ADVISORY COMMITTEE
ON
APPELLATE RULES

Denver, CO
April 5-6, 2016

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Advisory Committee on Appellate Rules
April 5 and 6, 2016
Denver, CO

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ADVISORY COMMITTEE ON APPELLATE RULES

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Members, Advisory Committee on Appellate Rules	**Professor Amy Coney Barrett** University of Notre Dame Law School 3165 Eck Hall of Law Notre Dame, IN 46556 **Honorable Michael A. Chagares** United States Court of Appeals United States Post Office and Courthouse Two Federal Square, Room 357 Newark, NJ 07102-3513 **Honorable Allison H. Eid** Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203 **Gregory G. Katsas** Jones Day 51 Louisiana Avenue, N.W. Washington, D.C. 20001-2113 **Neal Katyal, Esq.** Hogan Lovells US LLP Columbia Square 555 Thirteenth Street, N.W. Washington, DC 20004 **Honorable Brett M. Kavanaugh** United States Court of Appeals William B. Bryant United States Courthouse Annex 333 Constitution Avenue, N.W., Room 3004 Washington, DC 20001

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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	C	DC Circuit	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

Principal Staff: Rebecca Womeldorf 202-502-1820

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* Ex-officio

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Liaison for the Advisory Committee on Appellate Rules	**Gregory G. Garre, Esq.**	***(Standing)***
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 Solomon Oliver, Jr.**	***(Civil)***
Liaison for the Advisory Committee on Evidence Rules	**Judge Richard C. Wesley**	***(Standing)***

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TAB 1

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Advisory Committee on Appellate Rules
Table of Agenda Items —April 2016

FRAP Item	Proposal	Source	Current Status
07-AP-E	Consider possible FRAP amendments in response to Bowles v. Russell (2007).	Mark Levy, Esq.	Discussed and retained on agenda 11/07 Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 04/11 Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14 Draft approved 04/15 for submission to Standing Committee Approved by Standing Committee 06/15 Approved by Judicial Conference 09/15 Transmitted to the Supreme Court 10/15
07-AP-I	Consider amending FRAP 4(c)(1) to clarify the effect of failure to prepay first-class postage.	Hon. Diane Wood	Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14 Draft approved 04/15 for submission to Standing Committee Approved by Standing Committee 06/15 Approved by Judicial Conference 09/15 Transmitted to the Supreme Court 10/15
08-AP-A	Amend FRAP 3(d) concerning service of notices of appeal.	Hon. Mark R. Kravitz	Discussed and retained on agenda 11/08 Discussed and retained on agenda 10/15

FRAP Item	Proposal	Source	Current Status
08-AP-C	Abolish FRAP 26(c)'s three-day rule.	Hon. Frank H. Easterbrook	Discussed and retained on agenda 11/08 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14 Draft approved 04/15 for submission to Standing Committee Approved by Standing Committee 06/15 Approved by Judicial Conference 09/15 Transmitted to the Supreme Court 10/15
08-AP-R	Consider amending FRAP 26.1 (corporate disclosure) and the corresponding requirement in FRAP 29(c)	Hon. Frank H. Easterbrook	Discussed and retained on agenda 04/09 Discussed and retained on agenda 04/14 Discussed and retained on agenda 10/14 Discussed and retained on agenda 04/15 Discussed and retained on agenda 10/15
09-AP-B	Amend FRAP 1(b) to include federally recognized Indian tribes within the definition of "state"	Daniel I.S.J. Rey-Bear, Esq.	Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10 Discussed and retained on agenda 10/11 Discussed and retained on agenda 04/12; Committee will revisit in 2017
11-AP-C	Amend FRAP 3(d)(1) to take account of electronic filing	Harvey D. Ellis, Jr., Esq.	Discussed and retained on agenda 04/13 Discussed and retained on agenda 10/15
11-AP-D	Consider changes to FRAP in light of CM/ECF	Hon. Jeffrey S. Sutton	Discussed and retained on agenda 10/11 Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13 Discussed and retained on agenda 04/14 Discussed and retained on agenda 10/14 Discussed and retained on agenda 04/15 Discussed and retained on agenda 10/15

