ADVISORY COMMITTEE
ON
APPELLATE RULES

Chicago, IL
October 29-30, 2015

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Advisory Committee on Appellate Rules
October 29 and 30, 2015
Chicago, IL

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October 28-29, 2015

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Advisory Committee on Appellate Rules

Members	Position	District/Circuit	Start Date	End Date
Steven M. Colloton Chair	C	Eighth Circuit	2012	2016
Amy Coney Barrett	ACAD	Indiana	2010	2016
Michael A. Chagares	C	Third Circuit	2011	2017
Allison Eid	JUST	Colorado	2010	2016
Gregory G. Katsas	ESQ	Washington, DC	2013	2016
Neal K. Katyal	ESQ	Washington, DC	2011	2017
Brett M. Kavanaugh	D DC	Washington, DC	2015	2018
Stephen J. Murphy	DC	Michigan (Eastern)	2015	2018
Kevin C. Newsom	ESQ	Alabama	2011	2017
Donald B. Verrilli, Jr.*	DOJ	Washington, DC	----	Open
Gregory Maggs Reporter	ACAD	Washington, DC	2015	2020

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Liaison for the Advisory Committee on Bankruptcy Rules	**Roy T. Englert, Jr., Esq.**	***(Standing)***
Liaison for the Advisory Committee on Civil Rules	**Judge Arthur I. Harris**	***(Bankruptcy)***
Liaison for the Advisory Committee on Civil Rules	**Judge Neil M. Gorsuch**	***(Standing)***
Liaison for the Advisory Committee on Criminal Rules	**Judge Amy J. St. Eve**	***(Standing)***
Liaison for the Advisory Committee on Evidence Rules	**Judge James C. Dever III**	***(Criminal)***
Liaison for the Advisory Committee on Evidence Rules	**Judge Richard C. Wesley**	***(Standing)***

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Minutes of Spring 2015 Meeting of
Advisory Committee on Appellate Rules
April 23-24, 2015
Philadelphia, PA

I. Introductions

Judge Steven M. Colloton called the meeting of the Advisory Committee on Appellate Rules to order on Thursday, April 23, 2015, at 9:00 a.m. at the James A. Byrne United States Courthouse in Philadelphia, Pennsylvania. The following Advisory Committee members were present: Judge Michael A. Chagares, Judge Peter T. Fay, Judge Richard G. Taranto, Professor Amy Coney Barrett, Mr. Gregory G. Katsas, Professor Neal K. Katyal, and Mr. Kevin C. Newsom. Justice Allison H. Eid participated by telephone for all but a brief portion of the meeting during which no action items were discussed and no votes were taken. Mr. Douglas Letter, Director of the Appellate Staff of the Civil Division, U.S. Department of Justice ("DOJ"), and Mr. H. Thomas Byron III, also of the Civil Division, were present representing the Solicitor General.[1] Judge Jeffrey S. Sutton, Chair of the Standing Committee; Ms. Rebecca A. Womeldorf, the Standing Committee's Secretary and Rules Committee officer; Mr. Gregory G. Garre, liaison from the Standing Committee; Mr. Michael Ellis Gans, liaison from the appellate clerks; and Ms. Frances F. Skillman, Paralegal Specialist in the Rules Committee Support Office of the Administrative Office ("AO") were also present. Chief Judge Theodore A. McKee; Judge Anthony J. Scirica; Professor Daniel J. Capra, associate reporter to the Committee; Ms. Marie Leary from the Federal Judicial Center ("FJC"); Mr. Frederick Liu of Hogan Lovells; Mr. Robert A. Zauzmer, Chief of Appeals, U.S. Attorney's Office for the Eastern District of Pennsylvania; Mr. Howard J. Bashman; and Ms. Saranac Hale Spencer of The Legal Intelligencer attended portions of the meeting.

Judge Colloton welcomed Ms. Womeldorf as the new head of the Rules Office. Judge Colloton noted Ms. Womeldorf's impressive background, including her long experience as a litigator in Washington, D.C. Judge Colloton also noted that the Committee was fortunate to have, as its new associate reporter, Professor Daniel J. Capra, and he stated that Professor Capra would be joining the meeting later that day. Professor Struve observed that Professor Capra had taught her much of what she knew about serving as a reporter, and she expressed her appreciation to Professor Capra for agreeing to join her as a fellow reporter to the Committee.

[1] Mr. Letter was unable to attend the second day of the meeting.

On the afternoon of the first day of the meeting, Chief Judge McKee joined the meeting for a time. Judge Colloton welcomed Chief Judge McKee and thanked him for extending the Third Circuit's hospitality to the Appellate Rules Committee. Judge Colloton also expressed appreciation for the excellent logistical support provided by the Court's staff. Chief Judge McKee welcomed the Committee members to Philadelphia and encouraged their efforts.

II. Approval of Minutes of October 2014 Meeting

A motion was made and seconded to approve the minutes of the Committee's October 2014 meeting. The motion passed by voice vote without dissent.

III. Report on January 2015 Meeting of Standing Committee

Judge Colloton noted that the Appellate Rules Committee had had no action items to present to the Standing Committee at its January 2015 meeting. However, Judge Colloton had described to the Standing Committee a number of the Appellate Rules Committee's ongoing projects, and he had obtained the Standing Committee's input on those projects.

IV. Other Information Items

Professor Struve reminded the Committee members that on December 1, 2014, the amendments to Rule 6 (concerning bankruptcy appeals) had taken effect.

Later in the meeting, Professor Struve provided the Committee with updates on two recent Supreme Court decisions, *Jennings v. Stephens*, 135 S. Ct. 793 (2015), and *Gelboim v. Bank of America Corp.*, 135 S. Ct. 897 (2015). *Jennings* concerned the operation of the cross-appeal rule and the certificate-of-appealability requirement in habeas cases. Jennings, who had been sentenced to death, sought federal habeas relief on three theories of ineffective assistance of counsel. Two of those theories – based on a case called *Wiggins* – were accepted by the district court as a basis for habeas relief. The third theory – based on a case called *Spisak* – was rejected by the district court. The district court ordered the State to release Jennings unless, within a set period, it gave him a new sentencing hearing or changed his sentence from death to imprisonment. The State appealed the judgment. Jennings neither filed a cross-appeal nor sought a certificate of appealability. On appeal, the Fifth Circuit rejected Jennings' attempt to use the *Spisak* theory in defense of the judgment below. The Supreme Court, over a dissent, held that this was error, and that Jennings could argue the *Spisak* theory on appeal without either cross-appealing or seeking a certificate of appealability. The Supreme Court relied on its precedent stating that an appellee (without cross-appealing) can defend the judgment below on any ground appearing in the record, even if the ground in question was rejected by the district court. Here, the Court reasoned, upholding Jennings' *Spisak* claim would yield the same relief that he obtained by means of his *Wiggins* claims. Thus, neither a cross-appeal nor a certificate of appealability was needed. In the course of its discussion the Court noted that it is unclear whether the certificate-of-appealability requirement applies to a habeas petitioner who is the

cross-appellant (rather than the appellant).

In *Gelboim*, the Court addressed the question of a judgment's finality in the context of multidistrict litigation – a question that required the Court to discuss the interaction of 28 U.S.C. § 1291 (appeals from final decisions), 28 U.S.C. § 1407 (multidistrict litigation), and Civil Rule 54(b) (certification for immediate appeal of an order addressing fewer than all claims or parties). In this case, the Court held, the petitioners' complaint kept its independent status despite its inclusion in the MDL. Accordingly, the petitioners could appeal the dismissal of their complaint without awaiting the disposition of all the other cases involved in the MDL. The Court noted that it was not addressing how finality would work in an instance where multiple cases are consolidated for *all* purposes rather than (as here) for *limited* purposes.

V. Action Items – For Consideration After Publication

A. Item No. 07-AP-E (FRAP 4(a)(4) and "timely")

Judge Colloton invited Professor Struve to summarize the public comments on the proposal to amend Rule 4(a)(4). The amendment addresses the circuit split concerning whether a motion filed within a purported extension of a non-extendable deadline under Civil Rules 50, 52, or 59 counts as "timely" under Rule 4(a)(4). A number of circuits have ruled that the Civil Rules' deadlines for post-judgment motions are nonjurisdictional claim-processing rules. In this view, when a district court purports to extend the time for making such a motion, and no party objects to that extension, the district court has authority to decide the motion on its merits. But does the motion count as a "timely" one that, under Rule 4(a)(4), tolls the time to appeal? In the Third, Seventh, Ninth, and Eleventh Circuits, the answer is no. However, the Sixth Circuit has held to the contrary. The proposed amendment would implement the majority view.

Of the six commentators who submitted comments on this proposal, five supported it. The sole opponent disagreed with the Committee's decision to adopt the majority view; this commentator argued that it is anomalous that the district court can decide an untimely motion on its merits (absent an objection to the motion's untimeliness) but that such an untimely, unobjected-to motion does not extend the time to appeal under Rule 4(a)(4). This commentator also argued that the proposed rule sets a trap for unwary litigants – i.e., that the rule does not make clear to litigants the fact that such motions lack tolling effect. Professor Struve noted that the Committee had previously discussed whether to include in the text of the Rule an explicit statement that an untimely motion is not rendered timely (for purposes of Rule 4(a)(4)) by "a court order that sets a due date that is later than permitted by the Federal Rules of Civil Procedure, another party's consent or failure to object, or the court's disposition of the motion." The Committee had decided, instead, to place that explanation in the Committee Note. The commentator's concern about the clarity of the published Rule, Professor Struve suggested, might provide a reason to revisit that choice.

An appellate judge member responded that placing the explanatory language in the Rule

text would distend what is already a very long rule. On the other hand, this member noted, the additional language is not that long compared to the existing rule. Another member asked whether the Rule text, as published, would alert pro se litigants to the issue; there is no guarantee, this member noted, that such litigants will read the Committee Note. An attorney member stated, however, that the list of situations noted above (a court order erroneously extending a deadline, a lack of party objection to untimeliness, or a court's disposition of an untimely motion on its merits) might not be a complete list of the situations that a litigant might think render an untimely motion a timely one. If the list is incomplete, this member suggested, it may be misleading to place it in the text of the Rule. Another appellate judge member expressed agreement with the approach taken in the Rule as published.

A motion was made and seconded to approve the Rule and Committee Note as published. The motion passed by voice vote without dissent.

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

Judge Colloton invited Professor Struve to summarize the public comments on the proposed amendments to Rules 4(c)(1) and 25(a)(2)(C) and Forms 1 and 5, and new Form 7. As published, the amendments would make clear that prepayment of postage is required for an inmate to benefit from the inmate-filing provisions, but that the use of an institution's legal mail system is not. The amendments would clarify that a document is timely filed if it is accompanied by a declaration, notarized statement, or other evidence showing that the document was deposited by the due date and that postage was prepaid. Forms 1 and 5 would be revised to mention new Form 7, which shows a declaration meeting the Rule's requirements. The amendments would also clarify that if sufficient evidence does not accompany the initial filing, then the court of appeals has discretion to permit the later filing of the declaration or notarized statement.

The Committee commenced by discussing the aspect of the published Rule amendments that would delete the requirement that the inmate use a "system designed for legal mail" if one is available. Based on initial inquiries that disclosed no purpose for this requirement, the Committee had thought that its deletion would streamline the Rule and avoid possible confusion over what qualifies as a system designed for legal mail. One commentator expressed support for the deletion of this requirement. Another commentator, however, opposed its deletion, and pointed out that the State of Florida logs the date of legal mail but does not do the same with non-legal mail. Date-logging, this commentator argued, provides important evidence of the date of deposit in the institution's mail system. To investigate whether other states make a similar distinction in treatment of legal and non-legal mail, Professor Struve enlisted the assistance of the Director and Chief Counsel of the National Association of Attorneys General Center for Supreme Court Advocacy. The resulting inquiry generated responses from 21 states and the District of Columbia, and disclosed that a number of other States take an approach similar to Florida's (i.e., they record the date of legal mail but not non-legal mail). Some other states to not date-log any inmate mail, and still other states have systems in which the criteria for date-logging inmate mail are more difficult to categorize.

Mr. Letter reported that in facilities run by the U.S. Bureau of Prisons, it is up to the inmate whether to use the legal mail system or the regular mail system. Legal mail is always date-logged, and regular mail is not. Asked whether this fact leads the DOJ to oppose the deletion of the legal mail system requirement, Mr. Letter responded that, to the contrary, the DOJ supports deletion of that requirement. Deletion of the requirement would permit the inmate to choose which system to use, and would bring the Appellate Rules into closer parallel with Supreme Court Rule 29.2, which does not include such a requirement. But, he added, the DOJ does not feel strongly about this.

An appellate judge member observed that, before publishing the proposed amendments for comment, the Committee did not see a purpose for the legal mail system requirement. The comment period, he observed, had disclosed that the requirement actually does have a function. Mr. Letter noted, as well, that there may be significant delays in processing mail in an institution's regular (non-legal) mail system.

Responding to the argument that date-logging can provide important evidence of the date of deposit, an attorney member asked whether there is evidence concerning how often inmates mis-state the date of deposit. Professor Struve responded that there is no such evidence, other than an anecdotal account in the comment submitted by the opponent of the requirement's deletion.

Discussion turned to the question of how the Rule should describe the requirement if the requirement were retained. Professor Struve observed that it might not always be obvious to an inmate whether a particular system counts as a "system designed for legal mail." Indeed, Professor Struve noted, a few of the states who had responded to the survey had systems in which the presence or absence of date-logging did not correlate neatly with a distinction between legal and non-legal mail. Perhaps one could adopt, instead, a functional definition, referring, for example, to "a mail system that will document the date of a mailing." That formulation, however, had generated style objections from Professor Kimble.

An appellate judge member asked whether, as a practical matter, an inmate can make sure to use the legal mail system (where one exists) by simply writing "Legal Mail" on the outside of the envelope. Mr. Gans confirmed that envelopes containing inmates' filings often bear such a legend. The appellate judge member noted that, if the reference to a system designed for legal mail were to be retained, a state that wished to ensure that inmates use a special mail system could clearly label that system a "Legal Mail System."

Another member, though, suggested that a functional definition might be more accessible for inmates, because an inmate who is unsure which system to use could ask a corrections officer which system (if any) logs the date of inmate mail. An appellate judge member agreed that the functional definition would be preferable. This member emphasized that the requirement should be retained because many states, including Colorado, rely upon the use of a system that will log the date.

An appellate judge member suggested that one course of action would be to retain the requirement as it stands in the existing Rule. Professor Struve asked whether the existing language (referring to a system designed for legal mail) could be a source of confusion. She noted a Tenth Circuit opinion in which the court had warned of possible confusion. In that instance, though, the court was concerned that an inmate might think something counted as a system designed for legal mail when it actually did not. (That particular type of confusion would be problematic in circuits where certain requirements currently apply only if the inmate uses a regular (non-legal) mail system.) The converse sort of confusion (thinking that a system is not designed for legal mail when it really is) may be less likely to occur.

An appellate judge member asked what would happen if an inmate guessed wrong – i.e., if an inmate thought that there was no system designed for legal mail, but there actually was. Mr. Letter stated that the DOJ did not think this was an issue. An attorney member stated that during his three years as Alabama's Solicitor General, the issue never arose. Another appellate judge member observed that the inmate filing rules are designed for pro se inmate litigants, and he argued that it is important to make those rules user-friendly, even if it takes some extra language. Mr. Letter observed that the new Form 7 would be helpful to inmates.

An appellate judge participant observed that Chief Judge Diane Wood has commenced a project focusing on inmate litigation. The appellate judge member who favored the functional definition suggested that the rule might refer to a system that "documents the date of a mailing" or might direct the inmate to "use the system that logs the date" of a mailing. Professor Struve noted that she had had difficulty formulating a functional definition that would encompass the existing variety of institutional practices. Different institutions may log the date at different points in the process – for example, when the inmate hands the mailing to a corrections officer, or when the mailing enters the institution's mail room, or when the mailing leaves the mail room. By consensus, the Committee determined that it should retain the requirement that an inmate use a system designed for legal mail (where such a system exists). Professor Struve agreed to revise the Rule text and Committee Notes for the Committee's review later in the meeting.

Professor Struve next highlighted a commentator's suggestion that the proposed Rules be revised to authorize the inmate to file the declaration either contemporaneously with the underlying filing or later. The commentator recognized that the published proposal gives the court discretion to permit the declaration's later filing, but argued that the timing of the declaration's submission should be up to the inmate, not the court. Inmates, this commentator worried, may have trouble understanding and complying with procedural requirements. An appellate judge member recalled that the Committee had considered this point, and had structured the published proposal with the intention of giving inmates an incentive to file the declaration contemporaneously with the underlying filing. Contemporaneous submission of the declaration helps to ensure its accuracy. By consensus, the Committee decided not to adopt the commentator's suggestion.

Professor Struve noted that two commentators had proposed authorizing courts to excuse

a failure to prepay postage. Committee members had previously concluded that, in an appropriate case, an institution's failure to provide postage to an indigent inmate could be addressed by an as-applied constitutional challenge. As to the possibility of authorizing the court to excuse nonpayment of postage for good cause, participants in the Committee's prior discussions were concerned that such a provision would encourage satellite litigation. By consensus, the Committee decided not to adopt the commentators' suggestions.

Professor Struve observed that the need to ensure that pro se inmate litigants understand the inmate-filing rules – a need highlighted in one of the comments discussed above – helps to underscore reasons to retain the extra verbiage in the provisions' last phrase ("the court exercises its discretion to permit the later filing ...."). As noted in the "style" document that Professor Struve had circulated to Committee members prior to the meeting, Professor Kimble had objected to the draft's use of the phrase "exercises its discretion to permit," on the ground that the phrase was both unnecessary and inconsistent with the Committees' style conventions. (Professor Kimble feels that similar language in restyled Civil Rule 72(b)(1) is distinguishable.) A member of the Standing Committee had expressed a similar view. Professor Struve asked whether members felt that the rule should instead say simply "the court permits the later filing ...." One reason for retaining the longer phrase, Professor Struve suggested, is that an unskilled reader might read the shorter phrase as a declarative statement (i.e., as a statement that the court *does* permit the later filing) rather than a conditional phrase (i.e., referring to *situations in which the court chooses to* permit the later filing). As the commentator pointed out, Rules 4(c)(1) and 25(a)(2)(C) are distinctive in that their intended users are pro se litigants. Three attorney members stated that the Committee should retain the longer phrase. Professor Struve proposed that, as shown in the "style" document, language could be added to the Committee Note to explain the choice of the longer phrase. By consensus, the Committee agreed to this change.

The Committee next turned to the Rules' references to notarized statements. Prior to publication, a participant in the Standing Committee's discussion of the proposed amendments had asked whether those references should be deleted. Declarations, it was suggested, would be more convenient for inmates and inmates might lack access to notaries. However, none of the public comments had suggested deleting the references to notarized statements. Professor Struve's research had disclosed that notaries are available in at least some correctional institutions. In addition, Professor Struve noted, the inmate-filing rules applicable to habeas and Section 2255 proceedings and to filings in the U.S. Supreme Court all refer in the alternative to declarations and notarized statements. By consensus, the Committee decided to retain the references to notarized statements.

The Committee then discussed the proposed changes to Form 7 as shown in the "style" document. The Committee approved the change to the present tense ("Today, [insert date], I am depositing ...."). The Committee adopted Professor Kimble's style changes with one exception: In the inmate's declaration (at the end of the form) "that the foregoing is true and correct," Professor Kimble had suggested substituting "this" for "the foregoing." Mr. Byron expressed

concern that the re-styled sentence might be taken as a tautology – namely, it might be taken as a mere declaration that the particular sentence itself (rather than the preceding text) was true and correct. By consensus, the Committee decided not to change "the foregoing" to "this." The Committee decided not to adopt a commentator's suggestion that, in the "notes to inmate filers" that are added to Forms 1 and 5, an explanatory parenthetical should follow the citation to Rule 4(c)(1). Instead, a Committee member proposed (and the Committee later approved) the insertion of the word "timing," so that these notes would refer to the "timing benefit" of Rule 4(c)(1).

The Committee asked Professor Struve to revise the proposed Rule and Form amendments and Committee Notes to implement the choices noted above. She prepared a new draft overnight, and the Committee reviewed the draft the next morning.

Professor Struve pointed out that Professor Kimble had observed that the numbered subdivisions of Appellate Rules 4(a) and 4(b) have headings, and he had suggested that the numbered subdivisions in Rule 4(c) should too. He acknowledged that the Appellate Rules, overall, follow no uniform practice in this regard, but he argued that any given Rule should be internally consistent. Professor Struve predicted that it would be difficult to draft headings for Rules 4(c)(1), (2), and (3) that were informative, accurate, and not misleading. An appellate judge member stated that he saw no reason to add headings to those rules. An attorney member pointed out that amended Rule 4(c)(1) would be only two sentences long; a two-sentence rule, he suggested, did not require a heading. By consensus, the Committee decided not to add headings to Rules 4(c)(1), (2), and (3).

Professor Struve highlighted certain features of the proposed Rule and Form amendments as set out in the newly-circulated draft. The requirement that the inmate use the institution's legal mail system was reinstated. However, due to the structure of the amended rule, that requirement was now stated in a new sentence at the start of the rule. Following style guidance from Professor Kimble, the new first sentence referred to "an institution" and "an inmate confined there"; in what would now become the second sentence, "an inmate confined in an institution" became, simply, "an inmate." Conforming amendments were made to the Committee Note, and language was added to the Note to explain the Rule's use of the phrase "exercises its discretion to permit." (The draft showed the changes to Rule 4(c)(1); the same changes would be made to Rule 25(a)(2)(C).)

Professor Struve also pointed out the forms included in the newly-circulated draft. To clarify references to Rule 4(c)(1) in the "Note to inmate filers" in Forms 1 and 5, references to the "benefit" of that Rule had become references to its "timing benefit." A new "Note to inmate filers" was added to Form 7 to point out the legal-mail-system requirement. Other changes implemented the choices made by the Committee the previous day.

A motion was made to approve the amendments to Rules 4(c)(1) and 25(a)(2)(C) and Forms 1 and 5, and new Form 7, as set out in the newly-circulated draft. The motion passed by

voice vote without dissent.

C. Item No. 08-AP-C (the "three-day rule")

Judge Colloton invited Professor Struve to summarize the public comments and inter-committee deliberations on this item, which concerns the proposal to eliminate electronic service from the "three-day rules" in the Appellate, Civil, Criminal, and Bankruptcy Rules. Under Appellate Rule 26(c), "[w]hen a party may or must act within a specified time after service, 3 days are added after the period would otherwise expire ... , unless the paper is delivered on the date of service stated in the proof of service." The Rule currently provides that the three additional days apply not only to service by commercial carrier (when delivery is not same-day) and service by mail, but also to electronic service. In light of the now-standard use and smooth functioning of electronic service, the Advisory Committees (under the guidance of the Standing Committee's CM/ECF Subcommittee) decided that the time has come to eliminate the three extra days in instances where service is made electronically.

The public comments on the proposal spanned a range of views. Some commentators supported the proposal. Others, while acknowledging reasons for excluding electronic service from the three-day rule, sought other changes to offset the effect of that amendment. And still other commentators opposed the proposal entirely. Opponents worried that elimination of the three-day rule for electronic service would leave litigants vulnerable to unfair behavior by opponents (such as electronic service late at night before a holiday weekend). Motions for extensions of time, they warned, may not provide an adequate remedy and, in any event, are inefficient. Opponents stressed that reply briefs and motion papers may be complex and that the loss of the three days will cause hardship in preparing those filings. Focusing in particular on Rule 31(a)(1)'s deadline for reply briefs, a number of commentators stated that the prevalence of electronic service has made the nominal 14-day deadline a "de facto" 17-day deadline. If electronic service is to be excluded from the three-day rule, they argued, then Rule 31(a)(1)'s deadline should become 17 days (or perhaps more than 17 days). Other commentators proposed that one or two (instead of three) days be added for deadlines that are computed from the date of electronic service. One commentator proposed that the Committee adopt a rule that would address the computation of a time period when a party must act within a set time after service and the document served is submitted with a motion for leave to file or is not accepted for filing.

The DOJ proposed that concerns over the hardships that might ensue from the deletion of electronic service from the three-day rule should be addressed in a Committee Note recognizing the need for extensions of time in appropriate cases. The other advisory committees had already met and discussed this proposal. The Criminal Rules Committee strongly favored adding such language to the Committee Note, but the Bankruptcy and Civil Rules Committees favored not adding the language.

An attorney member stated that the commentators voiced persuasive concerns about the deadline for reply briefs. Fourteen days, this member reported, is a very short time frame. And it

can be difficult, as a practical matter, for a litigant to seek an extension of time. For instance, in order to take advantage of the safe harbor in the Eleventh Circuit's rule, the litigant must make the motion at least 14 days in advance of the due date.[2] Another attorney member agreed with this concern, but also noted that he would not wish to slow the progress of the Rule 26(c) proposal. An appellate judge participant observed that the Committee could add to its agenda a new item concerning a possible extension of Rule 31(a)(1)'s 14-day deadline for reply briefs.

An attorney member asked whether it would be possible to send the proposed amendment forward along with the three-day-rule proposals for the other sets of rules, but to delay the effective date of the amendment to Appellate Rule 26(c). Professor Struve observed that it would, technically, be possible to do so: 28 U.S.C. § 2074 provides that a rule amendment transmitted by the Court to Congress by May 1 of a given year "shall take effect no earlier than December 1 of the year in which such rule is so transmitted unless otherwise provided by law." Mr. Letter, however, cautioned that it would be disruptive to have an interval during which the three-day rule in the Appellate Rules worked differently from the three-day rules in the Civil, Criminal, and Bankruptcy Rules.

An attorney member observed that the concern about the deadline for reply briefs may be unique to the Appellate Rules; there may not be an analogously tight deadline (measured from an opponent's service of a document) in the rules that govern practice in the lower courts. An appellate judge member observed, as well, that the effective decrease from 17 days to 14 days is a proportionally large reduction.

The Committee members then discussed the possibility that these concerns could be addressed by means of a letter that Judge Colloton would write to the Chief Judges of the courts of appeals. The letter could highlight the issue in case the courts of appeals might wish to consider adopting an interim local provision that could address such concerns pending consideration of a possible national rule amendment on the deadline for reply briefs. An attorney member asked whether such a letter would be made publicly available; litigants, he suggested, might wish to be able to cite it to the court when making requests for extensions.

Judge Colloton asked the judge members of the Committee for their reactions. An appellate judge member stated that he was unsure whether a similar issue would be likely to come up in connection with the Civil, Criminal, or Bankruptcy Rules. Another appellate judge member stated that he had not been attuned to the issue. A third appellate judge member expressed support for the idea of a letter to the Chief Judges. This member also suggested that a

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[2] Eleventh Circuit Rule 31-2(b) provides: "When a party's first request for an extension of time to file the brief or appendix is filed 14 or more days in advance of the due date for filing the brief or appendix, and the requested extension of time is denied in full on a date that is seven or fewer days before the due date, or is after the due date has passed, the time for filing the party's brief or appendix will be extended an additional seven days beyond the initial due date or the date the court order is issued, whichever is later, unless the court orders otherwise."

21-day deadline for reply briefs would be desirable. Mr. Letter asked whether measures to address concerns about the reply-brief deadline should also address concerns about deadlines for motion papers. An attorney member responded that concerns over deadlines for motion papers could be handled through extensions of time.

Professor Struve asked what the Committee wished to do about the DOJ's proposal for adding language to the Committee Note to recognize the need for extensions in appropriate cases. An appellate judge participant observed that there are concerns about adding such language to the Committee Note every time that the Committee amends a rule concerning a length or time limit. Mr. Byron responded that the shift to electronic service, and the ensuing proposal to amend the three-day rule, has raised a unique problem. An appellate judge member stated that he agreed with the view – expressed by participants in the Civil Rules Committee's discussions – that it is undesirable to distend the Committee Notes with this kind of language. An attorney member, though, noted that the reality is that, with the availability of electronic service, most briefs are served between the hours of 6:00 p.m. and midnight.

A motion was made to approve the proposed amendment to Rule 26(c) as published, without the DOJ's proposed addition to the Committee Note. An attorney member expressed doubt that any lawyers actually move for extensions of time. The Committee returned to the topic of a letter that Judge Colloton could send to the Chief Judges of the courts of appeals. The letter would focus on the issue of reply brief deadlines during the transitional period when the amendment to the three-day rule has taken effect and a possible amendment to Rule 31(a)(1) is under consideration. Judge Colloton will draft a letter to facilitate further discussion at the Committee's fall 2015 meeting. Amendments to the three-day rule would not take effect until December 1, 2016.

Turning back to the motion, Judge Colloton asked whether the motion contemplated giving him discretion to accede to the addition of the DOJ's proposed Committee Note language if warranted in light of later discussions among the advisory committees and the Standing Committee. It was agreed that the motion did include that grant of discretion. An attorney member asked how quickly an amendment to Rule 31(a)(1)'s reply brief deadline could take effect. Professor Struve stated that – because such an amendment would be published for comment, at the earliest, in summer 2016 – a Rule 31(a)(1) amendment would take effect at least two years later than the pending amendments to Rule 26(c) and the other three-day rules. The motion was seconded and passed by voice vote without dissent.

By consensus, the Committee added to its study agenda a new item concerning a possible extension to Rule 31(a)(1)'s deadline for reply briefs.

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

Judge Colloton introduced this item, which concerns amendments to the length limits for briefs and other documents. The first issue for the Committee's consideration, he suggested, is

whether to adopt word limits for documents other than briefs. Such a change seems to make sense, but then the question becomes the page-to-word conversion ratio. Employing the 280 words per page conversion ratio that had been used in adopting the 1998 amendments to Rule 32 would effectively increase the length permitted under the existing page limits in Rules 5, 21, 27, 35, and 40. The 280 words per page conversion ratio, Judge Colloton noted, was derived from a 1990s study of commercially printed Supreme Court briefs. The Committee's published proposal instead employed a 250 words per page conversion ratio, which was supported by the findings in a 1993 D.C. Circuit Advisory Committee study. During the comment period, one commentator stated that briefs filed under the current Appellate Rules average 240 words per page. A recent study by Mr. Gans of rehearing petitions filed in the Eighth Circuit suggested that those filings average 255 words per page. Thus, it seems that something in the neighborhood of the 250 words per page ratio used in formulating the published proposals was a good measure.

The second issue, Judge Colloton stated, is what to do about the length limits for briefs. The published proposal would reduce the length limit for principal briefs from 14,000 words to 12,500 words. If the Committee instead used a conversion ratio of 260 words per page, that would generate a 13,000-word limit. Rule 32(e), as amended, would make clear that any circuit that wished to accept longer briefs could do so.

Underpinning the published proposal was a concern that the 280 words per page conversion ratio was not the best measure of equivalence. Judge Easterbrook's comment explained that the ratio was derived from a study of the number of words in commercially printed Supreme Court briefs. Other evidence, such as the 1993 D.C. Circuit Advisory Committee study and Mr. Gans's 2013 study of briefs filed in 1995-1998, indicated that briefs filed in the courts of appeals were different in length from commercially printed Supreme Court briefs. And the mid-1990s were a time when, as the Standing Committee observed, computer software enabled lawyers to file briefs that were technically compliant with the existing page limit but were as much as 40 percent longer than a normal brief. Judge Easterbrook's comment also reported a 1990s study finding that law firm briefs produced without printing averaged about 13,000 words.

A substantial number of judges, Judge Colloton observed, believe that briefs are too long. The judges of the D.C. Circuit unanimously favor the proposal. All of the active judges of the Tenth Circuit likewise support the proposal. Judge Chagares has reported that a majority of judges on the Third Circuit support it.

Judge Colloton turned next to the idea of adjusting the published length limit for principal briefs from 12,500 to 13,000 words. 12,500 words may be the best estimate of the length of traditional briefs filed in the courts of appeals, and that measure may best address judges' concerns. Moreover, there is no evidence that there were problems with the rule in effect in the D.C. Circuit (prior to the 1998 amendments) that limited briefs to 12,500 words. On the other hand, a 13,000-word limit may best approximate the length of briefs filed in the courts of appeals just prior to the 1998 amendments. And revising the limit from the published 12,500 words to 13,000 words would accommodate to some extent the objections that appellate lawyers have

registered about the proposal while still recognizing the validity of the concerns that judges and others have expressed about the current rule.

Alternatively, Judge Colloton noted, the Committee could decide to withdraw the proposal, as urged by many distinguished appellate lawyers. The principal argument here is that some complex cases require 14,000 words. No judge likely believes that there are no cases that warrant 14,000 words, but the question is how many?

Judge Colloton pointed out that Mr. Gans's most recent study had looked at data concerning briefs recently filed in the Eighth and D.C. Circuits. The study found that approximately 20% of briefs in Eighth Circuit argued cases contain between 12,500 and 14,000 words; in the D.C. Circuit, the number is closer to 25%. As the Solicitor General suggests, in the small number of cases that are complex enough to warrant 14,000 words, the litigant can move for permission to file an overlength brief. And an advisory committee note like that suggested by DOJ could address this potential need.

Commentators have argued that the burden on courts of adjudicating such motions will outweigh the work that courts will be spared by shortening the length limits; but that is a question for the courts to decide. An advantage of the pending proposal is that it allows individual circuits to choose whether to accept longer briefs than permitted by the national Rules. By contrast, the framework put in place by the 1998 amendments forced circuits to accept 14,000-word briefs even if they preferred a shorter limit.

In considering whether to withdraw the proposal, Judge Colloton suggested, the Committee should consider why the Rules should require circuits to accept 14,000-word briefs that some courts say they do not need and do not want. The Committee could show deference to the commentators who opposed the proposal by adjusting the proposed word limit upwards from 12,500 to a larger number of words. But Judge Colloton expressed confidence in the judges of the circuits who say that 12,500 or 13,000 words is a sufficient length limit under which to resolve cases. Judges want the information that they need in order to decide cases correctly. But many judges in their collective experience are saying that briefs are too long, and that judgment warrants some deference from the Committee.

Judge Colloton acknowledged that members of the Committee may have varying views on the subject, and he recognized that each member would try to do what he or she believes is best for the system. The chair then solicited views from the Committee about the pending proposal.

An attorney member stated that, as far as his own practice is concerned, he does not much care whether the length limits are reduced. When he was clerking for Justice Souter, this attorney recalled, the Justice required two-page bench memos, and the law clerks found a way to comply with that requirement. This member stated that he was taken somewhat by surprise by the bar's near-uniform adverse reaction to the published proposal. Especially persuasive, in his

view, were commentators' concerns about the shrinking opportunities for oral argument and about the need for length in multi-party cases. Less compelling, he suggested, were the arguments suggesting that there are many cases in which 14,000 words are truly necessary in order to make the right arguments. Most of the commentators' concerns would be equally applicable to practice in the trial court. In district court, he noted, lawyers have less than 14,000 words in which to brief summary judgment motions. When the limit is 25 pages, this member noted, he simply files the best 25-page brief that he can. The member expressed an expectation that, where more length is needed, the courts of appeals would grant permission for additional length. The member stated that he would strongly prefer a consensus judgment by the Committee – for example, a decision to change the limit to 13,000 words and to include other "softeners" to mitigate the impact of the change. He stated that he would prefer such a resolution to *either* rejecting the views of top lawyers *or* abandoning the proposal. He would like to give deference to the concerns of both judges and lawyers.

Another attorney member stated that, with trepidation, he opposed reducing the length limits for briefs, whether to 12,500 words or to 13,000 words. There is, he stated, an informational problem. Judges and lawyers have been talking past one another. Judges perceive that briefs are too long. But it is hard for judges to know what they would be missing if briefs were shorter. Lawyers do not know in advance which arguments will persuade the judges. In the *Hamdan* case, for example, he and his colleagues did not predict that an argument concerning Hamdan's exclusion from the courtroom would prove dispositive;[3] facing a shorter length limit, he stated, they would have omitted that argument. Time and time again, he has been surprised by the arguments that a judge seizes on. This member stated that he was not moved by arguments about the history of the 1998 amendments. He was moved, however, by the practitioners' reaction to the published proposal. He was concerned, as well, that the proposal would effect a drastic reduction in the length of reply briefs. Judge Silberman's comment, this member stated, convinced him that judges face a problem from unduly long briefs. But the key is to find the appropriate solution. Practitioners will be the ones who implement the solution. Briefing in the district court, he argued, is different from briefing on appeal. District court decisions do not create precedent. In the trial court, one is concerned with making a record and preserving issues for appeal. The Committee, this member argued, should be Burkean in its approach.

An appellate judge member expressed great respect for those who had submitted comments and those who had testified at the Committee's April 1, 2015, hearing. The Committee had before it the views of lawyers who are the cream of the crop and who argue complex and serious cases. But those sorts of cases are not representative of the bulk of the docket. The Eleventh Circuit has twelve authorized judgeships, and in some recent years three or

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[3] *See Hamdan v. Rumsfeld*, 548 U.S. 557, 614 (2006) (stating that the rights of the accused under the order governing military commission procedure were "subject ... to one glaring condition: The accused and his civilian counsel may be excluded from, and precluded from ever learning what evidence was presented during, any part of the proceeding that either the Appointing Authority or the presiding officer decides to 'close'").

four of those judgeships have been vacant. Suppose that the Eleventh Circuit decides roughly 6,200 cases in a year, and suppose that 200 of those cases are complex. The other 6,000 are not. Lawyers need not repeat an argument multiple times in a brief. The courts are inundated with pages that lack meaning. A typical case has one or two issues and does not require a 14,000-word brief. Shorter briefs would enable judges to do their jobs better. Five or six years ago, the Eleventh Circuit shortened oral argument time from 20 minutes to 15 minutes. Lawyers opposed that change, but they adjusted.

Mr. Letter stated that the DOJ deferred to the sense of the Committee concerning the conversion of existing page limits to word limits. As for the selection of a word limit, that is a judgment that circuit judges are best able to make. The comments submitted by the judges of the Tenth Circuit and the D.C. Circuit support a decrease in the word limits for briefs. Informal comments by judges also support such a decrease. The DOJ supports such a decrease, but with the proviso stated in the DOJ's comment. Some cases will require additional brief length. For instance, when multiple criminal defendants are involved in an appeal, the Government often must draft a single consolidated brief responding to the briefs filed by all the defendants. The DOJ urged the addition, in either Rule text or Committee Note, of language recognizing the need for extra length when appropriate.

An attorney participant expressed support for the reduction in brief length to either 12,500 words or 13,000 words. Based both on the data and on his own experience, this attorney concluded that briefs had become longer as a result of the 1998 amendments. Prior to 1998, there had been no outcry that the 50-page length limit was too short; this fact, the attorney stated, provided an important benchmark. He greatly respected the commentators, and he acknowledged that concerns could arise in marginal cases. However, he suggested, cases have not become more complex since 1998. Lawyers would encounter difficulty deciding which arguments to cut even if the limit were 16,000 words. Methods exist for shortening briefs. There is a gulf between the views of lawyers and judges. Lawyers should give weight to judges' views, including the experiences that judges recount with run-of-the-mill cases that are not handled by the elite bar. Rather than abandon the proposal, this participant suggested, the Committee could send it on to the Standing Committee. The proposal would benefit from debate in the Standing Committee.

An attorney member stated that he opposed the proposal with trepidation. He had not been particularly moved by the arguments concerning the history of the 1998 amendments. However, based on his own experience, he felt that a limit of 12,500 words would harm his ability to advocate for his client – not in every case, but in a not unusual number of cases. The rules, this member argued, should account for those hard cases. Judges see only the final product; they do not see the initial draft that contained every argument that the lawyer wanted to make. The member acknowledged the size of judges' caseload and the volume of briefs that they receive. He believed that a 14,000-word limit was better than a 13,000-word limit, which in turn was preferable to a 12,500-word limit.

An appellate judge member stated that he understood where the lawyers were coming

from. The judges and the lawyers, he observed, share a common goal – namely, ensuring that justice is served. He believed that the ends of justice could be served with shorter briefs, even though additional length would be necessary in some cases. This member expressed support for the DOJ's proposed addition to the Committee Note. And he expressed an expectation that courts would take seriously a lawyer's request for additional length where additional length is warranted. If a court wished to have more detail on a particular issue, it could request supplemental briefing. The member suggested that the Committee consider adopting a word limit of 13,000 for principal briefs and a conversion ratio of 260 words per page for documents other than briefs.

Another appellate judge member expressed support for the proposal – with a word limit of either 12,500 or 13,000 – so long as the proposal included confirmation that overlength briefs can be permitted, including by local rule. He stated that he was not persuaded by arguments about the history of the 1998 amendments. The choice of a word limit, he stated, is not precise; it is a judgment call. Higher limits invite briefs containing more issues and more words. There are pluses and minuses as to each. Higher limits permit raising of some valid issues that otherwise may be omitted or waived through inadequate briefing, and different aspects of a decision on review may necessarily raise different issues, which may implicate radically different consequences. But higher limits invite less party/attorney sifting of good issues from bad. The number of issues aside, higher limits permit more words, and sometimes additional words are very important to judges – as when they are used to clarify the record or (more rarely) to clarify a legal question. But other times more words are not helpful – for example, when they are used for repetition of thematic-level information in multiple locations in the brief (introduction, statement of facts, summary of argument, argument). A shorter limit would provide an incentive to present each point crisply and once and would discourage repetition of thematic points. This member stated that, although he had some doubts about the increased burden of considering motions to file overlength briefs that would seem to follow from lowering the default length limits, the process does not seem unmanageable. It was important, in this member's view, that the proposal, while decreasing the length limit, would allow a circuit to adopt a local rule providing for a higher limit.

Responding to Mr. Letter's expression of concern about multiple-defendant criminal appeals, an appellate judge member reported that the Eleventh Circuit gets many such cases and routinely gives the Government additional briefing length in those instances. Another appellate judge member reported that the Eighth Circuit likewise accords extra length to the Government when it must respond to briefing by multiple defendants. Mr. Letter stated, however, that a not insignificant number of DOJ lawyers around the country strongly feared that their motions for extra length would be denied. These concerns, he noted, were founded on anecdotal reports by highly experienced DOJ lawyers concerning the practices followed in some circuits.

An attorney member stated that the worries expressed by those experienced DOJ lawyers validated the concerns of the private bar. He also predicted that repetition would continue to be a problem in briefs no matter what the length limit was. Other approaches, he suggested, could

better address the judges' concerns with poor briefing. Efforts could be undertaken to educate the bar in methods of good writing, and courts could even require attorneys to revise and re-file briefs that are unduly repetitive. As to the circuits' ability to adopt local rules setting longer limits, this member noted that such a measure would only provide a realistic safety valve if the bar were represented on the committee that drafted a circuit's local rules. Even within the Committee, he stated, it is uncomfortable, as a practitioner, to voice the bar's concerns. The Committee should not assume that circuits will be willing to adopt local rules increasing the length limits. And the Committee should not change the rules unless it is sure that the amended rule would be better than the status quo.

Judge Sutton observed that the Committee had received input from expert members of the appellate bar. But, he observed, it was hard to know the reaction of other segments of the bar. Judges and lawyers tend to disagree on the issue of length limits. The Rules Committees, he noted, are designed to incorporate differing perspectives. While the issue of brief length limits is important, that issue paled in comparison to the significance of recent Civil Rules amendments. And the latter amendments had been unanimously adopted by the Civil Rules Committee because both sides had ceded ground. Whatever one's views on whether the 1998 amendments had changed the length of briefs, the pre-1998 50-page limit itself had resulted from an arbitrary choice at a prior point in time. The DOJ's proposed Committee Note language and the availability of local rulemaking provided important ways to address commentators' concerns. It was, he suggested, worthwhile for the Committee members to try to work toward a consensus and find common ground.

The attorney member who had spoken initially in support of a reduction to 13,000 words raised a question about the length of reply briefs. Might the Committee wish, he asked, to set the limit for principal briefs at 13,000 words but leave the limit for reply briefs at 7,000 words? An appellate judge member, however, responded that reply briefs tend to be significantly longer than necessary; two other appellate judge members agreed. Mr. Letter added that he would be concerned about lowering the limit for principal briefs without a corresponding reduction in the length of reply briefs. In criminal cases the Government is often the appellee. If anything, Mr. Letter suggested, reply briefs should be one-third the length of principal briefs (rather than one-half).

The Committee arrived at a consensus in favor of a 13,000-word limit for principal briefs. Language would be added to the Committee Notes of Rules 28.1 and 32 to address the need for additional length in appropriate cases. The language sketched at page 404 of the agenda book would provide a working draft of the addition to those Notes. Rule 32(e) would be amended as shown on page 12 of the previously-circulated "style" document to make clear the ability of a circuit, by local rule or order, to increase any of the length limits stated in the Appellate Rules. A motion was made to adopt the 13,000-word limit for principal briefs; to add appropriate language to the Committee Notes for Rules 28.1 and 32; and to amend Rule 32(e) as stated. The motion was made subject to the Committee's later approval of the Note language. The motion was seconded and passed by voice vote without dissent. Judge Sutton promised the Committee that

he would make sure that the concerns of the private bar were aired in the Standing Committee's discussion of the proposal. An appellate judge member noted that the Committee would monitor the effect of the changes.

A motion was made to adopt word limits for documents other than briefs, using a conversion ratio of 260 words per page. The motion was seconded and passed by voice vote without dissent. By consensus, the Committee members decided not to add the DOJ's proposed Committee Note language to the Committee Notes for Rules 5, 21, 27, 29, 35, or 40. Also, the Committee agreed that the published proposal's line limits for documents other than briefs should be deleted.

Professor Struve drew the Committee's attention to a commentator's suggestion that proposed Rule 32(f)'s list (of items than can be excluded when computing length) should be augmented to include "any required statement of related cases in a brief." Mr. Letter observed that local rules set varying requirements. He queried whether Rule 32(f) should permit the exclusion of any item that is required by local rule. (Rule 32(f) would incorporate by reference any local rule that excluded a particular item from the length calculation, so the question was whether Rule 32(f) should also exclude items that were required by local rule but that were not excluded, by local rule, from the length calculation.) Professor Struve noted that some items required by local rule may involve matters that go to the substance of the appeal. An appellate judge member observed that it would be difficult to draft language, for Rule 32(f), that would encompass only the items (required by local rule) that should be excluded from the length calculation.

Professor Struve asked the Committee about the commentator's suggestion that the statement required by Rule 35(b) (concerning the reasons for granting en banc review) should be excluded from the length limit for petitions for hearing or rehearing en banc. Professor Struve recalled that the Committee had discussed this question at its spring 2014 meeting and had decided that the statement should not be excluded. By consensus, the Committee decided to adhere to that prior determination.

The Committee approved of deleting Rule 32(a)(7)(A)'s reference to Rule 32(a)(7)(C) in the light of the proposed deletion of the latter provision. Professor Struve observed that a commentator had noted that the Rules do not define "monospaced face," and had suggested that the term should be defined, "now that it will be used in several places." Professor Struve suggested that the Committee's decision to delete the proposed line limits from Rules 5, 21, 27, 35, and 40 had removed the impetus for this suggestion. By consensus, the Committee decided not to define "monospaced face."

The Committee approved style suggestions by Professor Kimble that would change "comply with Rule 32(g)" to "include a certificate under Rule 32(g)" and that would flip the order in which Rules 5, 21, 27, 35, and 40 referred to word limits and page limits. The Committee approved Professor Kimble's style changes to Form 6 as shown in the "style"

document. The Committee adjourned at 3:53 p.m. on the 23rd, with the understanding that Professor Struve would prepare a revised draft of the proposed length-limits amendments for the Committee's consideration the next day.

The Committee reconvened on the morning of Friday March 24th and commenced by discussing the revised length-limits draft. Judge Colloton directed the Committee's attention to the revised Committee Notes. The Committee members focused on the second paragraph of the proposed Committee Note to Rule 32 as shown on page 8 of the newly-circulated draft. That paragraph contained a variant of the DOJ's proposed language concerning the need for additional length in some instances.

An attorney member highlighted a concern about Fifth Circuit Rule 32.4 (which was reproduced at page 397 of the agenda book). Not only does that Rule require that a motion for leave to file an overlength brief be submitted at least 10 days in advance of the brief's due date, but also the Rule requires that a draft of the brief accompany the motion. The attorney member stated that it is hard to imagine anyone moving for extra length in a circuit that has such a rule. Not only would it be difficult to comply with the Rule's timing, but also it is hard to imagine a lawyer being willing to share an advance copy of the brief with the other side. Although the attorney member hesitated to say that the Committee should interfere with a circuit's local rules, it would make sense, he suggested, that there be a streamlined procedure for a motion that merely seeks an extra 1,000 words (for a total of 14,000 words).

An appellate judge member questioned whether it would be appropriate for a Committee Note to a national Rule to include an instruction directed toward one Circuit's local rules. The attorney member responded that, during the previous day's discussions, he had not realized the problem that such a local rule might present for motions for extra length. He could not imagine his clients agreeing to give their opponent a draft brief in advance. Perhaps, he suggested, there was a way for the Committee to address this concern informally – i.e., to encourage the Fifth Circuit to adopt a streamlined procedure for motions that merely seek leave to employ the old 14,000-word limit. Another attorney member agreed that the Fifth Circuit's rule set a strong disincentive to motions for extra length. Judge Colloton observed that it was unknown whether the Fifth Circuit would apply a new length limit of 13,000 words or vary by local rule. In any event, he thought it likely that the chief judge of the Fifth Circuit, a former Chair of the Appellate Rules Committee, would be sensitive to the concerns expressed, and that the Committee chair could notify the chief judge informally of concerns raised about the local rule. The bar also could advise the court of its views on the local rule.

The Committee returned its attention to the proposed Committee Note to Rule 32. An appellate judge member questioned the draft's reference to the need for a brief to include information "explaining relevant background or legal provisions governing a particular case." Mr. Byron explained that judges sometimes look to the DOJ to explain a complex statutory framework. The appellate judge member suggested that the Note might instead refer to the need "to include unusually voluminous information explaining relevant background or legal

provisions."

Turning to proposed Rule 32(f)'s list of items that can be excluded when computing a document's length, an appellate judge member asked whether it would be clear that Rule 32(f)'s reference to "any item specifically excluded by rule" encompassed items excluded by a local rule. Professor Struve promised to ask Professor Kimble whether the rule should say "excluded by rule" or "excluded by these rules or a local rule."

Mr. Gans asked whether the Committee members were comfortable with the numerical limits stated in the newly-circulated draft. Professor Struve had raised a question concerning Rule 28.1(e)'s length limits for briefs on cross-appeals. Current Rule 28.1(e)(2)(B)(i) sets a limit of 16,500 words for the appellee's principal and response brief. Dividing 16,500 words by 280 words and multiplying by 260 words, one arrives at a limit of roughly 15,320 words. An attorney member suggested that the limit for the appellee's principal and response brief should be 15,300, and that the limits for rehearing petitions should be 4,000 words instead of 3,900. Another attorney participant suggested that it could be useful to include a table (akin to that in Supreme Court Rule 33.1(g)) setting out the various length limits stated in the Appellate Rules.

At this point, the Committee temporarily halted its discussion of the length-limits proposals so that revised Committee Note language could be printed and circulated to the Committee members.

When the Committee returned to its consideration of the length-limits proposal, it had before it the following proposed addition to the Committee Notes to Rules 28.1 and 32: "In a complex case, a party may need to file a brief that exceeds the type-volume limitations specified in these rules, such as when necessary to include unusually voluminous information explaining relevant background or legal provisions, or to respond to multiple briefs by opposing parties or amici."

An appellate judge member stated that the Note language should stress the unusual nature of the cases in which additional length will be necessary. An appellate judge participant asked whether attorneys would prefer the statement to be even more brief – perhaps omitting "such as" and the language that followed. Mr. Byron stated, however, that he was bound to press, on behalf of the Solicitor General, for inclusion of the examples that followed "such as." After further discussion, the Committee settled on the language quoted in the preceding paragraph, but with "when necessary" (and the last comma) deleted.

The Committee then turned back to its discussion of word limits. Mr. Gans expressed concern that the variety of the word limits at which the Committee had arrived (by using the conversion ratio of 260 words per page) might burden the clerk's offices when they had to check certificates of compliance with the length limits or when they had to run a word count on suspiciously-long filings. An attorney member suggested, however, that 14,000 words is itself an unusual number, and that any word limit numbers will require attorneys and court staff to

memorize the limits or refer to a source. He proposed that the Committee could address this concern by adding the length-limit table that had been discussed earlier that morning. The Chair advised that he and Professor Struve would circulate to the Committee, after the meeting, a draft of the proposed table.

A motion was made to approve the amendments to Rules 5, 21, 27, 28.1, 32, 35, and 40, and Form 6, as shown in the draft that had been circulated that morning, subject to the following revisions: (1) Rule 28.1(e)(2)(B)'s word limit for the appellee's principal and response brief in a cross-appeal would be 15,300 words; the language drafted that morning would be added to the Committee Notes to Rules 28.1 and 32; and a table or chart of the length limits in the Appellate Rules would be circulated to the Committee for its review and approval after the meeting. The motion was seconded and passed by voice vote without opposition.

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

Judge Colloton reminded the Committee that this item arose from a suggestion that the Committee adopt a national rule addressing amicus filings during a court's consideration of whether to grant panel or en banc rehearing. Not all circuits have local provisions addressing such filings, and practitioners understandably would like to know the rules on basic issues such as length and timing. The published proposal would add a new Rule 29(b) that would set default rules governing amicus filings during a court's consideration of whether to grant rehearing. A circuit could adopt local rules that differed from the national default rules. The adoption of new Rule 29(b) would ensure that practitioners in any circuit would be able to find the governing rules – whether in the national rule or in a local circuit rule.

Professor Struve noted that Rule 29(b)(4), as published, would set a length limit of 2,000 words. The Committee had arrived at that proposal by taking the length limit for the party's petition (15 pages), cutting it in half, rounding up (to eight pages), and multiplying by 250 words per page. The commentators who addressed this feature of the published proposal advocated a longer limit; specific suggestions ranged from 2,240 words to 4,200 words. Commentators pointed out that rehearing petitions may be filed in difficult cases; that the party's petition may not be well-written and may neglect the decision's larger implications; and that the Rules require amici to include various components such as the statement of the amicus's identity, interest, and authority and (usually) the authorship-and-funding disclosure.

The Chair asked whether the Committee might wish to consider revising the proposal to set a limit of 2,600 words (i.e., 10 pages multiplied by 260 words per page). An attorney member agreed that the limit should be longer than 2,000 words. This member suggested that amicus briefs are not a big burden on the courts, though he also queried how useful they are. An appellate judge member responded that he finds amicus briefs at the rehearing petition stage much less helpful; such briefs, he reported, tend not to do much more than register a vote. For that reason, this member stated, he would be inclined to accord amici more length. The attorney member then suggested a limit of 3,000 words. An attorney participant responded that the limit

for the party's rehearing petition would be 3,900 words; given that fact, he suggested, 3,000 words seemed like a lot to give to the amicus. Another attorney member stated that he assumed that judges would prefer a relatively focused amicus brief – not one that regurgitates the party's discussion of the merits. The attorney member who had suggested 3,000 words responded that – in light of the compressed time frame for amicus filings at the rehearing stage – amici tend to be sophisticated entities with sophisticated counsel; such amici, he argued, would make good use of the length permitted to them. The appellate judge member observed that when a party seeks rehearing en banc, its petition typically must compress into the allotted length both its arguments for panel rehearing and its arguments for rehearing en banc; and the party must also give adequate treatment of the facts. In light of those constraints on the party, an amicus filing in connection with a petition for rehearing en banc can be more helpful. By consensus, the Committee decided to increase Rule 29(b)(4)'s length limit to 2,600 words.

The Chair observed that Rule 29(b)(5), as published, would set the due date for amicus filings in support of a rehearing petition at three days after the petition is filed. Members had noted that a time lag longer than three days could cause inefficiency in instances where a judge calls for a response immediately after a petition is filed. In such an instance, the party opposing rehearing might have to revise its already-drafted response after belatedly receiving an amicus filing in support of the petition. Commentators, however, had argued that the published three-day time lag was too short, especially in instances where there is no coordination between the party and the amicus. Commentators had proposed longer periods (ranging from five to ten days). One commentator had proposed a two-step process in which the would-be amicus would have three days within which to file a notice of intent to file an amicus brief, but an additional seven to ten days in which to file the actual brief (along with a motion for leave to file).

An attorney member stated that he was intrigued by the two-step proposal. The mechanism was more complex than the published proposal, but complexity would not be a problem because the relevant actors are sophisticated. An appellate judge participant observed that one of the goals of the proposal was to nudge the circuits to specify the basic rules for amicus filings during consideration of a petition for rehearing. He asked whether Rule 29(b), as drafted, would permit a circuit to set a deadline shorter than the one in the national Rule. Professor Struve stated that the Rule would permit this. An appellate judge member suggested that, in the light of circuits' ability to "vary down," perhaps the national Rule should set a deadline of seven days instead of three. By consensus, the Committee agreed to change Rule 29(b)(5)'s deadline (for amicus filings in support of the petition or in support of neither party) to seven days after the filing of the petition.

Professor Struve directed the Committee's attention to a commentator's suggestion that the Rule should address amicus filings after the grant of rehearing en banc or after a remand from the Supreme Court. An attorney member stated that the Committee should not pursue that suggestion. By consensus, the Committee decided not to place that suggestion on its study agenda. Professor Struve asked whether the line limit should be deleted from proposed Rule 29(b)(4); the Committee agreed that it should be deleted. Professor Struve asked whether

proposed Rule 29(b)(5)'s due date for amicus filings in opposition to a rehearing petition should be revised; the Committee decided that it should not.

A motion was made to approve the proposed amendments to Rule 29, subject to (1) the revision of Rule 29(b)(4)'s length limit to 2,600 words and (2) the revision of Rule 29(b)(5)'s deadline for amicus filings in support of the petition (or in support of neither party) to seven days after the petition's filing. The motion was seconded and passed by voice vote without opposition.

VI. Item No. 15-AP-B (update cross-reference to Rule 13 in FRAP 26(a)(4)(C))

Judge Colloton invited Professor Struve to introduce this item, which concerns a technical amendment presented for final approval without publication. Professor Struve reminded the Committee that, in 2013, Rule 13 (governing appeals as of right from the United States Tax Court) was revised and became Rule 13(a), and a new Rule 13(b) (addressing permissive appeals from the Tax Court) was added. At that time, Professor Struve noted, the Committee did not pursue a conforming amendment to Rule 26(a)(4)(C); that Rule's reference to "filing by mail under Rule 13(b)" should have become a reference to "filing by mail under Rule 13(a)(2)." Professor Struve now sought to remedy that oversight by requesting that the Committee approve the amendment to Rule 26(a)(4)(C) to update that cross-reference.

A motion was made and seconded to give final approval to the proposed amendment to Rule 26(a)(4)(C). The motion passed by voice vote without dissent.

VII. Discussion Items

A. Item No. 11-AP-D (changes to FRAP in light of CM/ECF)

Judge Colloton invited Professor Struve to introduce this item, which encompasses possible amendments to Rule 25 that would address electronic filing, electronic service, and proof of electronic service. Professor Struve noted that the sketch of possible amendments set out at pages 835-41 of the agenda book had been superseded by the April 18, 2015 sketch that she had circulated to the Committee members by email. The latter sketch accounted for certain changes that had been adopted in the draft amendments to Civil Rule 5.

Professor Struve noted that the proposed amendments to Appellate Rule 25 would require electronic filing (subject to exceptions for good cause and by local rule) and would authorize electronic service through the court's transmission facilities on a registered user of those facilities. The proposal would also provide that the notice of electronic filing generated by CM/ECF serves as proof of service on anyone served by means of the court's electronic transmission facilities. The proposal includes special provisions for pro se litigants. Rather than being required to file electronically, pro se litigants would need permission by court order or local rule in order to file electronically. By tying the authorization for electronic service to the

recipient's status as a registered user of the court's transmission facilities, the provision on service would in effect incorporate the good-cause and local-rule exceptions (and the special treatment of pro se litigants). Other sorts of electronic service would still require consent.

An attorney member noted that it is customary for a paralegal to file papers in CM/ECF on a lawyer's behalf using the lawyer's login information. This member, focusing on the draft provision relating to proof of service, observed that Supreme Court Rule 29.5 requires the proof of service to "contain, or be accompanied by, a statement that all parties required to be served have been served ...." Mr. Gans responded that the proof of service should include information on any parties served non-electronically. Mr. Byron asked whether it would be possible for CM/ECF to be modified to include a requirement that the filer check a box stating that all parties required to be served have been served. Professor Struve suggested that a question of that nature would fall within the jurisdiction of the Committee on Court Administration and Case Management.

Mr. Byron asked whether the proposed rule's reference to "the court's transmission facilities" should be revised to read "the court's electronic transmission facilities."

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

B. Item No. 13-AP-H (*Ryan v. Schad* and *Bell v. Thompson* / FRAP 41)

Judge Colloton invited Professor Struve to introduce this item, which addresses the timing of the issuance of the mandate under Rule 41. Rule 41(b) states that "[t]he court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later," and also provides that "[t]he court may shorten or extend the time." Under Rule 41(d), a party can seek a stay pending the filing of a certiorari petition; if the stay is granted and the petition is filed, the stay continues until the Supreme Court's final disposition of the petition. Rule 41(d)(2)(D) directs that the mandate must issue "immediately when a copy of the Supreme Court order denying the petition ... is filed."

Professor Struve noted that a subcommittee composed of Justice Eid, Judge Taranto, and Professor Barrett had been studying questions relating to Rule 41. One question is whether stays of the mandate require an order or whether a court can accomplish such a stay merely by omitting to issue the mandate. The Supreme Court has noted but not decided this question. The original Rule 41 had set a deadline for issuance of the mandate "unless the time is shortened or enlarged by order." The words "by order" were deleted as part of the 1998 restyling of the Appellate Rules. The Subcommittee felt that it would make sense for the Rule to require that stays be accomplished by order.

Another question is whether the court of appeals has discretion to extend the stay of its mandate after the denial of certiorari. Judge Colloton noted that in both *Bell v. Thompson*, 545

U.S. 794 (2005), and *Ryan v. Schad*, 133 S. Ct. 2548 (2013) (per curiam), the Court assumed (without deciding) that Rule 41 authorizes a further stay of the mandate following the denial of certiorari, but held that the circumstances of those cases did not justify such a stay. The Court ruled that such a further stay was proper, if at all, only in "extraordinary circumstances." The Subcommittee had been considering whether Rule 41 should be amended to address this point – either by incorporating the extraordinary-circumstances test or by barring such further stays even in extraordinary circumstances. Judge Colloton noted that a court of appeals has authority to recall its mandate in extraordinary circumstances; one might ask whether it would serve any purpose to require a court of appeals to issue and recall its mandate instead of simply staying it.

Professor Struve observed that the salience of the topic had been illustrated by recent events in *Henry v. Ryan*, 748 F.3d 940, 941 (9th Cir.), *reh'g en banc granted*, 766 F.3d 1059 (9th Cir.), *and on reh'g en banc*, 775 F.3d 1112 (9th Cir. 2014) (en banc). Mr. Henry, under sentence of death, appealed the federal district court's denial of habeas relief. Henry relied in part on a case called *Eddings*. The Court of Appeals affirmed, ruling that even if there had been an *Eddings* error, Henry had failed to show a substantial and injurious effect on his sentence. In November 2013 the Court of Appeals denied panel rehearing and rehearing en banc. Henry did not request a stay of the mandate at that point, but nonetheless, the mandate did not issue. In March 2014, the Court of Appeals granted en banc review in a different case in order to address whether *Eddings* error is structural. In April 2014, Henry asked the panel to reconsider its November 2013 denial of rehearing in light of the grant of en banc review in the other case; this filing appears to have been the first in which Henry mentioned a stay. The panel denied Henry's motion, but a judge of the court requested a vote on whether to take that denial en banc. Next, the Supreme Court denied Henry's certiorari petition; that same day, Henry moved in the Court of Appeals for a stay of the mandate pending the outcome of the en banc call. Subsequently, a majority of the nonrecused active judges voted to rehear en banc the denial of Henry's April 2014 motion. Judge Fletcher, concurring in the grant of rehearing en banc, argued that the "extraordinary circumstances" test applies only when the mandate was stayed solely for the purpose of allowing time for a party to petition for certiorari. The State then sought a writ of mandamus from the Supreme Court, and the Supreme Court asked the Court of Appeals to file a response to the mandamus petition. However, before the due date for the response, the Court of Appeals concluded its en banc proceedings in Henry's case, denied Henry's request for a stay, and directed issuance of the mandate.

Judge Tallman, who had dissented from the grant of rehearing en banc in *Henry*, subsequently wrote to the Committee to propose that Rule 41 be amended to "permit a court of appeals to stay issuance of its mandate only by order and only in exceptional circumstances." Judge Tallman noted the issue was of particular concern in criminal cases, in light of the interest in the finality of convictions. In the sketch that Judge Tallman initially provided to the Committee, he proposed amending the last sentence of Rule 41(b) to read: "The court may shorten or extend the time only by order and only in exceptional circumstances." Judge Tallman later reviewed the draft language that the Committee had considered at its fall 2014 meeting, and he stated that he would not object to adding a reference to stays based on "extraordinary

circumstances" in Rule 41(d)(2)(D). However, he emphasized the importance of including the extraordinary-circumstances requirement in Rule 41(b) as well. Otherwise, he stated, the courts of appeals will use Rule 41(b) to stay mandates in cases that do not fall under Rule 41(d)(2).

The Subcommittee discussed Judge Tallman's suggestions and concluded that Judge Tallman had identified a gap in Rule 41. In the Subcommittee's view, it would be worthwhile to add an extraordinary-circumstances requirement to Rule 41(b). The language would be drafted so as to avoid a clash with Rule 41(d)(2)(A), which authorizes stays of the mandate pending the filing of a certiorari petition and which sets a test for such stays ("good cause" and a "substantial question") that is distinct from the extraordinary-circumstances test. The draft prepared by the Subcommittee would, accordingly, list the extraordinary-circumstances test and the Rule 41(d)(2)(A) test as alternative bases for a further stay of the mandate. The Subcommittee had considered whether adding this language to Rule 41(b) would bar stays in other circumstances where a stay might be desirable, but had concluded that compelling cases could be handled under the extraordinary-circumstances test.

Judge Colloton solicited Committee members' views on the idea of adding an extraordinary-circumstances test to Rule 41(b). An attorney member stated that his only concern related to the possibility that the court of appeals might not detail its findings concerning the existence of extraordinary circumstances. The rule, he suggested, should require such findings, because a further stay of the mandate should occur only in rare circumstances. Professor Struve observed that a list of the Appellate Rules that currently refer to findings was set out on page 880 of the agenda book. The attorney member also pointed out the language in the draft Committee Note, on page 15 of the "style" document, which included a sentence stating that "[t]he court of appeals must set out its findings concerning the facts that constitute the extraordinary circumstances."

An appellate judge member objected, however, that the courts of appeals do not make findings. Another attorney member stated that he preferred the language set out in footnote 36 on page 14 of the "style" document. That footnote suggested that the Rule could say "unless the court expressly identifies the extraordinary circumstances that justify ordering a further stay" or "unless the court issues an order identifying the extraordinary circumstances that justify a further stay." Another member agreed that the "expressly identifies" language would be a good choice. Another appellate judge member suggested that the Rule might direct that any stay be "based on extraordinary circumstances set forth in the order." A third appellate judge member stated the view that either of those formulations would work. A consensus developed that one of these formulations should be used in both Rule 41(b) and (as re-numbered) Rule 41(d)(4), and that the extraordinary-circumstances test should be added to Rule 41(b).

Professor Struve drew the Committee's attention to another feature of the proposed draft. A Subcommittee member had suggested that current Rule 41(d)(1) is redundant: Given that Rule 41(b) sets the mandate's presumptive issuance date (in a case where there is a timely rehearing petition or stay motion) at seven days after entry of the order denying the petition or stay motion,

it seems unnecessary for Rule 41(d)(1) to specify that the mandate is stayed until disposition of that petition or motion. The existence of these parallel provisions in Rules 41(b) and (d)(1) appears to be an artifact of the way in which the Rule developed over time. An appellate judge member suggested revising the proposed Committee Note to Rule 41(d) (shown at page 15 of the "style" document) by adding "former" and "new," where appropriate, to more clearly distinguish the proposed subdivisions from the existing ones.

Judge Sutton asked the Committee whether it might wish to hold the proposed amendment to Rule 41 for later presentation to the Standing Committee. The Rules Committees, he noted, have a practice of "bundling" proposed amendments so as to publish several proposals during the same cycle. If the Committee took this approach, it could also send forward, along with the Rule 41 proposal, any proposal concerning Rule 31(a)(1) and the timing of reply briefs. An appellate judge member asked whether the Committee might vote to approve the Rule 41 proposal at the current meeting and forward it to the Standing Committee, which might approve it in May 2015 but hold it for publication in a later cycle. Judge Sutton suggested, however, that the Standing Committee might be better able to focus its attention on the Rule 41 proposal if it were presented at the Standing Committee's January 2016 meeting. The dockets for the January meetings, he observed, tend to be lighter. By consensus, the Committee resolved to consider the Rule 41 proposal for potential approval at its October 2015 meeting.

C. Item No. 08-AP-R (disclosure requirements)

Judge Colloton invited Professor Capra to present this item, which focuses on disclosures required by local circuit provisions but not required by the Appellate Rules' disclosure provisions (contained in Rules 26.1 and 29(c)). Previously, a subcommittee composed of Judge Chagares, Professor Katyal, and Mr. Newsom had researched these issues. More recently, Professor Capra analyzed the issues and prepared sketches of possible Rule amendments.

Professor Capra explained that he had focused on identifying local rule requirements, not in the current Appellate Rules, that the Committee might be interested in discussing. His memo took a "building block" approach, discussing each requirement in turn and showing its addition to a consolidated sketch of possible Rule amendments. Some of the possible amendments, Professor Capra noted, seemed more viable than others.

Professor Capra first directed the Committee's attention to the topic, discussed at page 923 of the agenda book, that concerned a judge's connection with a prior or current participant in the litigation. The sketch on page 923 illustrated a rule that would elicit information about a judge's prior participation in the case. The sketch on page 924 showed a rule that would also elicit information about lawyers who had previously appeared in the case. That information, Professor Capra suggested, could be compiled fairly easily.

Professor Capra turned next to the question of disclosures in criminal appeals. The key issue here, he suggested, was whether the Appellate Rules should be amended to include a

provision paralleling Criminal Rule 12.4(a)(2). That Rule requires the Government to file a statement identifying an organizational victim and – if that victim is a corporation – also requires the Government to disclose the ownership information referred to in Criminal Rule 12.4(a)(1) (the cognate provision to Appellate Rule 26.1(a)) "to the extent that it can be obtained through due diligence." The sketch set out at page 926 of the materials illustrates an amendment that would add to Appellate Rule 26.1 a provision paralleling Criminal Rule 12.4(a)(2). Such an amendment, Professor Capra predicted, would not affect many appeals; but it would have the virtue of increasing uniformity across the Appellate and Criminal Rules. The Committee would coordinate with the Criminal Rules Committee on these issues.

Turning to the question of disclosures in bankruptcy cases, Professor Capra observed that the Code of Conduct Committee's Advisory Opinion No. 100 provided guidance concerning the participants (in a bankruptcy proceeding) that should be considered parties for purposes of the disclosure rules. The guidance from that Advisory Opinion is not currently reflected in the disclosure provisions in either the Appellate Rules or the Bankruptcy Rules. But the Bankruptcy Rules Committee has indicated a lack of interest in proceeding with an amendment on the topic of disclosures – a reluctance that weighs against proceeding with a bankruptcy-disclosure amendment to the Appellate Rules. For illustrational purposes, Professor Capra set out on page 927 of the agenda book a sketch showing an amendment that would incorporate into Appellate Rule 26.1 additional disclosure requirements for appeals in bankruptcy proceedings.

Next, Professor Capra observed that the Appellate Rules direct a corporate party or amicus to disclose "any parent corporation and any publicly held corporation that owns 10% or more of its stock." Some local rules, Professor Capra noted, require disclosure of ownership interests other than stock. This makes sense; because recusal rules focus on financial interest, it should make no difference whether the ownership interest is in stock or in some other unit. The sketch at page 928 of the agenda book illustrated an amendment that would require disclosure of ownership interests other than stock. At page 929, the sketch would extend the disclosure obligation to encompass ownership interests held by publicly held entities other than corporations. Page 930 of the agenda book showed an amendment that would extend Rule 26.1's disclosure obligations to non-governmental entity litigants other than corporations.

Professor Capra noted that he had sketched, at page 931 of the agenda materials, an amendment that would require disclosure concerning corporate affiliates. However, guidance from the Codes of Conduct Committee indicates that recusal is not automatically required when the judge has an ownership interest in a party's corporate affiliate. Accordingly, it does not seem worthwhile to amend Rule 26.1 to require disclosures concerning a party or amicus's corporate affiliates (beyond entities that have an ownership interest in the party or amicus).

Professor Capra next turned to the question of disclosure requirements applicable to intervenors. Intervention on appeal, he noted, is sufficiently rare that the Committee had previously decided not to pursue amendments that would govern the general topic. (Appellate Rule 15(d) addresses intervention in the specific context of proceedings for review or

enforcement of an agency order.) Morever, Professor Capra pointed out, once intervention has been granted, the intervenor should be viewed as having the status of a party and should thus be seen as subject to Rule 26.1's existing disclosure requirements for parties generally.

Professor Capra pointed out that, depending on the Committee's decisions with respect to the disclosure obligations for parties, changes to Rule 29(c)(1)'s disclosure requirement for amici might become necessary in order to ensure a proper fit between that Rule and Rule 26.1. Some disclosures, he noted, need not be required of amici because a party would already have disclosed the relevant information.

Responding to a suggestion by a member of the Standing Committee, the sketch on page 937 illustrated an amendment that would elicit the names of witnesses who had testified in a case. Professor Capra observed that, on the one hand, instances where a judge's relation to a witness causes recusal are likely to be relatively rare. But on the other hand, it should not be very burdensome for a party to disclose any relevant witness list.

Professor Capra pointed out that the Committee would also need to consider whether any additional disclosure requirements should apply to individuals as well as entities. If the Committee decided to apply some disclosure requirements to individual litigants, it would likely be necessary to restructure the Rule 26.1 sketches shown in his memo.

An attorney member thanked Professor Capra for his work on this topic and stated that he generally agreed with Professor Capra's assessments. This member suggested that the provision sketched on page 923 of the agenda book – designed to elicit information concerning a judge's prior participation in the litigation – should not be limited to participation as a trial judge. Thus, the member suggested deleting the word "trial."

Turning to the sketch on page 924 of the agenda book, which focused on appearances by law firms and lawyers, the attorney member suggested that it would be better to refer to "attorneys" rather than "partners and associates." Some firms, he noted, create positions other than partner and associate, such as "counsel." An appellate judge member asked about that sketch's reference to firms and lawyers who "are expected to appear" for the party. Another attorney member noted that it could be difficult for a firm to predict in advance which associates it might staff on a matter. An appellate judge member noted that the sketch on page 924 was based on Federal Circuit Rule 47.4(a)(4), which requires disclosure of "[t]he names of all law firms and the partners and associates that have appeared for the party in the lower tribunal or are expected to appear for the party in this court." The Federal Circuit, he reported, has discerned no difficulties with this provision. It is important, this member stressed, to get a lot of information early on. If the information is not provided until later, the court will deny an entry of appearance by a new attorney if that attorney's appearance would cause a recusal.

An attorney member stated that the sketch shown on page 936 – which would require amici to disclose whether "a lawyer or law firm contributed to the preparation of the brief, and, if

so, [to] identif[y] each such lawyer or firm" – would require disclosures beyond those required by the Supreme Court's rules. If the Supreme Court's rule does not require such information, the member suggested, neither should the Appellate Rules. Supreme Court Rule 37.6 requires that amici (other than specified governmental amici) must "indicate whether counsel for a party authored the brief in whole or in part and whether such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief, and shall identify every person other than the amicus curiae, its members, or its counsel, who made such a monetary contribution." Professor Capra queried whether the Supreme Court's rule would elicit the information necessary to discern situations in which a Justice's family member worked on the amicus brief. The member responded that the Stern and Gressman treatise takes the view that such work would count as a monetary contribution.[4] An appellate judge member expressed doubt about the merit of the treatise's view, because the ordinary meaning of "monetary contribution" does not include an attorney's labor on a brief.

An attorney member, turning to the question of disclosures by intervenors, stated that he agreed with Professor Capra that, once intervention is granted, the intervenor is subject to the same disclosure obligations as any other party. But, this member asked, what about disclosures *before* the grant of intervention? Mr. Byron reported that, in proceedings for review of agency rulemaking, he very frequently sees intervenors seeking to come in on both sides. Most such instances occur in proceedings in the D.C. Circuit, but some also occur in the regional circuits. Professor Capra noted the possibility of adding a rule provision to address such instances.

An appellate judge member expressed skepticism about the desirability of requiring disclosure of witness lists. Another appellate judge member stated that information relevant to recusal is very important to judges; however, he asked whether the disclosures being discussed would be onerous for lawyers.

An attorney member suggested that some of the information – concerning participation by attorneys and judges – could be compiled relatively readily. Another attorney member, however, warned that a list of lawyers who had participated in a case could end up being 15 pages long. One of the appellate judge members noted that, in the Eighth Circuit, the Circuit Clerk's office runs the recusal check based on the list (available in CM/ECF) of the lawyers who appeared in the district court. Another appellate judge member asked whether that sort of check would suffice to determine the names of the lawyers who had appeared before an agency. Mr. Gans responded that his office adds that information in manually. An attorney member suggested that it would be useful for judges to have this information. An appellate judge member noted that it

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[4] *See* Stern et al., Supreme Court Practice § 13.14 at 756 n. 62 ("Some nonparty organizations, desirous of helping an impecunious amicus present its views to the Court, may assist in writing the amicus brief. The nonparty organization, by paying its own lawyers, would thereby seem to be making a 'monetary contribution to the preparation' of the amicus brief. Unless and until the Clerk's Office advises otherwise, prudence dictates that such a 'monetary contribution' be revealed to the Court.").

is important to limit any required disclosures to the names of those who have actually appeared in a proceeding. The attorney member suggested that a provision could be tailored so that it only requires disclosure of the names of firms and lawyers who appeared in an agency proceeding. An appellate judge member asked whether the rule might state that there is no need to disclose any names of lawyers whose participation is already listed in the CM/ECF system. Mr. Gans noted that the Clerk's Offices should already be checking for lawyers' prior participation, because Judicial Conference policy requires such checks. Professor Capra noted that a rule on this topic should also account for any related state proceedings; the rule could do so by requiring the disclosure of any firms or lawyers not already listed in CM/ECF. Mr. Gans suggested that the Clerk's Office could send the lawyers the list his office generated from CM/ECF, and the lawyers could then disclose only the names not already on the list. An attorney member suggested that, alternatively, the rule might target particular types of prior proceedings (agency proceedings and state-court proceedings). An appellate judge member responded that it would be better to have a single source for all of the information. This member questioned whether lists generated using CM/ECF would always be complete; and he suggested that if the information is submitted by the attorneys, then the court can apply a kind of estoppel based on the disclosures. An attorney member noted, however, that creating this sort of list would be costly for litigants.

An appellate judge participant, commenting on the disclosures project as a whole, expressed concern that some might question why a disclosure would be required unless the information elicited by that disclosure required recusal. That is to say, the addition of a particular disclosure requirement might generate a perception that information responsive to that requirement necessitates recusal. And problems sometimes arise when a litigant takes certain steps in an effort to generate a recusal. Proceeding with this project, he suggested, would entail consultation with the Codes of Conduct Committee and the Committee on Court Administration and Case Management. Judge Colloton noted that the subcommittee was attuned to the concern that new disclosure requirements should be connected to recusal obligations and that the Committee would engage in appropriate consultation.

An appellate judge member noted that some disclosures (such as those concerning attorneys' prior participation) were relevant to individual litigants, not only to entities. He asked whether the rule should be adjusted to account for that. On the other hand, he noted, perhaps compliance would be more burdensome for individual litigants.

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

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

Judge Colloton observed that the Civil / Appellate Subcommittee had resumed its discussions of this item, which concerns a litigant's efforts to "manufacture" a final judgment – in order to secure appellate review of the disposition of fewer than all claims within an action – by dismissing all other claims with respect to all parties. The Committee had previously discussed the circuits' varying approaches to this topic. For example, the Second Circuit

recognizes a concept of "conditional prejudice," whereby a litigant can achieve a final judgment by dismissing its remaining claims with the understanding that the dismissal of those claims is with prejudice unless there is a reversal on appeal. A number of other circuits have ruled, to the contrary, that dismissals with conditional prejudice do not produce an appealable final judgment.

Professor Struve stated that the Civil / Appellate Subcommittee had formulated four options for consideration by the advisory committees. First, the rulemakers might decide not to take any action on this item, leaving it for further development in the caselaw. Second, the rulemakers might adopt a "simple" rule stating that a dismissal, with prejudice, of all remaining claims achieves finality. Third, the rulemakers could adopt a rule stating that *only* such a dismissal with prejudice achieves finality. Or fourth, the rulemakers could try to draft a rule that explicitly addresses the topic of dismissals with "conditional prejudice." The Civil Rules Committee, which met first, had discussed these four options, and had voted thirteen to one in favor of the first option.

Judge Colloton asked the Committee members whether they felt that the rulemakers should draft a rule on this topic. Mr. Letter stated that it would be worthwhile to adopt a rule, even if it were the minimalist rule described in the Subcommittee's second option. There is value, Mr. Letter suggested, in promoting nationwide uniformity and assisting less-skilled practitioners in understanding the rules of appellate jurisdiction. Mr. Letter stated that, in his view, it would be a good idea to address the issue of conditional prejudice. The Second Circuit, he suggested, takes the correct approach to this issue. Recognizing the finality of a judgment that results from a conditional dismissal with prejudice will prevent hardship to litigants. Moreover, such dismissals are likely to be relatively rare, and the resulting appeals will not unduly burden courts.

An attorney member asked whether Mr. Letter would propose that the district courts should serve any gate-keeping role in such a conditional-prejudice framework. Mr. Letter responded that he did not think so. Such appeals, he suggested, should be available at the litigant's option. If it sufficed to rely upon gate-keeping by the district court, then one could simply employ the existing avenues of Civil Rule 54(b) certification and of appeals under 28 U.S.C. § 1292(b). Some district judges, Mr. Letter suggested, may wish – for perfectly worthy reasons – to keep cases from going up to the courts of appeals. A discussion ensued concerning the policy reasons behind the Civil Rule 54(b) mechanism.

An appellate judge participant observed that the topic of manufactured finality has been on the Committee's agenda for a long time. It is always useful, he noted, for the Committee to pay attention to circuit splits relating to the Appellate Rules. The Civil Rules Committee did not, however, think that there is enough of a circuit split to justify rulemaking efforts, given the difficulties that such rulemaking would entail. Some issues, he suggested, are better dealt with by caselaw. And even the "simple" second option noted above, he cautioned, could prove tricky – for instance, it might be interpreted to supplant the Second Circuit's approach to conditional-prejudice dismissals.

An appellate judge member suggested that the best idea is for the Committee to do nothing. Though he understood why attorneys might like a rule that approves the conditional-prejudice concept, such a provision would weaken the final judgment rule.

By consensus, the Committee decided to take no action on the topic of manufactured finality. The chair noted, however, that if the division in authority warrants a uniform national rule, the rulemakers have an important role to play in making policy decisions about finality – as the Supreme Court made clear in *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100 (2009), and *Swint v. Chambers County Commission*, 514 U.S. 35 (1995).

E. Item No. 12-AP-D (Civil Rule 62 / appeal bonds)

Judge Colloton invited Mr. Newsom to introduce this item, which arises from Mr. Newsom's proposal that the Committee consider possible changes to Civil Rule 62's treatment of appeal bonds. Mr. Newsom explained that he had made this proposal because the appeal-bond process can be quite mysterious, even for experienced appellate practitioners. Mr. Newsom reported that the Civil / Appellate Subcommittee was still in the process of studying the proposal, so his remarks were in the nature of a progress report.

Amendments to the Rule, Mr. Newsom noted, could address a number of issues. First, there is the structure of the current Rule 62: it is hard, he suggested, to understand how subdivisions (a), (b), and (d) fit together. Second, there is a potential gap between Civil Rule 62(a)'s 14-day automatic stay and the stays available under Civil Rule 62(b) (pending disposition of a post-judgment motion) and Civil Rule 62(d) (pending appeal). The deadline for motions under Civil Rules 50, 52, and 59 is now 28 days after entry of judgment, while the deadline for most civil appeals is 30 days after entry of judgment. Third, rule amendments could address the form of the security. It is not always necessary to provide a bond. In some instances there may be better options, such as a letter of credit, or the deposit of a check in escrow. Rule 62(b) allows for flexibility in the form of the security, whereas Rule 62(d) requires a supersedeas bond. Fourth, and relatedly, lawyers would prefer to obtain a single form of security that will see them through the whole sequence (from postjudgment motions through the appeal), but Rule 62(d)'s comparative lack of flexibility may make that goal harder to achieve. Fifth, rule amendments could address the amount of the security. And the rule could address whether courts have discretion to grant a stay without a full bond, on one hand, or to modify or dissolve a stay, on the other hand.

An appellate judge member observed that rule amendments designed to address these issues would take the form of amendments to a Civil (not an Appellate) Rule. Mr. Newsom agreed, but observed that the topic is one that may be of concern primarily to appellate lawyers. Obtaining a stay of the judgment, he noted, is often the first thing that the appellate lawyer must take care of. Professor Struve mentioned that, during the Civil Rules Committee's discussion of this topic at its recent meeting, the judge members of that Committee had reported that they had not seen any problems in the functioning of the current Rule. To this report, an attorney member

of the Appellate Rules Committee responded that although the topic is treated in a Civil Rule, it is an *appellate* lawyers' problem. Judge Colloton noted that Mr. Newsom will continue to work with the Civil / Appellate Subcommittee on this item. An appellate judge member stated that he has been very impressed with the work on this topic by Mr. Newsom and Professor Cooper. An attorney participant expressed support for the idea of proceeding with the project.

VIII. Adjournment

The Committee adjourned at 11:50 a.m. on April 24, 2015.

Respectfully submitted,

Catherine T. Struve
Reporter

TAB 1B

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The minutes of the May 2015 Standing Committee meeting
will be distributed separately.

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TAB 2

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TAB 2A

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MEMORANDUM

DATE: October 14, 2015

TO: Advisory Committee on Appellate Rules

FROM: Gregory E. Maggs

RE: Item No. 13-AP-H (FRAP 41)

This item concerns possible amendments to Federal Rule of Appellate Procedure (FRAP) 41 that would (1) clarify that a court must enter an order if it wishes to stay the issuance of the mandate; (2) address the standard for stays of the mandate; and (3) restructure the Rule to eliminate redundancy.

The Committee last discussed this item at its April 2015 meeting. *See* Draft Minutes of April 23-24, 2015, Appellate Rules Committee Meeting at 24-27 [hereinafter Draft Minutes]. The attached memorandum by Reporter Catherine T. Struve, prepared for the April 2015 meeting, addresses the issues involved and summarizes the Committee's previous discussions of the item. *See* Memorandum to Advisory Committee on Appellate Rules from Reporter Catherine T. Struve regarding Item No. 13-AP-H (Apr. 9, 2015) (attached).

By consensus, the Committee resolved to consider the Rule 41 proposal for potential approval at its October 2015 meeting. *See* Draft Minutes at 27. As the Committee considers this item, it may wish to focus attention on an unresolved issue concerning the phrasing of an "extraordinary circumstances" provision in proposed FRAP 41(b). The Committee also may wish to review in more detail the stylistic changes proposed by Professor Kimble in a document circulated before the April 2015 meeting.

A. Exceptional Circumstances Provision

At the spring 2015 meeting, Judge Colloton solicited Committee members' views on the idea of adding an extraordinary-circumstances test to Rule 41(b). The minutes recount the following discussion of the matter:

> . . . An attorney member stated that his only concern related to the possibility that the court of appeals might not detail its findings concerning the existence of extraordinary circumstances. The rule, he suggested, should require such findings, because a further stay of the mandate should occur only in rare circumstances. Professor Struve observed that a list of the Appellate Rules that currently refer to findings was set out on page 880 of the agenda book. The attorney member also pointed out the language in the draft Committee Note, on

page 15 of the "style" document, which included a sentence stating that "[t]he court of appeals must set out its findings concerning the facts that constitute the extraordinary circumstances."

An appellate judge member objected, however, that the courts of appeals do not make findings. Another attorney member stated that he preferred the language set out in footnote 36 on page 14 of the "style" document. That footnote suggested that the Rule could say "unless the court expressly identifies the extraordinary circumstances that justify ordering a further stay" or "unless the court issues an order identifying the extraordinary circumstances that justify a further stay." Another member agreed that the "expressly identifies" language would be a good choice. Another appellate judge member suggested that the Rule might direct that any stay be "based on extraordinary circumstances set forth in the order." A third appellate judge member stated the view that either of those formulations would work. A consensus developed that one of these formulations should be used in both Rule 41(b) and (as re-numbered) Rule 41(d)(4), and that the extraordinary-circumstances test should be added to Rule 41(b).

As noted in the final sentence of this passage, although the Committee agreed by consensus to add an an extraordinary circumstance test, it did not decide on the language to be used. The Committee may wish to complete its consideration of this matter.

B. Stylistic Changes Recommended by Professor Joe Kimble

The original sketch of the proposal to amend Rule 41 appeared on pages 881-883 of the spring 2015 agenda book. Professor Kimble reviewed this original sketch, and a draft that incorporated his style comments was circulated prior to the meeting. That 'styled' version of Rule 41 reads as follows:

Rule 41. Mandate: Contents; Issuance and Effective Date; Stay

(a) **Contents.** Unless the court directs that a formal mandate issue, the mandate consists of a certified copy of the judgment, a copy of the court's opinion, if any, and any direction about costs.

(b) **When Issued.** The court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time by order. The court may

extend the time only [in] [if it finds][1] extraordinary circumstances or under[2] Rule 41(d).

(c) **Effective Date.** The mandate is effective when issued.

(d) **Staying the Mandate Pending a[3] Petition for Certiorari.**

~~(1) **On Petition for Rehearing or Motion.** The timely filing of a petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, stays the mandate until disposition of the petition or motion, unless the court orders otherwise.~~

~~(2) **Pending Petition for Certiorari.**~~

~~(A)~~ (1) A party may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. The motion must be served on all parties and must show that the certiorari petition[4] would present a substantial question and that there is good cause for a stay.

~~(B)~~ (2) The stay must not exceed 90 days, unless the period is extended for good cause or unless the party who obtained the stay files a petition for the writ and so notifies the circuit clerk in writing within the period of the stay. In that case, the stay continues until the Supreme Court's final disposition.

