2] The Fall 2010 Appellate Rules materials reflected additional proposed revisions to Appellate Rule 6(b)(2)(A) that were designed to track a pending proposal to amend Appellate Rule 4(a)(4). The Rule 4(a)(4) proposal has encountered drafting complications and its final form is yet to be determined. For that reason, that proposal is not reflected in the text shown here.

(i) If a timely motion for rehearing under Bankruptcy Rule ~~8015~~ [8023][3] is filed, the time to appeal for all parties runs from the entry of the order disposing of the motion. A notice of appeal filed after the district court or bankruptcy appellate panel announces or enters a judgment, order, or decree--but before disposition of the motions for rehearing--becomes effective when the order disposing of the motion for rehearing is entered.

(ii) ~~Appellate review of~~ A party intending to challenge the order disposing of the motion – or the alteration or amendment of a judgment, order, or decree upon such a motion – ~~requires the party, in compliance with Rules 3(c) and 6(b)(1)(B), to amend a previously filed notice of appeal. A party intending to challenge an altered or amended judgment, order, or decree~~ must file a notice of appeal, or an amended notice of appeal, in compliance with Rules 3(c) and 6(b)(1)(B). The notice or amended notice must be filed within the time prescribed by Rule 4 – excluding Rules 4(a)(4) and ~~4~~(b) – measured from the entry of the order disposing of the motion.

(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~~ [8009] – 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.

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[3] References to proposed Bankruptcy Rules are bracketed because the Part VIII project will re-number the relevant Bankruptcy Rules.

(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)] 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.

(B) **Transmitting the record.** Bankruptcy Rule [8010] governs the

completion and transmission of the record.

(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].

[(D) **Filing a representation statement**. Unless the court of appeals designates another time, the attorney who sought leave to appeal must, within 14 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.]

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)(ii) is amended to address problems that stemmed from the adoption — during the 1998 restyling project — of language referring to challenges to "an altered or amended judgment, order, or decree." Current Rule 6(b)(2)(A)(ii) states that "[a] party intending to challenge an altered or amended judgment, order, or decree must file a notice of appeal or amended notice of appeal ...." Before the 1998 restyling, the comparable subdivision of Rule 6 instead read "[a] party intending to challenge an alteration or amendment of the judgment, order, or decree shall file an amended notice of appeal ...." The 1998 restyling made a similar change in Rule 4(a)(4). One court has explained that the 1998 amendment introduced ambiguity into that Rule: "The new formulation could be read to expand the obligation to file an amended notice to circumstances where the ruling on the post-trial motion alters the prior judgment in an insignificant manner or in a manner favorable to the appellant, even though the appeal is not directed against the alteration of the judgment." *Sorensen v. City of New York*, 413 F.3d 292, 296 n.2 (2d Cir. 2005). Though the *Sorensen* court was writing of Rule 4(a)(4), a similar concern arises with respect to Rule 6(b)(2)(A)(ii). Rule 4(a)(4) was amended in 2009 to remove the ambiguity identified by the *Sorensen* court. The current amendment follows suit by removing Rule 6(b)(2)(A)(ii)'s reference to challenging "an altered or amended judgment, order, or decree," and referring instead to challenging "the alteration or amendment of a judgment, order, or decree."

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 governed by Bankruptcy Rule [8009]. Subdivision (c)(2)(B) provides that the transmission of the record is governed by Bankruptcy Rule [8010].

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.]

TAB-IX

August 2011						
S	M	T	W	T	F	S
	1	2	3	4	5	6
7	8	9	10	11	12	13
14	15	16	17	18	19	20
21	22	23	24	25	26	27
28	29	30	31			

October 2011						
S	M	T	W	T	F	S
						1
2	3	4	5	6	7	8
9	10	11	12	13	14	15
16	17	18	19	20	21	22
23 30	24 31	25	26	27	28	29

November 2011						
S	M	T	W	T	F	S
		1	2	3	4	5
6	7	8	9	10	11	12
13	14	15	16	17	18	19
20	21	22	23	24	25	26
27	28	29	30			

September 2011

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
				1	2	3
4	5 Labor Day	6	7	8	9	10
11 Grandparents Day	12	13	14	15	16	17
18	19	20	21	22	23 Autumn Begins	24
25	26	27	28	29	30	
						U.S. Federal Holidays are in Red.

September 2011						
S	M	T	W	T	F	S
				1	2	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29	30	

November 2011						
S	M	T	W	T	F	S
		1	2	3	4	5
6	7	8	9	10	11	12
13	14	15	16	17	18	19
20	21	22	23	24	25	26
27	28	29	30			

December 2011						
S	M	T	W	T	F	S
				1	2	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29	30	31

October 2011

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
						1
2	3	4	5	6	7	8
9	10 Columbus Day Thanksgiving (Canada)	11	12	13	14	15
16	17	18	19	20	21	22
23	24	25	26	27	28	29
30	31 Halloween					U.S. Federal Holidays are in Red.

March 2012						
S	M	T	W	T	F	S
				1	2	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29	30	31

May 2012						
S	M	T	W	T	F	S
		1	2	3	4	5
6	7	8	9	10	11	12
13	14	15	16	17	18	19
20	21	22	23	24	25	26
27	28	29	30	31		

June 2012						
S	M	T	W	T	F	S
					1	2
3	4	5	6	7	8	9
10	11	12	13	14	15	16
17	18	19	20	21	22	23
24	25	26	27	28	29	30

April 2012

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
1	2	3	4	5	6 Good Friday	7
8 Easter Sunday	9 Easter Monday	10	11	12	13	14
15	16	17	18	19	20	21
22	23	24	25	26	27	28
29	30					
						U.S. Federal Holidays are in Red.