FRAP Item	Proposal	Source	Current Status
12-AP-B	Consider amending FRAP Form 4's directive concerning institutional-account statements for IFP applicants	Peter Goldberger, Esq., on behalf of the National Association of Criminal Defense Lawyers (NACDL)	Discussed and retained on agenda 09/12 Discussed and retained on agenda 10/15
12-AP-D	Consider the treatment of appeal bonds under Civil Rule 62 and Appellate Rule 8	Kevin C. Newsom, Esq.	Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/15 Discussed and retained on agenda 10/15
12-AP-E	Consider treatment of length limits, including matters now governed by page limits	Professor Neal K. Katyal	Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14 Draft approved 04/15 for submission to Standing Committee Approved by Standing Committee 06/15 Approved by Judicial Conference 09/15 Transmitted to the Supreme Court 10/15
12-AP-F	Consider amending FRAP 42 to address class action appeals	Professors Brian T. Fitzpatrick and Brian Wolfman and Dean Alan B. Morrison	Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13 Discussed and retained on agenda 04/14 Discussed and retained on agenda 10/15
13-AP-B	Amend FRAP to address permissible length and timing of an amicus brief in support of a petition for rehearing and/or rehearing en banc	Roy T. Englert, Jr., Esq.	Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14 Draft approved 04/15 for submission to Standing Committee Approved by Standing Committee 06/15 Approved by Judicial Conference 09/15 Transmitted to the Supreme Court 10/15
13-AP-H	Consider possible amendments to FRAP 41 in light of Bell v. Thompson, 545 U.S. 794 (2005), and Ryan v. Schad, 133 S. Ct. 2548 (2013)	Hon. Steven M. Colloton	Discussed and retained on agenda 04/14 Discussed and retained on agenda 10/14 Discussed and retained on agenda 04/15 Draft approved 10/15 for submission to Standing Committee Approved by Standing Committee 01/16

FRAP Item	Proposal	Source	Current Status
14-AP-D	Consider possible changes to Rule 29's authorization of amicus filings based on party consent	Standing Committee	Awaiting initial discussion Draft approved 10/15 for submission to Standing Committee Discussed by Standing Committee 1/16 but not approved
15-AP-A	Consider adopting rule presumptively permitting pro se litigants to use CM/ECF	Robert M. Miller, Ph.D.	Awaiting initial discussion Discussed and retained on agenda 10/15
15-AP-B	Technical amendment – update cross-reference to Rule 13 in Rule 26(a)(4)(C)	Reporter	Draft approved 04/15 for submission to Standing Committee Approved by Standing Committee 06/15 Approved by Judicial Conference 09/15 Transmitted to the Supreme Court 10/15
15-AP-C	Consider amendment to Rule 31(a)(1)'s deadline for reply briefs	Appellate Rules Committee	Awaiting initial discussion Draft approved 10/15 for submission to Standing Committee Approved by Standing Committee 01/16
15-AP-D	Amend FRAP 3(a)(1) (copies of notice of appeal) and 3(d)(1) (service of notice of appeal)	Paul Ramshaw, Esq.	Awaiting initial discussion Discussed and retained on agenda 10/15
15-AP-E	Amend the FRAP (and other sets of rules) to address concerns relating to social security numbers; sealing of affidavits on motions under 28 U.S.C. § 1915 or 18 U.S.C. § 3006A; provision of authorities to pro se litigants; and electronic filing by pro se litigants	Sai	Awaiting initial discussion Discussed and retained on agenda 10/15
15-AP-F	Recovery of appellate fees	Prof. Gregory Sisk	Awaiting initial discussion Discussed and retained on agenda 10/15
15-AP-H	Electronic filing by pro se litigants	Robert M. Miller, Ph.D.	Awaiting initial discussion
16-AP-A	Increase 14-day period for filing notice of appeal to 30 days	Thomas L. Wright, Esq.	Awaiting initial discussion

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Minutes of the Fall 2015 Meeting of the
Advisory Committee on Appellate Rules
October 29-30, 2015

Chicago, Illinois

I. Attendance and Introductions

Judge Steven M. Colloton called the meeting of the Advisory Committee on Appellate Rules to order on Thursday, October 29, 2015, at 9:00 a.m., at the Notre Dame Law Suite in Chicago, Illinois.

In addition to Judge Colloton, the following Advisory Committee members were present: Professor Amy Coney Barrett, Judge Michael A. Chagares, Justice Allison H. Eid, Mr. Gregory G. Katsas, Mr. Neal K. Katyal, Judge Stephen Joseph Murphy III, and Mr. Kevin C. Newsom. Solicitor General Donald Verrilli was represented by Mr. Douglas Letter, Director of the Appellate Staff of the Civil Division, U.S. Department of Justice, and by Mr. H. Thomas Byron III, Appeals Counsel of the Appellate Staff of the Civil Division, both of whom were present. Judge Brett M. Kavanaugh was absent.

Reporter Gregory E. Maggs was present and kept these minutes. Associate Reporter Catherine Struve participated by telephone for all but brief portions of the meeting.