~~(C)~~ (3) The court may require a bond or other security as a condition to granting or continuing a stay of the mandate.

~~(D)~~ (4) The court of appeals must issue the mandate immediately on[5] receiving ~~when~~ a copy of a Supreme Court order denying the [certiorari] petition

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[1] The second bracketed alternative is included here in case the Committee concludes that a requirement of a finding should be stated in both Rule 41(b) and Rule 41(d)(4).

[2] "Pursuant to" changed to "under" for style reasons.

[3] "A" added for style reasons.

[4] Professor Kimble suggests deleting "certiorari" from proposed Rule 41(d)(1). If "certiorari" is retained here, then he proposes that we likewise say "certiorari petition" in proposed Rule 41(d)(4). But he favors using simply "petition" in both places.

[5] "Upon" changed to "on" for style reasons.

~~for writ of certiorari~~[6] ~~is filed~~, unless [[the court[7] finds that][8] extraordinary circumstances justify [ordering] a further stay] [the court[9] orders a further stay based on extraordinary circumstances].

Committee Note

Subdivision (b). Subdivision (b) is revised to clarify that an order is required for a stay of the mandate and to specify the standard for such stays.

Before[10] 1998, the Rule referred to a court's ability to shorten or enlarge the time for the mandate's issuance "by order." The phrase "by order" was deleted as part of the 1998 restyling of the Rule. Though the change appears to have been intended as merely stylistic, it has caused uncertainty concerning whether a court of appeals can stay its mandate through mere inaction or whether such a stay requires an order. There are good reasons to require an affirmative act by the court. Litigants – particularly those not well versed in appellate procedure – may overlook the need to check that the court of appeals has issued its mandate in due course after handing down a decision. And, in *Bell v. Thompson*, 545 U.S. 794, 804 (2005), the lack of notice of a stay was one of the factors that contributed to the Court's holding that staying the mandate was an abuse of discretion. Requiring stays of the mandate to be accomplished by court order will provide notice to litigants and can also facilitate review of the stay.

A new sentence is added to the end of subdivision (b) to specify that the court may extend the time for the mandate's issuance only in extraordinary circumstances or pursuant to Rule 41(d) (concerning stays pending petitions for certiorari). The extraordinary-circumstances requirement reflects the strong

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[6] Please see footnote 32, above, concerning proposed Rule 41(d)(1).

[7] "It" became "the court" for style reasons.

[8] Subcommittee members noted that it might be useful to be more specific about the requirement for findings. The language sketched in the text – "unless the court finds that extraordinary circumstances justify [etc.]" – is in keeping with a number of the existing references to findings in the Appellate Rules. However, those references concern findings by the district court, not by the court of appeals, and perhaps the relatively unusual context of requiring a finding by the court of appeals would call for more specificity. For example, the Rule could say "unless the court expressly identifies the extraordinary circumstances that justify ordering a further stay" or "unless the court issues an order identifying the extraordinary circumstances that justify a further stay."

[9] "It" became "the court" for style reasons.

[10] "Prior to" became "before" for style reasons.

systemic and litigant interests in finality. Rule 41(b)'s presumptive date for issuance of the mandate builds in an opportunity for a losing litigant to seek rehearing, and Rule 41(d) authorizes a litigant to seek a stay pending a petition for certiorari. Delays of the mandate's issuance for other reasons should be ordered only in extraordinary circumstances. [The court of appeals must set out its findings concerning the facts that constitute the extraordinary circumstances.]

Subdivision (d). Two changes are made in subdivision (d).

Subdivision (d)(1) – which formerly addressed stays of the mandate upon the timely filing of a motion to stay the mandate or a petition for panel or en banc rehearing – has been deleted and the rest of subdivision (d) has been renumbered accordingly. In instances where such a petition or motion is timely filed, subdivision (b) sets the presumptive date for issuance of the mandate at 7 days after entry of an order denying the petition or motion. Thus, it seems redundant to state (as subdivision (d)(1) did) that timely filing of such a petition or motion stays the mandate until disposition of the petition or motion. The deletion of subdivision (d)(1) is intended to streamline the Rule; no substantive change is intended.

Subdivision (d)(4) – i.e., former subdivision (d)(2)(D) – is amended to specify that a mandate stayed pending a petition for certiorari must issue immediately once the court of appeals receives a copy of the Supreme Court's order denying certiorari, unless the court of appeals finds that extraordinary circumstances justify a further stay. Without deciding whether the prior version of Rule 41 provided authority for a further stay of the mandate after denial of certiorari, the Supreme Court ruled that any such authority could be exercised only in "extraordinary circumstances." *Ryan v. Schad*, 133 S. Ct. 2548, 2551 (2013) (per curiam). The amendment to subdivision (d)(4) makes explicit that the court may stay the mandate after the denial of certiorari, and also makes explicit that such a stay is permissible only in extraordinary circumstances. Such a stay cannot occur through mere inaction but rather requires an order [and findings concerning the facts constituting extraordinary circumstances].

The reference in prior subdivision (d)(2)(D) to the *filing* of a copy of the Supreme Court's order is replaced by a reference to the court of appeals' *receipt* of a copy of the Supreme Court's order. The filing of the copy and its receipt by the court of appeals amount to the same thing (*cf.* Rule 25(a)(2), setting a general rule that "filing is not timely unless the clerk receives the papers within the time fixed for filing"), but "upon receiving a copy" is more specific and, hence, clearer.

Attachment
Memorandum to Advisory Committee on Appellate Rules from Reporter Catherine T. Struve regarding Item No. 13-AP-H (Apr. 9, 2015)

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TAB 2B

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MEMORANDUM

DATE: April 9, 2015

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve

RE: Item No. 13-AP-H

This item concerns possible amendments to Rule 41 that would (1) clarify that a court must enter an order if it wishes to stay the issuance of the mandate; (2) address the standard for stays of the mandate; and (3) restructure the Rule to eliminate redundancy.

Part I of this memo summarizes the progress of the Committee's discussions through fall 2014. Part II discusses a proposal submitted to the Committee by Judge Richard C. Tallman and summarizes recent deliberations by the Rule 41 Subcommittee.[1] Part III sketches possible language for an amendment to Rule 41.

I. The Committee's initial discussion of possible amendments to Rule 41

Appellate Rule 41(b) provides that "[t]he court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later," but also provides that "[t]he court may shorten or extend the time." Under Rule 41(d)(1), a timely rehearing petition or stay motion presumptively "stays the mandate until disposition of the petition or motion." A party can seek a stay pending the filing of a certiorari petition; if the court grants such a stay and the party who sought the stay files the certiorari petition, then Rule 41(d)(2)(B) provides that "the stay continues until the Supreme Court's final disposition." Rule 41(d)(2)(D) directs that "[t]he court of appeals must issue the mandate immediately when a copy of the Supreme Court order denying the petition for writ of certiorari is filed."

The Committee has been considering whether these rules warrant amendment in light of issues raised in *Ryan v. Schad*, 133 S. Ct. 2548 (2013) (per curiam), and *Bell v. Thompson*, 545 U.S. 794 (2005). A developing consensus supports amending Rule 41 to clarify that stays of the mandate under Rule 41(b) cannot occur through mere inaction and instead require entry of an order; I discuss this issue in Part I.A. The Committee has also discussed the possibility of amending Rule 41 to address the question of a court of appeals' authority to stay the mandate following denial of certiorari; I summarize that discussion in Part I.B.

[1] The Rule 41 Subcommittee includes Judge Taranto, Justice Eid, and Professor Barrett.

A. Clarifying that Rule 41(b) stays require an order

In *Bell*, the Supreme Court said that "[i]t is an open question whether a court may exercise its Rule 41(b) authority to extend the time for the mandate to issue through mere inaction." 545 U.S. at 805. The Rule provides merely that "[t]he court may shorten or extend the time." The court of appeals in *Bell* purported to stay the issuance of the mandate after denial of certiorari without notifying the parties, and the State in that case proceeded to set an execution date in a capital case without realizing that the mandate never had issued. The Supreme Court assumed, *arguendo*, "that a court may stay the mandate without entering an order" before holding that the court of appeals abused its discretion.

The original version of the Rule stated that "[t]he mandate of the court shall issue 21 days after the entry of judgment *unless the time is shortened or enlarged by order.*" The words "by order" were deleted as part of the 1998 restyling, which moved the relevant part of the rule from subdivision (a) into subdivision (b). As with all the restyling Committee Notes, the Note to Rule 41 states that most of the changes were "intended to be stylistic only." Both the Subcommittee and other members of the Committee have expressed support for amending Rule 41(b) to clarify that an order is required in order to extend the time for issuance of the mandate.

There are good reasons to require an affirmative act by the court. Litigants – particularly those not well versed in appellate procedure – may overlook the need to check that the court of appeals has issued its mandate in due course after handing down a decision. And, in *Bell*, the lack of notice was one of the factors that contributed to the Court's finding that staying the mandate was an abuse of discretion.[2] Requiring any stay of the mandate under Rule 41(b) to be accomplished by court order would address this problem. If an attorney receives a CM/ECF notice of a docket entry indicating that a judge has ordered the clerk to withhold the mandate, that will alert the attorney to the non-issuance of the mandate. It is also possible that requiring formal entry of a stay order would facilitate review of the court of appeals' decision to stay the mandate.[3]

Although a circuit could address this issue by local rule, the dearth of local provisions on point[4] suggests that local rulemaking on the topic is unlikely. Moreover,

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[2] *See Bell*, 545 U.S. at 804.

[3] *See Henry v. Ryan*, 766 F.3d 1059, 1072 (9th Cir. 2014) (Tallman, J., joined by O'Scannlain, Callahan, Bea, and Ikuta, JJ., dissenting from grant of reh'g en banc) ("[U]nless the en banc panel issues a formal stay of the mandate, our unorthodox actions might very well evade Supreme Court review. If the en banc panel issues such a stay, then Arizona could seek Supreme Court review of the stay. If it doesn't, then our failure to issue the mandate may escape review for an indeterminate period of time ....").

[4] For a rare example, see Eleventh Circuit IOP 6 accompanying Appellate Rule 35. That provision addresses instances when a judge directs the clerk to withhold the mandate during a poll with respect to sua sponte rehearing en banc. See Eleventh Circuit IOP 6 accompanying Eleventh Circuit Rule 35 ("If a petition for rehearing or a petition for

the importance of providing notice to litigants weighs in favor of applying this requirement in all the circuits. And it is difficult to conceive of local variations that would justify treating this question differently in different circuits.

Although it is not clear how often courts fail to issue mandates in the absence of a formal stay order, a notable example occurred in the Ninth Circuit in 2014. In *Henry v. Ryan*, a capital habeas case, the en banc court entered an order that had the effect of staying the mandate in *Henry* pending the court of appeals' en banc rehearing proceeding in a different case. The opinions concurring in and dissenting from this order disagree on several points – one of which was whether the court's failure to issue the *Henry* mandate in due course after the denial of panel rehearing and rehearing en banc constituted a stay of the mandate. *Henry* and its implications are discussed in depth in the memorandum by Judge Tallman which is treated in Part II of this memo. Judge Tallman supports the adoption of an amendment providing that a stay of the mandate requires an order.[5]

The sketch in Part III would, inter alia, amend Rule 41 to provide that an order is required for a stay of the mandate.[6]

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rehearing en banc has not been filed by the date that mandate would otherwise issue, the Clerk will make an entry on the docket to advise the parties that a judge has notified the clerk to withhold the mandate.").

[5] In his memo – a copy of which is enclosed – Judge Tallman states that

> the courts of appeals' practice of staying mandates by inaction fosters confusion, wastes judicial resources, undermines the litigants' interests in finality, and can violate principles of comity and federalism. *See, e.g.*, *Bell v. Thompson*, 545 U.S. 794 (2005). My circuit's recent experience in *Henry v. Ryan*, 766 F.3d 1059 (9th Cir. 2014), reemphasizes the need for transparency on this issue, *see id.* at 1067 (Tallman, J., dissenting).

Memorandum from Judge Richard C. Tallman to Judge Steven M. Colloton, March 11, 2015 ("Tallman memo"), at 1. Judge Tallman notes that amending the Rule to require an order "will promote transparency," and "will also require the court of appeals to communicate clearly to the district court when it relinquishes appellate jurisdiction, thus providing the district court a clear directive as to when it may resume control over the case." *Id.* at 9. Greater transparency, in turn, will help to ensure that stays of the mandate are "subject to review and oversight by colleagues and the Supreme Court." *Id.* at 11.

[6] One additional question is whether reinserting into Rule 41 a reference to the requirement of an order would imply that other Appellate Rules do *not* require an order for another type of action by the court of appeals. If no other Appellate Rules require orders by the court of appeals, then a negative implication might arise from the mention of an order in amended Rule 41. However, it turns out that a number of Appellate Rules do refer to actions that can be taken by "order." Many rules specify provisions that a court of appeals can institute "by local rule or by order in a particular case." *See, e.g.*, Appellate Rule 5(c). Perhaps one might argue that, in that formulation, "by order" is necessary (for parallelism) to match "by local rule." But the same is not true of other examples. *See, e.g.*, Appellate Rule 45(d) ("Unless

B. Addressing the court's authority (if any) to stay the mandate after denial of certiorari

The Committee's discussion at its fall 2014 meeting focused in particular on the authority of a court of appeals to stay the mandate after the Supreme Court denies certiorari. The Supreme Court has twice declined to say whether such authority exists under the current Rule.[7] In assessing whether to amend Rule 41 to address the question, the Committee considered two possible types of amendment.[8] Under one approach, Rule 41 could be revised to require that a court of appeals must issue the mandate immediately after a denial of certiorari, with no exceptions. Under the other approach, Rule 41 could be revised to authorize a court of appeals to stay the mandate, even after the denial of certiorari, in extraordinary circumstances.

At the fall 2014 meeting, some participants expressed interest in pursuing the latter approach. In addition to the basic choice between the two approaches, questions also were raised about the choice of language to express the standard (i.e., could a phrase other than "extraordinary circumstances" be found?) and whether the court of appeals

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the court orders or instructs otherwise, the clerk must not permit an original record or paper to be taken from the clerk's office."). There are also many instances when rules refer to an event occurring "unless the court orders otherwise." *See, e.g.*, Appellate Rule 15.1.

[7] In *Bell* and *Schad*, the petitioners argued that the mandatory language of Rule 41(d)(2)(D) admits of no exceptions, and that a court of appeals thus has no discretion to stay the issuance of the mandate. The respondent in *Bell* countered that Rule 41(d)(2)(D) "is determinative only when the court of appeals enters a stay of the mandate to allow the Supreme Court to dispose of a petition for certiorari." 545 U.S. at 803. He argued that Rule 41(b) grants a court of appeals authority to stay its mandate for other reasons following the Supreme Court's denial of certiorari and rehearing. In both *Bell* and *Schad*, the Court assumed, arguendo, that Rule 41 authorizes a further stay of the mandate following the denial of certiorari, but held that the court of appeals in both cases abused its discretion in doing so. The Court ruled that any authority to stay the mandate after denial of certiorari may be exercised only in "extraordinary circumstances." *Schad*, 133 S. Ct. at 2551.

[8] The background for the Committee's discussion of these issues included the Subcommittee's prior study of both policy arguments and possible doctrinal constraints. With respect to the latter point, subcommittee members had queried whether a court of appeals' authority to stay its mandate arises only from Rule 41 or whether additional sources ground that authority. In my October 3, 2014 memo to the Committee (a copy of which is enclosed), I noted support for the view that the courts of appeals have some inherent authority to stay their mandates, and I also noted some case law citing a statutory source for such stay authority. The subcommittee further discussed whether a rule adopted pursuant to the Rules Enabling Act could validly alter the scope of any such inherent and/or statutory authority; in the October 2014 memo, I suggested that such a rule could channel a court's inherent authority to stay the mandate but probably could not eliminate it (or, at least, could not do so without leaving in place an effective substitute to address instances where the integrity of the court's judgment is at stake).

should be required to make findings concerning the extraordinary circumstances in order to justify the issuance of the further stay.

The amendment sketched in Part III includes the "extraordinary circumstances" test; but, for reasons explained in Part II of this memo, the sketch applies that test broadly rather than only to stays entered after the denial of certiorari.

II. Judge Tallman's suggestion and the Subcommittee's further discussions

Since the time of the Committee's fall 2014 discussions, the Rule 41 proposal has benefited from input by Judge Tallman and from further discussions by the Rule 41 Subcommittee. In addition, *Henry v. Ryan* – which the Committee discussed at its fall 2014 meeting – has come to its conclusion. I summarize those developments here, and report that the Subcommittee – after taking into account Judge Tallman's proposed amendment to Rule 41 – favors adding the "extraordinary circumstances" test as a more general requirement for stays of the mandate.

As the Committee previously noted, *Henry v. Ryan* illustrates that the issues treated in this memo continue to be salient. Henry, under sentence of death pursuant to an Arizona judgment, appealed the federal district court's denial of habeas relief.[9] Henry relied, inter alia, on *Eddings v. Oklahoma*, 455 U.S. 104 (1982). The court of appeals affirmed in June 2013, reasoning that even assuming there was an *Eddings* error, Henry had not "shown that any error would have 'had substantial and injurious effect or influence in determining' [his] sentence."[10] In November 2013, the court of appeals denied panel rehearing and rehearing en banc.[11] Although Henry did not at that point request a stay of the mandate, the mandate did not issue. In March 2014, the court of appeals granted en banc review in a different case, *McKinney v. Ryan*, that presented the question "whether *Eddings* error is structural."[12] In April 2014, Henry asked the panel that had decided his appeal to reconsider its November 2013 denial of rehearing in light of the en banc proceeding in *McKinney*; this motion apparently was the first time that a filing by Henry mentioned a stay.[13] The panel denied Henry's motion, but a judge of the

[9] *See Henry v. Ryan*, 720 F.3d 1073, 1077 (9th Cir.), *reh'g denied*, (9th Cir. 2013), *cert. denied*, 134 S. Ct. 2729 (2014).

[10] *Id.* at 1089 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993)).

[11] *See Henry v. Ryan*, 748 F.3d 940, 941 (9th Cir.), *reh'g en banc granted*, 766 F.3d 1059 (9th Cir.), *and on reh'g en banc*, 775 F.3d 1112 (9th Cir. 2014) (en banc).

[12] *Henry v. Ryan*, 766 F.3d 1059, 1060 (9th Cir. 2014) (Fletcher, J., concurring in grant of reh'g en banc).

[13] The motion's title did not mention a request for a stay, but its conclusion stated that "the Court should grant Mr. Henry's motion for reconsideration of the denial of his petition for rehearing, vacate its decision denying the petition for rehearing, and stay the proceedings pending the resolution of the en banc proceedings in *McKinney*." Motion for Panel Reconsideration of Order Denying Petition for Panel Rehearing in Light of *McKinney v. Ryan* and *Poyson v. Ryan* at 8, 775 F.3d 1112 (9th Cir. 2014) (en banc) (No. 09-99007), ECF

court requested a vote on whether to take that denial en banc. Next, the Supreme Court denied Henry's petition for certiorari, and, on the same day, Henry moved in the court of appeals for a stay of the mandate pending the outcome of the en banc call.[14] Subsequently, "a majority of [the] nonrecused active [Ninth Circuit] judges" voted to rehear en banc the denial of Henry's April 2014 motion.[15] (Judge Fletcher, concurring in the grant of rehearing en banc, argued that the "extraordinary circumstances" test for staying a mandate applies only when the mandate was stayed solely for the purposes of allowing time for a party to petition for certiorari.[16]) The State then sought (inter alia) a writ of mandamus from the Supreme Court, quoting Judge Tallman's en banc dissent and arguing that the failure to issue the mandate after the denial of certiorari constituted an abuse of discretion under *Schad* and *Bell*.[17] The Supreme Court asked the court of appeals to file a response to the mandamus petition;[18] but before the due date of the response, the court of appeals concluded its en banc proceedings in Henry's case, denied Henry's request for a stay, and directed issuance of the mandate.[19]

Judge Tallman's memo notes the events in *Henry* and proposes that Rule 41 be amended to "permit a court of appeals to stay issuance of its mandate only by order and only in exceptional circumstances."[20] Judge Tallman explains that his concerns are particularly strong in criminal cases: "[W]ithholding the mandate without an order and as a matter of routine undermines the parties' interests in finality. This harm is particularly salient in the criminal and habeas corpus context, where governments (both state and federal) have a substantial interest in the finality of convictions."[21]

No. 99.

[14] *See* Motion to Stay Mandate at 11, 775 F.3d 1112 (9th Cir. 2014) (en banc) (No. 09-99007), ECF No. 107.

[15] *Henry v. Ryan*, 766 F.3d 1059, 1059 (9th Cir. 2014).

[16] *Id.* at 1063 (Fletcher, J., concurring in grant of reh'g en banc) ("The fact that there are reasons to stay proceedings other than for the purpose of allowing the Supreme Court to consider Henry's petition for certiorari means that this case is governed instead by Rule 41(b), with the result that 'extraordinary circumstances' within the meaning of *Bell* and *Schad* are not required."). As I argued in footnote 5 on page 4 of my October 3, 2014 memo (a copy of which is enclosed), Judge Fletcher's reading of *Bell* seems unconvincing.

[17] *See* Petition for a Writ of Mandamus and/or Prohibition, or a Writ of Certiorari at 16-23, In re *Ryan*, No. 14-375 (U.S. 2014).

[18] *See* Letter from Scott S. Harris, Clerk of the Court, Supreme Court of the U.S., to Molly Dwyer, Clerk of Court, U.S. Court of Appeals for the Ninth Circuit (Dec. 8, 2014).

[19] *See Henry v. Ryan*, 775 F.3d 1112 (9th Cir. 2014) (en banc).

[20] Tallman memo, *supra* note 5, at 1.

[21] Tallman memo, *supra* note 5, at 8. Highlighting the salience of the issue for capital cases, Judge Tallman reports that "there are 1,000 inmates on death row" in jurisdictions within the Ninth Circuit. *Id.*

Judge Tallman's initial sketch, enclosed with his memorandum, proposed amending the last sentence of Rule 41(b) to read: "The court may shorten or extend the time only by order and only in extraordinary circumstances." Judge Tallman subsequently reviewed the draft language that the Committee had considered at its fall 2014 meeting, and he stated that he would not object to a proposal to add a reference to stays based on "extraordinary circumstances" in Rule 41(d)(2)(D). But he emphasized the importance of including the extraordinary-circumstances requirement in Rule 41(b) as well. Noting Judge Fletcher's argument in *Henry* that that requirement applies only to stays under Rule 41(d)(2) and not to other stays under Rule 41(b), Judge Tallman observed that without an amendment to include the extraordinary-circumstances requirement in Rule 41(b), "the courts of appeals can and will use Rule 41(b) to stay mandates in cases that do not fall under Rule 41(d)(2) (otherwise said, in cases where no certiorari petition is filed)."

The Subcommittee conferred by telephone to discuss Judge Tallman's suggestions. Subcommittee members agreed that Judge Tallman had identified a gap in the current Rule and that it was worth adding an extraordinary-circumstances requirement to Rule 41(b). It was noted that such a requirement should be drafted in such a way as to avoid a clash with current Rule 41(d)(2)(A), which authorizes stays of the mandate pending the filing of a petition for certiorari and which sets out a test for such stays ("good cause" and a "substantial question") that is distinct from the extraordinary-circumstances test. The idea would be to list the extraordinary-circumstances test and the Rule 41(d)(2)(A) test as alternative bases for a further stay. The Subcommittee considered whether listing those two bases would exclude the possibility of stays of the mandate in other circumstances where a stay might be desirable. Suppose, for example, that six days after the time to petition for rehearing expires, a party moves for a post hoc extension of the time to petition for rehearing and also moves to stay the mandate. The motion to extend the time for the rehearing petition would be governed by Rule 26(b)'s "good cause" test, yet under the proposed amendment the motion to stay the mandate would be governed by the "extraordinary circumstances" test. Subcommittee members felt, however, that compelling cases could be dealt with under the extraordinary-circumstances test.

In the course of the Subcommittee's discussions, other possibilities for improvement came to light. In particular, members questioned what work present Rule 41(d)(1) is doing. As previously noted, Rule 41(b) provides that "[t]he court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later," and also that "[t]he court may shorten or extend the time." Rule 41(d)(1) provides that "[t]he timely filing of a petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, stays the mandate until disposition of the petition or motion, unless the court orders otherwise." Given that Rule 41(b) sets the mandate's presumptive issuance date (in a case where there is a timely rehearing petition or stay motion) at *7 days after* entry of the order denying the petition or stay motion, it is not clear why it is necessary for Rule

41(d)(1) to specify that the mandate is *stayed until* disposition of that petition or motion.[22]

The existence of these parallel provisions in Rules 41(b) and 41(d)(1) appears to be an artifact of the way in which the Rule developed over time. Original Rule 41(a) contained forerunners to both current Rule 41(b) and current Rule 41(d)(1). However, in the original Rule, the forerunner to current Rule 41(b) merely set the default date for issuance of the mandate (measured from entry of judgment) and authorized court-ordered alterations in that date; that part of the Rule made no mention of petitions for rehearing.[23] In 1994, Rule 40 was amended to provide a 45-day period for rehearing petitions in "civil cases in which the United States or an agency or officer thereof" was a party. In the light of that amendment, the original Rule's presumptive deadline for issuance of the mandate (21 days after entry of judgment) required adjustment. Thus, in 1994 the first sentence of Rule 41(a) was amended to set the presumptive deadline for the mandate's issuance at "7 days after the expiration of time for filing a petition for rehearing unless such a petition is filed"; meanwhile, no material change[24] was made in the last two sentences of then-Rule 41(a) (which already discussed the mandate's timing in connection with dispositions and denials of rehearing petitions).[25] The 1998 amendments extensively restructured Rule 41,

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[22] Admittedly, Rule 41(d)(1) refers to "disposition" of the motion or petition, whereas Rule 41(b) refers to denial. But that difference seems immaterial. If a motion to stay the mandate is disposed of but not denied, that would presumably mean that the court has disposed of the motion by granting it – in which event the court has "extend[ed] the time" for issuance of the mandate under Rule 41(b). If a rehearing petition is disposed of but not denied, that means that the court has granted either panel rehearing or rehearing en banc; in such instances, there seems to be no reason for Rule 41 to set a deadline for issuance of the mandate on the judgment entered upon the prior panel opinion. As the 1998 Committee Note to Rule 41(b) observes, "[i]f a petition for rehearing or a petition for rehearing en banc is granted, the court enters a new judgment after the rehearing and the mandate issues within the normal time after entry of that judgment."

[23] Original Rule 41(a) provided:

> Date of Issuance. **The mandate of the court shall issue 21 days after the entry of judgment unless the time is shortened or enlarged by order**. A certified copy of the judgment and a copy of the opinion of the court, if any, and any direction as to costs shall constitute the mandate, unless the court directs that a formal mandate issue. **The timely filing of a petition for rehearing will stay the mandate until disposition of the petition unless otherwise ordered by the court. If the petition is denied, the mandate shall issue 7 days after entry of the order denying the petition unless the time is shortened or enlarged by order.**

(Emphases added.) Original Rule 41(b) addressed stays of the mandate pending applications for writs of certiorari.

[24] "Shall" became "must."

[25] As amended in 1994, Rule 41(a) provided:

> (a) Date of Issuance.— **The mandate of the court must issue 7 days after**

breaking Rule 41(a) into Rules 41(a), (b), and (d)(1) and giving those provisions substantially[26] their current language. What had been the first and last sentences of Rule 41(a) became Rule 41(b). What had been the penultimate sentence of Rule 41(a) became Rule 41(d)(1). New Rules 41(b) and 41(d)(1) were amended to refer to petitions for en banc as well as panel rehearing, and to refer to motions to stay the mandate. The 1998 Committee Note does not discuss the overlap between Rules 41(b) and 41(d)(1).

Based on these considerations, the sketch shown in Part III below deletes Rule 41(d)(1) as redundant and re-numbers Rule 41(d) accordingly.[27] It adds the extraordinary-circumstances requirement in Rules 41(b) and (d)(4), and it specifies in Rule 41(b) that any stay of the mandate requires an order.

Two possible features of proposed Rule 41(d)(4) deserve special mention.[28] Proposed Rule 41(d)(4) would specify an extraordinary-circumstances test for staying the mandate after denial of certiorari. First, should that Rule reiterate that such a stay requires an order? Given that Rule 41(b) would be amended to specify the need for an

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> **the expiration of time for filing a petition for rehearing unless such a petition is filed or the time is shortened or enlarged by order.** A certified copy of the judgment and a copy of the opinion of the court, if any, and any direction as to costs shall constitute the mandate, unless the court directs that a formal mandate issue. **The timely filing of a petition for rehearing will stay the mandate until disposition of the petition unless otherwise ordered by the court. If the petition is denied, the mandate must issue 7 days after entry of the order denying the petition unless the time is shortened or enlarged by order.**

(Emphases added.)

[26] A style amendment to Rule 41(b) in 2002 added the words "petition for" before "rehearing en banc," presumably in the interests of parallelism.

[27] Re-numbering the subparts of Rule 41(d) will require no changes to cross-references in other Appellate Rules. (There is only one cross-reference to Rule 41 – in Rule 27(a)(3)(A) – and that cross-reference is to the rule as a whole.) The re-numbering would complicate research concerning caselaw addressing the subparts of Rule 41(d), but the subparts of that Rule have not been cited with great frequency. As a very rough measure, on March 25, 2015 I performed the following Westlaw search: ("41(d)(1)" "41(d)(2)") /p mandate. In the CTA database that search produced 50 hits; in the SCT database it produced two (*Bell* and *Schad*).

[28] In addition to the features discussed in the text, one other detail bears noting: Current Rule 41(d)(2)(D) refers to issuance of the mandate "immediately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed." Proposed Rule 41(d)(4) refers instead to the court of appeals' issuance of the mandate "upon receiving a copy of" that Supreme Court order. Subcommittee members felt that the phrase "upon receiving" was preferable. This does not seem like a substantive change; in line with Rule 25(a)(2)(A)'s general principle that "filing is not timely unless the clerk receives the papers within the time fixed for filing," I would think that "filed" in the current Rule refers to the time when the court of appeals receives the order.

order, reiterating the reference to an order in Rule 41(d)(4) might be viewed as redundant – or it might be viewed as a useful (or even necessary) reminder, and as a way to avoid arguments about whether Rule 41(b) already requires an order in the post-certiorari-denial context. Second, should the Rule require a finding concerning the extraordinary circumstances that justify the further stay? Requiring such a finding might improve the court's deliberative process by prompting articulation of the basis for the stay, and might also facilitate review of the grant of the stay. On the other hand, such a requirement may be unnecessary; a party seeking to defend the court's issuance of the further stay would articulate the grounds for it.

If the Rule should require a finding, would the use of some variant of the word "find" accomplish that, or should the Rule specify in more detail the nature of the finding? Most of the Appellate Rules' existing references to findings concern findings by the district court (the exception is an oblique reference in Rule 48, concerning the use of masters in ancillary proceedings in the court of appeals), and all but one of those references simply mention a finding, without elaboration.[29] The exception is Rule 24(a)(3)(A), which requires the district court to "state[] in writing its reasons for the certification or finding."

Also, if Rule 41(d)(4) is to require a finding concerning extraordinary circumstances, should Rule 41(b) explicitly require such a finding as well? Arguably, the requirements in both provisions should be parallel; on the other hand, perhaps the

[29] Here are the rules in question:

- Rule 4(a)(6)(A):
  - "the [district] court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry"
- Rule 4(a)(6)(C):
  - "the [district] court finds that no party would be prejudiced"
- Rule 4(b)(4):
  - "Upon a finding of excusable neglect or good cause, the district court may—before or after the time has expired, with or without motion and notice—extend the time to file a notice of appeal …."
- Rule 24(a)(3)(A):
  - "the district court—before or after the notice of appeal is filed—certifies that the appeal is not taken in good faith or finds that the party is not otherwise entitled to proceed in forma pauperis and states in writing its reasons for the certification or finding …."
- Rule 24(a)(4)(C):
  - "The district clerk must immediately notify the parties and the court of appeals when the district court does any of the following: … (C) finds that the party is not otherwise entitled to proceed in forma pauperis."
- Rule 48(a):
  - "A court of appeals may appoint a special master to hold hearings, if necessary, and to recommend factual findings and disposition in matters ancillary to proceedings in the court."

heightened interests in finality after denial of certiorari justify imposing the additional requirement of a finding in that context but not in the other contexts covered by Rule 41(b).

III. A sketch of the current proposal to amend Rule 41

Rule 41. Mandate: Contents; Issuance and Effective Date; Stay

(a) **Contents.** Unless the court directs that a formal mandate issue, the mandate consists of a certified copy of the judgment, a copy of the court's opinion, if any, and any direction about costs.

(b) **When Issued.** The court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time by order. The court may extend the time only [in] [if it finds][30] extraordinary circumstances or pursuant to Rule 41(d).

(c) **Effective Date.** The mandate is effective when issued.

(d) **Staying the Mandate Pending Petition for Certiorari.**

~~(1) **On Petition for Rehearing or Motion.** The timely filing of a petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, stays the mandate until disposition of the petition or motion, unless the court orders otherwise.~~

~~(2) **Pending Petition for Certiorari.**~~

~~(A)~~ (1) A party may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. The motion must be served on all parties and must show that the certiorari petition would present a substantial question and that there is good cause for a stay.

~~(B)~~ (2) The stay must not exceed 90 days, unless the period is extended for good cause or unless the party who obtained the stay files a petition for the writ and so notifies the circuit clerk in writing within the period of the stay. In that case, the stay continues until the Supreme Court's final disposition.

~~(C)~~ (3) The court may require a bond or other security as a condition to granting or continuing a stay of the mandate.

[30] The second bracketed alternative is included here in case the Committee concludes that a requirement of a finding should be stated in both Rule 41(b) and Rule 41(d)(4).

~~(D)~~ (4) The court of appeals must issue the mandate immediately upon receiving ~~when~~ a copy of a Supreme Court order denying the petition for writ of certiorari ~~is filed~~, unless [[it finds that][31] extraordinary circumstances justify [ordering] a further stay] [it orders a further stay based on extraordinary circumstances].

Committee Note

Subdivision (b). Subdivision (b) is revised to clarify that an order is required for a stay of the mandate and to specify the standard for such stays.

Prior to 1998, the Rule referred to a court's ability to shorten or enlarge the time for the mandate's issuance "by order." The phrase "by order" was deleted as part of the 1998 restyling of the Rule. Though the change appears to have been intended as merely stylistic, it has caused uncertainty concerning whether a court of appeals can stay its mandate through mere inaction or whether such a stay requires an order. There are good reasons to require an affirmative act by the court. Litigants – particularly those not well versed in appellate procedure – may overlook the need to check that the court of appeals has issued its mandate in due course after handing down a decision. And, in *Bell v. Thompson*, 545 U.S. 794, 804 (2005), the lack of notice of a stay was one of the factors that contributed to the Court's holding that staying the mandate was an abuse of discretion. Requiring stays of the mandate to be accomplished by court order will provide notice to litigants and can also facilitate review of the stay.

A new sentence is added to the end of subdivision (b) to specify that the court may extend the time for the mandate's issuance only in extraordinary circumstances or pursuant to Rule 41(d) (concerning stays pending petitions for certiorari). The extraordinary-circumstances requirement reflects the strong systemic and litigant interests in finality. Rule 41(b)'s presumptive date for issuance of the mandate builds in an opportunity for a losing litigant to seek rehearing, and Rule 41(d) authorizes a litigant to seek a stay pending a petition for certiorari. Delays of the mandate's issuance for other reasons should be ordered only in extraordinary circumstances. [The court of appeals must set out its findings concerning the facts that constitute the extraordinary circumstances.]

Subdivision (d). Two changes are made in subdivision (d).

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[31] Subcommittee members noted that it might be useful to be more specific about the requirement for findings. The language sketched in the text – "unless it finds that extraordinary circumstances justify [etc.]" – is in keeping with a number of the existing references to findings in the Appellate Rules. However, those references concern findings by the district court, not by the court of appeals, and perhaps the relatively unusual context of requiring a finding by the court of appeals would call for more specificity. For example, the Rule could say "unless it expressly identifies the extraordinary circumstances that justify ordering a further stay" or "unless it issues an order identifying the extraordinary circumstances that justify a further stay."

Subdivision (d)(1) – which formerly addressed stays of the mandate upon the timely filing of a motion to stay the mandate or a petition for panel or en banc rehearing – has been deleted and the rest of subdivision (d) has been renumbered accordingly. In instances where such a petition or motion is timely filed, subdivision (b) sets the presumptive date for issuance of the mandate at 7 days after entry of an order denying the petition or motion. Thus, it seems redundant to state (as subdivision (d)(1) did) that timely filing of such a petition or motion stays the mandate until disposition of the petition or motion. The deletion of subdivision (d)(1) is intended to streamline the Rule; no substantive change is intended.

Subdivision (d)(4) – i.e., former subdivision (d)(2)(D) – is amended to specify that a mandate stayed pending a petition for certiorari must issue immediately once the court of appeals receives a copy of the Supreme Court's order denying certiorari, unless the court of appeals finds that extraordinary circumstances justify a further stay. Without deciding whether the prior version of Rule 41 provided authority for a further stay of the mandate after denial of certiorari, the Supreme Court ruled that any such authority could be exercised only in "extraordinary circumstances." *Ryan v. Schad*, 133 S. Ct. 2548, 2551 (2013) (per curiam). The amendment to subdivision (d)(4) makes explicit that the court may stay the mandate after the denial of certiorari, and also makes explicit that such a stay is permissible only in extraordinary circumstances. Such a stay cannot occur through mere inaction but rather requires an order [and findings concerning the facts constituting extraordinary circumstances].

The reference in prior subdivision (d)(2)(D) to the *filing* of a copy of the Supreme Court's order is replaced by a reference to the court of appeals' *receipt* of a copy of the Supreme Court's order. The filing of the copy and its receipt by the court of appeals amount to the same thing (*cf.* Rule 25(a)(2), setting a general rule that "filing is not timely unless the clerk receives the papers within the time fixed for filing"), but "upon receiving a copy" is more specific and, hence, clearer.

IV. Conclusion

The amendment sketched in Part III of this memo would (1) restore the requirement that stays of the mandate require an order; (2) fill a gap in the current rule by making clear that stays of the mandate (other than pending a petition for certiorari) require extraordinary circumstances; and (3) streamline the rule by eliminating Rule 41(d)(1).

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MEMORANDUM

DATE: October 12, 2015

TO: Advisory Committee on Appellate Rules

FROM: Gregory E. Maggs, Reporter

RE: Item No. 08-AP-H (Manufactured Finality)

This item concerns efforts of a would-be appellant to "manufacture" appellate jurisdiction after the disposition of fewer than all the claims in an action by dismissing the remaining claims. The Committee first discussed this matter in November 2008 and then revisited it at seven subsequent meetings. At the April 2015 meeting, by consensus, the Committee decided to take no action on the topic of manufactured finality. As discussed at the April 2015 meeting, the Civil Rules Committee also has considered the matter of manufactured finality and voted thirteen to one in favor of taking no action. *See* Draft Minutes of April 23-24, 2015, Appellate Rules Committee Meeting at 31-33.

At the October 2015 meeting, given the numerous previous discussions and the recent decision to take no action, the Committee may wish to discuss whether to remove this item from its agenda.

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TAB 4A

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MEMORANDUM

DATE: October 15, 2015

TO: Advisory Committee on Appellate Rules

FROM: Gregory E. Maggs, Reporter

RE: Item No. 08-AP-R (FRAP 26.1 & 29(c) disclosure requirements so judges can evaluate recusal)

Local rules in various circuits impose disclosure requirements that go beyond those found in Federal Rules of Appellate Procedure 26.1 and 29(c), which call for corporate parties and amici curiae to file corporate disclosure statements.

The Committee discussed this item at length at its Spring 2015 meeting. *See* Draft Minutes of April 23-24, 2015, Appellate Rules Committee Meeting, at 27-31. The discussion focused on the attached detailed memorandum prepared by Professor Daniel J. Capra describing the local rules that go beyond the federal rules. The Committee did not reach any specific conclusions, although various members made suggestions. The Committee also discussed the matter at three previous meetings.

The issue of whether to expand disclosure requirements also concerns the other Committees. On September 1, 2015, Professors Sara Sun Beale and Nancy King prepared the attached memorandum to the Criminal Rules Advisory Committee regarding disclosures mandated by Federal Rule of Criminal Procedure 12.4(a)(2).

At the October 2015 meeting, given that the Committee has been discussing this matter for some time, the Committee may wish to decide the initial question of whether the current disclosure requirements are sufficient. If the Committee believes that additional disclosures should be required by federal rule, then it may be appropriate to resolve which disclosures required by local rules in various circuits and discussed in Professor Capra's memorandum should be added.

Attachments

1. Memorandum to the Advisory Committee on Appellate Rules from Professor Daniel J. Capra, regarding Item No. 08-AP-R (disclosure requirements) (Mar. 31, 2015)

2. Memorandum to the Criminal Rules Advisory Committee from Professors Sara Sun Beale and Nancy King, regarding [Federal Rule of Criminal Procedure] 12.4(a)(2) (Sept. 1, 2015)

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TAB 4B

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MEMORANDUM

To: Advisory Committee on Appellate Rules

From: Daniel J. Capra

Re: Item No. 08-AP-R (disclosure requirements)

Date: March 31, 2015

This item focuses on local circuit provisions that impose disclosure requirements broader than those requirements found in the Appellate Rules. The Committee has been discussing whether any of the additional requirements in these local rules should be considered for inclusion in the Appellate rules. At its last meeting, the Committee considered several areas in which certain circuits had imposed additional disclosure requirements. These included:

- Judge's connection with a prior or current participant in the litigation (including lawyers);
- Disclosures in criminal appeals;
- Disclosures in bankruptcy appeals;
- Disclosure by intervenors;
- Disclosure of an ownership interest other than stock;
- Disclosure of ownership interests held other than by publicly traded corporations;
- Disclosure by public entities not in the corporate form;
- Disclosure of affiliates; and
- Greater disclosure by amici.

In addition, at the Standing Committee meeting, one of the members asked the Committee to consider whether the parties should be required to disclose the witnesses in any proceeding in the lower court.

This memo provides, for discussion purposes only, some drafting language for adding disclosure requirements in the areas that the Committee has discussed. Part One of this memo sets forth background and a brief discussion of the cost/benefit analysis attendant to disclosure requirements. Part Two sets forth the drafting possibilities, and discusses some considerations

that the Committee might take into account in determining whether to pursue an amendment to the existing disclosure requirements in the Appellate Rules.[1] Part Three sets forth a draft, for discussion purposes only, on how the Appellate Rules would have to be amended to accommodate all the colorable additional disclosure requirements that have been discussed by the Committee.

I. Rules on Disclosure, and the Cost-Benefit Analysis:

A. Appellate Rules

Two Appellate Rules deal with disclosure. **Rule 26.1(a) provides:**

> **(a) Who Must File.** Any nongovernmental corporate party to a proceeding in a court of appeals must file a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation.

Appellate Rule 29(c)(1) provides disclosure requirements for amici. It is essentially an absorptive provision: it imposes the same disclosure requirements as are imposed on a party:

> **(c) Contents and Form.** * * * An amicus brief need not comply with Rule 28, but must include the following:
>
> > (1) If the amicus curiae is a corporation, a disclosure statement like that required of parties by Rule 26.1; [2]

[1] The memo does not treat all the options for greater disclosure provided by the local rules. The options treated are those that received at least preliminarily positive comments in memos prepared by Subcommittee members, or as reflected in the minutes from the last meeting. It also treats the one suggestion made by a Standing Committee member when the topic of disclosure rules was raised at the June Standing Committee meeting.

[2] The Appellate Rules Committee has previously considered a suggestion that Rule 29(c)(1) should be clarified because the language "like that required" might be thought to mean that the disclosure requirements for amici might be somehow different from the disclosure requirements for parties. But the Committee decided not to proceed with any such amendment, on the ground that the language was intended to and does mean that the disclosure requirements for parties and amici are coextensive.

B. Statute

These disclosure rules --- and any consideration of whether to expand upon them --- must be evaluated in light of the statute that predominantly regulates recusal and disqualification decisions. That provision is **28 U.S.C.§ 455**, which provides in pertinent part as follows:

§ 455. Disqualification of justice, judge, or magistrate judge

(a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

> **(c)** A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.[3]

In addition, **28 U.S.C. § 47** provides that ""[n]o judge shall hear or determine an appeal from the decision of a case or issue tried by him."

C. Cost-Benefit Analysis for Disclosure Rules

The general requirement of section 455 --- recusal should occur where impartiality might reasonably be questioned --- is broad and fuzzy enough that almost any scenario of a judge's relationship to a matter is at least potentially one that would call for disclosure. For example, if a corporate party has an affiliate, and the judge has an ownership interest in the affiliate, one can probably spin a factual situation in which the relationship is so close, or the effect on the affiliate is so profound, that impartiality might reasonably be questioned. A review of the local rules that require greater disclosure, conducted by Cathie Struve's research assistant in 2013, in fact concluded that every single one of the additional requirements could facilitate a judge's recusal decision. That is not an irrational conclusion given the breadth of the "impartiality might reasonably be questioned" standard.

So disclosure rules provide a benefit in informing the judge's recusal decisions. But of course these rules impose costs on the parties; investigation and disclosure of all the required details (affiliates, participating law firms, trade associations, etc.) adds to the expense of litigation. Thus, it would seem that a disclosure requirement should not be added simply because it might in some attenuated circumstance give a judge relevant information for recusal. It is hard to know where to draw the line, but if you have to spin an unlikely scenario to conclude that the information could be relevant to a recusal decision, then perhaps the disclosure should not be required. Another factor is the type of information demanded --- the more it is readily at hand, the more acceptable the disclosure requirement.

[3] Canon 3(C) of the Code of Conduct for United States Judges also governs disqualifications, but it is substantively identical to section 455.

II. Areas for Additional Disclosure

A. Judge's Connection With a Prior or Current Participant in the Litigation

The local rules in some circuits focus on two types of connections between a judge and a participant in the litigation: 1) a judge's prior participation in the case; and 2) lawyers who have previously appeared in the case. Both these connections are certainly in some cases relevant to disqualification/recusal considerations. They will be discussed in turn.

1. Prior Participation

Section 47 requires recusal if the judge tried the case or issue. Section 455(b)(2) provides that a judge must recuse himself where he served as lawyer in the matter. Section 455(b)(3) provides that if the judge was previously employed by the government, he must recuse if he participated as "counsel, advisor, or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case or controversy." Finally, section 455(b)(1) requires recusal when the judge has "personal knowledge of disputed evidentiary facts concerning the proceeding" and section 455(b)(2) requires recusal where the judge has been a material witness.

But while the statute does specifically regulate a judge's prior participation, the factors listed cannot easily be made the subject of disclosure requirements. Some of these connections would be probably be beyond a party's ability to know. For example, how is a party to know that the judge in his former life as a government lawyer "expressed an opinion concerning the merits of a particular case or controversy"? And how is a party to know whether the judge has personal knowledge of disputed evidentiary facts? It is probably for this reason that the local rules providing additional disclosure provisions on this subject are focused on the judge's actual participation in the proceeding or in related state proceedings.

The Eleventh Circuit provision might be a good model for discussion. As incorporated into Rule 26.1, and amended slightly to cover related state court proceedings, it would read like this:

> **(a) Who Must File.** Any nongovernmental corporate party to a proceeding in a court of appeals must file a statement that:
>
> > **(1)** identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation;
> >
> > **(2)** provides a list of the trial judges in the proceeding and in any related state proceeding.

2. Lawyer Participation

Under section 455(b)(2), a judge must recuse if "a lawyer with whom he previously practiced law" was involved with the case during their association. A judge must also recuse if he or his spouse, or anyone within three degrees of relationship of either of them, or a spouse of such a person, is an attorney in a proceeding. Given the connection between participating lawyers and grounds for recusal --- and the possibility that a judge has family members who are lawyers within the specified degree of relationship --- it is probably not surprising that five circuits seek information about lawyers' participation in the case. The cost of such a disclosure would not seem high as it should be information that the party has fairly easily at its disposal.

The most direct and comprehensive language on the subject is found in Federal Circuit Rule 47.4. As added to Rule 26.1, it would look like this:

> **(a) Who Must File.** Any nongovernmental corporate party to a proceeding in a court of appeals must file a statement that:
>
> > **(1)** identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation;
> >
> > **(2)** lists the trial judges in the proceeding and in any related state proceeding;
> >
> > **(3)** lists the names of all law firms and the partners and associates that have appeared or are expected to appear for the party in the proceeding;

B. Disclosures in Criminal Appeals

The disclosure provisions in the Criminal Rules are found in Rule 12.4. Rule 12.4(a)(1) is identical to Appellate Rule 26.1. Rule 12.4(a)(2) is an additional provision that requires the government to file a statement identifying an organizational victim, and also requires the government to disclose the ownership information required by Rule 12.4(a)(1) "to the extent it can be obtained through due diligence."[4]

[4] That language is a recognition that the government might not have ready access about whether the victim has a parent or 10% or more ownership by a public company. In contrast, parties would clearly have that information, so a due diligence standard is unnecessary in Rule 26.1(a). It should be noted, however, that adding

The minutes of the last Committee meeting describe a discussion led by Judge Chagares, who stated that some attorneys were under the impression that the Rule 26.1 disclosure requirements do not apply to criminal appeals. Judge Chagares concluded that an amendment to Rule 26.1 that would specify that it applies to criminal appeals would be unnecessary, because the rule plainly does apply, and because the Committee's work on the question had sensitized Circuit Clerks as to its applicability.

Therefore, the only question remaining for criminal cases is whether to add a provision regarding disclosure of organizational victims. It would seem that the need for disclosure is not dramatic. There are not many appeals involving corporate victims, and recoveries by organizational victims in criminal cases would seldom be so substantial as to raise an inference of impartiality.

On the other hand, there is no apparent explanation for having disclosure requirements as to victims in criminal trials, but not in criminal appeals. So if the Committee were to proceed with an amendment, it would have the positive effect of providing uniformity across the two sets of rules.

There is a drafting problem, however. A provision about an organizational victim does not fit well within the structure of the existing rule. It can't be efficiently incorporated into subdivision (a), and it is probably not worth it to make it subdivision (b) and move everything else down, as renumbering (or relettering) imposes transaction costs. The best solution is to add a subdivision at the end of the rule.

If Criminal Rule 12.4(a)(2) were added to the Appellate Rules, it might look like this (in a rule that adds, in building block fashion, to what has been added above).

> **(a) Who Must File.** Any nongovernmental corporate party to a proceeding in a court of appeals must file a statement that:
>
> > **(1)** identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation;
> >
> > **(2)** lists the trial judges in the proceeding and in any related state proceeding;
> >
> > **(3)** lists the names of all law firms and the partners and associates that have appeared or are expected to appear for the party in the proceeding;
>
> **(b) Time for Filing; Supplemental Filing.**

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certain disclosure requirements may raise a question of what kind of effort a party must undertake to find the information – in which case the addition of a due diligence standard might be warranted.

* * *

(c) Number of Copies.

* * *

(d) Organizational Victim in a Criminal Case. In a criminal case, if an organization is a victim of [the alleged][5] criminal activity, the government must file a statement identifying the victim. If the organizational victim is a corporation, the statement must also disclose the information required by Rule 26.1(a)(1) to the extent it can be obtained through due diligence.

C. Disclosures in Bankruptcy Appeals

As Judge Chagares noted at the last meeting, not every person or entity involved in a bankruptcy proceeding is treated as a party for purposes of disclosure issues. The Code of Conduct Committee's Advisory Opinion No. 100 states that the following participants in a bankruptcy proceeding have a sufficient relationship to that proceeding to be considered parties for purposes of the disclosure rules: 1) the debtor; 2) members of the creditors' committee; 3) the trustee; 4) parties to an adversary proceeding; and 5) participants in a contested matter.

The clarification provided by Advisory Opinion No. 100 is not currently set forth in either the Appellate Rules or the Bankruptcy Rules on disclosure. In 2008, the Codes of Conduct Committee suggested that the Bankruptcy Rules Committee "may wish to consider the special conflict screening issues related to bankruptcy proceedings, especially the potential need for corporate parent information in adversary proceedings and contested matters."[6] But the Bankruptcy Rules Committee has never adopted, and is not currently considering, any change to its disclosure rule. The lack of movement in the Bankruptcy Rules Committee probably counsels some caution in proceeding at the appellate level, as one would think that the Bankruptcy Rules would be the primary source for defining who is a party in a bankruptcy proceeding for purposes of the disclosure rules.

That said, if the Committee were interested in clarifying who the "parties" are in a bankruptcy, then it may wish to consider language along the lines of the Third Circuit Rule. As applied to the working draft as it has been set forth thus far, the language might be added as follows (it only works as a separate subdivision):

[5] "Alleged" is used in the Criminal Rules. There is an argument that "alleged" is not the right term at the appellate level.

[6] Letter from Chair of Codes of Conduct Committee to Chair of Rules Committee, May 8, 2008, at 2.

(a) Who Must File. Any nongovernmental corporate party to a proceeding in a court of appeals must file a statement that:

> **(1)** identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation;
>
> **(2)** lists the trial judges in the proceeding and in any related state proceeding;
>
> **(3)** lists the names of all law firms and the partners and associates that have appeared or are expected to appear for the party in the proceeding;

(b) Time for Filing; Supplemental Filing.

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(c) Number of Copies.

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(d) Organizational Victim in a Criminal Case. In a criminal case, if an organization is a victim of [the alleged] criminal activity, the government must file a statement identifying the victim. If the organizational victim is a corporation, the statement must also disclose the information required by Rule 26.1(a)(1) to the extent it can be obtained through due diligence.

(e) Bankruptcy Proceedings. In a bankruptcy proceeding, the debtor or the trustee of the bankruptcy estate --- or the appellant if the debtor or trustee is not a party --- must file a statement identifying:

- the debtor, if not named in the caption;
- the members of the creditors' committees;
- the parties to an adversary proceeding; and
- the active participants in a contested matter.

The Eleventh Circuit adds a requirement that "other entities whose stock or equity value may be substantially affected by the outcome of the proceedings" must be disclosed. But this language seems pretty fuzzy. There could be a lot of collateral damage in a bankruptcy proceeding and it would often be difficult to determine at the time disclosure is required what

kind of effect there will be. And it will certainly be difficult to determine if the effect may be "substantial" --- whatever that means. So it is probably better to avoid such fuzzy language.

D. Disclosure of an Ownership Interest Other Than Stock

Currently the only financial interest in a party or amici that must be disclosed is the parent corporation and "any public corporation that owns 10% or more of its stock." There are local rules that require disclosure of ownership interests other than stock. For example, the D.C. Circuit requires disclosure of any publicly held company "that has a 10% or greater ownership interest (such as stock or partnership shares)." Because recusal rules focuses on financial interest, it should make no difference whether the ownership interest is in stock or in some other unit.

An amendment that would expand the disclosure requirement beyond stock ownership would be straightforward. As applied to our already-altered Rule 26.1(a), it might look like this:

> **(a) Who Must File.** Any nongovernmental corporate party to a proceeding in a court of appeals must file a statement that:
>
> > **(1)** identifies any parent corporation and any publicly held corporation that ~~owns 10% or more of its stock~~ **has a 10% or greater ownership interest in the party,** or states that there is no such corporation;
> >
> > **(2)** lists the trial judges in the proceeding and in any related state proceeding; and
> >
> > **(3)** lists the names of all law firms and the partners and associates that have appeared or are expected to appear for the party in the proceeding.

E. Disclosure of Ownership Interests Held Other Than By Publicly Traded Corporations

Currently the 10% ownership disclosure requirement applies only if that interest is held by a publicly traded corporation. The Fourth Circuit recognizes that the financial interest that might be relevant to recusal is not limited to ownership by a publicly traded corporation. That is, nothing in 28 U.S.C. § 455 distinguishes between businesses organized as corporations and those organized in another way, such as a real estate investment trust.

Neal Katyal suggested, in his memo to the Committee prepared for the Subcommittee, that it is unlikely that parties are using the term "corporation" to avoid disclosure where the ownership interest is held by an entity in another form. That is a plausible conclusion, but it would seem hard to answer that question empirically with any certainty. In any event, if the Committee were to decide to amend the rule to expand disclosure requirements beyond corporate ownership, that amendment might look like this:

> **(a) Who Must File.** Any nongovernmental corporate party to a proceeding in a court of appeals must file a statement that:
>
> > **(1)** identifies any parent corporation and any publicly held ~~corporation~~ **entity** that ~~owns 10% or more of its stock~~ has a 10% or greater ownership interest in the party, or states that there is no such ~~corporation~~ **entity**;
> >
> > **(2)** lists the trial judges in the proceeding and in any related state proceeding; and
> >
> > **(3)** lists the names of all law firms and the partners and associates that have appeared or are expected to appear for the party in the proceeding.

F. Disclosure By Public Entities Not in the Corporate Form

As discussed at the previous meeting, the rule limiting the disclosure requirements to corporations is hard to square with the fact that a judge's ownership interest in an entity doing business other than in the corporate form --- such as an LLC or a trade association --- could in some cases be grounds for recusal. That is to say, for recusal purposes there is no substantive distinction between corporations and other non-governmental entities. The financial-interest prohibition in 28 U.S.C. § 455(b)(4) applies to all "parties" to a proceeding, and is not dependent on corporate form.

Neal Katyal stated in his previous memo on the subject that it is unlikely that parties believe they are exempt from disclosure requirements when the entity is not in corporate form. Again, this conclusion is very difficult to address empirically. If the Committee does decide to expand the parties' (and, by absorption, amici's) disclosure requirements to include entities other than in corporate form, the rule could be amended as follows:

> **(a) Who Must File.** ~~Any nongovernmental corporate~~ **Except for governmental units and individuals, any** party to a proceeding in a court of appeals must file a statement that:
>
> > **(1)** identifies any parent corporation and any publicly held ~~corporation~~ entity that ~~owns 10% or more of its stock~~ has a 10% or greater ownership interest in the party, or states that there is no such ~~corporation~~ entity;
> >
> > **(2)** lists the trial judges in the proceeding and in any related state proceeding; and
> >
> > **(3)** lists the names of all law firms and the partners and associates that have appeared or are expected to appear for the party in the proceeding.

It should be noted that if a change is made to require entities other than corporations to disclose, there will have to be conforming changes to Rule 29 (as discussed below) and to Rule 28(a)(1), which states that the brief must include "a corporate disclosure statement if required by Rule 26.1." The conforming change would be easy: just delete the word "corporate."

G. Disclosure of Affiliates

When Rule 26.1 was amended in 1998, the Advisory Committee specifically declined to require disclosure of a party's affiliates. The Committee Note explains that "disclosure of a party's subsidiaries or affiliated corporations is ordinarily unnecessary" because "the possibility is quite remote that the judge might be biased by the fact that the judge and the litigant are co-owners of the same corporation." Nothing has been presented to indicate that the interests supporting disclosure have somehow become more compelling since 1998. Moreover, the Committee on Codes of Conduct has advised that a judge need not automatically recuse simply because the judge owns stock in a subsidiary and the parent corporation is a party.[7] If that is so, then it follows that recusal is not required when the judge has an ownership interest in a party's corporate affiliate.

When it comes to affiliates, the question is whether the judge's interest in the affiliate "will be substantially affected by the outcome of the proceeding" under section 455(b)(4). The affiliate connection in general is more attenuated than when the judge has an ownership interest in a parent of the party, and so it is questionable whether affiliate status should be elevated to the same status as parent-sub, i.e., automatic reporting of the relationship. As stated above, many relationships that the judge might have --- financial, familial, etc. --- might in extreme cases be substantially affected by the outcome of the proceeding. But at some point the burdens of disclosure outweigh the benefits to judges, because the information disclosed will so rarely lead to recusal.

Nonetheless, if the Committee did wish to include corporate affiliation in the disclosure requirements, the rule amendment might look like this:

> **(a) Who Must File.** ~~Any nongovernmental corporate~~ **Except for governmental units and individuals, any** party to a proceeding in a court of appeals proceeding must file a statement that:
>
> > **(1)** identifies any parent **or affiliated** corporation and any publicly held ~~corporation~~ entity that ~~owns 10% or more of its stock~~ that has a 10% or greater ownership interest in the party, or states that there is no such ~~corporation~~ entity;
> >
> > **(2)** lists the trial judges in the proceeding and in any related state proceeding; and

[77] Advisory Opinion No. 57, *Disqualification Based on Stock Ownership in Parent Corporation of a Party or Controlled Subsidiary of a Party* (June 2009).

(3) lists the names of all law firms and the partners and associates that have appeared or are expected to appear for the party in the proceeding.

H. Intervenors

Intervenors obviously have an interest in the proceeding, and so theoretically intervenors should be subject to the same disclosure requirements as are imposed on a party. Three circuits have a local rule imposing disclosure requirements on intervenors that are the same as if they had been a party initially.

There are some strong arguments, though, for not amending the rule to deal specifically with intervenors. Probably the strongest argument is that intervention at the appellate level is so rare that it is not worth treating with a disclosure rule. It is true that the *government* intervenes at the appellate level with some frequency, but intervention on appeal by non-governmental corporate parties appears very rare. It is notable that in 2010, the Committee was asked by the DOJ representative to consider a rule on intervention, because the Appellate Rules have no general provision governing intervention along the lines of Civil Rule 24. The minutes of the meeting indicate that the Committee's discussion "did not produce any suggestions for moving forward with a rulemaking proposal on this item"; in 2011 the proposal on intervenors was taken off the Committee's agenda. Given the fact that the Committee has decided not to establish standards for intervention generally, it seems a bit odd to amend the disclosure rules to cover it. It seems odder still that Rule 26.1 should be amended to cover intervenors given the absence of movement on the subject by the Civil Rules Committee. It can be argued that a more systematic solution would be to consider a general rule on intervenors with a disclosure provision in that rule, or to consider a disclosure rule that tracked an amendment in the Civil Rules to that effect.

Another reason for questioning the need for an amendment treating intervenors is that when they do intervene, they have the same rights as a party to the proceeding. *See, e.g., City of Cleveland v. Nuclear Regulatory Commission,* 17 F.3d 1515, 1517 (D.C. Cir. 1994). If that is the case, then it is probable that a corporate intervenor is *already subject* to the disclosure requirements that apply to parties under Rule 26.1. Thus, imposing a disclosure requirement on intervenors specifically may be superfluous and even confusing, because the amendment would raise an inference that the Committee had determined that intervenors are *not* parties to the appeal. At a minimum, more thought should probably be given to the status of intervenors and

whether they are properly considered as parties before a disclosure amendment on the subject is proposed.

If the Committee were to decide to specify that the disclosure requirements apply to intervenors, it should be done by adding another subdivision to Rule 26.1. Lumping intervenors with parties results in balky drafting, especially if new disclosure requirements are to be added. For example, instead of having a provision requiring disclosure of an ownership interest "in the party" the rule would have to say "ownership interest in the party or intervenor." And so forth. Also, it needs to be specified in the amendment that intervenors are only subject to disclosure requirements if they would have those obligations as parties --- so, for example, an individual intervenor should not be subject to any disclosure obligations.

Here is what a separate subdivision covering intervenors might look like (as added to all the additions that have been discussed previously in this memo):

(a) Who Must File. ~~Any nongovernmental corporate~~ **Except for governmental units and individuals, any** party to a proceeding in a court of appeals proceeding must file a statement that:

(1) identifies any parent **or affiliated** corporation and any publicly held ~~corporation~~ entity that ~~owns 10% or more of its stock~~ that has a 10% or greater ownership interest in the party, or states that there is no such ~~corporation~~ entity;

(2) lists the trial judges in the proceeding and in any related state proceeding; and

(3) lists the names of all law firms and the partners and associates that have appeared or are expected to appear for the party in the proceeding.

(b) Time for Filing; Supplemental Filing.

* * *

(c) Number of Copies.

* * *

(d) Organizational Victim in a Criminal Case. In a criminal case, if an organization is a victim of [the alleged] criminal activity, the government must file a statement identifying the victim. If the organizational victim is a corporation, the statement must also disclose the information required by Rule 26.1(a)(1) to the extent it can be obtained through due diligence.

(e) Bankruptcy Proceedings. In bankruptcy proceedings, the debtor or the trustee of the bankruptcy estate --- or the appellant if the debtor or trustee is not a party --- must file a statement identifying:

- the debtor, if not named in the caption;
- the members of the creditors' committees;
- the parties to an adversary proceeding; and
- the active participants in a contested matter.

(f) Intervenors. Intervenors have the same disclosure requirements as parties under Rule 26.1(a) and (a)(1).[8]

I. More Disclosure by Amici

At the last meeting, Committee members noted that the interest of a judge in an amicus could warrant recusal. It was also noted that there have been instances in which parties engineered the participation of an amicus in order to generate a recusal. These concerns about amici are currently addressed in Rule 29(c)(1), which provides that a "corporation" must file "a disclosure statement like that required of parties by Rule 26.1."

The same issues of greater disclosure that have previously been discussed as to parties --- e.g., extension to non-corporate entities, different ownership interests, affiliates, etc. ---would appear to apply equally to amici. There does not seem to be any reason to try to impose a disclosure obligation on an amicus that would not be imposed on a party. For example, there would be no reason to conclude that an amicus must disclose affiliates, while a party is not required to do so. Indeed that is the very point of the absorptive Rule 29(c)(1) --- whatever parties must disclose, amici must disclose. That absorption would seem to be efficient and elegant rulemaking.

But that absorption works currently because the only disclosure requirement is that of a corporation, which must disclose its parent and any publicly held corporation that holds more than 10% of stock. The relevance of that interest is obvious for both parties and amici, and both parties and amici will be disclosing individualized and not cumulative information. Absorption is

[8] It would be unnecessary, and burdensome, to require intervenors to disclose judge and lawyer participation, because that information will already have been disclosed by the parties and an intervenor may not have easy access to that information.

more problematic if some of the extra disclosure requirements considered above are added to Rule 26.1. For example, the provisions discussed above, if enacted, would require parties to disclose the trial judges in the proceeding or in any related state proceeding, and the names of law firms and lawyers that have appeared or will appear in the proceeding. There would be no reason to impose those obligations on an amicus, because the parties will already have made those disclosures and the information demanded is not logically related to the amicus role and may be difficult for the amicus to access. The point here is not that a judge's interest in a party should be treated differently from an interest in an amicus, but rather that parties have access to information and will have disclosed that information independently of the amicus and so there is no reason to impose the requirement on the amicus.

In sum, if additional disclosure requirements on amici are to be imposed, Rule 29(c)(1) will have to be changed so that there is a proper fit between it and an amended Rule 26.1. There would be three problematic additions to Rule 26.1 considered so far as applied to current Rule 29(c)(1): 1) covering all non-governmental public entities (because Rule 29(c)(1) currently applies only to corporations); 2) requiring disclosure of trial judges in the proceeding; and 3) requiring disclosure of all participating lawyers. (All of the other possible extensions could be absorbed without changing the language of Rule 29(c)(1)). Assuming these three extensions were to be added, Rule 29(c)(1) could be changed as follows:

> **(c) Contents and Form.** * * * An amicus brief need not comply with Rule 28, but must include the following:
>
> (1) ~~If the amicus curiae is a corporation, a~~ A disclosure statement like that required of parties by Rule 26.1, with the following exceptions:
>
> (A) a disclosure statement is not required if the amicus curiae is a governmental unit or an individual; and
>
> (B) an amicus curiae is not required to disclose the information set forth in Rule 26.1(a)(2) and (3). [9]

Finally, in one respect it might be argued that amici should have an independent disclosure obligation: would it not be useful to disclose whether entities or lawyers not on the brief have actually contributed in some way (financially or otherwise) to the amicus's cause? The

[9] It could be argued that the rule's language requiring a statement "like that" made by parties, could be flexible enough to allow some differences and so it would be unnecessary to say anything about differences in disclosure. But failing to specify the different disclosure provisions is confusing, and moreover the Appellate Rules Committee has already determined that the term "like that" does not indicate any differences in disclosure requirements between parties and amici.

answer is, probably yes, as the judge's relationship to those with such interests could be pertinent to the recusal decision. It should be noted, though, that Rule 29 currently *does* require at least some disclosure of participation in the amicus brief. Rule 29(c)(4) already requires amici to provide "a concise statement of the identity of the amicus curiae and its interest in the case" --- and more importantly, Rule 29(c)(5)(C) requires all non-governmental amici to file a statement that indicates whether

> "a person --- other than the amicus curiae, its members, or its counsel --- contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person."

It could be argued that the language of Rule 29(c)(5) could be usefully amended to require disclosure of all the lawyers who worked on the brief, in order to determine whether the judge needs to exclude due to a family relationship. If such a changes were made, it would be best to add it as a new subpart might look like this:

> (C) a person --- other than the amicus curiae, its members, or its counsel --- contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person ; and
>
> (D) a lawyer or law firm contributed to the preparation of the brief, and, if so, identifies each such lawyer or firm.

J. Witness Lists

When the Committee's consideration of disclosure rules was discussed at the January Standing Committee meeting, a Committee member from the Ninth Circuit suggested that it would be useful to amend Rule 26.1 to require disclosure of the names of witnesses who testified in the proceeding. Certainly a scenario could be crafted in which the judge's relationship with one of the witnesses at trial is a strong enough connection as that his impartiality "might reasonably be questioned." 28 U.S.C. §455(b). Also, 28 U.S.C.§455(b)(5)(iv) requires a judge to recuse himself where a person who is within the necessary degree of relationship is "likely to be a material witness in the proceeding." That statutory provision is not addressed to appellate judges but rather to trial judges --- the provision looks forward and not backward. It seems to be grounded in the concern that a witness could receive preferential treatment by the trial judge. The relationship of an appellate judge to a witness in the case appears to be more attenuated. But it might be concluded that section 455(b)(v) has some relevance because it generally shows a concern about certain relationships between judges and witnesses.

That said, it is certainly the rare case in which an appellate judge's relationship to a trial witness raises cause for concern. On the other hand, the disclosure requirement would simply be producing a witness list, and that seems a minimal burden. It is of course for the Committee to determine whether the costs of disclosure with regard to witness lists outweighs the benefit of providing information to judges that could in some few cases be relevant to a recusal decision.

If witness lists are added to the disclosure requirement, the addition might look like this:

> **(a) Who Must File.** ~~Any nongovernmental corporate~~ **Except for governmental units and individuals, any** party ~~to a proceeding~~ or intervenor in a court of appeals proceeding must file a statement that:
>
> > **(1)** identifies any parent **or affiliated** corporation and any publicly held ~~corporation~~ entity that ~~owns 10% or more of its stock~~ that has a 10% or greater ownership interest in the party, or states that there is no such ~~corporation~~ entity;
> >
> > **(2)** lists the trial judges in the proceeding and in any related state proceeding;
> >
> > **(3)** lists the names of all law firms and the partners and associates that have appeared or are expected to appear for the party in the proceeding; and
> >
> > **(4)** lists the names of all witnesses who have testified on behalf of the party in the proceeding.

Under the drafts as set forth above, the witness list requirement would not apply to amici --- requiring amici to disclose this information would be burdensome on the amici and duplicative to the court. Nor would intervenors be subject to this requirement.

K. Reporting by Individuals?

There remains a concern about adding new disclosure requirements beyond corporate ownership that has not yet been discussed. The additional requirements – list of judges, list of lawyers, list of witnesses --- are not tied to the nature or identity of the *party.* And yet the disclosure requirement at the threshold is definitely dependent on the nature of the party. Only corporate parties (and, if added, other entities) are required to make disclosures. And yet the risk

of recusal because of trial judge participation, lawyer participation, and witness participation are the same regardless of whether the parties are business entities or individuals. So logically, individual parties should have disclosure requirements when it comes to these additional, non-business grounded recusal factors.

To date, however, none of the local rules require individuals to report, even though the information that needs to be reported goes well beyond corporate ownership in many of these rules. So the rules are logically inconsistent but at least avoid the concern that individual parties --- at least certain of them --- might be especially burdened by disclosure obligations.

If the Committee were to determine that individual parties should disclose non-business related factors, then Rule 26.1 would need substantial amendment. There would be a conflict with the opening clause ("Except for governmental units and individuals"). The draft incorporating all the other changes, set forth immediately below, would probably have to be subdivided: business entities would disclose ownership information in one subdivision and then individuals would be added to the requirement for disclosing the other information. Relettering would probably be required. Joe Kimble would surely be required.

Because this memo has ended up to be complicated enough, I chose not to give the Committee two separate drafts, one for exempting individuals and one for including them. The version below does not cover individuals.

III. Discussion Draft of All Possible Changes Discussed in This Memorandum

Rule 26.1. ~~Corporate~~ Disclosure Statement[10]

(a) Who Must File; <u>What Must Be Disclosed</u>.[11] ~~Any nongovernmental corporate~~ **<u>Except for governmental units and individuals, any</u>** party to a proceeding in a court of appeals must file a statement that<u>:</u>

> **<u>(1)</u>** identifies any parent **<u>or affiliated</u>** corporation and any publicly held ~~corporation~~ <u>entity</u> that ~~owns 10% or more of its stock~~ <u>that has a 10% or greater ownership interest in the party,</u> or states that there is no such ~~corporation~~ <u>entity;</u>
>
> **<u>(2)</u>** <u>lists the trial judges in the proceeding and in any related state proceeding; and</u>
>
> **<u>(3)</u>** <u>lists the names of all law firms and the partners and associates that have appeared or are expected to appear for the party in the proceeding; and</u>
>
> **<u>(4)</u>** <u>lists the names of all witnesses who have testified on behalf of the party in the proceeding.</u>

(b) Time for Filing; Supplemental Filing.

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(c) Number of Copies.

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<u>(d) Organizational Victim in a Criminal Case.</u> <u>In a criminal case, if an organization is a victim of [the alleged] criminal activity, the government must file a statement identifying the victim. If the organizational victim is a corporation, the statement must also disclose the information required by Rule 26.1(a)(1) to the extent it can be obtained through due diligence.</u>

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[10] "Corporate" is no longer descriptive if the rule governs other business entities.

[11] The caption of this subdivision is insufficiently descriptive --- even today --- because the subdivision covers not only the "who" but the "what."

(e) Bankruptcy Proceedings. In bankruptcy proceedings, the debtor or the trustee of the bankruptcy estate --- or the appellant if the debtor or trustee is not a party --- must file a statement identifying:

● the debtor, if not named in the caption;

● the members of the creditors' committees;

● the parties to an adversary proceeding; and

● the active participants in a contested matter.

(f) Intervenors. Intervenors have the same disclosure requirements as parties under Rule 26.1(a) and (a)(1).[12]

Rule 29. Brief of an Amicus Curiae

* * *

(c) Contents and Form. An amicus brief must comply with Rule 32. * * * . An amicus brief need not comply with Rule 28, but must include the following:

(c) Contents and Form. * * * An amicus brief need not comply with Rule 28, but must include the following:

(1) ~~If the amicus curiae is a corporation, a~~ A disclosure statement like that required of parties by Rule 26.1, with the following exceptions:

(A) a disclosure statement is not required if the amicus curiae is a governmental unit or an individual; and

(B) an amicus curiae is not required to disclose the information set forth in Rule 26.1(a)(2)-(4).]

* * *

[12] It would be unnecessary, and burdensome, to require intervenors to disclose judge and lawyer participation, witness lists, etc., because that information will already have been disclosed by the parties.

(5) unless the amicus curiae is one listed in the first sentence of Rule 29(a),[13] a statement that indicates whether:

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

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

(C) a person --- other than the amicus curiae, its members, or its counsel --- contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person; and

(D) a lawyer or law firm contributed to the preparation of the brief, and, if so, identifies each such lawyer or firm.

[13] This is odd phrasing. Why not just say who is excepted? "Unless the amicus curiae is the United States or its officer or its agency or a state . . ." If the rule ever does get amended, that would seem to be a stylistic and user-friendly improvement.

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MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professors Sara Sun Beale and Nancy King, Reporters

RE: Rule 12.4(a)(2)

DATE: September 1, 2015

In a memorandum dated June 8, 2015, Tab 2, Jonathan Wroblewski wrote on behalf of the Justice Department asking the Advisory Committee to consider "whether some amendment to Rule 12.4 might be warranted in light of the 2009 change to the Code of Conduct and to address the cases where compliance with the current rule may be problematic and unnecessary." Additionally, he noted that other advisory committees may be considering changes to their disclosure requirements, and he expressed the hope that the Criminal Rules Committee could coordinate with them.

The Department's proposal is on the agenda for discussion of the question whether a subcommittee should be appointed to consider whether and how to amend the rule, while coordinating with other committees.

Rule 12.4 governs the parties' disclosure statements. It provides:

(a) Who Must File.

(1) Nongovernmental Corporate Party. Any nongovernmental corporate party to a proceeding in a district court must file a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation.

(2) Organizational Victim. If an organization is a victim of the alleged criminal activity, the government must file a statement identifying the victim. If the organizational victim is a corporation, the statement must also disclose the information required by Rule 12.4(a)(1) to the extent it can be obtained through due diligence.

12.4 was a new rule added in 2002. The Committee Note states that "[t]he purpose of the rule is to assist judges in determining whether they must recuse themselves because of a 'financial interest in the subject matter in controversy.' Code of Judicial Conduct, Canon 3C(1)(c) (1972)."

The Department of Justice Memorandum presents two reasons for reconsideration of the notice requirement regarding organizational victims. First, the Code of Judicial Conduct was significantly amended in 2009, and it no longer treats all victims entitled to restitution as parties. Since the purpose of the rules was to require the disclosure of information necessary to assist judges in making rescusal decisions, a change in the recusal requirements may warrant a parallel change in Rule 12.4.

Second, the Department indicated that there are some cases in which it is difficult or impossible to provide the notification required by the current rule. For example, in some antitrust cases there may be hundreds or thousands of corporate victims. Providing the notification required for each of them, even if possible, would be extremely burdensome.

One other advisory committee has a related issue on its agenda. The Appellate Rules Committee has discussed whether to amend its own disclosure rules, and one of the issues was whether it should adopt a provision parallel to Rule 12.4(b)(2). At this time, this issue remains on the Appellate Rules study agenda, but there is no proposal under active consideration. Excerpts of the minutes of that Committee's fall 2014 and spring 2015 meetings are included as Tab 3.

U.S. Department of Justice

Criminal Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

June 8, 2015

MEMORANDUM

TO: The Honorable Reena Raggi
Chair, Advisory Committee on Criminal Rules

FROM: Jonathan J. Wroblewski, Director
Office of Policy and Legislation

SUBJECT: Rule 12.4 of the Federal Rules of Criminal Procedure

As I mentioned to you recently, I was contacted in April by Justice Department colleagues who staff other rules committees concerning Rule 12.4 of the Federal Rules of Criminal Procedure and consideration being given to adding a similar rule to the appellate rules (and perhaps others as well). My colleagues also indicated some concerns about the government's ability to fully comply with the rule as now written in certain cases with large numbers of corporate victims. As you know, Rule 12.4 requires the government to identify corporate victims in relevant cases to assist judges in complying with their obligations under the Judicial Code of Conduct.

After our discussion, I contacted Robert Deyling, Counsel to the Judicial Conference's Committee on Codes of Conduct, and Rebecca Womeldorf of the Rules Support Office about this matter. Mr. Deyling indicated that the relevant provision of the Code of Conduct for United States Judges was amended in 2009 to limit its reach, but that to his knowledge no consideration was given to making conforming changes to Rule 12.4. Specifically, the following commentary was added to Canon 3C(1)(c) in 2009:

> In a criminal proceeding, a victim entitled to restitution is not, within the meaning of this Canon, a party to the proceeding or the subject matter in controversy. A judge who has a financial interest in the victim of a crime is not required by Canon 3C(1)(c) to disqualify from the criminal proceeding, but the judge must do so if the judge's impartiality might reasonably be questioned under Canon 3C(1) or if the judge has an interest that could be substantially affected by the outcome of the proceeding under Canon 3C(1)(d)(iii).

In addition, I contacted federal prosecutors across the Department concerning this issue and found a number who had concerns related to the breadth of the current rule (especially given the 2009 amendment to the Code of Conduct) and the ability of prosecutors to comply with the rule in cases involving numerous corporate victims in certain types of prosecutions (*e.g.* in some antitrust cases where hundreds or even thousands of corporations may have been victimized to some extent by the offense).

My understanding is that other rules committees may be considering this issue over the coming months. As I indicated in our discussion, I think such consideration would benefit from our committee's involvement. I also believe that our committee should consider whether some amendment to Rule 12.4 might be warranted in light of the 2009 change to the Code of Conduct and to address the cases where compliance with the current rule may be problematic and unnecessary.

Please let me know if you would like to discuss this. We appreciate your consideration of this matter.

cc: Professor Sara Sun Beale
Professor Nancy King
Rebecca Womeldorf

DRAFT

Minutes of Fall 2014 Meeting of
Advisory Committee on Appellate Rules
October 20, 2014
Washington, D.C.

I. Introductions

Judge Steven M. Colloton called the meeting of the Advisory Committee on Appellate Rules to order on Monday, October 20, 2014, at 9:00 a.m. at the Mecham Conference Center in the Thurgood Marshall Federal Judiciary Building in Washington, D.C. The following Advisory Committee members were present: Judge Michael A. Chagares, Justice Allison H. Eid, Judge Peter T. Fay, Judge Richard G. Taranto, Professor Amy Coney Barrett, Mr. Gregory G. Katsas, Professor Neal K. Katyal, and Mr. Kevin C. Newsom. Mr. Douglas Letter, Director of the Appellate Staff of the Civil Division, U.S. Department of Justice ("DOJ"), and Mr. H. Thomas Byron III, also of the Civil Division, were present representing the Solicitor General. Professor Daniel R. Coquillette, Reporter for the Standing Committee; Mr. Jonathan C. Rose, the Standing Committee's Secretary and Rules Committee officer; Mr. Gregory G. Garre, liaison from the Standing Committee; Ms. Julie Wilson, Attorney Advisor in the Administrative Office ("AO"); Mr. Michael Ellis Gans, liaison from the appellate clerks; and Ms. Marie Leary from the Federal Judicial Center ("FJC") were also present. Mr. Robert Deyling, Counsel to the Committee on Codes of Conduct and Assistant General Counsel at the AO, attended part of the meeting, as did Mr. Joe S. Cecil and Ms. Catherine R. Borden of the FJC.

IV. Discussion Items

A. Item No. 08-AP-R (disclosure requirements)

Judge Colloton introduced this item, which concerns local circuit provisions that impose disclosure requirements beyond those set by the Appellate Rules. Judge Colloton noted that Judge Chagares, Professor Katyal, and Mr. Newsom had agreed to form a subcommittee on this topic, and he thanked them for their research. He thanked Mr. Deyling for attending the meeting in order to share the perspective of the Committee on Codes of Conduct. A central question, Judge Colloton noted, is whether there is information currently elicited by local circuit provisions but not required by the Appellate Rules that would be relevant to a judge's determination whether to recuse from a matter. A related question is whether, as to some types of information, the Appellate Rules Committee needs further guidance in order to assess the implications of such information for recusal determinations. Judge Colloton reported that the Chair of the Committee on Codes of Conduct had designated Judge Paul Kelly of the Tenth Circuit, a member of the Codes of Conduct Committee, to serve as a liaison to the Appellate Rules Committee in connection with this project.

Judge Colloton invited Judge Chagares, Professor Katyal, and Mr. Newsom to summarize the results of their research. Judge Chagares observed that recusal issues present a minefield for judges; despite judges' best efforts, it is possible that something relevant to recusal might be overlooked. He stated that, of the topics on which he had focused, the two key sets of issues concerned criminal appeals and bankruptcy appeals. Appellate Rule 26.1, Judge Chagares noted, applies to all types of appeals. However, some attorneys assert that Rule 26.1 does not apply to criminal appeals. The Third Circuit Clerk, at Judge Chagares's request, surveyed the other Circuit Clerks concerning corporate disclosures in criminal cases. The responses reported some resistance by attorneys to the application of Rule 26.1 in criminal cases, as well as a few instances in which a circuit had not been enforcing the rule in criminal cases. A benefit of the survey, Judge Chagares noted, was that it had sensitized the Circuit Clerks to the issue, which should improve enforcement of the Rule. Because appeals involving corporate criminal defendants are very rare, Judge Chagares suggested, it should not be necessary to consider amending Rule 26.1 to address this issue. Judge Chagares pointed out that, unlike Criminal Rule 12.4, Appellate Rule 26.1 does not require disclosures concerning crime victims. As to local provisions on this topic, the Third Circuit requires disclosures concerning organizational victims, while the Eleventh Circuit requires disclosures concerning all victims.

Judge Chagares noted the distinct challenges posed by bankruptcy appeals. Not everyone involved in the bankruptcy proceeding below is a party for purposes of analyzing recusal issues. An Advisory Opinion on this topic (Advisory Opinion No. 100), Judge Chagares observed,

provided helpful guidance. The opinion states that parties, for this purpose, include the debtor, members of the creditors' committee, the trustee, parties to an adversary proceeding, and participants in a contested matter. The Third Circuit's local provision on point roughly tracks this guidance; so does the Eleventh Circuit's provision, but that provision also requires disclosure of entities whose value may be substantially affected by the outcome.

Judge Colloton invited Judge Chagares to summarize his findings on the third topic that he had investigated – namely, a judge's connection with participants in the litigation. Judge Chagares noted that instances may arise when a judge on an appellate panel previously participated in the litigation. For example, Judge Chagares recalled an instance when a then-recently-elevated appellate judge discovered that an appeal involved a defendant whom he had arraigned while serving as a Magistrate Judge.

The Reporter noted that Criminal Rule 12.4 requires the government to make disclosures concerning organizational victims. In 2009, the Criminal Rules Committee – at the suggestion of the Codes of Conduct Committee – considered whether to expand Rule 12.4 to require disclosures concerning individual victims and to require disclosures by the organizational victims themselves. The Committee ultimately decided not to propose amendments making such changes; participants in the Committee discussions noted that requiring disclosures concerning individual victims would raise privacy concerns.

Professor Coquillette reminded the Committee that, under Appellate Rule 47, local circuit rules must be consistent with federal statutes and with the Appellate Rules. He observed that the requirement of "consistency" raises interesting questions: For instance, if the Appellate Rules impose a limited set of requirements concerning a given topic, can circuits impose additional local requirements concerning that same topic? The Reporter observed that, when Rule 26.1 was initially adopted, the drafters saw the Rule as setting minimum requirements to which a particular circuit was free to add.

An appellate judge member asked what disclosure requirements apply in proceedings under 28 U.S.C. §§ 2254 and 2255. The Reporter undertook to research this question. The member also asked whether Criminal Rule 12.4 defines the term "victim." The Reporter responded that Criminal Rule 1(b)(12) defines "victim" to mean a "crime victim" as defined in the Crime Victims' Rights Act.

Mr. Deyling stated that the topics discussed thus far seemed to him like topics worth exploring. He explained that the Codes of Conduct Committee's 2009 suggestion concerning crime victims arose from the Committee's desire to ensure that the courts' electronic conflicts screening program was picking up all the relevant conflicts. The Codes of Conduct Committee has altered its view, over time, concerning the significance of a judge's interest in a crime victim. The Committee's current view – which accords with the view found in relevant caselaw – is that recusal is necessary only if a judge has a substantial interest in a victim.

Judge Colloton, summarizing the Committee's discussion up to this point, suggested that

the Appellate Rules Committee might consider whether to adopt a provision reflecting Advisory Opinion No. 100's guidance concerning bankruptcy matters. The Committee could also consider adopting a provision requiring some disclosures concerning victims. On the other hand, he suggested, perhaps some caution is warranted because a provision requiring broad disclosure might suggest that certain interests require recusal when in fact they do not. It was noted that, in some instances, the recusal standard presents a judgment call that the judge must make based upon adequate information.

Judge Colloton invited Mr. Newsom to present his findings concerning the topics that he researched. Mr. Newsom turned first to disclosures by intervenors. It is rare, he observed, for intervention to occur in the first instance on appeal. But when such intervention does occur, the intervenor should be required to make the same disclosures as any party. Indeed, Mr. Newsom noted, some circuits have local provisions requiring intervenors to make the same types of disclosures as named parties.

Mr. Newsom next discussed local provisions requiring disclosures by amici. Local provisions take varying approaches concerning which amici must make disclosures and what those amici must disclose. As to the nature of the disclosure, a few circuits require amici to identify parent corporations (or, in one rule, parent companies); some other circuits require disclosure of any entities with a financial interest in the amicus brief. The subcommittee did not feel that it would be necessary for a national rule to require the latter sort of disclosure.

Mr. Newsom also noted local provisions that require disclosure of the identity and nature of parties to the litigation – such as the identity of pseudonoymous parties, or the members of a trade association. The idea behind such provisions, he observed, is to require disclosure concerning interested persons whose identity is not otherwise ascertainable from the filings on appeal.

Judge Colloton invited Mr. Deyling to comment on recusal issues that might be raised by amicus participation. Mr. Deyling conceded that the Codes of Conduct Committee had not provided comprehensive guidance on that topic, even in the Committee's unpublished compendium of summaries of its unpublished opinions. (That compendium, he explained, contains responses to specific requests for advice.) For the most part, Mr. Deyling noted, the Committee had not required recusal because of the participation of an organizational amicus, except in rare situations – for example, where a judge's spouse was involved in the affairs of an amicus. Advisory Opinion No. 63 states that the participation of an amicus that is a corporation does not require recusal if the judge's interest in the amicus would not be substantially affected by the outcome of the litigation and if the judge's impartiality could not reasonably be questioned. Judge Colloton noted that the Appellate Rules Committee might seek further guidance from the Codes of Conduct Committee concerning recusal issues raised by amicus filings.

A member asked whether there might be a concern that parties might engineer the participation of a particular amicus in an effort to generate a recusal. Another member agreed

that this could be a concern; he noted that when he is considering whether to file an amicus brief, he tries to avoid doing so in situations where the filing might trigger a recusal.

Mr. Deyling expressed agreement with Mr. Newsom's suggestion that an intervenor should be treated like any other party for purposes of disclosures. He noted as well that if an intervenor's participation raises a recusal issue, that issue will arise – even before intervention is granted – in connection with the *request* to intervene.

Judge Colloton observed that, when a judge owns shares in a member of a trade association and the trade association is a party to a lawsuit, the recusal issue will focus on whether the judge's interest in the member would be substantially affected by the outcome of the proceeding. Disclosure of the trade association's members would permit the judge to assess this question. Mr. Deyling noted that the question is who has the burden of discerning and disclosing such information.

Mr. Newsom pointed out that questions concerning real parties in interest can arise in a variety of situations. Mr. Byron noted that the Appellate Rules do not define who is a "party" or who counts as an "appellee"; what about those who do not actually participate in the litigation but who may benefit from it? Mr. Letter recalled that the Committee had previously considered defining "appellee" in the Appellate Rules, but the Committee had decided not to do so.