Also present were Judge Jeffrey S. Sutton, Chair of the Standing Committee on Rules of Practice and Procedure; Ms. Rebecca A. Womeldorf, Secretary of the Standing Committee on Rules of Practice and Procedure and Rules Committee Officer; Mr. Michael Ellis Gans, Clerk of Court Representative to the Advisory Committee on Appellate Rules; Professor Daniel R. Coquillette, Reporter, Committee on Rules of Practice and Procedure; and Ms. Shelly Cox, Administrative Specialist in the Rules Committee Support Office of the Administrative Office.

Judge Robert Michael Dow Jr., a member of the Advisory Committee on Civil Rules arrived at 11:30 a.m. and left at 12:30 p.m. Mr. Alex Dahl of Lawyers for Civil Justice also attended portions of the meeting as an observer.

Judge Colloton called the meeting to order. He thanked Professor Barrett for her efforts in making the Notre Dame Law Suite available to the Committee for this meeting. Judge Colloton mentioned that Judge Peter T. Fay and Judge Richard G. Taranto had completed their service on the Committee. Judge Colloton welcomed Judge Murphy as a new member. Judge Colloton also explained that Judge Kavanaugh is a new member but was unable to attend. Judge Colloton thanked Professor Struve for her long and diligent service as the reporter and her great assistance during the transition, and the Committee applauded. Judge Colloton introduced Professor Maggs as the new

reporter for the committee. Judge Colloton also announced that Ms. Marie Leary, Research Associate for the Appellate Rules Committee was unable to attend.

II. Approval of the Minutes of the April 2015 Meeting

Judge Colloton directed the Committee's attention to the approval of the minutes from the April 2015 meeting. An attorney member asked about the Committee's policy regarding the identification of speakers in its meetings. He observed that the minutes mostly did not identify speakers by name but sometimes included identifying information. Professor Coquillette said that the tradition was not to identify members of the Committee when they speak because of concerns about outside lobbying and about the ability of speakers to speak freely.

Two attorney members favored having the minutes identify speakers. Another attorney member spoke in favor of identifying speakers, noting that it was a public meeting. A judge member said that the practice of not identifying members had been in place for many years. He believed that the practice should be the same across committees. But he further said that he did not think that identifying members in the minutes would affect lobbying. Mr. Letter said that representatives of the Department of Justice should be identified as such, which has been the practice. The Committee did not vote on whether to change the traditional practice, leaving the matter open for further consideration.

An attorney member called the Committee's attention to page 19 of the minutes [Agenda Book at 39], and asked Judge Colloton whether a representative of the Committee had spoken to the Fifth Circuit about its local rules on the length of briefs. Judge Colloton said that no conversation had yet occurred with the Fifth Circuit because it seemed premature. The proposed amendment to the federal rules is still pending, and if it is adopted, then the Fifth Circuit might opt out of the new length limits or modify its local rule.

The minutes of the Spring 2015 meeting were approved by voice vote.

Judge Colloton mentioned that the minutes of the Standing Committee's May 2015 meeting were not available in time for inclusion in the Agenda Book for this meeting. He summarized the meeting, noting that the Standing Committee had approved all of the amendments proposed by the Appellate Committee. The Judicial Conference also has approved the proposed amendments, and they have gone to the Supreme Court. Judge Sutton said that the Standing Committee was grateful to the Appellate Rules Committee for preparing the proposed amendments.

III. Action and Discussion Items

A. Item No. 13-AP-H (FRAP 41)

Judge Colloton introduced Item No. 13-AP-H, reminding the Committee that the item concerns possible amendments to Rule 41 that would (1) clarify that a court of appeals 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.

Judge Colloton recounted that at its April 2014 meeting, the consensus of the Committee was that the words "by order" should be restored to Rule 41(b). Thus, a court would have to enter an order if it wished to stay the issuance of the mandate.

On the issue of the standard for ordering a stay, the Committee discussed whether to add an "extraordinary circumstances" test to Rules 41(b) and 41(d)(4). A judge member said that the standard under Rule 41(d)(4) was in fact already extraordinary circumstances and that the proposed amendment would be merely a codification of existing practice. The judge member said that it is not clear what the current standard is under Rule 41(b).

An attorney member asked whether judges should have to state their reasoning for an extension. Several members were opposed to adding such a requirement.

The consensus of the Committee was to add the "extraordinary circumstances" test to both Rules 41(b) and 41(d)(4). The Committee then discussed how to phrase the wording. An academic member suggested that Rule 41(b) and (d)(4) should be phrased consistently. An attorney member suggested that the phrase "unless extraordinary circumstances exist" for Rule 41(d). The Committee also agreed to this proposal by consensus.

The Committee then considered Professor Kimble's style suggestions as shown in the Agenda Book. The Committee approved the suggested changes, including his proposal to delete the word "certiorari" in Rule 41(d)(1) and (d)(4).

The Committee then set this item aside so that the Reporter could prepare a document showing all of the changes proposed at the meeting. The Committee resumed discussion of this item at the end of the meeting. The Reporter circulated electronically a document showing the changes.[1]

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[1] The circulated electronic document contained the following text, which the Committee approved:

> **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 extraordinary circumstances or under Rule 41(d).
>
> (c) **Effective Date.** The mandate is effective when issued.
>
> (d) **Staying the Mandate Pending a Petition for Certiorari.**
>
> ~~(1) **On Petition for Rehearing or Motion.** The timely filing of a~~

An attorney member of the Committee asserted that Rule 41(b) is warranted by the interest in finality which warrants a high bar. The member also asserted that Rule 41(d)(4) codifies the Supreme Court's decisions.

After reviewing the changes, Committee approved the revised version of the rule by consensus. A judge member moved to send the draft, as approved, to the standing committee. An academic member seconded the motion. The Committee approved the motion by voice vote.

B. Item No. 08-AP-H (Manufactured Finality)

Judge Colloton introduced Item No. 08-AP-H and recounted its history. He explained that 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. A judge member moved to remove the item from the agenda, and another judge member seconded the motion. Without further discussion, the Committee approved the motion by voice vote.

C. Item No. 08-AP-R (FRAP 26.1 & 29(c) disclosure requirements)

Judge Colloton introduced Item No. 08-AP-R. He reminded the Committee that local rules in various circuits impose disclosure requirements that go beyond those found in Rules 26.1 and 29(c), which call for corporate parties and amici curiae to file corporate disclosure statements. Judge Colloton said that the issue is whether additional disclosures should be required and, if so, which additional disclosures.

~~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.

~~(D)~~ (4) The court of appeals must issue the mandate immediately on receiving ~~when~~ a copy of a Supreme Court order denying the petition ~~for writ of certiorari is filed~~, unless extraordinary circumstances exist.

The Committee turned its attention to the discussion drafts of Rules 26.1 and 29 [Agenda Book 117-119].

A judge member said that, as a general matter, judges would prefer more disclosure up front so that they do not spend time on a case before a conflict is discovered. An attorney member said that an opposing consideration was that requiring more disclosure could be onerous to attorneys.

The committee then turned its attention to specific issues in the discussion draft. The summary of the Committee discussion in these minutes has been re-ordered to follow the structure of the rules.

Rule 26.1(a)(1): Members of the Committee discussed the draft proposal to add the words "or affiliated." Given the indefiniteness of this phrase, the Committee considered whether the words should be omitted.

Rule 26.1(a)(2): Members of the Committee were concerned that merely requiring a party to list the "trial" judges in prior proceedings might be insufficient. In a habeas case, for example, both trial and appellate judges may have taken part in prior proceedings. A judge member proposed that the word "trial" should be removed.

Rule 26.1 (a)(3): An attorney member said the term "partners and associates" should be changed to "attorneys" or "lawyers." He also asked whether the term "law firms" was appropriate, given that entities other than law firms, such as public interest organizations, might represent parties in a lawsuit. He suggested replacing "law firms" with "legal organizations."

Rule 26.1(d): Mr. Letter observed that in antitrust cases, requiring the disclosure of an organizational victim could be problematic because there could be thousands of victims.

Rule 26.1(f): The Committee considered whether the word "intervenor" should be replaced with the term "putative intervenor." The Committee also considered whether subsection (f) should be deleted as unnecessary because, following intervention, intervenors would be parties and would be covered by the rule.

Rule 29(c)(5)(D): The discussion of this provision focused on two questions. One question was whether (D) should be deleted. Two attorney members said that attorneys often do not list everyone who worked on a brief. One of the attorney members asked this hypothetical: "If a lawyer read a brief and gave a few comments, would that have to be disclosed?" A judge member asked this hypothetical: "If a judge's son or daughter wrote a brief, should that have to be disclosed or not?" An academic member asked whether there were actual examples of past problems. A judge member thought that the rule was unrealistically strict. The second question discussed was, if (D) is not deleted, whether the phrase "contributed to" was too broad. A judge member suggested using the word "authored" because it would not include those who merely reviewed a brief and made

comments. Mr. Letter asked whether the Supreme Court has experience with what the word "authored" meant.

Following all of the discussion, the sense of the Committee appeared to be that the draft should be revised, to delete "trial" in Rule 26.1(a)(2); to replace "partners and associates" with "lawyers" and to replace "law firms" with "legal organizations" in Rule 26.1(a)(3); and either to strike Rule 29(c)(5)(D) or to replace the phrase "contributed to the preparation" with "authored in whole or part." The Committee did not make definite conclusions with respect to the other issues. Judge Colloton said that he did not think the item was ready to send to the Standing Committee.