Summarizing this portion of the discussion, Judge Colloton noted that the Committee would further investigate questions relating to intervenors and amici, and that the Committee might seek further guidance concerning recusal obligations triggered by an amicus's participation.

Judge Colloton invited Professor Katyal to report on the results of his research. Professor Katyal noted that he had focused on disclosures concerning corporate relationships. The bottom line, he suggested, is that there is no need to change the disclosure requirements to address these topics. However, if the Committee is considering other possible amendments concerning disclosure requirements, then it might consider what parties other than corporations should be required to make disclosures under Rule 26.1. The D.C. Circuit's local provision, he observed, requires all nongovernmental, non-individual entities to make disclosures under Rule 26.1; this requirement encompasses, for example, joint ventures and partnerships. A prudent attorney representing such an entity would likely comply with existing Rule 26.1, but the Rule could be amended to cover such entities explicitly. The Reporter noted that Judge Easterbrook's comment – which initially provided one of the sources for this agenda item – had pointed out that Rule 26.1 is underinclusive because it covers only corporations and not other types of business entities.

The Committee might also consider what types of ownership interests might be encompassed within an amended disclosure rule. The D.C. Circuit's local provision requires disclosure of any ownership interest – not merely stock ownership – that is greater than 10 percent. Professor Katyal noted that if the Committee were inclined to expand Rule 26.1 in this

respect, it could propose amending the Rule to refer to "any publicly held entity that owns 10 percent or more of an ownership interest in the party." Such an amendment, he suggested, could be modestly helpful.

By contrast, Professor Katyal said, some other local requirements – such as the Eleventh Circuit's requirement that corporate parties disclose their full corporate title and stock ticker symbol – do not seem worthwhile candidates for inclusion in the national Rule. An appellate judge noted that the Eleventh Circuit had adopted its local disclosure requirements in an effort to avoid recusal problems. Mr. Gans reported that the Circuit Clerks face a complex task when assessing corporate disclosures; sometimes he finds that it is necessary to call counsel to obtain further information (including both some information currently required by Rule 26.1 and some additional information). Mr. Deyling noted that a judge's interest in a party's *subsidiary* would not trigger a recusal obligation.

By consensus, the Committee retained this item on its agenda. Judge Colloton noted that the Committee might seek further guidance from the Codes of Conduct Committee on particular issues.

C. Item No. 08-AP-R (disclosure requirements)

Judge Colloton invited Professor Capra to present this item, which focuses on disclosures required by local circuit provisions but not required by the Appellate Rules' disclosure provisions (contained in Rules 26.1 and 29(c)). Previously, a subcommittee composed of Judge Chagares, Professor Katyal, and Mr. Newsom had researched these issues. More recently, Professor Capra analyzed the issues and prepared sketches of possible Rule amendments.

Professor Capra explained that he had focused on identifying local rule requirements, not in the current Appellate Rules, that the Committee might be interested in discussing. His memo took a "building block" approach, discussing each requirement in turn and showing its addition to a consolidated sketch of possible Rule amendments. Some of the possible amendments, Professor Capra noted, seemed more viable than others.

Professor Capra first directed the Committee's attention to the topic, discussed at page 923 of the agenda book, that concerned a judge's connection with a prior or current participant in the litigation. The sketch on page 923 illustrated a rule that would elicit information about a judge's prior participation in the case. The sketch on page 924 showed a rule that would also elicit information about lawyers who had previously appeared in the case. That information, Professor Capra suggested, could be compiled fairly easily.

Professor Capra turned next to the question of disclosures in criminal appeals. The key issue here, he suggested, was whether the Appellate Rules should be amended to include a provision paralleling Criminal Rule 12.4(a)(2). That Rule requires the Government to file a statement identifying an organizational victim and – if that victim is a corporation – also requires the Government to disclose the ownership information referred to in Criminal Rule 12.4(a)(1) (the cognate provision to Appellate Rule 26.1(a)) "to the extent that it can be obtained through due diligence." The sketch set out at page 926 of the materials illustrates an amendment that would add to Appellate Rule 26.1 a provision paralleling Criminal Rule 12.4(a)(2). Such an amendment, Professor Capra predicted, would not affect many appeals; but it would have the virtue of increasing uniformity across the Appellate and Criminal Rules. The Committee would coordinate with the Criminal Rules Committee on these issues.

Turning to the question of disclosures in bankruptcy cases, Professor Capra observed that the Code of Conduct Committee's Advisory Opinion No. 100 provided guidance concerning the participants (in a bankruptcy proceeding) that should be considered parties for purposes of the disclosure rules. The guidance from that Advisory Opinion is not currently reflected in the disclosure provisions in either the Appellate Rules or the Bankruptcy Rules. But the Bankruptcy Rules Committee has indicated a lack of interest in proceeding with an amendment on the topic of disclosures – a reluctance that weighs against proceeding with a bankruptcy-disclosure amendment to the Appellate Rules. For illustrational purposes, Professor Capra set out on page 927 of the agenda book a sketch showing an amendment that would incorporate into Appellate Rule 26.1 additional disclosure requirements for appeals in bankruptcy proceedings.

Next, Professor Capra observed that the Appellate Rules direct a corporate party or

amicus to disclose "any parent corporation and any publicly held corporation that owns 10% or more of its stock." Some local rules, Professor Capra noted, require disclosure of ownership interests other than stock. This makes sense; because recusal rules focus on financial interest, it should make no difference whether the ownership interest is in stock or in some other unit. The sketch at page 928 of the agenda book illustrated an amendment that would require disclosure of ownership interests other than stock. At page 929, the sketch would extend the disclosure obligation to encompass ownership interests held by publicly held entities other than corporations. Page 930 of the agenda book showed an amendment that would extend Rule 26.1's disclosure obligations to non-governmental entity litigants other than corporations.

Professor Capra noted that he had sketched, at page 931 of the agenda materials, an amendment that would require disclosure concerning corporate affiliates. However, guidance from the Codes of Conduct Committee indicates that recusal is not automatically required when the judge has an ownership interest in a party's corporate affiliate. Accordingly, it does not seem worthwhile to amend Rule 26.1 to require disclosures concerning a party or amicus's corporate affiliates (beyond entities that have an ownership interest in the party or amicus).

Professor Capra next turned to the question of disclosure requirements applicable to intervenors. Intervention on appeal, he noted, is sufficiently rare that the Committee had previously decided not to pursue amendments that would govern the general topic. (Appellate Rule 15(d) addresses intervention in the specific context of proceedings for review or enforcement of an agency order.) Morever, Professor Capra pointed out, once intervention has been granted, the intervenor should be viewed as having the status of a party and should thus be seen as subject to Rule 26.1's existing disclosure requirements for parties generally.

Professor Capra pointed out that, depending on the Committee's decisions with respect to the disclosure obligations for parties, changes to Rule 29(c)(1)'s disclosure requirement for amici might become necessary in order to ensure a proper fit between that Rule and Rule 26.1. Some disclosures, he noted, need not be required of amici because a party would already have disclosed the relevant information.

Responding to a suggestion by a member of the Standing Committee, the sketch on page 937 illustrated an amendment that would elicit the names of witnesses who had testified in a case. Professor Capra observed that, on the one hand, instances where a judge's relation to a witness causes recusal are likely to be relatively rare. But on the other hand, it should not be very burdensome for a party to disclose any relevant witness list.

Professor Capra pointed out that the Committee would also need to consider whether any additional disclosure requirements should apply to individuals as well as entities. If the Committee decided to apply some disclosure requirements to individual litigants, it would likely be necessary to restructure the Rule 26.1 sketches shown in his memo.

An attorney member thanked Professor Capra for his work on this topic and stated that he generally agreed with Professor Capra's assessments. This member suggested that the provision sketched on page 923 of the agenda book – designed to elicit information concerning a judge's

prior participation in the litigation – should not be limited to participation as a trial judge. Thus, the member suggested deleting the word "trial."

Turning to the sketch on page 924 of the agenda book, which focused on appearances by law firms and lawyers, the attorney member suggested that it would be better to refer to "attorneys" rather than "partners and associates." Some firms, he noted, create positions other than partner and associate, such as "counsel." An appellate judge member asked about that sketch's reference to firms and lawyers who "are expected to appear" for the party. Another attorney member noted that it could be difficult for a firm to predict in advance which associates it might staff on a matter. An appellate judge member noted that the sketch on page 924 was based on Federal Circuit Rule 47.4(a)(4), which requires disclosure of "[t]he names of all law firms and the partners and associates that have appeared for the party in the lower tribunal or are expected to appear for the party in this court." The Federal Circuit, he reported, has discerned no difficulties with this provision. It is important, this member stressed, to get a lot of information early on. If the information is not provided until later, the court will deny an entry of appearance by a new attorney if that attorney's appearance would cause a recusal.

An attorney member stated that the sketch shown on page 936 – which would require amici to disclose whether "a lawyer or law firm contributed to the preparation of the brief, and, if so, [to] identif[y] each such lawyer or firm" – would require disclosures beyond those required by the Supreme Court's rules. If the Supreme Court's rule does not require such information, the member suggested, neither should the Appellate Rules. Supreme Court Rule 37.6 requires that amici (other than specified governmental amici) must "indicate whether counsel for a party authored the brief in whole or in part and whether such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief, and shall identify every person other than the amicus curiae, its members, or its counsel, who made such a monetary contribution." Professor Capra queried whether the Supreme Court's rule would elicit the information necessary to discern situations in which a Justice's family member worked on the amicus brief. The member responded that the Stern and Gressman treatise takes the view that such work would count as a monetary contribution.[1] An appellate judge member expressed doubt about the merit of the treatise's view, because the ordinary meaning of "monetary contribution" does not include an attorney's labor on a brief.

An attorney member, turning to the question of disclosures by intervenors, stated that he agreed with Professor Capra that, once intervention is granted, the intervenor is subject to the same disclosure obligations as any other party. But, this member asked, what about disclosures *before* the grant of intervention? Mr. Byron reported that, in proceedings for review of agency rulemaking, he very frequently sees intervenors seeking to come in on both sides. Most such

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[1] *See* Stern et al., Supreme Court Practice § 13.14 at 756 n. 62 ("Some nonparty organizations, desirous of helping an impecunious amicus present its views to the Court, may assist in writing the amicus brief. The nonparty organization, by paying its own lawyers, would thereby seem to be making a 'monetary contribution to the preparation' of the amicus brief. Unless and until the Clerk's Office advises otherwise, prudence dictates that such a 'monetary contribution' be revealed to the Court.").

instances occur in proceedings in the D.C. Circuit, but some also occur in the regional circuits. Professor Capra noted the possibility of adding a rule provision to address such instances.

An appellate judge member expressed skepticism about the desirability of requiring disclosure of witness lists. Another appellate judge member stated that information relevant to recusal is very important to judges; however, he asked whether the disclosures being discussed would be onerous for lawyers.

An attorney member suggested that some of the information – concerning participation by attorneys and judges – could be compiled relatively readily. Another attorney member, however, warned that a list of lawyers who had participated in a case could end up being 15 pages long. One of the appellate judge members noted that, in the Eighth Circuit, the Circuit Clerk's office runs the recusal check based on the list (available in CM/ECF) of the lawyers who appeared in the district court. Another appellate judge member asked whether that sort of check would suffice to determine the names of the lawyers who had appeared before an agency. Mr. Gans responded that his office adds that information in manually. An attorney member suggested that it would be useful for judges to have this information. An appellate judge member noted that it is important to limit any required disclosures to the names of those who have actually appeared in a proceeding. The attorney member suggested that a provision could be tailored so that it only requires disclosure of the names of firms and lawyers who appeared in an agency proceeding. An appellate judge member asked whether the rule might state that there is no need to disclose any names of lawyers whose participation is already listed in the CM/ECF system. Mr. Gans noted that the Clerk's Offices should already be checking for lawyers' prior participation, because Judicial Conference policy requires such checks. Professor Capra noted that a rule on this topic should also account for any related state proceedings; the rule could do so by requiring the disclosure of any firms or lawyers not already listed in CM/ECF. Mr. Gans suggested that the Clerk's Office could send the lawyers the list his office generated from CM/ECF, and the lawyers could then disclose only the names not already on the list. An attorney member suggested that, alternatively, the rule might target particular types of prior proceedings (agency proceedings and state-court proceedings). An appellate judge member responded that it would be better to have a single source for all of the information. This member questioned whether lists generated using CM/ECF would always be complete; and he suggested that if the information is submitted by the attorneys, then the court can apply a kind of estoppel based on the disclosures. An attorney member noted, however, that creating this sort of list would be costly for litigants.

An appellate judge participant, commenting on the disclosures project as a whole, expressed concern that some might question why a disclosure would be required unless the information elicited by that disclosure required recusal. That is to say, the addition of a particular disclosure requirement might generate a perception that information responsive to that requirement necessitates recusal. And problems sometimes arise when a litigant takes certain steps in an effort to generate a recusal. Proceeding with this project, he suggested, would entail consultation with the Codes of Conduct Committee and the Committee on Court Administration and Case Management. Judge Colloton noted that the subcommittee was attuned to the concern that new disclosure requirements should be connected to recusal obligations and that the Committee would engage in appropriate consultation.

An appellate judge member noted that some disclosures (such as those concerning attorneys' prior participation) were relevant to individual litigants, not only to entities. He asked whether the rule should be adjusted to account for that. On the other hand, he noted, perhaps compliance would be more burdensome for individual litigants.

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

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TAB 5

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TAB 5A

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MEMORANDUM

DATE: October 15, 2015

TO: Advisory Committee on Appellate Rules

FROM: Gregory E. Maggs, Reporter

RE: Item No. 12-AP-F (FRAP 42 Class Action Appeals)

This item concerns proposed amendments to the Appellate Rules relating to class-action-objector appeals. Reporter Catherine T. Struve wrote the attached detailed memorandum on the subject in 2013. *See* Memorandum to Advisory Committee on Appellate Rules from Reporter Catherine T. Struve, Regarding Item No. 12-AP-F (Sept. 10, 2013). The Committee last discussed this issue at its April 2014 meeting. *See* Minutes of Spring 2014 Meeting of the Advisory Committee on Appellate Rules, April 28 and 29, 2014 at 16-18 (excerpt attached).

In September 2015, a subcommittee of the Civil Rules Committee held a mini-conference on the subject of class action objectors and subsequently prepared a report on the matter. *See* Rule 23 Subcommittee Report (Oct. 2015) (attached). Although most of the draft report concerns changes to the Civil Rules, the report also briefly discusses a "sketch" of a new Appellate Rule 42(c). The pertinent passage in the report—contained in a footnote—says:

> For purposes of discussion at this meeting, one possibility that has been the subject of discussions with the Appellate Rules Committee is the addition of an Appellate Rule 42(c), providing as follows:
>
> > (c) Dismissal of Class-Action Objector's Appeal.
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> > A motion to dismiss an appeal from an order denying an objection made to approval of a class-action settlement under Rule 23(e)(5) of the Federal Rules of Civil Procedure [must][may] be referred to the district court for its determination whether to permit withdrawal of the objection and appeal under Rule 23(e)(5)(B) if the objector or the objector's counsel is to receive any payment or consideration in [exchange for] {connection with} dismissal of the appeal.
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> The use of "may" above recognizes that the court of appeals may wish to deal with the matter itself. For one thing, if no payment or consideration is to be paid to the objector or objector counsel, there seems no reason for reference to the

> district court. For another, there may be cases in which the court of appeals concludes that it is better situated to resolve the matter than the district court. If the motion to withdraw the appeal arises shortly after the notice of appeal is filed, and therefore also shortly after the district court has reviewed the proposed settlement and rejected the objection, it would be unlikely the court of appeals would feel itself better equipped to deal with the matter. On the other hand, if the appeal has been fully briefed and argued, the court of appeals may be more familiar with the issues than the district court, for the district court's action might be several years old by then.

Rule 23 Subcommittee Report at 15-16 n.3.

At the October 2015 meeting, the Committee may wish to consider the sketch of Appellate Rule 42(c) and the discussion quoted above. Potential questions to address are whether to adopt the proposed rule and, if so, which of the indicated optional wording choices would be best. The Committee presumably will not want to take any action until the Civil Committee is also ready to make amendments.

Attachments

1. Memorandum to Advisory Committee on Appellate Rules from Reporter Catherine T. Struve, Regarding Item No. 12-AP-F (Sept. 10, 2013).

2. Minutes of Spring 2014 Meeting of the Advisory Committee on Appellate Rules, April 28 and 29, 2014, Newark, New Jersey at 16-18 (excerpt)

3. Rule 23 Subcommittee Report (Oct. 2015)

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MEMORANDUM

DATE: September 10, 2013

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 12-AP-F

This item concerns proposed Appellate Rules amendments relating to class-action-objector appeals.[1] In this memo, I do not attempt an exhaustive review of the relevant issues. For in-depth treatment of particular facets of the problem, I commend to the Committee the articles by Professor Fitzpatrick[2] and by Judge Smith and Professor Lopatka.[3] Instead, I sketch here a schematic overview of portions of the problem.

The basic conundrum is this: District judges lack full information about the fairness of proposed class-action settlements, and the named parties – who have reached agreement on the settlement – will not always provide full information. Other sources are needed. Class members who object to the proposed settlement can usefully inform the district court's assessment of the settlement, and can also perform a useful function by renewing their objections on appeal. But not all objections have merit, either as complaints about what the objector will receive under the settlement or as complaints about what other class members will receive. Some objectors and their counsel pursue meritless objections mainly or solely to obtain a monetary payment (from the named parties and/or their counsel) in exchange for dropping the objection.

At the district-court level, the Civil Rules attempt to encourage input by class members and attempt to ensure that meritorious objections will receive due attention from the court. Settlement of a class action requires court approval.[4] Class members must receive reasonable notice of the proposed settlement,[5] and the court "may approve [the settlement] only after a hearing and on finding that it is fair, reasonable, and adequate."[6] Rule 23(e)(5) authorizes objections by any member of the class, and

[1] The docket number for this item refers specifically to the proposal submitted to the Committee by Professors Brian Fitzpatrick, Alan Morrison, and Brian Wolfman. However, the Committee has expanded the scope of the project to include possible alternatives as well.
[2] Brian T. Fitzpatrick, *The End of Objector Blackmail?*, 62 Vand. L. Rev. 1623 (2009).
[3] John E. Lopatka & D. Brooks Smith, *Class Action Professional Objectors: What To Do About Them?*, 39 Fla. St. U. L. Rev. 865 (2012).
[4] Civil Rule 23(e) provides: "The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval."
[5] *See* Civil Rule 23(e)(1).
[6] Civil Rule 23(e)(2).

provides that "the objection may be withdrawn only with the court's approval." Though these rules cannot deter objectors from interposing objections for the purpose of extracting a side payment, Rule 23(e)(5)'s requirement of court approval for objection withdrawal is designed to prevent the extraction of side payments while the case is in the trial court. Valid objections might lead the district court to require modifications in the proposed settlement. Let us suppose that many meritorious objections are satisfactorily addressed by the district court, but that at least a small number of such objections are erroneously rejected by the district court. Let us further suppose (for the sake of simplicity) that all non-meritorious objections are rejected by the district court.

The district court's rejection of the objections creates an opportunity for the objector to appeal from the judgment that approves the settlement. Under *Devlin v. Scardelletti*, 536 U.S. 1 (2002), "nonnamed class members … who have objected in a timely manner to approval of the settlement at the fairness hearing have the power to bring an appeal without first intervening."[7] *Devlin* itself involved a class certified under Civil Rule 23(b)(1), and the Court noted the relevance of this fact to the question of Devlin's right to appeal: "Particularly in light of the fact that petitioner had no ability to opt out of the settlement … appealing the approval of the settlement is petitioner's only means of protecting himself from being bound by a disposition of his rights he finds unacceptable and that a reviewing court might find legally inadequate."[8] However, the *Devlin* Court summed up its holding in terms that were not limited to non-opt-out classes,[9] and at least four circuits have applied *Devlin* to opt-out class actions.[10] Let us therefore suppose that even if the district court provides class members with a further

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[7] *Devlin*, 536 U.S. at 14.

[8] *Id*. at 10-11.

[9] *See supra* text accompanying footnote 7.

[10] *See* Churchill Village, L.L.C. v. Gen. Elec., 361 F.3d 566, 572 (9th Cir. 2004) (reasoning that opting out was not a realistic possibility "[b]ecause each objector's claim is too small to justify individual litigation," and concluding for that reason that "[b]y terminating all class actions relating to the dishwasher recall, the settlement will effectively bind the objectors"); Fidel v. Farley, 534 F.3d 508, 513 (6th Cir. 2008) (following *Churchill Village* and reasoning that "[t]he reality of class action litigation—wherein each class member is generally entitled to only a small damages claim—necessitates the application of *Devlin* to Rule 23(b)(3) class actions"); Nat'l Ass'n of Chain Drug Stores v. New England Carpenters Health Benefits Fund, 582 F.3d 30, 39-40 (1st Cir. 2009) (in a case involving a class "certified both as a mandatory class and one permitting opt-out rights," concluding that "*Devlin* … is about party status and one who could cease to be a party is still a party until opting out"); In re Integra Realty Resources, Inc., 354 F.3d 1246, 1257-58 (10th Cir. 2004) (holding in the context of a defendant class settlement with an opt-out opportunity that "*Devlin* applies to opt-out class settlements"). *See also, e.g*., Joan Steinman, *Irregulars: The Appellate Rights of Persons Who Are Not Full-Fledged Parties*, 39 Ga. L. Rev. 411, 455 (2005) (arguing that "the better policy would be *not* to view the decision to forego an opportunity to opt out as a waiver of the right to appeal a settlement approval over one's objections"). *But see* In re Gen. Am. Life Ins. Co. Sales Practices Litig., 302 F.3d 799, 800 (8th Cir. 2002) ("Because the Court relied upon the mandatory character of the class action, we question whether *Devlin*'s holding applies to opt-out class actions certified under Rule 23(b)(3)."). *Cf*. Ballard v. Advance Am., 349 Ark. 545, 549, 79 S.W.3d 835, 837 (Ark. 2002) (reaching result contrary to *Devlin* with respect to attempted appeal from class settlement approved under state class-action rule, and relying in part on the fact that "appellants had the ability to opt out and instead elected to object to the settlement and risk being bound by it, if approved by the court over their objections").

opportunity to opt out after the terms of the settlement are established,[11] an objector whose objection was rejected by the district court can appeal from the judgment approving the settlement.

Marie Leary's preliminary research indicates that – in the universe of cases that she analyzed prior to the Committee's spring 2013 meeting – all objector appeals were voluntarily dismissed prior to resolution on the merits, and many of those appeals were voluntarily dismissed before the appellant had filed a merits brief.[12] Docket research does not make clear the reason for these dismissals, but anecdotal evidence indicates that when an objector voluntarily dismisses an appeal, the dismissal often comes in exchange for a monetary payment. Professor Fitzpatrick reported to the Committee that he has heard informally from class-action lawyers of payments that range from $ 50,000 to $ 1 million per objector. These data suggest two problems: First, by filing appeals, objectors may be extracting large payments from named parties and/or their counsel, in amounts not commensurate with the merits of their objections or, indeed, what they would receive if their objections were vindicated on appeal. Second, to the extent that some of the appeals do have merit, the objectors' dropping of their appeals in exchange for personal payments deprives the court of appeals of the opportunity to review challenges that should be found meritorious and should benefit other class members.

Why are the named parties and their counsel willing to pay an objector to drop even a non-meritorious appeal? The reason is that, in practice, the pendency of the appeal delays the implementation of the settlement. One might initially wonder why this should be so, as a legal matter: outside the context of class actions, an appeal from a final judgment does not automatically stay the judgment. The answer appears to be that, typically, the class settlement agreement itself provides that the settlement does not become final until the disposition of any appeal from the order approving the settlement.[13] That is hardly surprising. Defendants who wish to achieve global (or even partial) peace through a settlement will not wish to pay out monies (either to class members or to class counsel) until any appellate challenges to the settlement have been resolved, if only because an appellate challenge, if successful, might make the settlement no longer worthwhile and thus lead defendants (or others) to withdraw their consent. Thus, an appeal typically delays both payment of attorney fees to class counsel and

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[11] Civil Rule 23(e)(4) provides: "If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so."

[12] This is not always the case. For example, Professor Marcus has pointed out that the Supreme Court's decisions in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), and *Ortiz v. Fibreboard Corp*., 527 U.S. 815 (1999), were both the result of objector appeals.

[13] *See* Lopatka & Smith, *supra* note 3, at 916 ("[T]he delay in execution of a judgment approving a class settlement does not arise because of entry of a judicial stay. After all, the defendants have agreed to their liability under the settlement. Rather, the delay during the pendency of the appeal arises because of the terms of the settlement."). *See, e.g.*, In re Cardizem CD Antitrust Litig., 391 F.3d 812, 818 (6th Cir. 2004) ("[T]he pursuit of [appellant's] objections has the practical effect of prejudicing the other injured parties by increasing transaction costs and delaying disbursement of settlement funds."); Vaughn v. Am. Honda Motor Co., Inc., 507 F.3d 295, 299 (5th Cir. 2007) (describing a class action settlement that "does not become effective, by its terms, until any appeals are concluded").

payment of settlement funds to class members. The hardship that this imposes gives the objector leverage to extract a payment in exchange for dropping the appeal.

What can be done to address these two problems (extortionate, non-meritorious appeals, and the dropping of valid appeals)? And can measures that address those problems do so without deterring meritorious appeals? In the Committee's inquiries thus far, each potential option on which we have focused appears to pose difficulties. In this memo, I will group those options in four categories,[14] which I will call the "Objector-Exclusion Approach," the "Settlement-Implementation Approach," the "Appeal-Hurdle Approach," and the "Dismissal-Hurdle Approach." The Objector-Exclusion Approach is simple and appropriate, but likely to be of limited usefulness. The Settlement-Implementation Approach can be (in fact, is being) employed without any rule changes, but is hardly a complete solution. The Appeal-Hurdle Approach runs the risk of chilling meritorious appeals and – in one of its forms – would likely require legislative action. And the Dismissal-Hurdle Approach may overstep the limits set by mootness doctrine.

I. The Objector-Exclusion Approach

Only a person bound by a class action judgment may appeal that judgment under *Devlin*. Suppose that an objector cavils, at the settlement stage, on the ground that he and others similarly situated ought not to be lumped into the class. Suppose that the district court agrees, and that the district court therefore redefines the class to exclude a subset of persons that includes the objector. So long as the redefined class meets the requirements of Rule 23, this approach validly excludes the objector (and anyone who resembles him in the relevant ways) from the ambit of the class. Because the objector will not be bound by the judgment, it would seem that *Devlin* would ordinarily provide him with no basis for taking an appeal.[15] However, I speculate that the universe of cases in which this approach solves the problem will be relatively limited. Many instances will remain in which the class cannot usefully be redefined to exclude the objector and those similarly situated to the objector.

Some commentators might be tempted to argue that *Devlin* itself should be narrowed to those instances in which the objector lacks the ability to opt out of the class. If the objector has the ability to exclude *himself* from the class, this argument would assert, then he should not be heard to complain – by means of an appeal – if he decides to

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[14] This list does not, of course, exhaust the possibilities. Professor Lopatka and Judge Smith discuss others as well. *See* Lopatka & Smith, *supra* note 3, at 890-903 (discussing the possibilities of limiting *Devlin* to non-opt-out actions; requiring intervention as a prerequisite to appeal; imposing sanctions on objectors; and expediting appeals).

[15] *Cf.* AAL High Yield Bond Fund v. Deloitte & Touche LLP, 361 F.3d 1305, 1309-10 & n.6 (11th Cir. 2004) (holding that *Devlin* did not provide a right to appeal to persons who merely "claim[ed] they fit the class definition until it was redrafted to exclude them at the time of class certification and settlement"). The *AAL High Yield Bond* court stated that the would-be appellants would not have met the requirements for intervention as of right, and left open the possibility that the analysis might differ if they had met those requirements. It concluded: "The Objectors do not seek to protect their own property, their allotment from an award or settlement, or any other cognizable legal right or interest. They are simply potential plaintiffs who have yet to litigate any claims." *Id.* at 1310-11.

stay in the class and be bound by the judgment. However, as I noted above, the weight of authority appears to be heading in the opposite direction; four circuits, thus far, have applied *Devlin* to opt-out actions, while I found only one circuit and a state high court that took a contrary view.[16] It seems to me that the developing majority view is sound. In a negative-value class action,[17] opting out is not a realistic possibility; class members will obtain relief as part of a class or not at all. Moreover, concluding that an opt-out opportunity removes an objector's right to appeal the class-settlement approval would foreclose objectors in opt-out class actions from bringing valid objections to the attention of the appellate court. Unless we are willing to assume that district courts always take proper account of all valid objections, closing off an objector's chance to appeal seems undesirable.

II. The Settlement-Implementation Approach

As noted above, the feature that gives objectors leverage to extract payments in exchange for dropping appeals is that – as a practical matter – the pendency of the appeal delays the implementation of the settlement. Because that delay arises from the terms of the settlement itself – rather than from a nonwaivable legal requirement – it is possible to imagine a settlement that provides for full or partial implementation of the settlement notwithstanding the pendency of an appeal.

There would seem to be two main reasons why a defendant would be reluctant to implement the settlement until all appellate challenges have been adjudicated. If the appeal results in the invalidation of the settlement, the defendant may want its money back. One risk is payment risk: The recipients may have spent the money in the meantime. That risk, presumably, could be insured against. The other risk is administrative cost: As to the class members, both paying out the money and recovering the money will impose very large administrative costs. Those administrative costs, as well as the self-interest of class counsel, might explain why the main observed settlement-implementation measure to date is the "quick-pay provision," which focuses on up-front partial payment of class counsel fees (rather than up-front distributions to class members). Professor Fitzpatrick has explained that a "quick-pay provision" in a settlement entitles class counsel to receive their fees upon settlement approval despite the pendency of an appeal (but subject to the return of the fees if the order is reversed on appeal). He reports that quick-pay provisions can immunize class counsel against pressure to pay off objector-appellants, but also that defendants are reluctant to agree to such provisions unless they receive security that assures the repayment of the fees if the judgment is reversed on appeal.

Apart from a quick-pay provision, one could imagine a settlement provision that presumptively defined the "final settlement date" as occurring only after resolution of all appeals, but that permitted the named parties to move the final settlement date earlier by

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[16] *See supra* note 10.

[17] This term denotes a class action in which no class member's claim is large enough to warrant individual litigation.

later agreement.[18] With such a provision in the settlement agreement, the named parties could commence settlement implementation despite a pending appeal. If all the named parties and their counsel were confident that the appeal lacked merit, one might expect them to take advantage of such a provision (if present) and commence settlement implementation notwithstanding the objector's appeal. That would deprive the objector of most of her leverage, because the only cost that the objector could threaten to impose would be the cost of defending the settlement on appeal – not a negligible cost, to be sure, but significantly less than the objector could impose by delaying settlement implementation. Why would the named parties not employ this strategy? If we are not seeing the use of this strategy, perhaps that is because some uncertainty exists as to the merits of the objector's appeal. After all, if the named parties were sure the appeal would be rejected, there would seem to be no downside to calling the objector's bluff, litigating the appeal, and implementing the settlement in the meantime.

In some recent cases, class counsel have proposed a creative but (in my view) dubious alternative strategy that appears to be designed to achieve settlement implementation notwithstanding the pendency of an objector appeal. In *Hitch Enterprises, Inc. v. Cimarex Energy Co.*, No. 5:11-cv-00013-W (W.D. Okla.), after an objector challenged the amount of attorney fees (to be paid to class counsel) and incentive payments (to be awarded to the class representatives), the class representatives moved "to sever the approximately $25 claim of the lone Objector Katherine Riesen Lathrop from the $16.4 million Settlement Fund for the benefit of the 29,689 member Settlement Class, or, in the alternative, to require a $3.1 million appeal bond for delay damages, increased costs of administration, and costs of appellate briefing, if she files an appeal from the final judgment in this case."[19] The motion papers proposed that

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[18] The Amended Settlement Agreement and Release in *Fraley v. Facebook, Inc.*, provides an example. Under the Agreement,

> The term "Final Settlement Date" means two Court days after the Final Order and Judgment become "final." For the purposes of this Section 1.13, "final" means (a) if no appeal from the Final Order and Judgment is filed, the expiration of the time for the filing or noticing of any appeal from the Final Order and Judgment; (b) if an appeal from the Final Order and Judgment is filed, the date on which all appeals therefrom, including but not limited to petitions for rehearing or reargument, petitions for rehearing en banc, and petitions for certiorari or any other form of review, have been finally disposed of in a manner that affirms the Final Order and Judgment; or (c) if the Class Counsel and Facebook's Counsel agree in writing, "Final Settlement Date" can occur on any other agreed upon date.

Amended Settlement Agreement and Release ¶ 1.13, *Fraley v. Facebook, Inc.*, Doc. 235-1, Case No. CV-11-01726 RS (N.D. Cal.). The settlement agreement sets the timing of settlement implementation by reference to the Final Settlement Date. *See, e.g., id.* ¶ 2.3(d) ("The Net Settlement Fund shall be distributed to Authorized Claimants between thirty (30) and forty-five (45) calendar days after the Final Settlement Date."). (The *Fraley* documents are available at http://www.fraleyfacebooksettlement.com/court .)

I do not attempt, for purposes of this memo, to determine whether there would ever be reasons for a district court to refuse to approve a settlement provision that provided for pre-appeal-resolution implementation of the settlement. (Might there, in some instances, be a legitimate concern that an unrecoverable payout to class members might, de facto, prejudice any right to fair treatment that an objector establishes on appeal, whether through a revised settlement or otherwise?)

[19] Plaintiff Class's Motion to Sever Objector's Claim, or Alternatively, Require an Appeal Bond and Brief in Support at 1, Hitch Enter., Inc. v. Cimarex Energy Co., No. 5:11-cv-00013-W (W.D. Okla. Apr. 11, 2013), ECF No. 136.

> The Court may sever Objector's claims from the remaining Settlement Class Members under Rule 54(b), and enter a final judgment for the other 29,688 non-objecting Settlement Class Members. Objector may then separately appeal the Court's ruling on her attorneys' fee and incentive award determination (and/or Class Counsel could simply choose to confess judgment for the entire amount of Objector's claim).[20]

The court never ruled on this proposal in *Hitch Enterprises*, because the objector subsequently obtained the court's approval to withdraw her objections.[21] But a similar strategy appears to have gained the court's approval in another case, *Chieftain Royalty Co. v. QEP Energy Co.*, No. 5:11-cv-00212-R (W.D.Okla.). In *Chieftain Royalty*, the district court's order granting final approval of the class settlement concluded as follows:

> 29. There is no reason for delay in the entry of this Final Approval Order and immediate entry by the Clerk of the Court is directed pursuant to Federal Rule of Civil Procedure 54(b).
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> 30. Further, to the extent any objector attempts to file an appeal as to this Order, such objection shall be severed for purposes of appeal and an appropriate cash bond shall be posted, pursuant to paragraphs 10.1 and 10.2 of the Stipulation, to which there were no objections.[22]

A motion subsequently filed by counsel for the named parties indicates that they understood this order as a mechanism for preventing any objector appeal from holding up the settlement implementation.[23] But the mechanism was never tested: The court denied the motion as unripe (because the objector had not filed a notice of appeal),[24] and no notice of appeal had been filed when I looked at the docket on August 25, 2013.

This strategy seems to me to misconstrue the purpose of Civil Rule 54(b). As the Committee knows, the purpose of Civil Rule 54(b) is to permit an immediate appeal of an order disposing of fewer than all claims or parties in a complex case. No such exigency presents itself in the class-settlement context; in that context, the order approving the class settlement disposes of all claims by and against all parties,[25] so there is no need to

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[20] *Id*. at 8.
[21] *See* Hitch Enter., Inc. v. Cimarex Energy Co., No. 5:11-cv-00013-W (W.D. Okla. Apr. 22, 2013), ECF Nos. 139 & 140.
[22] Order Granting Final Approval of Class Action Settlement, Form and Manner of Notice, and Plan of Allocation at 37, Chieftain Royalty Co. v. QEP Energy Co., No. 5:11-cv-00212-R (W.D. Okla. May 31, 2013), ECF No. 183.
[23] *See* Motion to (1) Effectuate Severed Objection of Objector Crain in New Case File, and (2) Require Objector Crain to Show Cause for Staying Distribution to Other Class Members Pending Appeal, Chieftain Royalty Co. v. QEP Energy Co., No. 5:11-cv-00212-R (W.D. Okla. Aug. 2, 2013), ECF No. 199.
[24] *See* Order Denying Motion to Sever, Denying Motion for Hearing, Chieftain Royalty Co. v. QEP Energy Co., No. 5:11-cv-00212-R (W.D. Okla. Aug. 5, 2013), ECF No. 201.
[25] Unnamed class members who never intervened in the action and who opt out have no claims pending in the action after they opt out.

enter a *partial* final judgment under Rule 54(b).[26] Given that the goal of the exercise appears to be to separate the objector's claim from the rest of the suit – so that the appeal by the objector can be said to leave unaffected the implementation of the settlement as to the remaining class members – I would have thought that this should be viewed as a joinder question, not a partial-final-judgment question. Civil Rule 21 provides: "Misjoinder of parties is not a ground for dismissing an action. On motion or on its own, the court may at any time, on just terms, add or drop a party. The court may also sever any claim against a party." It seems to me that Rule 21 is more closely on point than Rule 54(b) in this context. But stating the problem in those terms brings to light the problem: Once the question is viewed as one of joinder and severance, one wonders why the question is not governed by Rule 23 rather than Rule 21.[27] And if the question is governed by Rule 23, then it restates the question I treated in Part I above: When can the class validly be redefined to exclude the objector? I do not think that the answer can be that the class can be redefined to exclude unnamed class members whose only distinguishing feature is that they object to the proposed settlement.

In sum, a district-court order purporting to "sever" an objector merely in order to assure the named parties that the settlement can safely be implemented despite the pendency of the objector's appeal seems highly dubious. The objector is objecting to the resolution of the claims of other parties as well as his own. The objector's objection isn't solely about his own separate claim; rather, the objection is to the judgment proposed to be entered on the claims of the entire class (because that judgment affects him). If an objector were to press his appeal despite such a purported "severance"[28] and if the appeal succeeded on the merits, I would expect the court of appeals to direct that the district court, on remand, must vacate the settlement as to *all* class members despite the purported severance. The Tenth Circuit's observations, regarding a similar tactic attempted on appeal, seem equally apposite here:

> Plaintiffs seek dismissal of the appeals as to all class members other than Objectors because, inasmuch as the settlement agreement provides that there shall be no distributions as long as there are appeals pending, the pendency of Objectors' appeals prevents any distribution.
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> While we are sympathetic to Plaintiffs' plight, we can see no practical way to separate Objectors' individual interests from those of the other class members without upsetting the entire settlement fund. Moreover, in *Devlin v. Scardelletti*, 536 U.S. 1, 122 S.Ct. 2005, 153 L.Ed.2d 27 (2002), in which the Supreme Court held that nonnamed non-intervening class members objecting to the approval of a settlement may

[26] This is not to say that Civil Rule 54(b) has no application in the class-action context. For instance, it can be used to enter final judgment as to class claims against one defendant even though class claims against another defendant have not been finally resolved. *See* Nat'l Ass'n of Chain Drug Stores v. New England Carpenters Health Benefits Fund, 582 F.3d 30, 38 (1st Cir. 2009).

[27] *See* 4 NEWBERG ON CLASS ACTIONS § 11:69 (4th ed.) ("In a class action context, Rule 21, governing misjoinder of parties, is aimed at misjoinder of named parties and not unnamed absent class members.").

[28] I would think that the objector would be well advised to amend his notice of appeal to include the severance order.

> appeal that approval even though they were not permitted to intervene, the Court noted that such an objector "will only be allowed to appeal that aspect of the District Court's order that affects him." Id. at 2013, 2010. The Court described that "aspect," however, as "the District Court's decision to disregard his objections." Id. at 2010. Objectors' objections were directed at the entire settlement. We therefore deny Plaintiffs' motion to partially dismiss the appeals.[29]

One further topic bears mention in this context. Note that the motion in *Hitch Enterprises* suggested that "Class Counsel could simply choose to confess judgment for the entire amount of Objector's claim." The implication is that such an offer would render the objector's appeal moot even if the objector refused the offer. Last Term, in *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013), the Supreme Court noted but did not resolve a circuit split concerning "whether an unaccepted offer that fully satisfies a plaintiff's claim is sufficient to render the claim moot." *Id*. at 1528-29. The four dissenting Justices in *Genesis Healthcare* made clear that in their view, "an unaccepted offer of judgment cannot moot a case." *Id.* at 1533 (Kagan, J., joined by Ginsburg, Breyer, & Sotomayor, JJ., dissenting).

It may be relevant, in this context, to recall Justice Rehnquist's concurrence in *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326 (1980). Explaining why he joined in the majority's ruling that (on the facts of the case) "a tender to named plaintiffs in a class action of the amounts claimed in their individual capacities, followed by the entry of judgment in their favor on the basis of that tender, over their objection" did not "moot[] the case and terminate[] their right to appeal the denial of class certification,"[30] Justice Rehnquist observed:

> The distinguishing feature here is that the defendant has made an *unaccepted* offer of tender in settlement of the individual putative representative's claim. The action is moot in the Art. III sense only if this Court adopts a rule that an individual seeking to proceed as a class representative is required to accept a tender of only his individual claims. So long as the court does not require such acceptance, the individual is required to prove his case and the requisite Art. III adversity continues. Acceptance need not be mandated under our precedents since the defendant has not offered all that has been requested in the complaint (i.e., relief for the class) and any other rule would give the defendant the practical power to make the denial of class certification questions unreviewable.[31]

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[29] Rutter & Wilbanks Corp. v. Shell Oil Co., 314 F.3d 1180, 1183 n.1 (10th Cir. 2002); *see also* Lopatka & Smith, *supra* note 3, at 891 n.113 ("[O]bjections if successful on appeal would typically result in a benefit to at least a group of class members including the objector, and so the appeal would necessarily be undertaken on behalf of multiple class members, with a resolution affecting potentially the entire class.").
[30] *Roper*, 445 U.S. at 327 (majority opinion).
[31] *Id.* at 341 (Rehnquist, J., concurring).

The situation of an objector is not identical to that of a class representative. If the objector is asking only for relief for himself, an offer of that relief (in full) does not leave out some requested relief, unlike the offer to a class representative that Justice Rehnquist noted was insufficient to moot the class representative's claim. But there is a related concern about named parties' picking off objectors simply by offering them a payment equivalent to the amount of their individual share of the class's claims.

III. The Appeal-Hurdle Approach

Another sort of approach seeks to remove objectors' leverage by making it harder for them to take appeals, either by making appeals more expensive or by imposing a merit-screening mechanism. In Part III.A I discuss the possible use of appeal bonds for this purpose, while in Part III.B I discuss the possibility of requiring objectors to obtain a "certificate of appealability" in order to appeal.

A. Appeal bonds

Traditionally, appeal bonds were modest in amount and were designed to secure the appellee against the possibility that an appellant – ordered at the end of an appeal to pay the appellee's costs – might not have the money to do so. In recent years, some enterprising courts have imposed very large appeal bond requirements as a condition of an objector's appeal from a judgment approving a class action settlement.[32] But caselaw interpreting Appellate Rule 7 will not always justify the inclusion of attorney fees and/or settlement-implementation-delay costs in a Rule 7 cost bond required of an objector-appellant.

1. Practice under current Rule 7

Appellate Rule 7 provides that "[i]n a civil case, the district court may require an appellant to file a bond or provide other security in any form and amount necessary to ensure payment of costs on appeal." Rule 7 does not define "costs on appeal"; neither does Appellate Rule 39 (which sets the framework for the allocation of costs on appeal).[33] 28 U.S.C. § 1920 authorizes the taxation of certain items as costs, but none of

[32] The findings in Marie Leary's informative exploratory study included the following: "FRAP 7 bonds were more likely to be imposed in response to requests in class action litigation (80% of requests (N= 8)) than in all appeals (51% (N=17))." Marie Leary, Federal Judicial Center Exploratory Study of the Appellate Cost Bond Provisions of Rule 7 of the Federal Rules of Appellate Procedure 5 (FJC 2008). "Targets of motions in class actions were most often interveners or objectors (80% (N=8))." *Id*. "In two class action appeals, substantial portions of bonds of hundreds of thousands of dollars were attributable to anticipated delays and increased costs in administering a class settlement." *Id*. at 6. "In one class action appeal, an objector voluntarily dismissed the appeal after being ordered to pay a $1,240,500 bond." *Id*.

[33] Rule 39(a) sets general default rules for allocating appellate costs. Rule 39(b) addresses cost awards for or against federal government litigants. Rule 39(c) addresses copying costs. Rule 39(d) covers the procedure for requesting and objecting to costs and for including costs in the mandate. Rule 39(e) lists "costs on appeal [that] are taxable in the district court … : (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."

those items could be read to encompass attorney fees or damages caused by delay in implementation of a settlement.[34]

The Supreme Court has not addressed the interpretation of "costs" in Appellate Rule 7, but *Marek v. Chesny*, 473 U.S. 1 (1985), decided an arguably analogous question. In *Marek*, the Court held that Civil Rule 68's reference to "costs"[35] includes attorney fees where there is statutory authority for the award of attorney fees and the relevant statute "defines 'costs' to include attorney's fees." *Marek*, 473 U.S. at 9. The Court explained that because neither Rule 68 nor its Note defined "costs," and because the drafters of the original Rules were aware of the existence of fee-shifting statutes, "the most reasonable inference is that the term 'costs' in Rule 68 was intended to refer to all costs properly awardable under the relevant substantive statute or other authority." *Id.*

It might be difficult, though, to ascribe to the drafters of Appellate Rule 7's cost-bond provision an awareness of the costs of appeal-related delay in implementing class action settlements. The notion of requiring security for costs on appeal can be traced back to the First Judiciary Act.[36] The Revised Statutes carried forward the security requirement,[37] and Civil Rule 73 as initially adopted reflected that statutory backdrop. Original Civil Rule 73(c) provided:

> Bond on Appeal. Whenever a bond for costs on appeal is required by law, the bond shall be filed with the notice of appeal. The bond shall be in the sum of two hundred and fifty dollars, unless the court fixes a different amount or unless a supersedeas bond is filed, in which event no separate bond on appeal is required. The bond on appeal shall have sufficient surety and shall be conditioned to secure the payment of costs if the appeal

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[34] Section 1920 authorizes taxation of:

> (1) Fees of the clerk and marshal;
> (2) Fees for printed or electronically recorded transcripts necessarily obtained for use in the case;
> (3) Fees and disbursements for printing and witnesses;
> (4) Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case;
> (5) Docket fees under section 1923 of this title;
> (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

[35] If a Rule 68 offer of settlement is not accepted, and "[i]f 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." Fed. R. Civ. P. 68(d).

[36] Section 22 of the Act provided for certain civil appeals and required that "every justice or judge signing a citation on any writ of error as aforesaid, shall take good and sufficient security, that the plaintiff in error shall prosecute his writ to effect, and answer all damages and costs if he fail to make his plea good." Judiciary Act of 1789, ch. 20, § 22, 1 Stat. 73, 85.

[37] Section 1000 of the Revised Statutes provided: "Every justice or judge signing a citation on any writ of error, shall, except in cases brought up by the United States or by direction of any Department of the Government, take good and sufficient security that the plaintiff in error or the appellant shall prosecute his writ or appeal to effect, and, if he fail to make his plea good, shall answer all damages and costs, where the writ is a supersedeas and stays execution, or all costs only where it is not a supersedeas as aforesaid." 1 Rev. Stat. 187 (1878).

> is dismissed or the judgment affirmed, or of such costs as the appellate court may award if the judgment is modified. If a bond on appeal in the sum of two hundred and fifty dollars is given, no approval thereof is necessary. After a bond on appeal is filed an appellee may raise objections to the form of the bond or to the sufficiency of the surety for determination by the clerk.

The following decade, Congress enacted the 1948 Judicial Code and repealed the statutory appeal bond requirement, evidently because it was thought that this requirement should instead be implemented through the Rules.[38] Accordingly, the 1948 amendment to Civil Rule 73 altered Rule 73(c)'s first sentence to read as follows: "Unless a party is exempted by law, a bond for costs on appeal shall be filed with the notice of appeal."[39] Civil Rule 73(c) – as amended in 1966[40] – formed the basis for Appellate Rule 7, which, as originally adopted, read as follows:

> Unless an appellant is exempted by law, or has filed a supersedeas bond or other undertaking which includes security for the payment of costs on appeal, in civil cases a bond for costs on appeal or equivalent security shall be filed by the appellant in the district court with the notice of appeal; but security shall not be required of an appellant who is not subject to costs. The bond or equivalent security shall be in the sum or value of $ 250 unless the district court fixes a different amount. A bond for costs on appeal shall have sufficient surety, and it or any equivalent security shall be conditioned to secure the payment of costs if the appeal is finally dismissed or the judgment affirmed, or of such costs as the court of appeals may direct if the judgment is modified. If a bond or equivalent security in the sum or value of $ 250 is given, no approval thereof is necessary. After a bond for costs on appeal is filed, an appellee may raise for determination by the clerk of the district court objections to the form of the bond or to the sufficiency of the surety. The provisions of Rule 8(b) apply to a surety upon a bond given pursuant to this rule.

The 1979 amendments deleted most of the text of original Rule 7 and substituted the following:

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[38] *See, e.g.*, Thrift Packing Co. v. Food Machinery & Chemical Corp., 191 F.2d 113, 114 n.3 (5th Cir. 1951) ("Title 28 U.S.C. § 869 (1940), which provided that a bond for costs on appeal must be given by an appellant, was repealed by the 1948 revision because its provisions covered a subject more appropriately regulated by rule of court.").

[39] *See* 1948 Committee Note to Civil Rule 73(c) ("R.S. § 1000, Title 28, U.S.C., § 869 (1946), which provided for cost bonds, is repealed and its provisions are not included in revised Title 28. Since the Revisers thought that this should be controlled by rule of court as in the case of supersedeas bond, see subdivision (d), no amendment to Title 28 will be proposed to restore the omission. The requirement of a cost bond should, therefore, be incorporated in the rule, and the amendment so provides.").

[40] *See* 1966 Committee Note to Civil Rule 73(c) ("The additions to the first sentence permit the deposit of security other than a bond and eliminate the requirement of security in cases in which the appellant has already given security covering the total cost of litigation at an earlier stage in the proceeding (a common occurrence in admiralty cases) and in cases in which an appellant, though not exempted by law, is nevertheless not subject to costs under the rules of the courts of appeals.").

> The district court may require an appellant to file a bond or provide other security in such form and amount as it finds necessary to ensure payment of costs on appeal in a civil case. The provisions of Rule 8(b) apply to a surety upon a bond given pursuant to this rule.

As the 1979 Committee Note explained:

> The amendment would eliminate the provision of the present rule that requires the appellant to file a $ 250 bond for costs on appeal at the time of filing his notice of appeal. The $ 250 provision was carried forward in the F.R.App.P. from former Rule 73(c) of the F.R.Civ.P., and the $ 250 figure has remained unchanged since the adoption of that rule in 1937. Today it bears no relationship to actual costs. The amended rule would leave the question of the need for a bond for costs and its amount in the discretion of the court.

The 1998 restyling, which was intended to produce no change in substance, gave Rule 7 its current wording.

The substance of Rule 7's cost bond requirement, thus, was adopted at latest in 1979 – before the Court decided *Marek*. As of 1979, it seems doubtful that the rulemakers would have had occasion to consider the possibility that settlement-implementation-delay costs would be includable in the bond.[41] In fact, the available evidence suggests that the rulemakers regarded the 1979 elimination of the presumptive $ 250 bond amount as a relatively trivial change.[42]

The text of Rule 7 thus leaves unresolved two issues that are important in determining the amount of a cost bond in connection with an objector's appeal: Should the bond include attorney fees, and should the bond include the projected costs of delay in implementation of the settlement?

In two circuits – the Third and the D.C. Circuits – the answer appears to be no, because applicable caselaw[43] limits the costs for which a Rule 7 bond can be required to

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[41] Minutes of the Appellate Rules Committee meeting(s) at which the 1979 amendment of Rule 7 would have been discussed are not currently available on the uscourts.gov website.

Admittedly, the deletion of the presumptive $ 250 bond amount stemmed from the rulemakers' view that this amount "bears no relationship to actual costs." 1979 Committee Note to Appellate Rule 7. But there is a great deal of difference between deciding that $ 250 did not reflect actual costs on appeal and deciding that costs on appeal should include hundreds of thousands of dollars' worth of delay costs.

[42] On the topic of the proposed amendment to Rule 7, the minutes of the 1978 Standing Committee meeting state merely: "This rule was not submitted to the bench and bar, however, the members agreed the change is not significant. The amendment was approved as printed in the deskbook." Committee on Rules of Practice and Procedure, Minutes of the Meeting of July 17-18, 1978, at 3.

[43] Admittedly, in one of those circuits, the applicable caselaw is an unpublished nonprecedential opinion, *Hirschensohn v. Lawyers Title Ins. Corp.*, No. 96-7312, 1997 WL 307777 (3d Cir. June 10, 1997).

those that are awardable under Rule 39.[44] But five other circuits – the First,[45] Second,[46] Sixth, Ninth,[47] and Eleventh[48] Circuits – have concluded that attorney fees can be

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[44] In *In re American President Lines, Inc.*, 779 F.2d 714, 719 (D.C. Cir. 1985) (per curiam), the D.C. Circuit ordered a $10,000 appeal bond requirement to be reduced to $450. The court rejected the district court's justifications for the larger bond amount, including the district court's prediction that the appeal likely would be found frivolous (occasioning an award of damages and costs under Rule 38). Rule 7 "costs," the court explained, "are simply those that may be taxed against an unsuccessful litigant under Federal Appellate Rule 39, and do not include attorneys' fees that may be assessed on appeal." *Id*. at 716. (However, a later D.C. Circuit opinion held that for purposes of Rule 39(d)'s 14-day time limit on filing the bill of costs, "costs" does include attorney fees. *See* Montgomery & Assocs., Inc. v. Commodity Futures Trading Comm'n, 816 F.2d 783, 785 (D.C. Cir. 1987) (concluding that a "motion for attorneys' fees was subject to Rule 39(d)'s 14-day time limit").) Though *American President Lines* was decided some six months after *Marek*, the D.C. Circuit did not discuss *Marek*'s possible relevance to the Rule 7 question.

By contrast, when the Third Circuit followed the *American President Lines* approach in *Hirschensohn*, the court took pains to distinguish *Marek*'s treatment of Civil Rule 68 costs from the question of Appellate Rule 7 costs. The *Hirschensohn* court followed the D.C. Circuit's lead, stating that Rule 7 costs "are those that may be taxed against an unsuccessful litigant under Federal Rule of Appellate Procedure 39." *Hirschensohn*, 1997 WL 307777, at *1. The court reasoned that because "[a]ttorneys' fees are not among the expenses that are described as costs for purposes of Rule 39," such fees are likewise not within the scope of Rule 7 costs. *Id*. (The *Hirschensohn* court relied on its prior holding in *McDonald v. McCarthy*, 966 F.2d 112, 118 (3d Cir. 1992), that Rule 39 "costs" do not include attorney fees.) The court relied on Rule 39's references to particular types of costs as a means of distinguishing *Marek*: "[U]nlike Rule 68, which does not define costs, Rule 39 does so in some detail. Therefore, *Marek* does not require a different result ...." *Hirschensohn*, 1997 WL 307777, at *2. (The Rule 7 holding in *Hirschensohn* was an alternative holding; an "additional ground" for the result in that case was the court's holding that "the statutory source cited by defendants for an allowance of counsel fees" – namely, a provision of the Virgin Islands Code – "does not apply to appeals in this Court so as to make attorneys' fees recoverable as Rule 39 costs." *Hirschensohn*, 1997 WL 307777, at *3.)

[45] The First Circuit has adopted the majority view, although – somewhat oddly – it chose to do so in a nonprecedential opinion. *Int'l Floor Crafts, Inc. v. Dziemit*, 420 F. App'x 6, 17, 2011 WL 1499857, at *10 (1st Cir. April 21, 2011) ("[W]e endorse the majority view that a Rule 7 bond may include appellate attorneys' fees if the applicable statute underlying the litigation contains a fee-shifting provision that accounts for such fees in its definition of recoverable costs and the appellee is eligible to recover them.").

[46] The Second Circuit, affirming an order requiring (under Rule 7) a $35,000 bond in a copyright case, reasoned as follows:

> The Copyright Act, first adopted in 1909, contained section 40, the predecessor to section 505, which similarly provided for attorney's fees as part of the costs .... Thus, the drafters of Rule 7 ... – like the drafters of Rule 68, discussed in *Marek* – were equally aware of the Copyright Act's provision for the statutory award of attorney's fees "as part of the costs" when drafting Rule 7 and not defining costs therein. See 17 U.S.C. § 505. *Marek* provides very persuasive authority for the proposition that the statutorily authorized costs may be included in the appeal bond authorized by Rule 7.

Adsani v. Miller, 139 F.3d 67, 73 (2d Cir. 1998). The *Adsani* court noted that neither *American President Lines* nor *Hirschensohn* involved a type of case in which a federal statute would authorize an award of attorney fees, see *Adsani*, 139 F.3d at 73-74, but the *Adsani* court's more central point was that it disagreed with those decisions' view of the interaction between Rules 39 and 7:

> Rule 39 does not define costs for all of the Federal Rules of Appellate Procedure. Rule 39 is divided into five sections. These provide: (a) against whom costs will be taxed, (b) the taxability of the United States; (c) the maximum rate for costs of briefs, appendices and copies of records, (d) the procedure by which a party desiring "such costs" may claim them, and (e) that costs incurred in the preparation and transmission of the record on appeal will be taxed in the district court. See Fed.R.App.P. 39(a)-(e). None of these provisions purports to define costs: each concerns procedures for taxing them. Specific

> costs are mentioned only in the context of how that cost should be taxed, procedurally speaking.

Adsani, 139 F.3d at 74. Thus, the *Adsani* court concluded that "Rule 7 does not have a pre-existing definition of costs any more than Fed.R.Civ.P. 68, the rule interpreted in *Marek*, had its own definition." *Id*.

[47] The Ninth Circuit has held that "a district court may require an appellant to secure appellate attorney's fees in a Rule 7 bond, but only if an applicable fee-shifting statute includes them in its definition of recoverable costs, and only if the appellee is eligible to recover such fees." Azizian v. Federated Dep't Stores, Inc., 499 F.3d 950, 953 (9th Cir. 2007). The *Azizian* court cited four reasons for its holding:

> First, Rule 7 does not define "costs on appeal." At the time of its adoption in 1968, however, a number of federal statutes-including the Clayton Act-had departed from the American rule by defining "costs" to include attorney's fees. *Marek*, 473 U.S. at 8-9....
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> Second, Rule 39 does not contain any "expression[] to the contrary." *See id*. at 9. There is no indication that the rule's drafters intended Rule 39 to define costs for purposes of Rule 7 or for any other appellate rule. The 1967 Rules Advisory Committee note to Rule 39(e) states that "[t]he costs described in this subdivision are costs of the appeal and, as such, are within the undertaking of the appeal bond." Fed. R.App. P. 39(e) advisory committee's note (1967 adoption). We read this language to mean that the costs identified in Rule 39(e) are among, but not necessarily the only, costs available on appeal. Further, Rule 38 provides that the court of appeals may award "damages and ... costs," which include, according to that rule's advisory committee note, "damages, attorney's fees and other expenses incurred by an appellee." Fed. R.App. P. 38; id. advisory committee's note (1967 adoption). The discrepancy between the use of the term "costs" in Rule 39 and its use in Rule 38 strongly suggests that the rules' drafters did not intend for Rule 39 to create a uniform definition of "costs," exclusive of attorney's fees....
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> Third, while some commentators have criticized *Adsani* and *Pedraza* for "attach[ing] significant consequences to minor and quite possibly unintentional differences in the wording of fee-shifting statutes," 16A Wright, Miller & Cooper ... § 3953, *Marek* counsels that we must take fee-shifting statutes at their word. 473 U.S. at 9....
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> Fourth, allowing district courts to include appellate attorney's fees in estimating and ordering security for statutorily authorized costs under Rule 7 comports with their role in taxing the full range of costs of appeal. In practice, district courts are usually responsible at the conclusion of an appeal for taxing all appellate costs, including attorney's fees, available to the prevailing party under a relevant fee-shifting statute.

Azizian, 499 F.3d at 958-59.

The *Azizian* court also addressed a related question, holding that "a district court may not include in a Rule 7 bond appellate attorney's fees that might be awarded by the court of appeals if that court holds that the appeal is frivolous under Federal Rule of Appellate Procedure 38." *Azizian*, 499 F.3d at 954. In reaching this conclusion, the *Azizian* court disagreed with the First Circuit, which in a brief per curiam opinion had upheld the imposition of a $5,000 Rule 7 bond (in a case where the motion for the bond relied on Rules 38 and 39) based on the district court's implicit finding "that the appeal might be frivolous and that an award of sanctions against plaintiff on appeal was a real possibility." *Sckolnick v. Harlow*, 820 F.2d 13, 15 (1st Cir. 1987) (per curiam). As the *Azizian* court explained:

> Award of appellate attorney's fees for frivolousness under Rule 38 is highly exceptional, making it difficult to gauge prospectively, and without the benefit of a fully developed appellate record, whether such an award is likely.... Moreover, a Rule 7 bond including the potentially large and indeterminate amounts awardable under Rule 38 is more likely to chill an appeal than a bond covering the other smaller, and more predictable, costs on appeal. Finally, in contrast to ordinary fee-shifting and cost provisions, Rule 38 authorizes an award of appellate attorney's fees not simply as incident to a party's successful appellate defense or challenge of a judgment below, but rather as a sanction for improper conduct on appeal....

included in a Rule 7 cost bond if an underlying statute provides in appropriate language for an award of such fees. The Sixth Circuit decision, *In re Cardizem CD Antitrust Litigation*, is particularly notable because it involved the imposition of a cost bond in connection with a class-action-objector appeal.[49]

Azizian, 499 F.3d at 960. Thus, the *Azizian* court agreed with *American President Lines*' reasoning that "the question of whether, or how, to deter frivolous appeals is best left to the courts of appeals, which may dispose of the appeal at the outset through a screening process, grant an appellee's motion to dismiss, or impose sanctions including attorney's fees under Rule 38." *Azizian*, 499 F.3d at 961 (citing *American President Lines*, 779 F.2d at 717).

[48] In *Pedraza v. United Guaranty Corp.*, 313 F.3d 1323 (11th Cir. 2002), the Eleventh Circuit ruled:

> Federal Rule of Appellate Procedure 7 does not differ from Federal Rule of Civil Procedure 68 in any way that would lead us to adopt a different interpretive approach in this case than was embraced by the Supreme Court in *Marek*. Quite the contrary, close scrutiny reveals that there are several substantive and linguistic parallels between Rule 68 and Rule 7. Both concern the payment by a party of its opponent's "costs," yet neither provision defines the term "costs."... Moreover, just as the drafters of Rule 68 were aware in 1937 of the varying definitions of costs that were contained in various federal statutes, the same certainly can be said for the authors of Rule 7, which bears an effective date of July 1, 1968. As such, the reasoning that guided the *Marek* Court's determination that Rule 68 "costs" are to be defined with reference to the underlying cause of action is equally applicable in the context of Rule 7.

Pedraza, 313 F.3d at 1332. The *Pedraza* court held, however, that the attorney fees authorized under the Real Estate Settlement Procedures Act did not qualify for inclusion in a Rule 7 bond, because RESPA's language – "costs of the action *together with* reasonable attorneys fees" – treated attorney fees as a separate item rather than a subset of costs. *Pedraza*, 313 F.3d at 1334 (quoting 12 U.S.C. § 2607(d)(5); emphasis in case); *see also id*. ("Each and every statute cited in *Marek* as including attorneys' fees within the definition of allowable costs features either the words 'as part of the costs' or similar indicia that attorneys' fees are encompassed within costs."). More recently, the Eleventh Circuit refined its Rule 7 doctrine in the context of civil rights cases, holding that "a district court [may] require ... that a losing plaintiff in a civil rights case post a Fed. R.App. P. 7 bond that includes the defendant's anticipated appellate attorney's fees" only if the district court makes "a finding ... that the would-be appeal is frivolous, unreasonable, or groundless." Young v. New Process Steel, LP, 419 F.3d 1201, 1202 (11th Cir. 2005).

[49] *See* In re Cardizem CD Antitrust Litigation, 391 F.3d 812, 815, 818 (6th Cir. 2004) (with respect to class action settlement objector's appeal, upholding imposition of $174,429 appeal bond that included "prospective administrative costs and attorneys' fees"). Though the *Cardizem* court generally adopted the same reasoning as the *Adsani* and *Pedraza* courts (*see supra* notes 46 and 48), it did diverge from *Pedraza* in one respect: The *Cardizem* court rejected the contention that the statutory authority for the attorney fee must define the fee as part of the costs. Although the state statute at issue in *Cardizem* (a diversity case) authorized an award of "any damages incurred, including reasonable attorney's fees and costs," the court rejected the appellant's contention that the linguistic distinction between fees and costs barred inclusion of the fees in the Rule 7 bond: "*Marek* does not require that the underlying statute provide a definition for 'costs.' Rather, *Marek* requires a court to determine which sums are 'properly awardable' under the underlying statute, and to include those sums as 'costs' under the procedural rule. *Marek*, 473 U.S. at 9." *Cardizem*, 391 F.3d at 817 n.4.

The Sixth Circuit, like a number of other circuits, has held that attorney fees do not count as "costs" for purposes of Rule 39: "As appellate Rule 39 specifically delineates the 'costs' to which it applies, i.e. the 'traditional' costs of printing briefs, appendices, records, etc., the pronouncements of Marek render it inappropriate for this court to judicially-amend Rule 39's cost provisions to include § 1988 attorney's fees." Kelley v. Metro. Cnty. Bd. of Educ., 773 F.2d 677, 682 n.5 (6th Cir. 1985) (holding that a failure to award costs on appeal to a plaintiff does not preclude an award of attorney fees under 42 U.S.C. § 1988). The *Cardizem* court did not explicitly address the possible tension between the view that Rule 39 costs do not include attorney fees and the view that Rule 7 costs can include attorney fees. *Cardizem* cited much of *Pedraza*'s reasoning with approval, so perhaps the *Cardizem* court implicitly adopted the Eleventh

There is less appellate caselaw on the question of whether class-settlement-implementation-delay costs are includable in a Rule 7 cost bond. The Sixth Circuit in *Cardizem* concluded that settlement-administration costs were includable in the Rule 7 cost bond because an applicable state statute in that diversity case provided for the shifting of "any damages incurred, including reasonable attorney's fees and costs."[50] In *Vaughn v. American Honda Motor Co., Inc.*, the Fifth Circuit avoided deciding whether settlement-delay costs can ever be included in a Rule 7 bond amount, and rested its decision instead on its conclusion that in the particular case at hand, the settlement agreement contemplated that the plaintiff class members would not be compensated for delay in receiving the settlement funds.[51]

Stepping back from the details of existing caselaw, one can see that there is likely to be variation from circuit to circuit as to when, if ever, a class-action objector can be required to post a Rule 7 cost bond that includes attorney fees and/or settlement-implementation-delay costs. Even in a circuit where courts typically are willing to include anticipated appellate attorney fees in the bond amount when warranted by an underlying fee-shifting statute, there will be a question whether an *objector* (as distinct from a plaintiff or defendant) is among the types of parties who can be required to pay attorney fees under the relevant statute. Some courts might try to include attorney fees in the bond on the theory that such fees might be ultimately be awarded against the objector under Appellate Rule 38 – but the circuits have split on the includability of Rule 38 damages in an Appellate Rule 7 bond, and there are good reasons to doubt that such damages should be includable in the bond.[52] Moreover, it is unclear how an authorization

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Circuit's view that the definition of "costs" for purposes of Rule 7 can differ from the definition of "costs" for purposes of Rule 39.

[50] *Cardizem*, 391 F.3d at 817 (quoting Tenn. Code Ann. § 47-18-109; emphasis omitted); *id.* at 818 (supporting decision to dismiss appeal for failure to post bond partly on the basis that "the pursuit of [appellant's] objections has the practical effect of prejudicing the other injured parties by increasing transaction costs and delaying disbursement of settlement funds").

For a listing of district-court decisions that have included, in Rule 7 bonds, the "costs incurred by delays caused by objectors' appeals in a class action settlement.," see In re *Uponor, Inc., F1807 Plumbing Fittings Prods. Liability Litig.*, No. 11-MD-2247 ADM/JJK, 2012 WL 3984542, at *4 (D. Minn. Sept. 11, 2012). *See also id.* at *5-*6 (including in the amount of the bond $ 125,000 "to cover the costs of any additional class notice that may be required due to the delay caused by the appeal").

[51] The court explained:

> "[T]he costs of delay are adequately captured by the settlement. The settlement agreement makes no provision for the payment of pre-judgment interest on the benefits Honda has agreed to pay, and the settlement does not become effective, by its terms, until any appeals are concluded. The parties to the settlement thus agreed that the financial time-value of the benefits to be paid under the settlement is not to be awarded to the plaintiffs. To the extent that the district court found that interest should be secured as part of 'costs,' it was in error, assuming, without deciding, that interest accrued pending appeal can appropriately be included as part of a bond for costs on appeal.

Vaughn v. Am. Honda Motor Co., Inc., 507 F.3d 295, 299 (5th Cir. 2007) (per curiam); *see also id.* at 297 (reducing size of bond from $ 150,000 – the amount set by the district court – to $ 1,000).

[52] *See supra* note 47 (discussing the Ninth Circuit's decision in *Azizian* and the First Circuit's decision in *Sckolnick*). *See also* In re *Am. President Lines*, 779 F.2d at 717 ("It is … for the court of appeals, not the district court, to decide whether Rule 38 costs and damages should be allowed in any given case…. The

to award attorney fees would encompass authorization to award damages attributable to delay in implementing a settlement.[53] Professor Lopatka and Judge Smith provide a useful summary of these doctrinal intricacies;[54] their assessment is that "courts have disagreed on the legal constraints that affect the availability and magnitude of appeal bonds, and most courts have concluded that the amount of the bond is seriously constrained, undermining its capacity to curb extortionate behavior."[55]

2. The proposal advanced by Judge Smith and Professor Lopatka

To remedy this perceived shortcoming, Judge Smith and Professor Lopatka propose that the rulemakers amend Appellate Rules 7 and 39 to presumptively require – in connection with appeals by unnamed class members – a bond for costs on appeal that includes delay costs and attorney fees attributable to the pendency of the appeal, and to presumptively require the imposition of those costs and fees in the event that the judgment is affirmed.

Specifically, Professor Lopatka and Judge Smith propose the following:

- Amend Federal Rule of Appellate Procedure 39 to add the following subdivision (f): "Notwithstanding other subdivisions of this rule, whenever a nonnamed member of a class certified under Federal Rule of Civil Procedure 23 appeals a judgment approving a settlement of the class action and the judgment is affirmed, the appellate court will tax the appellant the full costs of appeal imposed on others, including all costs of delay, attorney's fees incurred as a result of the appeal, and costs described in subdivision (e) and 28 U.S.C. § 1920, unless the court finds that appellant raised substantial issues of law and did not appeal primarily to obtain a payment for withdrawing the appeal. If the court so finds, it will tax appellant the costs specified in subdivision (e) and 28 U.S.C. § 1920."

- Amend Federal Rule of Appellate Procedure 7 to add the following subdivision: "Whenever a nonnamed member of a class certified under Federal Rule of Civil Procedure 23 appeals a judgment approving a settlement of the class action, the district court will require the appellant to file a bond in the amount of the expected costs specified in Rule 39(f) unless the court finds that (1) appellant raises substantial issues of law and does not appeal

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District Court's bond order effectively preempts this court's prerogative to determine, should Safir's appeal be found to be frivolous, whether APL is entitled to a Rule 38 recovery.").

[53] *See, e.g.*, In re Navistar Diesel Engine Prods. Liability Litig., No. 11-C-2496, 2013 WL 4052673, at *2 (N.D. Ill. Aug. 12, 2013) (questioning "how a rule that expressly allows requiring a bond only to secure payment of recoverable costs (which, under some statutes, includes recoverable attorney's fees) can be read to authorize posting a bond to secure payment of expenses that are not recoverable costs").

[54] *See* Lopatka & Smith, *supra* note 3, at 909-18.

[55] *Id.* at 909.

primarily to obtain a payment for withdrawing the appeal and (2) appellant would be financially unable to file a bond in that amount. If the court so finds, the court will impose a bond in whatever amount it deems necessary to protect the interests of the class, but in no event will the bond be less than the costs specified in Rule 39(e) and 28 U.S.C. § 1920."

- Amend Federal Rule of Appellate Procedure 3 to add the following subdivision: "A court of appeals may not hear an appeal brought by a nonnamed member of a class certified under Federal Rule of Procedure 23 seeking review of a judgment approving a settlement of the class action, an order under Rule 7 requiring the appellant to file a bond, or the amount of such a bond unless the appellant has filed any bond required by the district court under Rule 7."[56]

The minutes of the Committee's spring meeting contain a detailed discussion of the merits and disadvantages of this proposal. It seems fair to say that a number of participants in the discussion thought that the requirement of a very large appeal bond might be a blunt tool and might chill some meritorious appeals. On the other hand, one could argue that the bond proposal is no more likely to chill meritorious appeals than is the certificate-of-appealability proposal discussed in Part III.B below. A prohibitively large bond would be no more restrictive than the denial of a required certificate of appealability. Indeed, in some instances even a large cost bond would be less restrictive, because in theory the objector could post the bond and, thus, proceed with the appeal. And just as an objector whose request for a certificate of appealability is denied by the district court could obtain (in effect) appellate review of that denial by requesting a certificate of appealability from the court of appeals, an objector could appeal the district court's order imposing a cost bond.

3. Attempts to draft around the limits of Rule 7

It appears that some class action lawyers are now attempting to draft around the possible limits on Rule 7 cost bonds by including in the class-settlement agreement a provision that purports to obligate any member of the class who wishes to appeal to post a bond covering delay costs. In *Hershey v. ExxonMobil Oil Corp.*, No. 07-1300-JTM, 2013 WL 66075 (D. Kan. Jan. 4, 2013), the district court relied on such a provision[57] in requiring objectors to file a more than $ 9 million appeal bond:

> Objectors … oppose the motion, contending that such a bond requirement is precluded by Fed.R.App.Pr. 7 and 39. However, the court finds that the

[56] Lopatka & Smith, *supra* note 3, at 928.

[57] The provision read: "Any Class Member wishing to remain a Class Member, but objecting to any part of the Settlement can do so only as set forth in the Class Notice …. Because any appeal by an objecting Class Member would delay the payment under the Settlement, each Class Member that appeals agrees to put up a cash bond to be set by the district court sufficient to reimburse Class Counsel's appellate fees, Class Counsel's expenses, and the lost interest to the Class caused by the delay." *Hershey*, 2013 WL 66075, at *1 (quoting Settlement Agreement).

> authorities relied upon by the objectors do not involve class actions in which the parties have, as here, allocated the risks and burden of an appeal by explicit agreement. Further, the objectors have failed to present any authority demonstrating that, pursuant to such an explicit fee-shifting agreement, the court may not enforce that agreement to the extent the appeal causes additional expenses and delays to the settlement class.

Id. at *2. The objectors appealed both the judgment approving the settlement and also the order requiring the appeal bond; those appeals were pending in the Tenth Circuit as of August 25, 2013.[58]

It seems hard to justify reliance on a provision in the class settlement agreement in order to authorize the imposition of a multimillion dollar appeal bond requirement when an objector seeks to appeal the judgment approving the settlement. Such an argument seems circular: how can a court rely on the challenged class settlement to justify a bond requirement that poses a barrier to appellate review of that very settlement?

B. Requiring a 'certificate of appealability'

During the spring 2013 meeting, a member suggested that another possible approach for addressing objector appeals would be to adopt a certificate-of-appealability ("COA") requirement like that which applies to appeals by habeas petitioners. Under 28 U.S.C. § 2253(c)(1), a habeas or Section 2255 petitioner must obtain a COA in order to appeal. Section 2253(c)(2) provides that the COA "may issue ... only if the applicant has made a substantial showing of the denial of a constitutional right." Section 2253(c)(3) provides that the COA "shall indicate which specific issue or issues satisfy the showing required by paragraph (2)."

Imposing a COA requirement could screen out truly meritless appeals. The standard for an objector-appeal COA might, for example, require that the objector who wishes to appeal make a substantial showing of the merit of the appeal. To flesh out that standard, one might require the objector to make a showing that reasonable jurists would find the district court's assessment of the class action settlement debatable or wrong.[59]

The objector would seek the COA, in the first instance, from the district judge. That could leverage the district judge's detailed knowledge of the settlement by producing a succinct opinion from the district court explaining why the court's approval of the challenged aspects of the settlement either is or is not debatable. Admittedly, a skeptic might ask whether a district judge would be willing to pronounce her own ruling debatable; but there is no doubt that some district judges would do so candidly and

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[58] *See* Hershey, et al v. ExxonMobil Oil Corporation, No. 12-3309 (appeal from final judgment), and Hershey, et al v. ExxonMobil Oil Corporation, No. 13-3029 (appeal from bond order).

[59] *Cf.* Slack v. McDaniel, 529 U.S. 473, 484 (2000) ("Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.").

insightfully. (To assess the willingness of district judges to perform analogous self-assessment tasks, one could look at the rate at which district judges grant COAs to habeas petitioners.[60])

The timing of the district court's COA ruling, in this context, would present an interesting question. In habeas cases, the district judge must rule on the COA question at the time it denies the petition[61] rather than waiting to see whether the petitioner files a notice of appeal – a requirement that is designed both to "ensure prompt decision making when the issues are fresh" and to "help inform the applicant's decision whether to file a notice of appeal."[62] If a COA mechanism were to be adopted for class-action-objector appeals, it is possible that the calculus might come out differently due to a number of factors (such as the frequency of appeals, the incentives for possible appellants, and the amount of effort that would be required to draft the COA ruling).

Presumably, as with COAs in the habeas context, so too here it would be advisable to give the would-be appellant an alternative means for obtaining the COA if the district court denies it. If one were following the habeas model, one would enable the appellant to seek the COA from a circuit judge in the relevant court of appeals, and (if that request is denied) to seek rehearing in the court of appeals.

If the Committee were to conclude that it would be useful to require a certificate of appealability before an objector could appeal from a judgment approving a class action settlement, the next question would be whether such a requirement could be implemented by rule. As the Supreme Court observed in *Devlin*, "the right to appeal from an action that finally disposes of one's rights has a statutory basis." *Devlin*, 536 U.S. at 14 (citing 28 U.S.C. § 1291). Although Congress has authorized the rulemakers to adopt rules that "define when a ruling of a district court is final for the purposes of appeal under section 1291," 28 U.S.C. § 2072(c), as well as rules that "provide for an appeal of an interlocutory decision to the courts of appeals," 28 U.S.C. § 1292(e), Congress has not authorized the rulemakers to cut off or narrow the right to appeal "all final decisions of the district courts of the United States," 28 U.S.C. § 1291.

The presence in the national Rules of provisions that treat the COA requirement for habeas and Section 2255 matters does not demonstrate rulemaking authority to impose a COA requirement without a statutory mandate. The requirement that a state habeas petitioner obtain a certificate of probable cause in order to take an appeal from the denial of the habeas petition was originally adopted by statute in 1908.[63] Thus, when the

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[60] One might also look at the rate at which district judges include, in their interlocutory orders in cases more generally, a statement that "such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation," 28 U.S.C. § 1292(b).

[61] *See* Rule 11 of the Rules governing Section 2254 and Section 2255 proceedings.

[62] *See* 2009 Committee Note to Rule 11 of the Rules governing Section 2254 and Section 2255 proceedings.

[63] *See* Ira P. Robbins, *The Habeas Corpus Certificate of Probable Cause*, 44 Ohio St. L.J. 307, 314 (1983) ("Congress sought this new procedural obstacle to the right of an appeal from a denial of habeas to stem a

rulemakers adopted original Appellate Rule 22, its certificate-of-probable-cause provision was designed to dovetail with a long-preexisting statutory requirement.[64] In 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which substituted the current COA requirement for the prior "certificate of probable cause" requirement and which extended the COA requirement to appeals by Section 2255 petitioners.[65] Only after that did the rulemakers amend Rule 22(b) to encompass Section 2255 petitioners.[66]

In sum, though a COA approach is worth exploring, it seems that the adoption of such a mechanism would require legislation.

IV. The Dismissal-Hurdle Approach

Rather than making it harder for an objector to appeal a judgment approving a class settlement, some approaches would instead make it harder for an objector to dismiss such an appeal once brought. One might at first think that limiting the dismissal of such appeals could address both of the problems identified near the outset of this memo (extortionate, non-meritorious appeals, and the dropping of valid appeals). But on closer inspection, a number of problems come to light.

A. Banning dismissals for value (the "inalienability" approach)

Professors Fitzpatrick, Wolfman, and Morrison have proposed that Appellate Rule 42 be amended to require approval from the court of appeals for any dismissal of an appeal from a judgment approving a class action settlement or fee award, and to bar such dismissals absent a certification that no person will give or receive anything of value in exchange for dismissing the appeal.[67] This proposal would impose, at the appellate stage,

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perceived tide of state prisoners, already sentenced to death, who were evading execution with frivolous appeals.").

[64] The original Committee Note to Appellate Rule 22(b) stated in part:

> Title 28 U.S.C. § 2253 provides that an appeal may not be taken in a habeas corpus proceeding where confinement is under a judgment of a state court unless the judge who rendered the order in the habeas corpus proceeding, or a circuit justice or judge, issues a certificate of probable cause. In the interest of insuring that the matter of the certificate will not be overlooked and that, if the certificate is denied, the reasons for denial in the first instance will be available on any subsequent application, the proposed rule requires the district judge to issue the certificate or to state reasons for its denial.

[65] *See* 28 U.S.C. § 2253(c).

[66] The 1998 Committee Note to Rule 22(b) stated in part: "[P]aragraph [22(b)(1)] is made applicable to 28 U.S.C. § 2255 proceedings. This brings the rule into conformity with 28 U.S.C. § 2253 as amended by the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132." Likewise, Rule 11 of the Rules Governing Section 2255 Proceedings was amended in 2009 to mirror the statutory COA requirement.

[67] I enclose a copy of their August 2012 letter to Judge Sutton, as well as a representative letter of support from Vincent J. Esades, Esq., an attorney who commented on their proposal. A second letter, from Daniel R. Karon, Esq., appears to track verbatim the wording of Mr. Esades' letter; I am omitting it in order to conserve space.

controls that are somewhat similar, but not identical, to those imposed by Civil Rule 23(e)(5) in the court below.[68]

The proposal is an elegant one in the sense that its goal is to craft a Rule that would cause undesirable objectors to self-select out of the appellate process. If they anticipate that they can get no personal benefit from the appeal, then they will not appeal. However, participants in the Committee's discussions have noted some difficulties with the proposal.

First, the inflexible nature of the inalienability rule has costs as well as benefits. The benefits include ease of administration and predictability. A complete ban on the withdrawal of appeals in exchange for money would send a clear message to self-interested objectors and could be readily applied by the Circuit Clerk's office. But such a ban might sweep too broadly. For example, it would encompass appeals by objectors whose objection is specific to them (rather than generalizable to the class or a subclass) and who therefore might legitimately settle the objection in exchange for a side payment. This feature of the inalienability proposal has led the Committee to consider the possible alternative of requiring court permission but leaving the grant of permission within the court's discretion; I discuss that possibility in Part IV.B below.

Second, it would be unusual for a court of appeals to deny permission to withdraw an appeal. By denying permission, the court would be in the unusual position of forcing a now-unwilling appellant to maintain an appeal.[69] I have not found many cases in which a court did so.[70] Where an appellant has burdened an appellee, the court might deny the appellant's request for *voluntary* dismissal and instead dismiss the appeal by order with an award of costs.[71] Occasionally, the court of appeals has denied permission to dismiss a proceeding on the ground that one of the parties was attempting to manipulate the

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[68] Compared with current Civil Rule 23(e)(5), the proposed amendment to Appellate Rule 42 is broader in scope and more stringent in its criteria. Unlike Civil Rule 23(e)(5), the proposed amendment would encompass objections to fee awards. Civil Rule 23(h)(2) does contemplate objections to fee awards, but does not constrain the dropping of such objections in the way that the proposed Appellate Rule 42 amendment would. Even more significantly, Civil Rule 23(e)(5) gives the district court discretion whether to approve the withdrawal of an objection, whereas the proposed amendment to Appellate Rule 42 would remove the court of appeals' discretion to approve the withdrawal of the appeal if there is a payment in exchange for that withdrawal.

[69] As a point of comparison, Supreme Court Rule 46.1 provides: "At any stage of the proceedings, whenever all parties file with the Clerk an agreement in writing that a case be dismissed, specifying the terms for payment of costs, and pay to the Clerk any fees then due, the Clerk, without further reference to the Court, will enter an order of dismissal."

[70] For purposes of the present inquiry, I leave aside cases that involve a request to withdraw or vacate a previously issued decision. The issues posed by such requests for vacatur are distinct from the questions that would be raised in the context of class-action-objector appeals withdrawn before an appellate decision. *See generally* U.S. Bancorp Mort. Co. v. Bonner Mall P'ship, 513 U.S. 18 (1994).

[71] *See* Blount v. State Bank & Trust Co., 425 F.2d 266, 266 (4th Cir. 1970) (per curiam) ("[V]oluntary dismissal is not appropriate when the appellee has been put to trouble and expense because the appellant has not complied with the rules of court. Accordingly, the appellee's motion to dismiss is granted. Costs on appeal are taxed against … one of appellant's counsel, without contribution from the appellant or his other counsel.").

formation of precedent.[72] In some instances the court of appeals might take into account the fact that it has already invested effort in drafting an opinion prior to the parties' attempt to dismiss the appeal.[73] In one case the court denied the defendant-appellant's pro se motion to dismiss because the district court had found him "not competent to make that decision."[74] Among the cases where the court of appeals denied permission to dismiss an appeal, most were cases in which the motion to dismiss was opposed;[75] however, I did find one case in which a court of appeals denied an unopposed motion to

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[72] In *Khouzam v. Ashcroft*, 361 F.3d 161 (2d Cir. 2004), the government and the petitioner reached an agreement under which the petitioner would withdraw his petition for review of an order by the Board of Immigration Appeals if the court of appeals would vacate that order. The court of appeals refused to cooperate:

> [W]e are troubled by the government's tactics here. Khouzam's [Convention Against Torture] petition has been fully litigated by both sides. At oral argument, we expressed doubts as to the soundness of the Attorney General's definition of torture …. [T]his is clearly an issue of public importance. For the government to agree to a vacatur two weeks after oral argument suggests that it is trying to avoid having this Court rule on that issue. We therefore decline to grant the order that the parties have agreed to. Instead, we will review Khouzam's CAT petition and grant or deny it according to its merits.

Id. at 168.

In *Albers v. Eli Lilly & Co*., 354 F.3d 644 (7th Cir. 2004), the court of appeals refused to dismiss the appeal where (1) appellant's counsel "essentially conced[ed]" that he was "attempting to manipulate the formation of precedent by dismissing those proceedings that may lead to an adverse decision while pursuing others to conclusion," (2) "a draft of [the court's] opinion had been written" before appellant moved to dismiss, and (3) the appellee did not agree to the dismissal of the appeal. *Id*. at 646.

In *United States v. Hagerman*, 549 F.3d 536 (7th Cir. 2008), after its appeal was fully briefed, a limited liability company fired its lawyer, who was permitted to withdraw. The court of appeals ruled: "In this case, with the appeal fully briefed and the merits free from doubt, we would be mistaken to grant the (imputed) motion. For that would allow Wabash to argue in future regulatory proceedings that the merits of its defense had never been fully adjudicated. We have thought it best, therefore, to affirm the judgment of the district court in order to lay to rest any doubt about the company's guilt." *Id*. at 538.

[73] Thus, in *Telenor Mobile Communications AS v. Storm LLC*, 584 F.3d 396 (2d Cir. 2009), the court of appeals denied the parties' request – made three days before its opinion issued – "to 'withdraw [this appeal] from active consideration.'" *Id*. at 400 n.1 (citing *Khouzam*). *See also Albers*, *supra* note 72; Ford v. Strickland, 696 F.2d 804, 807 (11th Cir. 1983) (per curiam) (denying dismissal where request came only after panel decision, en banc briefing, lengthy oral argument, and "months of deliberation" by the en banc court).

A somewhat related rationale arose in a case where only one of two appellants sought to dismiss its appeal, and the two appellants were making the same arguments on appeal. Reasoning that it would be deciding the same issues either way, the court of appeals denied the request to dismiss. Benton Twp. v. Berrien Cnty., 570 F.2d 114, 119 (6th Cir. 1978).

[74] United States v. DeShazer, 554 F.3d 1281, 1285 n.1 (10th Cir. 2009).

[75] *See, e.g*., *Albers*, *supra* note 72, at 646 ("When the parties do not agree on terms, dismissal is discretionary with the court. Doubtless there is a presumption in favor of dismissal, but the procedure is not automatic.").

In one case, the Seventh Circuit suggested that an appellee's opposition would foreclose a Rule 42(b) dismissal: "[D]ismissal is available under [Rule 42(b)] only on the parties' joint motion or, if the motion is solely the appellant's, on terms agreed by the parties." Hope Clinic v. Ryan, 249 F.3d 603, 605 (7th Cir. 2001). This view seems to me to be at odds with the text of the Rule, which states in part that "[a]n appeal may be dismissed on the appellant's motion on terms agreed to by the parties or fixed by the court." And, in fact, the *Hope Clinic* court phrased its denial of permission to dismiss the appeal in terms that made the decision sound more discretionary than the statement quoted above would suggest: "Given the lack of agreement among the parties, it is best to resolve the appeal on the merits and let the district court apply [42 U.S.C.] § 1988 on plaintiffs' request for costs and fees." *Hope Clinic*, 249 F.3d at 605.

dismiss.[76] Some of the decisions remark upon the awkwardness of denying an appellant permission to drop an appeal and raise concerns about the lack of adversary presentation by an unwilling appellant.[77] That concern shades into the third problem: the question of mootness.