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

Judge Colloton introduced Item No. 12-AP-F, which concerns possible problems when objectors to class action settlements ask for consideration to drop their appeals. Judge Colloton then turned the discussion over to Judge Dow, who discussed the work of the Civil Committee. Judge Dow began by saying that Prof. Catherine Struve's memorandum [Agenda Book at 145-171] was directly on point.

Judge Dow explained that while it would be an error to say that all class action settlement objectors are bad, some objectors may be causing delays with extortionate appeals. He explained that a class member may lay low while a class action settlement is negotiated, file a pro forma objection to the settlement in the district court, and then surface by filing an appeal. After filing the appeal, the objector then may call counsel and ask for money to make the appeal go away.

Judge Dow said that the proposed changes have two parts. First, objectors must state their grounds for objection to a class action settlement under the proposed Federal Rule of Civil Procedure 23(e)(5)(A) [Agenda Book, at 203-204]. Second, a district court would have to approve any withdrawal of an objection under the proposed Rule 23(e)(5)(C) [Agenda Book at 204]. This requirement of approval would not only allow district judges to prohibit "a payoff" but also likely would discourage extortionate objections. Judge Dow said that the appellate and civil committees need to work together to determine the implementation.

A judge member asked whether the proposed Rule 23(e)(5)(C) was a permissible Civil Rule given that it effectively would limit what happens in the appellate courts. The judge member also asked how a payment would come to the attention of the court of appeals absent a rule that the objector or class counsel must disclose the payment. Another judge said that courts would not usually become involved in the withdrawal of an appeal. Judge Dow agreed that the Federal Rules of Appellate Procedure also should address the issue. Mr. Byron asked whether the sketch of Appellate Rule 42(c) [Agenda Book at 141] would suffice. Mr. Letter asked whether a payoff to a class action objector would be less of a concern if the money was coming out of the class counsel's fees. Judge Sutton asked whether an "indicative rule" under proposed Rule 42(c) would work. An attorney member said that proposed Rule 42(c) was inconsistent with general practice because it would require the court of appeals to refer a matter to the district court. Mr. Byron did not think it was inconsistent,

and Judge Sutton suggested that the procedure contemplated would be like sending a case back for a determination of whether there is jurisdiction. Mr. Letter also thought that if there was nothing in the Appellate Rules about withdrawing appeals, litigants might not know to look at Civil Rule 23. The clerk representative asked what the district court would do with the case when it was sent back. Judge Dow suggested that perhaps Rule 42 should require disclosure and approval of a fee. Judge Sutton suggested that an alternative would be for class counsel to seek an expedited appeal to reduce the pressure for class objectors. Mr. Letter said that the procedure might be burdensome because parties settle with appellants all the time. Prof. Coquillette suggested that it is an attorney conduct problem.

Judge Dow said that he would take this matter to back to Civil Rules Committee to discuss the issues. He emphasized that the sketch of proposed Rule 42(c) is a work in progress.

Mr. Dahl asked about the "indicative ruling" under Rule 23(e)(5): If the district court does approve the payment, could the objector appeal the indicative ruling? Judge Colloton suggested that it would remain in the Court of Appeals.

The Committee was in recess for lunch.

D. Item No. 15-AP-C (Deadline for Reply Briefs)

Judge Colloton introduced Item No. 15-AP-C. He summarized past discussions, which had recognized that most appellants now have effectively a total of 17 days to serve and file reply briefs because of the 14 days provided by Rule 31(a)(1) and the 3 additional days provided by Rule 26(c). The proposed revision of Rule 26(c) to eliminate the 3 additional days when appellants serve and file documents electronically will effectively reduce the time for serving and filing a reply brief to 14 days. Judge Colloton said that the questions for the Committee are whether to modify Rule 31(a) to extend the period from 14 days and, if so, whether the extended period should be 17 days or 21 days.

Judge Colloton noted that one question previously raised had been whether extending the time for filing and serving a reply brief would reduce the time before oral argument. On this point, he noted that statistics suggest that the extension from 14 days to 21 days would be unlikely to have a material effect because in federal courts of appeal the mean period from the filing of the last appellate brief to oral argument is currently 3.6 months [see Agenda Book at 265]. In addition, the clerk representative recalled that a study had shown that no courts had waited until a reply brief is filed before scheduling oral argument.