At the Committee's spring meeting, a participant asked whether an objector might find a way around the proposed ban on appeal dismissals by arguing that, when and if class counsel pay the objector a satisfactory settlement, the objector's appeal becomes moot. There are precedents holding that when a district court certifies a class action (or erroneously denies such certification), the class gains its own legal status such that subsequent events mooting the individual plaintiff's claim do not thereby moot the class action.[78] However, the Court recently refused to apply those precedents in the context of a collective action brought by an employee under the Fair Labor Standards Act on behalf of similarly situated employees.[79]

None of the existing Supreme Court precedents directly addresses whether an *objector*'s appeal becomes moot once the objector voluntarily settles and seeks to withdraw the appeal. Even if it is possible to argue that there remains a case and controversy concerning the validity of the objection to the settlement,[80] it would seem that an objector who accepted (via settlement of the objection) payment in full of her substantive claim (and of any accompanying claim to attorney fees)[81] might lack the

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[76] *See* Washington Legal Found. v. Texas Equal Access to Justice Found., 270 F.3d 180, 184 n.3 (5th Cir. 2001) (noting without further explanation that the court of appeals had denied an appellant's "unopposed … motion (post-oral argument) to dismiss his appeal"), *cert. granted and judgment vacated on other grounds sub nom*. Phillips v. Washington Legal Found., 538 U.S. 942 (2003).

[77] In *United States v. Washington Dep't of Fisheries*, 573 F.2d 1117 (9th Cir. 1978), two Native American tribes appealed an order ruling that the district court had jurisdiction to regulate tribes' on-reservation fishing. The court of appeals granted the tribes' motion to dismiss their appeal. Then-Judge Kennedy, writing for the court, noted that as of the date of the order, "no injunctions regulating on-reservation fishing were of current effect," and he observed: "We are reluctant to determine an issue presented in the abstract, and we should be especially cautious of doing so when it appears that one of the parties is not willing to fully contest the issue. Accordingly, we find no basis for exercising our discretionary authority to decline to grant the appellants' motion to dismiss." *Id*. at 1118.

In *In re Chicago, Milwaukee, St. Paul and Pacific R. Co.*, No. 80-1346, 1980 WL 324449 (7th Cir. Dec. 8, 1980), the appellants moved to dismiss their appeal on the day before argument. Over the objection of some of the appellees, the court of appeals granted the motion, reasoning that "[w]ith the appellant no longer desirous of pursuing this appeal, there is no longer the adversariness needed in order to find an ongoing controversy between the parties." *Id*. at *2.

[78] *See* Sosna v. Iowa, 419 U.S. 393 (1975), and U.S. Parole Comm'n v. Geraghty, 445 U.S. 388 (1980).

[79] *See* Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523 (2013).

[80] A certified class is a legal entity distinct from either the named class representative or any objector. It seems to me that the class members' interest in obtaining relief through a legally appropriate settlement would survive any particular objector's settlement of her individual claim.

[81] In *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326 (1980), the named class representatives were permitted to appeal the denial of class certification despite the tender of payment in full on their individual claims; the representatives "asserted as their personal stake in the appeal their desire to shift to successful class litigants a portion of those fees and expenses that have been incurred in this litigation and for which they assert a continuing obligation." *Roper*, 445 U.S. at 334 n.6.

requisite personal stake in continuing to litigate the appeal.[82] It would be key, in this analysis, that the objector voluntarily settled and sought to dismiss the appeal. An instance where the named parties and their counsel sought to "pick off" an objector appeal by tendering a payment that the objector rejected should not, in my view, result in a finding that the appeal is moot.[83] But the instances on which the Committee is focusing are those in which the objector is a willing participant in the dismissal. In those instances, it seems difficult to argue that the appeal can continue, unless some other class member is willing to step into the objector's shoes and litigate the appeal. Because that is unlikely to occur in most instances, it seems that a Rule barring dismissal of an appeal would pose a serious problem of judicial administration, if not of Article III power.

B. Requiring discretionary court approval for dismissal of the appeal

As noted above, the possible disadvantages of a strict inalienability rule led some participants in the discussion to suggest an alternative approach: Appellate Rule 42 could be amended to require court approval for the dismissal of an appeal and could direct the court, in reviewing a request for approval, to consider whether the appellant received anything of value in exchange for seeking to dismiss the appeal. Admittedly, the court of appeals would not necessarily be well situated to scrutinize the events that led to a proposed withdrawal of an objector's appeal,[84] but it could remand to the district court for consideration of the motion.

This option is well worth considering. However, it seems to me that a discretionary-dismissal option faces the same basic problems as the inalienability rule discussed above. If the named parties and/or their counsel have paid the objector in full for the objector's claim and any possible attorney fees, and the objector has accepted the payment in exchange for a promise to withdraw the appeal, then the objector appears to lack the requisite personal stake in prosecuting the appeal. Unless another member of the class is willing to take over the prosecution of the appeal, sound judicial administration – if not Article III itself – would likely counsel against withholding permission to withdraw the appeal.[85]

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[82] In the analogous context of a named class representative's settlement of her individual claim, the question of whether that person was no longer suited to litigate on behalf of the class might be addressed, in the first instance, as a question of adequacy of representation under Civil Rule 23(a). However, no similar provision governs the role of objectors.

[83] *See supra* notes 30 - 31 and accompanying text.

[84] An example of the complexities that could ensue is provided by the majority and dissenting opinions in *Safeco Insurance Co. v. American Int'l Group, Inc*., 710 F.3d 754 (7th Cir. 2013) (a case previously brought to the Committee's attention by Marie Leary).

[85] The reader might, by this time, be wondering whether I think that a similar problem attends Civil Rule 23(e)(5)'s requirement of court permission for the withdrawal of objections in the district court. I do not think that the trial-level context presents the same set of issues. At the trial level, the district court will address the objections as part of its overall duty to assess the settlement's appropriateness under Civil Rule 23(e). The objections will simply form a component of that overall analysis, which will occur in any event. By contrast, when an objector appeals, the objector's appeal forms the only reason for continued judicial activity.

V. Conclusion

Objectors play an important role in class action litigation. Sometimes they provide needed information and raise valid arguments. At other times they press meritless objections in order to extract a payment. Adopting a rule amendment that curbs the latter sort of objection without chilling the former may prove challenging. However, in the light of the gravity of the charge that some objectors are exploiting federal class action litigation as an opportunity for extortionate behavior, the matter warrants serious consideration. I look forward to the Committee's further discussions of the topic.

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Minutes of Spring 2014 Meeting of the Advisory Committee on Appellate Rules, April 28 and 29, 2014, Newark, New Jersey (excerpt, pp. 16-18)

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

Judge Colloton introduced this item, which concerns a proposal for addressing appeals by objectors to a class action settlement. He invited the Reporter to summarize briefly the Committee's research thus far. The Reporter noted that district judges may lack full information concerning the fairness of a proposed settlement, and that objectors can be a helpful source of such information. Civil Rule 23(e) is designed to promote careful scrutiny of a proposed class settlement; it requires notice, a hearing, and a finding that the proposed settlement is fair, reasonable, and adequate. Rule 23(e) authorizes objections by any class member, and requires court approval for the withdrawal of such an objection once it has been made.

Concerns have been raised that some objectors lodge objections for the purpose of extracting a side payment from class counsel in exchange for dropping the objection. Rule 23(e)'s requirement of court approval for the withdrawal of objections constrains such pay-offs while the case is in the trial court, but no rule imposes a similar constraint during an objector's appeal from a district court order approving the settlement. If an objector appeals but then drops the appeal in exchange for a side payment, two costs arise: First, the extraction of the side payment functions as a tax on class counsel and could be viewed as unseemly; and second, the discontinuance of an appeal that raised serious issues about the fairness of the class settlement deprives class members of the opportunity to benefit from the resolution of the merits of the appeal.

Various strategies have been proposed for addressing the problem. The objector-appellant's leverage for extracting a side payment arises from the fact that, in practice, such an appeal will often delay implementation of the settlement. Thus, one approach focuses on decreasing the objector-appellant's leverage by speeding the implementation of the settlement despite the pendency of the appeal. Quick-pay provisions (allowing for payment of some or all of class counsel's fees while the appeal is pending) provide an example of this approach.

Another approach would be to set hurdles that an objector must surmount in order to appeal. Some courts have, for example, required sizeable appeal bonds as a condition for taking such an appeal; but there are questions about whether the size of a bond for costs on appeal (under Appellate Rule 7) can be enlarged to take account of anticipated attorney fees and costs associated with delay in implementation of the settlement. At the Committee's spring 2013 meeting, Judge D. Brooks Smith and Professor John E. Lopatka presented their proposal for amendments to Appellate Rules 7 and 39 that would presumptively require objector-appellants to post a bond for costs on appeal that would include costs and attorney fees attributable to the pendency of the appeal (and that would presumptively require imposition of those fees and costs if the court of appeals affirms the order approving the settlement). An appellate judge member suggested that it would be worthwhile for the Committee to consider the appeal-bond possibility further; another appellate judge member noted the need to take care not to deter objector appeals that raise valid questions about a settlement's propriety.

Another way of setting a hurdle for objector appeals would be to impose a "certificate of appealability" ("COA") requirement – akin to that imposed on habeas petitioners, who must make "a substantial showing of the denial of a constitutional right" in order to obtain the COA that is a requisite for an appeal of the denial of a habeas petition. The Reporter questioned, however, whether a COA requirement could be imposed by rulemaking without an accompanying statutory change.

Judge Colloton observed that the Committee was indebted to Marie Leary for her painstaking and informative study concerning class-action-objector appeals. He invited Ms. Leary to summarize her findings for the Committee. Ms. Leary explained that she had searched the CM/ECF district court databases for cases (filed in 2008 or later) in the Second, Seventh, and Ninth Circuits in which an appeal was taken from an order approving a class settlement. Objector appeals tend to be relatively rare as a proportion of each circuit's overall appellate caseload; however, they are a significant feature in large multidistrict litigation and nationwide class actions.

Ms. Leary found that the trend concerning disposition of objector appeals in the Second Circuit differs from the trend concerning disposition of such appeals in the Seventh and Ninth Circuits. In the Seventh and Ninth Circuits, objector appeals tend to be voluntarily dismissed (under Appellate Rule 42(b)) within 200 days after the appeal was filed (and before the appellant files its brief). By contrast, in the Second Circuit a majority of terminated appeals were decided on the merits (by unpublished summary orders). Ms. Leary observed that the explanation for this difference is not clear; she wondered whether the Second Circuit puts the appeals on an expedited track for disposition.

Ms. Leary noted a feature of practice in the Ninth Circuit concerning Rule 7 cost bonds. In instances where the district court ordered the objector to post a cost bond but the objector failed to do so, the Ninth Circuit did not dismiss the appeal for failure to post the bond; rather, the court deferred (until the time of argument) its ruling on the consequences of the failure.

Although the Ninth Circuit thus appears not to have responded immediately to the failure to post the bond, that failure did not go unnoticed in the court below; in some cases, it was followed by contempt findings and the imposition of sanctions by the district court.

Judge Colloton reported that he had discussed with Ms. Leary, and with Judge Jeremy Fogel (the Director of the FJC), the possibility of conducting a survey of attorneys who practice in this field. Judge Fogel and others within the FJC had expressed concern about possible obstacles to conducting an effective survey study on the topic of class-action-objector appeals. Instead, Judge Fogel proposed that the Committee consider co-sponsoring (with the Civil Rules Committee) a mini-conference on class action practice. Such a mini-conference could bring together knowledgeable participants to discuss review of class settlements both in the district court and on appeal. Judge Sutton observed that the Civil Rules Committee has already discussed the possibility of planning a mini-conference on class action practice. Judge Colloton noted that the Appellate Rules Committee would be glad to work with Judge Robert Michael Dow, Jr. – the Chair of the Civil Rules Committee's Rule 23 Subcommittee – on the planning for such a mini-conference.

A member asked whether it would be useful for Ms. Leary to examine how objector appeals fare in other circuits, such as the Fifth Circuit. Judge Colloton invited Ms. Leary to discuss the methodology for her study, which has been, of necessity, very labor-intensive. Ms. Leary explained that there is no quick way to identify the relevant appeals using the CM/ECF databases at the level of the courts of appeals; thus, one must start by searching for class actions at the level of the district court and then identifying, within that pool of cases, the subset of cases that feature an appeal from a judgment approving a class settlement.

An appellate judge member asked whether it would be possible to address inappropriate objector appeals by sanctioning the objector's attorney. The Reporter noted reports that district judges tend not to want to spend time on such sanctions motions. Likewise, Professor Coquillette has observed a reluctance to pursue the possibility of attorney discipline under Model Rules 3.4 and 8.4.

Mr. Letter suggested that the general topic warranted further consideration by the Appellate Rules Committee, in conjunction with the Civil Rules Committee. By consensus, the Committee retained this item on its agenda.

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RULE 23 SUBCOMMITTEE REPORT

The Rule 23 Subcommittee has been quite active since the full Committee's April meeting. In total, it has attended, or at least had representatives participate in, roughly a dozen conferences since late 2014, culminating in the Subcommittee's own mini-conference at the DFW Airport on Sept. 11, 2015. Since April the Subcommittee has also held a number of conference calls and meetings.

This memorandum is designed to summarize the ideas developed during this activity and to present the six rule-amendment ideas that presently seem to hold the most promise for productive effort. In addition, it reports on a variety of other possible rule-revision ideas that the Subcommittee has discussed with the full Committee on occasion since the first full Committee discussion of these issues during the March, 2012, meeting.

Accompanying this memorandum, the agenda book should contain a variety of additional materials developed during the Subcommittee's work. These should include the issues memo for the Sept. 11 mini-conference and notes of the mini-conference. It also should include notes on Subcommittee meetings or conference calls on Sept. 25, 2015, Sept. 11, 2015, July 15, 2015, July 12, 2015, and June 26, 2015. The Subcommittee held other conference calls principally addressed to more logistical matters, and also discussed these issues during the many conferences it has attended. Notes on those events are not included.

It is also worth noting that the Subcommittee has received submissions from many individuals and groups about possible amendments to Rule 23. During 2015, approximately 25 submissions have been received. These submissions are posted at www.uscourts.gov.

Based on the input the Subcommittee has received, it has concluded that some topics that initially seemed to warrant proceeding with rule-amendment preparation no longer seem to support immediate activity. In part, that conclusion is based on relatively recent developments, including developments in the case law. In part, that conclusion recognizes that further developments in the relatively near future may cause the Subcommittee to conclude that further work on some of these topics is justified. So it is possible that some of the topics on which further action has been deferred will return to the full Committee at its Spring 2016 meeting. The Subcommittee is still contemplating a schedule that would permit publication of preliminary drafts of rule amendments in August, 2016.

The list of "front burner" topics has evolved considerably since the April full Committee meeting, which discussed a list of topics that had already evolved quite a lot since the first full

Committee discussion of these issues at the March 2012 meeting. Below are presentations on six topics the Subcommittee currently regards as most suited to immediate work. After introducing those topics, this memorandum will discuss other topics that have received considerable attention during the Subcommittee's work, including some on which it contemplates that further work may be in order.

The topics on which the Subcommittee proposes to focus its immediate attention are:

1. "Frontloading"

2. Excluding "preliminary approvals" of class certification and orders regarding notice to the class about possible settlements from immediate appeal under Rule 23(f)

3. Clarifying Rule 23(c)(2)(B) to state that Rule 23(e)(1) notice triggers the opt-out period

4. Notice to unnamed class members

5. Handling objections by class members to proposed settlements

6. Criteria for judicial approval of class-action settlements

After presenting these topics on which the Subcommittee makes recommendations, the memorandum presents a composite version of the amendment sketches so that Committee members can see how they might fit together.

This memorandum reflects the Subcommittee's present thinking, which has evolved further even since its last conference call on September 25. Thus, one topic on which the Subcommittee was uncertain about proceeding during that conference call has been restored to its list of recommendations. Besides making these recommendations, this memorandum also presents additional ideas that the Subcommittee has examined in detail and discussed with many participants in conferences and meetings it has attended. These issues are presented for discussion in order to support full discussion in Salt Lake City. That discussion will provide a basis for introducing the issues during the Standing Committee's January, 2016, meeting. Meanwhile, the Subcommittee will continue its work on Rule 23, and the rule language and Committee Note language presented in the sketches will surely be refined.

The additional issues presented for discussion can be generally separated into three categories:

Issues "on hold"

Two issues seem not suitable for current rulemaking efforts, although developments may justify reconsidering that conclusion. Fuller explanations of the current situation will be presented later in this memorandum, but it seems useful to introduce these two issues:

Ascertainability: During the full Committee's April meeting, the Subcommittee was urged to look carefully at issues of ascertainability. In part due to a series of decisions by the Third Circuit, this topic appeared to have growing importance. It is clear that the court must include a class definition when it certifies a class. Indeed, as amended in 2003, Rule 23(c)(1)(B) instructs the court to "define the class." Particularly in consumer class actions, much attention has been given recently to whether there is a workable way to identify class members and scrutinize claims submitted by class members, particularly those who do not have receipts for retail purchases of relatively small-value items that sometimes give rise to claims. A key question is the extent to which courts ought to insist, at the certification stage, on a definite game plan for possible later distribution of benefits. The Third Circuit view appears to emphasize this concern. The Seventh Circuit has issued an opinion offering distinctive views supported by provisions presently in the rule, and raising doubts about the need to inquire into the manner of distribution of benefits to the class at the certification stage. [Copies of three recent decisions -- all rendered since the full Committee's April meeting -- should be included in this agenda book, for those who wish to review them.]

Rule 68 and pick-off individual offers of judgment: This set of issues has achieved considerable prominence during recent years, in part because the Seventh Circuit took a position that enabled defendants in some class actions to pick off the class-action aspects of the case by offering the named plaintiff full relief before a motion to certify was filed. A consequence was sometimes that plaintiffs would file "out of the chute" motions to certify, which plaintiffs sometimes asked the courts to stay pending development of a record suitable to deciding class certification. The Seventh Circuit has recently changed its views on these issues, and the Supreme Court has granted certiorari in a case that appears to raise these issues, with oral argument scheduled in October.

Topic the Subcommittee brings
before the full Committee
without a recommendation

Settlement class certification: After the mini-conference, the Subcommittee initially decided that the potential

difficulties of proceeding with a new Rule 23(b)(4) on settlement class certification outweighed any benefits in doing so. Presented below is the material that relates to that conclusion. Further reflection prompts the Subcommittee to bring this question before the full Committee. As an alternative, this memorandum also introduces an idea drawn from the 1999 Report on Mass Tort Litigation for adding reference to settlement to Rule 23(b)(3). Subcommittee members can address these issues during the meeting in Salt Lake City.

Topics the Subcommittee would take off the agenda

Besides deciding that the two issues identified above should be put "on hold," the Subcommittee has also determined that the following issues that it has previously discussed with the Committee should be taken off the agenda for the present Rule 23 reform effort. The notes of the mini-conference and the various Subcommittee meetings and conference calls show the consideration given these issues. Details on what was before the mini-conference can be found in the issues memorandum submitted to participants in that event. All of these items should be included in the agenda book. These issues are:

Cy pres: In his separate statement regarding denial of certiorari in a case involving Facebook, Chief Justice Roberts expressed concern about the manner in which what have been called cy pres issues have been handled in some cases. The ALI, in § 3.07 of its Principles of Aggregate Litigation, addressed these issues, and the courts are increasingly referring to the ALI formulation in addressing these issues. The Subcommittee has concluded that a rule amendment would not be likely to improve the handling of these issues, and that it could raise the risk of undesirable side effects. One point on which many agree is that, when there are lump sum class-action settlements, there often is some residue after initial claims distribution is completed. The topics on which the Subcommittee recommends proceeding, particularly amendments to Rules 23(e)(1) and 23(e)(2), include reference in the Committee Note to the importance of addressing these eventualities in submissions to the court at the beginning of the settlement process and in the handling of final approval of a proposed settlement. The Notes also focus attention on the claims process recommended by the settlement proposal, in an effort to ensure that it is suited to the case.

Issue classes: Considerable discussion has been had of the possible tension between the predominance requirement of Rule 23(b)(3) and the invitation in Rule 23(c)(4) to certify a class with regard to particular issues. Included in this discussion was the possibility of recommending an amendment to Rule 23(f) to authorize discretionary immediate appellate review of the district court's resolution of such issues. Eventually, the

conclusion was reached that there is no significant need for such a rule amendment. The various circuits seem to be in accord about the propriety of such treatment "[w]hen appropriate," as Rule 23(c)(4) now says. And this treatment may sometimes be warranted in actions under Rule 23(b)(2), a practice that might be called into question under some of the amendment ideas the Subcommittee has examined. On balance, these issues appear not to warrant amendment of the rules.

1. "Frontloading"

This issue was not on the list the Subcommittee presented to the full Committee in April. It has emerged from various discussions since then, which emphasized that it is important to ensure that vital information is provided to judges asked to approve class-action settlements, and to ensure that class members can learn enough about proposed settlements to make informed decisions whether to opt out or object.

At the mini-conference, the Subcommittee presented a more elaborate sketch of a "frontloading" rule that enumerated 14 specific topics on which parties must present the court with information when asking the court to authorize notice to the class under Rule 23(e). But there was widespread unhappiness among the conferees with a "laundry list" approach to such a rule even though the idea of getting more important information on the table early in the settlement-review process received considerable support. The sketch below responds to these concerns.

Rule 23. Class Actions

* * * * *

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class, or a class proposed to be certified as part of a settlement, may be settled, voluntarily dismissed or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) After the parties have provided [relevant] {sufficient} information about the proposed settlement, ~~T~~the court must direct notice in a reasonable manner to all class members who would be bound by the proposal if it determines that giving notice is justified by the prospect of class certification and approval of the proposal.

Sketch of Draft Committee Note

Subdivision (e). The introductory paragraph of Rule 23(e) is amended to make explicit that its procedural requirements apply in instances in which the court has not certified a class at the time that a proposed settlement is presented to the court. The notice required under Rule 23(e)(1) then could also satisfy the notice requirements of Rule 23(c)(2)(B) in a class to be certified under Rule 23(b)(3), and trigger the class members' time to opt out. Information about the opt-out rate could then

be available to the court at the time that it considers final approval of the proposed settlement.

Subdivision (e)(1). The decision to give notice to the class of a proposed settlement is an important event. It should be based on a solid record supporting the conclusion that the proposed settlement will likely earn final approval after notice and an opportunity to object. If the court has not previously certified a class, this showing should also provide a basis for concluding that the court will certify a class for purposes of settlement. Although the order to send notice is often called a "preliminary approval" of class certification, it is not appealable under Rule 23(f). It is, however, sufficient to require notice under Rule 23(c)(2)(B) calling for class members in Rule 23(b)(3) classes to decide whether to opt out.

There are many types of class actions, and class-action settlements are of many types. As a consequence, no single list of topics to be addressed in the submission to the court would apply to each one. Instead, the subjects to be addressed depend on the specifics of the particular class action and the particular proposed settlement. General observations can be made, however.

One key element is class certification. If the court has already certified a class, the only information necessary in regard to a proposed settlement is whether the proposed settlement calls for any change in the class certified, or of the claims, defenses, or issues regarding which certification was granted. But if class certification has not occurred, the parties must ensure that the court has a basis for concluding that it will be able, after the final hearing, to certify the class. Although the standards for certification differ for settlement and litigation purposes, the court cannot make the decision that the prospects for certification are warranted without a suitable basis in the record. The ultimate decision to certify the class for purposes of settlement cannot be made until the hearing on final approval of the proposed settlement. If the settlement is not approved and certification for purposes of litigation is later sought, the parties' submissions in regard to the proposed settlement should not be considered in relation to the later request for certification.

Regarding the proposed settlement, a great variety of types of information might appropriately be included in the submission to the court. A basic focus is the extent and nature of benefits that the settlement will confer on the members of the class. Depending on the nature of the proposed relief, that showing may include details on the nature of the claims process that is contemplated [and about the take-up rate anticipated]. The possibility that the parties will report back to the court on the

take-up rate after notice to the class is completed is also often important. And because there are often funds left unclaimed, it is often important for the settlement agreement to address the use of those funds. Many courts have found guidance on this subject in § 3.07 of the American Law Institute, Principles of Aggregate Litigation (2010).

It is often important for the parties to supply the court with information about the likely range of litigated outcomes, and about the risks that might attend full litigation. In that connection, information about the extent of discovery completed in the litigation or in parallel actions may often be important. In addition, as suggested by Rule 23(b)(3)(A), the existence of other pending or anticipated litigation on behalf of class members involving claims that would be released under the proposal is often important.

The proposed handling of an attorney fee award under Rule 23(h) is another topic that ordinarily should be addressed in the parties' submission to the court. In some cases, it will be important to relate the amount of an attorney fee award to the expected benefits to the class, and to take account of the likely take-up rate. One method of addressing this issue is to defer some or all of the attorney fee award determination until the court is advised of the actual take-up rate and results. Another topic that normally should be included in the report is identification of any agreement that must be identified under Rule 23(e)(3).

The parties may supply information to the court on any other topic that they regard as pertinent to the determination whether the proposal is fair, reasonable, and adequate. The court may direct the parties to supply further information about the topics they do address, or to supply information on topics they do not address. It must not direct notice to the class until the parties' submissions demonstrate the likelihood that the court will have a basis to approve the proposal after notice to the class and a final approval hearing.

(2) 23(f) and the Rule 23(e)(1) order for notice to the class

Rule 23. Class Actions

* * * * *

(f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An order under Rule 23(e)(1) may not be appealed under Rule 23(f). An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

Sketch of Draft Committee Note

Subdivision (f). As amended, Rule 23(e)(1) provides that the court should direct notice to the class regarding a proposed class-action settlement in cases in which class certification has not yet been granted only after determining that the prospect of eventual class certification justifies giving notice. This decision is often characterized as a "preliminary approval" of the proposed class certification. But it is not a final approval of class certification, and review under Rule 23(f) would be premature. This amendment makes it clear that the court of appeals may not permit an appeal under this rule until the district court decides whether to certify the class. If it approves the settlement as well, that may often lead to entry of an appealable judgment. If it does not approve class certification -- thus leaving class certification for litigation purposes for possible later resolution -- there is no order subject to review under Rule 23(f).

(3) Clarifying that Rule 23(e)(1) notice triggers the opt-out period

Rule 23. Class Actions

* * * * *

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses

* * * * *

(2) *Notice.*

* * * * *

(B) *For (b)(3) Classes.* For any class certified under Rule 23(b)(3), or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified [for settlement] under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances to all members who can be identified through reasonable effort. * * * * *

Sketch of Draft Committee Note

As amended, Rule 23(e)(1) provides that the court must direct notice to the class regarding a proposed class-action settlement only after determining that the prospect of class certification and approval of the proposed settlement justifies the giving of notice. This decision is sometimes called a "preliminary approval" of the proposed class certification in Rule 23(b)(3) actions, and it is commonplace that notice to the class is sent simultaneously under both Rule 23(e)(1) and Rule 23(c)(2)(B), including a provision for class members to decide by a certain date whether to opt out. This amendment recognizes the propriety of that practice. Requiring repeat notices to the class can be wasteful and confusing to the class members.

(4) Notice in 23(b)(3) class actions

Rule 23. Class Actions

* * * * *

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses

* * * * *

(2) *Notice*

* * * * *

(B) *For (b)(3) Classes.* For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice [by the most appropriate means, including first class mail, electronic, or other means] {by first class mail, electronic mail, or other appropriate means} to all members who can be identified through reasonable effort. * * * * *[1]

Sketch of Draft Committee Note

Subdivision (c)(2). Since Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974), interpreted the rule's individual notice requirement for class members in Rule 23(b)(3) class actions, many courts interpreted that requirement to mean that first class mail would be necessary in every case. But technological change since 1974 has meant that other forms of communication are more reliable and important to many. As that technological change has evolved, courts and counsel have begun to employ new technology to make notice more effective, and sometimes less costly.

Rule 23(c)(2)(B) is amended to take account of these changes, and to call attention to them. No longer should courts assume that first class mail is the "gold standard" for notice in Rule 23(b)(3) class actions. As amended, the rule calls for giving notice "by the most appropriate means." It does not specify any particular means as preferred. Although it may often be true that online methods of notice, for example by email, are the most promising, it is important to keep in mind that a significant portion of class members in certain cases may have limited or no access to the Internet.

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[1] The alternative language was suggested by a Subcommittee member.

Instead of assuming one size fits all, therefore, courts and counsel should focus on the means most likely to be effective to notify class members in the case before the court. Professional claims administration firms have achieved expertise in evaluating differing methods of reaching class members. There is no requirement that such professional assistance be sought in every case, but in appropriate cases it may be important, and provide a resource for the court and counsel. In providing the court with information supporting notice to the class of a proposed class-action settlement under Rule 23(e)(1), for example, it may often be important to include a report about the proposed method of giving notice to the class, and perhaps a forecast of the anticipated take-up rate, as well as the proposed form of notice and any proposed claims form.

[Careful attention should also be given to the content and format of the notice and any claim form. The ultimate goal of giving notice is to enable class members to make decisions about whether to opt out or object, or to make claims. The rule requires that the court use the "best notice that is practicable." To achieve that goal, attention to format and content are in order. Format and content that would be appropriate for class members likely to be sophisticated, for example in a securities fraud class action, might not be appropriate for a class made of up of members likely to be less sophisticated. As with the method of notice, the form of notice should be tailored to the class members' expectations and capabilities.

Particular attention to the method for class members to make claims is an important ingredient of the process of developing the notice and claims process. Although it is important to guard against groundless claims by purported class members, it is also important to avoid making the claims process unnecessarily burdensome, particularly when the amounts available for successful claimants are relatively small. Submissions to the court under Rule 23(e)(1) often should address the possibility that after initial submission of claims a residue of funds will be left for further distribution. In addition, it may often be desirable for the court to direct that the parties report back at the end of the claims distribution process about the actual pay-out rate. The goal of a notice and claims process in a Rule 23(b)(3) class action is to deliver relief to the class members. A claims process that maximizes delivery of relief to class members should be a primary objective of the notice program.

Attention should focus also on the method of opting out provided in the notice. As with making claims, the process of opting out should not be unduly difficult or cumbersome. At the same time, it is important to guard against the risk of unauthorized opt-out notices. As with other aspects of the notice process, there is no single method that is suitable for

all cases.][2]

This amendment recognizes that technological change since 1974 calls for recalibrating methods of notice to take account of current realities. There is no reason to think that technological change will halt soon, and there is no way to forecast what further technological developments will affect the methods used to communicate. Courts seeking "the most appropriate means" of giving notice to class members under this rule should attend to existing technology, including class members' likely access to that technology, when reviewing the methods proposed in specific cases.

[2] This Note discussion draws from comments made to the Subcommittee in numerous conferences. It is supported by the rule's current reference to the "best notice that is practicable." It might be debated whether that rule language, which has long been in the rule, precisely supports this Note language, for the Note is mainly about the changes being proposed for the rule, not what has long been in it. But the amendment addresses "appropriate" notice methods, so a Note that addresses questions of format and content based on experience seems in order.

(5) Objectors

Although the Subcommittee's many conferences and meetings with experienced class-action lawyers have revealed considerable disagreement about many of the topics discussed, this topic is one on which there was widespread agreement, if not virtual unanimity. Even those who have presented objections to class-action settlements in many instances also express chagrin about the behavior of some objectors or objector counsel who exploit the objection process, and the ability to appeal from denial of an objection, to extract unjustified payments from class counsel desirous of completing the settlement and delivering the agreed relief to the members of the class.

The amendment ideas below essentially adopt two methods for dealing with these problems. First, the rule would direct objectors to state the grounds for their objections. The Subcommittee has been informed that, on occasion, objectors submit virtual one-line objections that are placeholders for appeals that in turn present the opportunity to extract tribute from class counsel. Not only does that behavior constitute a sort of a "tax" on successful class actions, it also denies the district court the benefit of a ground for evaluating the objections it receives.

The idea of objector disclosure was suggested to the Subcommittee during the conferences it attended after the full Committee's April meeting, and initially produced a detailed list of items that an objector would have to provide the court. Although a demanding list of disclosure requirements might be an inviting way of dealing with bad faith objectors, such requirements could also constitute an undue obstacle to objections by other class members not intent on extracting tribute. Accordingly, the sketch below is more general about what must be disclosed, and includes bracketed language that might strengthen this aspect of this approach.

The second feature of this amendment approach seeks to remove, or at least to regulate, the apparent inducement for bad faith objections -- the pay off. It builds on suggestions made to the Civil Rules Committee and to the Appellate Rules Committee recommending that there be a complete prohibition of any payment to objectors or objector counsel. The sketch below does not go that far. Instead, it builds on the 2003 amendments to Rule 23, which in Rule 23(e)(5) already require that an objector who wants to withdraw an objection must obtain the court's approval to do so. This approach is designed to put the court in a position to review any such payment rather than prohibit all such payments.

The appropriate court to make the approval decision is not certain. An initial reaction might be that the district court, having recently performed the review required under Rules

23(e)(1) and 23(e)(2) would be in a much better position than the court of appeals, which may be unfamiliar with the case. The Subcommittee has been told that often the "payoff" sort of situation arises shortly after the notice of appeal is filed, or even before it is filed. If that is so, it seems likely that the district court would be much better situated than the court of appeals to evaluate the matter.

On the other hand, it is possible that the question could arise much later in the process. An FJC study several years ago revealed that there is a striking divergence among circuits with regard to the resolution of objector appeals on the merits. The "hold up" paradigm for the sort of objector behavior addressed in this sketch seems to presume an early deal and no resolution on the merits. In two of the circuits studied by the FJC that was what happened in the great majority or all the objector appeals during the period studied. But in another circuit about two-thirds of the objector appeals resulted in an appellate decision on the merits of the objector's appeal. At least in that circuit, it may be that after the appeal has resulted in substantial appellate proceedings, the court of appeals is better equipped to evaluate a proposed dismissal of the appeal than the district court, which may not have seen the case for a year or two.

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

* * * * *

(5) **(A)** Any class member may object to the proposal if it requires court approval under this subdivision (e)~~(1)~~. The objection must [state whether the objection applies only to the objector or to the entire class, and] state [with specificity] the grounds for the objection. [Failure to state the grounds for the objection is a ground for rejecting the objection.]

(B) T~~t~~he objection, or an appeal from an order denying an objection, may be withdrawn only with the court's approval. If [a proposed payment in relation to] a motion to withdraw an appeal was referred to the court under Rule 42(c)[3] of the

[3] For purposes of discussion at this meeting, one possibility that has been the subject of discussions with the

Federal Rules of Appellate Procedure, the court must inform the court of appeals of its action.[4] [5]

Appellate Rules Committee is the addition of an Appellate Rule 42(c), providing as follows:

> **(c) Dismissal of Class-Action Objector's Appeal.** A motion to dismiss an appeal from an order denying an objection made to approval of a class-action settlement under Rule 23(e)(5) of the Federal Rules of Civil Procedure [must][may] be referred to the district court for its determination whether to permit withdrawal of the objection and appeal under Rule 23(e)(5)(B) [if the objector or the objector's counsel is to receive any payment or consideration in [exchange for] {connection with} dismissal of the appeal].

The use of "may" above recognizes that the court of appeals may wish to deal with the matter itself. For one thing, if no payment or consideration is to be paid to the objector or objector counsel, there may be no reason for reference to the district court. For another, there may be cases in which the court of appeals concludes that it is better situated to resolve the matter than the district court. If the motion to withdraw the appeal arises shortly after the notice of appeal is filed, and therefore also shortly after the district court has reviewed the proposed settlement and rejected the objection, it would be unlikely the court of appeals would feel itself better equipped to deal with the matter. On the other hand, if the appeal has been fully briefed and argued, the court of appeals may be more familiar with the issues than the district court, for the district court's action might be several years old by then.

[4] The sketch presents in brackets the question whether the rule should be directed only to withdrawal of an objection or dismissal of an appeal, or instead to payment to the objector or objector counsel for withdrawing the objection or appeal. Current Rule 23(e)(5) focuses only on withdrawal of the objection. That may be sufficient. But it would seem that many objections are, in effect, abandoned after the class member obtains a fuller understanding of the issues. Whether one wants to burden that withdrawal with a court-approval requirement could be debated. On the other hand, it may be that the filing of a notice of appeal shows that something more serious is going forward. Then perhaps the focus on payment should be more pronounced. This issue has been discussed by the Subcommittee and it continues to consider the right balance.

[5] Another consideration might be whether to include something like current Rule 23(e)(3), which requires

Alternative 1

(C) Unless approved by the district court, no payment may be made to any objector or objector's counsel in [exchange for] {connection with} withdrawal of an objection or appeal from denial of an objection.

Alternative 2

(C) The court must approve any payment to the objector in connection with withdrawing the objection or[, if acting on referral from the court of appeals, withdrawing] an appeal from denial of an objection.[6]

[This sketch assumes collaborative work with the Appellate Rules Committee on devising a combination of Civil Rule and Appellate Rule provisions that would suitably implement the regime of judicial review of any dismissal of an appeal from denial of an objection. Communications are under way with the Appellate Rules Committee to develop a coordinated response. The content of any amendments to the Appellate Rules is committed to the Appellate Rules Committee. One possible place for an Appellate Rule would be in Rule 42, which is why that designation is used in the above sketch of a Civil Rules.]

Sketch of Draft Committee Note

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identification of "side agreements" reached in connection with proposed settlements. Perhaps requiring disclosure (not just identification) of such side agreements would be a good idea in connection with proposed withdrawal of an objection or appeal from denial of the objection. That might somewhat sidestep the question of having a rule require court approval for payments themselves, as opposed to court approval for withdrawal of the objection or dismissal of the appeal.

[6] As a matter of form of amendment, it has been suggested that the better way to present an amendment along these lines would be to retain the first portion of the rule ("Any class member may object to the proposal if it requires court approval.") as 23(e)(5), and to make the remainder of (A) new Rule 23(e)(5)(A). Then (B) and (C) might be combined. These drafting possibilities will be kept in mind as the Subcommittee moves forward.

Subdivision (e)(5). Objecting class members can play a critical role in the Rule 23(e) process. They can be a source of important information about possible deficiencies in a proposed settlement, and thus provide assistance to the court. With access to the information regarding the proposed settlement submitted to the court under Rule 23(e)(1), objectors can make an accurate appraisal of the merits and possible failings of a proposed settlement. By raising these matters, they can assist the court in making its decision whether to approve the settlement.

The amendment therefore directs that objections state [with specificity] the grounds on which they are made. A simple "I object" does not assist the court in evaluating the proposal. [Accordingly, the amended rule specifies that failure to state the grounds for the objection is a reason to reject the objection during the final approval process.] Care must be taken, however, to avoid unduly burdening class members who wish to object. Particularly if they are not assisted by counsel, class members cannot be expected to present objections that adhere to technical legal requirements. Instead, they should only be expected to specify what aspect of the settlement they find objectionable. [In particular, they should state whether they are objecting only for themselves, for the entire class, or for some discrete part of the class.] With these specifics, the court and the parties may suitably address the concerns raised during the final approval hearing.

The rule is also amended to require court approval of any payment to an objector or objector's counsel in exchange for withdrawing an objection or appeal from denial of an objection. Although good-faith objections have provided assistance to courts reviewing proposed settlements, the Committee has been informed that in at least some instances objectors or their counsel appear to be acting in counterproductive ways. Some may submit delphic objections that do not go much beyond "I object," and thus do not assist the court in evaluating the proposed settlement. The requirement that the objection state the grounds [and authority to reject any objection that does not] addresses this problem.

Another problem is that objectors may exploit the delay potential of an appeal to extract concessions for themselves. The 2003 amendments to Rule 23 permitted withdrawal of an objection before the district court only with that court's approval, an initial step to assure judicial supervision of the objection process. Whatever the success of that measure in ensuring the district court's ability to supervise the behavior of objectors during the Rule 23(e) review process, it seems not to have had a significant effect on the handling of objector appeals. But the delay resulting from an objector appeal may enable objectors to extract special concessions in return for

dropping the appeal. That is certainly not to say that most objector appeals are intended for inappropriate purposes, but only that some may have been pursued inappropriately, leading class counsel to conclude that a substantial payment to the objector or the objector's counsel is warranted -- without particular regard to the merits of the objection -- in order to enable the class to receive the benefits of the settlement.

This amendment therefore extends the requirement of court approval to apply to withdrawal of an appeal as well to withdrawal of an objection before the district court whether or not the objector or objector counsel is to receive a payment or other consideration for dropping the appeal. A parallel amendment to Appellate Rule 42(c) confirms that the Court of Appeals may refer the question whether to approve the dismissal of the appeal to the district court upon receipt of a motion to dismiss the appeal. The district court is likely often to be better equipped to decide whether to approve the payment than the court of appeals because the district court is more familiar with the case and with the settlement.

[In reviewing requests for withdrawal of an appeal -- as with requests for approval of withdrawal of an objection before the district court under current Rule 23(e)(5) -- the court should adopt a standard of reasonableness. Attention should focus particularly on instances in which a payment is to be made to the objector or objector counsel in return for the withdrawal. The request for approval should include details on any agreements made in connection with the withdrawal.

When the payment recognizes that the objector is in a distinctive or unique position that warrants treatment different from the other members of the class, that would ordinarily be a ground for approving the payment. When the objection results in a change in the settlement that affords additional relief to other class members as well as the objector, that would ordinarily be a sufficient basis for approving the payment [unless the amount of the payment is disproportionate to the overall benefits for other members of the class]. Even if the objection does not result in any change to the proposal, it may be that it assisted the district court in evaluating the proposal. For example, it may be that the objection enabled more careful review of certain aspects of the proposal or the value of the entire proposal. Even if the court concluded, after that review of the adequacy of the proposal, that approval was warranted, the value of the objection to the review process may justify a reasonable payment to the objector or objector counsel.][7]

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[7] The bracketed paragraphs are largely about the standards the court might use when passing on requests to withdraw an

(6) Settlement approval criteria

The Subcommittee early focused on the diversity and divergence of settlement-approval "checklists" employed in various circuits. The ALI had expressed concern in its Aggregate Litigation Principles that existing precedent produced an unduly diffuse and unfocused settlement review process, frustrating both judges and lawyers.

In place of that existing process, the Subcommittee presented in April a sketch that emphasized four approval principles and also contained a "catch all" authorization to consider whatever else the court thought important. During the April Committee meeting, it was suggested that a revised sketch for discussion at the mini-conference omit the catch-all provision.

The issues memorandum for the Sept. 11 mini-conference included such a sketch. It produced concern that in given cases other matters not directly invoked among the four factors distilled in the Subcommittee's list could matter enough to mention the possibility that such factors supported rejection of the proposal. Accordingly, both alternatives below offer a version of a "catch all" authorization for consideration of other things. At the same time, it might be argued that the listed four factors suffice for this purpose, and that anything that might trouble a court should bear on one of those four factors. Indeed, as the brackets around factor (B) suggest, it might be that we need only three, and can trust factor (A) to cover the problems that might also be presented under factor (B).

The sketch below also includes two alternative formulations. It could be said that Alternative 2 is more focused, and potentially more confining than Alternative 1. Alternative 1 merely says that the court should consider the listed factors in deciding whether the proposed settlement is "fair, reasonable, and adequate." It may be that this phrase, in the current rule, is so elastic as to encompass virtually any factor ever mentioned by any court considering a class-action settlement. Alternative 2 may be more focused, since it says that the court must find that all four (or three) factors are met. So it could be that in a given case a judge would consider approval forbidden under Alternative 2, even though the proposed settlement would be found

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objection or dismiss an appeal. It might be argued that they go too far beyond the actual provisions of the rule. On the other hand, the rule does require court approval, so Note language about how the court should approach that duty seems legitimate. It could also be noted that the court of appeals may sometimes be able to apply these standards when the appellant moves to dismiss an appeal.

fair, reasonable, and adequate using the more expansive direction in Alternative 1, and would win approval under that alternative.

The Subcommittee is somewhat divided on whether to adopt Alternative 1 or Alternative 2. In part, this division results from debates about the extent to which a rule should constrain courts in their review of proposed settlements. It also results from uncertainty about whether any rule would really constrain courts if it turns on whether the judge thought the settlement "fair, reasonable, and adequate."

There may also be some disagreement on the Subcommittee on whether either of these formulations -- particularly with a "catch all" provision -- would actually change judicial behavior. One view is that they would not, since judges could continue to do exactly what they did before the amendment. Another view is that such a rule change would provide much-needed structure and focus for the settlement-review process. It would also provide a basis for judges in any district to look to decisions in any other district for guidance in that process, without the complication that the other district was employing a different circuit's list of factors.

The Subcommittee is presenting these two alternatives to the full Committee, along with the question whether to include a "catch all" provision. Although it has not reached consensus as between Alternative 1 and Alternative 2, it is persuaded that the choice is not of monumental importance.

Rule 23. Class Actions

* * * * *

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise.

* * * * *

Alternative 1

(2) If the proposal would bind class members, the court [may disapprove it on any ground the court deems pertinent to approval of the proposal, but] may approve it only after a hearing and [only] on finding that it is fair, reasonable, and adequate~~.~~, considering whether:

Alternative 2

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that: ~~it is fair, reasonable, and adequate.~~

(A) the class representatives and class counsel have [been and currently are] adequately represented [representing] the class [in preparing to negotiate the settlement];

[(B) the settlement was negotiated at arm's length and was not the product of collusion;]

(C) the relief awarded to the class -- taking into account the proposed attorney fee award [and the timing of its payment,] and any ancillary agreement made in connection with the settlement -- is fair, reasonable, and adequate, given the costs, risks, probability of success, and delays of trial and appeal; [and]

(D) class members are treated equitably relative to each other [based on their facts and circumstances and are not disadvantaged by the settlement considered as a whole] and the proposed method of claims processing is fair [and is designed to achieve the goals of the class action]; [and]

[(E) approval is warranted in light of any other matter that the court deems pertinent.]

[For purposes of simplicity, the draft Committee Note below assumes that Alternative 1 will be adopted.]

Sketch of Draft Committee Note

Subdivision (e)(2). Since 1966, Rule 23(e) has provided that a class action may be settled or dismissed only with the court's approval. Many circuits developed lists of "factors" to be considered in connection with proposed settlements, but these lists were not the same, were often long, and did not explain how the various factors should be weighed. In 2003, Rule 23(e) was amended to clarify that the court should approve a proposed class-action settlement only if it is "fair, reasonable, and adequate." Nonetheless, in some instances the existing lists of factors used in various circuits may have been employed in a

"checklist" manner that has not always best served courts and litigants dealing with settlement-approval questions.

This amendment is designed to provide more focus for courts called upon to make this important decision. Rule 23(e)(1) is amended to ensure that the court has a broader knowledge base when initially reviewing a proposed class-action settlement and deciding whether giving notice to the class is warranted by the prospect that the settlement will win final approval. The submissions to the court under Rule 23(e)(1), supporting notice to the class, should provide class members with more information to evaluate a proposed settlement. Objections under Rule 23(e)(5) can therefore be calibrated more carefully to the actual specifics of the proposed settlement. Rule 23(e)(5) is amended to direct objectors to state the grounds for their objections, which should assist the court and the parties in connection with the possible final approval of the proposed settlement.

Amended Rule 23(e)(2) builds on the knowledge base provided by the Rule 23(e)(1) disclosures and any objections from class members. It focuses the court and the parties on the core considerations that should be the prime factors in making the final decision whether to approve a settlement proposal. It is not a straitjacket for the court, but does recognize the central concerns that judicial experience has shown should be the main focus of the court as it makes a decision whether to approve the settlement.

Paragraphs (A) and (B). These paragraphs identify matters that might be described as "procedural" concerns, looking to the conduct of the litigation and of the negotiations leading up to the proposed settlement. If the court has appointed class counsel or interim class counsel, it will have made an initial evaluation of counsel's capacities and experience. But the focus at this point is on the actual performance of counsel acting on behalf of the class.

The information submitted under Rule 23(e)(1) may provide a useful starting point in assessing these topics. For example, the nature and amount of discovery may indicate whether counsel negotiating on behalf of the class had an adequate information base. The pendency of other litigation about the same general subject on behalf of class members may also be pertinent. The conduct of the negotiations may also be important. For example, the involvement of a court-affiliated mediator or facilitator in those negotiations may bear on whether they were conducted in a manner that would protect and further the class interests.

In making this analysis, the court may also refer to Rule 23(g)'s criteria for appointment of class counsel; the concern is whether the actual conduct of counsel has been consistent with

what Rule 23(g) seeks to ensure. Particular attention might focus on the treatment of any attorney fee award, both in terms of the manner of negotiating the fee award and the terms of the award.

Paragraphs (C) and (D). These paragraphs focus on what might be called a "substantive" review of the terms of the proposed settlement. A central concern is the relief that the settlement is expected to provide to class members. Evaluating the proposed claims process and expected or actual claims experience (if the notice to the class calls for simultaneous submission of claims) may bear on this topic. The contents of any agreement identified under Rule 23(e)(3) may also bear on this subject, in particular the equitable treatment of all members of the class.

Another central concern will relate to the cost and risk involved in pursuing a litigated outcome. Often, courts may need to forecast what the likely range of possible classwide recoveries might be and the likelihood of success in obtaining such results. That forecast cannot be done with arithmetic accuracy, but it can provide a benchmark for comparison with the settlement figure. And the court may need to assess that settlement figure in light of the expected or actual claims experience under the settlement.

[If the class has not yet been certified for trial, the court may also give weight to its assessment whether litigation certification would be granted were the settlement not approved.]

Examination of the attorney fee provisions may also be important to assessing the fairness of the proposed settlement. Ultimately, any attorney fee award must be evaluated under Rule 23(h), and no rigid limits exist for such awards. Nonetheless, the relief actually delivered to the class is often an important factor in determining the appropriate fee award. Provisions for reporting back to the court about actual claims experience, and deferring a portion of the fee award until the claims experience is known, may bear on the fairness of the overall proposed settlement.

Often it will be important for the court to scrutinize the method of claims processing to ensure that it is suitably receptive to legitimate claims. A claims processing method should deter or defeat unjustified claims, but unduly demanding claims procedures can impede legitimate claims. Particularly if some or all of any funds remaining at the end of the claims process must be returned to the defendant, the court must be alert to whether the claims process is unduly exacting.

[**Paragraph (E).** Rule 23(e)(5)'s distillation of core

settlement-approval criteria does not prevent the court from considering any other matter that, in its discretion, appears pertinent to the overall fairness, reasonableness, or adequacy of the proposal. In order to permit effective evaluation of such matters, the court may direct the parties to provide information that will assist in its review of the settlement.]

Ultimately, the burden of establishing that a proposed settlement is fair, reasonable, and adequate rests on the proponents of the settlement. But no formula is a substitute for the informed discretion of the district court in assessing the overall fairness of proposed class-action settlements. Rule 23(e)(2) provides the focus the court should use in undertaking that analysis.

Composite of possible amendments
that might become an amendment package

In order to facilitate comprehension of the overall package of possible amendments, the following attempts to combine all six sketches above into a single presentation. Before any such package goes forward, it would certainly be modified and refined. Nonetheless, the overall composite may be helpful to Committee members.

Rule 23. Class Actions

* * * * *

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses

* * * * *

(2) ***Notice***

* * * * *

(B) *For (b)(3) Classes.* For any class certified under Rule 23(b)(3), or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified [for settlement] under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice [by the most appropriate means, including first class mail, electronic, or other means] {by first class mail, electronic mail, or other appropriate means} to all members who can be identified through reasonable effort. * * * * *

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class, or a class proposed to be certified as part of a settlement, may be settled, voluntarily dismissed or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) After the parties have provided [relevant] {sufficient} information about the proposed settlement, ~~T~~the court must direct notice in a reasonable manner to all class members who would be bound by the proposal if it determines that giving notice is justified by the prospect of class certification and approval of the proposal.

Alternative 1

(2) If the proposal would bind class members, the court [may disapprove it on any ground the court deems pertinent to approval of the proposal, but] may approve it only after a hearing and [only] on finding that it is fair, reasonable, and adequate~~.~~, considering whether:

Alternative 2

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that: ~~it is fair, reasonable, and adequate.~~

(A) the class representatives and class counsel have [been and currently are] adequately represented [representing] the class [in preparing to negotiate the settlement];

[(B) the settlement was negotiated at arm's length and was not the product of collusion;]

(C) the relief awarded to the class -- taking into account the proposed attorney fee award [and timing of its payment,] and any ancillary agreement made in connection with the settlement -- is fair, reasonable, and adequate, given the costs, risks, probability of success, and delays of trial and appeal; and

(D) class members are treated equitably relative to each other [based on their facts and circumstances and are not disadvantaged by the settlement considered as a whole] and the proposed method of claims processing is fair [and is designed to achieve the goals of the class action].

[(E) approval is warranted in light of any other matter that the court deems pertinent.]

* * * * *

(5) (A) Any class member may object to the proposal if it requires court approval under this subdivision (e)~~,~~. The objection must [state whether the objection applies only to the

objector or to the entire class, and] state [with specificity] the grounds for the objection. [Failure to state the grounds for the objection is a ground for rejecting the objection.]

(B) Tthe objection, or an appeal from an order denying an objection, may be withdrawn only with the court's approval. If [a proposed payment in relation to] a motion to withdraw an appeal was referred to the court under Rule 42(c) of the Federal Rules of Appellate Procedure, the court must inform the court of appeals of its action.

Alternative 1

(C) Unless approved by the district court, no payment may be made to any objector or objector's counsel in [exchange for] {connection with} withdrawal of an objection or appeal from denial of an objection.

Alternative 2

(C) The court must approve any payment to the objector in connection with withdrawing the objection or[, if acting on referral from the court of appeals, withdrawing] an appeal from denial of an objection.

(f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An order under Rule 23(e)(1) may not be appealed under Rule 23(f). An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

Topics on which the Subcommittee is not recommending we go forward now

Based on the input it has received, including the mini-conference, the Subcommittee is not bringing forward several topics on which it has spent considerable time. These topics fall into essentially three categories.

(1) The first includes two topics that are "on hold" -- "ascertainability" and "pick-off" offers of judgment or settlement offers. The Subcommittee has concluded that activity on these topics is not warranted at this time, but recognizes that developments in the relatively near future may mean that it may be suitable for the Subcommittee to return to one or the other of these topics in light of developments.

(2) The second category includes one topic -- settlement class certification -- which the Subcommittee initially concluded should be dropped from the agenda, but later concluded should be presented to the full Committee without a Subcommittee recommendation

(3) The third category includes another two topics -- cy pres provisions and issue class certification. The Subcommittee has concluded that these topics should be dropped from the Subcommittee's current agenda because there is no need for current rule-amendment action, or too many questions about what that action might be, to warrant further work at this time.

(1) Topics "on hold"

Ascertainability

During the April, 2015, meeting of the full Committee, the conclusion was reached that the Subcommittee should examine the question of ascertainability. Since then, it has received much advice and commentary about this subject, and it included a segment on ascertainability in the issues memo for the mini-conference that is included in this agenda book. That memorandum presented a sketch of a possible "minimalist" rule change dealing with ascertainability issues that was unfavorably received by a number of participants in the mini-conference. As reflected in the Subcommittee's post-conference meeting, the Subcommittee concluded that the state of the law on this topic was too unsettled, and that any effort to address it now by pursing rule amendments would present great difficulties. Particularly because this issue was discussed during the Committee's April meeting, a rather full discussion is presented here even though the Subcommittee does not presently recommend proceeding with rule-amendment ideas.

In order to provide some examples of ascertainability decisions, included in the agenda book should be three recent court of appeals decisions grappling with the concept: Brecher v. Republic of Argentina, ___ F.3d ___, 2015 WL 5438797 (2d Cir. No. 14-4385, Sept. 16, 2015); Mullins v. Direct Digital, LLC, 795 F.3d 654 (7th Cir. 2015); and Byrd v. Aaron's, Inc., 784 F.3d 184 (3d Cir. 2015). All three of these cases have been decided since the Committee's April meeting, and they illustrate the unsettled nature of the law, and the variety of issues that this general topic can encompass.

A starting point in approaching these issues is to recognize that a number of Rule 23 provisions deal with matters that relate to concerns addressed under the heading ascertainability. Thus:

> Rule 23(a) refers to a suit on behalf of "members of a class," implying that one must be able to define who is in the class.
>
> Rule 23(a)(1) says that a class action is proper only if the "class" is so numerous that joinder of all members is impracticable, implying that there must be a way to determine who is in the class.
>
> Rule 23(c)(1)(B) directs the court, upon certifying the class action to "define the class."
>
> Rule 23(c)(2)(B) says that in Rule 23(b)(3) class actions the court must direct individual notice to "all members who can be identified through reasonable effort."

> Rule 23(c)(3)(A) says that the judgment in a (b)(1) or (b)(2) class action must "describe those whom the court finds to be class members" and that the judgment binds them.
>
> Rule 23(c)(3)(B) says that the judgment in a (b)(3) class action should specify those "whom the court finds to be class members" and that the judgment binds them.

The list goes on. For decades it is been apparent that the proponent of class treatment must provide a reasonable definition of the proposed class; "all those similarly situated" usually would not suffice.

A recurrent theme has been that the definition must be objective, and eschew reliance on potential class members' state of mind. Another concern has been the "fail safe" class defined as something like "all those injured by defendant's illegal behavior." In that situation, a defendant victory would mean that there are no members of the class.

Thus, a considerable body of case law has developed on Rule 23's expectations about class definition. Recently, in part sparked by a series of Third Circuit decisions, the "implicit" requirement of ascertainability has emerged in the decisions of some courts. In significant measure, cases have focused on problems of identifying all class members, and whether a form of self-identification (e.g., by affidavit) should suffice initially for that purpose. Some have emphasized the need to ensure at the class certification stage that no difficulties will be encountered later in the case when the proceeds of the action are to be distributed to class members. Others have regarded such efforts as premature and unnecessary at the class certification stage.

It seems widely agreed that the most significant category of cases involving ascertainability problems are consumer class actions involving low-value products purchased by retail consumers who probably do not retain receipts. Identifying all such people may prove quite difficult. Verifying that they actually made the purchases might be quite burdensome to the class opponent and the court.

Various of the submissions to the Subcommittee that are mentioned at the beginning of this memorandum illustrate ways that experienced lawyers favored rule amendments to address this issue:

> No. 15-CV-D, from Professors Adam Steinman, Joshua Davis, Alexandra Lahav & Judith Resnik, proposes adding the following to Rule 23(c)(1)(B):
>
> > A class definition shall be stated in a manner that

> such an individual could ascertain whether he or she is potentially a member of the class.

No. 15-CV-I, from Jennie Anderson, proposes adding the following to Rule 23(c)(1)(B):

> An order must define the class in objective terms so that a class member can ascertain whether he or she is a member of the class. A class definition is not deficient because it includes individuals who may be ineligible for recovery.

No. 15-CV-J, from Frederick Longer proposes addressing the "splintering interpretation" of ascertainability by adding the following to Rule 23(c)(2)(B)(ii):

> the definition of the class in clear terms so that class members can be identified and ascertained through ordinary proofs, including affidavits, prior to issuance of a judgment.

No. 15-CV-N, from Public Justice, proposes adding the following to Rule 23(c)(1)(B):

> In certifying a class under Rule 23(b)(3), the court must define the class so that it is ascertainable by reference to objective criteria. The ascertainability or identifiability of individual class members is not a relevant consideration at the class certification stage.

No. 15-CV-P, from the National Consumer Law Center and National Assoc. of Consumer Advocates proposes adding the following to Rule 23(c)(1)(B):

> A class is sufficiently defined if the class members it encompasses are described by reference to objective criteria. It is not necessary to prove at the class certification stage that all class members can be precisely identified by name and contact information.

The case law, meanwhile, appears fluid. The three recent decisions included in this agenda book illustrate the point. In Brecher v. Republic of Argentina, ___ F.3d ___ (2d Cir. No. 14-4385, Sept. 16, 2015), the court observed (citations omitted):

> Like our sister Circuits, we have recognized an "implied requirement of ascertainability" in Rule 23 of the Federal Rules of Civil Procedure. While we have noted this requirement is distinct from predominance, we have not further defined its content. We here clarify that the touchstone of ascertainability is whether the class is

> "sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member." "A class is ascertainable when defined by objective criteria that are administratively feasible and when identifying its members would not require a mini-hearing on the merits of each case."
>
> On appeal, Appellee argues that a class defined by "reference to objective criteria . . . is all that is required" to sustain ascertainability. We are not persuaded. * * * [T]he use of objective criteria cannot alone determine ascertainability when those criteria, taken together, do not establish the definite boundaries of a readily identifiable class.

The court found that, under the rather distinctive circumstances of the litigation before the court on behalf of those with beneficial interests in Argentinean bonds, the ascertainability requirement was not satisfied. The following discussion illustrates the difficulties that persuaded the court that the case was different from ordinary consumer class actions, such as actions on behalf of recipients of gift cards. The court's analysis of this contrast illustrates the fact-bound nature of potential ascertainability analyses:

> Appellee argued that the class here is comparable to those cases involving gift cards, which are fully transferable instruments. However, gift cards are qualitatively different: For example, they exist in a physical form and possess a unique serial number. By contrast, an individual holding a beneficial interest in Argentina's bond series possesses a right to the *benefit* of the bond but does not hold the physical bond itself. Thus, trading on the secondary market changes only to whom the benefit inures. Further, all bonds from the same series have the same trading number identifier (called a CUSIP/ISIN) making it practically impossible to trace purchases and sales of a particular beneficial interest. Thus, when it becomes necessary to determine who holds bonds that opted into (or out of) the class, it will be nearly impossible to distinguish between them once traded on the secondary market.

This analysis suggests some of the challenges that framing an ascertainability rule might present.

In Mullins v. Direct Digital, LLC, 795 F.3d 654 (2d Cir. 2015), the court cited Third Circuit precedent (including the Third Circuit's Byrd v. Aaron's decision included in the agenda materials) and referred to "doctrinal drift" toward what it described as a "heightened" ascertainability requirement that "has defeated certification, especially in consumer class

actions.". It explained:

> We decline to follow this path and will stick with our settled law. Nothing in Rule 23 mentions or implies this heightened requirement under Rule 23(b)(3), which has the effect of skewing the balance that district courts must strike when deciding whether to certify classes. The policy concerns motivating the heightened ascertainability requirement are better addressed by applying carefully the explicit requirements of Rule 23(a) and especially (b)(3). These existing requirements already address the balance of interests that Rule 23 is designed to protect. A court must consider "the likely difficulties in managing a class action," but in doing so it must balance countervailing interests to decide whether a class action "is superior to other available methods for fairly and efficiently adjudicating the controversy."

In particular, the Seventh Circuit pointed out, "some courts have used this requirement to erect a nearly insurmountable hurdle at the class certification stage in situations where a class action is the only viable way to pursue valid but small individual claims," worrying that the Third Circuit approach "effectively bars low-value consumer class actions, at least where plaintiffs do not have documentary proof of purchases." It also noted, regarding the Third Circuit's cases, that "several members of the court [the Third Circuit] have expressed doubts about the expanding ascertainability doctrine," adding that "we agree in essence with Judge Rendell's concurring opinion in Byrd [v. Aaron's, Inc.], which urged "retreat from [the] heightened ascertainability requirement in favor of following the historical meaning of ascertainability under Rule 23."

In Byrd v. Aaron's, Inc., 784 F.3d 154 (3d Cir. 2015), the court reversed a district court's denial of class certification on grounds of ascertainability. It explained that "the District Court confused ascertainability with other relevant inquiries under Rule 23." It introduced its discussion as follows (id. at 161-62):

> Before discussing these errors, however, we believe it is necessary to address the scope and source of the ascertainability requirement that our cases have articulated. Our ascertainability decisions have been consistent and reflect a relatively simple requirement. Yet there has been apparent confusion in the invocation and application of ascertainability in this Circuit. (Whether that is because, for example, the courts of appeals have discussed ascertainability in varying and distinct ways, or the ascertainability requirement is implicit rather than explicit in Rule 23, we need not say.) Not surprisingly, defendants in class actions have seized upon this lack of

> precision by invoking the ascertainability requirement with increasing frequency in order to defeat class certification.

As noted above, Judge Rendell concurred in the holding that the district court's denial of class certification was wrong, but added the following (id. at 172):

> [T]he lengths to which the majority goes in its attempt to clarify what our requirement of ascertainability means, and to explain how this implicit requirement fits in the class certification calculus, indicate that the time has come to do away with this newly created aspect of Rule 23 in the Third Circuit. Our heightened ascertainability requirement defies clarification.

Having received much input about this issue, the Subcommittee has concluded that it is not prepared at present to advance a rule provision that would helpfully address this set of issues. As the discussion above shows, this area is still in a state of considerable flux. It might even receive Supreme Court attention in the near future. In any event, it does seem likely that the courts of appeals and district courts will continue to grapple with issues and that the "common law" of ascertainability will evolve and emerge during the coming months. Part of the reason for the gradual nature of this process is that aspects of this topic touch on very basic principles of class-action jurisprudence. Any attempt to modify the handling of those basic principles will likely produce very considerable controversy. Although that prospect is not an argument against proceeding with needed rule amendments, it is a reason for caution about proceeding before the actual state of the law has become clear enough to make the consequences of rulemaking relatively predictable.

Rule 68 and Pick-Off offers

The Subcommittee does not recommend proceeding with work on an amendment to address the problem presented by "pick off" offers of settlement of judgment or settlement that might moot the claims of proposed class representatives before class certification could be decided.

Until recently, the Seventh Circuit had held that, at least in some circumstances, such offers would moot proposed class actions. See Damasco v. Clearwire Corp., 662 F.3d 891 (7th Cir. 2011). In reaction, plaintiff lawyers inside and outside the Seventh Circuit filed "out of the chute" class certification motions to guard against mootness, because the Seventh Circuit regarded making such a motion as sufficient to cure the potential mootness problem. On occasion, plaintiffs would also move to stay resolution of the class-certification motion until discovery and other work had been done to support resolution of certification.

The issues memorandum for the mini-conference contained three different possible rule-amendment approaches for dealing with these problems. The memo also raised the question whether the problem warranted the effort involved in proceeding to amend the rules. After the mini-conference, the Subcommittee decided that proceeding at this time is not indicated.

In Chapman v. First Index, Inc., 796 F.3d 783 (7th Cir. 2015), the Seventh Circuit overruled *Damasco* and a number of its cases following that decision "to the extent they hold that a defendant's offer of full compensation moots the litigation or otherwise ends the Article III case or controversy." Judge Easterbrook noted that "Justice Kagan's dissent in Genesis Healthcare Corp. v. Symczyk, 133 S.Ct. 1523, 1532-37 (2013) (joined by Ginsburg, Breyer & Sotomayor, JJ.), shows that an expired (and unaccepted) offer of a judgment does not satisfy the Court's definition of mootness, because relief remains possible." He added:

> Courts of appeals that have considered this issue since Genesis Healthcare uniformly agree with Justice Kagan. See, e.g., Tanasi v. New Alliance Bank, 786 F.3d 195 (2d Cir. 2015); Gomez v. Campbell-Ewald Co., 768 F.3d 871 (9th Cir. 2014), cert. granted, 135 S.Ct. 2311 (2015). The issue is before the Supreme Court in *Gomez*, and we think it best to clean up the law of this circuit promptly, rather than require Chapman and others in his position to wait another year for the Supreme Court's decision.

See also Hooks v. Landmark Indus. Inc., 797 F.3d 309 (5th Cir. 2015) (holding that "an unaccepted offer of judgment cannot moot a named-plaintiff's claim in a putative class action").

As noted by Judge Easterbrook, the Supreme Court has this issue before it in the *Campbell-Ewald* case. The oral argument in that case occurred on Oct. 14, 2015. It seems prudent to await the result of the Court's decision, and quite possible that the issue will recede from the scene after that decision. It could recede even if the Court did not decide the case, or the decision left some questions open.

(2) Topic which the Subcommittee presents without a recommendation -- adopting a settlement certification rule

Below is introductory material on a topic that the Subcommittee has been considering since it began its deliberations in 2011. As set forth below, the Subcommittee's initial reaction after the mini-conference was that this topic should be taken off the agenda. But some reactions since then have prompted the Subcommittee to conclude that the subject should be presented to the full Committee. Below is the sketch presented to the Dallas mini-conference, the notes on the discussion of this topic during the conference, and the notes on the Subcommittee's discussion of the issue during its meeting after the conclusion of the conference.

After the sketch presented at the mini-conference, there appears an alternative inspired by the 1999 Report on Mass Tort Litigation to the Chief Justice from the Advisory Committee and the Working Group on Mass Torts. It proposes amending Rule 23(b)(3) to authorize certification under that subdivision if "interests in settlement" predominate over individual questions. This alternative approach has emerged only recently and has not been discussed in detail by the Subcommittee.

A. Rule 23(b)(4) Authorization
for Settlement Certification

Issues memo for mini-conference

(6) Settlement Class Certification

As noted again below, a key question is whether a settlement-certification addition to Rule 23(b) is needed to deal with difficulty in obtaining such certification under *Amchem*. A subsidiary issue is whether such additional certification authorization should be added only for actions brought under 23(b)(3).

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

* * * * * *

(4) the parties to a settlement [in an action to be certified under subdivision (b)(3)] request certification and the court finds that the proposed settlement is superior to other available methods for fairly and efficiently adjudicating the controversy, and that it should be approved under Rule 23(e).

Sketch of Draft Committee Note

Subdivision (b)(4) is new. In 1996, a proposed new subdivision (b)(4) was published for public comment. That new subdivision would have authorized certification of a (b)(3) class for settlement in certain circumstances in which certification for full litigation would not be possible. One stimulus for that amendment proposal was the existence of a conflict among the courts of appeals about whether settlement certification could be used only in cases that could be certified for full litigation. That circuit conflict was resolved by the holding in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), that the fact of settlement is relevant to class certification. The (b)(4) amendment proposal was not pursued after that decision.

Rule 23(f), also in the package of amendment proposals published for comment in 1996, was adopted and went into effect in 1998. As a consequence of that addition to that rule, a considerable body of appellate precedent on class-certification principles has developed. In 2003, Rule 23(e) was amended to clarify and fortify the standards for review of class settlements, and subdivisions (g) and (h) were added to the rule to govern the appointment of class counsel, including interim

class counsel, and attorney fees for class counsel. These developments have provided added focus for the court's handling of the settlement-approval process under Rule 23(e). Rule 23(e) is being further amended to sharpen that focus.

Concerns have emerged about whether it might sometimes be too difficult to obtain certification solely for purposes of settlement. Some report that alternatives such as multidistrict processing or proceeding in state courts have grown in popularity to achieve resolution of multiple claims.

This amendment is designed to respond to those concerns by clarifying and, in some instances, easing the path to certification for purposes of settlement. Like the 1996 proposal, this subdivision is available only after the parties have reached a proposed settlement and presented it to the court. Before that time, the court may, under Rule 23(g)(3), appoint interim counsel to represent the interests of the putative class.

[Subdivision (b)(4) addresses only class actions maintained under Rule 23(b)(3). The (b)(3) predominance requirement may be an unnecessary obstacle to certification for settlement purposes, but that requirement does not apply to certification under other provisions of Rule 23(b). Rule 23(b)(4) has no bearing on whether certification for settlement is proper in class actions not brought under Rule 23(b)(3).]

Like all class actions, an action certified under subdivision (b)(4) must satisfy the requirements of Rule 23(a). Unless these basic requirements can be satisfied, a class settlement should not be authorized.

Increasing confidence in the ability of courts to evaluate proposed settlements, and the tools available to them for doing so, provides important support for the addition of subdivision (b)(4). For that reason, the subdivision makes the court's conclusion under Rule 23(e)(2) an essential component to settlement class certification. Under amended Rule 23(e), the court can approve a settlement only after considering specified matters in the full Rule 23(e) settlement-review process, and amended Rules 23(e)(1) and (e)(5) provide the court and the parties with more information about proposed settlements and objections to them. Given the added confidence in settlement review afforded by strengthening Rule 23(e), the Committee is comfortable with reduced emphasis on some provisions of Rule 23(a) and (b).

Subdivision (b)(4) also borrows a factor from subdivision (b)(3) as a prerequisite for settlement certification -- that the court must also find that resolution through a class-action settlement is superior to other available methods for fairly and efficiently adjudicating the controversy. Unless that finding

can be made, there seems no reason for the court or the parties to undertake the responsibilities involved in a class action.

Subdivision (b)(4) does not require, however, that common questions predominate in the action. To a significant extent, the predominance requirement, like manageability, focuses on difficulties that would hamper the court's ability to hold a fair trial of the action. But certification under subdivision (b)(4) assumes that there will be no trial. Subdivision (b)(4) is available only in cases that satisfy the common-question requirements of Rule 23(a)(2), which ensure commonality needed for classwide fairness. Since the Supreme Court's decision in *Amchem*, the courts have struggled to determine how predominance should be approached as a factor in the settlement context. This amendment recognizes that it does not have a productive role to play and removes it.

Settlement certification also requires that the court conclude that the class representatives are typical and adequate under Rule 23(a)(3) and (4). Under amended Rule 23(e)(2), the court must also consider whether the settlement proposal was negotiated at arms length by persons who adequately represented the class interests, and that it provides fair and adequate relief to class members, treating them equitably.

In sum, together with changes to Rule 23(e), subdivision (b)(4) ensures that the court will give appropriate attention to adequacy of representation and the fair treatment of class members relative to each other and the potential value of their claims. At the same time, it avoids the risk that a desirable settlement will prove impossible due to factors that matter only to a hypothetical trial scenario that the settlement is designed to avoid.

Should the court conclude that certification under subdivision (b)(4) is not warranted -- because the proposed settlement cannot be approved under subdivision (e) or because the requirements of Rule 23(a) or superiority are not met -- the court should not rely on any party's statements in connection with proposed (b)(4) certification in relation to later class certification or merits litigation.

Reporter's Comments and Questions

A key question is whether a provision of this nature is useful and/or necessary. The 1996 proposal was prompted in part by Third Circuit decisions saying that certification could never be allowed unless litigation certification standards were satisfied. But *Amchem* rejected that view, and recognized that the settlement class action had become a "stock device." At the same time, it said that predominance of common questions is required for settlement certification in (b)(3) cases. Lower

courts have sometimes seemed to struggle with this requirement. Some might say that the lower courts have sought to circumvent the *Amchem* Court's requirement that they employ predominance in the settlement certification context. A prime illustration could be situations in which divergent state laws would preclude litigation certification of a multistate class, but those divergences could be resolved by the proposed settlement.

If predominance is an obstacle to court approval of settlement certification, should it be removed? One aspect of the sketch above is that it places great weight on the court's settlement review. The sketch of revisions to Rule 23(e)(2) is designed to focus and improve that process. Do they suffice to support reliance on that process in place of reliance on the predominance prong of 23(b)(3)?

If predominance is not useful in the settlement context, is superiority useful? One might say that a court that concludes a settlement satisfies Rule 23(e)(2) is likely to say also that it is superior to continued litigation of either a putative class action or individual actions. But eliminating both predominance and superiority may make it odd to say that (b)(4) is about class actions "certified under subdivision (b)(3)." It seems, instead, entirely a substitute, and one in which (contrary to comments in *Amchem*), Rule 23(e) becomes a supervening criterion for class certification. That, in turn, might invite the sort of "grand-scale compensation scheme" that the *Amchem* Court regarded as "a matter fit for legislative consideration," but not appropriate under Rule 23.

Another set of considerations focuses on whether making this change would actually have undesirable effects. Could it be said that the predominance requirement is a counterweight to "hydraulic pressures" on the judge to approve settlements in class actions? If judges are presently dealing in a satisfactory way with the *Amchem* requirements for settlement approval, will making a change like this one prompt the filing of federal-court class actions that should not be settled because of the diversity of interests involved or for other reasons? And could this sort of development also prompt more collateral attacks later on the binding effect of settlement class-action judgments?

Discussion during mini-conference

There was extensive discussion of the Rule 23(b)(4) settlement certification sketch during the mini-conference. A thorough report on that discussion appears on the notes of the mini-conference, included in this agenda book. The discussion included the question whether the Supreme Court's Amchem decision unduly limited settlement certification in practice, and whether adding a new (b)(4) might invite inappropriate class action filings.

Notes on Subcommittee discussion after conference.

The following is an excerpt from the notes of the Subcommittee's meeting after the mini-conference

Topic 6 -- settlement class certification

Initial reactions to the discussion of this topic were that parties are presently able to navigate the issues presented by settlement class certification under current precedents. Another view was that fashioning a rule would be quite difficult, and that it is not clear it is worth the effort.

Concerns include the risk that proceeding with the amendment sketch in the conference materials would encourage abuse of class actions, and invite reverse auctions to an extent not happening under current law.

Another view was that "people are satisfied with current work-arounds." In addition, we have heard concern that a rule like our sketch could lead to undisciplined gathering of claims.

On the other hand, a rule on this subject would bring some discipline to the actual resolution of related claims. One could regard MDL treatment of massed claims as the equivalent of a mandatory class action unregulated by rule. That is a particular problem in certain types of cases. And the volume of MDL actions has grown in recent years. By some calculations they constitute more than a third of all pending civil cases in the federal judicial system.

That drew a skeptical response: "Can we fix the problems with MDL handling of mass claims situations?" We have been advised to leave this problem alone. Maybe a manual of some sort would be desirable, but the Civil Rules are not a manual. A reaction to this point was that MDL proceedings are inherently unique, and that "Judges are just doing it."

The consensus was that a separate settlement class rule should not be pursued at this time.

B. Alternative proposal based on 1999 Report on Mass Tort Litigation

In 1998-99, an ad hoc Working Group on Mass Torts, chaired by Judge Anthony Scirica, studied mass tort issues. It prepared a report that the Advisory Committee submitted to the Chief Justice in 1999. See Report of the Advisory Committee on Civil Rules and the Working Group on Mass Torts to the Chief Justice of the United States and the Judicial Conference of the United States (Feb. 15, 1999). Ed Cooper, who served as co-Reporter for the Working Group, developed the following possible amendment to Rule 23(b)(3) in the wake of Amchem:

> **(3)** the court finds that the questions of law or fact common to class members, or interests in settlement, predominate over any questions affecting only individual class members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

Cooper, Aggregation and Settlement of Mass Torts, 148 U. Pa. L. Rev. 1943, 1995 (2000).

This approach may offer advantages to the 23(b)(4) approach sketched above, by introducing flexibility without creating a new species of settlement class in Rule 23(b). Indeed, it may recognize what some who have spoken with the Subcommittee have reported -- that the courts are actually taking account of settlement interests in deciding whether to certify classes for purposes of settlement. Moreover, it could involve the court at an earlier point in the negotiation, and perhaps design, of a proposed settlement. To some extent, the court may sometimes become involved when asked to designate interim class counsel under Rule 23(g)(3), but this approach would invite broader attention from the court before the settlement is reached.

This approach also takes account of the many potential benefits of settlement. As Prof. Cooper explained in 2000 (148 U. Pa. L. Rev. at 1994-95):

> There is a powerful shared interest in achieving all of the things that can be achieved only by settlement. Indeed, * * * the greatest charm of settlement is that it enables a disposition that cuts free from the shortcomings of substantive law as well as the fallibility of our procedural institutions. Neither individual litigation nor disposition of an aggregated litigation by adjudication can do as well. From this perspective we would do well to focus on crafting the best settlement procedure possible, and to put aside lingering doubts about the importance of individual opportunities to opt out, the enormous complexities that

charge the professional responsibility of class counsel with almost unendurable pressures, as well as other doubts.

Genuine questions could be raised about this approach as well. Cutting free of the shortcomings of substantive law may be questioned.[8] Here are some: (1) Is it better to have the court involved before the parties reach a settlement? The (b)(4) proposal requires the parties to reach a proposed settlement before certification for purposes of settlement can occur. (2) Should this possibility be limited to (b)(3) classes? One might urge that a similar opportunity should be available for (b)(2) classes.[9] Whether it could be justified in (b)(1) situations might raise difficult questions. (3) If this is "certification" under (b)(3), does it trigger the notice requirements and opt-out rights in Rule 23(c)(2)(B)? If the settlement is not ultimately approved under Rule 23(e), does that invalidate the opt-outs of class members who opted out? Should a second notice be sent if the case is later certified for litigation purposes? (4) Is there a risk that courts would routinely conclude that "interests in settlement" predominate over individual issues? Some with whom the Subcommittee has talked speak of "hydraulic pressure" toward settlement, and this change might increase that pressure.

As noted above, the Subcommittee has only recently given any consideration to this possible approach, and it has not had an opportunity to discuss it at any length. It invites input about this alternative approach.

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[8] For an exploration of these issues, see Marcus, They Can't Do That, Can They? Mass Tort Reform via Rule 23, 80 Cornell L. Rev. 858 (1995).

[9] Indeed, the Report on Mass Tort Litigation itself included a more aggressive idea that would have applied to all class actions, but would depend on major surgery on Rule 23:

> **(b) ~~Class Actions Maintainable~~ When Class Actions May be Certified.** An action may be ~~maintained~~ certified as a class action fur purposes of settlement or trial if the prerequisites of subdivision (a) are satisfied and in addition * * * * *

Report on Mass Tort Litigation, Appendix F-5 (Settlement Classes). This approach seems to equate settlement and trial as co-equal possibilities, but the possibility would exist for (b)(2) and even (b)(1) classes as well as (b)(3) classes. So more aggressive approaches could be considered.

(3) Topics the Subcommittee recommends taking off the current agenda

The Subcommittee has previously brought the following issues before the full Committee, but has now concluded that further work on these issues is not warranted at this time.

Cy pres

Chief Justice Roberts articulated concerns about cy pres provisions in his separate opinion regarding denial of certiorari in Marek v. Lane, 134 S.Ct. 8 (2013). The ALI Aggregate Litigation Principles, in § 3.07, offered a series of recommendations about cy pres provisions that many courts of appeals have adopted. Indeed, this provision is the one that has been most cited and followed by the courts.

Beginning with several ideas from the ALI recommendations, the Subcommittee developed a draft provision to be added to Rule 23(e) specifically addressing use of cy pres provisions. A fairly lengthy sketch of both a possible rule amendment and a possible Committee Note were included in the issues memo for the mini-conference. That sketch has drawn very considerable attention, and also raised a wide variety of questions.

One question is whether there is any need for a rule in light of the widespread adoption of the ALI approach. It is not clear that any circuit has rejected the ALI approach, and it is clear that several have adopted it.

Another question is whether adopting such a provision would raise genuine Enabling Act concerns. The sketch the Subcommittee developed authorized the inclusion of a cy pres provision in a settlement agreement "even if such a remedy could not be ordered in a contested case." The notion is that the parties may agree to many things in a settlement that a court could not order after full litigation. Yet it might also be stressed that, from the perspective of unnamed members of the class, the binding effect of the class-action settlement depends on the court's decree, not just the parties' agreement. So it might be said that a rule under which a court could substitute a cy pres arrangement for the class members' causes of action is subject to challenge. That argument could be met, however, with the point that the court has unquestioned authority to approve a class-action settlement that implements a compromise of the amount claimed, so assent to a cy pres arrangement for the residue after claims are paid should be within the purview of Rule 23.

At the same time, some submissions to the Subcommittee articulated reasons for caution in the area. Some urged, for example, that cy pres provisions serve valuable purposes in supporting such worthy causes as providing legal representation

to low-income individuals who otherwise would not have access to legal services. Examples of other worthy causes that have benefitted from funds disbursed pursuant to cy pres arrangements have been mentioned. See, e.g., Cal. Code Civ. Pro. § 384(b) (directing that the residue left after distribution of benefits from class-action settlements should be distributed to child advocacy programs or nonprofit organizations providing civil legal services to the indigent, or to organizations supporting projects that will benefit the class).

It seems widely agreed that lump-sum settlements often produce a residue of undistributed funds after the initial claims process is completed. The ALI approach favors attempting to make a further distribution to class members who have submitted claims at that point, but it may be that the very process of trying to locate more class members or make additional distributions would use up most or all of the residue.

It is also troubling, however, that there may be cases in which very large amounts of money are unclaimed, raising questions about the purpose of such class actions. Though deterrence is often cited as a purpose beyond compensating class members, crafting a rule of procedure principally to strengthen deterrence may be questionable.

Ultimately, the Subcommittee concluded that the combination of (a) uncertainty about whether guidance beyond the ALI provision and judicial adoption of it is needed and (b) uneasiness about the proper limits of the rulemaking authority cautioned against adopting a freestanding provision on cy pres provisions.

At the same time, it also concluded that emphasizing the importance of considering the possibility of a residue and including attention to cy pres arrangements in the "frontloading" Committee Note would be a desirable way to call attention to the general issues.

Issue classes

The Subcommittee included several sketches of possible amendments to Rule 23(b) or (c) better to integrate Rule 23(b)(3) and 23(c)(4). For a time it appeared that there was a significant conflict among the circuits about whether these two provisions could both be effectively employed under the current rule. But it is increasingly clear that the dissonance in the courts has subsided. At the same time, there have been some intimations that changing the rule along the lines the Subcommittee has discussed might actually create rather than solve problems.

The Subcommittee also circulated a sketch of a change to

Rule 23(f) to authorize discretionary immediate appellate review of the district court's resolution of issues on which it had based issue class certification. This sketch raised a variety of potential difficulties about whether there should be a requirement for district-court endorsement of the timing of the appeal, and whether a right to seek appellate review might lead to premature efforts to obtain review.

The Subcommittee eventually concluded that there was no significant need for rule amendments to deal with issue class issues, and that there were notable risks of adverse consequences.

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TAB 6A

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MEMORANDUM

DATE: October 14, 2015

TO: Advisory Committee on Appellate Rules

FROM: Gregory E. Maggs, Reporter

RE: Item No. 15-AP-C (Amendment to Rule 31(a)(1)'s deadline for reply briefs)

This item is a proposal to lengthen the period under Federal Rule of Appellate Procedure (FRAP) 31(a)(1) for filing reply briefs from 14 days to either 17 or 21 days. The proposal first arose in public comments concerning Item 08-AP-C (amendment to Rule 26(c) to eliminate the "three-day rule" for documents served by electronic means). At the April 2015 meeting, the Committee by consensus decided to add the proposal to lengthen the 14-day period as a new agenda item. *See* Draft Minutes of April 23-24, 2015, Appellate Rules Committee Meeting, at 11 [hereinafter Draft Minutes].

A. Background

The Federal Rules of Appellate Procedure currently provide a period of 14 days to file a reply brief. FRAP 31(a)(1) says:

> (a) Time to Serve and File a Brief.
>
> (1) The appellant must serve and file a brief within 40 days after the record is filed. The appellee must serve and file a brief within 30 days after the appellant's brief is served. The appellant may serve and file a reply brief within 14 days after service of the appellee's brief but a reply brief must be filed at least 7 days before argument, unless the court, for good cause, allows a later filing.

When the Committee was considering the amendment to FRAP 26(c) that would eliminate the 3-day extension, two of the public comments proposed extending the period of filing a reply brief under FRAP 31(a)(1) from 14 days to 17 days. These comments generally argued that litigants have come to rely on the additional time provided by FRAP 26(c) when filing reply briefs. Reporter Cathie Struve summarized these two comments in her memorandum of April 9, 2015 to the Committee as follows:

> **AP-2014-0002-0044: The Appellate and Constitutional Law Practice Group of Gibson, Dunn & Crutcher LLP.** Acknowledges that the three-day rule for electronic service "is no longer justified given that, with electronic service, documents are transmitted to the recipient instantaneously." But argues that, if

electronic service is excluded from the three-day rule, Rule 31(a)(1)'s deadline for reply briefs should be augmented by 3 days in order to retain what is now the "*de facto*" 17-day deadline ("fourteen days under Rule 31(a)(1) plus three for electronic service under Rule 26(c)"). The 17-day period "allow[s] counsel sufficient time to draft such briefs, coordinate with clients or other parties, and avoid burdening courts with an increase in requests for extensions of time."

AP-2014-0002-0048: Seth P. Waxman on behalf of the appellate and Supreme Court litigation practice groups at Wilmer Cutler Pickering Hale and Dorr LLP and Akin Gump Strauss Hauer & Feld LLP, Arnold & Porter LLP, Jenner & Block LLP, Kirkland & Ellis LLP, Molo Lamken LLP, Morrison & Foerster LLP, O'Melveny & Myers LLP, Orrick, Herrington & Sutcliffe LLP, Sidley Austin LLP, and Vinson & Elkins LLP. "We agree that a paper served electronically should be treated as delivered on the date of service." But if Rule 26(c) is amended to eliminate the three-day rule where service is made electronically, the deadline for reply briefs should be extended to 17 or 21 days. "The de facto deadline for most reply briefs has been more than fourteen days for many years, even before electronic service became widespread." Lawyers need the extra time when "juggling competing deadlines[,] representing incarcerated ... clients," or briefing complex cases. And a longer deadline can be shortened when necessary and, in other cases, will "reduc[e] the number of extension requests." As a point of comparison, "the Supreme Court sets a thirty-day deadline for merits reply briefs."

Memorandum to Advisory Committee on Appellate Rules from Reporter Catherine T. Struve, Concerning Item No. 08-AP-C: The "three-day rule" (Apr. 9, 2015), at 5-6 [hereinafter Struve Memorandum].

B. Reporter Struve's Comments

Reporter Struve did not make a recommendation on the merits of whether to extend the 14-day period. She did, however, provide the following comment on whether an extension should be 17 days or 21 days: "As to a choice between 17 days and 21 days, although I admit that the Committee Note to the current proposal invokes the idea that time periods stated in multiples of seven are desirable because they minimize the instances when end points of a period fall on a weekend, it is not difficult to figure out what to do when the end-point of a 17-day period falls on a weekend; in such instances the period becomes an 18-day or 19-day period." Struve Memorandum, at 13-14.

C. The April 2015 Meeting

At the April 2015 Meeting, several Committee members addressed the proposal to extend the time period for filing a reply brief from 14 days to 17 or 21 days. They asserted that the

period of 14 days is a very short time frame, that an effective decrease from 17 days to 14 days is a proportionally large reduction, and that seeking an extension of time may be difficult as a practical matter. *See* Draft Minutes, at 9-11.

D. Statistical Information

The Administrative Office of the U.S. Courts keeps statistics that may be relevant to this issue. For the 12-month period ending September 30, 2014, the median time from the filing of the appellee's "last brief" to oral argument or submission on the briefs was 3.6 months nationally. The Administrative Office does not specifically measure the time from filing of the "reply brief" to oral argument, perhaps because the reply brief is optional. Given this time period, however, a three-day or one-week extension of the current time most likely would not have any discernible impact on the scheduling or submission of cases. *See* Administrative Office of the U.S. Courts, Table B-4A ("U.S. Courts of Appeals—Median Time Intervals in Months for Civil and Criminal Appeals Terminated on the Merits, by Circuit, During the 12-Month Period Ending September 30, 2014") (attached).

E. The Fall 2015 Meeting

At the Fall 2015 Meeting, the Committee may wish to discuss and decide whether an extension of time is warranted and, if so, whether the time should be extended to 17 days or 21 days**.**

Attachments

1. Memorandum to Advisory Committee on Appellate Rules from Reporter Catherine T. Struve, regarding Item No. 08-AP-C: The “three-day rule” (Apr. 9, 2015).

2. Public Submissions AP-2014-0002-0044 and AP-2014-0002-0048 regarding "The 3-Day Rule."

3. Administrative Office of the U.S. Courts, Table B-4A ("U.S. Courts of Appeals—Median Time Intervals in Months for Civil and Criminal Appeals Terminated on the Merits, by Circuit, During the 12-Month Period Ending September 30, 2014"), available at <http://www.uscourts.gov/file/14276/download>

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TAB 6B

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MEMORANDUM

DATE: April 9, 2015

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 08-AP-C: the "three-day rule"

Appellate Rule 26(c) sets out the "three-day rule" for purposes of deadlines set in the Appellate Rules. It provides:

> **(c) Additional Time after Service.** When a party may or must act within a specified time after service, 3 days are added after the period would otherwise expire under Rule 26(a), unless the paper is delivered on the date of service stated in the proof of service. For purposes of this Rule 26(c), a paper that is served electronically is not treated as delivered on the date of service stated in the proof of service.

Under this Rule, the three additional days apply not only to service by commercial carrier (when delivery is not same-day) and service by mail, but also to electronic service.

In 2007, then-Chief Judge Frank H. Easterbrook proposed that Appellate Rule 26(c)'s three-day rule be abolished. Last summer, the Appellate Rules Committee – in coordination with the other advisory committees – published for comment a proposed amendment that would render the three-day rule unavailable when service is electronic.

Part I.A of this memo summarizes the background to the proposal, while Part I.B sets out the proposal as published. Part II summarizes the public comments (copies of which are enclosed). Part III.A discusses concerns raised in the comments, and Part III.B assesses commentators' suggestions for modifying the proposal. Part IV concludes by suggesting that the Committee adopt the proposed change as published, with language added to the Committee Note along the lines suggested by the Department of Justice (DOJ).

I. The proposal to exclude electronic service from the three-day rule

Proposals to narrow or abolish the three-day rule have been discussed, on and off, for years.[1] Part I.A summarizes the most recent discussions, while Part I.B sets out the published

[1] The rules committees have discussed the question periodically since at least the spring of 1999.

proposal that resulted from those discussions.

A. Background of the current proposal

In his 2007 comment on the time-computation project, Chief Judge Easterbrook suggested abolishing the three-day rule contained in Appellate Rule 26(c). He argued that the three-day rule is particularly incongruous for electronic service,[2] and that adding three days to a period thwarts the goal served by the time-computation project's preference for setting periods in multiples of seven days.

Though Chief Judge Easterbrook's suggestion related only to the Appellate Rules, the criticism of the three-day rule was relevant, as well, to Civil Rule 6(d), Criminal Rule 45(c), and Bankruptcy Rule 9006(f). In 2013, the CM/ECF Subcommittee concluded that the time had come to amend the three-day rule (in each set of rules) to exclude electronic service.

Participants in the discussion of the proposed change felt that the reasons given for including electronic service appear less persuasive now than they were a decade ago. Concerns that electronic service may be delayed by technical glitches or that electronically served attachments may arrive in garbled form seem less urgent in districts (or circuits) where electronic service occurs as part of smoothly-running CM/ECF programs. And in districts or circuits where CM/ECF is mandatory for counsel, there would be no need to give counsel an incentive to consent to electronic service (or to avoid giving counsel a disincentive to consent to electronic service) by maintaining the three-day rule for electronic service. There remains a lingering concern that counsel might strategically serve an opponent by electronic means on a Friday night in order to inconvenience the opponent. But a litigant whose opponent uses such a tactic can seek an extension of time to respond. *See* Appellate Rule 26(b) (providing, subject to exceptions that would not be relevant in this context, that "[f]or good cause, the court may extend the time prescribed by these rules or by its order to perform any act, or may permit an act to be done after that time expires").

B. Text of Rule and Committee Note as published

Rule 26. Computing and Extending Time

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[2] Chief Judge Easterbrook favored eliminating the three-day rule entirely, in part because its application interferes with the Rules' preference for setting time periods in increments of seven days. However, during the Appellate Rules Committee's spring 2013 meeting, participants noted the possible need for more time by those who respond to pro se filings. For example, in cases involving the federal government, pro se papers tend to reach the DOJ belatedly because all mail bound for the DOJ is screened for security reasons. If the three-day rule were eliminated, it was suggested, the DOJ would move more frequently for extensions of time to respond to pro se filings.

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(c) Additional Time after Certain Kinds of Service. When a party may or must act within a specified time after ~~service~~ being served, 3 days are added after the period would otherwise expire under Rule 26(a), unless the paper is delivered on the date of service stated in the proof of service. For purposes of this Rule 26(c), a paper that is served electronically is ~~not~~ treated as delivered on the date of service stated in the proof of service.

Committee Note

Rule 26(c) is amended to remove service by electronic means under Rule 25(c)(1)(D) from the modes of service that allow 3 added days to act after being served.

Rule 25(c) was amended in 2002 to provide for service by electronic means. Although electronic transmission seemed virtually instantaneous even then, electronic service was included in the modes of service that allow 3 added days to act after being served. There were concerns that the transmission might be delayed for some time, and particular concerns that incompatible systems might make it difficult or impossible to open attachments. Those concerns have been substantially alleviated by advances in technology and widespread skill in using electronic transmission.

A parallel reason for allowing the 3 added days was that electronic service was authorized only with the consent of the person to be served. Concerns about the reliability of electronic transmission might have led to refusals of consent; the 3 added days were calculated to alleviate these concerns.

Diminution of the concerns that prompted the decision to allow the 3 added days for electronic transmission is not the only reason for discarding this indulgence. Many rules have been changed to ease the task of computing time by adopting 7-, 14-, 21-, and 28- day periods that allow "day-of-the-week" counting. Adding 3 days at the end complicated the counting, and increased the occasions for further complication by invoking the provisions that apply when the last day is a Saturday, Sunday, or legal holiday.

Rule 26(c) has also been amended to refer to instances when a party "may or must act … after being served" rather than to instances when a party "may or must act … after service." If, in future, an Appellate Rule sets a deadline for a party to act after *that party itself effects service* on another person, this change in language will clarify that Rule 26(c)'s three added days are not accorded to the party who effected service.

II. Summary of public comments

AP-2014-0002-0013 & AP-2014-0002-0015: James C. Martin (and Charles A. Bird) on behalf of the American Academy of Appellate Lawyers. Supports the proposal.

AP-2014-0002-0019: Committee on Federal Courts, Association of the Bar of the City of New York. Supports the proposal.

AP-2014-0002-0020: Dorothy F. Easley, Easley Appellate Practice. In an article appended to her comment, supports this proposal as "clarifying and helpful."

AP-2014-0002-0036: Federal Courts Committee of the New York County Lawyers Association. A majority of the Committee's members "generally endorses" the proposal (a minority dissents from this endorsement, fearing that the amendment "will lead to 'gamesmanship'"). Observes that electronic service after business hours, particularly on a Friday night, can be unfair, especially where the papers are voluminous and will need to be printed. However, difficulties can be worked out by agreement or by seeking relief from the court.

Notes that "in the New York State court system, where electronic service is permitted it is considered equivalent to service by hand; that is, it does not give rise to additional time to respond. We are not aware of any systemic problems with this practice; indeed, we understand at least anecdotally that practitioners in New York are so accustomed to electronic service being treated as equivalent to service by hand that many do not take advantage of the three extra days in federal court."

AP-2014-0002-0038: Walter K. Pyle. Opposes the proposal. "[T]he same concern exists today [as in 2002] – particularly for the small law office – that an electronic transmission will be delayed or go unnoticed, whereas a paper delivered personally during business hours simply will not." Mr. Pyle reports personal experience with lawyers who "invariably wait until late on Friday nights (especially when there is a 3-day weekend) to serve complex motion papers electronically." Nor is the computation of the three added days difficult.

AP-2014-0002-0039: Peter Goldberger & William J. Genego on behalf of the National Association of Criminal Defense Lawyers. Opposes the proposal as based on "arid logic." Criminal defense lawyers are overburdened and many work solo or in small firms with little support. Many "do not see their ECF notices – much less open and study the linked documents – immediately or even on the same day they are 'received' at the attorney's email address." These attorneys need the extra three days when served electronically. The change would increase the number of motions for extra time.

"[I]f the 3-day addition is to be retained," NACDL proposes adding "a subparagraph (d) which states that when a party must act within a specified time after service, and the document served is submitted with a motion for leave to file or is not accepted for filing, the time within

which the party must act is determined by the date the document is deemed filed by the clerk, unless a new document is ordered to be filed, in which case the time period runs from the date of service of the superseding document."

AP-2014-0002-0040: The Pennsylvania Bar Association (PBA), upon the recommendation of its Federal Practice Committee. Opposes the proposal. Encloses a memo regarding the "Report of the PBA Federal Practice Committee Subcommittee on Proposed Amendments to Appellate Rules." The memo expresses "concern[] that electronic service may happen at any time of day or any day of the week," and argues that "the additional three days serves a useful purpose in alleviating the burdens that can arise if a filing is electronically served at extremely inconvenient times."

AP-2014-0002-0044: The Appellate and Constitutional Law Practice Group of Gibson, Dunn & Crutcher LLP. Acknowledges that the three-day rule for electronic service "is no longer justified given that, with electronic service, documents are transmitted to the recipient instantaneously." But argues that, if electronic service is excluded from the three-day rule, Rule 31(a)(1)'s deadline for reply briefs should be augmented by 3 days in order to retain what is now the "*de facto*" 17-day deadline ("fourteen days under Rule 31(a)(1) plus three for electronic service under Rule 26(c)"). The 17-day period "allow[s] counsel sufficient time to draft such briefs, coordinate with clients or other parties, and avoid burdening courts with an increase in requests for extensions of time."

AP-2014-0002-0045: Donald B. Verrilli, Jr., Solicitor General of the United States, on behalf of the United States Department of Justice (DOJ). Notes that "in most cases" there may no longer be a need for three extra days when service is made electronically, but that the extra time may be necessary if a filing is made in a different time zone, late at night, on a Friday, and/or before a holiday weekend. Otherwise attorneys might have "as little as five business days ... to respond to substantive or complicated jurisdictional motions." Government lawyers "typically need to confer and coordinate filings with personnel within interested government agencies and components, as well as policy officials in significant cases."

Proposes that, if Appellate Rule 26(c), Bankruptcy Rule 9006(f), Civil Rule 6(d), and Criminal Rule 45(c) are amended to exclude electronic service from the three-day rule, the Committee Notes should contain language to the following effect:

> "This amendment is not intended to discourage courts from providing additional time to respond in appropriate circumstances. When, for example, electronic service is effected in a manner that will shorten the time to respond, such as service after business hours or from a location in a different time zone, or an intervening weekend or holiday, that service may significantly reduce the time available to prepare a response. In those circumstances, a responding party may need to seek an extension, sometimes on short notice. The courts should accommodate those situations and provide additional response time to discourage tactical advantage or prevent prejudice to the responding party."

AP-2014-0002-0046: Richard A. Samp, Chief Counsel, Washington Legal Foundation. "[L]argely support[s]" the proposal, because "the three-day rule ... makes little sense in the context of electronic service." But many lawyers "file and serve briefs ... late in the day," after their opponents have gone home. The proposal should be revised to provide "that if electronic service is sent to other counsel after 6 p.m. in that counsel's time zone, a paper served electronically will be deemed to have been delivered on the next business day (Monday through Friday, excluding holidays) following the date of service stated in the proof of service."

AP-2014-0002-0048: Seth P. Waxman on behalf of the appellate and Supreme Court litigation practice groups at Wilmer Cutler Pickering Hale and Dorr LLP and Akin Gump Strauss Hauer & Feld LLP, Arnold & Porter LLP, Jenner & Block LLP, Kirkland & Ellis LLP, Molo Lamken LLP, Morrison & Foerster LLP, O'Melveny & Myers LLP, Orrick, Herrington & Sutcliffe LLP, Sidley Austin LLP, and Vinson & Elkins LLP. "We agree that a paper served electronically should be treated as delivered on the date of service." But if Rule 26(c) is amended to eliminate the three-day rule where service is made electronically, the deadline for reply briefs should be extended to 17 or 21 days. "The de facto deadline for most reply briefs has been more than fourteen days for many years, even before electronic service became widespread." Lawyers need the extra time when "juggling competing deadlines[,] representing incarcerated ... clients," or briefing complex cases. And a longer deadline can be shortened when necessary and, in other cases, will "reduc[e] the number of extension requests." As a point of comparison, "the Supreme Court sets a thirty-day deadline for merits reply briefs."

AP-2014-0002-0058: John Derrick on behalf of the State Bar of California's Committee on Appellate Courts. "[A]s appellate practitioners commenting on behalf of an appellate courts committee, we limit our comments to Rule 26(c)" (and not the parallel proposals for the Civil, Criminal, and Bankruptcy rules). "Although the Committee would support a reduction of the current *three* days, the Committee does not support a rule that would add *zero* days." In contrast to personal service (which must be made at counsel's office during business hours), electronic service can occur at any hour, wherever the intended recipient may be, yet "only results in simultaneous delivery when practitioners are connected to, and reviewing, an electronic device." The Rules should not presume "[a]n 'instantaneous' review of all incoming electronic transmittals." There should be "some time" added when electronic service is used, in order to forestall "gamesmanship (for example, intentionally waiting until 11:59 p.m. on Friday to serve electronically)."

AP-2014-0002-0059: Earthjustice, Sierra Club, Defenders of Wildlife, and Western Environmental Law Center. Opposes the proposal, which the commenters assert "would eliminate the 3-day rule." "The practical effect of the proposed changes is to reduce the times for submitting [motion] responses and replies to a short period that will be, in many instances, inadequate." The change will not appreciably expedite motions' resolutions but it will burden courts and litigants with motions for extra time and "will prevent attorneys from fully presenting their reasons for opposing (or supporting) a motion, leaving appellate courts to make less informed decisions." The problem will be acute with respect to "dispositive motions (such as

motions to dismiss) and motions to stay government regulations pending judicial review." Such motions can gravely affect both the litigants and the public – for example, when the question is whether to stay "government regulations that limit emissions of toxic pollution."

Observes that without the three-day rule, "responses to a motion filed at 11pm on the Friday before a holiday weekend would be due ... just 5 working days later." Asserts that "[w]here responses to a motion were filed on the Friday before a holiday weekend, a reply would be due the Monday after next – again, just 5 working days later." Observes that "[e]ven in the absence of an intervening holiday, the proposed revision would allow just 6 working days to respond to a motion filed on a Friday, and 5 working days for a reply to a response filed on a Friday."

Asserts that, prior to 2009, there was a 10-day period for motion responses, calculated by skipping intermediate weekends and holidays; and asserts that, prior to 2009, there was a 7-day period for motion replies, calculated by skipping intermediate weekends and holidays. Based on those assertions, argues that "although the proposed rule change appears to be intended to restore the actual times that were provided for responses and replies before electronic service was available and widely used, it actually provides times that are significantly shorter than were allowed under previous rules."

III. Commentators' concerns and suggestions

A number of commentators support the proposal. Others concede its appeal, but propose changes to offset its anticipated downsides. Still others oppose the proposal altogether. Part III.A discusses commentators' concerns, while Part III.B evaluates commentators' suggested revisions.

A. Commentators' concerns

The concerns stated by those who oppose the proposal (or request modification) fall into four basic categories: unfair behavior by opponents, hardship for the party being served, the need for time to draft reply briefs and/or motion papers, and inefficiency that would result from motions for extensions of time. One additional set of concerns appears to stem from a misunderstanding of prior timing rules that affected motion practice.

Unfair behavior by opponents. Electronic service may be made late at night on a Friday before a holiday weekend. Moreover, if the recipient is located in a time zone that lies east of the time zone containing the circuit clerk's principal office, then electronic service through the court's transmission facilities might occur as late as 2:59 a.m. the next morning (by the recipient's time).[3] Some commentators warn that lawyers will choose such inconvenient

[3] *See* Appellate Rule 26(a)(4)(B) ("Unless a different time is set by a statute, local rule, or court order, the last day ends ... for electronic filing in the court of appeals, at midnight in the

times intentionally in order to disadvantage their opponent. Other commentators focus simply on the inconvenience (intended or not) that will result; the latter concern shades into the general topic of hardship.

Hardship for the recipient. Some commentators worry that electronically served papers are more likely to be overlooked. If the papers are lengthy and the lawyer is out of the office, review of the papers may need to await access to a printer. Electronic service, unlike personal service, can occur outside of business hours. The hardships will be worse for criminal defense lawyers and other lawyers who operate in small offices or as solo practitioners. The problem will also be more acute the more complex the response paper must be.

The need for time to draft reply briefs and motion papers. Commentators state that the three extra days are especially important to provide extra time to draft reply briefs, responses to motions, and replies to such responses. They state that, with the prevalence of electronic filing and service, the extra three days have become a "de facto" part of the time periods for such documents. Commentators point in particular to motions that could dispose of the appeal (for example, a motion for summary disposition or a motion to dismiss for lack of jurisdiction) and motions that seek momentous interim relief (such as a motion to stay the effectiveness of a government regulation). The DOJ notes that government lawyers need time to confer with relevant personnel. And other commentators note that lawyers need time to deal with the competing demands of other cases and to communicate with clients who are incarcerated.

Inefficiency caused by motions for extensions. Acknowledging that an extension of time could address the problems noted above, commentators argue that such motions do not provide a good solution, because making and adjudicating those motions consume lawyer and court time.

A misunderstanding of previous time-counting regimes. Earthjustice, Sierra Club, Defenders of Wildlife, and the Western Environmental Law Center (collectively, Earthjustice) argue that "although the proposed rule change appears to be intended to restore the actual times that were provided for [motion] responses and replies before electronic service was available and widely used, it actually provides times that are significantly shorter than were allowed under previous rules." The argument is that, during periods when mail rather than electronic service was the norm, the deadlines for motions were effectively lengthened for a different reason, namely, the exclusion of intervening weekends and holidays:

> As explained in the Committee's notes accompanying the 2009 Amendments to Rule 26(a)(1), intermediate Saturdays, Sundays, and legal holidays were not previously included in computing periods shorter than 11 days, as they are now. Thus, intermediate Saturdays, Sundays, and legal holidays would not have been counted in computing either the 10-day response period for motions in Rule

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time zone of the circuit clerk's principal office.").

27(a)(3)(A) or the 7-day period for replies in Rule 27(a)(4).

The problem with this argument is that the method of time-counting was not the only thing that changed in 2009; so did the deadlines for motion responses and replies. From 1968 to 1998, the deadline for motion responses was 7 days after service of the motion, computed without skipping intermediate weekends and holidays.[4] In 1998, amendments to Rule 27 extended the motion-response deadline to 10 days and set the motion-reply deadline at 7 days after service of the response; both those periods were calculated without skipping intermediate weekends and holidays. Between 2002 and 2009, a different time-counting approach provided for the omission of weekends and holidays when computing these periods[5] – but to offset that different approach, the relevant deadlines were pared down. From 2002 to 2009, the motion-response deadline was 8 days and the motion-reply deadline was 5 days.

Assessment of the concerns. Leaving aside Earthjustice's concern about prior time computation regimes, the other four categories of concern warrant further consideration.

Gamesmanship may occur, and the three-day rule does soften the impact of such gamesmanship by affording the recipient extra time. However, it is to be hoped that such gamesmanship is the exception rather than the rule; and it might be questioned why three extra days should *always* be afforded in order to forestall unfairness in the subset of instances where gamesmanship has occurred. Service late on a Friday night before a holiday weekend is an easily demonstrable indicator of gamesmanship, and thus should be a good basis for an extension motion. And if the Committee adopts the DOJ's suggested Note language, discussed below, that should assist parties in advocating for needed extensions. Admittedly, such motions do come at a cost – to parties, in drafting the motions and to the court, in resolving them – and the question for the Committee is whether those costs would outweigh the overall gains from the amendment. The gains would come in the form of easier calculation (especially of periods stated in multiples of 7 days) and streamlined process (because time periods would apply as stated rather than subject to the addition of three extra days). The costs of a motion would likely not be all that great, given that the relevant facts and law would be very straightforward.

Extension motions could also address other hardships identified by the commentators. Admittedly, though, those hardships might be less likely to persuade a court. A lawyer who overlooked an electronic notice of docket activity, or who was out of the office on a weekday without access to a printer, or who is a solo practitioner, might not be as likely to win an

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[4] Before 1998, the Appellate Rules did not set a time limit for replies.

[5] From 1968 to 2002, Rule 26(a) directed that intermediate weekends and holidays be omitted when computing a time period "less than 7 days." From 2002 to 2009, Rule 26(a) instead directed that intermediate weekends and holidays be omitted if the time period was "less than 11 days." From 2009 on, Rule 26(a)(1) has directed that periods stated in days be computed on a 'days-are-days' basis, without omitting intermediate weekends and holidays.

extension of time on that basis as one who was served at 11:59 p.m. on a Friday night. If the Committee were concerned that such circumstances might also warrant extensions, perhaps the DOJ's proposed additional language for the Committee Note could be modified accordingly.

As for the concerns about particular types of papers that require additional drafting time, it seems to me that those concerns really focus on the deadline for the relevant type of filing and not on the three-day rule as such. If more time is needed for reply briefs or for motion responses and/or replies, that can be addressed in the rules setting the deadlines for those types of filings. I address that possibility, below, in discussing suggested modifications to the proposal.

B. Suggested revisions to the proposal

A number of commentators suggested modifications in the proposal, and/or additional amendments that would offset some effects of the proposal. Some of the suggested revisions seem equally relevant to the three-day rules in the Civil, Criminal, and Bankruptcy Rules. Others are specific to the Appellate Rules.

Those suggestions that are common to all four sets of Rules should, ideally, be treated the same for all sets. As of this writing, it seems likely that the other Advisory Committees will reject all the commonly-applicable suggestions, with the possible exception of the DOJ's suggested language for the Committee Notes.

Note language encouraging extensions. The DOJ proposes the addition, to each Committee Note, of language encouraging the grant of extensions when appropriate. It suggests the following:

> This amendment is not intended to discourage courts from providing additional time to respond in appropriate circumstances. When, for example, electronic service is effected in a manner that will shorten the time to respond, such as service after business hours or from a location in a different time zone, or an intervening weekend or holiday, that service may significantly reduce the time available to prepare a response. In those circumstances, a responding party may need to seek an extension, sometimes on short notice. The courts should accommodate those situations and provide additional response time to discourage tactical advantage or prevent prejudice to the responding party.

Presumably, this language would be added to the Note as its penultimate paragraph, so that it immediately followed the discussion of the elimination of electronic service from the three-day rule. In the interests of parallel syntax, it might be useful to amend the second sentence of the paragraph slightly, thus: "When, for example, electronic service is effected in a manner that will shorten the time to respond, such as service after business hours, or from a location in a different time zone, or just before an intervening weekend or holiday, that service may significantly reduce the time available to prepare a response."

The initial discussions of this proposed Note language did not produce a consensus among the reporters. As Professor Cooper noted, "[s]ome believe it would be useful to add the language. Others – including the Civil Rules Reporter – believe that the general principle of economy in Committee Notes should prevail because courts will readily understand and accommodate the needs of a party who has been put at a disadvantage by the circumstances of e-service." On the other hand, Professor Beale has reported that the Criminal Rules Committee

> unanimously approved adding the DOJ language to the committee note. The Committee favored adding similar language to the parallel committee notes, and asked us to transmit its views and encourage other committees to add the language. However, members also emphasized that it is especially important to encourage judicial flexibility and allow the resolution of issues on the merits in criminal cases. This can avoid later collateral attacks based on claims of ineffective assistance of counsel.

Most recently, Professor Cooper formulated an alternative, shorter, addition to the Note:

> The ease of making electronic service outside ordinary business hours may at times lead to a practical reduction in the time available to respond. [alternative 1: It is expected that courts will allow appropriate extensions when warranted.] [alternative 2: Eliminating the automatic addition of 3 days does not limit the court's authority to grant an extension in appropriate circumstances.]

As Professor Cooper points out, this proposed alternative is shorter and "less directive."

Although I propose, above, that the Committee reject the argument that concerns over gamesmanship justify retaining the three-day rule for electronic service, I think that the DOJ's proposed addition to the Committee Note could provide a useful way to encourage appropriate extensions on a case-by-case basis. (The more that such encouragement is deemed advisable, the more that the longer and more directive Note language might be seen as useful; if members do not feel strongly that such encouragement is needed, then Professor Cooper's shorter alternative might be preferred.) In addition, to the extent that the Committee Note to Criminal Rule 45(c) will include the proposed addition, that weighs in favor of including the same language in the Committee Note to Rule 26(c).[6] Of course, by the time of the Committee's spring meeting, the

[6] Admittedly, if the same language will not be added to the Committee Notes to Civil Rule 6(d) and Bankruptcy Rule 9006(f), then one could argue that considerations of uniformity across the four sets of Rules do not weigh in favor of including the DOJ's addition in the Committee Note to Appellate Rule 26(c). On the other hand, if participants are convinced that the additional Note language is particularly worthwhile in criminal cases for the reasons summarized by Professor Beale, that could weigh in favor of including the additional Note language in the Committee Note to Rule 26(c), given that Rules 26(b) and (c) will of course come into play in criminal as well as civil appeals.

Committee will be in a position to take into account, as well, the decisions taken by the Civil and Bankruptcy Rules Committees.

A less-than-three-day-rule for electronic service. Two commentators suggest that though electronic service should not give rise to an automatic three-day extension, a more limited automatic extension would be appropriate. Washington Legal Foundation proposes that rule text be added to specify that electronic service after 6 p.m. in the recipient's time zone is deemed delivered on the next following business day. The State Bar of California's Committee on Appellate Courts (commenting only on the Appellate Rules proposal) states that the rule should add one or two days (rather than three) when electronic service is used.

Adding such a feature could mitigate some of the anticipated hardships noted above, by affording an extra day or two as a matter of course, and might thereby reduce the number of additional motions for extensions of time that might otherwise result. On the other hand, such a feature would add further complexity to the computation of time periods.

A separate rule where a filing is not immediately accepted. NACDL states that the three-day rule

> has long required clarification in connection with a common circumstance, that is, where the adversary's deadline-triggering document was tendered to the appellate court with a motion for leave to file (for example, because it is late) or where the court of appeals clerk flags the deadline-triggering document as non-compliant and requires that it be corrected in some way. In that circumstance, although the adversary's certificate containing the date of service (which normally establishes the baseline for computing the response date) may not change (and indeed, there may be no new service of the document at all), the Rule should be clarified to state that the response date runs from the date later set by the Clerk (or, if none is later specified, then from the date when compliance is achieved or the filing is accepted). This may be accomplished by adding a subparagraph (d) which states that when a party must act within a specified time after service, and the document served is submitted with a motion for leave to file or is not accepted for filing, the time within which the party must act is determined by the date the document is deemed filed by the clerk, unless a new document is ordered to be filed, in which case the time period runs from the date of service of the superseding document.

This suggestion does not seem to me to relate to the three-day rule itself, except in the sense that the suggestion, like the three-day rule, would pertain only to time periods measured from the date of service. That is to say, if this suggestion is worth addressing, it would seem equally so whether or not a three-day rule exists. (I suppose that there might be a practical connection between the two issues, in the sense that the provision of an extra three days might suffice in some instances to allow the recipient to see whether the court accepts the document for filing; but that would not be so in all instances.) I therefore propose that the Committee consider adding

this suggestion to its study agenda as a separate item.

Extending the deadline for reply briefs. Two sets of comments – from the appellate and constitutional law practice group at Gibson, Dunn & Crutcher LLP (the "Gibson Dunn comments") and from Seth Waxman on behalf of appellate and Supreme Court litigation practice groups at eleven firms (the "Waxman comments") – suggest lengthening the deadline for reply briefs. The Gibson Dunn comments argue that the "*de facto*" deadline is now 17 days (14 under Rule 31(a)(1), plus three under Rule 26(c)) and that 17 days is an appropriate length of time. The Waxman comments make a similar argument about the current "de facto" deadline, and suggest that the rulemakers "set the period to file a reply brief at seventeen days or, preferably, twenty-one days, to reflect the increasing complexity of cases on appellate dockets and to maintain day-of-the-week counting."

It has not always been possible to argue that the rules set a de facto deadline of 17 days. Ever since the original adoption of the Appellate Rules, Rule 31(a) (now Rule 31(a)(1)) has set the deadline for reply briefs at 14 days after service of the appellee's brief. Before the advent of electronic service, the three-day rule existed to offset transit time in the mail; if the mail took three days, then the de facto response time would be the same as the nominal deadline, namely, 14 days. But in 2002, Rule 25 was amended to permit electronic service, and the more widespread electronic service has become, the stronger the argument that the de facto deadline is 17 days.

Of course, some might dispute whether this de facto deadline should be set in stone. During a 2008 discussion of the three-day rule, the following exchange occurred:

> A judge member queried whether a decision to maintain the three-day rule, for the present time, even in cases of electronic service might result in a situation – a few years hence – in which the availability of the extra three days has come to be viewed by practitioners as an entitlement. An attorney member stated that she did not think so, because the extra three days are currently viewed more as a gift than as a right.

Minutes of November 13-14, 2008, Appellate Rules Committee Meeting.

Even if the extra three days are not viewed as a matter of right, the commentators argue that a 17-day or 21-day period better reflects the increased complexity of appeals. They maintain that a longer deadline will help to reduce the number of extension requests. They assert that setting the deadline at 21 days after service will help to simplify time computation. And they note that Supreme Court Rule 25.3 sets a 30 day deadline for reply briefs on the merits.

It does not seem advisable to adopt this proposal as part of the current round of amendments. For one thing, altering Rule 31(a)(1)'s deadline for reply briefs would seem to be a change that requires publication; the current proposals gave no indication that such a change was

under contemplation. For another, further consideration of the merits of the proposal seems worthwhile. As to a choice between 17 days and 21 days, although I admit that the Committee Note to the current proposal invokes the idea that time periods stated in multiples of seven are desirable because they minimize the instances when end points of a period fall on a weekend, it is not difficult to figure out what to do when the end-point of a 17-day period falls on a weekend; in such instances the period becomes an 18-day or 19-day period.[7] The more important questions would seem to include whether a time period longer than 14 days is routinely necessary; if the necessity for additional time is not routine, whether the courts of appeals are willing to grant extensions when necessary;[8] whether any circuits routinely set the argument date close enough to the reply due date that a longer deadline would throw off the schedule;[9] and whether the Supreme Court's briefing schedule provides an appropriate benchmark for practice in the courts of appeals.

Rather than addressing these questions in the context of the current proposal, I suggest that the Committee consider whether to add this issue to its agenda as a separate item. I realize that the downside of separate treatment of this suggestion is that – if the Committee ultimately does decide to increase the time limit for reply briefs – there may be an interim period when the three-day rule is largely unavailable but the reply-brief deadline has not yet been extended. However, the availability of extensions should help to alleviate any hardships that arise during that interim period.

Extending the deadline for motion responses and replies. Rule 27(a)(3)(A) sets a 10-day deadline for responses to motions; Rule 27(a)(4) sets a 7-day deadline for replies to such responses. The DOJ's comments point out that those deadlines can be very tight when they span a holiday weekend and involve "substantive or complicated jurisdictional motions." The comments by Earthjustice go further, asserting that without the three-day extension provided by Rule 26(c), the 10-day and 7-day deadlines would be too short (for dispositive motions or stay motions) even when they did not span a holiday weekend.

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[7] *See* Rule 26(a)(1)(C) ("[I]nclude the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.").

[8] The relevant circuits, for purposes of this inquiry, would be those that employ Rule 31(a)(1)'s timing rules rather than setting briefing schedules with dates certain.

[9] A three-day extension of Rule 31(a)(1)'s deadline seems unlikely to cause problems in instances where electronic service is employed; such a change would merely offset the new inapplicability of the three-day rule. But it would be worth investigating whether lengthening the period by three days would cause any undue delay in cases where the three-day rule would still apply – that is to say, in cases where service is by mail (as seems likely to be the case with many pro se litigants).

Neither set of comments actually suggests changing the Rule 27(a) deadlines. DOJ suggests language for the Committee Note encouraging extensions where appropriate. Earthjustice urges retention of the three-day rule for electronic service. Further investigation would be needed in order to determine whether Rule 27(a)'s deadlines require adjustment.

As noted above, Earthjustice's argument based on prior time computation mechanisms in the Appellate Rules rests on a misunderstanding of the deadlines applicable in prior years. In fact, for the first 30 years of the Appellate Rules' existence, the deadline for motion responses was 7 days (computed without skipping intermediate weekends and holidays), and service would likely have been by mail – resulting in a net effective deadline of 7 calendar days if one assumes that the mail took roughly three days. From 1998 to 2002, the deadline for motion responses was 10 days (computed without skipping intermediate weekends and holidays) and service would likely have been by mail, resulting in a net effective deadline of 10 calendar days (based on the same assumption about the mail). In 1998, Rule 27 was amended to set a 7-day deadline for motion replies (computed without skipping intermediate weekends and holidays); until 2002, service would likely have been by mail, resulting in a net effective deadline of 7 calendar days.

As noted above, in 2002 Rule 25 was amended to permit electronic service. As electronic service became more common, the deadlines for motion responses and replies underwent the same sort of de facto expansion noted above with respect to the deadline for reply briefs. During the period from 2002 to 2009, where electronic service was employed, the de facto deadline for responses typically varied from 13 to 15 calendar days,[10] while the de facto deadline for replies typically was 10 calendar days.[11] From 2009 to the present, when electronic service is employed the de facto deadline for a response has been 13 calendar days and the de facto deadline for a reply has been 10 calendar days.

Does the entrenchment of the longer "de facto" deadlines post-2002 justify an extension of Rule 27(a)'s deadlines if the three-day rule is eliminated for electronic service? Or has motion practice become more elaborate, complex, or high-stakes since 1998,[12] justifying such a change?

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[10] The variation arose from the fact that, under the then-applicable version of Rule 26(a), intermediate weekends and holidays were not counted when computing periods "less than 11 days." A nominally 8-day period would last 10 calendar days if it spanned one weekend and 12 calendar days if it spanned two. Then, under the three-day rule, an additional three days would be added to the 10- or 12-day period.

[11] *I.e.*, seven calendar days (because the nominally-five-day period would span a weekend) plus three additional days.

[12] It was as recently as 1998 that the motion-response deadline was lengthened from 7 days to 10 days to better reflect the realities of motion practice. The 1998 Committee Note to Rule 27(a)(3) states in part:

Would extensions of these periods cause undesirable delays?[13] The Committee has not yet investigated those questions.

In any event, even if the Committee is concerned that eliminating the three-day rule for electronic service might undesirably shorten the deadlines for motion responses and replies, I suggest that it consider lengthening Rule 27(a)'s deadlines rather than retaining the three-day rule for electronic service. A change targeted at the deadlines for motions in particular seems like a better way to address the issue.

I therefore suggest that the Committee consider whether to add as a new agenda item the question of whether to lengthen Rule 27(a)'s deadlines for motion responses and replies.

IV. Conclusion

I propose that the Committee adopt the proposed amendment to Rule 26(c) as published, with language added to the Committee Note along the lines suggested by the DOJ.[14]

Encl.

> Paragraph (3) retains the provisions of the current rule concerning the filing of a response to a motion except that the time for responding has been expanded to 10 days rather than 7 days. Because the time periods in the rule apply to a substantive motion as well as a procedural motion, the longer time period may help reduce the number of motions for extension of time, or at least provide a more realistic time frame within which to make and dispose of such a motion.

[13] As noted above with respect to reply briefs, the question of delay would focus on those instances where service is made by mail or third-party commercial carrier, because it would be in those instances that the three-day rule would continue to apply.

[14] As noted above, the Committee may also wish to consider whether to add to its agenda, as new items, proposals to specify the computation of time periods measured after service of a filing that is not immediately accepted by the court; to enlarge Rule 31(a)(1)'s time limit for reply briefs; and to enlarge Rule 27(a)'s time limits for motion responses and replies.

PUBLIC SUBMISSION

As of: February 19, 2015
Tracking No. 1jz-8h93-7isu
Comments Due: February 17, 2015

Docket: USC-RULES-AP-2014-0002
Proposed Amendments to the Federal Rules of Appellate Procedure

Comment On: USC-RULES-AP-2014-0002-0001
Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2014-0002-0044
Comment from Caitlin Halligan, Gibson, Dunn & Crutcher LLP

Submitter Information

Name: Caitlin Halligan
Organization: Gibson, Dunn & Crutcher LLP

General Comment

See attached file(s)

Attachments

Comment Letter_GDC

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February 17, 2015

Jonathan C. Rose, Secretary
Committee on Rules of Practice and Procedure of the Judicial
Conference of the United States
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Washington, DC 20544

Dear Mr. Rose:

The Appellate and Constitutional Law Practice Group of Gibson, Dunn & Crutcher LLP appreciates this opportunity to comment on the pending proposal of the Advisory Committee on Appellate Rules to amend Federal Rules of Appellate Procedure 32 and 26(c). As one of the leading appellate practices in the United States, we have broad experience in all manner of cases, particularly complex civil litigation, before the federal courts of appeals. Based on this experience, we respectfully oppose the proposed amendment to reduce the word limits on appellate briefs under Rule 32. We do not oppose the proposal to eliminate the "three-additional-days" rule for electronic service under Rule 26(c); in the event the Committee repeals that rule, however, we urge the Committee to adopt an accompanying amendment to preserve the existing *de facto* seventeen-day deadline for filing a reply brief.

Rule 32: Word Limits

We respectfully submit that the proposal to reduce the word limits for appellate briefs from 14,000 words to 12,500 words for opening briefs, and from 7,000 words to 6,250 words for reply briefs, should not be adopted. The current word limits, which have functioned

effectively for the last sixteen years, strike the proper balance between preserving judicial economy and providing sufficient space for parties to present their positions. As explained below, a reduction in these word limits would impose burdens on courts and litigants that outweigh any purported benefits.

We appreciate the importance of brevity and concision in appellate briefing and strive to achieve those goals in our work. We also understand the concern that some advocates unfortunately fail to embrace these principles and submit unnecessarily long briefs. *See, e.g.*, Comments of Hon. Laurence H. Silberman, at 1 (Jan. 13, 2015) ("Silberman Comments"). But the proposed word limits, we believe, would unduly constrain all litigants in their ability to submit sufficiently informative and comprehensive briefs across cases. Litigants already face a strong disincentive against submitting unduly long briefs—such briefs are simply not effective. *See* Silberman Comments, at 1. And while there may be *some* cases that can be well briefed in less than 14,000 words, that is not true for *all* cases, in our experience.

Indeed, a substantial number of cases in the courts of appeals today are highly complex—involving, for example, intricate statutory and regulatory schemes, open jurisdictional issues, and questions at the intersection of state and federal law. Proper exposition of these cases requires *at least* the existing word limit to adequately present the facts and legal issues for the benefit of the court. As other commenters have observed, *see e.g.*, Comments of American Academy of Appellate Lawyers, at Section D(5) (Dec. 2, 2014), this complexity is only growing. Thus, although the proposed amendment might lead to

shorter briefs, we, like other commenters, are skeptical of the premise that it would actually produce better or more helpful briefs. *See* Comments of Reed Smith, at 3 (Feb. 10, 2015).

Moreover, a reduced word limit would impose particular harm on parties on the same side of a consolidated or joint appeal who, under the local rules of several circuits, must submit a joint brief. *See, e.g.*, United States Court of Appeals for the D.C. Circuit, Handbook of Practice and Internal Procedures at 37 (explaining that "[p]arties with common interests in consolidated or joint appeals must join in a single brief where feasible" and that the court "looks with extreme disfavor on the filing of duplicative briefs"). The parties must often make difficult compromises in determining how best to present the legal issues. Moreover, such cases often involve a challenge by multiple parties to agency action. The Government, as the opposing party, does not share such challenges and can benefit from a divided opposition. Reducing the word limits would only exacerbate this disparity.

A reduced word limit would lead to other problems. It would increase administrative burdens on the appellate courts because there would surely be an increased number of motions to exceed the word limit. A reduced word limit also could force litigants to abandon or drastically shorten meritorious arguments; the appellate courts would increasingly need to resolve questions of waiver.

Finally, we note that appeals court filings have decreased by fifteen percent over the past ten years. *See* Admin. Office of the U.S. Courts, Federal Judicial Caseload Statistics 2014, Caseload Analysis, U.S. Court of Appeals (Feb. 17, 2015), *available at*

http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics/caseload-statistics-2014/caseload-analysis.aspx. Consequently, the courts are less burdened, in terms of the total amount of briefing they must review, than they were when the current word limits were adopted.

In sum, the existing word limits have worked well over the past sixteen years, striking a proper balance in the vast majority of cases. The proposed reduction in word limits would have undesirable consequences that outweigh the purported benefit of having shorter—but not necessarily better—briefs. We respectfully suggest that the current word limits in Rule 32 be retained.

Rule 26(c): The "Three-Additional-Days" Rule

The Committee also proposed eliminating the three additional days to file a response provided under Rule 26(c) for a party receiving electronic service. We agree that this rule is no longer justified given that, with electronic service, documents are transmitted to the recipient instantaneously, and that such service is today the prevailing mode of service.

We note, however, that because most litigants do opt for electronic service, the proposed change would effectively reduce the time for filing a reply brief from the current *de facto* period of seventeen days (fourteen days under Rule 31(a)(1) plus three for electronic service under Rule 26(c)) to fourteen days. Maintaining the existing seventeen-day period for reply briefs would allow counsel sufficient time to draft such briefs, coordinate with

clients or other parties, and avoid burdening courts with an increase in requests for extensions of time.

We therefore urge the Committee to accompany any elimination of Rule 26(c) with an offsetting amendment to preserve the existing seventeen-day period for filing a reply brief.

Sincerely yours,

/s/ Theodore J. Boutrous Jr.	/s/ Thomas G. Hungar	/s/ Caitlin J. Halligan
Theodore J. Boutrous Jr.	Thomas G. Hungar	Caitlin J. Halligan

Practice Leaders, Appellate and Constitutional Law Practice Group
Gibson, Dunn & Crutcher LLP

PUBLIC SUBMISSION

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Proposed Amendments to the Federal Rules of Appellate Procedure

Comment On: USC-RULES-AP-2014-0002-0001
Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: USC-RULES-AP-2014-0002-0048
Comment from Seth Waxman, Wilmer Cutler Pickering Hale and Dorr LLP

Submitter Information

Name: Seth Waxman
Organization: Wilmer Cutler Pickering Hale and Dorr LLP

General Comment

Please see the attached comments on behalf of the appellate and Supreme Court litigation practice groups at Wilmer Cutler Pickering Hale and Dorr LLP and Akin Gump Strauss Hauer & Feld LLP, Arnold & Porter LLP, Jenner & Block LLP, Kirkland & Ellis LLP, Molo Lamken LLP, Morrison & Foerster LLP, OMelveny & Myers LLP, Orrick, Herrington & Sutcliffe LLP, Sidley Austin LLP, and Vinson & Elkins LLP.

Attachments

Comment - Wilmer Cutler Pickering Hale and Dorr LLP

February 17, 2015

Jonathan C. Rose, Secretary
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, NE
Suite 7-240
Washington, DC 20544

Dear Mr. Rose:

We submit these comments on behalf of the appellate and Supreme Court litigation practice groups at Wilmer Cutler Pickering Hale and Dorr LLP and Akin Gump Strauss Hauer & Feld LLP, Arnold & Porter LLP, Jenner & Block LLP, Kirkland & Ellis LLP, Molo Lamken LLP, Morrison & Foerster LLP, O'Melveny & Myers LLP, Orrick, Herrington & Sutcliffe LLP, Sidley Austin LLP, and Vinson & Elkins LLP. We appreciate this opportunity to address the proposal by the Advisory Committee on Appellate Rules to amend Federal Rules of Appellate Procedure 32 and 26(c). Our groups have extensive experience before the federal courts of appeals, and we draw on that experience to respectfully oppose the proposal to reduce the word limits for appellate briefs. We also suggest that eliminating the three additional days for electronic service provides an opportunity to consider whether the default deadline for filing a reply brief should be increased. Both of these suggestions reflect the increasing complexity of cases handled in the courts of appeals and would help avoid burdening courts with motions to extend the word limits or the time to file a reply brief.

RULE 32: WORD LIMITS

We oppose the proposal to reduce the word limits for opening and response briefs from 14,000 words to 12,500 words and to reduce the word limits for reply briefs from 7,000 words to

6,250 words. There is no compelling reason to change course after seventeen years under the current word limits, and there are good reasons to preserve the status quo.

As noted in other comments, the cases heard by the courts of appeals are complex and, if anything, only increasing in complexity. *E.g.*, American Academy of Appellate Lawyers, Cmt. § D(5) (Dec. 2, 2014); Joshua Lee, Cmt. (Sept. 16, 2014). Litigants on appeal must frequently address multiple causes of action, complex statutory schemes, ever-growing bodies of precedent, disputes among lower courts, threshold questions of jurisdiction and standing, interactions between state and federal law, and complicated technologies or business arrangements.

For many appeals, 1,500 words in an opening brief or 750 words on reply can mean the difference between including or excising a meritorious argument. It can also substantially affect the depth of treatment that each argument receives. Advocates understand that their objective is always to be helpful to the court as it works to understand their case and its salient points. While some advocates submit unnecessarily long briefs, there is already a penalty for going on longer than required: Such briefs tend to be less persuasive. At the same time, a shorter brief is not always possible or helpful to the court, lest the court not understand the context in which the case arises. We thus strive to submit shorter briefs whenever possible, but often find that the existing word limits constrain the substance of the arguments we can make. This is especially true in cases involving statutes with complicated common-law backgrounds or legislative histories, areas of law where the courts have issued conflicting rulings or decisions that require close distinctions, cases where several agencies have overlapping jurisdiction, and cases that have been through a prior appeal and remand.

The proposal to reduce the word limits contrasts with the Supreme Court's rule, which gives advocates 15,000 words for opening briefs on the merits. S. Ct. R. 33.1(g). Although the Supreme Court and the courts of appeals hear a different mix of cases, the number of words that the Supreme Court considers appropriate for addressing what is often a single question of law (and usually in a clean vehicle) should give the Committee pause about reducing the number of words litigants are given to develop multiple issues in an appeal from a case that may have involved numerous issues, many parties, or a complex trial record.

Moreover, it is not clear that the courts of appeals will benefit from reducing the word limits. Advocates forced to make cuts are likely to preserve substantive arguments at the expense of discussing some of the supporting authorities and record materials, such as details regarding the trial record and procedural history. This would require courts to spend more time tracking down cases and examining the record to analyze arguments that cross-reference those materials but that counsel do not have room to elaborate. The concern in such circumstances is not that litigants on appeal had to excise arguments completely, but that their briefs will fail to provide a complete understanding of what is at issue in the case and thus will be less helpful to the courts.

Lower word limits will also increase the number of motions seeking additional words. Office of General Counsel, EEOC, Cmt. at 1 (Feb. 5, 2015). Based on our experience, the current limits appear sufficient to accommodate the substantial majority of cases; requests for additional words appear relatively rare at present, and granted requests even more so. Tighter

limits would likely upset this balance, causing an uptick in the frequency of requests for more words and imposing an additional burden on the courts.

Additionally, many cases involve more than one party on each side. In some instances—including some of the most complex appeals from agency determinations—parties are presumptively required to file a joint brief. *See* D.C. Cir. R. 28(d) (providing that "[i]ntervenors on the same side must join a single brief to the extent practicable"). A single brief of 12,500 words may prove difficult in such cases, resulting in an ineffective joint submission, or multiple briefs where a single 14,000-word brief would have been "practicable." Even where joinder is not required, moreover, parties often work together to file joint briefs. Fed. R. App. P. 28(i); *see also, e.g.*, *Classen Immunotherapies, Inc. v. Shionogi, Inc., Merz Pharm., LLC, Merz Pharm., GmbH*, No. 2014-1364 (Fed. Cir. Aug. 8, 2014) (joint brief filed for all defendants). But the willingness to participate in a joint brief depends on the assurance that all issues will be fairly covered by that one submission. Again, then, the proposed reduction in word limits would reduce the attractiveness of such arrangements, with the unfortunate result that courts may receive *more* briefs in complex multi-party appeals than they currently do.

In the face of these reasons to stay the course, there is no compelling justification for changing direction after seventeen years of practice. The Committee points to what it believes was an "inadvertent[] increase[]" in the length limits as the reason for its proposed reduction. *Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure* 48 (Aug. 2014). The newly proposed conversion ratio, however, is based on a tiny sample of only fifteen opening briefs and thirteen reply briefs filed before

1993. *Id*. at 18, 20-24. Even within that small sample, eleven briefs—more than a third—would have exceeded the proposed new limits. *Id*. at 23-24. In addition, Judge Easterbrook has disputed the assertion that the 1998 amendment resulted from a mistaken conversion ratio and reported that, in a pre-1998 study of fifty briefs that he conducted for purposes of amending the Seventh Circuit Rules, the average word count was only "a little under 14,000." Easterbrook, Cmt. (Sept. 11, 2014). The premise that briefs have gotten longer as the result of a 1998 mistake therefore cannot justify the proposed change.

Nor would a change be warranted even if there had been a mistake. Litigants and courts have been operating under the current word limits for seventeen years. Although some briefs filed during that time undoubtedly should have been shorter, there is no evidence that the current limits have proved unworkable for the average case or that there is any other pressing reason to change them. The burden should be on those who would change the status quo, and there has been no showing that a nationwide reduction in the word limits is warranted.[1]

RULE 26(C): THE "THREE-DAY RULE"

Rule 26(c) currently gives a party receiving a brief by electronic service three extra days to respond. The Committee proposes to eliminate this extra time. We agree that a paper served electronically should be treated as delivered on the date of service. However, the proposed change would reduce the time for filing a reply brief from what is typically seventeen days to

[1] If the Committee decides to reduce the word limits in Rule 32 notwithstanding these concerns, it should, at a minimum, add a statement making clear that nothing in the rule prevents the courts of appeals from granting increased page limits, especially in cases where the parties agree that the case is a complex one and warrants more words.

fourteen days. We suggest that rather than reduce the de facto seventeen-day deadline for reply briefs that has existed under Rule 26(c), the Committee should adopt an offsetting amendment that would set a seventeen-day deadline for filing a reply brief or, better yet, increase the deadline to twenty-one days.

The de facto deadline for most reply briefs has been more than fourteen days for many years, even before electronic service became widespread. This extra time can be critical for advocates juggling competing deadlines or representing incarcerated (and thus hard to reach) clients and is particularly important as litigation grows more complex. A longer deadline also allows more time for client review and feedback and benefits the courts by reducing the number of extension requests.

By comparison to the current proposal, the Supreme Court sets a thirty-day deadline for merits reply briefs. S. Ct. Rule 25.3. Even when that deadline is cut short because it would fall too close to oral argument, *see id.*, it is longer than the current de facto deadline in the courts of appeals and will typically be more than double the proposed new deadline.

Although there is no need to link the extra time to electronic service, we suggest that the Committee adopt an offsetting amendment that would set the period to file a reply brief at seventeen days or, preferably, twenty-one days, to reflect the increasing complexity of cases on appellate dockets and to maintain day-of-the-week counting. This time could, of course, be shortened when there is a case-specific need to expedite an appeal. But an across-the-board contraction of the de facto deadline for filing reply briefs should not be adopted without considering whether a longer default period for reply briefs is warranted.

Respectfully yours,

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Table B-4A.
U.S. Courts of Appeals—Median Time Intervals in Months for Civil and Criminal Appeals Terminated on the Merits, by Circuit, During the 12-Month Period Ending September 30, 2014

Circuit	Terminated on the Merits													
			Median Time Intervals From											
			Filing of Notice of Appeal to Filing of Appellee's Last Brief		Filing of Appellee's Last Brief to Oral Argument or Submission on Briefs		Oral Argument to Last Opinion or Final Order		Submission on Briefs to Last Opinion or Final Order		Filing of Notice of Appeal to Last Opinion or Final Order		Filing in Lower Court to Last Opinion or Final Order in Appeals Court	
	Total	By Consolidation	Appeals	Interval	Appeals	Interval	Appeals	Interval	Appeals	Interval	Appeals	Interval	Appeals	Interval
Total	**27,391**	**2,130**	**12,215**	**5.6**	**12,215**	**3.6**	**5,764**	**2.1**	**19,497**	**0.4**	**25,261**	**9.2**	**25,261**	**28.4**
DC	376	52	210	8.0	210	5.1	163	3.1	161	0.9	324	12.8	324	37.1
1st	725	66	464	7.5	464	2.5	236	3.0	423	2.3	659	12.9	659	31.9
2nd	2,146	219	1,105	6.8	1,105	3.7	740	0.8	1,187	0.2	1,927	10.5	1,927	35.9
3rd	1,627	71	883	5.7	883	1.9	204	3.5	1,352	0.9	1,556	8.3	1,556	32.6
4th	3,017	137	801	5.4	801	2.9	305	2.0	2,575	0.2	2,880	5.5	2,880	26.2
5th	4,092	710	1,655	5.5	1,655	3.8	711	1.4	2,671	0.5	3,382	9.5	3,382	22.2
6th	2,638	201	1,525	5.1	1,525	3.6	447	2.3	1,990	1.1	2,437	9.8	2,437	30.6
7th	1,552	151	827	5.4	827	2.0	605	2.8	796	0.3	1,401	7.9	1,401	28.3
8th	1,851	92	813	3.6	813	4.8	374	3.5	1,385	0.3	1,759	7.0	1,759	24.4
9th	5,071	230	1,540	7.1	1,540	10.4	1,234	1.3	3,607	0.2	4,841	12.4	4,841	32.9
10th	1,190	28	765	4.9	765	3.0	338	3.3	824	1.5	1,162	8.7	1,162	26.0
11th	3,106	173	1,627	4.5	1,627	2.6	407	1.7	2,526	1.1	2,933	8.1	2,933	24.6
Prisoner Petitions	**9,853**	**243**	**1,395**	**7.1**	**1,395**	**4.0**	**628**	**1.9**	**8,982**	**0.2**	**9,610**	**6.2**	**9,610**	**25.1**
DC	60	9	18	6.8	18	3.2	17	3.2	34	0.9	51	9.6	51	38.3
1st	137	12	39	6.5	39	2.0	20	2.7	105	3.0	125	9.7	125	27.2
2nd	475	17	68	7.7	68	3.6	36	0.8	422	0.1	458	4.2	458	29.6
3rd	591	10	91	8.1	91	2.6	27	3.0	554	0.5	581	5.1	581	31.9
4th	1,292	18	49	6.9	49	3.4	30	1.7	1,244	0.2	1,274	4.7	1,274	27.4
5th	1,090	105	140	6.0	140	5.1	55	1.0	930	0.2	985	7.1	985	19.7
6th	946	19	221	8.3	221	3.7	65	2.3	862	0.7	927	7.5	927	30.3
7th	543	17	119	7.1	119	2.1	48	2.8	478	0.4	526	5.3	526	19.8
8th	724	8	110	4.7	110	4.6	44	3.5	672	0.2	716	4.7	716	17.3
9th	2,380	7	250	12.9	250	9.7	215	0.9	2,158	0.1	2,373	9.9	2,373	29.4
10th	360	2	78	4.2	78	1.7	17	3.9	341	1.3	358	4.8	358	16.9
11th	1,245	19	208	7.1	208	2.8	54	2.6	1,172	0.3	1,226	6.0	1,226	20.7

Table B-4A. (September 30, 2014—Continued)

Circuit	Terminated on the Merits													
			Median Time Intervals From											
			Filing of Notice of Appeal to Filing of Appellee's Last Brief		Filing of Appellee's Last Brief to Oral Argument or Submission on Briefs		Oral Argument to Last Opinion or Final Order		Submission on Briefs to Last Opinion or Final Order		Filing of Notice of Appeal to Last Opinion or Final Order		Filing in Lower Court to Last Opinion or Final Order in Appeals Court	
	Total	By Consolidation	Appeals	Interval	Appeals	Interval	Appeals	Interval	Appeals	Interval	Appeals	Interval	Appeals	Interval
Other Civil Appeals	**8,631**	**1065**	**5,974**	**4.9**	**5,974**	**3.9**	**3,377**	**2.3**	**4,189**	**0.8**	**7,566**	**10.8**	**7,566**	**30.5**
DC	249	28	144	7.2	144	5.5	112	2.9	109	0.9	221	12.7	221	32.9
1st	279	27	217	5.4	217	2.3	135	2.8	117	2.3	252	10.6	252	29.3
2nd	1,071	130	694	6.4	694	3.8	509	1.0	432	0.2	941	10.7	941	33.8
3rd	596	38	480	5.2	480	2.0	125	3.8	433	2.3	558	10.0	558	30.1
4th	638	45	249	4.1	249	4.6	151	2.1	444	0.2	595	6.0	595	21.5
5th	1,135	357	707	4.5	707	3.9	425	1.8	353	1.7	778	9.9	778	28.4
6th	887	128	718	4.0	718	3.8	274	2.4	488	1.5	762	10.2	762	28.6
7th	564	75	433	4.7	433	2.1	326	3.0	163	0.1	489	9.7	489	31.1
8th	542	49	399	3.3	399	5.3	233	3.6	261	0.3	494	10.6	494	26.7
9th	1,389	117	838	6.6	838	13.6	666	1.5	609	0.3	1,275	21.3	1,275	38.3
10th	470	16	406	4.3	406	3.0	179	3.8	275	2.2	454	10.4	454	29.4
11th	811	55	693	3.4	693	2.8	242	1.6	515	1.9	757	9.0	757	28.0
Criminal Appeals	**8,907**	**822**	**4,846**	**6.4**	**4,846**	**3.2**	**1,759**	**1.9**	**6,326**	**0.6**	**8,085**	**10.8**	**8,085**	**29.2**
DC	67	15	48	15.7	48	4.5	34	3.3	18	0.9	52	20.2	52	66.2
1st	309	27	208	9.8	208	3.2	81	3.4	201	1.7	282	16.4	282	37.2
2nd	600	72	343	9.2	343	3.7	195	0.7	333	0.2	528	13.2	528	45.0
3rd	440	23	312	6.5	312	1.6	52	3.2	365	2.7	417	10.8	417	37.4
4th	1,085	74	503	6.0	503	2.5	124	1.9	887	0.3	1,011	7.9	1,011	28.5
5th	1,867	248	808	6.5	808	3.6	231	1.1	1,388	0.5	1,619	10.3	1,619	20.3
6th	802	54	586	6.5	586	3.3	108	2.0	640	1.4	748	11.8	748	34.2
7th	445	59	275	6.3	275	1.7	231	2.5	155	0.1	386	9.9	386	35.0
8th	584	35	304	3.7	304	4.1	97	3.5	452	0.4	549	8.3	549	28.1
9th	1,299	106	452	7.0	452	5.3	353	1.1	840	0.3	1,193	13.5	1,193	31.4
10th	360	10	281	5.8	281	3.5	142	3.0	208	0.9	350	10.4	350	28.0
11th	1,049	99	726	5.4	726	2.4	111	1.4	839	1.5	950	10.0	950	24.6

NOTE: This table does not include data for the U.S. Court of Appeals for the Federal Circuit.

TAB 7

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TAB 7A

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MEMORANDUM

DATE: October 15, 2015

TO: Advisory Committee on Appellate Rules

FROM: Gregory E. Maggs, Reporter

RE: Item No. 14-AP-D (Consider possible changes to FRAP 29's authorization of amicus filings based on party consent)

This is a new item that concerns Federal Rule of Appellate Procedure (FRAP) 29(a). At the May 2014 Meeting of the Standing Committee, Judge Sutton observed that FRAP 29(a), which allows filing amicus briefs by consent during initial consideration of a case on the merits, may be in tension with some circuits' local rules. He suggested that the Advisory Committee on Appellate Rules consider whether FRAP 29(a) should be changed in the future. Judge Colloton agreed to add the matter to the Committee's agenda. *See* Minutes of the Committee on Rules and Practice Meeting of May 29-30, 2014, at 14 (excerpt attached).

A. Background and Potential Concern about Disqualification

FRAP 29(a) specifies when an amicus curiae may file a brief with or without leave of the court. The rule says:

> (a) When Permitted. The United States or its officer or agency or a state 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.

Under the last clause of this provision, if the parties to the lawsuit consent, then the amicus curiae does not have to obtain leave of the court.

A potential concern about the last clause is that the parties might consent to the filing of brief by an amicus curiae, and that filing may cause the recusal of one or more judges on the panel hearing the case. For example, suppose that Corporation X has sued Corporation Y, and the matter is now on appeal. Both parties consent to the filing of an amicus brief by Corporation Z. Suppose further that, as the result of the amicus filing, a judge on the panel is disqualified. This might happen if the law firm that wrote the brief for Corporation Z is on the judge's recusal list because a relative of the judge works for the firm. *See* Code of Conduct for United States Judges, Canon 3(C)(1)(d)(iii).

Perhaps Corporation X and Corporation Y did not know that the judge would be disqualified by the filing of the amicus brief. Maybe one corporation knew and the other did not. Or perhaps they both knew but did not care about recusal or even favored recusal. In any event, allowing the parties to take an action the requires disqualification of a judge seems contrary to the usual presumption that parties do not have the power to choose the judges who hear their cases.

B. Response by Several Circuits in their Local Rules

Several Circuits have local rules that address the concern that amicus briefs may require recusal:

- DC Circuit Rule 29(b) states in part: "Leave to participate as amicus will not be granted and an amicus brief will not be accepted if the participation of amicus would result in the recusal of a member of the panel that has been assigned to the case or a member of the en banc court when participation is sought with respect to a petition for rehearing en banc."

- Second Circuit Rule 29.1(a) states: "The court ordinarily will deny leave to file an amicus brief when, by reason of a relationship between a judge assigned to hear the proceeding and the amicus curiae or its counsel, the filing of the brief might cause the recusal of the judge."

- Fifth Circuit Rule 29.4 states: "After a panel opinion is issued, amicus curiae status will not be permitted if the allowance would result in the disqualification of any member of the panel or of the en banc court."

- Ninth Circuit Advisory Committee Note to Rule 29-2 states in part: "The Court will ordinarily deny motions and disallow stipulations for leave to file an amicus curiae brief where the filing of the brief would result in the recusal of a member of the en banc court. Any member of the Court who would be subject to disqualification in light of the amicus curiae brief may, of course, voluntarily recuse, thereby allowing the filing of the amicus curiae brief."

In each of these Circuits, the local rule appears to address the concern about recusal raised by the hypothetical above concerning Corporations X, Y, and Z. Even if Corporation X and Corporation Y consented to the filing of an amicus brief by Corporation Z, the court would not have to accept the brief if doing so would disqualify a judge.

C. Consideration by the Committee

At the October 2015 Meeting, the Committee may wish to consider issues related to this Item. An initial question, raised by Judge Sutton above, is whether the local rules quoted above are inconsistent with FRAP 29(a). They certainly appear to be inconsistent in that they do not

allow the filing of amicus briefs based solely on consent of the parties in all instances. If these local rules are inconsistent, then an additional question is whether FRAP 29(a) should be amended either to authorize local rules of this type or to go further and mirror the substance of these local rules. Under FRAP 47(a)(1), local rules must be consistent with Federal Rules.

Attachment

Minutes of the Committee on Rules and Practice Meeting of May 29-30, 2014 (excerpt)

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of May 29–30, 2014
Washington, D.C.

Minutes

TABLE OF CONTENTS

ATTENDANCE

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Washington, D.C., on Thursday and Friday, May 29 and 30, 2014. The following members participated in the meeting:

Judge Jeffrey S. Sutton, Chair
Dean C. Colson, Esquire
Roy T. Englert, Jr., Esquire
Gregory G. Garre, Esquire
Judge Neil M. Gorsuch
Judge Susan P. Graber
Chief Justice Wallace B. Jefferson
Dean David F. Levi
Judge Patrick J. Schiltz
Judge Amy J. St. Eve
Larry D. Thompson, Esquire
Judge Richard C. Wesley
Judge Jack Zouhary

Appellate Rules 5, 21, 27, 28.1, 32, 35, and 40, and to Form 6.

FED. R. APP. P. 29

Judge Colloton reported that the advisory committee recommended publishing an amendment to Rule 29, addressing amicus filings in connection with rehearing. The amendment would re-number the existing rule as Rule 29(a) and would add Rule 29(b) to set default rules for the treatment of amicus filings in connection with petitions for rehearing.

Judge Colloton noted that two stylistic changes were made to the version that appeared in the Standing Committee's agenda materials. First, on page 584, line 14, in proposed Rule 29(b)(2), "Rule 29(a)(2) applies" was changed to "Rule 29(a)(2) governs the need to seek leave." Second, on page 584, line 16, in proposed Rule 29(b)(3), "the" was changed to "a."

The committee discussed whether Rule 29(b)(2) should incorporate any of the language of Rule 29(a)(2). Some members noted that some appellate courts do not allow the filing of amicus briefs without leave of court, because a practice had developed of filing amicus briefs in order to force recusals. Judge Colloton agreed, on behalf of the advisory committee, to borrow some of the language from Rule 29(a)(2) for use in Rule 29(b)(2). The proposed amendment to Rule 29(b)(2) would read: "The United States or its officer or agency or a state 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." Judge Sutton noted that Rule 29(a), which allows filing amicus briefs by consent during initial consideration of a case on the merits, may be in tension with some circuits' practice, and suggested that the advisory committee consider whether it should be changed in the future. Judge Colloton agreed that the advisory committee would add Rule 29(a) to its agenda.

The committee unanimously approved publication of the proposed amendment to Rule 29, revised as stated above.

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TAB 8A

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MEMORANDUM

DATE: October 15, 2015

TO: Advisory Committee on Appellate Rules

FROM: Gregory E. Maggs, Reporter

RE: Item No. 12-AP-D (Civil Rule 62/Appeal Bonds)

This item concerns possible changes to Civil Rule 62 (Stay of Proceedings to Enforce a Judgment) and the rule's treatment of supersedeas bonds (i.e. bonds that an appellant must post to stay execution of a judgment during the pendency of an appeal).

At the April 2015 meeting, the Committee discussed five possible areas of reform. Amendments to the rule might address the rule's structure, fill certain gaps, allow for flexibility in the forms of security, allow a single form a security to suffice for the entire period from post-judgment motions through appeals, and specify the amount of security. Members of the Committee recognized that the Civil Rules Committee would propose any changes to the rule but observed that the matter is of interest to this Committee because appeal bonds are an appellate lawyer's concern. The Committee took no action on this item. *See* Draft Minutes of April 23-24, 2015, Appellate Rules Committee Meeting at 33-34.

A joint subcommittee appointed by the Civil and Appellate Rules Committees has continued to study the matter. This Subcommittee is chaired by Judge Scott Matheson, and its other members has included Judge Peter Fay, Douglas Letter, Kevin Newsom, and Virginia Seitz. On October 12, 2015, Judge Matheson informed Judge Colloton that the subcommittee is ready to present its
work in progress to the Appellate Rules Committee and that it will circulate a report of its discussions later this month.

At the October 2015 meeting, the Committee may wish to discuss the work of the Rule 62 Subcommittee.

Attachment

Notes, Appellate-Civil Subcommittee (Aug. 20, 2015)

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8. Rule 62: Stays of Execution

Introduction

These Rule 62 proposals are made to the Appellate and Civil Rules Committees by a joint subcommittee appointed by the two Committees. The Subcommittee was chaired by Judge Scott Matheson. Its other members include Judge Peter Fay, Douglas Letter, Kevin Newsom, and Virginia Seitz.

The Rule 62 proposals reorganize present subdivisions (a) through (d) and make several additions to rule text. The provisions in present subdivisions (a) and (c) that address judgments for injunctions, receiverships, and accountings in actions for patent infringement are consolidated in a single subdivision (d), with a few minor style revisions. The provisions that address stays of execution on judgments for other remedies provide the occasion for the additions to rule text. Most of those judgments simply award money, but some award other forms of relief such as foreclosing a lien or quieting title.

It seems likely that most of the revisions do no more than make explicit the authority to do things that courts have understood can be done in the shadow of present Rule 62. The broad theme is to recognize authority to grant, modify, or refuse a stay in all of the circumstances addressed by — or perhaps inadvertently omitted from — the present rule. Any of those actions can be taken with or without security. For example, the proposals allow the court to refuse or vacate an automatic stay, and at the same time decide whether to require the judgment creditor to post security as a condition of permitting present enforcement. The proposal expressly recognizes the opportunity to post security in a form other than a bond, and makes it clear that a party who wishes to do so can arrange security in a single undertaking that will run from the moment judgment is entered through completion of the final acts on appeal. Throughout, the emphasis is on trial court discretion to adjust to the circumstances of a particular case.

Proposed Rule 62(a) identifies three types of stay: The automatic stay, present Rule 62(a); a stay initiated by the judgment debtor by posting a bond or other security, succeeding to the "supersedeas" bond provisions of present Rule 62(d); and a stay ordered by the court, expanding the provisions of present Rule 62(b) for a stay pending disposition of post-trial motions. Proposed Rule 62(b) allows the court, for good cause, to refuse a stay sought by posting a bond, and to dissolve any stay or modify its terms. Proposed Rule 62(c) establishes broad discretion to require and set appropriate terms for security or to deny security.

The next section briefly describes the origins of the Rule 62 work and several of the broad concerns that emerged as the work progressed. Detailed discussion of the proposed rule text is provided in the concluding section.

Developing the Proposal

Rule 62 came to the agenda by two paths, one beginning in the Appellate Rules Committee and the other in the Civil Rules Committee.

The Appellate Rules Committee took up Rule 62 at the suggestion of a member who was interested in making it clear that a judgment debtor can secure a stay by posting continuing security, whether as a bond or by other means, that will last from termination of the automatic stay through completion of all acts by the court of appeals. This beginning led to a comprehensive report by Professor Struve, Reporter for the Committee, examining many different aspects of Rule 62 stays.

The Civil Rules Committee first looked at Rule 62 in response to a question raised by a district judge. The question arose from a complication in the relationship between automatic stays and the authority to order a stay pending disposition of a post-judgment motion. The complication arose from the Time Computation Project that led each of the several advisory committees to reset many of the time periods set in the various sets of rules. Before the Time Project changes, Civil Rules 50, 52, and 59 set the time for motions at 10 days after entry of judgment. Rule 62(a) extinguished the automatic stay 10 days after entry of judgment. Rule 62(b) recognized authority to issue a stay pending disposition of a motion under Rule 50, 52, 59, or 60. The Time Project reset the time for motions under Rules 50, 52, or 59 at 28 days. It also reset expiration of the automatic stay at 14 days after entry of judgment. The result was that the automatic stay expired half-way through the time allowed to make a post-judgment motion. Rule 62(b), however, continued to authorize a stay "pending disposition of any of" these motions. The judge submitted a suggestion that Rule 62 should be amended to make it clear that a stay could be issued before a post-judgment motion is made. The Committee decided against any immediate action. It believed that there is inherent authority to issue a stay as part of the court’s necessary control over its own judgment. It concluded that the usual conservative approach made it sensible to wait to see whether actual problems might emerge in practice.

Consultation through the joint Subcommittee led to consideration of many other questions. The central questions are described here. Other questions are addressed in looking at particular provisions of the proposal.

The "gap" between expiration of the automatic stay and the later time allowed to make a post-trial motion was addressed from the beginning. The simplest adjustment would be to rewrite the rule to allow the court to enter a stay at any time after expiration of the automatic stay. That would make explicit the authority that should exist in any event. It would avoid any need to worry whether a pre-motion stay could be ordered only on a party's representation that a post-judgment motion would, or likely would, be made. But it would add to the burdens imposed on the judgment debtor, to some extent vitiating the advantages sought by extending the motion time to 28 days. The alternative was to adopt two approaches. Proposed Rule 62(a)(3) authorizes the court to order a stay at any time, including a stay that supersedes the automatic stay before it expires. And proposed Rule 62(a)(1) extends the time of the automatic stay to 30 days. That time allows two days beyond the time for making a post-trial motion, an advantage that could become important in cases in which decisions whether to appeal may be affected by the absence of any post-trial motion. It also provides a brief window to arrange security for a court-ordered stay.

The possible disadvantage of extending the automatic stay is the risk that it will become easier to take steps to defeat any execution, ever. That risk is addressed at the outset of proposed Rule 62(a)(1): the automatic stay takes hold "unless the court orders otherwise." There may be no automatic stay at all. Or the court may supersede the automatic stay by ordering a stay under Rule 62(a)(3). So too, proposed Rule 62(b) authorizes the court to dissolve or modify a stay for good cause — the automatic stay is included. The countering risks that denial of a stay may work irremediable injury on the judgment debtor are addressed by the court's authority under proposed Rule 62(c) to require security on refusing or dissolving a stay.

The single-security question turned attention to present Rule 62(d)'s provisions for a stay by supersedeas bond. An attempt to post a single bond to cover a stay both during post-judgment proceedings and during an appeal might run afoul of the present rule language that recognizes this procedure "If an appeal is taken," and directs that "[t]he bond may be given upon or after filing the notice of appeal." It should not be hard work to redraft to dispel the implication that a pre-appeal bond is premature. Proposed Rule 62(a)(2) does that by enabling a party

to obtain a stay by providing a bond "at any time after judgment is entered." So too, it is easy enough to add language authorizing security in a form other than a bond. Proposed Rule 62(a)(2) does that by recognizing "a bond or other security."

But consideration of the stay by supersedeas bond raised the question whether there is an absolute right to a stay. Practitioners report a belief that this provision establishes a right to stay execution on posting a satisfactory bond. This belief may be supported by the rule text: "the appellant may obtain a stay by supersedeas bond * * *." There may be some offsetting implication in the further provision that the stay takes effect when the court approves the bond, although approval may be limited to considering the amount of the security, the form of the bond, and the assurance that the bond can be made good. This question was discussed at length. In the end, the Subcommittee concluded that it is better to recognize authority to refuse a stay for good cause even if adequate security is tendered. Even as to a money judgment, delay in execution may inflict harms that cannot be compensated by full payment of the judgment, with interest, after affirmance. Judgments for other forms of relief may present risks comparable to the risks posed by staying an injunction. Staying a declaration of title may defeat a favorable transaction that cannot be accurately measured in setting a bond amount. (The alternative of exercising Enabling Act authority to allow bond provisions for "delay damages" might invite significant difficulties.)

The final major decision was to reorganize and carry forward the provisions in present Rule 62(a) and (c) for stays of judgments in an action for an injunction or a receivership, or directing an accounting in an action for patent infringement. They are joined in proposed subdivision (d). One change is proposed. Present Rule 62(c) incorporates some, but not all, of the words used in the interlocutory injunction appeal statute, 28 U.S.C. § 1292(a)(1). The Rule refers to "an interlocutory order or final judgment that grants, dissolves, or denies an injunction." The formula in § 1292(a)(1) is more elaborate. Although the Subcommittee is not aware of any difficulties arising from the differences, it has seemed wise to forestall any arguments about appeals from such orders as those that "continue" or "modify" an injunction.

The Subcommittee also considered present Rules 62(e) and (f). Rule 62(e) is captured in its tag line: "Stay without Bond on an Appeal by the United States, Its Officers, or Its Agencies." Representatives of the Department of Justice reported that they were not aware of any difficulties arising from this

subdivision. Rule 62(f) invokes state law that entitles a judgment debtor to a stay when a judgment is a lien on the judgment debtor's property under the law of the state where the court is located. Professor Struve's memorandum described potential problems of the sort that might be expected when incorporating state law. These questions were put aside for want of any clear sense whether there are significant problems in practice, or how to address any problems that might be identified.

Details of The Rule

Automatic Stay:

(a) STAY OF EXECUTION. Except as provided in Rule 62(d), execution on a judgment, or proceedings to enforce it, are stayed as follows:

(1) *Automatic Stay.* Unless the court orders otherwise, for 30 days after the judgment is entered.

Two points may be noted about the introduction. It begins with a reminder that subsection (d) sets out different rules for judgments in actions for an injunction or receivership, or for an accounting in an action for patent infringement. It also carries forward the part of the present rule that includes "proceedings to enforce" the judgment. It would be a legitimate use of the Committee Note to note that a court might distinguish between execution and other proceedings to enforce the judgment. Discovery in aid of future execution, and perhaps security orders aimed to preserve discovered assets, would be an obvious example. The current draft Note has not gone that far, in part for uncertainty whether courts or even litigants need to be reminded of this distinction in the present rule.

The automatic stay itself is discussed above. The draft adds express authority to defeat the automatic stay, either from the inception by ordering otherwise, by superseding it under Rule 62(a)(3), or by dissolving it under subdivision (b). The automatic stay is extended from 14 days to 30 days. And the "gap" between the end of the 14th day and the time to make post-judgment motions is eliminated.

Stay by Bond:

(2) *By Bond or Other Security.* A party may at any time after judgment is entered obtain a stay by providing a bond or other security. The stay takes effect when the court

approves the bond or other security and remains in effect for the time specified in the bond or security.

As noted above, the time for seeking a stay by posting a bond is advanced from "upon or after filing the notice of appeal" to "at any time after judgment is entered." This change securely establishes the practice that allows a party to obtain a single security that lasts from expiration of the automatic stay — or, with fast action, from the entry of judgment — through completion of all proceedings on appeal.

The proposed rule text also expressly recognizes authority to accept "other security." As compared to bond premiums, for example, a party might find it advantageous to place the amount of the judgment in escrow. A showing that the judgment debtor has assets that amply ensure future execution also might displace any need for security; subsection (c) confirms the court's authority to approve that outcome.

The provision that the bond takes effect when the court approves the bond is taken verbatim from present Rule 62(d); "other security" is added. No attempt is made, either in rule text or Committee Note, to explore whatever measure of discretion has been established in determining whether to approve the bond. Similar discretion is appropriate as to other forms of security, although the parties are likely to exercise greater inventiveness, exacting closer scrutiny by the court. Most importantly, no suggestion is offered either way as to the possibility that the court's authority to approve the security establishes authority to deny a stay on any terms — that question is important under the present rule, but is expressly answered by subdivision (b) of the proposal, which establishes authority to refuse a stay under subdivision (a)(2) for good cause.

The further provision that the bond remains in effect for the time specified complements the time for posting, reinforcing the opportunity to provide a single bond or other security that runs from judgment through post-judgment proceedings and appeal.

By Court Order:

(3) *By Court Order.* The court may at any time order a stay that remains in effect until a time designated by the court[, which may be as late as issuance of the mandate on appeal].

"[A]t any time" does at least two things. It authorizes the court to issue a stay that displaces the automatic stay, either before the automatic stay arises with entry of judgment or during its initial life. The purpose of displacing the stay with the court-ordered stay may be to require security, or perhaps to establish other terms. It also ensures the power established by present Rule 62(b) to issue a stay pending disposition of post-judgment motions.

The "remains in effect" language confirms the "single bond" for a court-ordered stay, whether or not security is required. The bracketed clause is redundant, but it may be a helpful reminder to court and parties that the time can run to completion of all proceedings in the court of appeals.

Refusing, Dissolving, or Modifying:

(b) REFUSING, DISSOLVING, OR MODIFYING STAY. The court may, for good cause, refuse a stay under Rule 62(a)(2) or dissolve a stay or modify its terms.

This subdivision explicitly establishes the court's authority to control the stay process.

The first authority, described above, is to refuse a stay even though a judgment debtor is prepared to post full security. Good cause is required to refuse. This outcome may depart from the present rule — at least some lawyers believe that posting adequate security establishes an indefeasible right to a stay. But there may be circumstances in which immediate execution seems important because the judgment creditor will be irreparably harmed by delay, because only wasting (or disappearing) assets can be identified for execution, because the judgment orders relief that is not for money but also is not an injunction, or for still other reasons. Protection for the judgment debtor is provided by proposed subdivision (c), which expressly authorizes the court to demand that the judgment creditor post security as a condition of refusing the stay.

The other aspects of the court's control extend to dissolving a stay or modifying its terms. Again, good cause is required. This authority extends to all stays. In addition to the (a)(2) stay-by-bond, it includes the (a)(3) court-ordered stay. It also includes the (a)(1) automatic stay, although the occasions to dissolve or modify may be reduced by the initial authority to "order otherwise" before the automatic stay even takes effect. The court also may supersede an automatic stay by

issuing a stay under Rule 62(a)(3). (There is no explicit "good cause" requirement to forestall the automatic stay before it springs into effect under (a)(1), but the court's discretion will be influenced by the same factors that enter into a good-cause determination.)

Security:

(c) SECURITY ON GRANTING, REFUSING, OR DISSOLVING A STAY. The court may, on entering a stay or on refusing or dissolving a stay, require and set appropriate terms for security or deny security.

This subdivision is new. It recognizes full authority as to security. The increased emphasis on authority to deny any stay is supported by expressly recognizing authority to require security as a condition of refusing or dissolving a stay.

Injunctions, etc.:

Proposed subdivision (d) consolidates the provisions of present subdivisions (a) and (c) that address judgments in actions for an injunction or receivership, or for an accounting in an action for patent infringement. Apart from new subdivision, paragraph, and subparagraph designations, the only change is to incorporate all of the many terms used in 28 U.S.C. § 1292(a)(1) to establish jurisdiction of appeals from interlocutory orders with respect to injunctions.

Rule 62: September 2015 Draft

Rule 62. Stay of Proceedings to Enforce a Judgment.

(a) STAY OF EXECUTION. Except as provided in Rule 62(d), execution on a judgment, and proceedings to enforce it, are stayed as follows:

(1) *Automatic Stay.* Unless the court orders otherwise, for 30 days after the judgment is entered.

(2) *By Bond or Other Security.* A party may at any time after judgment is entered obtain a stay by providing a bond or other security. The stay takes effect when the court approves the bond or other security and remains in effect for the time specified in the bond or security.

(3) *By Court Order.* The court may at any time order a stay

that remains in effect until a time designated by the court[, which may be as late as issuance of the mandate on appeal].

(b) REFUSING, DISSOLVING, OR MODIFYING STAY. The court may, for good cause, refuse a stay under Rule 62(a)(2) or dissolve a stay or modify its terms.

(c) SECURITY ON GRANTING, REFUSING, OR DISSOLVING A STAY. The court may, on entering a stay or on refusing or dissolving a stay, require and set appropriate terms for security or deny security.

(d) STAY OF INJUNCTION, RECEIVERSHIP, AND PATENT ACCOUNTING ORDERS.

(1) Unless the court orders otherwise, the following are not stayed after being entered, even if an appeal is taken:

(A) an interlocutory or final judgment in an action for an injunction or a receivership; or

(B) a judgment or order that directs an accounting in an action for patent infringement.

(2) While an appeal is pending from an interlocutory order or final judgment that grants, continues, modifies, refuses, dissolves, or refuses to dissolve or modify an injunction, the court may suspend, modify, restore, or grant an injunction on terms [for bond or other terms] that secure the opposing party's rights. If the judgment appealed from is rendered by a statutory three-judge district court, the order must be made either:

(A) by that court sitting in open session; or

(B) by the assent of all its judges, as evidenced by their signatures.

* * * * *

COMMITTEE NOTE

Subdivisions (a), (b), (c), and (d) of former Rule 62 are reorganized and the provisions for staying a judgment are revised.

The provisions for staying an injunction, receivership, or patent accounting order are reorganized by consolidating them in new subdivision (d). There is no change in meaning. The language is revised to include all of the words used in 28 U.S.C. § 1292(a)(1) to describe the right to appeal from interlocutory actions with respect to an injunction, but subdivision (d) applies to both interlocutory injunction orders and final judgments that grant, refuse, or otherwise deal with an injunction.

The provisions for staying a judgment are revised to clarify several points. The automatic stay is extended to 30 days, and it is made clear that the court may forestall any automatic stay or vacate an automatic stay before it expires. The former provision for a court-ordered stay "pending the disposition of" enumerated post-judgment motions is superseded by establishing authority to order a stay at any time. This provision closes the apparent gap in the present rule between expiration of the automatic stay after 14 days and the 28-day time set for making these motions. The court's authority to issue a stay designed to last through final disposition on any appeal is established, and it is made clear that the court can accept security by bond or by other means, can set the amount of security, can dispense with any security, and can order security as a condition of refusing or dissolving any stay. A single bond or other form of security can be provided for the life of the stay.

The provision for obtaining a stay by posting a supersedeas bond is changed. New subdivision (a)(2) provides for a stay by providing a bond or other security at any time after judgment is entered. The stay takes effect when the court approves the bond or other security and remains in effect for the time specified in the bond or security. The stay may be refused, dissolved, or modified by the court for good cause under subdivision (b). Refusal can be accomplished by refusing to approve the bond or other security.

Subdivisions (a), (b), and (c) address stays of all judgments, except as provided in subdivision (d). The determination whether to direct a stay and what its terms should be may be more complicated when a judgment includes provisions for relief other than — or in addition to — a payment of money,

and that are outside subdivision (d). Examples include a variety of non-injunctive orders directed to property, such as enforcing a lien, or quieting title.

Some orders that direct a payment of money may not be a "judgment" for purposes of Rule 62. An order to pay money to the court as a procedural sanction is a matter left to the court's inherent power. The decision whether to stay the sanction is made as part of the sanction determination. The same result may hold if the sanction is payable to another party. But if some circumstance establishes an opportunity to appeal, the order becomes a "judgment" under Rule 54(a) and is governed by Rule 62.

Special concerns surround civil contempt orders. The ordinary rule is that a party cannot appeal a civil contempt order, whether it is compensatory or coercive. A nonparty, however, can appeal a civil contempt order. If appeal is available, effective implementation of the contempt authority may counsel against any stay. This need is adequately protected by the discretion to refuse a stay. So too, a stay of an order committing a person for contempt is left to the court's inherent control of the contempt power and the authority to refuse a stay.

New Rule 62(a)(1) extends the period of the automatic stay to 30 days. Former Rule 62(a) set the period at 14 days, while former Rule 62(b) provided for a court-ordered stay "pending disposition of" motions under Rules 50, 52, 59, and 60. The time for making motions under Rules 50, 52, and 59, however, was extended to 28 days, leaving an apparent gap between expiration of the automatic stay and any of those motions (or a Rule 60 motion) made more than 14 days after entry of judgment. The revised rule eliminates any need to rely on inherent power to issue a stay during this period. Setting the period at 30 days coincides with the time for filing most appeals in civil actions, providing a would-be appellant the full period of appeal time to arrange a stay by other means. Thirty days of automatic stay also is sufficient in cases governed by a 60-day appeal period.

Amended Rule 62(a)(1) expressly recognizes the court's authority to supersede the automatic stay. Several reasons may suggest that the court act. Among them are these: A stay may be justified, but security seems appropriate. The court can make an appropriate order under Rule 62(a)(3). Or immediate execution may seem important. Again, the court can make an appropriate order, and under Rule 62(c) may order security as a condition of denying a stay.

Subdivision 62(a)(2) carries forward in modified form the supersedeas bond provisions of former Rule 62(d). A stay may be obtained under subdivision (a)(2) at any time after judgment is entered. Thus a stay may be obtained before the automatic stay has expired, or after the automatic stay has been lifted by the court. The new rule text makes explicit the opportunity to post security in a form other than a bond. The stay remains in effect for the time specified in the bond or security — a party may find it convenient to arrange a single bond or other security that persists through completion of post-judgment proceedings in the trial court and on through completion of all proceedings on appeal by issuance of the appellate mandate. This provision does not supersede the opportunity for a stay under 28 U.S.C. § 2101(f) pending review by the Supreme Court on certiorari.

Rule 62(a)(2), like former Rule 62(d), does not specify the amount of the bond or other security provided to secure a stay. As before, the stay takes effect when the court approves the bond or security. And as before, the court may consider the amount of the security as well as its form, terms, and quality of the security or the issuer of the bond. The amount may be set higher than the amount of a monetary award. Some local rules set higher figures. [E.D. Cal. Local Rule 151(d) and D.Kan. Local Rule 62.2, for example, set the figure at one hundred and twenty-five percent of the amount of the judgment.] The amount also may be set to reflect relief that is not an award of money but also is not covered by Rule 62(d). And, in the other direction, the amount may be set at a figure lower than the value of the judgment. One reason might be that the cost of obtaining a bond is beyond the appellant's means. And, although the stay is ordinarily available on posting a bond or other security, the court may for good cause refuse the stay, or dissolve or modify it, under subdivision (b). A stay with lesser or different security may be obtained by court order under subdivision (a)(3).

Subdivision (a)(3) recognizes the court's broad general and discretionary power to stay, or to refuse to stay, execution and proceedings to enforce a judgment. This broad authority is supplemented by subdivision (b), which authorizes modification or dissolution of a stay for good cause. The court may set terms for any of these actions under subdivision (c). A stay may be granted or modified with no security, partial security, full security, or security in an amount greater than the amount of a money judgment. Security may be in the form of a bond or another form. In some circumstances appropriate security may inhere in the events that underlie the litigation — for example, a contract claim may be fully secured by a payment bond. So too the court may, under subdivision (c), require security on refusing or

dissolving a stay. Security may be an important safeguard when immediate execution seems important but may entail consequences that cannot, absent security, be cured if the judgment on appeal reverses, vacates, or modifies the judgment.

Subdivision (b) authorizes the court to dissolve or modify any stay for good cause, including one initially obtained by posting bond under subdivision (a)(2).

Rule 62 applies no matter who appeals. A party who won a judgment may appeal to request greater relief. The automatic stay of subdivision (a)(1) applies as on any appeal. The appellee may seek a stay under subdivisions (a)(2) and (3), although a failure to cross-appeal may be an important factor in determining whether to order a stay. And, if the judgment awards money to the appellee as well as to the appellant, the appellant also may seek a stay.

Style Revision

Professor Kimble has made a first pass at styling the proposed draft. He may wish to suggest further revisions. The current version is set out here. When the time comes, the Subcommittee will consider final styling decisions.

Rule 62. Stay of Proceedings to Enforce a Judgment.

(a) AUTOMATIC STAY. Except as provided in Rule 62(e), execution on a judgment and proceedings to enforce it are stayed for 30 days after its entry, unless the court orders otherwise.

(b) *Stay by Other Means.*

(1) By Court Order. The court may at any time order a stay that remains in effect until a designated time[, which may be as late as issuance of the mandate on appeal].

(2) By Bond or Other Security. At any time after judgment is entered, a party may obtain a stay by providing a bond or other security. The stay takes effect when the court approves the bond or other security and remains in effect for the time specified in the bond or security. But the court may, for good cause, refuse the stay.

(c) *Dissolving, or Modifying a Stay.* The court may, for good cause, dissolve a stay or modify its terms.

(d) *Security on Granting, Refusing, or Dissolving a Stay.* On entering a stay or on refusing or dissolving one, the court may require and set appropriate terms for security or deny security.

(e) STAY OF INJUNCTION, RECEIVERSHIP, OR PATENT ACCOUNTING ORDERS. Unless the court orders otherwise, the following are not stayed after being entered, even if an appeal is taken:

(1) an interlocutory or final judgment in an action for an injunction or a receivership; or

(2) a judgment or order that directs an accounting in an action for patent infringement.