An attorney member said that 14 days was too short for preparing and filing a reply brief. He further said that he would prefer 21 days to 17 days, explaining that the time for filing and serving a reply brief was already shorter than the time for filing other briefs. He believed that the benefit to attorneys and clients would come at very little cost to the system. Another attorney member said that attorneys in practice had internalized the 17-day period. He noted also that the period for filing a reply brief starts when the response is actually filed, not when it is due, and the uncertainty of when

the response will be filed also may make filing a reply in 14 days difficult. He supported 21 days. Professor Coquillette supported 21 days because 21 days is a multiple of 7 days, which helps keep the reply brief due on a weekday. The appellate clerk liaison agreed that multiples of 7 days are slightly easier for the clerks office to work with. An attorney member believed that additional time will help lawyers produce better briefs. An appellate judge member said that the Supreme Court of Colorado has the same schedule as the current federal rule. Another appellate judge emphasized that there should be a replacement for the lost three days and that 21 days made more sense than 17 days.

The sense of the Committee was to modify the Rules to extend the period for filing and serving reply briefs from 14 days to 21 days. Judge Colloton suggested that the Committee's reporter prepare a marked-up draft showing the exact changes to Rules 31(a)(1) and 28.1(f)(4). The Committee would then have an opportunity to vote on the proposed changes by email.

E. Item No. 14-AP-D (amicus briefs filed by consent of the parties)

Judge Colloton introduced Item No. 14-AP-D, which came to the advisory committee's attention through discussion at the June meeting of the Standing Committee. He explained that some circuits have created local rules that appear to conflict with Rule 29(a). Although Rule 29(a) says that an amicus may file a brief if all parties have consented to its filing, some local rules bar filing of amicus briefs that would result in the recusal of a judge. Judge Colloton said that questions for the Committee are whether Rule 29(a) is optimal as written or whether Rule 29(a) should be revised to permit what the local rules provide.

An appellate judge member explained how allowing the filing of an amicus brief in some cases might require a judge to recuse himself or herself. Although this possibility might not happen often in panel cases, he explained that it could happen when a court hears a case en banc.

An attorney member supported the position of the local rules. He proposed adding this sentence to the end of Rule 29(a): "The court may reject an amicus curiae brief, including one submitted with all parties' consent, where it would result in the recusal of any member of the court." An appellate judge member asked whether there was a way to reword the proposal because it seemed odd to reject a brief after it had been filed.

Mr. Byron suggested that Rule 29(a) could be amended to allow circuits to adopt local rules. An attorney member responded that a broad authorization might be problematic because a circuit might bar all amicus briefs.

After further discussion, it was the sense of the Committee that the local rules were reasonable and that Rule 29(a) should be amended to allow the kinds of local rules that have been adopted by the D.C., Second, Fifth, and Ninth Circuits. Judge Colloton asked the Committee's reporter to draft and circulate proposed language for revising Rule 29(a) to achieve the Committee's objective. He suggested that the Committee could vote on a proposed amendment by email.

F. Item No. 12-AP-D (Civil Rule 62/Appeal Bonds)

Judge Colloton briefly recounted the history of this agenda item and thanked all those who had worked on it. Judge Colloton then invited Mr. Newsom to discuss the matter. Mr. Newsom began by asking the Committee to compare the current version of Federal Rule of Civil Procedure 62 to the proposed "September 2015 Draft" revision of Rule 62 [Agenda Book at 294]. Mr. Newsom then identified four principal points for consideration: (1) Under the current rule, there is a gap between the automatic 14-day stay of a judgment and the deadline for filing anything attacking the judgment. (2) Most appellants currently obtain a single bond (or other form of security) to cover both the post-judgment period and the appeal period, but the current rule seems to anticipate two different bonds. (3) Although the current rule contemplates that appellants will give a bond as security, sometimes appellants provide a letter of credit or other form of security. (4) The current rule does not specify an amount for the bond.

Mr. Newsom explained that the proposed Rule 62(a)(1) would extend the automatic stay from 14 to 30 days, unless the court orders otherwise. This extension would address the current gap between the 14-day stay of judgment and the deadline for filing an appeal or other attack on the judgment. Mr. Newsom explained that a court might "order otherwise" if the court is concerned about the possibility that the losing party might try to hide assets during the period of the stay. The proposed revision of Rule 62(a)(2) authorizes a stay to be secured by a bond or by other form of security, such as a letter of credit or an escrow account. Mr. Newsom noted that the proposed rule does not contemplate that the appellant would have to post more than one form of security. The proposed rule, like the current rule, does not specify an amount of the bond or other security. Proposed Rule 62(a)(3) authorizes a court to grant a stay in its discretion.

An attorney member was concerned about what might happen if a judge did not grant a stay to the appellant and the appellee lost on appeal. Mr. Newsom explained that the proposed revision of Rule 62(c) would allow a district court to impose terms if the district court denied a stay.

An attorney member was concerned that the proposed revision of Rule 62(b) would allow a court to refuse a stay for good cause even though an appellant had provided security. The attorney member thought that this proposed rule was contrary to current practice. The attorney member asserted that practitioners currently assume that if a client who has lost at trial posts a sufficient bond, the client is entitled to a stay. An appellate judge member asked whether the proposed Rule 62(b) should be rewritten to make clear that ordinarily a stay would be granted. Another appellate judge member asked whether this portion of the proposed Rule 62(b) should be eliminated.