(f) *Injunction Pending an Appeal.* While an appeal is pending from an interlocutory order or final judgment that grants, continues, modifies, refuses, dissolves, or refuses to dissolve or modify an injunction, the court may suspend, modify, restore, or grant an injunction on terms [for bond or other terms] that secure the opposing party's rights. If the judgment appealed from is rendered by a statutory three-judge district court, the order must be made either:

(1) by that court sitting in open session; or

(2) by the assent of all its judges, as evidenced by their signatures.

Present Rule 62

Rule 62. Stay of Proceedings to Enforce a Judgment.

(a) *Automatic Stay; Exceptions for Injunctions, Receiverships, and Patent Accountings.* Except as stated in this rule, no execution may issue on a judgment, nor may proceedings be taken to enforce it, until 14 days have passed after its entry. But unless the court orders otherwise, the following are not stayed after being entered, even if an appeal is taken:

(1) an interlocutory or final judgment in an action for an injunction or a receivership; or

(2) a judgment or order that directs an accounting in an action for patent infringement.

(b) *Stay Pending the Disposition of a Motion.* On appropriate terms for the opposing party's security, the court may stay the execution of a judgment--or any proceedings to enforce it--pending disposition of any of the following motions:

(1) under Rule 50, for judgment as a matter of law;

(2) under Rule 52(b), to amend the findings or for additional findings;

(3) under Rule 59, for a new trial or to alter or amend a judgment; or

(4) under Rule 60, for relief from a judgment or order.

(c) *Injunction Pending an Appeal.* While an appeal is pending from an interlocutory order or final judgment that grants, dissolves, or denies an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights. If the judgment appealed from is rendered by a statutory three-judge district court, the order must be made either:

(1) by that court sitting in open session; or

(2) by the assent of all its judges, as evidenced by their signatures.

(d) *Stay with Bond on Appeal.* If an appeal is taken, the appellant may obtain a stay by supersedeas bond, except in an action described in Rule 62(a)(1) or (2). The bond may be given upon or after filing the notice of appeal or after obtaining the order allowing the appeal. The stay takes effect when the court approves the bond.

(e) *Stay Without Bond on an Appeal by the United States, Its Officers, or Its Agencies.* The court must not require a bond, obligation, or other security from the appellant when granting a stay on an appeal by the United States, its officers, or its

agencies or on an appeal directed by a department of the federal government.

(f) *Stay in Favor of a Judgment Debtor Under State Law.* If a judgment is a lien on the judgment debtor's property under the law of the state where the court is located, the judgment debtor is entitled to the same stay of execution the state court would give.

(g) *Appellate Court's Power Not Limited.* This rule does not limit the power of the appellate court or one of its judges or justices:

(1) to stay proceedings--or suspend, modify, restore, or grant an injunction--while an appeal is pending; or

(2) to issue an order to preserve the status quo or the effectiveness of the judgment to be entered.

(h) *Stay with Multiple Claims or Parties.* A court may stay the enforcement of a final judgment entered under Rule 54(b) until it enters a later judgment or judgments, and may prescribe terms necessary to secure the benefit of the stayed judgment for the party in whose favor it was entered.

Notes, Appellate-Civil Subcommittee September 24, 2015

The Appellate-Civil Subcommittee met by conference call on September 24, 2015. Participants included Hon. Scott Matheson, Subcommittee Chair; Hon. John D. Bates; Hon. Peter Fay; H. Thomas Byron, Esq.; Douglas Letter, Esq.; Kevin Newsom, Esq.; and Julie Wilson, Esq. Reporters Catherine Struve and Edward Cooper also participated.

Judge Matheson opened the meeting by observing that the Notes describing the August 20 meeting showed that serious progress was made. The most important change in the August draft was recognition that it had been a mistake to move away from present Rule 62 by addressing only judgments for money in the provisions for judgments other than injunctions, receiverships, and accountings in proceedings for patent infringement. Present Rule 62 addresses all judgments. Something should be said about judgments that are not for money, but also are not injunctions. Familiar examples may be a judgment quieting title or foreclosing a lien. Restoring provisions for non-money judgments, however, leads to complex drafting issues if we retain the provision establishing a presumption that the bond for a stay obtained by posting bond should be set at 125% of the amount of the judgment. The answer may be that complex rule provisions are worthwhile. The answer instead may be that it is better to let the rule go on as it has been, silent as to the amount of the bond or other security.

Discussion began with a related issue. Even under earlier drafts that addressed only judgments for money, problems could be foreseen as to some forms of money awards. Sanctions and civil contempt are common examples. It does not seem likely that a procedural sanction should be subject to an automatic stay, nor many civil contempt awards — particularly those designed to encourage compliance. Often those orders are not immediately appealable. And it is important that the trial court's authority be maintained. Those questions are addressed in the draft Committee Note. There was no further discussion of this point.

Discussion then moved to the decision to return to the present scope of Rule 62, addressing all "judgments." The Department of Justice has become concerned about the effects of stays on types of non-money, non-injunctive judgments it often wins. The concerns focus on the part of the draft that extends the automatic stay from 14 days to 30 days. Civil asset forfeiture is one setting. Often the government seizes property incident to a criminal prosecution, but rather than seek criminal forfeiture waits for a conviction and then initiates civil forfeiture proceedings. The seized property can be expensive to hold and maintain — common examples include

boats, automobiles, and houses. Storage and maintenance costs can be steep. And the value of the assets may decline directly with time. An added 16 days of automatic say may aggravate these costs.

Discussion pointed out that an additional 16 days after a prolonged period may not seem a significant marginal aggravation of preservation costs. A fix, even if narrowly tailored to these and perhaps some other kinds of cases, would intrude on the purpose to close the "gap" in the present rule between expiration of the automatic stay after 14 days and the 28 days allowed to make any of the post-judgment motions that suspend appeal time and, under the present rule, trigger the first express provision for a court-ordered stay. The court, moreover, seems to have useful authority to address preservation costs and diminishing value assets through Supplemental Rule G(7). Most importantly, the draft rule text establishing the automatic stay begins: "Unless the court orders otherwise * * *." The court has wide discretion to deny any automatic stay when judgment is entered. In addition, draft Rule 62(b) allows the court to dissolve any stay for good cause.

The Department has similar concerns about other types of non-money judgments. An example is provided by disputes with ranchers who use government land to graze their cattle. The judgment may do no more than declare that the United States owns the land and the defendant has been trespassing. An automatic stay for 30 days could aggravate the damage done by the trespassing cattle. But the same ameliorating features of the draft rule apply.

More generally, it may be that the United States has more frequent encounters than most judgment creditors with judgment debtors who are bent on dissipating or concealing their assets.

One suggestion was that perhaps the rule text should be expanded to provide some sort of criterion to guide the court's exercise of discretion in determining whether to "order otherwise" against an automatic stay. The consensus was that it is better to provide open-ended discretion. The judge knows the case and parties, and often will confront circumstances that can be addressed only awkwardly by any rule language. No change will be made on this score.

It also was noted that the Committee Note makes clear what the text of draft Rule 62(b) clearly says: the court can, for good cause, dissolve any stay.

This part of the discussion concluded with the Department's undertaking to consider the issue further. If it decides to recommend some changes in rule text to still further alleviate the risks posed by a 16-day extension of the automatic stay, it will

also consider whether it would be better to work through Supplemental Rule G than through Rule 62.

Discussion then turned to the questions that arise from adding to a rule that covers all judgments a provision that a stay obtained by posting a bond should be secured by a bond or other security for one hundred and twenty-five percent of the amount of the judgment. The questions were illustrated by bracketed language introduced to draft Rule 62(a)(2): "The bond must be for an amount equal to [at least] one hundred and twenty-five percent of the [net] amount of any monetary award [plus an amount for any other relief not governed by Rule 62(d)]." (Draft Rule 62(d) carries forward the provisions of present Rule 62(a) and (c) for injunctions, receiverships, and patent accountings.)

"[A]t least" 125% of the monetary award was added as an introduction to the provision for adding "an amount for any other relief not governed by Rule 62(d)." The judgment, for example, might both quiet title and award damages for trespass. A stay of the declaration of title might encourage the defendant to continue the activities found to be trespassing. If that is the effect of the stay, the amount of the bond should reflect the ongoing damages caused by continuing the activities that may be affirmed on appeal to be trespassing. This part of the drafting seems reasonably clear, but only on reflecting about the circumstances it addresses. It may not seem so clear to those who come to it afresh.

Greater complications are suggested by referring to the "net" amount of the judgment. This word opens onto cases in which two or more parties win awards. Even the simplest situations can call for close thought. Suppose the judgment awards $40,000 to the plaintiff and $50,000 to the defendant. In most circumstances, the awards will be set off, leaving the defendant with a net recovery of $10,000. (Set off may not be available in some circumstances — in some states, if both awards are covered by liability insurance, each party may be allowed to recover the full award. That is simply one added wrinkle.) The amount to be secured — or 125% of that amount — will depend on who appeals, and to what purpose. If the plaintiff is the only appellant, a stay imposes only a $10,000 risk on the defendant, whether the plaintiff seeks only to increase the award to the plaintiff, to decrease the award to the defendant, or both. At least in most circumstances, the defendant's failure to appeal means that the award to the plaintiff cannot be decreased, and the award to the defendant cannot be increased. If the defendant is the only appellant, the award to the plaintiff cannot be increased and the award to the defendant cannot be decreased. No matter whether the defendant seeks to diminish the award to the plaintiff or to increase its own award, the plaintiff will not be

entitled to any recovery even if the judgment is affirmed. There is no apparent need for security for the plaintiff. But things become much messier if both parties appeal. Should the court begin by looking at the appellant? Or should it shift focus when there is a cross-appeal? Does the answer depend on whether both parties want a stay — and is there a risk of strategic behavior in that dimension?

No obvious or easy solution was found so long as the 125% super-security provision remains. The original proponent of adopting this feature from the practice in some states, and some local rules in the federal courts, suggested that the problems that arise on close consideration may justify putting aside any effort to address this in rule text. The Committee Note could mention the possibility of setting a presumptive amount by local rule, perhaps referring to one or two of the existing local rules. That would leave the rule where we find it — present Rule 62 does not say anything about the amount of the bond.

An alternative might be to add a few words to rule text: "the bond must be for an appropriate amount." No such language appears in the present rule. It might interfere with the current practice, recognized by at least some courts, allowing the bond to be set at an amount below the amount of the judgment, perhaps as low as zero. This risk would be offset by the provisions in draft Rule 62(b) and (c) that allow the court to modify the terms of a stay and to set appropriate terms for security, but there could be some internal dissonance in the rule text. This possibility was rejected.

The conclusion was that the provision for 125% security should be removed. The accompanying rule text complications would disappear with it.

Other issues were discussed briefly.

The tag line for draft Rule 62(a)(2) is "By bond or Other Security." It is not elegant. It reflects a choice to drop the reference to "supersedeas bond" in present Rule 62(d). This choice reflects the determination that the rule text should refer expressly to "other security." The rule still could refer to "supersedeas bond or other security," but the traditions of supersedeas bonds might carry implications inconsistent with the deliberately pragmatic and discretionary focus of the draft rule. No changes were suggested.

Another question is raised by bracketed language in draft Rule 62(a)(2): "A party may at any time [after judgment is entered] obtain a stay by providing a bond or other security * * *." The

question posed by the bracketed words relates to one of the original purposes that launched reexamination of Rule 62 stays. A party may wish to secure a single bond that covers the entire period from termination of the automatic stay (if there is one) through the conclusion of all proceedings on appeal. Present Rule 62(d) authorizes an appeal by bond "If an appeal is taken." Draft Rule 62(a)(3), on the other hand, provides that a court may at any time order a stay. Might it be that a party who prefers to obtain a stay by posting a bond or other security will wish to arrange the bond even before judgment is entered? But should the rule cater to any such wish? The court may make the terms of the judgment clear some time before judgment is actually entered, particularly if there is a lapse between entry of the dispositive order and entry of judgment on a separate document. But both present Rule 62(d) and draft Rule 62(a)(2) provide that the stay becomes effective only when the court approves the bond (or other security). A party who is anxious to proceed by way of bond or other security, depending on a court order only for approval of the bond or other security, can submit the security to the court with a request that it be approved at the same time as judgment is entered. There is no need for a stay until judgment is entered. Further discussion concluded that there is no need for "jumping the gun." "after judgment is entered" will be retained in rule text without brackets.

Earlier discussions explored the possibility that the provisions for a stay on posting a bond or other security might be combined in a single paragraph with the provisions for a stay ordered by the court. An illustrative draft was prepared. Brief discussion concluded that greater clarity is achieved by the present separation into paragraphs (1), (2), and (3).

Draft Rule 62(d) combines the provisions of present Rule 62(a) and (c) for judgments for injunctions, receiverships, and patent accountings. But it revises present (c) by adopting the full language of 28 U.S.C. § 1292(a)(1) for appeals from interlocutory orders with respect to injunctions. The statutory language is comprehensive. The effort to streamline it is worthy. But departures from the statute create a risk of unintended gaps. This change was approved.

The next step will be circulation of revised rule text to reflect these decisions. A revised draft Committee Note also will be circulated. The plan is to receive written (likely e-written) comments by early October, facilitating preparation of a draft that can be submitted for discussion at the October meeting of the Appellate Rules Committee and the November meeting of the Civil Rules Committee.

Notes, Appellate-Civil Subcommittee August 20, 2015

The Appellate-Civil Subcommittee met by conference call on August 20, 2015. Participants included Hon. Scott Matheson, Subcommittee Chair; Hon. John D. Bates; Hon. Peter Fay; Douglas Letter, Esq.; Kevin Newsom, Esq.; Virginia Seitz, Esq.; Hon. Jeffrey Sutton, Chair, Standing Committee; and Rebecca Womeldorf, Esq. Reporters Catherine Struve and Edward Cooper also participated.

Judge Matheson began the meeting by noting that as compared to the "mid-stream" point of progress reached at the start of the June 30 conference call, the work on Civil Rule 62 has moved further along the stream. It may prove useful to begin by confirming that the Subcommittee has indeed reached substantial agreement on some of the points discussed in earlier meetings.

30-Day Automatic Stay: Draft Rule 62(a)(1) extends the automatic stay from the 14 days provided by the current rule to 30 days. One purpose is to eliminate the "gap" between expiration of the 14 days and the 28-day time allowed to make post-judgment motions under Rules 50, 52, 59, and (for this purpose) 60. The present rule seems to contemplate a court-ordered stay only "pending disposition" of those motions. It does not address the availability of a stay in contemplation of a motion that has not yet been made.

It was noted that the Time Project established a presumption in favor of measuring time in 7-day intervals. Most of the time provisions set at less than 30 days were reset to 7, 14, or 21 days. When it was decided that more than 14 days were needed for many motions under Rules 50, 52, and 59, the initial choice was to set them at 30 days. Existing 30-day periods were kept at 30 days, rather than reduce them to 28 days or expand them to 35 days. But this convention was put aside because a timely motion under these rules (and a Rule 60 motion made within the same time) suspends appeal time. Setting the time at 28 days avoided the prospect that a party uncertain whether to appeal would not know whether a timely post-judgment motion had been made on the last day of a 30-day appeal period.

Against this background, setting the automatic stay at 30 days has the advantage that a party who has lost a judgment has not only 28 days to decide whether to make a post-judgment motion, but the remaining two days both to file a notice of appeal and take steps to secure a stay after expiration of the automatic stay. The full advantage of the 30-day appeal period might be diminished if a party, still uncertain whether to appeal, must arrange a continuing stay 2 days before finally deciding whether to appeal.

The 30-day period was accepted.

It was noted that many civil actions have a 60-day period to appeal because the government is a party. The Committee Note should not convey any misleading impression on this score. But there is no need to provide an automatic 60-day stay in those cases.

The automatic stay provision came on for further discussion in conjunction with the question whether the court should have authority to dissolve a stay obtained by posting a bond or other security for 125% of the amount of the judgment. Present Rule 62(a) does not speak to dissolution of the automatic stay. Why should it be amended to begin "unless the court orders otherwise"? The concern is that some judgment debtors may manage to dissipate or conceal assets even during a 14-day period. Extension to 30 days will exacerbate this risk. And the automatic stay arises automatically, without any bond. This explanation came to be accepted in comparing the provision for obtaining a stay by providing a bond or other security. So too, although "good cause" is required by the draft provision for dissolving a stay, there is no need to add a "good cause" threshold for ordering away an automatic stay. Courts will understand that they should not act lightly. This discussion was summarized by observing that with the automatic stay, discretion is important "because of bad people." It is different with an appeal-bond stay: "you're putting up a lot of money to get the bond," and there is less need to dissolve it.

Further attention should be paid to the wording of draft (b)(1). It recognizes authority to require security for a stay under draft (a)(3), "or on denying or lifting a stay." "Lifting" seems an unusual word in the Rules. "Vacating" or "dissolving" are more familiar. "Denying" might be "refusing," a common word in the rules. And there may be a subtle difference — "denying" might be read back to imply authority to forestall a stay by posting bond. "Refusing" may not pose the same risk, since it implies that action by the court had to be sought in the effort to obtain a stay. A stay obtained without more on posting bond does not involve court action.

Single Bond: Recognizing the practice of securing a single bond that extends from expiration of the automatic stay through the completion of all appeal proceedings that may be taken was generally approved in June. Brief discussion confirmed that this approach should go forward.

Right to a Stay: The question whether the court can dissolve or modify a stay obtained by filing a full-value appeal bond was not firmly resolved in June. Present Rule 62(d) says "the appellant may

obtain a stay by supersedeas bond * * *." Practitioners widely believe that there is a right to a stay on posting a bond in the full amount of the judgment. The current draft of a new Rule 62(a)(2) sets the amount of the bond at one hundred and twenty-five percent of the amount of the [money] judgment. One Subcommittee member went looking for cases that might authorize dissolution of a stay obtained by a supersedeas bond. None were found. That is not conclusive; obscure practices may exist or even thrive below the most visible levels.

This question was initially tied to the questions that arise when a sanction or civil-contempt order directs payment of money. But those pose broader questions about the risks that a stay may undermine the court's authority to compel compliance with its orders. They will be considered separately.

The question was then confronted directly. The reason to recognize authority to dissolve a stay obtained by posting a 125% bond is that eventual full payment after affirmance, with interest, may not compensate for harm done by the stay. The continuing example is the judgment creditor whose business is on the brink of failure. Collecting on the judgment after the business has failed may afford no real protection. It might be that a litigation finance firm would be willing to advance the value of the judgment, but that may not always be available and is likely to be costly. Concern about recapture could be met by the court's authority under draft (b)(1) to require security on "denying or lifting" a stay. [Those words may be revised — perhaps to "refusing or dissolving" a stay.]

One member expressed strong support for recognizing authority to dissolve a stay obtained by posting a bond or other security.

This question is reflected in the draft in two stages. Subdivision (a)(2), drawing from present Rule 62(d), provides that a party "may * * * obtain a stay" by providing the bond. This language is similar to Civil Rule 23(b), where the words "[a] class action may be maintained" were read in the Shady Grove decision to establish a right to maintain a class action. Then subdivision (b)(2) provides in general terms that the court may, for good cause, dissolve a stay. This language embraces all stays issued under subdivision (a). The idea is that a judgment debtor is assured that normally a bond will obtain a stay, but also will recognize that the court may dissolve it for good cause.

Discussion opened by asking whether the power to deny a stay on posting a bond should be set out in (a)(2), as it is for the automatic stay in (a)(1): "Unless the court orders otherwise, a

party may * * * obtain a stay." That would make the point clear immediately. But addressing authority to dissolve in a later subdivision may be wise. This approach subtly underscores the expectation that posting bond under (a)(2) will usually establish a stay that endures for the time specified in the bond or other security.

Addressing authority to dissolve in a separate subdivision prompted the observation that this will be authority to dissolve, not to deny before the bond is posted. That will "avoid watering down the presumption" in favor of the stay.

But it was asked whether "may obtain" is strong enough. Should the rule be expressed as an entitlement: "A party is entitled to obtain a stay by providing a bond or other security * * *"? That would bolster the implication that the stay can be dissolved only in extraordinary circumstances. And it might add force to arguments that if the judgment creditor manages to win dissolution, the price should be reimbursement of the considerable costs likely to have been incurred by the judgment debtor in securing a bond. It was pointed out that "entitled" is used in Rule 62(f), and is used — albeit in a quite different sense — in Rule 8(a)(2) directing that a pleading "show[] that the pleader is entitled to relief." But fear was expressed that "entitlement" "would skew the debate."

Further discussion suggested that sufficient clarity is achieved by the draft structure. The authority to dissolve is clearly expressed in (b)(2). Unlike the automatic stay, which does not provide security, there is less need to emphasize the authority to dissolve by beginning (a)(2) with "unless the court orders otherwise." It was further observed that "judges tend to be practical." If a judgment creditor anticipates a bond stay and approaches the court before bond is posted, the problem will be worked out, quite possibly in a way that protects the judgment debtor against incurring the cost of a bond only to have the stay dissolved.

At the end, it was agreed that "good cause" should be retained in the provision for dissolving or modifying a stay.

Security for immediate execution: Draft 62(b)(1) authorizes the court to require security for a stay "or on denying or lifting a stay." (As above, this may become "or on refusing or dissolving [vacating] a stay.") This is a reciprocal of security for a stay. Allowing immediate execution exposes the judgment debtor to the risk that the amounts collected will not be recaptured upon final disposition of the case. Brief discussion approved this approach.

Structure: Some ambivalence continues as to the structure of draft subdivision (a). It is divided into (1), automatic stay; (2) stay by posting bond; and (3) stay by court order.

The question is whether, although this structure seems clear enough, greater clarity could be achieved by reducing it to two paragraphs. (1) would be the automatic stay. (2), most likely divided into subparagraphs (A) and (B), would be all other stays. It was agreed that an alternative draft would be prepared to illustrate this approach.

Sanctions, contempt: Uncertainty continues as to the best approach to orders that impose sanctions or civil contempt. Staying a sanction may impair the court's authority to direct compliance with the rules and its orders. Civil contempt may present similar problems. In part, these questions are caught up with the "judgment" concept. Rule 54(a) defines "judgment" for purposes of the Civil Rules. It "includes a decree and any order from which an appeal lies." A sanction order often cannot be appealed when entered. The traditional rule is that an adjudication of civil contempt cannot be appealed by a party before the action proceeds to a final judgment, but can be appealed by a nonparty. Some part of the contempt issues may be approached through present Rule 62(a)(1), to be carried forward in the draft. This rule provides that an interlocutory or final judgment in an action for an injunction is not stayed unless the court orders otherwise. But contempt may be imposed for disobeying an order that is not an injunction.

These questions were supplemented by asking why draft 62(a) limits Rule 62 to stays of "execution on a judgment to pay money, and proceedings to enforce it." Present Rule 62 simply addresses "a judgment." There may be judgments that fall between injunctions and money judgments. What about foreclosure of a lien? A declaration of title? Various of the orders authorized by Rule 70 — a vesting order, an attachment or sequestration to compel obedience to an order, a writ of assistance on an order for possession? And what does Rule 65(f) mean for purposes of Rule 62 by providing that Rule 65 — injunctions and restraining orders — applies to copyright impoundment proceedings?

The initial impulse to draft a revised Rule 62 to address money judgments reflected a desire to separate out injunctions. What should be done for other forms of judgments that do not direct payment of money remains for further discussion. The first step will be an inquiry within the Department of Justice to determine whether their collective experience sheds any light on these issues.

A new draft will be prepared and circulated for further work.

Notes, Appellate-Civil Subcommittee June 30, 2015

The Appellate-Civil Subcommittee met by conference call on June 30, 2015. Participants included Hon. Scott Matheson, Subcommittee Chair; Hon. David G. Campbell, Civil Rules Committee Chair; Hon. John D. Bates; Hon. Peter Fay; H. Thomas Byron, Esq. (for Douglas Letter, Esq.); Kevin Newsom, Esq.; Virginia Seitz, Esq.; and Rebecca Womeldorf, Esq. Reporters Catherine Struve and Edward Cooper also participated.

Judge Matheson began the meeting by recounting events in the advisory committees and the Standing Committee following the Subcommittee conference call in February.

The Subcommittee reported to the Civil Rules Committee and the Appellate Rules Committee that, just as an earlier Subcommittee, it had not been able to reach a consensus on the multiple questions gathered under the "manufactured finality" label. The advisory committees appreciated the work the Subcommittee had done, and also appreciated the difficulty in deciding whether it might be useful to address these questions by explicit provisions in the rules. The Civil Rules Committee explored the Subcommittee report and concluded, by a nearly unanimous vote, that the topic should be put aside. It is better to let the issues percolate in the courts. The Appellate Rules Committee came out in the same basic place. These conclusions were reported to the Standing Committee, which accepted them. Manufactured finality is not on the active docket of either advisory committee. But it can be moved back for active consideration if further developments in the courts show an opportunity for improvement by rule.

The Subcommittee also reported to the advisory committees on stays of execution under Civil Rule 62. The report was clear in characterizing this work as "midstream." Neither committee reported any sense of difficulties under present Rule 62, either in general or by anecdote. At the same time, there was a sense that it is worthwhile to continue Subcommittee consideration. The seeming "gap" between expiration of the automatic stay and the time to make the post-judgment motions covered by Rule 62(b) is worth addressing. So is the prospect of expressly allowing a single bond to cover the period between expiration of the automatic stay and completion of all appeal proceedings. It also is appropriate, having begun to consider Rule 62, to open the inquiry. It is better to make this the occasion to examine all of Rule 62 and to determine whether other changes may be desirable.

Discussion of Rule 62 in the Standing Committee was, for the most part, similar to the discussion in the advisory committees.

Some concerns were expressed about the best way to address the three types of stays presented by the draft of Rule 62(a): (1) the automatic stay; (2) stays ordered by the court; and (3) a stay as of right obtained by filing a supersedeas bond. A better integration may be possible. A related concern was noted: a court should have authority to insist on full security as a condition of staying execution. This concern was reflected in an anecdote describing a case in which the judgment debtor sought a stay without a bond, the court exacted a full bond, and it was only the bond that enabled execution after the appellant-debtor became insolvent. A stay without security should be approached with caution.

Discussion turned to the drafts circulated for this call: the two versions from February that were before the advisory committees and the Standing Committee, and an annotated version of the draft prepared by Kevin Newsom.

The first question went to the "gap" between expiration of the Rule 62(a) automatic stay 14 days after judgment enters and the ambiguous provision of Rule 62(b) for a stay pending disposition of post-judgment motions under Rules 50, 52, 59, or 60. Motions under Rules 50, 52, and 59 may be made as late as 28 days after entry of judgment. Rule 60 has a different time table, but a Rule 60 motion made within the 28-day period is treated for many purposes in the same way as motions under Rules 50, 52, and 59. Rule 62(b) authorizes the court to order a stay "pending disposition of any of" those motions. Can it order a stay before the motion is made? If it can, must it insist on a firm commitment to make such a motion within the allotted time?

Other questions also were identified at the outset. Should the rule address the single-bond practice? Are there broader questions about the court's authority to grant or deny a stay? To require security — for example, to require the judgment creditor to post security as a condition of denying a stay? To allow a stay with diminished security, or no security? Should there be general recognition of authority to accept security in a form other than a bond? Should there be an absolute right to a stay on posting adequate security?

The first of these questions to be addressed was whether the automatic stay should remain set at 14 days, or be expanded — most likely to 28 days or 30 days.

The purpose of the automatic stay was described from a practitioner's viewpoint: It allows the judgment debtor to "get his act together," to file a bond, to prepare post-judgment motions. In

the end, it was decided that 30 days is an appropriate period. It endures through the 28 days for making post-judgment motions that would suspend appeal time, and allows a small 2-day margin to the expiration of appeal time. It is fair to ask that a party take appropriate steps to secure a stay by motion or other means within that time.

But it was asked whether the automatic stay should be invulnerable. The discussion draft implements an automatic stay "unless the court orders otherwise." Current Rule 62(a) does not say that, although Rule 62(g)(2) says that a court may "issue an order to preserve the status quo or the effectiveness of the judgment to be entered." There may be circumstances in which even a 14-day stay will enable the judgment debtor to conceal or dissipate assets, thwarting collection on the judgment. Subcommittee members described experience with such circumstances.

Having agreed that the court should have authority to lift the automatic stay, the discussion turned to the question whether the authority should be limited by adding a "good cause" requirement. It was pointed out that the discussion draft included a bracketed option that would include "for good cause" in describing authority to dissolve or modify a stay. On the other hand, "good cause" should be implicit in most grants of authority: who would read the rule to contemplate whimsical or arbitrary action? The choice whether to refer to good cause recurs continually in drafting proposed rules. There is no apparent consensus on a general approach . Nor was a consensus reached for this setting. The discussion draft will go ahead with a simple "Unless the court orders otherwise," recognizing that an exhortation to find good cause may be added.

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This structural question leads to the underlying question whether the court should be able to deny a stay even though a supersedeas bond has been posted. The draft provides alternatives. It is noted that a leading treatise "states flatly that a stay on posting a supersedeas bond is a matter of right." But it also suggests that this approach might be rejected by adopting an

express provision that the court may dissolve or modify any stay. The argument for allowing the court to reject an absolute right to a stay is that there may be circumstances in which the judgment creditor is not adequately protected by recovering the full amount of the judgment only after the appeal process culminates in affirmance. "My case is so strong that I won summary judgment that the defendant has wrongfully withheld the final million dollars due under our contract. I plan to seek sanctions under Appellate Rule 38 for taking a frivolous appeal. But my business is on the brink of insolvency. It will not survive through the time required to complete the appeal process. I can post security for enforcement." This question was deferred for further discussion of the structure issues.

Kevin Newsom provided a draft that also had three parts: the automatic stay, a stay pending disposition of post-judgment motions, and a stay pending appeal. These parts reflect the way he thinks of stay issues in practice, but still can be used to recognize the "single bond" practice. But the drafting may be more difficult than at first appeared.

Everyone agreed that it is desirable to craft a rule that authorizes a single bond that covers the period from issuance of any stay that supersedes the automatic stay through the completion of all proceedings on appeal. That feature will be retained no matter how many subdivisions or paragraphs are used to describe the various means of obtaining a stay.

Returning to the question whether there should be an absolute right to a stay on posting adequate security, it was asked what should be done about a judgment that combines money and specific relief. The answer was that the separate parts of the judgment present separate stay questions — so far, we have considered only the stay of a judgment to pay money, and have thought to carry forward without change the provisions for stays of an injunction or similar relief. The only change for those provisions is to combine them into a single subdivision, making for easier tracking than allowed by the present rule.

The question whether there should be an absolute right to a stay on posting an adequate supersedeas bond returned. It was agreed that it is possible to imagine circumstances in which it might be desirable to direct immediate execution. But it seems to be understood now that although immediate execution should be available absent full security, posting full security establishes a right to a stay that cannot be undone. At the same time, a court may authorize a stay on less than full security. One reason may be

that full security cannot be obtained. Other reasons may arise.[1]

Recognizing an absolute right to a stay on posting a supersedeas bond may affect the choice of rule structure. It was agreed that this right should arise when the automatic stay is lifted by the court or expires at the end of 30 days. That will facilitate security by a single bond that endures through the end of all appeals, if the judgment debtor chooses to post such a bond. It will mean there is no need to seek a stay from the court, either pending disposition of post-judgment motions or pending appeal after the time for motions has expired or all motions have been decided.

The right to a stay on posting full security leaves open the opportunity to obtain a stay on less than full security. Courts implementing the present supersedeas bond requirement assert the right to dispense with any security, to set the amount at less than the judgment, and to specify a form of security other than a bond. All of these alternatives seem attractive. So the rule should provide for these alternatives. The discussion draft does that, allowing the court to order a stay at any time. It further provides that the court may set appropriate terms for security, and for that matter can require security as a condition of denying a stay. And the court may dissolve or modify a stay, subject to the question whether there should be authority to undo the right to a stay on posting an adequate bond.

The structure question remains after all of this discussion. Which structure will achieve greater clarity? A sequence that begins with the automatic stay and then brings together in one provision the supersedeas stay as of right and the discretionary stay by court order? Or a sequence that follows the automatic stay with separate provisions — perhaps beginning with the stay as of right on posting full security, and then recognizing authority to grant or deny a stay absent full security? This sequence may make sense if it is decided to deny discretion to defeat the stay obtained on posting full security.

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[1] A related question was not discussed. Present Rule 62(a) and (b) both provide for a stay of execution and of "proceedings to enforce" the judgment. Present Rule 62(d) providing a stay on giving a supersedeas bond refers only to "a stay." It may be desirable to allow proceedings in aid of enforcement even if actual execution is stayed. Discovery in aid of execution is an obvious example. It also may be useful to think about other possibilities — a lien on executable assets, as directed by the court, might be an example.

Discussion turned to the amount of the security that should be required to obtain a stay as of right. The draft suggests one hundred and twenty-five percent of the amount of the money judgment. This amount was taken from a state statute. Local rules in the federal courts often address this question, specifying amounts that range from 110% to 125%, or even to 150% of small judgments below a specified amount. The reason for rising above the amount of the money judgment goes to the time value of money. Interest rates are low just now. But they have been higher in the past, and indeed there have been times when the interest allowed on a judgment falls below the returns the judgment debtor may expect from devoting the amount of the judgment to other purposes. Those days may return.

A related question went unanswered. Are bond premiums geared directly to the amount of the bond, so a 125% bond will always cost 25% more than a 100% bond? Or is allowance made for the prospect that even full affirmance will lead to total liability less than 125%? For that matter, are bond premiums calculated with an eye to such questions as the judgment debtor's probable ability to pay, or even the apparent risk of affirmance? And what about security by means other than a bond — including a showing of assets sufficient to ensure payment if the judgment is affirmed?

Another question as to the amount of the bond was considered briefly. An injunction bond can be set to compensate the harm done by complying with the injunction. Should the amount of an appeal bond be set to reflect the harms that may flow from the stay apart from delay in collecting? That question may seem more pressing if there is an absolute right to a stay on posting full security. But the complications of attempting to measure various kinds of damages that may arise from delay seem daunting. And our courts are structured around the right to appeal. Perhaps exercising the right to appeal should not expose the appellant to the risk of liability for delay damages, particularly when the decision to appeal is made reasonably and in good faith.

This discussion concluded by agreeing to set the amount at 125%. The choice can be informed by public comment if this project leads to proposals to amend Rule 62.

Parts of Rule 62 not yet explored were then considered. The Subcommittee has focused its initial work on the basic provisions for staying money judgments. It has concluded that the provisions for injunctions, receiverships, and patent accountings can be rearranged and carried forward without substantive change. But Professor Struve's comprehensive memorandum at the beginning of this work addresses other issues. Should any of them be taken up?

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Rule 62(e), dispenses with a "bond, obligation, or other security" when the United States (etc.) is granted a stay on appeal. No problems with this subdivision are familiar at the moment, but an inquiry will be made to determine whether this subject should also be added to the agenda.

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TAB 9

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TAB 9A

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MEMORANDUM

DATE: October 15, 2015

TO: Advisory Committee on Appellate Rules

FROM: Gregory E. Maggs, Reporter

RE: Item No. 12-AP-B (FRAP Form 4 and institutional-account statements for IFP applicants)

This item concerns Federal Rules of Appellate Procedure Form 4 (Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis). Effective December 1, 2013, the instruction accompanying Question 4 on Form 4 was amended to read as follows (with the new language underlined):

> If you are a prisoner <u>seeking to appeal a judgment in a civil action or proceeding</u>, 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.

On February 14, 2012, after the proposed amendment had been published for comment but before it became effective, the National Association of Criminal Defense Lawyers (NACDL) submitted the attached proposal for slightly altering the instruction. The proposal would add this parenthetical phrase after the new language: "(not including a decision in a habeas corpus proceeding or a proceeding under 28 U.S.C. § 2255)."

On August 12, 2012, Reporter Catherine T. Struve wrote the attached detailed memorandum regarding the NACDL comments. The Committee discussed the proposal and Reporter Struve's memorandum at its September 2012 meeting. *See* Minutes of September 27, 2012, Appellate Rules Committee Meeting at 14-15 (excerpt attached). The Committee's discussion concluded when an appellate judge member suggested that "it would make sense to wait and see how the pending amendments to Form 4 function in practice before considering further changes." By consensus, the Committee retained this item on its agenda.

Given that several years have passed, the Committee may wish to revisit the proposal in light of experience. Although no statistics are kept, the Committee's clerk representative reports that at least some inmates still submit institutional account statements in habeas cases. This anecdotal information suggests that the proposed clarifying language may be helpful if the goal is to eliminate such statements. That said, one factor that may weigh in favor of waiting for even

more experience with amended Form 4 is that the templates for Form 4 which are available at the U.S. Courts website have not yet been updated and still contain the pre-2013 language. *See* U.S. Court, Appellate Rules Forms http://www.uscourts.gov/rules-policies/current-rules-practice-procedure/appellate-rules-forms (visited October 10, 2015).

Attachments

1. Memorandum to the Advisory Committee on Appellate Rules from Reporter Catherine T. Struve, regarding Item No. 12-AP-B (Aug. 29, 2012)

2. Comments of the National Association of Criminal Defense Lawyers Concerning Proposed Amendments to the Federal Rules of Appellate Procedure Published for Comment in August 2011 (Feb. 14, 2012)

3. Minutes of September 27, 2012, Appellate Rules Committee Meeting (excerpt)

TAB 9B

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MEMORANDUM

DATE: August 29, 2012

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 12-AP-B

The pending Appellate Rules amendments include a set of proposed changes to Form 4 (concerning applications to proceed in forma pauperis ("IFP")) that make some technical changes and remove the current Form's requirement of detailed information concerning the IFP applicant's expenditures for legal and other services in connection with the case. One of the technical changes reads as follows:

> 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.

After publication of the proposed amendments, the sole comment received by the Committee concerning Form 4 was a suggestion by the National Association of Criminal Defense Lawyers ("NACDL") that when the Form specifies that the requirement of an institutional-account statement is limited to prisoners "seeking to appeal a judgment in a civil action or proceeding," the form should further specify that for this purpose neither a habeas proceeding nor a proceeding under 28 U.S.C. § 2255 counts as a civil proceeding.[1] Rather than addressing that suggestion in the context of the pending amendments to Form 4, the Committee decided to add the proposal to the study agenda as a new item.

Part I of this memo summarizes the background of NACDL's proposal. Part II.A reviews relevant caselaw and concludes that the requirement of an institutional-account statement clearly does not apply to proceedings under 28 U.S.C. § 2254 and also should not apply to proceedings under 28 U.S.C. § 2255 or 28 U.S.C. § 2241. (Part II.A largely duplicates the analysis from my memo on this topic in the spring 2012 agenda materials.) Part II.B assesses how the choice of wording for Form 4 might affect the risk that an IFP applicant would make an error in compiling his or her IFP application. The risk of error – under the wording of the pending amendment to

[1] I enclose Peter Goldberger's February 2012 letter on behalf of NACDL.

Form 4 – would be a risk of inconvenience to incarcerated IFP applicants (and perhaps to the institutions housing them). The risk of error – under NACDL's proposed wording – would be a (probably much less widespread) risk that some incarcerated IFP applicants would file incomplete IFP applications because they incorrectly thought they did not need to include the institutional-account statement. Omission of the institutional-account statement ought to be curable without affecting the timeliness of the filing, so long as the applicant promptly corrects the error, though the possibility remains that a court could reach a contrary conclusion.

I. NACDL's comment on the Form 4 proposal

NACDL's comment concerned one of the technical amendments that are included among the pending amendments to Form 4. As the Committee knows, these technical amendments arose from our discovery that the version of Form 4 in the December 1, 2009, House pamphlet (and prior such pamphlets) was not identical to the version of Form 4 transmitted by the Chief Justice to Congress on April 24, 1998. 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 (the "Committee Version") – rather than the version transmitted by the Supreme Court to Congress in spring 1998 (the "Transmitted Version"). Believing the Committee Version to be preferable to the Transmitted Version, the Committee has included among the pending amendments to Form 4 the alterations necessary to eliminate the discrepancies between the official Form 4 and the Committee Version.

One of those changes concerns Form 4's 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."[2] The pending amendment, as noted on page 1 of this memo, will bring Form 4 into conformity with the Committee Version by inserting the limiting phrase "seeking to appeal a judgment in a civil action or proceeding."

NACDL's comment proposes a further amendment to this language:

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[2] 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 IFP "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 IFP.

The committee proposes to clarify that the requirement that a prisoner attach a statement of the balance in his or her institutional account applies only when the prisoner[] seeks to appeal "a judgment in a civil action or proceeding." NACDL suggests that this wording be clarified to reflect more accurately the coverage of the Prison Litigation Reform Act, by adding "(not including a decision in a habeas corpus proceeding or a proceeding under 28 U.S.C. § 2255)." Such proceedings, while generally treated as "civil" for purposes of appeal, are not governed by the PLRA. *See, e.g.*, *Santana v. United States*, 98 F.3d 752 (3d Cir. 1996) (Becker, J.).

II. Analysis

In drafting the in forma pauperis provisions in the Prison Litigation Reform Act ("PLRA"), Congress used the term "civil action or proceeding" without defining what it meant.[3]

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[3] As NACDL notes, habeas and Section 2255 proceedings are treated as civil for purposes of determining the time to appeal. *See* Rule 11(b) of the Rules Governing § 2255 Proceedings ("Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered under these rules."); Bowles v. Russell, 551 U.S. 205, 208-09 (2007) (applying Appellate Rule 4(a) and 28 U.S.C. § 2107 to an appeal by a habeas petitioner). The 1979 Committee Note to Rule 11 of the Section 2255 Rules states:

> Prior to the promulgation of the Rules Governing Section 2255 Proceedings, the courts consistently held that the time for appeal in a section 2255 case is as provided in Fed.R.App.P. 4(a), that is, 60 days when the government is a party, rather than as provided in appellate rule 4(b), which says that the time is 10 days in criminal cases. This result has often been explained on the ground that rule 4(a) has to do with civil cases and that "proceedings under section 2255 are civil in nature." E.g., *Rothman v. United States*, 508 F.2d 648 (3d Cir.1975). Because the new section 2255 rules are based upon the premise "that a motion under § 2255 is a further step in the movant's criminal case rather than a separate civil action," see Advisory Committee Note to Rule 1, the question has arisen whether the new rules have the effect of shortening the time for appeal to that provided in appellate rule 4(b). A sentence has been added to Rule 11 in order to make it clear that this is not the case.
>
> Even though section 2255 proceedings are a further step in the criminal case, the added sentence correctly states current law. In *United States v. Hayman*, 342 U.S. 205 (1952), the Supreme Court noted that such appeals "are governed by the civil rules applicable to appeals from final judgments in habeas corpus actions." In support, the Court cited *Mercado v. United States*, 183 F.2d 486 (1st Cir.1950), a case rejecting the argument that because § 2255 proceedings are criminal in nature the time for appeal is only 10 days. The *Mercado* court

The question before the Committee is whether Form 4 should supply clarification that is absent from the statute itself. In Part II.A, I express general agreement with NACDL's analysis of the caselaw concerning the scope of the institutional-account statement. Part II.B analyzes how that conclusion should affect the text of Form 4.

A. The scope of "civil action or proceeding"

NACDL is correct that the caselaw has reached a general consensus that the term "civil action or proceeding" (as used in Section 1915) does not include habeas proceedings.[4] Caselaw from all twelve of the relevant circuits[5] now agrees that state prisoners' habeas petitions under 28 U.S.C. § 2254 fall outside the terms of the PLRA's IFP provisions.[6] I have found caselaw from

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> concluded that the situation was governed by that part of 28 U.S.C. § 2255 which reads: "An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus." Thus, because appellate rule 4(a) is applicable in habeas cases, it likewise governs in § 2255 cases even though they are criminal in nature.

Habeas proceedings are not characterized as "civil" for all purposes. *See, e.g.*, Harris v. Nelson, 394 U.S. 286, 293-94 (1969) ("It is, of course, true that habeas corpus proceedings are characterized as 'civil.' .... But the label is gross and inexact.... Essentially, the proceeding is unique."). *Compare* Browder v. Director, Dept. of Corrections, 434 U.S. 257, 269 (1978) ("It is well settled that habeas corpus is a civil proceeding."); 28 U.S.C. § 1914(a) ("The clerk of each district court shall require the parties instituting any civil action, suit or proceeding in such court, whether by original process, removal or otherwise, to pay a filing fee of $350, except that on application for a writ of habeas corpus the filing fee shall be $5.").

[4] NACDL presents its suggestion as one that will bring Form 4 more closely into line with existing caselaw, rather than as a suggestion that Form 4 be amended to depart from the approach taken in existing caselaw. This makes sense to me. As discussed in this memo, the caselaw interprets statutory law (the PLRA). I doubt that the Committee would wish to take an approach in Form 4 that purported to supersede the PLRA's requirements. It is an interesting question whether the Rules Enabling Act's supersession clause – which refers to supersession via rules and does not mention forms, see 28 U.S.C. § 2072(b) – would authorize supersession by means of the combination of Appellate Rule 24 and Form 4.

[5] For obvious reasons, the Federal Circuit's caselaw does not address questions concerning habeas or Section 2255 proceedings.

[6] *See* Martin v. Bissonette, 118 F.3d 871, 874 (1st Cir. 1997) (holding on an appeal from the dismissal of a Section 2254 petition that "the PLRA does not apply to habeas petitions prosecuted in federal courts by state prisoners"); Reyes v. Keane, 90 F.3d 676, 678 (2d Cir. 1996) (holding in the context of an appeal from the dismissal of a state prisoner's habeas petition"that

seven circuits reaching the same conclusion about federal prisoners' petitions under 28 U.S.C. § 2255.[7] And there are holdings in five circuits – and dicta in two more – that take the same approach to habeas petitions under 28 U.S.C. § 2241.[8] (A further complication arises when a

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Congress did not intend the PLRA to apply to petitions for a writ of habeas corpus"), *overruled on other grounds by* Lindh v. Murphy, 521 U.S. 320, 336-37 (1997); Santana v. United States, 98 F.3d 752, 756 (3d Cir. 1996) (directing court clerks with circuit not to apply PLRA's in forma pauperis provisions to Section 2254 or Section 2255 proceedings); Smith v. Angelone, 111 F.3d 1126, 1131 (4th Cir. 1997) (holding on appeal from the denial of a Section 2254 petition that "the in forma pauperis filing fee provisions of the PLRA do not apply in habeas corpus actions"); Carson v. Johnson, 112 F.3d 818, 820-21 (5th Cir. 1997) (concluding that "the new PLRA requirements do not apply to habeas petitions under § 2254," but characterizing the suit at hand as a Section 1983 action rather than a habeas action); Kincade v. Sparkman, 117 F.3d 949, 951 (6th Cir. 1997) ("[T]he fee requirements of the Prison Litigation Reform Act do not apply to cases or appeals brought under § 2254 and § 2255."); Martin v. United States, 96 F.3d 853, 855-56 (7th Cir. 1996) (addressing a Section 2255 proceeding and a state-prisoner habeas proceeding); Malave v. Hedrick, 271 F.3d 1139, 1140 (8th Cir. 2001) (per curiam) (in the context of an appeal from the dismissal of a Section 2241 petition, "holding that the PLRA's filing-fee provisions are inapplicable to habeas corpus actions"); Carmona v. Minnesota, 23 Fed. Appx. 629, 630 (8th Cir. 2002) (nonprecedential opinion applying *Malave* in the context of a Section 2254 petition); Naddi v. Hill, 106 F.3d 275, 277 (9th Cir. 1997) (Section 2254 proceeding); United States v. Simmonds, 111 F.3d 737, 741 (10th Cir. 1997) (holding that neither Section 2254 proceedings nor Section 2255 proceedings are "'civil actions' for purposes of 28 U.S.C. § 1915"), overruled on other grounds by United States v. Hurst, 322 F.3d 1256, 1261 n.4 (10th Cir. 2003); Anderson v. Singletary, 111 F.3d 801, 806 (11th Cir. 1997) (holding that "the filing fee provisions of section 804(a) of the PLRA do not apply in 28 U.S.C. § 2254 or 28 U.S.C. § 2255 proceedings"); United States v. Levi, 111 F.3d 955, 956 (D.C. Cir. 1997) (per curiam) (holding that the PLRA does not apply to Section 2254 or Section 2255 proceedings).

[7] *See Santana*, 98 F.3d at 756; United States v. Cole, 101 F.3d 1076, 1077 (5th Cir. 1996) (holding that the PLRA "is inapplicable to § 2255 petitions"); *Kincade*, 117 F.3d at 951; *Martin*, 96 F.3d at 855-56; *Simmonds*, 111 F.3d at 741; *Anderson*, 111 F.3d at 806; *Levi*, 111 F.3d at 956; United States v. Ortiz, 136 F.3d 161, 169 (D.C. Cir. 1998) ("[T]he in forma pauperis filing fee provisions of the PLRA do not apply to proceedings under § 2255.").

[8] *See* Davis v. Fechtel, 150 F.3d 486, 487 (5th Cir. 1998) (holding in the context of a habeas action by a federal prisoner "that Congress did not intend for the term 'civil action' [in the PLRA] to include section 2241 habeas proceedings"); *Malave*, 271 F.3d at 1140; McIntosh v. U.S. Parole Comm'n, 115 F.3d 809, 811-12 (10th Cir. 1997) (reasoning that "a § 2241 action challenging prison disciplinary proceedings, such as the deprivation of good-time credits, is not challenging prison *conditions*, it is challenging an action affecting the fact or duration of the petitioner's custody" and holding that "§ 2241 habeas corpus proceedings, and appeals of those proceedings, are not 'civil actions' for purposes of §§ 1915(a)(2) and (b)."); Blair-Bey v. Quick,

mandamus petition – arising out of an underlying proceeding under Sections 2241, 2254, or 2255 – is filed in the court of appeals. A number of circuits have concluded that the PLRA's applicability to a mandamus petition depends on whether the underlying district-court proceeding falls within the PLRA's scope.[9])

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151 F.3d 1036, 1037, 1041 (D.C. Cir. 1998) (holding that the PLRA did not apply to petitioner's Section 2241 action challenging "the procedures by which he was denied parole").

The Seventh Circuit had previously held to the contrary. *See* Newlin v. Helman, 123 F.3d 429, 438 (7th Cir. 1997); Thurman v. Gramley, 97 F.3d 185, 187 (7th Cir. 1996) (dictum). However, in 2000 it reversed course and joined other circuits in holding that "the PLRA does not apply to any requests for collateral relief under 28 U.S.C. §§ 2241, 2254, or 2255." Walker v. O'Brien, 216 F.3d 626, 629 (7th Cir. 2000). The *Walker* court reasoned that a distinction "between habeas corpus petitions that relate to the original criminal prosecution and those that do not, for purposes of the PLRA, is not consistent with the Supreme Court's decisions in this area, is in tension with the distinct statutory systems Congress has created for habeas corpus actions and other civil actions, and is confusing for the district courts to administer." *Id.* at 634.

See also Harris v. Garner, 216 F.3d 970, 979 n.7 (11th Cir. 2000) (en banc) (discussing figures concerning cases subject to the PLRA and noting that "[t]he statistic we cite does not include 28 U.S.C. §§ 2241, 2254, and 2255 filings, because they are not covered by the PLRA."); Carmona v. U.S. Bureau of Prisons, 243 F.3d 629, 634 (2d Cir. 2001) (resting decision concerning exhaustion requirement in a Section 2241 proceeding on caselaw rather than the PLRA, observing that "[a] number of other circuits ... have ruled the Litigation Reform Act inapplicable to habeas actions brought by federal prisoners under § 2241," and stating that "[d]oubtless the same rule should obtain in § 2241 cases as in § 2254 petitions").

[9] *See* In re Stone, 118 F.3d 1032, 1034 (5th Cir. 1997) ("In a mandamus proceeding ... the nature of the underlying action will determine the applicability of the PLRA."); *Martin*, 96 F.3d at 854 ("When as is normally the case in the federal courts mandamus is being sought against the judge presiding in the petitioner's case, it is realistically a form of interlocutory appeal, and whether an interlocutory appeal is within the scope of the new Act should turn on whether the litigation in which it is being filed is within that scope."); In re Grant, 635 F.3d 1227, 1232 (D.C. Cir. 2011) ("[P]risoners filing petitions for mandamus in civil cases must comply with the filing-fee requirements of the PLRA.").

The Tenth Circuit initially took a different view, holding the PLRA applicable to a mandamus petition that asked the court of appeals to require prompt resolution of the petitioner's habeas petition. *See* Green v. Nottingham, 90 F.3d 415, 416, 418 (10th Cir. 1996). Some two years later, however, the Tenth Circuit disavowed *Green*'s holding without citing it by name: "[T]his circuit will no longer require mandatory fees under the PLRA for filing petitions for writs of mandamus seeking to compel district courts to hear and decide actions brought solely under 28 U.S.C. §§ 2241, 2254 and 2255. To the limited extent that any of our earlier cases could be

The analysis supporting these decisions seems persuasive to me. Courts have reasoned that interpreting the PLRA's IFP provisions to include habeas petitioners would run counter to the tradition of access to courts for such petitioners.[10] Courts have noted that the PLRA was directed principally at perceived abuses of suits concerning prison conditions,[11] and that the same Congress that enacted the PLRA separately addressed questions concerning the appropriate scope

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interpreted to the contrary, they are overruled." In re Phillips, 133 F.3d 770, 771 (10th Cir. 1998).

See also In re Nagy, 89 F.3d 115, 117 (2d Cir. 1996) ("Nagy filed the pending motion for i.f.p. status in aid of a petition for a writ of mandamus directed to a judge conducting a criminal trial. Such a petition is not analogous to the lawsuits to which the PLRA applies. We will therefore not apply our PLRA procedure to Nagy's motion."); Madden v. Myers, 102 F.3d 74, 77-78 (3d Cir. 1996) (expressing agreement "with the courts of appeals that have held that where the underlying litigation is criminal, or otherwise of the type that Congress did not intend to curtail, the petition for mandamus need not comply with the PLRA," but also stating that "*bona fide* mandamus petitions, regardless of the nature of the underlying actions, cannot be subject to the PLRA"); In re Crittenden, 143 F.3d 919, 920 (5th Cir. 1998) (holding that "the 'three strikes rule' of 28 U.S.C. § 1915(g) prevents Crittenden from filing a petition for a writ of mandamus in this Court without first paying the applicable filing fees when his petition arises from an underlying civil rights action"); In re Tyler, 110 F.3d 528, 529 (8th Cir. 1997) (holding that "a mandamus petition arising from an ongoing civil rights lawsuit falls within the scope of the PLRA" but leaving undecided "whether the PLRA applies to mandamus petitions when the underlying litigation is a civil habeas corpus proceeding"); In re Smith, 114 F.3d 1247, 1250 (D.C. Cir. 1997) (holding that because petition for writ of prohibition "includes compensatory and punitive damage claims ... that are civil in nature, and was filed after the effective date of the PLRA while he was still in prison, the fee requirements of the PLRA apply").

[10] *See Carson*, 112 F.3d at 820; *Reyes*, 90 F.3d at 678 ("Congress has endeavored to make the filing of a habeas corpus petition easier than the filing of a typical civil action by setting the district court filing fee at $5, compared to the $120 applicable to civil complaints. See 28 U.S.C. § 1914. It is not likely that Congress would have wished the elaborate procedures of the PLRA to apply to a habeas corpus petition just to assure partial, monthly payments of a $5 filing fee."); *Martin*, 96 F.3d at 855-56 ("[A]pplication of the Prison Litigation Reform Act to habeas corpus would block access to any prisoner who had filed three groundless civil suits and was unable to pay the full appellate filing fee (compared to the $5 fee for an application for habeas corpus). This result would be contrary to a long tradition of ready access of prisoners to federal habeas corpus.").

[11] *See Reyes*, 90 F.3d at 678 ("[T]he PLRA was aimed primarily at prisoners' suits challenging prison conditions, many of which are routinely dismissed as frivolous.... There is nothing in the text of the PLRA or its legislative history to indicate that Congress expected its filing fee payment requirements to apply to habeas corpus petitions.").

of habeas and Section 2255 relief in the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA").[12] And courts have observed that the PLRA and AEDPA adopted different methods for dealing with frequent filers.[13] In sum, though the Supreme Court has not spoken to the issue and though not all circuits have ruled on all permutations of the issue, I think that NACDL's statement – that the PLRA's IFP provisions do not apply to habeas or Section 2255 proceedings – is clearly accurate as to Section 2254 proceedings and likely accurate as to Section 2255 and Section 2241 proceedings.

There are, however, a few caveats. If a prisoner erroneously styles as a habeas petition something that actually presents a challenge to prison conditions[14] – or if a prisoner includes a prison-conditions challenge in a petition that also presents a claim that does fall within the core of habeas[15] – the court is likely to conclude that the PLRA's IFP provisions apply. And to the extent (currently unclear) that a habeas proceeding could be employed to assert some challenges to prison conditions, it seems possible that the PLRA's IFP provisions would apply to such a

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[12] *See Carson*, 112 F.3d at 820; Reyes, 90 F.3d at 678 ("Congress gave specific attention to perceived abuses in the filing of habeas corpus petitions by enacting Title I of the AEDPA. That title imposes several new restrictions on habeas corpus petitions, but makes no change in filings fees or in a prisoner's obligation for payment of existing fees."); United States v. Cole, 101 F.3d 1076, 1077 (5th Cir. 1996); *Naddi*, 106 F.3d at 277; Santana v. United States, 98 F.3d 752, 755 (3d Cir. 1996) ("If Congress had wanted to reform the *in forma pauperis* status of habeas petitioners, it might have done so in the AEDPA; yet nothing in the AEDPA changes the filing fees attached to habeas petitions or a prisoner's obligation to pay those filing fees.")

[13] *See* Walker v. O'Brien, 216 F.3d 626, 637 (7th Cir. 2000) ("AEDPA handles the problem of repeat filers through the requirement that inmates seeking to file second or successive petitions for a writ of habeas corpus must obtain the permission of the court of appeals, in 28 U.S.C. § 2244. The PLRA, in contrast, handles the problem of repetitive filers through the 'three strikes' rule .... See 28 U.S.C. § 1915(g).").

[14] *See Walker*, 216 F.3d at 634 n.4 ("We emphasize that the action must be a proper habeas corpus action. Our ruling is not intended in any way to suggest that the district courts should not look beyond the label the petitioner attaches to his pleading to ensure that the proper procedural regime is followed.").

[15] *Cf.* Jennings v. Natrona County Detention Center Medical Facility, 175 F.3d 775, 779 & n.2 (10th Cir. 1999) (holding that dismissal of prior habeas action did not count as a strike under 28 U.S.C. § 1915(g), but noting that the court was "not dealing here with a habeas petition containing both habeas corpus and civil rights claims, which, when dismissed under § 1915(e) as frivolous, may count as a prior occasion .... Nor are we dealing with a habeas petition more appropriately construed as a § 1983 action and thus countable as a strike.").

proceeding.[16]

B. Implications for Form 4

If this description of the caselaw is accurate, that suggests the following thoughts about the wording of Form 4's Question 4. The current wording of Form 4 is over-inclusive and could mislead appellants in criminal cases into thinking that they must submit the institutional-account statement. Thus, the pending amendments to Form 4 constitute an improvement over Form 4's current wording, because adding a limitation to "civil action[s] or proceeding[s]" alerts readers that no institutional-account statement is needed for IFP applications in criminal proceedings.

The question then becomes whether it would be even better to specify further, in the Form, that the account-statement requirement does not apply to habeas or Section 2255 proceedings. Given that habeas and Section 2255 proceedings are treated as civil actions for some purposes (such as the time to appeal), the pending amendment to Form 4 could lead some readers to believe that the institutional-account statement applies to such proceedings. Adding the further specification about habeas and Section 2255 proceedings would avoid that problem.

On the other hand, it is worth asking whether the addition of the habeas / Section 2255 specification might mislead some prisoners into thinking that they need not submit an institutional-account statement when they actually must do so. This problem could arise to the extent that the prisoner erroneously styles his or her complaint as a habeas petition when it actually should be styled as a *Bivens* or Section 1983 claim about prison conditions.[17] It is

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[16] The D.C. Circuit has reasoned as follows:

> It is possible that habeas corpus might be available to challenge prison conditions in at least some situations. The Court expressly left this possibility open in Preiser v. Rodriguez, see 411 U.S. 475, 499 ... (1973); see also Brown v. Plaut, 131 F.3d 163, 168 (D.C. Cir.1997), cert. denied, 524 U.S. 939 ... (1998); Abdul-Hakeem v. Koehler, 910 F.2d 66, 69-70 (2d Cir.1990); but cf. Gomez v. United States, 899 F.2d 1124, 1125-26 (11th Cir.1990). Such claims, if they are permissibly brought in habeas corpus, would have to be subject to the PLRA's filing fee rules, as they are precisely the sort of actions that the PLRA sought to address. See In re Smith, 114 F.3d at 1250 (D.C. Cir.1997) ("[I]t would defeat the purpose of the PLRA if a prisoner could evade its requirements simply by dressing up an ordinary civil action as a petition for mandamus or prohibition or by joining it with a petition for habeas corpus.").

Blair-Bey, 151 F.3d at 1042.

[17] As noted above, the possibility appears to remain that in some instances habeas may provide an avenue to challenge some prison conditions. If a challenge to prison conditions could

possible that this sort of wrong guess by a prisoner would be less likely to occur at the stage of an appeal, because by that point the district court would likely have recharacterized the claims appropriately, thus putting the prisoner on notice that the action is not properly styled as a habeas petition. But it should be noted that the choices that the Committee makes with respect to Form 4 may affect practice in the district courts as well as practice in the Supreme Court.[18] The Administrative Office has created forms for use in connection with requests to proceed IFP in the district courts. Form AO 240 is a short form that dispenses with much of the detail sought by Appellate Form 4. Form AO 239 is a longer form that is more similar to Appellate Form 4. AO 239 and AO 240 both require prisoners to include the institutional-account statement; because AO 239 and AO 240 are styled for use in civil actions (they include a space at the top for a civil action number), their approach is consistent with that taken by the published amendments to Appellate Form 4. But if Appellate Form 4 were amended to further specify the institutional-account-statement requirement's inapplicability to habeas and Section 2255 proceedings, that could raise the question whether AO 239 and AO 240 should be similarly amended.

In comparing the merits of an over-inclusive approach – i.e., an approach in which the applicable forms purport to require an institutional-account statement in all "civil actions" – with the merits of a more specific approach – i.e., an approach in which the applicable forms explicitly exempt habeas and Section 2255 proceedings from the institutional-account-statement requirement – it seems useful to ask what the consequences would be if an inmate misunderstands the instructions on the form. If the inmate erroneously understands the form to require an institutional-account statement when it does not, then that inconveniences the inmate (and perhaps the institution in which the inmate is held). If the inmate erroneously understands the form not to require an institutional-account statement and therefore does not provide one, then the inmate's IFP application will be incomplete.

This raises the question whether such a defect in an IFP filing would harm the would-be IFP litigant's interests. In particular, would an otherwise timely complaint or notice of appeal be deemed untimely because the inmate plaintiff or appellant sought to proceed IFP but failed to

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be properly styled as a habeas petition in a given case, the courts might well apply the PLRA's IFP provisions to such a habeas petition.

[18] As the Committee knows, changes to Form 4 directly affect practice in the Supreme Court because Supreme Court Rule 39 requires an IFP applicant to "file a motion for leave to [proceed IFP] together with the party's notarized affidavit or declaration (in compliance with 28 U. S. C. § 1746) in the form prescribed by the Federal Rules of Appellate Procedure, Form 4." I have not found caselaw that addresses the applicability of the PLRA's IFP provisions to petitions for certiorari seeking Supreme Court review. Even if these PLRA provisions were construed to extend to Supreme Court proceedings in civil actions, I would think that the reasoning that justifies exempting appeals to the courts of appeals in habeas and Section 2255 proceedings would also justify exempting petitions for certiorari seeking Supreme Court review in connection with such proceedings.

include the institutional-account statement? Appellate caselaw and local circuit provisions indicate that the answer should be no, though the matter is not entirely free from doubt in circuits that have not yet addressed the issue. I should note that most of the relevant cases and local circuit provisions do not discuss failures to provide institutional-account statements specifically, but rather concern the more general topic of failures to pay the relevant fee and/or move for permission to proceed IFP.

Caselaw in the Eighth Circuit and local circuit provisions in the Third, Fourth, and Federal Circuits suggest that failure to include the institutional-account statement does not in itself render a notice of appeal untimely, though the local circuit provisions warn that if the failure to provide the statement persists for some length of time (such as 14 or 15 days), the appeal will be dismissed.[19] This is consistent with the treatment of the question of fees in the Appellate Rules and in the caselaw. Rule 3(e) requires that "[u]pon filing a notice of appeal, the

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[19] *See* Henderson v. Norris, 129 F.3d 481, 484 (8th Cir. 1997) (providing that inmate appellant "must submit to the clerk of the district court a certified copy of the prisoner's prison account for the last six months within 30 days of filing the notice of appeal" and that "failure to file the prison account information will result in the assessment of an initial appellate partial fee of $35 or such other amount that is reasonable, based on whatever information the court has about the prisoner's finances"); Third Circuit Local Appellate Rule 24.2 ("Failure to file any of the documents specified in Rule 24.1 will result in the dismissal of the appeal by the clerk under L.A.R. 3.3 and L.A.R. Misc. 107.1(a)."); Third Circuit Local Appellate Rule 3.3(a) ("If a proceeding is docketed without prepayment of the applicable docketing fee, the appellant must pay the fee within 14 days after docketing. If the appellant fails to do so, the clerk is authorized to dismiss the appeal."); Third Circuit Local Appellate Rule 3.3(b) ("If an action has been dismissed by the district court pursuant to 28 U.S.C. § 1915 as frivolous or malicious, or if the district court certifies pursuant to § 1915(a) and FRAP 24(a) that an appeal is not taken in good faith, the appellant may either pay the applicable docketing fee or file a motion to proceed in forma pauperis within 14 days after docketing the appeal. If appellant fails to either pay the applicable docketing fee or file the motion to proceed in forma pauperis and any required supporting documents, the clerk is authorized to dismiss the appeal 30 days after docketing of the appeal."); Third Circuit Local Appellate Rule 107.1(a) ("The clerk is authorized to dismiss the appeal if the appellant does not pay the docketing fee within 14 days after the case is opened in the court of appeals, as prescribed by 3d Cir. L.A.R. 3.3."); Fourth Circuit Rule 24(a) ("If a prisoner proceeding under this rule fails to file the forms or make the payments required by the Court, the appeal will be dismissed pursuant to Local Rule 45."); Fourth Circuit Rule 45 ("When an appellant ... fails to comply with the Federal Rules of Appellate Procedure or the rules or directives of this Court, the clerk shall notify the appellant ... that upon the expiration of 15 days from the date thereof the appeal will be dismissed for want of prosecution, unless prior to that date appellant remedies the default."); Federal Circuit Appendix II: Guide for Pro Se Petitioners and Appellants ¶ 5 ("If ... you do not submit the motion and affidavit for leave to proceed IFP and the supplemental in forma pauperis form [authorizing provision of prison account statement] within 14 days of the date of docketing, the prisoner's appeal shall be dismissed.").

appellant must pay the district clerk all required fees." But the court has the authority under Rule 26(b) to grant an extension of the fee-payment deadline for "good cause."[20] And Rule 3(a)(2) provides that "[a]n appellant's failure to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for the court of appeals to act as it considers appropriate, including dismissing the appeal." An established line of cases holds that the notice of appeal is timely even if the filing fee is not paid until after the deadline for taking the appeal has passed.[21] Local circuit provisions in the Second, Fifth, Sixth, Seventh, Ninth, Tenth, and Federal Circuits provide for dismissal of such an appeal if the filing fee is not paid relatively promptly thereafter; a number of these circuits set 14 days as the limit for late payment of the fee.[22] Some of these provisions make explicit the fact that by the relevant

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[20] Rule 26(b) bars extensions of "the time to file ... a notice of appeal (except as authorized in Rule 4)." But the filing of the notice of appeal is conceptually separate from the payment of the fees, even though these events are ordinarily expected to occur simultaneously. *See* 1979 Committee Note to Rule 3(e) (observing that "[p]roposed new Rule 3(e) ... requir[es] that both [docketing and filing] fees be paid at the time the notice of appeal is filed, but subject to the provisions of Rule 26(b) preserving the authority of the court of appeals to permit late payment").

[21] *See* Parissi v. Telechron, Inc., 349 U.S. 46, 47 (1955) (per curiam) ("We think that the Clerk's receipt of the notice of appeal within the 30-day period satisfied the requirements of § 2107, and that untimely payment of the § 1917 fee did not vitiate the validity of petitioner's notice of appeal."); Gould v. Members of New Jersey Division of Water Policy and Supply, 555 F.2d 340, 341 (3d Cir. 1977) (following *Parissi*); Searcy v. City of Dayton, 38 F.3d 282, 288 (6th Cir. 1994) (applying same principle to failure to provide $105 filing fee upon filing cross-appeal); Klemm v. Astrue, 543 F.3d 1139, 1142 (9th Cir. 2008) (applying *Parissi* to case in which appellant proffered postdated check for filing fee); Brennan v. U.S. Gypsum Co., 330 F.2d 728, 729 & n.3 (10th Cir. 1964) (following *Parissi*).

This line of cases has also been extended to the treatment of petitions filed in the court of appeals seeking review of agency determinations. *See* Wisniewski v. Director, Office of Workers' Compensation Programs, 929 F.2d 952, 955 (3d Cir. 1991) ("Because the requirement that a petitioner pay a filing or docketing fee for a petition for review is not jurisdictional, payment of such a fee beyond the time prescribed by statute for filing the petition for review does not render the petition untimely or deprive the court of jurisdiction."); City of Chicago v. U.S. Dept. of Labor, 737 F.2d 1466, 1471 (7th Cir. 1984) (applying *Parissi*); B. J. McAdams, Inc. v. I. C. C., 551 F.2d 1112, 1115 n.3 (8th Cir. 1977) (petition for review was effective despite late payment of docketing fee); Long v. U.S. Dept. of Air Force, 751 F.2d 339, 342 (10th Cir. 1984) (same with respect to late payment of filing fee).

[22] *See* Second Circuit Rule 12.1(a) ("All actions required under this rule must be completed within 14 days after the filing of a notice of appeal."); *id.* 12.1(c) ("An appellant or petitioner must pay the docketing fee fixed by the U.S. Judicial Conference under 28 U.S.C.

deadline, the appellant must either pay the fee or file a proper request for permission to proceed IFP.

A number of appellate cases provide roughly similar treatment of the question of the timeliness of a complaint that is filed in the district court without payment of the required fee. One Eighth Circuit case specifically treats the question of the institutional-account statement, holding that its absence does not render the complaint untimely, though the statement must be filed "within a reasonable time" thereafter.[23] As to the more general question of fee payment, some cases appear to provide simply that the filing of the complaint itself is the relevant event for purposes of applying the statute of limitations, even if the required fee is not paid (and/or a

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§ 1913, unless the appellant or petitioner is seeking or has obtained leave to proceed in forma pauperis under 28 U.S.C. § 1915 and FRAP 24, and so notifies the circuit court."); *id.* 12.1(d) ("Failure to take any of the above actions may result in dismissal of the appeal."); Fifth Circuit IOP accompanying Rule 21 ("If the [mandamus] petitioner does not accompany the petition with the requisite filing fee or motion to proceed IFP, the clerk will, by letter, notify the petitioner of the defect and set a correction deadline. If the petitioner fails to meet the deadline, the clerk will dismiss the petition 15 days after the deadline in accordance with our practices under 5th Cir. R. 42.3.1."); Sixth Circuit Rule 3 ("The court may dismiss an appeal if required fees are not paid."); Seventh Circuit Rule 3(b) ("If a proceeding is docketed without prepayment of the docketing fee, the appellant shall pay the fee within 14 days after docketing. If the appellant fails to do so, the clerk is authorized to dismiss the appeal."); Ninth Circuit Rule 3-1 (providing that if filing and docket fees "are not paid promptly, the Court of Appeals Clerk will dismiss the case after transmitting a warning notice," but also providing that "[t]he docket fee need not be paid upon filing the notice of appeal when ... an application for in forma pauperis relief or for a certificate of appealability is pending"); Tenth Circuit Rule 3.3(b) ("An appeal may be dismissed immediately if, within 14 days after filing the notice of appeal, a party fails to: (1) pay a required fee; (2) file a timely motion for extension of time to pay the required fee; or (3) file a timely motion for leave to proceed without prepayment of fees."); Tenth Circuit Rule 24.1 ("[I]f a prisoner tenders no filing fee, or less than the full fee, when a notice of appeal is filed, the district court shall obtain sufficient information to determine the prisoner's eligibility for, and make the assessment of, a partial filing fee under the Act.... The appeal should be processed and submitted to this court in the normal course, as required by Federal Rule of Appellate Procedure 3(d), without waiting for the determination of the prisoner's eligibility for paying less than the full filing fee."); Federal Circuit Rule 24(a) ("If an appeal or petition for review is docketed without payment of the docketing fee, the clerk in providing notice of docketing will forward to the appellant or petitioner the form prescribed by this court for the motion to proceed on appeal in forma pauperis.... Except as provided in Federal Rule of Appellate Procedure 24(a), if the clerk does not receive a completed motion, the docketing fee, or a completed Form 6B within 14 days of the date of docketing of the appeal or petition, the clerk is authorized to dismiss the appeal or petition."); Federal Circuit Rule 52(d) (restating provision concerning dismissal).

[23] Garrett v. Clarke, 147 F.3d 745, 746 (8th Cir. 1998).

motion to proceed IFP is not made) until after the running of the limitations period.[24] Other cases specify that the filing of a motion to proceed IFP tolls the running of the statute of limitations; if the court grants the application, then there is no timeliness problem, but if the court denies the application, these courts state that the statute of limitations resumes running and that the plaintiff must pay the filing fee within the limitations period or face dismissal on timeliness grounds.[25] Whether or not a circuit employs such a tolling approach, the court has ample means to enforce the fee requirement where IFP status has been denied, because continued failure to pay the fee can result in dismissal for want of prosecution.[26]

Overall, these cases provide strong reason to hope that an inmate who erroneously failed to include an institutional-account statement with his or her IFP application would be able to avoid dismissal by promptly furnishing the statement after the problem is pointed out. It seems

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[24] *See* Casanova v. Dubois, 304 F.3d 75, 80 (1st Cir. 2002) (holding that failure to tender fee along with complaint did not render complaint untimely because local rule requiring prepayment was subject to waiver and because "appellants appear to have done everything within their power to comply with the filing fee provisions of the court"); McDowell v. Delaware State Police, 88 F.3d 188, 191 (3d Cir. 1996) ("[W]e deem a complaint to be constructively filed as of the date that the clerk received the complaint – as long as the plaintiff ultimately pays the filing fee or the district court grants the plaintiff's request to proceed in forma pauperis."); Wrenn v. American Cast Iron Pipe Co., 575 F.2d 544, 545, 547 (5th Cir. 1978) (payment of filing fee outside limitations period and nine days after deadline set by district court did not render complaint untimely); Farzana K. v. Indiana Dept. of Educ., 473 F.3d 703, 707 (7th Cir. 2007) ("[A] complaint must be accepted and filed even if neither the fee nor an application to proceed in forma pauperis is enclosed, and that the complaint alone satisfies the statute of limitations."); Rodgers ex rel. Jones v. Bowen, 790 F.2d 1550, 1551-53 (11th Cir. 1986) (plaintiff filed complaint and IFP application just within limitations period; about a month after the district court denied her IFP application, she paid the filing fee; court of appeals held that the complaint was timely and that the delay in paying filing fee did not justify dismissal for failure to prosecute).

[25] *See* Truitt v. County of Wayne, 148 F.3d 644, 648 (6th Cir. 1998) (holding that complaint is filed for statute-of-limitations purposes when fee is paid or IFP status is granted, but also stating that the limitations period is tolled during period when IFP petition is pending); Williams-Guice v. Board of Educ. of City of Chicago, 45 F.3d 161, 163-65 (7th Cir. 1995) (reasoning that filing of complaint suspends running of limitations period while plaintiff amends deficient IFP application and until the court denies the application – but that limitations period starts running again after denial of IFP application); Jarrett v. US Sprint Communications Co. 22 F.3d 256, 259-60 (10th Cir. 1994) (reasoning that where IFP petition is ultimately denied, limitations period is tolled while the petition is pending, and perhaps for a brief period thereafter, but holding that the plaintiff in this case waited too long).

[26] *See, e.g.*, *Farzana K.*, 473 F.3d at 707.

to this writer that a contrary conclusion would unduly disadvantage poor incarcerated litigants, by subjecting them to a worse result than they would face if they had avoided seeking IFP status at all.[27]

However, at least a word of caution is required, because the possibility exists that a judge focusing only on the text of Section 1915(a) might reach a contrary conclusion. As amended by the PLRA, the first two subdivisions of Section 1915(a) state:

> (1) Subject to subsection (b), **any court of the United States may authorize the commencement**, prosecution or defense **of any suit, action or proceeding, civil or criminal, or appeal therein**, without prepayment of fees or security therefor, by a person who submits 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. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress.
>
> (2) 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) (emphases added). A few judges have taken the view that by referring to "commencement," the statute indicates that the lawsuit or appeal is not "commenced" for purposes of timeliness until the fee is paid or the litigant receives permission to proceed IFP.[28]

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[27] That is to say, if the inmate simply failed to pay the required fee and did not request IFP status, the caselaw described above would treat the notice of the complaint or the appeal as timely filed despite the absence of the fee (though the continued failure to pay the fee would expose the litigant to dismissal of the case or the appeal).

[28] The panel majority in one Eighth Circuit case stated as follows:

> [T]he PLRA would seem clearly to prevent a prisoner from filing an action in forma pauperis until he has complied with the requirements of subsection (a) of § 1915.... Our recent opinion in *Garrett v. Clarke*, however, takes a contrary position, holding that the PLRA allows a prisoner to file the complaint and then satisfy the requirements of § 1915(a) within a reasonable time.... We believe that this is an incorrect interpretation of the statute and is contrary to the policies established by Congress with the enactment of the Prison Litigation Reform Act of 1995. In our view, such a rule will needlessly and improperly create numerous

However, I know of no court of appeals that has actually adopted such a view.

IV. Conclusion

NACDL's suggested revision to Form 4 would help to ensure that habeas petitioners do not erroneously assume that they must provide institutional-account statements when seeking permission to proceed IFP. Given the very large number of habeas filings and the fact that habeas proceedings are treated as civil actions for some key purposes, it seems possible that such confusion could be relatively widespread. On the other hand, the harm to an IFP applicant who makes this sort of error would likely be limited to the inconvenience entailed in obtaining the institutional-account statement.

Specifying in Form 4 that the institutional-account-statement requirement does not apply to habeas petitioners might cause a different sort of confusion at the margin, to the extent that a litigant erroneously believes that a proceeding is a habeas proceeding when it is not. This sort of confusion should be much more rare than the sort (noted above) that NACDL's proposal seeks to avoid; especially by the time of an appeal, litigants should not make this sort of category error. However, the downside of this kind of confusion could be more serious for the litigant, because the absence of the institutional-account statement would render the IFP application incomplete. On the other hand, the existing caselaw and local circuit provisions support the view that such a defect will not render the initial filing untimely (for purposes of appeal deadlines or, in the district court, statutes of limitations). Such a view seems strongly persuasive to me, but it should be noted that some judges have questioned it – leaving the possibility that a court might in future impose a forfeiture on a litigant who erroneously omitted to supply the institutional-account statement at the time of initial filing.

> case and docket management problems for the district courts in this circuit. Nevertheless, we are bound by the decision in *Garrett*.

Murray v. Dosal, 150 F.3d 814, 816 n.4 (8th Cir. 1998).

A Seventh Circuit panel also acknowledged this textual argument: "To say that the judge may 'authorize the commencement' of a suit is to imply that depositing a copy of the complaint with the clerk does *not* commence the litigation and therefore does not satisfy the statute of limitations. Only the judge's order permitting the plaintiff to proceed *in forma pauperis*, and accepting the papers for filing, would commence the action." *Williams-Guice*, 45 F.3d at 162. The *Williams-Guice* court, however, rejected this inference, observing that it "would make judicial delay fatal to some actions." *Id.* Instead, the court noted circuit precedent holding "that the receipt of the complaint by the clerk suffices, at least when the judge ultimately permits the plaintiff to proceed IFP," and it went on to adopt a tolling approach for instances when the IFP request is ultimately denied. *See id.* at 162, 164-65.

Encl.

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11-AP-003

February 14, 2012
via e-mail

Peter G. McCabe, Secretary
Standing Committee on Rules of Prac. and Proc.
Judicial Conference of the United States
Administrative Office of the U.S. Courts
Thurgood Marshall Federal Judiciary Bldg.
One Columbus Circle, N.E., suite 4-170
Washington, DC 20002

COMMENTS OF THE
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
Concerning Proposed Amendments to the Federal Rules of Appellate Procedure
Published for Comment in August 2011

Dear Mr. McCabe:

The National Association of Criminal Defense Lawyers is pleased to submit our comments with respect to the proposed changes in the Federal Rules of Appellate Procedure. NACDL's comments on the proposed amendments to the Evidence and Criminal Rules are being submitted separately. Our organization has more than 12,000 members; in addition, NACDL's 94 state and local affiliates, in all 50 states, comprise a combined membership of about 35,000 private and public defenders. NACDL, which celebrated its 50th Anniversary in 2008, is the preeminent organization in the United States representing the views, rights and interests of the defense bar and its clients.

FRAP 28. The proposed amendment to Rules 28(a)(6) and (b)(4) would eliminate the prior, artificial distinction between the "statement of the case" and the "statement of facts." (Conforming amendments to Rule 28.1 are also proposed.) As amended, Rule 28 would require only the appellant's brief contain, "a concise statement of the case setting out the facts relevant to the issues submitted for review and identifying the rulings presented for review …." NACDL agrees that the prior requirement to separate these two "statements" has sometimes proven confusing and

unhelpful to either counsel or the court. The "facts" underlying an issue that arose in the courtroom are often indistinguishable from the details of the procedural history of the case. The new requirement that the now-consolidated Statement of the Case include a specific reference to any ruling of the lower court which the appellant seeks to have reviewed is also bound to be helpful.

At the same time, we note that the wording of the new rule could lead to new forms of confusion. Practitioners may think, from the use of the term "relevant," that all the facts pertinent an argument must be in this new Statement. We assume this would not be a correct reading of the words, "setting out the facts relevant to the issues submitted for review," particularly since the statement is required to be "concise." Accordingly, NACDL suggests that the Advisory Committee Note concerning this change be expanded somewhat to make clear that a brief overview of the facts may be sufficient in the Statement, where additional necessary details are set forth in the Argument portion of the brief, showing how the issues raised and argument for reversal (or affirmance, in the case of the appellee's brief) arises out of the factual history of the case.

Conversely, we assume that the Committee does not mean to suggest that a brief statement of "the nature of the case, the course of proceedings, and the disposition below" is *not* expected to be found in every appellant's brief, despite the deletion of those words. As presently worded, the committee's proposal, as we read it, could suggest that these basic "facts" are not appropriate for inclusion in an appellate brief. If those words are not restored to the Rule, then at least the Note should be amended to make the expectation clear, since their pointed elimination is potentially misleading. We suggest language such as the following: "a concise statement setting forth the nature of the case, the essential procedural history (including reference to the rulings presented for review), and the key facts giving rise to the claims or charges as well as those relevant to the issues submitted for review …."

Form 4 - IFP. The committee proposes to clarify that the requirement that a prisoner attach a statement of the balance in his or her institutional account applies only when the prisoners seeks to appeal "a judgment in a civil action or proceeding." NACDL suggests that this wording be clarified to reflect more accurately the coverage of the Prison Litigation Reform Act, by adding "(not including a decision in a habeas corpus proceeding or a proceeding under 28 U.S.C. § 2255)." Such proceedings, while generally treated as "civil" for purposes of appeal, are not governed by the PLRA. See, *e.g.*, *Santana v. United States*, 98 F.3d 752 (3d Cir. 1996) (Becker, J.).

The National Association of Criminal Defense Lawyers is grateful for the opportunity to submit its views on these proposals. We look forward to continuing to work with the Committee in the years to come.

Very truly yours,
s/Peter Goldberger

Alexander Bunin
Houston, Texas
Cheryl Stein
Washington, D.C.
William J. Genego
Santa Monica, CA
Peter Goldberger
Ardmore, PA

National Association of Criminal Defense Lawyers
Committee on Rules of Procedure

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Minutes of September 27, 2012, Appellate Rules Committee Meeting (excerpt)

A. Item No. 12-AP-B (Form 4's directive regarding institutional-account statements)

Judge Sutton invited the Reporter to introduce this item, which arises from a comment that the National Association of Criminal Defense Lawyers ("NACDL") submitted on the pending amendment to Form 4 (concerning applications to proceed *in forma pauperis* ("IFP")). The pending amendments – which are on track to take effect on December 1, 2013 if the Supreme Court approves them and Congress takes no contrary action – make certain technical changes to the Form and revise the current Form's detailed questions about the applicant's payments for legal and other services.

The pending technical changes include a revision to the Form's directive that prisoners must attach an institutional account statement. The pending revision would limit that directive to prisoners "seeking to appeal a judgment in a civil action or proceeding." That revised language more closely tracks the language in 28 U.S.C. § 1915(a)(2) (a statutory provision added by the Prison Litigation Reform Act ("PLRA")). Commenting on this proposed change, NACDL suggested that this provision be further revised by adding the following parenthetical: "(not including a decision in a habeas corpus proceeding or a proceeding under 28 U.S.C. § 2255)."

The Reporter stated that NACDL's legal analysis accords with the overall state of the law. All circuits have cases stating that the PLRA's IFP provisions do not apply to habeas petitions under Section 2254. A majority of circuits have cases stating the same view with respect to Section 2255 motions. However, the Reporter noted that courts might well apply the PLRA's IFP requirements if a prisoner (erroneously or not) styled a challenge to prison conditions as a habeas petition, or if a prisoner included a prison-conditions challenge in a habeas petition.

The Reporter suggested that, in evaluating NACDL's proposal, it may be useful to consider the effect of Form 4's wording on the risk of error by an IFP applicant. Form 4, as revised by the pending amendment, might risk inconveniencing some IFP applicants in habeas cases who erroneously think that they must include an institutional-account statement with their IFP application. This risk may be relatively widespread, but would likely pose no more than an inconvenience in any given case. If NACDL's proposed change is made, there would be a risk that some (relatively small) number of IFP applicants would erroneously believe they need not include an institutional-account statement. That risk would not likely be widespread, but it might have more significant implications for the appeal. Those implications would depend on how courts would treat the absence of an institutional-account statement when one is required. The caselaw gives reason to hope that such an error would not render the filing untimely, and that the appeal would be permitted to proceed so long as the applicant supplied the required statement promptly once alerted to the error. That would be the likely outcome, but there remains the possibility that a court might disagree.

An appellate judge member suggested that the worst-case scenario under the Form (as revised by the pending amendment) does not seem a matter for grave concern: The prison will simply supply an institutional-account statement unnecessarily. An attorney member asked what would happen if an inmate is moved from one institution to another – would he or she need to supply more than one institutional-account statement? Mr. Green stated that if a litigant omitted an institutional-account statement when one was required, his office would simply direct the litigant to remedy the omission. A district judge member reported that this requirement does not cause problems at the district court level; within his district, each prison has a designated person whose job it is to process the institutional-account statements.

Judge Colloton noted the broader issue of the role of rulemaking concerning forms; the Civil Rules Committee, he observed, is considering whether to cease promulgating forms. Professor Coquillette noted that the Advisory Committees vary in their approaches to forms.

An attorney member suggested that any change in response to NACDL's comment should be held for disposition along with other small changes that might be addressed once every five years or so. Judge Sutton agreed that it is worth thinking about the frequency of rule amendments. More generally, though, bundling amendments might not always work for all of the Advisory Committees. Mr. Byron recalled that in the late 1990s and early 2000s the Appellate Rules Committee did follow the practice of bundling rule amendments.

Concerning the present proposal about Form 4, Mr. Byron stated that the DOJ defers to the views of the judges and clerks. An appellate judge member suggested that it would make sense to wait and see how the pending amendments to Form 4 function in practice before considering further changes.

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

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MEMORANDUM

DATE: October 12, 2015

TO: Advisory Committee on Appellate Rules

FROM: Gregory E. Maggs, Reporter

RE: Item No. 14-AP-C (Issues relating to Morris v. Atichity)

Following her experiences as a *pro se* litigant in the Ninth Circuit, Ms. Margaret Morris submitted a proposal for a new rule by email on July 1, 2014. The proposed rule would require courts to resolve issues raised by litigants. Professor Daniel Capra wrote the attached memorandum addressing the proposal on March 31, 2015.

This item was included on the agenda for the April 2015 meeting, but the Committee did not have time to address it. Accordingly, the item is still awaiting initial discussion.

Attachments

1. Email to Committee on Rules of Practice and Procedure, Administrative Office of the United States Courts from Ms. Margaret Morris (Jul. 1, 2014)

2. Memorandum to the Advisory Committee on Appellate Rules from Prof. Daniel J. Capra, regarding No. 14-AP-C (pro se briefs) (Mar. 31, 2015)

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TAB 10B

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Suggestion for a much-needed new rule

Margaret Morris to: Rules_Support 07/01/2014 04:51 PM

Dear Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts,

A new rule is needed to secure Constitutional rights in our appellate courts.

Background - my appeal illustrates the need for a new rule:

The 9th Circuit Court of Appeals, in San Francisco, put my copyright infringement case into its Pro Bono Program by court order. When the judges heard my appeal, they counted the pro bono supplemental briefs (clearly marked and designated as supplemental) as replacement briefs instead. The pro bono attorneys only argued a few minor points not covered in my appeal brief. The court ignored my appeal brief even though it contained the main issues of the appeal. All further motions arguing that the main issues of appeal be heard were denied without giving any reason for the denial until the court finally refused to accept any more motions. So, the court did not meet its legal obligation to fully hear my properly-filed, timely appeal. The end result was Constitutional deprivations, i.e., the denial of due process (the rights to fair proceedings and the right to be heard in a meaningful way) and, consequently, equal protection -- very costly deprivations after investing almost a decade in the court system fighting for my property rights.

Details of my case are provided in my petition for a writ of certiorari docketed 4/18/2014 as No. 13-1266; Morris v Atchity et al.). My petition was denied on 6/2/2014

A new rule:
A new rule could prevent court errors of this magnitude. A new rule should require that as long as a litigant presents a motion showing that any main issue on appeal is not resolved according to law as applied to proven facts of the case, the appeals court cannot refuse the motion. Said rule should assure that the court provides written, law-based reasoning for denying such motion. If not, the motion can be resubmitted until the court reaches a soundly-reasoned legal decision. This makes it harder for judges to produce incorrect decisions in the first place—and to not avoid fairly resolving issues as the end result of each appeal. This kind of rule should apply whether or not a ruling is published. The rule should provide a safeguard against creating Constitutional deprivations, as the appellate court is the court of last resort for almost all litigants and it is required to meet its legal responsibilities. There should be a remedy for the litigant if the rule is not followed by the court, too.