Mr. Byron suggested that the appellee might have other options besides needing the denial of a stay.

Mr. Letter reminded the Committee that in a case in which the government is involved there is an automatic 60-day period in which to file an appeal. *See* Fed. R. App. P. 4(a)(1)(B). As a result, even extending the automatic stay from 14 to 30 days will still lead to a gap.

Judge Sutton said that the current version of Rule 62 is somewhat ambiguous. He wondered whether that ambiguity might not be beneficial because it affords discretion.

Judge Colloton reminded the Committee that the proposal concerned a Federal Rule of Civil Procedure, rather than a Federal Rule of Appellate Procedure. But he emphasized that the Committee may want to provide feedback to the Civil Rules Committee because the issue affects appellate lawyers. He suggested communicating to the Civil Rules Committee that concerns were raised among appellate lawyers that the current rule, in practice, has meant that there is a right to a stay if the appellant posts a bond, and that the proposed Rule 62(b) appears to represent a shift in policy, such that a stay upon posting security is not assured.

Summing up the discussion, Mr. Newsom asked whether the Committee thought it was acceptable for proposed Rule 62(a)(2) to require only a single bond and to allow for alternative forms of security other than bonds, and for proposed Rule 62(a)(1) to extend the period of the automatic stay from 14 days to 30 days. This was the sense of the Committee.

G. Item No. 12-AP-B (FRAP Form 4 and institutional-account statements)

The reporter introduced Item No. 12-AP-D, which concerns Federal Rules of Appellate Procedure Form 4. Question 4 requires a prisoner "seeking to appeal a judgment in a civil action or proceeding" to attach an institutional account statement. The proposal is to add the phrase "(not including a decision in a habeas corpus proceeding or a proceeding under 28 U.S.C. § 2255)" to Question 4 so that prisoners would not have to attach such statements in habeas cases. The reporter noted that Form 4 was amended in 2013 but the word processing templates for Form 4 which are available at the U.S. Courts website had not yet been updated and still contain the pre-2013 language.

The clerk representative said that institutional account statements are currently filed in many cases in which they are not needed. He further said that filed forms are not made public.

Mr. Letter said that he would ask the Bureau of Prisons to determine whether preparing the account statements is burdensome. The clerk representative said that he would inquire about whether the form is burdensome for clerks of courts.

The reporter said that he would notify those responsible of the need to update the word processing forms available on the U.S. Courts website.

The sense of the Committee was to leave the matter on the agenda until more information is obtained and the word processing templates are corrected.

H. Item No. 14-AP-C (Issues relating to *Morris v. Atichity*)

The reporter introduced Item No. 14-AP-C, which is a proposed rule that would require

courts to resolve issues raised by litigants. The reporter reminded the Committee that the item was included on the agenda for the April 2015 meeting, but the Committee did not have time to address it.

Following a brief discussion of the points raised in Professor Daniel Capra's memorandum [Agenda Book at 369-370], an attorney member moved that Committee take no action and remove the item from the agenda. Another attorney member seconded the motion. The Committee approved the motion by voice vote.

I. Item Nos. 08-AP-A, 11-AP-C, 11-AP-D, 15-AP-A, and 15-AP-D (Possible amendments relating to electronic filing)

Judge Chagares introduced these items. The Committee's discussion focused on three issues. The first issue was whether pro se litigants should be permitted to file electronically. Judge Chagares said that a consensus appears to be emerging among the Advisory Committees that pro se litigants should be barred from using electronic filing unless local rules allow. Professor Coquillette cautioned that it may be undesirable to allow the circuits to adopt their own approaches because of the benefits of uniformity.

The clerk representative said that the Eighth Circuit allows pro se prisoners to file electronically and the clerk's office then uses the filing to serve the parties electronically. He said that this approach has not been problematic to date, but he cautioned that a handful of pro se litigants conceivably might abuse the system.

Judge Chagares said that the Advisory Committees have been discussing how to handle signatures on electronically filed and served documents. He suggested that the rules should specify that logging in and sending constitutes signature.

Finally, Judge Chagares addressed the current rules requiringg a filing to contain a proof of service. He suggested that proof of service should not be required when there is electronic filing.

Judge Colloton explained that the Committee at this time did not need to reach any final conclusion, but instead only to develop a sense of the issues. He suggested that the Committee should wait until the Advisory Committees on the Civil and Criminal Rules have considered the matters, and that the advisory committees should coordinate their approaches. This was the sense of the Committee.