Sincerely,

Margaret Morris

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MEMORANDUM

To: Advisory Committee on Appellate Rules

From: Daniel J. Capra

Re: Item No. 14-AP-C (pro se briefs)

Date: March 31, 2015

A pro se plaintiff asks for a new appellate rule after having what she believes to be an unsatisfactory experience when she was appointed counsel under the Ninth Circuit's pro bono program. Her description of the experience is as follows:

> The 9th Circuit Court of Appeals, in San Francisco, put my copyright infringement case into its Pro Bono Program by court order. When the judges heard my appeal, they counted the pro bono supplemental briefs (clearly marked and designated as supplemental) as replacement briefs instead. The pro bono attorneys only argued a few minor points not covered in my appeal brief. The court ignored my appeal brief even though it contained the main issues of the appeal. All further motions arguing that the main issues of appeal be heard were denied without giving any reason for the denial until the court finally refused to accept any more motions. So, the court did not meet its legal obligation to fully hear my properly-filed, timely appeal. The end result was Constitutional deprivations, i.e., the denial of due process (the rights to fair proceedings and the right to be heard in a meaningful way) and, consequently, equal protection -- very costly deprivations after investing almost a decade in the court system.
>
> * * *
>
> A new rule could prevent court errors of this magnitude. A new rule should require that as long as a litigant presents a motion showing that any main issue on appeal is not resolved according to law as applied to proven facts of the case, the appeals court cannot refuse the motion. Said rule should assure that the court provides written, law-based reasoning for denying such motion. If not, the motion can be resubmitted until the court reaches a soundly-reasoned legal decision. This makes it harder for judges to produce incorrect decisions in the first place—and to not avoid fairly resolving issues as the end result of each appeal.

The docket of the case indicates that under the order directing appointment of pro bono counsel, the pro se's pending motions were denied without prejudice to renewal through

counsel. Once appointed, counsel filed a "Supplemental Opening Brief." The pro se's complaint is that the 9th Circuit failed to treat this brief as supplemental--i.e., instead of considering briefs/motions filed pro se prior to appointment of counsel along with those filed by counsel, the 9th Circuit only considered the briefs filed by counsel.

The rule that the pro se proposes to address the alleged wrong is not a viable rule. A rule that says "a court of appeals must accept a motion when a main issue is not resolved according to law as applied to the facts" is so broad, and would have to be subject to so many exceptions, that it would likely do more harm than good. A more narrow possibility would be to address what to do when a court receives a supplemental brief from counsel after a pro se litigant files her own brief. There is nothing that I could find in the Appellate Rules about such a situation. The only thing I could find even close to on point is Rule 28(c), which requires court permission for any brief after the reply. In this case, such permission was granted but the original brief was not considered.

At bottom, the complaint of the pro se appellant here seems to be a disagreement over strategy with appointed counsel. I spoke with Judge Hurwitz of the Ninth Circuit and he says this occurs with some frequency under the Circuit's pro bono plan. Another way to look at it is that counsel simply mischaracterized the brief given the court order. It was not "supplemental" given the fact that the pro se's briefs were rejected because counsel was appointed. Neither of these scenarios warrants appellate rulemaking.

On the merits, it would appear that the court should surely have the discretion to reject the pro se's brief and consider counsel's brief to be the brief on the merits. Once counsel is appointed, strategic decisions, particularly in civil cases, are for counsel to make.

If the Committee decides, however, that a rule might be useful to assist courts and parties in determining how to treat briefs filed by pro bono counsel after a pro se has already filed a brief --- or more specifically that a pro se's opening brief will be accepted or rejected if counsel is appointed --- then a full memorandum on the subject will be prepared for the next meeting.

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MEMORANDUM

DATE: October 15, 2015

TO: Advisory Committee on Appellate Rules

FROM: Gregory E. Maggs, Reporter[1]

RE: Possible amendments relating to electronic filing
(Item Nos. 08-AP-A, 11-AP-C, 11-AP-D, 15-AP-A, and 15-AP-D)

The Appellate Rules Committee, like the Civil, Criminal, and Bankruptcy Rules Committees, is considering possible amendments relating to electronic filing and service. Appellate Rule 25(a)(2)(D) currently authorizes the adoption of local rules mandating electronic filing, subject to reasonable exceptions. Appellate Rule 25(c)(1)(D) purports to allow electronic service only with the recipient's consent. The Advisory Committees are now considering amending the national Rules to mandate e-filing and permit e-service (subject to certain exceptions).

The goal is to develop a package of amendments that will treat these issues similarly across all four sets of Rules; however, the process of developing those amendments is not yet complete. Given the importance of ensuring that the Appellate Rules dovetail appropriately with the other Rules, and given some uncertainty about the details of the proposals that will be adopted by the other Committees, this memo lays out key issues for the Committee's consideration but does not present language for final adoption at the Committee's fall meeting. With input from all advisory Committees at their fall meetings and with guidance from the Standing Committee at the January meeting, it will be possible to finalize specific amendment language for consideration at the Committee's spring meeting.

Part I of this memo briefly reviews local circuit practices. Part II sets out basic policy choices for the Committee's consideration. Part III concludes. As background, I enclose the relevant agenda materials from the fall 2015 agenda books for the Criminal and Bankruptcy Committees and the April 18, 2015 sketch of Appellate Rule 25 amendments that was circulated to the Appellate Rules Committee in advance of the spring 2015 meeting. (I include the last document in case it is useful for Committee members to recall the tentative sketch that the Committee had before it last spring. The sketch was meant to parallel the version of the Civil Rule 5 draft that was approved at the Civil Rules Committee's spring 2015 meeting. A number of revisions will likely be

[1] This memorandum is a revision of a draft originally prepared by Reporter Catherine T. Struve.

warranted in light of developments in the other Rules Committees' deliberations since then.)

I. Current practice in the courts of appeals

Based on a review of local circuit provisions that was most recently updated in spring 2015,[2] one can summarize local practice as follows. All thirteen circuits set a presumptive requirement that all attorney filers file electronically but permit exemptions on a showing of sufficient justification. Some circuits bar pro se litigants from using CM/ECF. At least three circuits authorize (but do not require) pro se litigants to use CM/ECF. Still other circuits authorize pro se litigants to seek court permission to use CM/ECF; in the latter group, some circuits distinguish between pro se inmate litigants and other pro se litigants. Even when a filer is generally required to use CM/ECF, local provisions sometimes require particular types of filings to be made in paper form and sometimes permit other types of filings to be made in paper form. Currently, all thirteen circuits have local provisions stating that registration for CM/ECF constitutes consent to electronic service, which typically would mean service by means of the notice of docket activity (NDA) generated by CM/ECF.

II. Policy choices

Though consensus has developed on most of the items noted below, it seems useful to collect and briefly discuss them here.

A. Presumptively requiring electronic filing and permitting electronic service

The consensus is that it makes sense, at this time, to revise the Rules to presumptively require electronic filing and permit electronic service. Such a presumptive requirement mirrors the current local circuit practices noted in Part I above.

B. Good-cause and local-rule exceptions to the electronic filing and service provisions

Here, too, there is consensus: There should be exceptions for good cause and where provided by local rule.

Moreover, it seems to be accepted that the local-rule provision not only should authorize courts to *permit* paper filing by local rule, but also should authorize courts to *require* paper filings by local rule. Such a feature seems desirable, for the Appellate Rules, in light of the existing local provisions in a number of circuits that require paper filings in certain circumstances.

[2] The discussion of local circuit provisions in this memo is current as of spring 2015. It seems unlikely that the relevant local provisions have changed appreciably in the past six months.

C. Pro se litigants

Should the e-filing and e-service rules treat pro se litigants differently? And, if so, how should they be treated, and how should they be denoted? Parts II.C.1 and II.C.2 review possibilities considered but not adopted, while Part II.C.3 summarizes the emerging consensus among the Advisory Committees and notes a few outstanding questions.

1. Same versus different treatment

In theory, the Appellate Rules could avoid mentioning pro se litigants in particular. Assuming that the e-filing and e-service provisions provided for exceptions according to local rule, it seems likely that each circuit would carry forward (or revise) its local circuit provisions so as to address pro se litigants. All thirteen circuits currently have local provisions that, in effect, exempt pro se litigants from any requirement of using CM/ECF. Some of those circuit provisions, carried forward without change, would also exempt pro se litigants from an e-filing requirement that included a local-rule exemption; this would be true, for example, of local circuit rules that bar pro se litigants from using CM/ECF and local circuit rules that permit pro se litigants to use CM/ECF or not as they choose. Other circuits might need to amend their local rules in order to maintain the status quo (*i.e.*, to maintain the categorical exemption of pro se litigants from e-filing and e-service requirements).[3]

But though it might be feasible to rely on local rules to tailor the approach to pro se litigants in the courts of appeals, such an approach would be impractical for the district courts. The enclosed memo by Julie Wilson and Bridget Healy, which surveys and analyzes local district court and bankruptcy court provisions relating to pro se litigants, establishes both that the lower courts take differing approaches to this question and that not all of those courts have made their approaches clear in local rules.

Moreover, as explained in Part I.A. of the enclosed September 3, 2015 memorandum by Professors Beale and King, the Criminal Rules Committee has expressed strong concerns about treating pro se litigants (and particularly pro se inmate litigants) the same as other litigants for purposes of electronic filing and service.

Accordingly, the developing consensus is that the national Rules should be explicit in their treatment of pro se litigants with respect to e-filing and e-service. So, if the Rules are to address pro se litigants particularly, what should they say?

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[3] This would be true if the current provision exempting pro se litigants is in something other than a local rule, such as a circuit guide or administrative order concerning electronic filing. It might also be true if the current local circuit provision focuses on when pro se litigants *are permitted* to use CM/ECF rather than on *exempting* them from CM/ECF; though such provisions should be read to provide an exemption whenever authorization to use CM/ECF has not been granted to a particular pro se litigant, it would seem preferable for the local rule to create an explicit exemption.

2. Protective / permissive approach

One possible approach would be to exempt pro se litigants from the *requirement* of e-filing (and, relatedly, to exempt them from receiving e-service without their consent). Such an exemption need not restrict a pro se litigant's ability to use e-filing and e-service; it would merely allow a pro se litigant a right not to use electronic means if the pro se litigant preferred not to do so.

Exempting pro se litigants from a requirement of electronic filing would take account of the fact that many pro se litigants lack the resources and/or ability to participate in electronic filing. Meanwhile, presumptively permitting electronic filing and service by pro se litigants would address the concerns of commentators who focus on the cost and hardship a pro se litigant faces in filing non-electronically. Robert M. Miller, Ph.D., a pro se litigant, reports that the Federal Circuit's refusal to permit him to file electronically imposed financial costs (of printing, copying, and mailing) and increased the risk of untimely filing (due to "unfor[e]seeable problems at the copy store or delivery service").[4] Similarly, Sai suggests that "courts should not prohibit pro se litigants from having CM/ECF access where represented parties would have it. Doing so imposes a disparate burden of time, expense, effort, processing delays, reduction in the visual quality of papers due to printing and scanning, removal of hyperlinks in papers, and reduction in ADA / Rehab Act accessibility."[5]

It is, however, apparent that not all courts would favor such a permissive approach. In advocating "that pro se litigants should be permitted to use ECF unless and until they demonstrate an inability to use the system above and beyond mistakes commonly made by seasoned attorneys admitted to the bar," Dr. Miller observes that the Ninth Circuit currently takes this approach; so do the Third and Eighth Circuits.[6] But, as he also notes, the Federal Circuit bars pro se litigants from using CM/ECF;[7] so do the Sixth, Seventh, and Eleventh Circuits.[8] Still other circuits authorize pro se litigants to seek court permission to use CM/ECF;[9] in the latter group, some circuits distinguish between pro se inmate litigants and other pro se litigants.[10] A similar split emerges in the findings of Julie Wilson and Bridget Healy concerning practices in the district courts:

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[4] I enclose Dr. Miller's submission.
[5] I enclose Sai's submission.
[6] *See supra* note 22.
[7] *See supra* note 23.
[8] *See supra* notes 21 and 23.
[9] *See* D.C. Circuit Rule ECF-2(B); D.C. Circuit Rule ECF-8(A); Second Circuit Rule 25.1(b)(3); Fourth Circuit Rule 25(a)(2); Tenth Circuit CM/ECF Manual Sections II.A.2 and II.B.2.
[10] *See* First Circuit CM/ECF Rules Preamble (electronic filing is "voluntary for all non-incarcerated pro se litigants"); First Circuit CM/ECF Rule 2 (same); Fifth Circuit Rules 25.2.1 and 25.2.3 ("[n]on-incarcerated pro se litigants" in civil cases may seek permission to register for CM/ECF).

> In the majority of districts, pro se litigants are expected (or required) to file paper documents. Thirty-nine districts categorically prohibit electronic filing; thirty-four districts have a default rule requiring paper filing, but do permit pro se litigants to file electronically after seeking and obtaining permission from the court. Only sixteen districts allow pro se litigants who are not incarcerated to file electronically without having to first obtain permission from the court.[11]

They further note that "[t]he default rule requiring paper filing is even more evident with regard to incarcerated pro se litigants. Among the federal districts, fifty-five categorically prohibit electronic filing by incarcerated pro se litigants."[12] It seems likely that this landscape reflects, in part, the concerns articulated in the memo by Professors Beale and King.

3. Restrictive approach

Taking into account the concerns noted above, the emerging consensus, in discussions with the other Advisory Committees, favors an approach that not only exempts but bars pro se litigants from using CM/ECF unless the court grants permission through a local rule or a court order. Under this approach, a circuit could carry forward or adopt a permissive local rule. This approach also would permit each circuit the opportunity to tailor its local rules to fit particular concerns, such as those that might arise with respect to pro se inmate litigants.

Assuming that the Committee favors the presumptively-restrictive approach, the Committee may also wish to consider three subsidiary drafting issues:

- Is it important to select language that not only restricts but also exempts the pro se litigant from filing through CM/ECF?
  - As a point of comparison, the enclosed sketch of Criminal Rule 49(b)(3)(B) states: "A party not represented by an attorney must file nonelectronically, unless allowed to file electronically by court order or local rule."
  - Would such a provision in a national Rule prevent a circuit or district from adopting a local rule that *required* e-filing by pro se litigants and did not include an exception for good cause? Is it important to draft language that would prevent such an approach, or is it simply not likely that a court would adopt such a local rule?
- Should pro se litigants who are not on CM/ECF be permitted by Rule to use email service if the other party has consented in writing?

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[11] Wilson & Healy at 1-2.

[12] *Id.* at 2.

- This is the approach taken in the current Rules.[13] And one could readily imagine instances where both a pro se litigant (who is not on CM/ECF) and that litigant's opponent might prefer the use of email service. In such instances, it is not apparent why the Rules should require court permission for email service to which the party being served has consented. Retaining the requirement of written consent would help to prevent instances where there is a dispute as to the existence of consent.

- As a point of contrast, the enclosed sketch of Criminal Rule 49(a)(3) states: "(a) Service ... (3) How Made Electronically.... (B) By an Unrepresented Party. A party not represented by an attorney may use electronic service only if allowed by court order or by local rule."[14]

○ What is the best choice of term to denote pro se litigants?

- The most recent Criminal Rule 49 draft uses the terms "unrepresented," "nonrepresented," and "a party not represented by an attorney."

- As other examples of nomenclature, here are samples from the local circuit provisions: "a party not represented by counsel" / "a party … not represented by an attorney"; "unrepresented litigants who are not themselves lawyers"; "litigants proceeding pro se."

- Another possible phrasing (employed in a prior draft of the Civil Rules proposal) is "a person proceeding without an attorney."

- One non-semantic question concerns the treatment of pro se lawyers. The Seventh Circuit local rules treat pro se lawyers the same way they treat represented parties for purposes of the CM/ECF requirement. The reporters for the various Advisory Committees considered the possibility of taking a similar approach, but in the end decided instead to take the represented / nonrepresented divide as the salient distinction.

D. Non-parties

In preparing to revise the service and filing provisions, the Advisory Committees have considered whether the revised provisions should refer only to "parties" or also

[13] *See* Appellate Rule 25(c)(1)(D) (service may be "by electronic means, if the party being served consents in writing").

[14] Proposed Criminal Rule 49(a)(4) – concerning service "Made by Other Means" – states that, "[a]lternatively, a paper may be served by: ... (E) delivering it by any other means that the person consented to in writing ...."

other persons. The emerging consensus appears to favor using the term "party," although the Criminal Rules Committee may also consider adopting a separate provision addressing service and filing by nonparties.

Current Appellate Rule 25 takes differing approaches in different subparts. Some parts – Rules 25(a), (d), and (e) – avoid reference to the subject of the requirement, and thus could be read to govern both parties and other persons. Other provisions – Rules 25(b) and (c) – refer specifically to "a party."

Referring to "persons" rather than "parties" might be desirable because the broader term would encompass amici, persons seeking intervention on appeal, and perhaps other less usual participants in appellate proceedings.[15]

However, use of the broader term would require consideration of whether such non-parties are in a position to use the CM/ECF system. Moreover, if – as seems likely – the Civil, Criminal, and Bankruptcy Rules Committees prefer the term "party," then parallelism would cut in favor of using the same approach in the Appellate Rule.

E. Signature of electronically filed documents

The Advisory Committees have been discussing how to handle signatures on electronically-filed papers.

The Appellate Rules require that papers be signed by the attorney (or unrepresented party).[16] Currently, the Appellate Rules (like the other relevant sets of national Rules[17]) authorize local rules that permit or require electronic signature: Appellate Rule 25(a)(2)(D) states in part that "[a] court of appeals may by local rule permit or require papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes."

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[15] Another example of this rare phenomenon was pointed out by Mr. Gans – namely, "when a state or the federal government is a defendant and the case is dismissed prior to service. On appeal, we have asked government agencies to file something like an appellee brief in response to the appellant's brief without adding them as a party to the appeal. They would be served the appellant's reply brief or other documents filed after they were invited to submit their views." At least some circuits permit non-parties in some of these situations to use CM/ECF to file papers. Whether such a non-party would then receive notice through CM/ECF of subsequent filings by parties is a question the answer to which may vary by circuit.

[16] Appellate Rule 32(d) states: "Every brief, motion, or other paper filed with the court must be signed by the party filing the paper or, if the party is represented, by one of the party's attorneys."

[17] *See* Fed. R. Civ. P. 5(d)(3); Fed. R. Crim. P. 49(e); Fed. R. Bankr. P. 5005(a)(2).

If the Rules are revised to adopt a presumptive requirement of electronic filing, it seems desirable for those Rules also to address the question of signatures in electronically-filed documents.

Proposed draft Criminal Rule 49(b)(2)(A) states: "The user name and password of an attorney of record serves as the attorney's signature."[18] An earlier sketch of a Civil Rule 5 amendment had instead stated: "The act of electronic filing constitutes the signature of the person who makes the filing." But the Advisory Committees appear to be converging on the approach reflected in the draft Criminal Rule.

F. Proof of service

Appellate Rule 25(d) requires that a paper presented for filing contain either "an acknowledgment of service" or "proof of service." The Committee has begun considering amending Rule 25(d) so that it no longer requires a proof of service in instances when service is accomplished by means of the notice of docket activity (NDA) generated by CM/ECF. The Civil, Criminal, and Bankruptcy Committees are considering similar changes to the lower-court Rules.

Although twelve of the thirteen circuits have local provisions that make clear that the NDA does not replace the certificate of service, Michael Gans has explained that these provisions likely arose from an assumption that it would be improper to dispense with the certificate of service so long as Rule 25(d) seemed to require one. The Second Circuit now has a local provision indicating that filling out the "service" section in CM/ECF constitutes compliance with Appellate Rule 25(d)'s requirement for a certificate of service.

Mr. Gans reported that a majority of the Circuit Clerks favor amending Rule 25(d) to remove the certificate-of-service requirement in cases where all the litigants participate in CM/ECF – though they think that Rule 25(d) should continue to require the certificate of service when any of the parties is served by a means other than CM/ECF.[19] On the other hand, a substantial minority of the Circuit Clerks favor retaining the certificate-of-service requirement across the board. Sometimes attorneys may err in thinking that a particular litigant can be served through CM/ECF when that is not in fact the case (for instance, when a party who was filing electronically in the district court has not yet registered to file electronically in the appellate court). And when the clerk's office is checking to ensure that proper service occurred, the certificate of service can provide a starting point. But, as Mr. Gans points out, the existence of a certificate of service does not remove the need for the clerk's office to check each filing against the service list to make sure that proper service occurred.

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[18] One prior variation of this approach, reflected in a previous Civil Rules draft, was: "The user name and password of an attorney of record[, together with the attorney's name on the signature block,] serves as the attorney's signature."

[19] I enclose Mr. Gans's October 14, 2014 letter.

As for the drafting of a proposed amendment, the structure of the relevant Appellate Rule provision may justify departure from the phrasing under consideration in the other Advisory Committees. The other Committees appear to be converging on the following: "A notice of electronic filing constitutes a certificate of service on any party [or person] served through the court's transmission facilities." However, different phrasing may be preferable in the Appellate Rules (which, for example, do not currently use the term "certificate of service," but refer in several places to "proof of service"). One possibility, illustrated in the spring 2015 Appellate Rules Committee materials, would be to amend Appellate Rule 25(d)(1) to provide: "Proof of service consists of: ... (C) as to any [person] [party] served through the court's transmission facilities, a notice of electronic filing."

If the Committee proceeds with a proposal addressing proof of service, it may also wish to consider proposing an amendment to Rule 39(d)(1), which includes a requirement of proof of service that seems redundant in light of Rule 25(d).[20]

III. Conclusion

The Advisory Committees are well on the way to developing coordinated proposals that will update the treatment of electronic filing and service. As those proposals come into sharper focus in light of the discussions at the fall Advisory Committee meetings and the January Standing Committee meeting, it will be possible to craft appropriate language for an amendment to Appellate Rule 25. In the meantime, the Committee's consideration of the topics noted here will help to inform the inter-committee discussions.

Encls.

1. Materials from the Criminal Rules Agenda Book for Fall 2015 [including the cited memorandum by Professors Beale and King, memorandum by Staff Attorneys Wilson and Healy, and sketch of Criminal Rule 49(b)(3)]

2. Materials from the Bankruptcy Rules Agenda Book for Fall 2015

3. Sketch of Appellate Rule 25 amendments (Apr. 18, 2015)

4. Submission by Dr. Miller (Mar. 9, 2015)

5. Submission by Sai (Sept. 7, 2015)

6. Letter from Mr. Gans (Oct. 14, 2014)

[20] Other provisions that require proof of service can be found in Appellate Rules 5(a)(1), 21(a)(1), and 21(c). Those provisions, however, are not redundant, because they specify the parties on whom service must be made. See Rule 5(a)(1) ("all other parties to the district-court action"); Rule 21(a)(1) ("all parties to the proceeding in the trial court"); Rule 21(c) ("the respondents"). Compare Rule 25(b) (requiring service of all papers on "the other parties to the appeal or review").

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TAB 11B

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MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professors Sara Sun Beale and Nancy King, Reporters

RE: Rule 49

DATE: September 3, 2015

The proposed amendment grows out of a project considering the implications for all of the Federal Rules of ongoing revisions to the CM/ECF filing system. The Standing Committee's CM/ECF Subcommittee – which included representatives of all of the advisory committees – concluded that it would be desirable for the Federal Rules to reflect the reality that electronic filing and service are now the norm. Virtually all districts now have local rules that require e-filing and service, and there was general agreement that it was time for the Federal Rules themselves to require e-filing and service, subject to appropriate exceptions.

This memorandum (1) briefly reviews the discussion at the spring meeting of the Criminal Rules Committee as well as the later actions of other advisory committees, and (2) reports on the recommendations of the Criminal Rules CM/ECF Subcommittee, which has proposed a significant revision of Rule 49 to detail the requirements for filing and service, requirements presently noted only by reference to the civil rules.

The Subcommittee's proposal, Tab B, is a discussion draft. We anticipate that changes will be made as a result of the discussion at our September meeting, and further consultation with other advisory committees is likely to suggest additional revisions. The Subcommittee intends to submit a revised proposal, including proposed Committee Notes, as an action item at the spring meeting.

If all goes well, each advisory committee will be prepared to submit a proposed electronic filing and service rule at the spring meeting of the Standing Committee, so that all of the proposed amendments can be considered by the Standing Committee for publication at the same time.

I. Background

A. Discussion at the spring meeting

At the time of our 2015 spring Committee meeting, an amendment mandating electronic filing was being prepared for presentation to the Civil Rules Advisory Committee. The draft Civil Rules amendment made no exception for pro se parties or inmates, though it allowed exemptions for good cause or by local rule. The reporters for the Bankruptcy and Appellate Committees were also preparing parallel amendments.

The proposed amendment to the Civil Rules was of particular concern to the our committee because Criminal Rule 49 now incorporates the Civil Rules governing service and filing. Rule 49(b) provides that "service must be made in the manner provided for a civil action," and Rule 49(d) states "a paper must be filed in a manner provided for in a civil action." Accordingly, any changes in the Civil Rules regarding service and filing would be incorporated by reference into the Criminal Rules. Also, the Criminal Rules Committee has traditionally taken responsibility for amending the Rules Governing 2254 cases and 2255 cases, and these rules also incorporate Civil Rules.

At our spring meeting committee members expressed very strong reservations about requiring pro se litigants, and especially prisoners, to file electronically. The Committee expressed the unanimous view that a pro se litigant's use of paper filing in a criminal case should require either of the showings required by the draft civil rule, namely (1) a showing of good cause in an individual case, or (2) that the local district had exempted pro se litigants from the national requirement.

Our Committee's clerk of court liaison explained the development of the CM/ECF system, the current mechanisms for receiving pro se filings, and his concerns about a rule that would mandate e-filing without exempting pro se or inmate filers. The liaison explained various features of CM/ECF that work well for attorney users, but could cause significant problems with pro se filers, as well as several issues that may arise if CM/ECF filing were to be extended to those in custody or to pro se criminal defendants.

Some of the concerns raised apply to filings by pro se litigants regardless of whether they were accused of a crime or in custody, such as lack of training or resources for training for pro se filers, concerns about ability or willingness of pro se litigants to obtain or comply with training, and an increased burden on clerk staff to answer questions of pro se filers, particularly those who, unlike attorneys, are not routine filers. One of the most striking points our liaison made was that a person who has credentials to file in one case may, without limitation, file in other cases – even those in which he is not a litigant. This feature of the system may pose much greater problems in the case of pro se filers who have not had legal training and are not bound by rules of professional responsibility.

Other issues raised by our liaison and other members were specific to the criminal/custody contexts. These concerns included the lack of email accounts for those in custody, as well as the

inability to send notice of electronic filing by email. Many federal criminal defendants, and all state habeas petitioners, are housed in state jails and prisons unlikely to give prisoners access to the means to e-file, or to receive electronic confirmations. Additionally, prisoners often move from facility to facility, and in and out of custody.

Committee members from various districts stated that the majority of pro se filers in custody in their districts would not have the ability to file electronically. There is a constitutional obligation to provide court access to prisoners and those accused of a crime, and members expressed very serious concerns about applying to pro se criminal defendants and pro se litigants in custody a presumptive e-filing rule that would condition their ability to file in paper upon a showing by the defendant or prisoner that there is good cause to allow paper filing, or upon the prior adoption of a local rule permitting or requiring pro se defendants and prisoners to paper file. Because of constitutionality concerns, members anticipated that most districts would eventually adopt local rules exempting criminal defendants and pro se litigants in custody from the requirement to file electronically, but they were not in favor of a national rule that would require nearly every district to undertake local rule making to opt out.

Because any change to the e-filing provisions in the Civil Rules would impact criminal cases, habeas cases filed by state prisoners, and Section 2255 applications by federal prisoners, the Committee voted unanimously to direct the reporters and chair to share the concerns raised at the meeting with the other reporters, and to request that the Civil Rules Committee consider adding a specific exception for pro se filers to the text of its proposed amendment.

The Committee recognized that local rules could be adjusted to exempt pro se defendants and plaintiffs in habeas and Section 2255 cases. But there was a strong consensus among the members of the Committee that the proposed national rule should not be adopted if it would require a revision of the local rules in the vast majority of districts. The Committee members felt that any change in the national rule should carve out pro se filers in the criminal, habeas, and Section 2255 contexts. Although members recognized that a carve out for pro se filers had already been discussed and rejected by those working on the Civil Rules, they favored further consideration of a carve out given the concerns listed above.

Some members also expressed support for consideration of revising the Criminal Rules to incorporate independent provisions on filing and service, rather than incorporating the Civil Rules by reference. As demonstrated in the discussion of the issues concerning mandatory electronic filing, the considerations in criminal cases may vary significantly from those in civil cases. This project would also include the Rules Governing 2254 and 2255 cases, for which the our Committee has responsibility.

B. The response from other committees

Following our spring meeting, the reporters and chair shared the Committee's concerns with their counterparts on other committees, who were very responsive. The Civil Rules Committee received and approved at its spring meeting a revised version of the e-filing and service amendment under consideration that exempted persons not represented by counsel from the requirement to file electronically. The other committees also discussed extensively electronic service and signatures, issues that our Committee has not yet considered.

At the spring Standing Committee meeting, there was general agreement that the various Advisory Committees would continue work on their draft rules.. This allows the Criminal Rules Committee the opportunity to study the provisions under consideration by the Civil Rules Committee (as well as the Bankruptcy and Appellate Rules Committee), and to determine how best to revise the Criminal Rules, including consideration of new provisions in the Criminal Rules that would replace the current provisions adopting the Civil Rules on filing and service.

C. Study undertaken by the Administrative Office

In order to assist all of the advisory committees, the Rules staff at the Administrative Office of U.S. Courts has undertaken a study of all of the local rules concerning electronic filing by pro se litigants. The results from this survey were not available in time for review by the Subcommittee, but they are included as Tab C.

II. The Subcommittee's recommendations

The Subcommittee recommends that the Criminal Rules be delinked from the Civil Rules on filing and service, and unanimously approved a discussion draft (Tab 2). There are several points noted below on which the Subcommittee is especially eager to receive feedback.

The discussion draft has been revised extensively after consultation with our style consultant, Professor Kimble. It was also shared with the reporters for the other advisory committees. Some comments from those reporters were received in time to be considered by the Subcommittee and incorporated in the discussion draft; others that were not discussed are noted below.

A. Delinking Rule 49 from the Civil Rules

The threshold issue facing the Subcommittee was whether to amend Rule 49 to sever the link to the Civil Rules, which currently govern both filing and service. The Subcommittee unanimously concluded that the advantages of severing the tie to the Civil Rules warranted the transaction costs of a comprehensive revision to Rule 49 to import all of the applicable rules for filing and service in criminal cases. The Subcommittee identified two major advantages of this approach.

First, the Subcommittee's approach reflects an understanding that there are important differences between criminal and civil litigation, which are reflected in the institutional expertise

of the various advisory committees. Placing the rules governing filing and service in the Federal Rules of Criminal Procedure ensures that decisions about filing and service in criminal cases will be made by the Advisory Committee on Criminal Rules, which is most familiar with – and is charged with the responsibility of crafting rules that best accommodate – the distinctive issues, interests, and policies in criminal cases. The discussion of electronic filing and service highlighted some of these differences, including the constitutional obligation to provide criminal defendants and prisoners with access to the courts, and the special difficulties prisoner litigants would have in filing or receiving service electronically.

Although the Civil Rules Advisory Committee modified its proposal to respond to the concerns raised by the Criminal Rules Committee, there is no guarantee all future differences of opinion would be resolved in the same way. If it proved to be impossible to reach agreement on some future issue, the Criminal Rules Committee might find it necessary to work very quickly to develop an amendment to counter the effect of an imminent change in the Civil Rules. Additionally, Subcommittee members expressed concern that the Criminal Rules Committee might even be unaware of some change in the Civil Rules that would work a change in the rules of filing and service in criminal cases.

Second, it is desirable to include the rules on filing and service in the Criminal Rules, rather than requiring the parties to consult two sets of rules. Federal prosecutors and many defense lawyers specialize in or limit their practice to criminal cases. Including the rules of filing and service in the Federal Rules of Criminal Procedure would be more convenient for them, and it might help them avoid errors. This would also be very beneficial for pro se defendants and prisoners litigating habeas cases and actions under Section 2255.

Finally, the Subcommittee recognized a secondary benefit of severing the link to the Civil Rules. The process of migrating the rules for filing and service from Civil Rule 5 to Criminal Rule 49 provides an opportunity to review the current rules to determine whether any changes would be desirable. This might include substantive changes, or simply rewording to improve clarity.

The Subcommittee was persuaded that these advantages were sufficient to justify the transaction costs inherent in proposing a comprehensive revision of Rule 49, rather than the relatively simple approach of dealing only with e-filing and service. It seeks feedback from the Committee on this threshold issue.

C. Drafting issues

The discussion draft was based on Civil Rule 5, but there is one key organizational difference. Unlike current Civil Rule 5, the Subcommittee draft gives electronic filing and service the central position in the rule that they now occupy in practice. Thus for both filing and service the discussion draft provides first for electronic means, which most parties will employ (and indeed, will be required to employ), before turning to other means.

The Subcommittee is seeking feedback on the following drafting issues.

1. Service rules

Lines 3–5

The Subcommittee considered, but decided not to include, a provision in the text further defining what must be served under Rule 49(a) (and hence must be filed under Rule 49(b)(1)). At present the rule refers to the service of "any written motion (other than one to be heard ex parte), written notice, designation on appeal, or similar paper." By common understanding, Rule 49 has not been applied to the service of summonses (governed by Rule 4), indictments, or search warrant applications, and the Subcommittee found no indications that the failure to provide any further definition had caused any difficulties.

Subcommittee members discussed whether this issue should be mentioned in a Committee Note, but concluded that would be unnecessary. The amendment works no change in the scope of pleadings and filings covered by the rule, and an effort to provide a comprehensive definition in the Note is not necessary and might produce unintended consequences.

Lines 14–16

A Subcommittee member questioned the justification for the rule that electronic service "is not effective if the serving party learns that it did not reach the person to be served." Because this provision was drawn from Rule 5, it is currently applicable in criminal cases pursuant to Rule 49(b).

This provision was added to the Civil Rules in 2001. The Committee Note explain the rationale:

> Paragraph (3)[1] addresses a question that may arise from a literal reading of the provision that service by electronic means is complete on transmission. Electronic communication is rapidly improving, but lawyers report continuing failures of transmission, particularly with respect to attachments. Ordinarily the risk of non-receipt falls on the person being served, who has consented to this form of service. But the risk should not extend to situations in which the person attempting service learns that the attempted service in fact did not reach the person to be served. Given actual knowledge that the attempt failed, service is not effected. The person attempting service must either try again or show circumstances that justify dispensing with service.
>
> Paragraph (3) does not address the similar questions that may arise when a person attempting service learns that service by means other than electronic means in fact did not reach the person to be served. Case law provides few illustrations of circumstances in which a person attempting service actually knows that the attempt failed but seeks to act as if service had been made. This negative history suggests there is no need to address these

[1]At the time of restyling, Rule 5 was reorganized, and this provision was relocated to (b)(2)(E).

> problems in Rule 5(b)(3). This silence does not imply any view on these issues, nor on the circumstances that justify various forms of judicial action even though service has not been made.

To some degree, experience with electronic filing and service has undercut the rationale for this provision. Indeed, the pending proposal to eliminate the extra three days for responses after electronic service in civil, criminal, and bankruptcy cases[2] rests on the accumulated experience with electronic service. The proposed Committee Note for Federal Rule of Criminal Procedure 45(c) explains:

> There were concerns that the transmission might be delayed for some time, and particular concerns that incompatible systems might make it difficult or impossible to open attachments. Those concerns have been substantially alleviated by advances in technology and widespread skill in using electronic transmission.

On the other hand, electronic service may still occasionally fail for a variety of reasons. When that occurs, the person who attempted to make service will, in some instances be aware of that failure. He may, for example, receive an error message. Under the current discussion draft, lines 15-16, under those circumstances that service would not be effective.

Lines 22–26

A Subcommittee member suggested that some of this language, drawn from Civil Rule 5(b)(2)(B), is too vague to be helpful. He wrote:

> (4)(B)(I) reference to "a conspicuous place in the office" is vague and invites litigation. Can I lay it on the floor? Put it on a lunch table? Tape it to the door or a photo? I would revise this to read "at the office"
>
> Also, reference in (4)(B)(ii) "with someone of suitable age and discretion" is vague. Will a bright 5-year-old suffice? A ditzy 13-year-old? An elderly cleaner?
>
> I would revise it to end the provision after the word "abode" and eliminate the rest of the sentence.

This language was in the text of Rule 5 as originally adopted. The brief 1937 Committee Note does not discuss it. Initial research by the reporters did not bring to light any civil litigation raising these issues.

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[2]Parallel proposals to amend Criminal Rule 45(c), Civil Rule 6(d), Appellate Rule 26(c), and Bankruptcy Rule 9006(f) have been approved by the Standing Committee and submitted to the Judicial Conference. These proposals govern the time required for action following service, and eliminate the three days that are currently added when electronic service has been made.

Because the Subcommittee did not have an opportunity to discuss this comment, it asked for discussion at the September meeting.

Lines 30–32

The Subcommittee's discussion draft includes the following as one option for service: delivery "by any other means that the person consented to in writing—in which event service is complete when the person making service delivers it to the agency designated to make delivery." This option is listed in the Civil Rule without regard to whether the serving party is represented by counsel. One reporter from another committee thought the draft's language – which prohibits electronic service by pro se parties except if allowed by court order or local rule – would also preclude service by email, even with the consent of the person being served. This reporter noted that the option of email service by consent is available to represented and pro se parties alike under the present rule, and argued that an approach that lets a pro se litigant serve by email if the party being served has consented would be "particularly useful to pro se litigants since they're much more likely not to be on CM/ECF."

The Subcommittee did not have an opportunity to consider this comment, so discussion of the following questions at the September meeting would be helpful:

(1) Does the language of the discussion draft bar a person who is not represented by counsel from using email service when the person to be served consents;

(2) Are there specific reasons to preclude pro se litigants in criminal, habeas, and 2255 cases from serving by email if the served party consents;

(3) Do any United States Attorney's Offices ever consent to email service by pro se litigants in civil or criminal cases? Do state's attorneys in habeas cases? and

(4) If the prerequisite of consent is sufficient protection against any anticipated problems with email service by pro se litigants in criminal, habeas and 2255 cases, should written consent be required to deter and resolve disputes over whether consent was provided?

2. Filing rules

Lines 35–37

Under this rule

The bracketed language on line 35 highlights the limited scope of the filing requirement under Rule 49; it applies only when Rule 49(a) requires a party to serve "a paper." Thus the rule does not govern the filing of an indictment, an information, or a search warrant application, since they are not governed by Rule 49(a). This limitation may be implicit in the structure of the subparts of Rule 49, but the Subcommittee thought it might be desirable to make that limitation clear.

Certificate of service

The Subcommittee would appreciate feedback on the draft language concerning the certificate of service.

Reasonable time requirement

Civil Rule 5(d)(1) presently contains a "within a reasonable time after service" requirement: "Any paper after the complaint that is required to be served – together with a certificate of service – must be filed within a reasonable time after service." The Subcommittee decided to leave this timing requirement out of the requirements for filing in its proposed amendments to Rule 49. Members voiced two reasons. First, Subcommittee members did not view untimely filing after service as a problem, and perceived no need for such a requirement. Second, some questioned whether this timing mandate fell within the Rule 49 language referencing filing "in a manner provided" by the civil rules. "Manner" of filing, they argued, is different than time of filing. According to this reasoning, federal criminal practice does not presently include a reasonable time requirement.

The reporters from other committees who provided feedback on this draft questioned the omission of this language on time of filing and thought it should be included. They inquired whether there is some reason that justifies changing the status quo, noting the value in having uniformity among the filing rules absent a significant reason for variation.

Our research suggests this restriction is rarely at issue, even in civil cases. Courts have held that filing two months after service is unreasonably late, *Gan v. Hillside Ave. Associates*, No. 01 CIV. 8457 (AGS), 2001 WL 1505988, at *2 (S.D.N.Y. Nov. 26, 2001) (unreasonable when over two months elapsed since service of the amended complaint, yet the amended complaint has not been filed, declining to consider the amended complaint), but that six days is not. *Chesson v. Jaquez*, 986 F.2d 363, 365 (10th Cir. 1993) (motion for reconsideration received and file-stamped in the district court, six days after service, was within a reasonable time after service, especially considering the six days included a weekend).

The Subcommittee did not have the opportunity to consider this issue again after the comments were received from the other reporters. It would be helpful to hear from the Committee whether it favors including this timing restriction on filing. If added, the words "within a reasonable time after service" would be inserted on line 35 of the discussion draft, between the word "service" and the period.

Lines 41-49

This language – which was not included in the earlier draft prepared by the Civil Rules Committee – was drawn from the local rules applicable in one Subcommittee member's district. It would be helpful to have discussion on the question whether it would be desirable to have this level of specificity I n Rule 49, and, if so, whether there should be any changes in the draft language. Two of the other reporters and a clerk representative to another Committee quickly

reviewed this draft before this memo was drafted and suggested that leaving detailed signature requirements to local rule would be better than adding this detail (which may be inconsistent with some local rules) in the national rule. The Subcommittee has not considered their feedback.

Assuming that lines 41-47 are retained, Professor Kimble questions whether it is also necessary to include lines 48-49, and he requested discussion on the relationship between the requirements on lines 41-47 (including the scanned signature) and the attorney's signature on lines 48-49.

Lines 53–55

Lines 53–55 are drawn from Civil Rule 5(d)(2), which is currently applicable in criminal cases under Rule 49(d). It provides that a party may file by delivering a paper to "to a judge who agrees to accept it for filing, and who must then note the filing date on the [paper] [item] and promptly send it to the clerk." A member suggested that this language might encourage a party to file with the judge, rather than a clerk, and questioned the necessity for this alternative form of filing in criminal cases . The Subcommittee requested that the reporters provide the Committee with information about the purpose of this requirement in the Civil Rules, and whether it has been useful or caused problems.

This language was included in Civil Rule 5 as originally adopted. The 1937 Committee Note does not discuss it, but Wright and Miller explain its function:

> This provision is designed to avoid delay and to facilitate the implementation of temporary restraining orders and the hearing of emergency applications. For example, in one case in which a hospital petitioned for an order authorizing an emergency blood transfusion, the papers were permitted to be filed with the district judge. It also should be noted that filing in this context is complete when the judge has custody of the papers; a judge's failure to forward them "promptly" or to enter a necessary order will not prejudice the party who has attempted to comply with the filing requirement.[3]

Although in emergency cases – such as the application for a stay in a death penalty case – the filing may be made at the judge's home late at night, the filing with a judge may also occur in the courtroom. As one court explained, "a judge may wish to facilitate a matter, by permitting a paper to be filed in court with the judge, rather than putting a trial or hearing on hold for counsel to run to the clerks's office to file a paper." *In re EQUIVEST ST THOMAS, INC*., No. 2004/156, 2007 WL 517672 at *4 (D. V.I., Feb. 8, 2007). Moreover, the rule does not require the judge to accept filings. It is applicable only if the judge agrees to accept a filing, and a judge may choose not to do so. *Id.*

In addition to the cases described in Wright and Miller, *supra*, there are only a few published cases dealing with this provision, and they reveal no significant pattern.

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[3]WRIGHT, MILLER, KANE, MARCUS, & STEINMAN, 4B FED. PRAC. & PROC. CIV. § 1153 (4th ed. and Supps.) (footnotes omitted).

In two criminal cases the government was permitted to "file" a notice of the defendant's prior felony drug convictions under 21 U.S.C. § 851 with the district judge in the courtroom. Although the defendant objected to this procedure, the district court accepted the filing and the court of appeals found no error. *United States v. Kent*, 649 F.3d 906, 911 (9th Cir. 2011); *United States v. Brown*, 921 F.2d 1304, 1308–09 (D.C. Cir. 1990). In *Kent*, the defendant was attempting to enter a quick plea before the government had time to file the notice under § 851, and in *Brown* the trial was about to begin. In both cases, the judge's acceptance of courtroom filing allowed the government to meet the timing requirements for a sentence enhancement.

In another case, a pro se prisoner repeatedly mailed pleadings and letters directly to the judge in violation of the local court rules. After repeatedly admonishing the prisoner to file documents with the clerk rather than sending them to the judge, the judge issued an opinion noting that he would consider sanctions if the conduct persisted. *Althouse v. Cockrell*, No. 3:01-CV-0774, 2004 WL 377049 at *1 (N.D. Tex., Feb. 13, 2004). There is no indication that the prisoner had relied on Civil Rule 5(d)(2), which was mentioned in a footnote in which the judge stated that he did not permit papers to be filed by mailing a copy to his chambers. *Id.* at n.1.

We also sought the views of the reporters for the other advisory committees. In general, they thought it advisable to retain the provision allowing filing with the judge for unusual cases in the absence of evidence that it was causing difficulties. They were unaware of any problems with the provisions in the Civil and Appellate rules, and noted that they believed them to be useful for emergencies or unusual situations. Although these provisions may have been more important before e-filing was available, Professor Ed Cooper noted the possibility that hacking might paralyze the e-filing system, which might make alternative forms of filing essential as a back-up.

Line 54

Both Rule 49 and the Civil Rules refer only to "paper." A Subcommittee member noted, however, that parties do, under some circumstances, file objects or items. For example, a physical object, such as a DVD or a CD, might be filed as an attachment to a suppression or other motion, particularly in districts that do not allow filing of digital audio or video files in CM/ECF.

Lines 58–62

Two options are presented for discussion. Option 2 more closely conforms to the version presented to the Civil Rules Committee last spring after review and discussion among all of the reporters. It emphasizes not only the general requirement for electronic filing, but also the circumstances under which paper filing must be permitted. Professor Kimble and the reporters from the other Committees that have provided feedback on this draft also prefer this version.

Lines 66–68

A Subcommittee member requested an explanation of the need for this provision. It was based on Civil Rule 5(d)(4). The Civil Rule reflects a policy decision about the role of court clerks. The 1999 Committee Note explains the origins of the provision:

> Several local district rules have directed the office of the clerk to refuse to accept for filing papers not conforming to certain requirements of form imposed by local rules or practice. This is not a suitable role for the office of the clerk, and the practice exposes litigants to the hazards of time bars; for these reasons, such rules are proscribed by this revision. The enforcement of these rules and of the local rules is a role for a judicial officer. A clerk may of course advise a party or counsel that a particular instrument is not in proper form, and may be directed to so inform the court.

It is not entirely clear whether Civil Rule 5(d)(4) is currently applicable in criminal cases. Criminal Rule 49(d) states that "[a] paper must be *filed in a manner provided for* in a civil action." (Emphasis added.) On its face, Civil Rule 5(d)(4) is addressed to the clerk, not the filer, and it does not state requirements for filing. On the other hand, by requiring that papers must be accepted for filing regardless of errors in the "form prescribed," the rule makes it clear that prescribed form is not a feature of the filing requirements under the Civil Rules, nor, presumably, under the Criminal or 2254 or 2255 Rules.

3. Service and Filing on Nonparties

Lines 82–83

The Subcommittee drafted this new provision in response to a point raised by Professor Cathie Struve, the reporter for the Appellate Rules Committee, who raised the question whether the Criminal Rules need to provide for service by nonparties. Although Rule 49 now refers only to filing and service by the parties, other provisions in the Criminal Rules currently permit or require nonparties to file and serve motions or other pleadings. For example, Rule 15(a)(2) provides that a material witness who is being detained may file a motion seeking to be deposed. And Rule 60(b)(1) and (2) provide for motions asserting a victim's rights, and allow the victim or the victim's lawful representative to assert these rights.

The Subcommittee agreed that the rule should provide for such nonparty filings, but also thought it important to word the new provision in an manner that did not unintentionally create new rights for nonparties to make filings.

Rule 49. Serving and Filing Papers

(a) Service

(1) ***When Required.*** A party must serve on every other party any written motion (other than one to be heard ex parte), written notice, designation of the record on appeal, or similar paper.

~~**(b) How Made.** Service must be made in the manner provided for a civil action.~~

(2) ***Whom to Serve***. When these rules or a court order requires or permits service on a party represented by an attorney, service must be made on the attorney instead of the party, unless the court orders otherwise.

(3) ***How Made Electronically***.

(A) *By a Represented Party*. A party represented by an attorney may serve a paper by sending it through the court's electronic-transmission facilities to a registered user or by other electronic means that the person consented to [in writing]. Electronic service is complete upon transmission, but is not effective if the serving party learns that it did not reach the person to be served;

(B) *By an Unrepresented Party*. A party not represented by an attorney may use electronic service only if allowed by court order or by local rule.

(4) ***How Made by Other Means***. Alternatively, a paper may be served by:

(A) handing it to the person;

(B) leaving it:

(i) at the person's office with a clerk or other person in charge or, if no one is in charge, in a conspicuous place in the office; or

(ii) if the person has no office or the office is closed, at the person's dwelling or usual place of abode with someone of suitable age and discretion who resides there;

(C) mailing it to the person's last known address—in which event service is complete upon mailing;

(D) leaving it with the court clerk if the person has no known address; or

(E) delivering it by any other means that the person consented to in writing—in which event service is complete when the person making service delivers it to the agency designated to make delivery.

(b) Filing

(1) ***When Required.*** A party must file with the court a copy of any paper the party is required to serve [under this rule], along with a certificate of service. A notice of electronic filing constitutes a certificate of service on any party served through the court's transmission facilities.

(2) ***How Done.***

(A) *Electronically.* A paper is filed electronically by using means that are consistent with any technical standards established by the Judicial Conference of the United States. The paper must include a signature block with the filer's:

- name [represented by "s/" or a scanned signature]:
- firm name (if any):
- street address;
- telephone number;
- primary email address [if any]; and
- bar ID number (if any).

The user name and password of an attorney of record~~[, together with the attorney's name on a signature block,]~~ serves as the attorney's signature.

(B) *Nonelectronically.* A paper [or other item] not filed electronically is filed by delivering it:

(i) to the clerk; or

(ii) to a judge who agrees to accept it for filing, and who must then note the filing date on the [paper] [item] and promptly send it to the clerk.

(3) ***Means Used by Represented and Unrepresented ~~Parties~~ .***

(A) *Represented Party.*

OPTION #1: Unless excused by the court for good cause or local rule, a person represented by an attorney must file electronically.

OPTION #2 A person represented by an attorney must file electronically, but paper filing must be allowed for good cause, and may be required or allowed for other reasons by local rule.

(B) *Nonrepresented Party*. A party not represented by an attorney must file nonelectronically, unless allowed to file electronically by court order or local rule.

(4) ***Acceptance by the Clerk.*** The clerk must not refuse to file a paper solely because it is not in the form prescribed by these rules or by a local rule or practice.

(c) Notice of a Court Order. When the court issues an order on any post-arraignment motion, the clerk must provide notice in a manner provided for in a civil action. Except as Federal Rule of Appellate Procedure 4(b) provides otherwise, the clerk's failure to give notice does not affect the time to appeal, or relieve—or authorize the court to relieve—a party's failure to appeal within the allowed time.

~~**(d) Filing.** A party must file with the court a copy of any paper the party is required to serve. A paper must be filed in a manner provided for in a civil action.~~

~~**(e) Electronic Service and Filing.** A court may, by local rule, allow papers to be filed, signed, or verified by electronic means that are consistent with any technical standards established by the Judicial Conference of the United States. A local rule may require electronic filing only if reasonable exceptions are allowed. A paper filed electronically in compliance with a local rule is written or in writing under these rules.~~

(d) Service and Filing by Nonparties. Non-parties who are permitted or required by law to file [papers] must comply with this rule.

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MEMORANDUM

TO: Rules Committees Reporters

FROM: Julie Wilson
Bridget Healy

DATE: September 2, 2015

RE: Survey of Electronic Filing Provisions for Pro Se Litigants

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I. Introduction

This memorandum is in response to the request that the Rules Office conduct a survey of each federal district's local rules and procedures for provisions regarding electronic filing by pro se litigants; specifically, whether pro se litigants are permitted to file electronically via the CM/ECF filing system. The Rules Office researched the following three categories of pro se litigants: (1) non-incarcerated pro se litigants in the district courts; (2) incarcerated pro se litigants in the district courts; and (3) pro se debtors in the bankruptcy courts.

The accompanying spreadsheets contain information on all ninety-four federal judicial districts and bankruptcy courts. The spreadsheets indicate: (1) whether pro se litigants are permitted to file electronically; (2) where the provisions regarding electronic filing are located; and (3) any additional relevant notes.

II. Results of Survey

A. District Courts

1. Non-Incarcerated Pro Se Litigants

In the majority of districts, pro se litigants are expected (or required) to file paper documents. Thirty-nine districts categorically prohibit electronic filing; thirty-four districts have a default rule requiring paper filing, but do permit pro se litigants to file electronically after

seeking and obtaining permission from the court. Only sixteen districts allow pro se litigants who are not incarcerated to file electronically without having to first obtain permission from the court.

2. Incarcerated Pro Se Litigants

The default rule requiring paper filing is even more evident with regard to incarcerated pro se litigants. Among the federal districts, fifty-five categorically prohibit electronic filing by incarcerated pro se litigants. It is difficult to assess the number of districts that permit an incarcerated pro se litigant to use the CM/ECF system (or conceivably permit electronic filing by requesting leave of court). The difficulty is due to the fact that the provisions governing pro se litigants often do not distinguish between types of pro se litigants. In these instances, we assumed the rule for pro se litigants applied to all pro se litigants; however, we made note of the lack of clarity.

There are three districts that expressly permit electronic filing by incarcerated pro se litigants: the Central District of Illinois, the Southern District of Illinois, and the Eastern District of Washington. It is worth noting that, in these districts, electronically filed documents are filed by prison library staff and not the incarcerated litigant.

It is also worth noting that it was often difficult to find the answer to the question of whether pro se litigants (incarcerated or not) are permitted to file electronically. There is little uniformity among the federal districts with regard to the location of the provision governing pro se litigants. In some cases, even after looking at the local rules, standing orders, general orders, CM/ECF procedures, and pro se materials posted on the court's website, the answer was elusive. In such cases, we indicated that the answer was "unclear."

B. Bankruptcy Courts

Very few bankruptcy courts, ten in total, permit electronic filing by pro se debtors. For the few that do, the provisions permitting such filing are usually located within the court's local rules or electronic filing procedures. Two of the courts that permit electronic filing by pro se debtors do so through the Electronic Self-Representation program (eSR), a program developed with the Administrative Office that provides access for pro se debtors to file case opening forms electronically. The program permits electronic filing for case opening forms only; later filings must be done in paper unless otherwise permitted by the court and these courts otherwise do not permit electronic filing by pro se debtors.

The majority of bankruptcy courts do not permit electronic filing by pro se debtors. For a few of the courts (ten), it is unclear whether or not pro se debtors are permitted to file electronically, although the lack of any specific permission leads to the conclusion that it is not permitted.

Most local rules (usually a variant of Local Rule 5005) refer to the electronic filing procedures to provide greater detail about permitted electronic filers and the procedure for registration and filing. Usually the local rules do not specifically prohibit electronic filing by pro se debtors; instead, any specific prohibition is included in the electronic filing procedures.

In completing the review, it was often time consuming to determine whether pro se debtors were permitted to file electronically, given that it required reviewing both the local rules and electronic filing procedures, and the procedures were located in various places on court websites. Also, despite the fact that most bankruptcy courts have sections on their websites for pro se filers, specific guidance on whether or not a pro se debtor could file electronically was often not included in that section.

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Electronic Filing Provisions for Pro Se Litigants

	A: Are Pro Se Litigants Permitted to File Electronically?					B: Are Incarcerated Pro Se Litigants Permitted to File Electronically?				
U.S. District Court	A: Yes	A: No	A: With Permission	A: Unclear	A: Reference	B: Yes	B: No	B: With Permission	B: Unclear	B: Reference
Alabama Middle		No			No. Admin. Procedures: "Pro se litigants shall file paper originals of all complaints, pleadings, motions, affidavits, briefs, and other documents which must be signed or which require either verification or an unsworn declaration under any rule or statute."		No			No. Same reference.
Alabama Northern		No			No. Admin. Procedures: "Pro se litigants shall file paper originals of all complaints, pleadings, motions, affidavits, briefs, and other documents which must be signed or which require either verification or an unsworn declaration under any rule or statute."		No			No. Same reference.
Alabama Southern	Yes				Yes. Admin. Procedures: "Pro se filers may conventionally file paper originals of complaints, pleadings, motions, affidavits, briefs, and other documents which must be signed or which require either verification or an unsworn declaration under any rule or statute. *Pro se filers may also register for electronic filing.* "	Yes				Unclear if differs from general pro se rule. No distinction between types of pro se litigants.
Alaska		No			No. Electronic Filing Admin. Policies & Procedures: "Non-attorney filers may not file documents electronically but must file all documents conventionally on paper."		No			No. Same reference.
Arizona			With Permission		With permission. LRCiv 5.5(d) states "Unless the Court orders otherwise, parties appearing without an attorney shall not file documents electronically."			With Permission		With permission. LRCrim 49.3 incorporates LRCiv 5.5.
Arkansas Eastern		No			No. Admin. Procedures for Civil Filings: "Pro se filers shall file paper originals of all complaints, pleadings, motions, affidavits, briefs, and other documents that must be signed or that require either verification or an unsworn declaration under any rule or statute. The Clerk's office will scan these original documents into an electronic file in the system, but shall also maintain the original in a paper file."		No			No. Admin. Procedures for Criminal Filings: "Pro se filers shall file paper originals of all motions, affidavits, briefs, and other documents that must be signed or that require either verification or an unsworn declaration under any rule or statute. The Clerk's office will image these original documents into an electronic file in the system, but shall also maintain the original in a paper file."
Arkansas Western		No			No. Admin. Procedures for Civil Filings: "Pro se filers shall file paper originals of pleadings with the Clerk's office. The Clerk's office will scan these original documents into an electronic file, uploadand file them in the System. The original pleadings will be maintained by the Clerk's office in a paper file."		No			No. Admin. Procedures for Criminal Filings: "Pro se filers shall file paper originals of documents with the Clerk's office. The Clerk's office will scan these original documents into an electronic file, upload and file them in the System. The original documents will be maintained by the Clerk's office in a paper file."

	A: Are Pro Se Litigants Permitted to File Electronically?					B: Are Incarcerated Pro Se Litigants Permitted to File Electronically?				
U.S. District Court	A: Yes	A: No	A: With Permission	A: Unclear	A: Reference	B: Yes	B: No	B: With Permission	B: Unclear	B: Reference
California Central			With Permission		With permission. LR 5-4.2 Unless otherwise ordered by the Court, pro se litigants shall continue to present all documents to the Clerk for filing in paper format.			With Permission		No/with permission. LRCrim 49-1.2: "Unless otherwise ordered by the Court, pro se litigants shall continue to present all documents to the Clerk for filing in paper format. "
California Eastern			With Permission		With permission. LR 133(b)(2): "Any person appearing pro se may not utilize electronic filing except with the permission of the assigned Judge or Magistrate Judge." (see also LR 183(c))			With Permission		Unclear if differs from general pro se rule. No distinction between types of pro se litigants.
California Northern			With Permission		With permission. LR 5-1: "A case that involves a pro se party is subject to electronic filing, unless it is a sealed case. However, the pro se party may not file electronically unless the pro se party moves for and is granted permission by the assigned judge to become an ECF user in that case. Parties represented by counsel in a case involving a pro se party must file documents electronically and serve them manually on the pro se party unless the pro se party has been granted permission to become an ECF user."			With Permission		Unclear if differs from general pro se rule. No distinction between types of pro se litigants, but LRCrim 44-3 implies that it is possible: "Any act these local rules require to be done by defense counsel shall be performed by the defendant, if appearing pro se."
California Southern			With Permission		With permission. ECF Policies & Procedures: "Unless otherwise authorized by the court, all documents submitted for filing to the Clerk's Office by parties appearing without an attorney must be in legible, paper form. The Clerk's Office will scan and electronically file the document. A pro se party seeking leave to electronically file documents must file a motion and demonstrate the means to do so properly by stating their equipment and software capabilities in addition to agreeing to follow all rules and policies in the CM/ECF Administrative Policies and Procedures Manual. If granted leave to electronically file, the pro se party must register as a user with the Clerk's Office and as a subscriber to PACER within five (5) days. A pro se party must seek leave to electronically file documents in each case filed. If an attorney enters an appearance on behalf of a pro se party, the attorney must advise the Clerk's Office to terminate the login and password for the pro se party."			With Permission		Unclear if differs from general pro se rule. No distinction between types of pro se litigants.

	A: Are Pro Se Litigants Permitted to File Electronically?					B: Are Incarcerated Pro Se Litigants Permitted to File Electronically?				
U.S. District Court	A: Yes	A: No	A: With Permission	A: Unclear	A: Reference	B: Yes	B: No	B: With Permission	B: Unclear	B: Reference
Colorado			With Permission		With permission. LR 5.1(b)(3): "All unrepresented parties must file in paper unless receive permission from court to file electronically."		No			No. LR 5.1(b)(2): Prisoners must file in paper
Connecticut		No			No. Guide for Pro Se Litigants & Admin. Procedures: Pro se litigants may not file electronically, but can consent to receiving electronic notices		No			No. Same reference.
Delaware			With Permission		With permission. Subsection N of the Admin. Procedures: "A party to a case who is not represented by an attorney may file and serve all pleadings and other documents on paper. Upon approval of the judge, a pro se party may register as a user of CM/ECF in accordance with subsection (B) of these procedures."			With Permission		Unclear if differs from general pro se rule. No distinction between types of pro se litigants.
District of Columbia			With Permission		With permission. LR 5.4(e)(2): "A party appearing pro se shall file with the Clerk and serve documents in paper form and must be served with documents in paper form, unless the pro se party has obtained a CM/ECF password."		No			No. LCrR 49(e)(2): "A party appearing pro se shall file with the Clerk (original plus one) and serve documents in paper form and must be served with documents in paper form, unless the pro se party has obtained a CM/ECF password."
Florida Middle			With Permission		With permission. Admin. Procedures: "A pro se litigant (i.e., an individual proceeding without legal representation) is not permitted to file electronically, absent authorization by the Court. A pro se litigant must file all pleadings and documents in paper format with the appropriate divisional Clerk's Office. The Clerk will scan a pro se litigant's documents and file them in CM/ECF."			With Permission		Unclear if differs from general pro se rule. No distinction between types of pro se litigants.
Florida Northern			With Permission		With permission. LR 5.1: "All documents in civil and criminal cases shall be filed by electronic means, except that documents in cases filed pro se (prisoner and non-prisoner), and documents in other categories of cases (or types of documents) identified by Administrative Order, shall continue to be filed in paper form. A judicial officer may grant other exceptions for good cause."			With Permission		With permission. Same reference.
Florida Southern		No			No. Section 5 of the Admin. Procedures states that pro ses must file paper.		No			No. Same reference.
Georgia Middle			With Permission		With permission. LR 5.0 (A): "Pro se parties are not authorized to file electronically without permission from the court." Guide for Self-Represented Litigants (http://www.gamd.uscourts.gov/sites/gamd/files/GuideForSelfRep			With Permission		Unclear if differs from general pro se rule. No distinction between types of pro se litigants.

	A: Are Pro Se Litigants Permitted to File Electronically?					B: Are Incarcerated Pro Se Litigants Permitted to File Electronically?				
U.S. District Court	A: Yes	A: No	A: With Permission	A: Unclear	A: Reference	B: Yes	B: No	B: With Permission	B: Unclear	B: Reference
Georgia Northern		No			No. Appx. H, Ex. A of LR states: "Pro se filers shall file paper originals of all complaints, pleadings, motions, affidavits, briefs, and other documents. The Clerk's Office will scan these original documents and upload them into ECF, but will also maintain a paper file."		No			No. Same reference.
Georgia Southern		No			No. Admin. Procedures state: "Pro se filers shall file paper originals of all complaints, pleadings, motions, affidavits, briefs, and other documents. The Clerk's Office will scan these original documents and upload them into ECF. Once documents are scanned into the system, the electronic version will become the official record."		No			No. Same reference.
Guam		No			No. General Order No. 13-0003: "Non-ECF Users, including pro se parties, shall continue to file documents conventionally by submitting paper documents to the court."		No			No. Same reference.
Hawaii			With Permission		With permission. LR 100.2.2(1): Pro se filers may not file electronically without leave of the court			With Permission		Unclear if differs from general pro se rule. No distinction between types of pro se litigants.
Idaho			With Permission		With permission. Electronic Case Filing Procedures: non-attorney pro se parties cannot file electronically without leave of court			With Permission		Unclear if differs from general pro se rule. No distinction between types of pro se litigants.
Illinois Central			With Permission		With permission. LR 5.5(B): Unless the court, in its discretion, grants leave to a pro se filer to file electronically, pro se filers must file paper originals of all complaints, pleadings, motions, affidavits, briefs, and other documents.	Yes				Yes. Electronic submissions are made by library staff of participating correctional facility. Prisoner E-Filing Initiative (http://www.ilcd.uscourts.gov/sites/ilcd/files/forms/General%20Order%2014-01.pdf)
Illinois Northern	Yes				Yes. General Order 14-0024: "A party to a pending civil action who is not represented by an attorney and who is not under filing restrictions imposed by the Executive Committee of this Court, may register as an E-Filer solely for purposes of the case."		No			No. General Order 14-0024: "Parties who are in custody are not permitted to register as E-Filers. If, during the course of the action, a party who is registered as an E-Filer is placed in custody, the E-Filer shall promptly advise the Clerk of the Court to terminate the E-Filer'sregistration as an E-Filer."
Illinois Southern	Yes				Yes. Electronic Filing Rule 1: Pro se filers may, but do not have to, utilize the ECF system. Pro se filers who do not utilize the ECF system shall file all documents with the Clerk of Court by U.S. Mail or personal delivery to the Clerk's Office.	Yes				Yes. Electronic submissions are made by library staff of participating correctional facility. Prisoner E-Filing Initiative (http://www.ilcd.uscourts.gov/sites/ilcd/files/forms/General%20Order%2014-01.pdf)
Indiana Northern		No			No. CM/ECF User Manual: "While all parties, including those proceeding pro se, may register to receive "read only" PACER accounts, only registered attorneys, as officers of the court, are permitted to file electronically at this time."		No.			Same; however, unclear if incarcerated pro se litigants can also obtain "read only" PACER accounts.

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U.S. District Court	A: Yes	A: No	A: With Permission	A: Unclear	A: Reference	B: Yes	B: No	B: With Permission	B: Unclear	B: Reference
Indiana Southern		No			No. LR 5-2: Papers filed by pro se litigants are exempt from electronic filing requirement and must be filed directly with the clerk.		No			No. LCrR 49-1: Papers filed by pro se defendants are exempt from electronic filing requirement and must be filed directly with the clerk.
Iowa Northern		No			No. LR 5.2: "All documents submitted to the Clerk of Court for filing by parties proceeding pro se must be in paper form."		No			No. LCrR 55.1 incorporates LR 5.2.
Iowa Southern		No			No. LR 5.2: "All documents submitted to the Clerk of Court for filing by parties proceeding pro se must be in paper form."		No			No. LCrR 55.1 incorporates LR 5.2.
Kansas	Yes				Yes. LR 5.4.2: "[P]ro se parties may register as Filing Users of the court's Electronic Filing System."		No			No. Admin. Procedures: Incarcerated pro se civil litigants must email their documents to the clerk, who will file electronically. Incarcerated pro se criminal litigants must file paper.
Kentucky Eastern			With Permission		With permission. General Order 11-02: "A party proceeding pro se shall not file electronically, unless otherwise permitted by the court. Pro se filers shall file paper originals of all documents. The clerk's office will scan these original documents into the court's electronic System."			With Permission		Unclear if differs from general pro se rule. No distinction between types of pro se litigants.
Kentucky Western			With Permission		With permission. General Order 11-02: "A party proceeding pro se shall not file electronically, unless otherwise permitted by the court. Pro se filers shall file paper originals of all documents. The clerk's office will scan these original documents into the court's electronic System."			With Permission		Unclear if differs from general pro se rule. No distinction between types of pro se litigants.
Louisiana Eastern		No			No. Rule 13, Admin. Procedures: "All pleadings and documents filed by unrepresented parties including individuals who are incarcerated."		No			No. Same reference.
Louisiana Middle		No			No. Admin. Procedures: Pro se filers shall file paper originals of all complaints, pleadings, motions, affidavits, briefs, and other documents that must be signed or that require either verification or an unsworn declaration under any rule or statue, unless otherwise authorized by the court. The Clerk's Office will scan these original documents into an electronic file in the System.		No			No. Same reference.
Louisiana Western		No			No. Admin. Procedures: "Pro se filers shall file fully signed paper originals of all petitions, lists, schedules,statements, amendments, pleadings, affidavits, and other documents which must contain either original signatures or verification by unsworn declaration under any applicable rule or statute. These documents will be scanned by the Office of the Clerk and the original documents will be retained by the Clerk of Court for at least five (5) years after the case is closed."		No			No. Same reference.

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U.S. District Court	A: Yes	A: No	A: With Permission	A: Unclear	A: Reference	B: Yes	B: No	B: With Permission	B: Unclear	B: Reference
Maine	Yes				Yes. Admin. Procedures: "A non-prisoner who is a party to a civil action and who is not represented by an attorney may register to receive service electronically and to electronically transmit their documents to the Court for filing in the ECF system. If during the course of the action the person retains an attorney who appears on the person's behalf, the Clerk shall terminate the person's registration upon the attorney's appearance."		No			No. Admin. Procedures: "All pleadings and documents filed by pro se litigants who are incarcerated or who are not registered filing users in ECF" must be filed in paper.
Maryland				Unclear	Unclear. Electronic Filing & Requirements & Procedures (Civil & Criminal) refer only to attorneys.		No			No. There are Electronic Filing Procedures for Self-Represented Prisoner Cases (includes § 1983, *Bivens* , writs of mandamus, § 2254 petitions, § 2241 petitions, and other civil actions; does not include § 2255 motions), but the procedures require the litigant to file paper.
Massachusetts			With Permission		With permission. Admin. Procedures: "Pro Se Litigants. Anyone who is a party to a civil action, and not a prisoner, and who is not represented by an attorney may register as a filer in the CM/ECF system. The party must (1) have the approval of the judicial officer assigned to the case; and (2) attend a training session offered by the clerk's office on the ECFsystem or otherwise prove their proficiency on the use of the CM/ECF system before an ECF login will be issued."		No			No. Admin. Procedures: "Pro Se Litigants. Anyone who is a party to a civil action, *and not a prisoner* , and who is not represented by an attorney may register as a filer in the CM/ECF system. The party must (1) have the approval of the judicial officer assigned to the case; and (2) attend a training session offered by the clerk's office on the ECFsystem or otherwise prove their proficiency on the use of the CM/ECF system before an ECF login will be issued."
Michigan Eastern		No			With permission. Rule 3 of the Electronic Filing Policies & Procedures: "A filing user must be . . . a non-incarcerated pro se party granted access permission."		No			No. Rule 3 of the Electronic Filing Policies & Procedures does not apply to pro se defendants.
Michigan Western			With Permission		No. LR 5.7(d): "Pro se parties who are not members of the bar of the Court may not file pleadings or other papers electronically, but must submit them in paper form."		No			No. Same reference.

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U.S. District Court	A: Yes	A: No	A: With Permission	A: Unclear	A: Reference	B: Yes	B: No	B: With Permission	B: Unclear	B: Reference
Minnesota			With Permission		With permission. ECF Procedures Guide: "Non-Prisoner Pro Se. A non-prisoner pro se party may complete and sign an "Application for Pro Se Litigant to File Electronically" form. The form is available from the Clerk's Office or on the "Court Forms" page of the court's website at: www.mnd.uscourts.gov. If the application is approved, the applicant will receive a login ID and password and the applicant's account will be activated, enabling the applicant to file electronically and to receive system-generated notices of electronic filing. If the court becomes aware of misuse of ECF, access will be revoked by the court without advance notice. Upon closure of the case for which access is granted (and the expiration of all appeal periods), the account will be deactivated."		No			No. ECF Procedures Guide: "Prisoner Pro Se. Prisoner pro se parties may not receive a login and password to use ECF and must file their documents in paper."
Mississippi Northern		No			No. Admin. Procedures: "While all parties, including those proceeding pro se, may register with PACER to receive "read only" accounts, only registered attorneys, as officers of the court, are permitted to file electronically. Pro Se (Non-Prisoner) parties may consent to receive documents electronically."		No			No. Same reference.
Mississippi Southern		No			No. Admin. Procedures: "While all parties, including those proceeding pro se, may register with PACER to receive "read only" accounts, only registered attorneys, as officers of the court, are permitted to file electronically. Pro Se (Non-Prisoner) parties may consent to receive documents electronically."		No			No. Same reference.
Missouri Eastern		No			No. Rule 3-2.10: "Filings shall be made by means of the Court's electronic case filing system, except by pro se litigants." Note: the district has an electronic document preparation application called E-Pro Se that allows pro se litigants to create case initiation documents for Social Security, employment, consumer, and civil rights complaints.		No			No. Same reference.
Missouri Western				Unclear	Unclear, but implication is that pro se litigants cannot file electronically. LR 5.1: "[A]ll litigants and other interested parties represented by legal counsel shall electronically file all pleadings and documents (including initiating documents) in connection with a case on the Court's electronic filing system."; Admin. Procedures state that only attorneys are eligible to register for ECF.				Unclear	Unclear. Same reference.

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U.S. District Court	A: Yes	A: No	A: With Permission	A: Unclear	A: Reference	B: Yes	B: No	B: With Permission	B: Unclear	B: Reference
Montana				Unclear	Unclear. LR 1.4 states: "All attorneys and self-represented litigants must follow the guidance of the Clerk's Office to facilitate electronic filing and to make the record legible and complete."				Unclear	Unclear. Same referemce.
Nebraska	Yes				Yes. LR 1.3: "A pro se party, i.e., one not represented by an attorney, to a pending civil case may register to use the System only in that case. A pro se party is assigned a password allowing electronic retrieval and filing of documents in the case."				Unclear	Unclear, but implication is that an incarcerated pro se litigant could file electronically. LR Crim 49.1(c)states that pro se parties *who are not registered users* are excepted from mandatory electronic filing.
Nevada				Unclear	Unclear. The Pro Se Assistance Packet refers to paper filings.				Unclear	Unclear. Same reference.
New Hampshire			With Permission		With permission. Supplemental Rules for Electronic Case Filing 2.1(d): A non-prisoner who is a party to a civil action and who is not represented by an attorney may file a motion to obtain an Electronic Case Filing (ECF) login and password.		No			No. Same reference.
New Jersey		No			No, but may apply to receive filed documents electronically. Electronic Case Filing Policies and Procedures: A party who is not represented by counsel must file documents with the Clerk as a Paper Filing. A Pro Se party who is not incarcerated may request to receive filed documents electronically upon completion of a "Consent & Registration Form to Receive Documents Electronically."		No			No. Same reference.
New Mexico			With Permission		With permission. CM/ECF Admin. Procedures Manual: Pro se parties can register and consent to electronic service, but must request permission to be able to file electronically.			With Permission		Unclear if differs from general pro se rule. No distinction between types of pro se litigants.
New York Eastern		No			No, but can receive electronic notifications of filings. https://img.nyed.uscourts.gov/files/forms/ProSeConsElecSvc-Flier.pdf		No			No. Incarcerated pro se litigants cannot file or receive electronic notification of filings.
New York Northern			With Permission		With permission. Admin. Procedures (Gen. Order #22) 12.1: "A non-prisoner who is a party to a civil action and who is not represented by an attorney may file a motion to obtain an Electronic Case Filing (ECF) login and password on a form prescribed by the Clerk's Office."		No			No. Same reference.
New York Southern			With Permission		With permission. Electronic Case Filing Rules & Instructions Section 2.2(a): "The Court may permit or require a pro se party to a pending civil action to register as a Filing User in the ECF system solely for purposes of that action." Section 2.2(b): A pro se party may also consent to receiving electronic notifications.				Unclear	Electronic Case Filing Rules & Instructions Section 2.2(a) does not distinguish between types of pro se litigants; however, implication is that an incarcerated pro se could not file electronically because, in order to file electronically, a pro se litigant may be required to attend in-person training and because only non-incarcerated pro se

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U.S. District Court	A: Yes	A: No	A: With Permission	A: Unclear	A: Reference	B: Yes	B: No	B: With Permission	B: Unclear	B: Reference
New York Western			With Permission		With permission. Admin. Procedures: "Pro Se litigants who have been granted permission to file documents electronically must register as a Filing User of the Court's Electronic Filing System." (Default is paper filing.)			With Permission		Unclear if differs from general pro se rule. No distinction between types of pro se litigants.
North Carolina Eastern		No			No. Admin. Policies. www.nced.uscourts.gov/pdfs/cmecfPolicyManual.pdf		No			No. Same reference.
North Carolina Middle		No			No. Admin. Procedures: http://www.ncmd.uscourts.gov/sites/ncmd/files/ecfprocman.pdf		No			No. Same reference.
North Carolina Western		No			No. Admin. Procedures http://www.ncwd.uscourts.gov/ECFDocs/ADMINORDER.pdf		No			No. Same reference.
North Dakota			With Permission		With permission. Section II, Administrative Policy Regarding Electronic Filing & Service		No			No. Sections II & XI, Administrative Policy Regarding Electronic Filing & Service
Northern Mariana Islands				Unclear	Unclear. Admin. Procedures imply that a pro se litigant could register as a Filer: "All pleadings and documents filed by pro se litigants who are not registered Filing Users in the Electronic Filing System [shall be filed in paper]."				Unclear	Unclear. Same reference.
Ohio Northern			With Permission		Yes, with court permission. LR 5.1(b) and LCrR 49.2 refer to Electronic Filing Policies and Procedures Manual, located in Appendix B http://www.ohnd.uscourts.gov/assets/Rules_and_Orders/Local_Civil_Rules/AppendixB.pdf			With Permission		Same.
Ohio Southern		No			No. LR 5.1 refers to ECF Manual http://www.ohsd.uscourts.gov/sites/ohsd/files/Electronic%20Filing%20Policies%20and%20Procedures.%202013.0222.pdf; LCrR 49.1 addresses signatures of criminal defendants		No			Same.
Oklahoma Eastern		No			No. LR 5.1 and LCrR 49.1 refer to the CM/ECF Administrative Guide of Policies and Procedures		No			Same.
Oklahoma Northern			With Permission		Yes, with court permission. LR 5.1 and LCrR 49.3 refer to the CM/ECF Administrative Guide of Policies and Procedures. See http://www.oknd.uscourts.gov/docs/08906891-22d0-4806-9544-b574b9932935/CMECFAdminManual.pdf			With Permission		Same.
Oklahoma Western		No			No. LR 5.1 and LCrR 49.1 refer to Electronic Case Filing Policies and Procedures Manual (ECF Policy Manual)		No			Same.
Oregon	Yes				Yes. LR 5.2 and LCrR 3001 refer to the CM/ECF User Manual http://www.ord.uscourts.gov/index.php/about-cmecf-and-pacer/user-manual. Signature Requirements in LR 11	Yes				Same.
Pennsylvania Eastern			With Permission		Yes, with court permission, for the specific case. LR 5.1.2 "Electronic Case Filing Procedures"			With Permission		Same.

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U.S. District Court	A: Yes	A: No	A: With Permission	A: Unclear	A: Reference	B: Yes	B: No	B: With Permission	B: Unclear	B: Reference
Pennsylvania Middle	Yes				Yes. LR 5.6 refers to Standing Order and to ECF User Manual http://www.pamd.uscourts.gov/sites/default/files/ecf_manualv2.pdf	Yes				Same.
Pennsylvania Western		No			No. LR 5.5 and LCrR 49 refer to the Court's Standing Order regarding Electronic Case Filing Policies and Procedures and the ECF User Manual		No			Same.
Puerto Rico			With Permission		Yes, with court permission, limited to specific cases. See http://www.prd.uscourts.gov/sites/default/files/documents/ajax/2014%20CM%20ECF%20Manual%20%28rev%2007%202015%29_0.pdf			With Permission		Same.
Rhode Island	Yes				Yes. See http://www.rid.uscourts.gov/; also Local Rule 303 (http://www.rid.uscourts.gov/menu/generalinformation/rulesandprocedures/localrulesandprocedures/Local_Rules-121514.pdf). Pro se filers must move to file electronically.		No			No. Same reference.
South Carolina		No			No. Local Rule 5.02 and Local Cr Rule 49.02 refer to ECF Policies and Procedures Manual http://www.scd.uscourts.gov/AttorneyResourceManuals/ECF/ECF_Policy_and_Procedures.pdf		No			Same.
South Dakota		No			No. Local Rule 5. See http://www.sdd.uscourts.gov/sites/sdd/files/local_rules/Civil_Local_Rules.pdf		No			No. Local Rule 49.1 See http://www.sdd.uscourts.gov/sites/sdd/files/local_rules/LocalRulesCriminal.pdf
Tennessee Eastern	Yes				Yes. LR 5.2 refers to Electronic Filing Rules and Procedures http://tned.uscourts.gov/docs/ecf_rules_procedures.pdf	Yes				Same.
Tennessee Middle	Yes				Yes. See http://www.tnmd.uscourts.gov/files/AO167-1AmendedPracticesandProcedures.pdf (see also Local Rule 5.03 http://www.tnmd.uscourts.gov/files/LocalRules-20120425.pdf)	Yes				Same.
Tennessee Western		No			No. Electronic Case Filing Policies and Procedures Manual located in Appendix A to the Local Rules		No			Same.
Texas Eastern	Yes				Yes. Local Rule 5.6.	Yes				Same.
Texas Northern		No			No Local Rule 5.1.		No			Same.
Texas Southern		No			No. Administrative Procedures for Electronic Filing http://www.txs.uscourts.gov/attorneys/cmecf/district/admcvcrproc.pdf		No			Same.
Texas Western	Yes				Yes. See http://www.txwd.uscourts.gov/CMECF/Documents/efileprocd.pdf		No			No. See http://www.txwd.uscourts.gov/CMECF/Documents/efileprocd.pdf

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U.S. District Court	A: Yes	A: No	A: With Permission	A: Unclear	A: Reference	B: Yes	B: No	B: With Permission	B: Unclear	B: Reference
Utah			With Permission		Only if permitted by the court. See http://www.utd.uscourts.gov/documents/utahadminproc.pdf			With Permission		Same.
Vermont		No			No. LR 5 refers to Administrative Procedures for Electronic Case Filing http://www.vtd.uscourts.gov/sites/vtd/files/ECFAdminProc.pdf		No			Same.
Virgin Islands			With Permission		Yes, if permitted by the court. LR 5.4. See http://www.vid.uscourts.gov/sites/vid/files/local_rules/VID_LRCi_1-10-2014.pdf			With Permission		Same.
Virginia Eastern		No			No. E-Filing Policies and Procedures Manual http://www.vaed.uscourts.gov/ecf/documents/ECF%20Procedures%20Manual/.pdf		No			Same.
Virginia Western			With Permission		If permitted by court. See http://www.vawd.uscourts.gov/media/3355/ecfprocedures.pdf			With Permission		Same.
Washington Eastern	Yes				Yes. See http://www.waed.uscourts.gov/sites/default/files/ECF%20Administrative%20Procedures%20-%20Rev.%20May%206%202015_0.pdf and Local Rule 3.1.	Yes				A prisoner who is a party to a civil action, is not represented by an attorney and resides in a correctional facility that participates in the prison electronic filing initiative is required to adhere to the procedures established in General Order No. 15-35-1, absent a court order to the contrary. Prisoners who reside in correctional facilities that do not participate in the prison electronic filing initiative are not eligible to register or participate in electronic filing.
Washington Western	Yes				Yes. Pro se filers are permitted but not required to file electronically. See http://www.wawd.uscourts.gov/sites/wawd/files/ECFFilingProceduresAmended8-3-15.pdf	Yes				Same.
West Virginia Northern			With Permission		Yes, with permission of the court. See Administrative Procedures for Electronic Case Filing http://www.wvnd.uscourts.gov/sites/wvnd/files/Adminstrative%20Procedures%20For%20Electronic%20Filing%20Effective%20June%2011%2C%202012%20page%20numbers%20corrected.pdf		No			No. See Administrative Procedures for Electronic Case Filing http://www.wvnd.uscourts.gov/sites/wvnd/files/Adminstrative%20Procedures%20For%20Electronic%20Filing%20Effective%20June%2011%2C%202012%20page%20numbers%20corrected.pdf
West Virginia Southern			With Permission		Yes, with permission of the court. See http://www.wvsd.uscourts.gov/pdfs/ECFAdministrativeProcedures.pdf		No			No. See http://www.wvsd.uscourts.gov/pdfs/ECFAdministrativeProcedures.pdf
Wisconsin Eastern		No			No. Electronic Case Filing Policies and Procedures Manual file:///Users/juliemwilson10/Downloads/072811%20ECF%20Policies%20and%20Procedures%20-%20FINAL.pdf		No			Same.

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U.S. District Court	A: Yes	A: No	A: With Permission	A: Unclear	A: Reference	B: Yes	B: No	B: With Permission	B: Unclear	B: Reference
Wisconsin Western	Yes				Yes. See http://www.wiwd.uscourts.gov/electronic-filing-procedures#C._Exceptions_to_Electronic_Filing	Yes				Same.
Wyoming		No			No. See http://www.wyd.uscourts.gov/pdfforms/cmprocmanual.pdf		No			Same.

U.S. Bankruptcy Court	Local Rule/Order/Procedures Regarding Electronic Filing	Local Rule, Order or Procedures link (if available)	Pro se filers allowed to use electronic fiing system?	Notes	Notes2
Alabama Middle	Local Rule 5005-1 and CM/ECF procedures	http://www.almb.uscourts.gov/sites/almb/files/local_rules/120109%20Amended%20Local%20Rules.pdf	No	Beginning May 1, 2015, the court offers Debtor Electronic Bankruptcy Noticing (DeBN). With DeBN debtors receive court notices and orders by email in .pdf format the same day they are filed by the court, and there is no charge and	
Alabama Northern	Local Rule 5005-4	5005-4, http://www.alnb.uscourts.gov/sites/default/files/Local%20Rules%2010-1-13_0.pdf	No	The court offers debtors the opportunity to request receipt of orders and court-generated notices via email, instead of U.S. mail, through DeBN.	
Alabama Southern	Local Rule 5005-1	http://www.alsb.uscourts.gov/sites/alsb/files/local_rules/localrules.pdf	No		
Alaska	Local Rule 5005-4	LR 5005-4; http://www.akb.uscourts.gov/pdfs/2012_lbr.pdf	No		
Arizona	Local Rule 5005-2	http://www.azb.uscourts.gov/rule-5005-2	No	Pro se filers are specifically excepted from the electronic filing requirements.	
Arkansas Eastern & Western	Local Rule 5005-4	http://www.arb.uscourts.gov/orders-rules-opinions/rules/LR5005-4.pdf	No	Pro se filers are specifically excepted from the electronic filing requirements.	
California Central	Local Rule 5005-1	http://www.cacb.uscourts.gov/esr	Pro se filers can file electronically through the Electronic Self-Representation program.	Court offers Debtor Electronic Bankruptcy Noticing (DeBN). Pro se filers are excepted from mandatory requirements other than the eSR program.	

U.S. Bankruptcy Court	Local Rule/Order/Procedures Regarding Electronic Filing	Local Rule, Order or Procedures link (if available)	Pro se filers allowed to use electronic fiing system?	Notes	Notes2
California Eastern	Local Rule 5005-1(d)	http://www.caeb.uscourts.gov/documents/Forms/LocalRules/15.Local_Rules.pdf	No		
California Northern	Local Rule 5005-1	http://www.canb.uscourts.gov/procedures/local-rules	No	The court offers Debtor Electronic Bankruptcy Noticing http://www.canb.uscourts.gov/faq/ebn	
California Southern	General Order 162-A	http://www.casb.uscourts.gov/pdf/GO162a.pdf	No		
Colorado	Local Rule 5005-4	http://www.cob.uscourts.gov/files/mrfa.pdf	No		
Connecticut	Standing Order No. 7	http://www.ctb.uscourts.gov/Doc/sorders/STorder7-1.pdf	No		
Delaware	Local Rule 5005-4	http://www.deb.uscourts.gov/sites/default/files/local_rules/LocalRules_2015.pdf	No	Debtors are not required to file electronically.	
District of Columbia	Administrative Order Relating to Electronic Case Filing	http://www.dcb.uscourts.gov/dcb/sites/www.dcb.uscourts.gov.dcb/files/AdmOrderSigned.pdf	No		
Florida Middle	Local Rule 5005-1	http://www.flmb.uscourts.gov/localrules/rules/5005-1.pdf	No	Debtors may sign up to receive electronic notice. http://www.flmb.uscourts.gov/filing_without_attorney/documents/pro_se_registration.pdf	
Florida Northern	Standing Order; Local Rule 5005-1	http://www.flnb.uscourts.gov/sites/default/files/standing_orders/so11.pdf	No	Debtors are not required to file electronically.	

U.S. Bankruptcy Court	Local Rule/Order/Procedures Regarding Electronic Filing	Local Rule, Order or Procedures link (if available)	Pro se filers allowed to use electronic fiing system?	Notes	Notes2
Florida Southern	Local Rule 5005-4	http://www.flsb.uscourts.gov/?page_id=2305#50054	No		
Georgia Middle	Local Rule 5005-4(b)	http://www.gamb.uscourts.gov/USCourts/sites/default/files/local_rules/Updated_Local_Rules.pdf	No		
Georgia Northern	Local Rules 5005-5; 5005-6	http://www.ganb.uscourts.gov/content/blr-5005-5-electronic-filing	No	See also: http://www.ganb.uscourts.gov/content/blr-5005-6-attorneys-trustees-and-examiners-required-file-documents-electronically	
Georgia Southern	General Order for Administrative Procedures	http://www.gasb.uscourts.gov/usbcGenOrders.htm#go_2010_1	No		
Hawaii	Local Rule 5005-2	http://www.hib.uscourts.gov/localrules/LBRs.pdf	No	The court permits Debtor Electronic Noticing through DeBN - http://www.hib.uscourts.gov/	
Idaho	ECF Procedures	http://www.id.uscourts.gov/announcements/ECFProcedures_Final.pdf	No		
Illinois Central	Standing Order	http://www.ilcb.uscourts.gov/sites/ilcb/files/3rd%20amd%20GO%20re%20ECF.pdf	Yes, with court approval. Limited to specific case.	Offers Debtor Electronic Bankruptcy Noticing through DeBN.	The Bankruptcy Court does not have separate local rules but instead refers to the District Court rules. The District Court rules permit pro se electronic filing (see District Court Local Rule
Illinois Northern	ECF Procedures and Local Rule 5005-2	http://www.ilnb.uscourts.gov/sites/default/files/Procedures_for_CMECF.pdf	No		
Illinois Southern	Electronic Filing Rules; Local Rule 5005-1	http://www.ilsb.uscourts.gov/sites/default/files/ElectronicFilingRulesDec2013.pdf; http://www.ilsb.uscourts.gov/sites/default/files/LocalRules-BkSoDistrict.pdf	No	There is a reference in the rules to pro se filers scanning their filings at the clerk's office.	
Indiana Northern	Standing Order	http://www.innb.uscourts.gov/pdfs/6thAmendedECFOrder.pdf	No		
Indiana Southern	Local Rule 5005-4 and Administrative Procedures	http://www.insb.uscourts.gov/AdminManual/Attorney/Admin_Policies_and_Procedures.htm	No		
Iowa Northern	Standing Order	http://www.ianb.uscourts.gov/publicweb/sites/default/files/standing-ordes/ExhibitOnetoStandingOrder1-Revised11-08.pdf	No		

U.S. Bankruptcy Court	Local Rule/Order/Procedures Regarding Electronic Filing	Local Rule, Order or Procedures link (if available)	Pro se filers allowed to use electronic fiing system?	Notes	Notes2
Iowa Southern	None.		Not clear but most likely no.	The court offers debtors the opportunity to request receipt of court notices and orders via email, instead of U.S. mail, through a program called DeBN.	The court abolished its local rules in 2003.
Kansas	Local Rule 5005-1; Administrative Manual(see http://www.ksb.uscourts.gov/images/local_rules/LOCALRULES.MARCH.2015CompleteFiled.pdf)	http://www.ksb.uscourts.gov/images/local_rules/2014_Local_Rules.pdf	Yes, with court approval. Limited to specific case.	If a pro se filer hires an attorney, he or she loses electronic filing privileges.	
Kentucky Eastern	Local Rule 5005-4; Administrative Procedures Manual	http://www.kyeb.uscourts.gov/sites/kyeb/files/June%202015%20APM%20with%20TOC%20Web%20Version.pdf	Yes, with court approval. Limited to specific case.	If a pro se filer hires an attorney, he or she loses electronic filing privileges.	
Kentucky Western	None.		No	http://www.kywb.uscourts.gov/fpweb/pro_se_faqs.htm#6	
Louisiana Eastern	Local Rule 5005-1; Administrative Manual	http://www.laeb.uscourts.gov/sites/laeb/files/AdminProcManual121213.pdf	Not clear but most likely no.		
Louisiana Middle	Administrative Procedures	http://www.lamb.uscourts.gov/sites/lamb/files/adminprocedures-2013-12.pdf	No		
Louisiana Western	Administrative Procedures	http://www.lawb.uscourts.gov/sites/lawb/files/court/Administrative_Procedures_Feb2011.pdf	No		
Maine	Administrative Procedures	http://www.meb.uscourts.gov/meb/pdf/Administrative%20Procedures_%203_2011.pdf	No		
Maryland	Administrative Procedures	http://www.mdb.uscourts.gov/content/training-and-registration	No	Offers Debtor Electronic Bankruptcy Noticing through DeBN.	
Massachusetts	CM/ECF FAQs	http://www.mab.uscourts.gov/mab/ecf-faqs	No		
Michigan Eastern	Administrative Procedures	http://www.mieb.uscourts.gov/sites/default/files/courtinfo/ECFAdminProc.pdf	No		
Michigan Western	Administrative Procedures	http://www.miwb.uscourts.gov/sites/miwb/files/local_rules/AdminProc.pdf	Not clear but most likely no.	There are conflicting statements in the Administrative Procedures. It may be that pro se filers are permitted but not required to use the electronic filing system.	
Minnesota	Website, under Electronic Filing tab	http://www.mnb.uscourts.gov/cmecf-case-managementelectronic-case-filing	No		
Mississippi Northern	Local Rule 5005-1	http://msnb-dev.jdc.ao.dcn/sites/msnb/files/Red_Line_Local_Rules_12-1-2014.pdf	No		
Mississippi Southern	Local Rule 5005-1	http://msnb-dev.jdc.ao.dcn/sites/msnb/files/Red_Line_Local_Rules_12-1-2014.pdf	No		

U.S. Bankruptcy Court	Local Rule/Order/Procedures Regarding Electronic Filing	Local Rule, Order or Procedures link (if available)	Pro se filers allowed to use electronic fiing system?	Notes	Notes2
Missouri Eastern	Procedures Manual; Local Rule 5005 (see http://www.moeb.uscourts.gov/pdfs/local_rules/2014/2014_Local_Rules.pdf)	http://www.moeb.uscourts.gov/pdfs/local_rules/2013/Procedures_Manual_2013.pdf	Not clear but most likely no.	The language in Local Rule 5005 reads:All documents filed by an attorney shall be filed electronically in accordance with the procedures for electronic case filing set forth in the Procedures Manual. If the deadline to file a document occurs, or a party must file an emergency motion while the Court's CM/ECF system is shut down, the attorney filer may file the document by paper following the procedures set forth in these Rules and the Procedures Manual for paper filing by unrepresented parties. The attorney filer may, in such an instance, seek any further relief by separate	
Missouri Western	Local Rule 11002-1	http://www.mow.uscourts.gov/bankruptcy/rules/bk_rules.pdf	No		
Montana	Local Rules 5005-1; 5005-2	http://www.mtb.uscourts.gov/Reports/2009BKRulesFinal.pdf	No		
Nebraska	Local Rule 5005-1	https://www.neb.uscourts.gov/Robohelp_Manuals/Local_Rules/index.htm	No		
Nevada	Local Rule 5005	http://www.nvb.uscourts.gov/downloads/rules/local-rules-2012_12-17-12.pdf	No	Pro se filers are exempt from the mandatory electronic filing requirements.	
New Hampshire	Local Rule 5005-4	http://www.nhb.uscourts.gov/OrdersRulesForms/LocalRulesOrdersPDFs/2012%20LBRs%20IBRs%20AOs%20and%20LBFs%20-%20Clean.pdf	Not clear but most likely no.	Language from 5005-4: Attorneys admitted to the bar of this court (including those admitted pro hac vice), United States trustees and their assistants, trustees and others as the court deems appropriate, may register as Filing Users of the court's CM/ECF system upon: (A) completion of the court's training program, or (B) certification that the proposed Filing User has been trained in another court and is qualified to file pleadings in a federal court.	
New Jersey	Local Rule 5005-1	http://www.njb.uscourts.gov/sites/default/files/local_rules/Local_Rules_August_1_2015.pdf	Not clear but most likely no.		
New Mexico	Local Rule 5005-3	http://nmb.uscourts.gov/sites/default/files/local_rules/lr111514.pdf	Pro se filers can file electronically through the Electronic Self-Representation program.	The rule provides that: "except for proofs of claim and petitions filed using court-approved electronic filing procedures, all papers filed by unrepresented parties must be submitted to the clerk in paper unless the court, for good cause, authorizes an unrepresented party to submit papers for filing by alternate means." The District of New Mexico is participating in the eSR program that permits debtors to file case opening documents electronically.	

U.S. Bankruptcy Court	Local Rule/Order/Procedures Regarding Electronic Filing	Local Rule, Order or Procedures link (if available)	Pro se filers allowed to use electronic fiing system?	Notes	Notes2
New York Eastern	Electronic Filing Procedures; Local Rule 5005-1 (see http://www.nyeb.uscourts.gov/usbc-edny-local-bankruptcy-rules#5005-1)	http://www.nyeb.uscourts.gov/sites/nyeb/files/general-ordes/ord_559.pdf	No		
New York Northern	Local Rule 5005-2; Electronic Filing Procedures (see http://www.nynb.uscourts.gov/sites/default/files/LBR_GenOrders/LBRs_2014.pdf#page=81)	http://www.nynb.uscourts.gov/sites/default/files/CMECF/AdminProc010112.pdf	No		
New York Southern	Administrative Procedures	http://www.nysb.uscourts.gov/sites/default/files/5005-2-procedures.pdf	Not clear but most likely no.		
New York Western	Administrative Procedures	http://www.nywb.uscourts.gov/sites/nywb/files/ECF_Administrative_Procedures_Oct_2010_update.pdf	No		
North Carolina Eastern	Local Rule 5005-1	http://www.nceb.uscourts.gov/sites/nceb/files/local-rules.pdf	No		
North Carolina Middle	Local Rule 5005-4(2)	http://www.ncmb.uscourts.gov/sites/default/files/local_rules/LR%20July%201%202014%20update%20final%20with%20TOC.pdf	Yes, with court approval and training. Limited to specific case.	If a pro se filer hires an attorney, he or she loses electronic filing privileges.	
North Carolina Western	None.		Not clear but most likely no.	The court offers Debtor Electronic Bankruptcy Noticing through DeBN.	
North Dakota	Administrative Procedures	http://www.ndb.uscourts.gov/CM-ECF%20Administrative%20Procedures/CM-ECF_Administrative_Procedures.htm	Not clear but most likely no.	See Administrative Procedures (in effective through Local Rule 5005-1)	
Ohio Northern	Administrative Procedures	https://www.ohnb.uscourts.gov/ecf/repository/administrative_procedures_manual.pdf	No		
Ohio Southern	Administrative Procedures	https://www.ohsb.uscourts.gov/New%20Local%20Rules/AdminProcs_Clean.pdf	No		
Oklahoma Eastern	Administrative Procedures	http://www.okeb.uscourts.gov/sites/default/files/AdmGuide10-01-09.pdf	No		
Oklahoma Northern	Local Rule 5005-1	http://www.oknb.uscourts.gov/sites/default/files/Local%20Rules.pdf	No		
Oklahoma Western	Local Rule 5005	http://www.okwb.uscourts.gov/sites/okwb/files/Local_Rules.pdf	No		
Oregon	Local Rules 5005-4	http://www.orb.uscourts.gov/sites/orb/files/documents/general/Local_Rules_clean.pdf	No		
Pennsylvania Eastern	Procedures for Electronic Filing	http://www.paeb.uscourts.gov/sites/paeb/files/general-ordes/StandingOrder1.pdf	Yes, with court approval and training. Limited to specific case.	If a pro se filer hires an attorney, he or she loses electronic filing privileges.	
Pennsylvania Middle	Local Rules	http://www.pamb.uscourts.gov/sites/default/files/LocalRulesandForms/USBC_PAMB_Local_Rules.pdf	No	Debtors can now request to receive court notices and orders from the Bankruptcy Noticing Center (BNC) by email rather than by U.S. mail via DeBN.	
Pennsylvania Western	Local Rule 5005-2	http://www.pawb.uscourts.gov/sites/default/files/lrules2013/LocalRule5005-2.pdf	Yes, with court approval and training. Limited to specific case.	If a pro se filer hires an attorney, he or she loses electronic filing privileges.	
Puerto Rico	Local Rule 5005-4	http://www.prb.uscourts.gov/sites/default/files/local_rules/LBR-5005-4.pdf	No	The rule states that pro se filers "may" conventionally file rather than an actual prohibition on electronic filing.	
Rhode Island	Local Rule 5005-4	http://www.rib.uscourts.gov/newhome/rulesinfo/html5/default.htm#5000/5005-4.htm%3FTocPath%3D5000%7C_____6	No		
South Carolina	Local Rule 5005-4, Order Regarding Electronic Filing and Participant's Guides	http://www.scb.uscourts.gov/pdf/oporder/opor13-03.pdf	No	Debtor electronic noticing is available through DeBN.	
South Dakota	Administrative Procedures	http://www.sdb.uscourts.gov/sites/sdb/files/Administrative%20Procedures.pdf	No		

U.S. Bankruptcy Court	Local Rule/Order/Procedures Regarding Electronic Filing	Local Rule, Order or Procedures link (if available)	Pro se filers allowed to use electronic fiing system?	Notes	Notes2
Tennessee Eastern	Administrative Procedures	http://www.tneb.uscourts.gov/sites/default/files/2008_admin_procedures.pdf	No		
Tennessee Middle	Administrative Procedures for Electronic Filing	http://www.tnmb.uscourts.gov/documents/ecf_procedures[1].pdf	Yes, with court approval. Limited to specific case.		
Tennessee Western	ECF Guidelines	http://www.tnwb.uscourts.gov/PDFs/ECF/ECF_guidelines.pdf	No	Debtor electronic noticing is available through DeBN. Also, pro se parties are permitted to access CM/ECF through computers at the Clerk's Office. See http://www.tnwb.uscourts.gov/PDFs/ECF/ecffaq.pdf	
Texas Eastern	Administrative Procedures	http://www.txeb.uscourts.gov/LBRs%2012_09/5005.pdf	No	The Eastern, Northern, Southern and Western District of Texas share the same Administrative Procedures for Electronic Filing. Any differences are noted in the text.	
Texas Northern	Administrative Procedures	http://www.txnb.uscourts.gov/content/ecf-administrative-procedures	No	The Eastern, Northern, Southern and Western District of Texas share the same Administrative Procedures for Electronic Filing. Any differences are noted in the text.	
Texas Southern	Administrative Procedures	http://www.txs.uscourts.gov/attorneys/cmecf/bankruptcy/adminproc.pdf	No	The Eastern, Northern, Southern and Western District of Texas share the same Administrative Procedures for Electronic Filing. Any differences are noted in the text.	
Texas Western	Administrative Procedures	administrative_procedures_electronic_filing-2.pdf	No	The Eastern, Northern, Southern and Western District of Texas share the same Administrative Procedures for Electronic Filing. Any differences are noted in the text.	
Utah	Local Rule 5005-2	https://www.utb.uscourts.gov/sites/default/files/news-attachments/2014localrules_clean.pdf	Not clear - see notes.	Offers Debtor Electronic Bankruptcy Noticing. Local rule permits "individuals" with the court's consent.	
Vermont	Local Rule 5005-3	http://www.vtb.uscourts.gov/sites/vtb/files/Local_Rules_2012.pdf	Yes, with court approval and training. Limited to specific case.		
Virginia Eastern	Local Rule 5005 and Electronic Filing Procedures	https://www.vaeb.uscourts.gov/wordpress/?wpfb_dl=546	No	The court offers debtors the opportunity, pursuant to Federal Rule of Bankruptcy Procedure 9036, to request delivery by email, rather than by U.S. mail, of court-generated notices and orders that have been filed by the court, through DeBN, a Bankruptcy Noticing Center ("BNC") program.	
Virginia Western	Administrative Procedures	http://www.vawb.uscourts.gov/sites/default/files/adminpro08.pdf	No		
Washington Eastern	Local Rule 5005-3	http://www.waeb.uscourts.gov/sites/default/files/waeb/local_rules/Local_Rules_Complete_Set.pdf	No		
Washington Western	Local Rule 5005 and Administrative Procedures	http://www.wawb.uscourts.gov/read_file.php?file=3812&id=919	No		
West Virginia Northern	Local Rule 5005.4-02	http://www.wvnb.uscourts.gov/sites/wvnb/files/local_rules/N.D.W.V.%20LBR%205005-4.02.pdf	No		
West Virginia Southern	General Order re: Administrative Procedures for Electronic Filing	http://www.wvsb.uscourts.gov/sites/wvsb/files/general-ordes/genord08-07.pdf	No		

U.S. Bankruptcy Court	Local Rule/Order/Procedures Regarding Electronic Filing	Local Rule, Order or Procedures link (if available)	Pro se filers allowed to use electronic fiing system?	Notes	Notes2
Wisconsin Eastern	Administrative Procedures	http://www.wieb.uscourts.gov/index.php/orders-rules/1-local-rules/41-rules-a-procedures	No		
Wisconsin Western	Administrative Procedures	http://www.wiwb.uscourts.gov/pdf/admin_procedures.PDF	No		
Wyoming	Local Rule 5005-2	http://www.wyb.uscourts.gov/sites/default/files/pdf-files/local-rules-20120701.pdf	No	Due to original signature requirements per Rule 9011, the Court's electronic filing system is not available to pro se filers	

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON TECHNOLOGY AND CROSS BORDER INSOLVENCY

SUBJECT: PROPOSALS REGARDING ELECTRONIC FILING AND SERVICE

DATE: SEPTEMBER 10, 2015

The Committee previously reviewed several possible amendments to Civil Rule 5 regarding (1) electronic filing and signing of documents, (2) electronic service of documents after the summons and complaint, and (3) use of a notice of electronic filing in place of a certificate of service. These amendments were being considered by the Civil Rules Committee in coordination with the other advisory committees. At the spring 2015 meeting, the Committee voted to propose for publication an amendment to Rule 5005(a)(2) (Filing By Electronic Means) that would conform to the proposed amendment to Civil Rule 5(d). Because the language of the proposed amendment to Civil Rule 5(d) was still in flux at the time of the meeting, the Committee authorized the chair and the reporter to participate in inter-committee negotiations over the language of the proposed Rule 5(d) amendment and to incorporate into the proposed amendment to Rule 5005(a)(2) language that was mutually acceptable to the advisory committees.

The Civil Rules Committee subsequently decided not to seek publication of amendments to Rule 5 in 2015 in order to give the other advisory committees more time to consider any similar amendments they want to propose. It then presented its proposals as an information item at the May Standing Committee meeting, where it was decided that information should be gathered about the treatment of pro se litigants under local rules currently in effect regarding

electronic filing. Julie Wilson and Bridget Healy from the Administrative Office of the Courts are undertaking that research.

This matter is back before the Committee for an update on developments and additional consideration of the possible amendments to Civil Rule 5 and the related amendment to Bankruptcy Rule 5005. They were discussed by the Subcommittee during its conference call on August 6. Because the Civil Rule amendments are still a moving target, the Subcommittee has prepared this memorandum to provide information to the Committee in case it wants to give feedback to the Civil Committee about the wording or content of any of the amendments to Rule 5 that are under consideration. The deliberations of the other advisory committees and the survey of local rules being carried out by the Administrative Office are ongoing, so it is likely that no final decision regarding publication of an amendment to Rule 5005 and parallel amendments to other sets of rules will occur until the spring 2016 advisory committee meetings.

This memorandum discusses the possible amendments to Civil Rule 5, including wording changes that were made after the Committee's spring meeting; possible amendments to Criminal Rule 49 that were drafted after the Subcommittee's conference call; and the relationship of the Civil Rule amendments to the Bankruptcy Rules.

Electronic Filing

The Civil Rules Committee initially considered amending Rule 5(d)(3) to require electronic filing, subject to exceptions for good cause and as provided by local rules. It read as follows:

Rule 5. Serving and Filing Pleadings and Other Papers

* * * * *

(d) Filing.

* * * * *

(3) *Electronic Filing~~,~~ and Signing~~, or Verification~~.* ~~A court may, by local rule, allow papers to be filed~~ All filings must be made~~, signed, or verified~~ by electronic means that are consistent with any technical standards ~~or standards of form~~ established by the Judicial Conference of the United States. ~~A local rule may require electronic filing only if reasonable exceptions are allowed.~~ But paper filing must be allowed for good cause, and may be required or allowed for other reasons by local rule. The act of electronic filing constitutes the signature of the person who makes the filing. A paper filed electronically ~~in accordance with a local rule~~ is a written paper for purposes of these rules.

Criminal Rule 49(b) currently provides that "[s]ervice must be made in the manner provided for a civil action." In response to the initial proposal to amend Civil Rule 5(d), the Criminal Rules Committee expressed concerns about requiring or even allowing pro se litigants to file electronically and about the burden that adopting local rules to except pro se filings would impose on districts. Responding to this concern, the Civil Committee revised its proposed amendment to read as follows:

Rule 5. Serving and Filing Pleadings and Other Papers

*** * * * ***

(d) Filing

*** * * * ***

(3) *Electronic Filing~~,~~ and Signing ~~, or Verification~~.*

(A) *When Required or Allowed; Paper Filing.* ~~A court may, by local rule, allow papers to be filed, signed, or verified.~~ All filings, except

those made by a person proceeding without an attorney, must be made by electronic means that are consistent with any technical standards established by the Judicial Conference of the United States. But paper filing must be allowed for good cause, and may be required or allowed for other reasons by local rule.

(B) *Electronic Filing by Unrepresented Party.* A person proceeding without an attorney may file by electronic means only if allowed by court order or by local rule.

(C) *Electronic Signing.* The user name and password of an attorney of record[, together with the attorney's name on a signature block,] serves as the attorney's signature. A paper filed electronically ~~in compliance with a local rule~~ is a written paper for purposes of these rules.

COMMITTEE NOTE

Electronic filing has matured. Most districts have adopted local rules that require electronic filing, and allow reasonable exceptions as required by the former rule. The time has come to seize the advantages of electronic filing by making it mandatory in all districts, except for filings made by a person proceeding without an attorney. But exceptions continue to be available. Paper filing must be allowed for good cause. And a local rule may allow or require paper filing for other reasons.

Filings by a person proceeding without an attorney are treated separately. It is not yet possible to rely on an assumption that pro se litigants are generally able to seize the advantages of electronic filing. Encounters with the court's system may prove overwhelming to some. Attempts to work within the system may generate substantial burdens on a pro se party, on other parties, and on the court. Rather than mandate electronic filing, filing by pro se litigants is left for governing by local rules or court order. Efficiently handled electronic filing works to the advantage of all parties and the court. Many courts now allow electronic filing by pro se litigants with the court's permission. Such approaches may expand with growing experience in these and other courts, along with the growing availability of the systems required for electronic filing and the increasing familiarity of most people with electronic communication.

The user name and password of an attorney of record[, together with the attorney's name on a signature block,] serves as the attorney's signature.

The Criminal Rules Committee will be considering its own version of a rule on electronic filing at its fall meeting. The draft of an amendment to Criminal Rule 49(b) currently under consideration provides in part as follows:

Rule 49. Serving and Filing Papers

* * * * *

(b) Filing

* * * * *

(3) ***Means Used by Represented and Unrepresented ~~Parties~~ .***

(A) *Represented Party.*

OPTION #1: Unless excused by the court for good cause or local rule, a person represented by an attorney must file electronically.

OPTION #2: A person represented by an attorney must file electronically, but paper filing must be allowed for good cause, and may be required or allowed for other reasons by local rule.

(B) *Nonrepresented Party.* A party not represented by an attorney must file nonelectronically, unless allowed to file electronically by court order or local rule.

* * * * *

Although there are wording differences between the civil and criminal proposals, the substance of proposed Criminal Rule 49(b)(3) (particularly under Option #2) is similar to the substance of proposed Civil Rule 5(d)(3). The main difference is one of tone. The Civil Rule would authorize a pro se party to file electronically "only if allowed by court order or by local

rule," whereas the Criminal Rule would prohibit electronic filing by such parties "unless allowed to file electronically by court order or local rule."

Bankruptcy Rule 7005 makes Civil Rule 5 applicable in adversary proceedings. Therefore an amendment to Rule 5(d)(3) would automatically apply in adversary proceedings unless Rule 7005 were amended to provide otherwise. But the topic of electronic filing is also addressed in Bankruptcy Rule 5005(a)(2). That rule largely tracks the language of current Civil Rule 5(d)(3). In order to make Rule 5005(a)(2) consistent with Rule 7005's incorporation of an amended Civil Rule 5(d)(3), Rule 5005(a) would need to be similarly amended. Based on the original version of the civil rule amendment, that could be accomplished as follows:

Rule 5005. Filing and Transmittal of Papers

(a) FILING.

* * * * *

(2) *Filing and Signing by Electronic Means*. ~~A court may by local rule permit or require documents to be filed, signed, or verified~~ All filings shall be made by electronic means that are consistent with any technical standards~~, if any, that~~ established by the Judicial Conference of the United States ~~establishes~~. ~~A local rule may require filing by electronic means only if reasonable exceptions are allowed.~~ But paper filing shall be allowed for good cause, and may be required or allowed for other reasons by local rule. The act of electronic filing constitutes the signature of the person who makes the filing. A document filed by electronic means ~~in compliance with a local rule~~ constitutes a written paper for the purpose of

applying these rules, the Federal Rules of Civil Procedure made applicable by these rules, and § 107 of the Code.

COMMITTEE NOTE

Subdivision (a)(2) is amended to conform to Rule 5(d)(3) F.R. Civ. P, which Rule 7005 makes applicable in adversary proceedings. This amendment is based on recognition that electronic filing has matured. Most [All?] districts have adopted local rules that require electronic filing and allow reasonable exceptions as required by the former rule. The time has come to seize the advantages of electronic filing by making it mandatory in all districts. But exceptions continue to be available. Paper filing must be allowed for good cause. And a local rule may allow or require paper filing for other reasons. Many courts now have local rules that provide for paper filing by pro se litigants, and they may carry those rules forward.

The act of electronic filing by an authorized user of the court's system counts as the filer's signature. Under current technology, the filer must log in and present a password. Those acts satisfy the purposes of requiring a signature without need for an additional electronic substitute for a physical signature. But the rule does not make it improper to include an additional "signature" by any of the various electronic means that may indicate an intent to sign.

The amended rule applies directly [only?] to the filer's signature. It does not address others' signatures. Many filings include papers signed by someone other than the filer. Examples include petitions, schedules, affidavits and declarations and, when filed, discovery materials. Provision for these signatures may be made by local rule, but if the Judicial Conference adopts standards that govern the means or form of electronic signing, they may displace local rules.

[The former provision for verification by electronic means is omitted. Verification is not often required by these rules. The special policies that justify a verification requirement suggest that it is better to defer electronic verification pending further experience. Local rules may address verification by electronic means.**]**

This was the proposed amendment that the Committee approved for publication at the spring meeting, subject to further negotiations on wording. The proposed amendment would generally require electronic filing by national rule. To the extent that local rules currently allow reasonable exceptions—for example, for pro se filers—those exceptions could continue because local exceptions are permitted. The amended rule would contain a new sentence providing that

the act of electronic filing constitutes the signature of the filer, but that provision also conforms to existing practice. When this Committee's proposed (and later withdrawn) electronic signature amendment was published, a similar provision was included, and it drew no negative comments. All of the criticism related to the provisions regarding the electronic signature of a non-filing party.

Should the revised version of the amendment to Civil Rule 5(d)(3) prevail, Rule 5005(b) could be amended this way:

Rule 5005. Filing and Transmittal of Papers

(a) FILING.

* * * * *

(2) *Filing and Signing by Electronic Means*.

(A) *When Required or Allowed; Paper Filing.* ~~A court may by local rule permit or require documents to be filed, signed, or verified~~ All filings, except those made by a person [individual] proceeding without an attorney, shall be made by electronic means that are consistent with any technical standards~~, if any,~~ ~~that~~ established by the Judicial Conference of the United States ~~establishes~~. ~~A local rule may require filing by electronic means only if reasonable exceptions are allowed.~~ But paper filing shall be allowed for good cause, and may be required or allowed for other reasons by local rule.

(B) *Electronic Filing by Unrepresented Party.* A person [individual] proceeding without an attorney may file by electronic means only if allowed by court order or by local rule.

(C) *Electronic Signing.* The user name and password of an attorney of record[, together with the attorney's name on a signature block,] serves as the attorney's signature. A document filed by electronic means ~~in compliance with a local rule~~ constitutes a written paper for the purpose of applying these rules, the Federal Rules of Civil Procedure made applicable by these rules, and § 107 of the Code.

Corresponding changes could be made to the Committee Note.

The Subcommittee concluded that it prefers the second version of Rule 5005(a)(2)—which would prohibit electronic filing by pro se litigants unless authorized by local rule. It also concluded that the language in brackets in proposed Rule 5005(a)(2)(C) is unnecessary and should be deleted.

Electronic Service

The Civil Rules Committee also proposed to amend Rule 5(b)(2)(E) to eliminate the consent requirement for the use of electronic service of documents filed after the original complaint. As noted above, Rule 7005 adopts Civil Rule 5 for adversary proceedings, so any amendment to Rule 5(b)(2)(E) would become applicable in adversary proceedings unless the Bankruptcy Rule were amended to deviate from the Civil Rule. Similarly, Rule 9014(b), which governs contested matters, requires service according to Civil Rule 5(b) for any paper filed after the initial motion, so any amendment to Rule 5(b) would automatically apply under this rule.

The proposed amendment to Rule 5(b)(2)(E) does not mandate the use of electronic service by the serving party; alternative methods of service would remain in subparagraphs (A), (B), (C), (D) and (F). When the Committee last reviewed the proposed amendment, it would have eliminated the requirement that the party being served consent in writing to the receipt of electronic service and would have replaced that requirement with "good cause" and local rule exceptions:

Rule 5. Serving and Filing Pleadings and Other Papers

* * * * *

(b) Service: How Made.

* * * * *

(2) *Service in General.* A paper is served on the person to be served under this rule by:

* * * * *

(E) sending it by electronic means ~~if the person consented in writing~~, unless the person shows good cause to be exempted from such service or is exempted by local rule. ~~— in which event~~ Electronic service is complete upon transmission, but is not effective if the serving party learns that it did not reach the person to be served; or

* * * * *

The Civil Rules Committee later narrowed the amendment to allow electronic service without consent only by means of the court's CM/ECF system on other authorized users. The version presented to the Standing Committee provides as follows:

Rule 5. Serving and Filing Pleadings and Other Papers

*** * * * ***

(b) Service: How Made.

* * * * *

(2) *Service in General.* A paper is served under this rule by:

(A) handing it to the person;

* * * * *

(E) sending it through the court's electronic transmission facilities to a registered user or by other electronic means ~~if~~ that the person consented to ~~in writing — in which event~~. Electronic service is complete upon transmission, but is not effective if the serving party learns that it did not reach the person to be served; or

* * * * *

COMMITTEE NOTE

Provision for electronic service was first made when electronic communication was not as widespread or as fully reliable as it is now. Consent of the person served to receive service by electronic means was required as a safeguard. Those concerns have substantially diminished, but have not disappeared entirely, particularly as to persons proceeding without an attorney.

The amended rule recognizes electronic service through the court's transmission facilities as to any registered user. A court may choose to allow registration only with the court's permission. But a party who registers will be subject to service through the court's facilities unless the court provides otherwise. With the consent of the person served, electronic service also may be made by means that do not utilize the court's facilities. [Consent can be limited to [service at] a prescribed address or in a specified form, and may be limited by other conditions.]

Because Rule 5(b)(2)(E) now authorizes service through the court's facilities as a uniform national practice, Rule 5(b)(3) is abrogated. It is no longer necessary to rely on local rules to authorize such service.

As stated in the last paragraph of the Committee Note, accompanying this amendment would be a proposal to delete Rule 5(b)(3) as unnecessary:

~~(3) *Using Court Facilities*. If a local rule so authorizes, a party may use the court's transmission facilities to make service under Rule 5(b)(2)(E).~~

COMMITTEE NOTE

Rule 5(b)(3) is abrogated. As amended, Rule 5(b)(2)(E) directly authorizes service on a registered user through the court's transmission facilities. Local rule authority is no longer necessary. The court retains inherent authority to deny registration [or to qualify a registered user's participation in service through the court's facilities].

The Criminal Rules Committee is considering a slightly different approach. The amendment to Criminal Rule 49(a)(3) under consideration would draw a distinction between represented and unrepresented parties:

(3) ***How Made Electronically***.

(A) *By a Represented Party*. A party represented by an attorney may serve a paper by sending it through the court's electronic-transmission facilities to a registered user or by other electronic means that the person consented to [in writing]. Electronic service is complete upon transmission, but is not effective if the serving party learns that it did not reach the person to be served;

(B) *By an Unrepresented Party*. A party not represented by an attorney may use electronic service only if allowed by court order or by local rule.

The Civil Rule proposal would leave regulation of CM/ECF service up to the courts' registration process and would require consent of the person served for other means of electronic service, such as by email. The Criminal Rule would instead require authorization by court order or local rule for pro se parties to use any form of electronic service.

Because the proposed civil amendment would apply automatically to the Bankruptcy Rules, the Committee does not need to make any recommendation regarding Civil Rule 5(b)(2). Members of the Subcommittee, however, expressed a preference for the second version of the Civil Rule amendment, which would eliminate the consent requirement only for service through the CM/ECF system.

Notice of Electronic Filing

Along with the change to Rule 5(b)(2)(E), the Civil Rules Committee is also proposing an amendment to Rule 5(d)(1) regarding certificates of service. The Committee on Court Administration and Case Management suggested to the Standing Committee that the various advisory committees consider rule amendments that would allow a notice of electronic filing to be used in place of a certificate of service.

The proposed amendment to Rule 5(d)(1) is substantially the same as the version previously reviewed by the Committee. After undergoing stylistic changes, it provides as follows:

Rule 5. Serving and Filing Pleadings and Other Papers

* * * * *

(d) Filing.

(1) *Required Filings; Certificate of Service*.

(A) *Papers after the Complaint.* Any paper after the complaint that is required to be served ~~— together with a certificate of service —~~ must be filed within a reasonable time after service. But disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed * * * * *

(B) *Certificate.* A certificate of service must be filed within a reasonable time after service, but a notice of electronic filing constitutes a certificate of service on any party [person] served through the court's transmission facilities.

COMMITTEE NOTE

The amendment provides that a notice of electronic filing generated by the court's CM/ECF system is a certificate of service on any party served through the court's transmission facilities. But if the serving party learns that the paper did not reach the party to be served, there is no service under Rule 5(b)(2)(E) and there is no certificate of the (nonexistent) service.

When service is not made through the court's transmission facilities, a certificate of service must be filed and should specify the date as well as the manner of service.

The Criminal Rules Committee is considering a similar amendment to Rule 49(b)(1): "A notice of electronic filing constitutes a certificate of service on any party served through the court's transmission facilities."

As with electronic service, the Civil Rule amendment, if approved, would become applicable in adversary proceedings pursuant to Rule 7005. Rule 9014, however, does not incorporate Rule 5(d). When the Committee previously reviewed this proposed amendment, no member raised any concerns about the prospect of the amended rule applying in adversary proceedings in bankruptcy.*

* Rule 8011(d), applicable in bankruptcy appeals, requires either an acknowledgment of service or a proof of service to be filed and does not refer to a notice of electronic filing. But Rule 8004(a)(3), which addresses appeals by leave, recognizes that electronic service may eliminate the need for certificates of service. It states that a certificate of service must be filed with a notice of appeal and motion for leave to appeal "unless [those documents are] served electronically using the court's transmission equipment." The Committee may in the future want to consider whether Rule 8011(d) should be amended along the lines of Civil Rule 5(d)(1).

Draft, April 18, 2015

The sketch below, of proposed amendments to Appellate Rule 25, reflects changes designed to conform the Rule 25 draft to the latest version[1] of the Civil Rule 5 draft as approved at the Civil Rules Committee's Spring 2015 meeting. Blacklining shows differences between the sketch and the current Rule 25. Yellow highlighting shows portions of the sketch that differ from the sketch presented at pages 835-41 of the Appellate Rules Committee's agenda book.

Rule 25. Filing and Service

(a) Filing.

(1) Filing with the Clerk. A paper required or permitted to be filed in a court of appeals must be filed with the clerk.

(2) Filing~~:~~ Method; Signing. ~~and Timeliness. (A) In general.~~

(A) All filings, except those made by a person proceeding without an attorney, must be made by electronic means that are consistent with any technical standards established by the Judicial Conference of the United States. But paper filing must be allowed for good cause, and may be required or allowed for other reasons by local rule.

(B) A person proceeding without an attorney may file by electronic means only if permitted by local rule or by court order.

(C) The act of electronic filing constitutes the signature of the person who makes the filing. A paper filed electronically is a written paper for purposes of these rules. ~~Filing may be accomplished by mail addressed to the clerk, but filing is not timely unless the clerk receives the papers within the time fixed for filing.~~

[1] Further changes to the proposed Civil Rule 5 amendment, including on matters of style, may follow.

(3) Filing: Timeliness of Certain Methods. Where paper filing is required or allowed:

(A) By mail. Filing by mail [must be addressed to the clerk and][2] is not timely unless the clerk receives the papers within the time fixed for filing.

(B) A brief or appendix. A brief or appendix is timely filed, however, if on or before the last day for filing, it is:

(i) mailed to the clerk by First-Class Mail, or other class of mail that is at least as expeditious, postage prepaid; or

(ii) dispatched to a third-party commercial carrier for delivery to the clerk within 3 days.

(C) Inmate filing.[3] A paper filed by an inmate confined in an institution is timely if deposited in the institution's internal mailing system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

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[2] The bracketed language is carried forward from current Rule 25(a)(2)(A) ("Filing may be accomplished by mail addressed to the clerk ...."). I am not sure whether the bracketed language is necessary; after all, common sense would indicate that the way to ensure that the filing reaches the clerk is to address it to the clerk. On the other hand, perhaps the concern is that neophytes might otherwise address their filings to a judge of the court.

[3] The pending proposal to amend Rule 25(a)(2)(C) is discussed elsewhere in the agenda book. Adoption of that proposal would not affect the proposal discussed in this memo.

~~**(D) Electronic filing.** A court of appeals may by local rule permit or require papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes. A local rule may require filing by electronic means only if reasonable exceptions are allowed. A paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules.~~

~~**(3)** **(4)** **Filing a Motion with a Judge.** If a motion requests relief that may be granted by a single judge, the judge may permit the motion to be filed with the judge; the judge must note the filing date on the motion and give it to the clerk.

~~**(4)** **(5)** **Clerk's Refusal of Documents.** The clerk must not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or by any local rule or practice.

~~**(5)** **(6)** **Privacy Protection.** An appeal in a case whose privacy protection was governed by Federal Rule of Bankruptcy Procedure 9037, Federal Rule of Civil Procedure 5.2, or Federal Rule of Criminal Procedure 49.1 is governed by the same rule on appeal. In all other proceedings, privacy protection is governed by Federal Rule of Civil Procedure 5.2, except that Federal Rule of Criminal Procedure 49.1 governs when an extraordinary writ is sought in a criminal case.

(b) Service of All Papers Required. Unless a rule requires service by the clerk, a party must, at or before the time of filing a paper, serve a copy on the other parties to the

appeal or review. Service on a party represented by counsel must be made on the party's counsel.

(c) Manner of Service.

(1) Service may be any of the following:

(A) personal, including delivery to a responsible person at the office of counsel;

(B) by mail;

(C) by third-party commercial carrier for delivery within 3 days; or

(D) through the court's transmission facilities to a registered user [of those facilities] or by other electronic means [to which the person[4] being served consented] [that the person being served consented to][5]~~, if the party being served consents in writing~~[6].

~~(2) If authorized by local rule, a party may use the court's transmission equipment to make electronic service under Rule 25(c)(1)(D).~~

~~(3)~~ (2) When reasonable considering such factors as the immediacy of the relief sought, distance, and cost, service on a party must be by a manner at least as expeditious as the manner used to file the paper with the court.

---

[4] Current Rule 25(c)(1)(D) uses "party." The proposed revised Rule 25(a)(2) uses "person," in keeping with the draft of Civil Rule 5(b)(2)(E). I prefer "person" because there might be situations where service is made by or on someone not a party. However, on the theory of "if it ain't broke, don't fix it," I do not propose altering the references to "parties" in Rule 25(b).

[5] The two bracketed options reflect a difference of opinion. Judge Colloton and I prefer the first option ("to which the person being served consented") while Professor Cooper prefers the second ("that the person being served consented to").

[6] The Civil Rules Committee discussed whether consent to electronic service (other than through CM/ECF) should require a writing, and concluded that written consent was not necessary and that the Rule should recognize less formal means of consent. The sketch here follows suit.

~~(4)~~ (3) Service by mail or by commercial carrier is complete on mailing or delivery to the carrier. Service by electronic means is complete on transmission, unless the party making service is notified that the paper was not received by the party served.

(d) Proof of Service.

(1) ~~A paper presented for filing must contain either of the following~~ Proof of service consists of:

(A) an acknowledgment of service by the person served; ~~or~~

(B) ~~proof of service consisting of~~ a statement by the person who made service certifying:

(i) the date and manner of service;

(ii) the names of the persons served; and

(iii) their mail or electronic addresses, facsimile numbers, or the addresses of the places of delivery, as appropriate for the manner of service~~.~~; or

(C) as to any [person] [party][7] served through the court's transmission facilities, a notice of electronic filing.

(2) When a brief or appendix is filed by mailing or dispatch in accordance with Rule ~~25(a)(2)(B)~~ 25(a)(3)(B), the proof of service must also state the date and manner by which the document was mailed or dispatched to the clerk.

(3) Proof of service – other than under Rule 25(d)(1)(C) – must ~~may~~ appear on or be affixed to ~~the~~ any papers filed.

(e) Number of Copies. When these rules require the filing or furnishing of a number of copies, a court may require a different number by local rule or by order in a particular case.

Committee Note

Subdivision (a). Subdivision (a)(2) is split into two new subdivisions (a)(2) and (a)(3). New subdivision (a)(2) sets a default rule that electronic filing is mandatory for represented litigants (subject to exceptions). Subdivision (a)(3) discusses timeliness of filings made non-electronically. Existing subdivisions (a)(3) through (a)(5) are re-numbered (a)(4) through (a)(6).

Subdivision (a)(2). Electronic filing has matured. Currently, all thirteen circuits set a presumptive requirement that all attorney filers file electronically but permit exemptions on a showing of sufficient justification. Rule 25(a) is now amended to make

[7] The draft of proposed Civil Rule 5(d)(1) uses "party." The possible advantage of using "person" would be to capture instances when a person not (yet) a party is served through the court's transmission facilities. Non-parties may occasionally be served with papers – for example, a response to a request to file an amicus brief or a response to a request to intervene. Another example of this rare phenomenon was pointed out by Mr. Gans – namely, "when a state or the federal government is a defendant and the case is dismissed prior to service. On appeal, we have asked government agencies to file something like an appellee brief in response to the appellant's brief without adding them as a party to the appeal. They would be served the appellant's reply brief or other documents filed after they were invited to submit their views." At least some circuits permit non-parties in some of these situations to use CM/ECF to file papers. Whether such a non-party would then receive notice through CM/ECF of subsequent filings by parties is a question the answer to which may vary by circuit. Given the rarity with which such instances would arise, using "party" here may be best – especially if the Civil Rules Committee sticks with "party" for proposed Civil Rule 5(d)(1).

electronic filing presumptively mandatory, except for filings made by a person proceeding without an attorney. However, the courts of appeals must permit paper filings for good cause, and are free to have local rules that permit or require paper filings for other reasons.

Filings by a person proceeding without an attorney are treated separately. It is not yet possible to rely on an assumption that pro se litigants are generally able to seize the advantages of electronic filing. Encounters with the court's system may prove overwhelming to some. Attempts to work within the system may generate substantial burdens on a pro se party, on other parties, and on the court. Rather than mandate electronic filing, filing by pro se litigants is left for governing by local rules. At present, some circuits bar pro se litigants from using CM/ECF. At least three circuits authorize (but do not require) pro se litigants to use CM/ECF. Still other circuits authorize pro se litigants to seek court permission to use CM/ECF; in the latter group, some circuits distinguish between pro se inmate litigants and other pro se litigants.

The act of electronic filing by an authorized user of the court's system counts as the filer's signature.[8] Under current technology, the filer must log in and present a password. Those acts satisfy the purposes of requiring a signature without need for an additional electronic substitute for a physical signature. But the rule does not make it improper to include an additional "signature" by any of the various electronic means that may indicate an intent to sign. [The amended rule applies directly to the filer's signature. It does not address others' signatures. Some filings include papers signed by someone other than the filer. Examples include affidavits and stipulations.][9]

Subdivision (a)(3). The timeliness rules from former subdivision (a)(2) – for filings by mail, briefs and appendices, and inmate filings – are now collected in new subdivision (a)(3). No mention is made of the other method of paper filing – in person at the Circuit Clerk's office – because timeliness for in-person paper filings is straightforward. *See* Appellate Rule 26(a)(4)(D).

Subdivision (c)(1)(D). Provision for electronic service was first made when electronic communication was not as widespread or as reliable as it is now. Consent of the person served to receive service by electronic means was required as a safeguard. Those concerns have substantially diminished, but have not disappeared entirely, particularly as to persons proceeding without an attorney.

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[8] Appellate Rule 32(d) provides: "Every brief, motion, or other paper filed with the court must be signed by the party filing the paper or, if the party is represented, by one of the party's attorneys."

[9] It is unclear whether the counterparts to these four sentences will be retained in the Committee Note to Civil Rule 5(d)(3). The remaining text in this portion of the Committee Note to proposed Appellate Rule 25(a)(2) (shown on pages 840-41 of the agenda book) has been deleted based upon a decision by the Civil Rules Committee to delete the corresponding passage from the proposed Committee Note to Civil Rule 5(d)(3).

The amended rule recognizes electronic service through the court's transmission facilities as to any registered user. A court may choose to allow registration only with the court's permission. But a party who registers will be subject to service through the court's facilities unless the court provides otherwise. With the consent of the person served, electronic service also may be made by means that do not utilize the court's facilities. [Consent can be limited to service at a prescribed address or in a specified form, and may be limited by other conditions.]

Because Rule 25(c)(1)(D) now authorizes service through the court's facilities as a uniform national practice, Rule 25(c)(2) is abrogated. It is no longer necessary to rely on local rules to authorize such service.

Subdivision (c)(2).[10] Rule 25(c)(2) is abrogated. As amended, Rule 25(c)(1)(D) directly authorizes service on a registered user through the court's transmission facilities. Local rule authority is no longer necessary. The court retains inherent authority to deny registration [or to qualify a registered user's participation in service through the court's facilities].

Subdivision (d). The amendment provides that a notice of electronic filing generated by the court's CM/ECF system constitutes proof of service on any party[11] served through the court's transmission facilities. Proof of service is now defined as (1) an acknowledgment of service by the party served; (2) a statement certifying the required details of service, or (3) for parties served through the court's electronic transmission facilities, a notice of electronic filing. Where either of the first two kinds of proof of service is employed, proof of service must be included with the filing; no such requirement applies where the third kind of proof of service is employed, because it is the electronic filing itself that generates the notice of electronic filing.

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[10] Although the sketch in the agenda book showed the deletion of Rule 25(c)(2), I accidentally omitted from the Committee Note an explanation for that deletion. The explanation provided by Professor Cooper, in connection with the proposed deletion of Civil Rule 5(b)(3), is equally apposite here:

> The basic reason to abrogate [Rule 25(c)(2)] is to avoid the seeming inconsistency of authorizing service through the court's facilities in [Rule 25(c)(1)(D) and then requiring authorization by a local rule as well. Probably there is no danger that a local rule might opt out of the national rule, but eliminating [Rule 25(c)(2)] would ensure that none will. It remains important to ensure that a court can refuse to allow a particular person to become a registered user. It may be safe to rely on the Committee Note to [Rule 25(c)(1)(D)], with added support in a Committee Note explaining the abrogation of [Rule 25(c)(2)].

[11] The Note discussion assumes that "party" rather than "person" is selected for proposed Rule 25(d)(1)(C). If the Committee prefers "person," then conforming changes would be made to the Note.

Proposed change to Federal Circuit ECF rules
Rob Miller
to:
Rules_Support
03/09/2015 10:09 PM
Hide Details
From: Rob Miller <robmiller44@hotmail.com>

To: Rules_Support@ao.uscourts.gov

15-AP-A

History: This message has been forwarded.

I, Robert M. Miller, am a petitioner for three cases before the US Court of Appeals for the Federal Circuit. I also have an appeal being heard by the Ninth Circuit.

The Ninth Circuit permitted me, a pro se appellant, to file briefs electronically. However, Federal Circuit rules currently prohibit pro se petitioners from doing so. I filed an unopposed motion to use Electronic Case Filing (ECF) for two of my cases at the Federal Circuit, and the Court denied both motions.

Pro se litigants are already disadvantaged relative to the Federal agencies they are arguing against. Aside from the burden of proof as an appellant, the costs, rules, and research capabilities are onerous. It cost me hundreds of dollars to print, copy, and mail my briefs and appendices. I risked untimely filing merely because of unforseeable problems at the copy store or delivery service. Filing electronically eliminates several last minute hangups that can dispose of a worthy case.

I believe that pro se litigants should be permitted to use ECF unless and until they demonstrate an inability to use the system above and beyond mistakes commonly made by seasoned attorneys admitted to the bar. This request is for the consideration of fairness as well as cost. The Ninth Circuit routinely approves this motion, and I don't believe its experience leaves them worse for wear.

Respectfully submitted,

Robert M. Miller, Ph.D.

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Re: Proposed rule changes for fairness to pro se and IFP litigants

Sai to: Rules_Support 09/07/2015 10:36 AM

History: This message has been forwarded.

Dear Committee on Rules of Practice and Procedure -

I further request parallel changes to the non-civil rules, and defer to the Committee on how to mirror them appropriately, as I am only familiar with the civil rules.

In particular, I note an error in my draft below for proposal #2: 18 U.S.C. 3006A (the Criminal Justice Act) would of course come under the FRCrP, not the FRCvP, so the FRCvP rule should refer only to 28 U.S.C. 1915 (the IFP statute).

Sincerely,
Sai

On Mon, Sep 7, 2015 at 10:02 AM, Sai <dccc@s.ai> wrote:
> Dear Committee on Rules of Practice and Procedure -
>
> I hereby propose the following four changes to the Federal Rules of
> Civil Procedure.
>
>
> 1. FRCP 5.2: amend (a)(1) to read as follows:
> (1) any part of the social-security number and taxpayer-identification
number
>
> The last four digits of an SSN, prior to a recent change by the SSA,
> is the only part that is random. The first digits can be strongly
> derived from knowing the person's place and date of birth.
>
> Disclosure of the last four digits of an SSN effectively gives away
> all of the private information, serves no public purpose in
> understanding the litigation, and should therefore be sealed by
> default (absent a court order to the contrary, as already provided for
> by FRCP 5.2).
>
> See, e.g.:
> Alessandro Acquisti and Ralph Gross, Predicting Social Security
> numbers from public data, DOI 10.1073/pnas.0904891106, PNAS July 7,
> 2009 vol. 106 no. 27 10975-10980 and supplement
> https://www.pnas.org/content/106/27/10975.full.pdf
> http://www.heinz.cmu.edu/~acquisti/ssnstudy/
>
> EPIC: Social Security Numbers (Nov. 13, 2014)
> https://epic.org/privacy/ssn/
>
> Latanya Sweeney, SSNwatch, Harvard Data Privacy Lab; see also demo
> http://latanyasweeney.org/work/ssnwatch.html
> http://dataprivacylab.org/dataprivacy/projects/ssnwatch/index.html
>
>
> 2. FRCP 5.2: add a new paragraph, to read as follows:
>
> (i) Any affidavit made in support of a motion under 28 U.S.C. 1915 or

> 18 U.S.C. 3006A shall be filed under seal and reviewed ex parte. Upon
> a motion showing good cause, notice to the affiant and all others
> whose information is to be disclosed, and opportunity for the same to
> contest the motion, the court may order that such affidavits be
> (1) disclosed to other parties under an appropriate protective order; or
> (2) unsealed in appropriately redacted form.
>
> For extensive argument, please see the petition and amicus briefs in
> my petition for certiorari regarding this issue: http://s.ai/ifp
>
>
> 3. Add new rule 7.2, matching that of S.D. & E.D. NY:
>
> Rule 7.2. Authorities to Be Provided to Pro Se Litigants
> In cases involving a pro se litigant, counsel shall, when serving a
> memorandum of law (or other submissions to the Court), provide the pro
> se litigant (but not other counsel or the Court) with copies of cases
> and other authorities cited therein that are unpublished or reported
> exclusively on computerized databases. Upon request, counsel shall
> provide the pro se litigant with copies of such unpublished cases and
> other authorities as are cited in a decision of the Court and were not
> previously cited by any party.
>
> See:
> Local Civil Rule of the Southern and Eastern Districts of New York 7.2
> Lebron v. Sanders, 557 F.3d 76 (2d Cir. 2009)
>
>
> 4. Add new subparagraph to rule 5(d)(3):
> (1) A court may not require a pro se litigant to file any paper by
> non-electronic means solely because of the litigant's pro se status.
>
> Pro se litigants should still be permitted (not required) to file by
> paper, to ensure that those without access to CM/ECF or familiarity
> with adequate technology have access to the courts.
>
> Pro se litigants may of course be required to register with CM/ECF in
> the same manner as an attorney, including signing appropriate
> declarations or passing the same CM/ECF training or testing required
> of attorneys.
>
> However, courts should not prohibit pro se litigants from having
> CM/ECF access where represented parties would have it. Doing so
> imposes a disparate burden of time, expense, effort, processing
> delays, reduction in the visual quality of papers due to printing and
> scanning, removal of hyperlinks in papers, and reduction in ADA /
> Rehab Act accessibility.
>
>
>
> I request to be notified by email of any progress related to the four
> changes I have proposed above.
>
> Respectfully submitted,
> /s/ Sai

United States Court of Appeals
For the Eighth Circuit
Thomas F. Eagleton U.S. Courthouse
111 South 10th Street, Room 24.329
St. Louis, Missouri 63102

Michael E. Gans
Clerk of Court

VOICE (314) 244-2400
FAX (314) 244-2780
www.ca8.uscourts.gov

October 14, 2014

Professor Catherine T. Struve
Reporter
Advisory Committee on the Federal Appellate Rules
University of Pennsylvania Law School

Re: Possible Amendments Relating to Electronic Filing - FRAP 25 and CM/ECF Proof of Service

Dear Professor Struve:

The October meeting materials include a section regarding the possible amendment of FRAP 25(d) to provide that no certificate of service be required when service is accomplished by means of a Notice of Docket Activity in CM/ECF. On October 3 you sent me an email suggesting that I survey the appellate clerks to ask them why their local rules continue to require a certificate of service in such instances. In response to your email, I sent the clerks the relevant sections of the meeting materials and surveyed them on their current practices, as well as their thoughts regarding amendment of FRAP 25(d).

With respect to the question of why the various local rules require a proof of service despite the fact that service is accomplished through the Notice of Docket Activity, the simple answer is that none of the clerks thought we could dispense with it in light of the national service rule. When I drafted the first set of standing orders and local rules for our circuit (we were the first appellate court to implement electronic filing), I consulted many district court local rules, as well as the district court model rules and FRAP, and I concluded that proof of service was a requirement. Many of the circuits looked to our standing orders and local rules as they drafted their procedures and reached the same conclusion (or adopted our provisions without further analysis of the question). The Second Circuit, being one of the last courts to implement CM/ECF, took a slightly different approach, indicating, as you point out at page 17 of the materials, that "filling out the 'service' section in CM/ECF constitutes compliance with Appellate Rule 25(d)'s requirement for a proof of service." The clerk of

the Second Circuit informs me that their local rule works without any problems.

When I surveyed the clerks regarding the amendment, their responses fell into two camps. The majority of clerks approve of the proposal to do away with a separate proof of service in those cases where all of the case participants are CM/ECF filers. In their experience, the requirement of a separate proof of service adds little value for the clerk's office or the case participants, causes confusion among counsel and creates extra work for the clerk's office as the proof of service is often omitted and must be obtained from counsel to complete the filing. These clerks note that each filer receives a Notice of Docket Activity at the time they make a filing and that the Notice of Docket Activity provides information about each case participant's CM/ECF or paper service status. Additionally, attorneys can use a standard CM/ECF report called "Attorney Service Preference Report" before they make a filing to ascertain every participants's CM/ECF or paper service status. So long as Rule25(d) continues to require filers to complete a proof of service when one or more of the participants must be served by traditional means, these clerks believe that the rule could be amended to eliminate the requirement of a proof of service when all case participants are CM/ECF filers.

A substantial minority of the clerks, while generally in favor of an amendment, believe, as your memo suggests, "that important values are served by continuing to require the certificate of service." These clerks point out that the proof of service requirement "forces the filing attorney to stop, look at the service list, and think about who may need to be served in paper." They believe that clerk's offices will have to check every filing in every case for proper service since the absence of a certificate of service does not establish that there are no non-CM/ECF filers in the case. They believe that the proof of service provides a starting point for the clerk's office's review of the service of the filing. They also point out that when a case is initially docketed the cast of participants may not be fully known or may include district court filers who have not registered to file in the appellate court (a separate process from becoming an authorized filer in the district court). In such instances, an attorney filer may mistakenly believe a case participant is a CM/ECF filer in the court of appeals when they are not, and the case participant may be inadvertently overlooked for filing and service. The proof of service in these instances gives the appellate court clerk's office important information about case participants when it is establishing the service list for the case and linking parties and attorneys at docketing.

My personal feeling is that it is time to eliminate this requirement for cases where all participants are CM/ECF filers. With or without a certificate of service, our offices must check every filing against the service list to make sure that service has been accomplished

for all case participants. While the certificate of service might be a useful starting point, other tools exist, such as the docket sheet, the Notice of Docket Activity and service reports, which we can and do use. If offices are not undertaking this review - and I gather from some of the responses that they are not - they should be. At case docketing a careful review of the lower court or agency file must be performed to determine the service list, and we do not rely on a Notice of Docket Activity to provide the necessary case participant information. The list of case participants changes frequently throughout the life of a case, and it is the clerk's responsibility to monitor the case and update that information on a timely basis.

I look forward to discussing this issue at the coming meeting. I hope this information is useful to you and the Committee members.

Sincerely,
Michael E. Gans
Clerk of Court

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MEMORANDUM

DATE: October 14, 2015

TO: Advisory Committee on Appellate Rules

FROM: Gregory E. Maggs, Reporter

RE: Item No. 15-AP-E (FRAP amendments relating to social security numbers; sealing of affidavits; provision of authorities to pro se litigants; and electronic filing by pro se litigants)

This new item comes to the Committee by an email, dated September 7, 2015, from mononymous proponent Sai. *See* Email to Committee of Rules of Practice and Procedure from Sai, regarding Proposed Rule Changes for Fairness to Pro Se and IFP Litigants (Sept. 7, 2015) (attached). The item proposes four Rule amendments to ensure: (1) that filings do not include any part of a social security number; (2) that courts seal financial affidavits filed in connection with motions to proceed i*n forma pauperis*; (3) that opposing parties provide certain types of cited authorities to pro se litigants; and (4) that courts do not prevent pro se litigants from filing or serving documents electronically.

A. Social Security Numbers

The first proposal is to prohibit litigants from including "any part" of a social security number in court filings. Federal Rule of Civil Procedure (FRCP) 5.2(a)(1) generally allows filings to include only the first four digits of a social security number. The Rule says:

> Unless the court orders otherwise, in an electronic or paper filing with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, or a financial-account number, a party or nonparty making the filing may include only:
>
> (1) the last four digits of the social-security number and taxpayer-identification number;

FRCP 5.2(a)(1) (emphasis added). Sai proposes to amend this Rule to preclude filings from containing "any part" of a social security number or taxpayer identification number, not even the last four digits. Sai argues that excluding all but the last four digits of a social security number provides insufficient privacy and security. He explains that "[t]he last four digits of an SSN, prior to a recent change by the SSA, is the only part that is random. The first digits can be strongly derived from knowing the person's place and date of birth."

Although this item specifically proposes an amendment to the Federal Rules of Civil Procedure, it would have consequences for filings in the U.S. Courts of Appeals because Federal Rule of Appellate Procedure (FRAP) 25(a)(5) expressly makes FRCP 5.2 applicable to appeals:

> (5) Privacy Protection. An appeal in a case whose privacy protection was governed by Federal Rule of Bankruptcy Procedure 9037, Federal Rule of Civil Procedure 5.2, or Federal Rule of Criminal Procedure 49.1 is governed by the same rule on appeal. In all other proceedings, privacy protection is governed by Federal Rule of Civil Procedure 5.2, except that Federal Rule of Criminal Procedure 49.1 governs when an extraordinary writ is sought in a criminal case.

The Federal Rules of Appellate Procedure generally do not require parties to include social security numbers in filings. The only exception appears to be that FRAP Form 4 (Affidavit Accompanying Motion for Permission to Appeal in Forma Pauperis) specifically asks movants to provide the last four digits of their social security numbers as part of their identifying information. This requirement may be a vestige of prior practice. Preliminary investigation of the matter indicates that the courts of appeals no longer use this information for any purpose.

In exceptional cases, appellate briefs may need to discuss social security numbers when they are relevant to an issue on appeal. For example, in *United States v. Godin*, 534 F.3d 51 (1st Cir. 2008), the appellant committed identity theft by altering digits of her own social security number. In such cases, if the parties must identify the appellant's actual security number in their briefs, they could seek a court order permitting them to do so under FRAP 25(a)(5) and FRCP 5.2(a)(1). In *Godin*, the court of appeals apparently knew the appellant's actual social security number but redacted it from its opinion for privacy reasons. *See id.* at 54 & n.2. In addition, the record of trial may contain social security numbers if they appear in testimony, exhibits, or documents filed in the district courts or bankruptcy courts.

At its October 2015 meeting, the Committee might wish to discuss several topics related to this item, such as (1) whether more investigation regarding the use of social security numbers in the courts of appeals is needed before taking any action and, if so, how that investigation might be conducted; (2) whether the Committee wishes to communicate its views on social security numbers to the Civil Rules Committee which also is considering Sai's proposed amendment to FRCP 5.2(a)(1) ; and (3) whether FRAP 25(c) or FRAP Form 4 should be amended even if FRCP 5.2 is not amended.

B. Motions for Leave to Proceed in Forma Pauperis Under Seal

Sai's second proposal is to amend FRCP 5.2 to require courts to seal any affidavit made in support of a motion to proceed *in forma pauperis* under 28 U.S.C. § 1915 or 18 U.S.C. § 3006A and to review the sealed affadavit *ex parte*. Sai does not make a legal or policy argument for this proposal in his email, but he refers the Committee to a petition for certiorari that he filed after the D.C. Circuit denied his motion to seal his affidavit in *Sai v. United States Postal Service*, No.

14-1005, slip op. (D.C. Cir. June 23, 2014). The petition for certiorari is available at Sai's website,[1] and the D.C. Circuit order is included in the petition's Appendix C. In the petition Sai argues that sealing is appropriate so that "indigent plaintiffs" do not have "to jettison their right to privacy and open themselves up to identity theft and costly internet schemes in order to access the courts." He further alleges a conflict in the circuits on the issue of whether such affidavits are sealable. The Supreme Court denied certiorari. *Sai v. United States Postal Service*, 135 S. Ct. 1915 (2015).

This proposal, if adapted to the Appellate Rules, would appear to change current practice. My research and cases cited in Sai's petition for certiorari reveal that several circuits, in addition to the D.C. Circuit in Sai's own case, have denied motions to seal affidavits filed in connection with motions to proceed *in forma pauperis*. *See, e.g., Hart v. Tannery*, 2011 WL 10967635, *1 (3d Cir.); *United States v. Daniels*, 470 F. App'x 213 (4th Cir. 2012); *In re Mesaba Aviation, Inc.*, 386 F. App'x 580, 581 (8th Cir. 2010). Under Sai's proposal, the courts would have to grant such motions.

The *Hart v. Tannery* case is instructive because the court explained the extent to which the Third Circuit's appellate procedures protect, and do not protect, affidavits filed by those seeking permission to proceed in forma pauperis. The court said:

> The request to keep [appellant's] in forma pauperis motion sealed . . . is denied as appellant has not overcome the presumption in favor of "open process, accessible to the public" that "disallows the routine and perfunctory closing of judicial records." *In re Cendant Corp.*, 260 F.3d 183, 193–94 (3d Cir. 2001) (citations omitted). We note for appellant's information that, because in forma pauperis motions and supporting affidavits contain sensitive information, the Clerk's Office files them as "locked" documents. That means that the document can be seen electronically (on PACER) by parties to the litigation and court staff, but not by the public. If a member of the public wants to see the document, that person has to come into the courthouse.

2011 WL 10967635 at *1. Other cases generally have not addressed the issue as thoroughly, often summarily denying motions to seal.

At the October 2015 meeting, the Committee may wish to discuss whether the proposed change is warranted based on policy considerations. The competing views are easily summarized. On one hand, as indicated above, sealing affidavits will protect the privacy of litigants who lack the money to pay court costs. On the other hand, sealing will reduce the openness of the judicial process.

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[1] http://s.ai/ifp/Sai%20v%20USPS%20SCOTUS%20Petition%20for%20certiorari.pdf

C. Providing CitedAuthorities to Pro Se Litigants

Sai's third proposal is the creation of a new FRCP 7.2 that would match the local rules in the Southern District and Eastern District of New York. These local rules provide:

> Local Civil Rule 7.2. Authorities to Be Provided to Pro Se Litigants
>
> In cases involving a pro se litigant, counsel shall, when serving a memorandum of law (or other submissions to the Court), provide the pro se litigant (but not other counsel or the Court) with copies of cases and other authorities cited therein that are unpublished or reported exclusively on computerized databases. Upon request, counsel shall provide the pro se litigant with copies of such unpublished cases and other authorities as are cited in a decision of the Court and were not previously cited by any party.

See Local Rules of the United States District Courts for the Southern and Eastern Districts of New York, http://www.nysd.uscourts.gov/rules/rules.pdf.

Sai does not expressly make any legal or policy argument in support of his proposal, but presumably the goal of creating the new rule would be to treat pro se litigants fairly. Pro se litigants generally do not subscribe to the kinds of databases to which attorneys have access, and doing so merely to pursue a single case might be unreasonably expensive. The counter argument presumably is that the legal system generally requires each side to pay the costs of its own representation.

As to filings in the courts of appeals, however, the concerns motivating this suggestion by Sai may already be largely addressed by FRAP 32.1(b), which provides: "If a party cites a federal judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database, the party must file and serve a copy of that opinion, order, judgment, or disposition with the brief or other paper in which it is cited." One question might be whether the proposed rule's references to "other authorities" would encompass items not already encompassed in FRAP 32.1(b).

At the October 2015 meeting, the Committee may wish to discuss whether policy considerations warrant a change to FRAP 32.1(b).

D. Electronic Filing by Pro Se Litigants

Sai's fourth proposal is to amend FRCP 5(d)(3) to specify that a "court may not require a pro se litigant to file any paper by non-electronic means solely because of the litigant's pro se status." In support of the proposal, Sai argues:

> [C]ourts should not prohibit pro se litigants from having CM/ECF access where represented parties would have it. Doing so imposes a disparate burden of time, expense, effort, processing delays, reduction in the visual quality of papers due to printing and scanning, removal of hyperlinks in papers, and reduction in ADA / Rehab Act accessibility.

Although this proposal is specifically addressed to the Federal Rules of Civil Procedure, the concerns that Sai raises also may apply to courts of appeals. The Federal Rules of Appellate Procedure leave most decisions about electronic filing and service to local circuit rules. Some of these local rules currently treat pro se litigant differently from represented parties. *See, e.g.*, Second Circuit Local Rule 25.1(b)(3) ("A pro se party who wishes to file electronically must seek permission from the court . . . ."). The proposal, once adapted to the Federal Rules of Appellate Procedure, presumably would prohibit different treatment based solely on pro se status.

The Committee is currently undertaking a broad review of necessary changes to the Appellate Rules in light of Case Management/Electronic Case Files (CM/ECF) issues. See Items No. 08-AP-A, 11-AP-C, 11-AP-D, 15-AP-D. At the October 2015 Meeting, the Committee may wish to consider whether to include Sai's fourth proposal with the other proposals currently under review.

Attachment

Email to Committee of Rules of Practice and Procedure from Sai, regarding Proposed Rule Changes for Fairness to Pro Se and IFP Litigants (Sept. 7, 2015)

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Re: Proposed rule changes for fairness to pro se and IFP litigants

Sai to: Rules_Support 09/07/2015 10:36 AM

History: This message has been forwarded.

Dear Committee on Rules of Practice and Procedure -

I further request parallel changes to the non-civil rules, and defer to the Committee on how to mirror them appropriately, as I am only familiar with the civil rules.

In particular, I note an error in my draft below for proposal #2: 18 U.S.C. 3006A (the Criminal Justice Act) would of course come under the FRCrP, not the FRCvP, so the FRCvP rule should refer only to 28 U.S.C. 1915 (the IFP statute).

Sincerely,
Sai

On Mon, Sep 7, 2015 at 10:02 AM, Sai <dccc@s.ai> wrote:
> Dear Committee on Rules of Practice and Procedure -
>
> I hereby propose the following four changes to the Federal Rules of
> Civil Procedure.
>
>
> 1. FRCP 5.2: amend (a)(1) to read as follows:
> (1) any part of the social-security number and taxpayer-identification
number
>
> The last four digits of an SSN, prior to a recent change by the SSA,
> is the only part that is random. The first digits can be strongly
> derived from knowing the person's place and date of birth.
>
> Disclosure of the last four digits of an SSN effectively gives away
> all of the private information, serves no public purpose in
> understanding the litigation, and should therefore be sealed by
> default (absent a court order to the contrary, as already provided for
> by FRCP 5.2).
>
> See, e.g.:
> Alessandro Acquisti and Ralph Gross, Predicting Social Security
> numbers from public data, DOI 10.1073/pnas.0904891106, PNAS July 7,
> 2009 vol. 106 no. 27 10975-10980 and supplement
> https://www.pnas.org/content/106/27/10975.full.pdf
> http://www.heinz.cmu.edu/~acquisti/ssnstudy/
>
> EPIC: Social Security Numbers (Nov. 13, 2014)
> https://epic.org/privacy/ssn/
>
> Latanya Sweeney, SSNwatch, Harvard Data Privacy Lab; see also demo
> http://latanyasweeney.org/work/ssnwatch.html
> http://dataprivacylab.org/dataprivacy/projects/ssnwatch/index.html
>
>
> 2. FRCP 5.2: add a new paragraph, to read as follows:
>
> (i) Any affidavit made in support of a motion under 28 U.S.C. 1915 or

> 18 U.S.C. 3006A shall be filed under seal and reviewed ex parte. Upon
> a motion showing good cause, notice to the affiant and all others
> whose information is to be disclosed, and opportunity for the same to
> contest the motion, the court may order that such affidavits be
> (1) disclosed to other parties under an appropriate protective order; or
> (2) unsealed in appropriately redacted form.
>
> For extensive argument, please see the petition and amicus briefs in
> my petition for certiorari regarding this issue: http://s.ai/ifp
>
>
> 3. Add new rule 7.2, matching that of S.D. & E.D. NY:
>
> Rule 7.2. Authorities to Be Provided to Pro Se Litigants
> In cases involving a pro se litigant, counsel shall, when serving a
> memorandum of law (or other submissions to the Court), provide the pro
> se litigant (but not other counsel or the Court) with copies of cases
> and other authorities cited therein that are unpublished or reported
> exclusively on computerized databases. Upon request, counsel shall
> provide the pro se litigant with copies of such unpublished cases and
> other authorities as are cited in a decision of the Court and were not
> previously cited by any party.
>
> See:
> Local Civil Rule of the Southern and Eastern Districts of New York 7.2
> Lebron v. Sanders, 557 F.3d 76 (2d Cir. 2009)
>
>
> 4. Add new subparagraph to rule 5(d)(3):
> (1) A court may not require a pro se litigant to file any paper by
> non-electronic means solely because of the litigant's pro se status.
>
> Pro se litigants should still be permitted (not required) to file by
> paper, to ensure that those without access to CM/ECF or familiarity
> with adequate technology have access to the courts.
>
> Pro se litigants may of course be required to register with CM/ECF in
> the same manner as an attorney, including signing appropriate
> declarations or passing the same CM/ECF training or testing required
> of attorneys.
>
> However, courts should not prohibit pro se litigants from having
> CM/ECF access where represented parties would have it. Doing so
> imposes a disparate burden of time, expense, effort, processing
> delays, reduction in the visual quality of papers due to printing and
> scanning, removal of hyperlinks in papers, and reduction in ADA /
> Rehab Act accessibility.
>
>
>
> I request to be notified by email of any progress related to the four
> changes I have proposed above.
>
> Respectfully submitted,
> /s/ Sai

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MEMORANDUM

DATE: October 15, 2015

TO: Advisory Committee on Appellate Rules

FROM: Gregory E. Maggs, Reporter

RE: Item No. 15-AP-F (Recovery of Appellate Docketing Fee after Reversal)

This new item concerns the procedure by which an appellant who prevails on appeal may recover the $500 docketing fee from the appellee. The matter comes to the Committee in an email from Professor Gregory C. Sisk. *See* Email to Catherine T. Struve from Professor Gregory C. Sisk, regarding Reimbursement of Appellate Docketing Fee after Reversal (Apr. 15, 2015). Professor Sisk proposes adding a rule to the Federal Rules of Appellate Procedure (FRAP) that would expressly direct the "routine recovery of the docketing fee by the successful [appellant] as part of the ordinary bill of costs in the Court of Appeals."

A. Background on Fees for Filing a Notice of Appeal and Docketing an Appeal

Under 28 U.S.C. § 1917, an appellant who files a notice of appeal must pay $5 to the district court. Under 28 U.S.C. § 1913, the Judicial Conference may prescribe the fees and costs to be collected by the courts of appeals. The current fee for docketing a case on review is $500 (recently increased from $450). *See* Judicial Conference Schedule of Fees, reprinted along with 28 U.S.C.A. § 1913.

If an appellant is successful, the appellant can recover the notice of appeal fee and the docket fee. FRAP 39(a)(3) provides that "if a judgment is reversed, costs are taxed against the appellee." FRAP 39(e)(4) further specifies that those costs include "the fee for filing the notice of appeal." But a difficulty with obtaining reimbursement is that FRAP 39 does not specify how a successful appellant actually recovers those costs.

The Circuits have adopted different approaches to how a prevailing appellant actually recovers the $5 notice of appeal fee and the $500 docket fee. A report prepared for the Committee in 2011 summarized the matter as follows:

> Ten appellate courts identify the docket fee as recoverable costs, by either listing it as a recoverable item on their required Bill of Costs Form and/or specifically including the courts of appeals' docket fee as a recoverable costs in their local rule or internal procedures, or by informal policy. 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 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 $[500] 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 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 $[500] docketing fee.

Marie Leary, 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 13-14 (Apr. 2011) (footnotes omitted) (excerpt attached). A research study undertaken for Reporter Catherine Struve during the summer of 2015 confirms that these conclusions remain current. *See* Research Memorandum for Professor Catherine Struve (attached).

B. Professor Sisk's Proposal

Professor Sisk is concerned about the $500 docket fee. He asserts that the minority approach to this fee is problematic because "the District Courts don't really have a process for . . . taxing the . . . fee—other than general provisions for a bill of costs at final judgment that may come months or years after the appellate reversal." He proposes an amendment to FRAP 39 that would expressly require Circuits to follow the majority approach. He also notes that the minority approach is especially confusing to pro se litigants, for whom recovery of the docket fee usually matters most.

C. October 2015 Meeting

At the October 2015 Meeting, the Committee may wish to discuss whether it should recommend a change to the Rules that would resolve the current circuit conflict and, if so, whether to adopt the majority or minority approach with respect to the docket fee.

Attachments

1. Email to Catherine T. Struve from Professor Gregory C. Sisk, regarding Reimbursement of appellate docketing fee after reversal (Apr. 15, 2015).

2. Marie Leary, 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 13-14 (Apr. 2011) (excerpt)

3. Research Memorandum for Professor Catherine Struve (Summer 2015)

TAB 13B

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From: Sisk, Gregory C. [mailto:GCSISK@stthomas.edu]
Sent: Monday, April 13, 2015 6:24 PM
To: Catherine T Struve
Subject: Reimbursement of appellate docketing fee after reversal

Catherine:

Having just returned from supervising the student arguments before the Ninth Circuit in Seattle as part of our school's Appellate Clinic, and being cautiously optimistic about a reversal in favor of our client, I was reminded again of an issue that has arisen more than once in our work. I wanted to run this by you in your capacity as Reporter for the Advisory Committee on Appellate Rules. The matter would seem to be simple – recovering the appeal filing fee after winning an appeal for an appellant. But it has proven to be anything but simple.

In my pro bono appellate work, mainly on behalf of prisoners who were pro se in the District Court, we have repeatedly run into a procedural quagmire in getting reimbursement of the appellate docketing/filing fee for our clients when they succeed on appeal, typically by reversal of a dismissal on the pleadings or at summary judgment. While the amount of money involved – around $450 – may not seem like a lot to many of us, the plaintiff proceeding pro se who filed the notice of appeal and paid the docketing fee out of his or her own pocket often is genuinely concerned about getting that cost refunded. And for a prisoner who has no earning capacity, the financial impact can be surprisingly severe. And yet we have encountered confusion and a lack of a clear process for having that appellate docketing fee taxed against the other side and then actually recovered.

As you know, under Federal Rule of Appellate Procedure 39(a)(3), "if a judgment is reversed, costs are taxed against the appellee." Among those costs to be taxed in favor of the successful appellant is "the fee for filing the notice of appeal." Fed. R. App. P. 39(e)(4).

Some circuits provide directly for recovery of the docket fee as part of the bill of costs on appeal:
http://www.ca4.uscourts.gov/docs/pdfs/bill-of-costs.pdf
www.ca5.uscourts.gov/docs/default-source/forms/**bill-of-costs**.pdf
This strikes me as the most straightforward and sensible approach.

But other circuits, like the Ninth Circuit, read Rule 39(e) as mandating recovery of the filing fee only in the District Court. Thus, in the Ninth Circuit, the bill of costs covers only such things as the costs of printing the briefs. The Ninth Circuit directs appellants to seek recovery of the appellate docketing fee through the process set out by the District Court.

But the District Courts frequently are surprised when our pro se clients ask for recovery of the filing fee for the appeal. And the District Courts don't really have a process for so taxing the appellate filing fee – other than general provisions for a bill of costs at final judgment that may come months or years after the appellate reversal. When our clients inquire of the District Court how to request reimbursement of the filing fee, they usually are told by the District Court clerk's office that they should have asked for that to be taxed in the Court of Appeals before the mandate issued and that the District Court has no authority to do so. Indeed, the District of Nevada says as much in its local rules: "LR 54-15. APPELLATE COSTS. The District Court does not tax or retax appellate costs. The certified copy of the judgment or the mandate of the Court of Appeals, without further action by the District Court, is sufficient basis to request the Clerk of the District Court to issue a writ of execution to recover costs taxed by the appellate court."

Thus far, we've been able to help our clients get the filing fee back in the District Court. But we've often had to go back and forth between courts and try multiple methods before it finally happens. While it was not one of our cases, the attached unpublished decision from the District of Oregon reflects one court that came to the correct conclusion, but without any clear procedure that led to that result. Importantly, given how surprisingly confusing this simple matter has proven to be for me as an experienced appellate attorney who has practiced in ten of the thirteen circuits, I can only imagine how difficult it would be for the typical pro se appellant who wins on appeal to navigate the process to get the filing fee recovered.

Again, I know it should be a simple thing and the amount involved seems so small, so I should apologize for such a long message to set out the problem. And yet the complexity that occasions the length description is the problem. I wonder why the FRAP couldn't simply direct routine recovery of the docketing fee by the successful appellate as part of the ordinary bill of costs in the Court of Appeals?

Greg

Gregory Sisk
Laghi Distinguished Chair in Law
University of St. Thomas School of Law (Minnesota)
MSL 400, 1000 LaSalle Avenue
Minneapolis, MN 55403-2005
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Publications: http://ssrn.com/author=44545

EXCERPT, pp. 13-14

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

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 for the $5

[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."

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.

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Research Memorandum for Professor Catherine Struve (summer 2015)

Sometimes filing and docketing fees are used interchangeably, but it's evident that the $500 docketing fee is of concern. The language of FRAP 39(e)(4) makes it clear that the $5 filing fee is taxable in the district court, but the docketing fee is not specified. The rules don't explicitly say where that cost is to be taxed, hence the confusion and local procedure disparity.

However, my findings tell me that the docketing fee generally fits under the FRAP 39(d) Bill of Costs umbrella, which is filed with the circuit court. The party who wants costs taxed must file their itemized bill of costs according to Rule 39(d)(1), and it is reasonable to interpret it as including the docketing fee if circuits construe it that way. It seems that the DC Circuit puts the docketing fee in their "itemized bill of costs" rules, while other circuits don't specify in their local rule 39 but do on their forms or internal operating procedures. Only the 9th and 11th see 39(e)(4)'s "fee for filing the notice of appeal" as including both fees, and the 10th Circuit doesn't definitively go either way. The others have it listed in their bill of costs forms, rules, or procedures to be filed with the appellate court.

Given that the district court now also handles the docketing fee at the front end[1], it makes sense that the taxation of such costs could be handled by the district court on behalf of the circuit if they so interpret. But it looks like only the 9th and 11th courts see it that way. However, when speaking with a circuit court (2nd) who *does* include the docketing fee on its itemized bill of costs form, I found that he didn't seem to think it was that prevalent.

By and large, it seems that if the circuit bill of costs form or procedure notes the docketing fee, an appellant should be filing that $500 with the circuit court. The court mandate re: Bill of Costs delineates what they can recover, I believe, so appellants should recoup accordingly. I am unsure if judge mandates in some of those circuits are [mistakenly] delegating it to the district court (i.e., the 4th Circuit's Local Rule 39(c) mandate doesn't include the docketing fee as one they will send to the district court).

1st	Recovery of docketing fee is filed with Appellate Court. Their Bill of Costs form lists the docketing fee: http://www.ca1.uscourts.gov/sites/ca1/files/billofcostsform.pdf The local circuit rule nor IOPs do not say one way or the other.
2nd	Recovery of docketing fee is filed with the Appellate Court. Their Bill of Costs form lists the docketing fee: http://www.ca2.uscourts.gov/clerk/case_filing/forms/pdf/Verified%20Itemized%20Bill%20of%20Costs.pdf The local circuit rule nor IOPs do not say one way or the other.

[1] Rule 3(e) provides that the filing and docketing fees are paid to the clerk of the district court when notice of appeal is filed. § 3949.3 Payment of Fees, 16A Fed. Prac. & Proc. Juris. § 3949.3 (4th ed.).

3rd	Recovery of docketing fee is filed with the Appellate Court. Their Bill of Costs form lists the docketing fee: http://www2.ca3.uscourts.gov/legacyfiles/bill_of_costs.pdf The local circuit rule nor IOPs do not say one way or the other.
4th	Recovery of docketing fee is filed with the Appellate Court. Their Bill of Costs form lists the docketing fee: http://www.ca4.uscourts.gov/docs/pdfs/costs.pdf?sfvrsn=8 **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 04/08/15 33 mandate, the clerk will send a supplemental "Bill of Costs" to the district court for inclusion in the mandate at a later date. 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.
5th	Recovery of docketing fee is filed with the Appellate Court. Their Bill of Costs form lists the docketing fee: http://www.ca5.uscourts.gov/docs/default-source/forms/billofcosts500.pdf The local circuit rule nor IOPs do not say one way or the other.
6th	Recovery of the docketing fee is filed with the Appellate Court. **6 Cir. I.O.P. 39 Bill of Costs - Allowable Costs and Motion to Extend Time** (a) **Bills of Costs.** Costs may include the court of appeals docket fee (where applicable) and production of the briefs and appendix, as limited by 6 Cir. R. 39. The court does not favor commercial printing or other expensive methods of producing the briefs and appendix. Therefore, 6 Cir. R. 39 limits the recoverable costs for production or reproduction of those documents. Generally, the court does not consider attorney fees costs of appeal.
7th	Per the local rule handbook, recovery of the docketing fee is filed with the Appellate Court.

	https://www.ca7.uscourts.gov/Rules/handbook.pdf XXXII. COSTS (page 162): 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.
8th	Per their IOP, recovery of the docketing fee is filed with the Appellate Court. http://media.ca8.uscourts.gov/newrules/coa/IOP.pdf E. COSTS (page 22): 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).
9th	The 9th Circuit has interpreted 39(e) to include docketing fees, so they are filed with the District Court. The Bill of Costs form doesn't list the docketing fee: http://cdn.ca9.uscourts.gov/datastore/uploads/forms/Form%2010%20-%20Bill%20of%20Costs.pdf **Circuit Rule 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: (Rev. 1/1/05) (1) The number of copies of the briefs or excerpts of record reproduced; and (Rev. 1/1/05) (2) The actual cost per page for each document
10th	I actually called the 10th Circuit to ask, since their local rules/IOP/forms do not say. They told me that since it's technically an appellate fee, an appellant could see its recovery in the circuit court, but they don't usually see it filed there. Recovery for the $505 is usually filed in the district court.
11th	The 11th Circuit has interpreted 39(e) to include docketing fees, so they are filed with the District Court. The Bill of Costs form doesn't include the docketing fee. http://www.ca11.uscourts.gov/sites/default/files/courtdocs/clk/FormBillofCosts.pdf
Federal Circuit	Recovery of the docketing fee is filed with this court if it was paid in this court: http://www.cafc.uscourts.gov/images/stories/rules-of-practice/forms/form24.pdf
DC	Per the local rule handbook, recovery of the docketing fee is filed with the Appellate Court **CTADC Rule 39**

	(a) 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. The Bill of Costs form corroborates this: http://www.cadc.uscourts.gov/internet/home.nsf/content/VL+-+Forms+-+Bill+of+Costs+Worksheet/$FILE/Bill%20of%20Costs%20Form.pdf

TAB 14

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MEMORANDUM

DATE: October 15, 2015

TO: Advisory Committee on Appellate Rules

FROM: Gregory E. Maggs, Reporter

RE: Item No. 15-AP-G (discretionary appeals of interlocutory orders)

This new item arises out of a brief article written by Associate Dean Alan Morrison of the George Washington University Law School, in response to the Supreme Court's decision in *Bullard v. Blue Hills Savings Bank*, 135 S. Ct. 1686 (2015). *See* Alan Morrison, *Bullard v. Blue Hills Saving Bank: Response by Alan Morrison*, http://www.gwlr.org/bullard-v-blue-hills-savings-bank. The Supreme Court in *Bullard* held that a bankruptcy court's rejection of a debtor's plan under Chapter 13 was not final and was therefore not appealable as of right. As Dean Morrison reads the case, "The Court did not deny that interlocutory review might be appropriate in this case, but concluded that there would be many other cases in which it would not be appropriate, and yet the appealability rule that the debtor sought would apply across the board." This reasoning prompts Dean Morrison to advocate creating a "general rule authorizing discretionary appeals of interlocutory orders, leaving it to the court of appeals to sort through those requests on a case by case basis." Dean Morrison and Howard Eisenberg also made a similar proposal in an article published in 1999. *See* Howard B. Eisenberg & Alan B. Morrison, *Discretionary Appellate Review of Non-Final Orders: It's Time to Change the Rules*, 1 J. App. Prac. & Process 285 (1999).

Dean Morrison compares his proposed rule to Federal Rule of Civil Procedure 23(f), which gives courts of appeal discretion to permit appeals from orders granting or denying class-action certification. Rule 23(f) says:

> (f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

Dean Morrison advocates using Rule 23(f) as a model for creating a general rule authorizing discretionary interlocutory appeals. He recognizes that this rule might increase appeals, but argues that "we would be better off if less time were spent fighting over whether an appeal was authorized and more time focusing on whether the lower court got the correct result."

This proposal raises one major legal question and numerous policy questions. The legal question is whether the Supreme Court would have the power to prescribe the general rule that Dean Morrison proposes. According to Dean Morrison, the Supreme Court could promulgate the proposed rule using the authority granted under the last section of the Rules Enabling Act, 28 U.S.C. § 2072(c) (added in 1990). This section authorizes the Supreme Court to prescribe rules that "may define when a ruling of a district court is final under section 1291 of this title." In support of his proposal, Dean Morrison observes that this provision provided the statutory authority for Rule 23(f). *See also* Committee Note, Fed. R. Civ. P. 23(f) (citing 28 U.S.C. § 2072(c)); *Blair v. Equifax Check Servs., Inc.,* 181 F.3d 832, 834 (7th Cir. 1999) (discussing the policy reasons that Rule 23(f) came into being).

Whether Dean Morrison's interpretation of § 2072(c) is correct is uncertain. While the Supreme Court might use its power under § 2072(c) to establish a rule permitting discretionary review interlocutory appeals of a very specific kind of order—e.g., class certification or decertification as in Rule 23(f)—§ 2072(c) may not give the Supreme Court the power to create a general rule saying, in effect, that any district court order is final and can be reviewed in the discretion of a court of appeals. A total of only thirteen cases have cited 28 U.S.C. § 2072(c). These cases primarily discuss and uphold Rule 23(f). None of the cases addresses the kind of broad interpretation of § 2072(c) that would be necessary for the rule that Dean Morrison proposes. A possibly better source of statutory authority for such a rulemaking project would be 28 U.S.C. § 1292(e), which states: "The Supreme Court may prescribe rules, in accordance with section 2072 of this title, to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under subsection (a), (b), (c), or (d)."

The proposal also raises the policy question of whether the proposed new rule would improve federal litigation. This policy question would appear to depend on factual questions such as: How much time is currently spent litigating whether a district court order is appealable? What would be the costs of creating a general rule permitting discretionary review of any interlocutory orders? Does the predicted benefit outweigh the likely burdens? Dean Morrison does not say much about these questions in his short article on *Bullard v. Blue Hills Savings Bank*, but he and his co-author address them at considerable length and provide litigation statistics in their longer article from 1990. Summarizing the policy arguments, that earlier article concludes:

> [A]ppeals court judges may resist because of a fear that they will be inundated with applications and perhaps even appeals that are accepted. As to the former, there will surely be some increase in appellate workload if this proposal is enacted, but the discretionary determinations will be relatively easy to make and will not require any written opinions. We predict that this increase will be offset by a decrease in time spent on jurisdictional issues that abound under the current law. As for the increase in the actual number of appeals, that is wholly within the control of the courts of appeals. But even if interlocutory appeals increase, many of those cases would be appealed eventually, and others are cases for which

> fairness requires an exception to the final judgment rule, much like the recent amendment to rule 23(f) that will allow discretionary appeals from orders granting or denying class certification. And the answers are likely difficult to discover or predict without considerable study.

Eisenberg & Morrison, *supra*, at 303.

At its October 2015 meeting, the Committee may wish to consider this proposal and how it should be evaluated. Note, however, that the Committee recently considered the matter of interlocutory appeals in general, and the decision in *Mohawk Industries v. Carpenter* in particular, and determined to remove the item from the agenda with no action. Any review of the Morrison proposal should bear in mind that the suggested new rule, like Civil Rule 23(f), presumably would be included in the Civil Rules even though it concerns appeals, and thus would implicate the jurisdiction of the Civil Rules Committee.

Bibliography (sources not included in the Agenda Book because of copyright concerns)

1. Alan Morrison, *Bullard v. Blue Hills Saving Bank: Response by Alan Morrison*, http://www.gwlr.org/bullard-v-blue-hills-savings-bank

2. Howard B. Eisenberg & Alan B. Morrison, *Discretionary Appellate Review of Non-Final Orders: It's Time to Change the Rules*, 1 J. App. Prac. & Process 285 (1999)

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