J. Item No. 15-AP-E (FRAP amendments relating to social security numbers etc.)

The reporter introduced Item No. 15-AP-E, which concerns four proposals, namely: (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 in 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. The reporter noted that the Committee had just discussed the fourth issue in connection with the previous item.

The social security number issue concerns Federal Rule of Civil Procedure 5.2(a)(1), which allows filed documents to contain only the last four digits of a person's social security number. Although this is a rule of civil procedure, the matter concerns this Committee because Federal Rule of Appellate Procedure 25(a)(5) makes Rule 5.2 applicable to appeals. In addition, Form 4 specifically asks movants seeking leave to proceed in forma pauperis to provide the last four digits of their social security numbers. The clerk representative believed that these last four digits are no longer used for any purpose. He noted that similar forms (i.e., AO 239/240, "Application to Proceed in District Court Without Prepaying Fees or Costs") are used in the district courts.

After a brief discussion, based on the information available at the meeting, it was the sense of the Committee that Form 4 should not ask movants for the last four digits of their social security number. It was also the sense of the Committee that motions for leave to proceed in forma pauperis should not be sealed. A judge member expressed the view that these petitions are court documents and that the other party in a lawsuit should not be prevented from seeing them. No votes, however, were taken on either issue.

The proposal to require litigants to provide cited authorities to pro se litigants concerns local district court rules, but Federal Rule of Appellate Procedure 32.1(b) already partly addresses the concerns raised in the proposal. An attorney member asked whether Rule 32.1(b) refers only to free publicly accessible databases or would include databases like Westlaw and Lexis for which payment is required. Another Committee member responded that the Advisory Committee Note to Rule 32.1 says that publicly accessible databases could include "a commercial database maintained by a legal research service or a database maintained by a court."

Judge Colloton suggested that the item be retained on the agenda for the spring meeting. The Appellate Committee will see what the Civil Committee recommends before taking action.

K. Item No. 15-AP-F (Recovery of Appellate Docketing Fee after Reversal)

The reporter introduced this new item, which concerns the procedure by which an appellant who prevails on appeal may recover the $500 docketing fee. The majority of circuits allow recovery of this fee as costs in the circuit court but a few courts require litigants to recover this fee in the district court. The proposal was to amend Rule 39 to require courts to follow what is now the majority approach.

A judge member question whether an amended rule was necessary. It may be that the circuits that do not allow for the recovery of costs in the circuit courts are not following the current rule. The clerk representative said that the Eighth Circuit has not always been consistent in its approach. He further said that he would raise the issue with other clerks of court to determine their practice.

The Committee took no action on the matter and left it on the agenda.

L. Item No. 15-AP-G (discretionary appeals of interlocutory orders)

The reporter introduced Item No. 15-AP-G, explaining that its proponent requested 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." The reporter briefly summarized the proponent's argument as outlined in the memorandum on the item [Agenda Book at 491-494].

A judge member said that in Colorado all orders are appealable with leave of the Supreme Court. In her experience, the process often took a lot of time. She said that the trial courts typically will stay the litigation while the interlocutory appeal is pending.

A judge member and an attorney member spoke against the proposal, questioning both its benefits and the authority to pass such a rule.

Following brief discussion, an attorney member moved that the Committee take no action on Item No. 15-AP-G and remove the item from the agenda. The motion was seconded. After brief discussion, the Committee voted by voice to remove the item.

IV. Concluding matters

Judge Colloton explained that the reporter would circulate for vote by email the final proposed language for two items. For Item No. 14-AP-D, the reporter will circulate a revised version of Rule 29(a), as amended to authorize local rules that would prevent the filing of an amicus brief based on party consent when filing the brief might cause the disqualification of a judge. For Item 15-AP-C, the reporter will circulate revised versions of Rules 31(a)(1) and 28.1(f)(4), amended to extend the deadline for filing and serving a reply brief from 14 days to 21 days.

Judge Colloton said that proposed revisions of Rules 26.1 and 29(c) concerning disclosure requirements were not ready for circulation. The consensus among the Committee was that Item No. 08-AP-R should be held over until the spring.

The Committee adjourned at 5:00 pm.

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MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 7, 2016 | Phoenix, AZ

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ATTENDANCE

The Judicial Conference on Rules of Practice and Procedure held its spring meeting in Phoenix, Arizona on January 7, 2016. The following members participated in the meeting:

Judge Jeffrey S. Sutton, Chair
Associate Justice Brent E. Dickson
Roy T. Englert, Esq.
Gregory G. Garre, Esq.
Daniel C. Girard, Esq.
Judge Neil M. Gorsuch
Judge Susan P. Graber
Professor William K. Kelley
Judge Patrick J. Schiltz
Judge Amy St. Eve
Judge Richard C. Wesley
Judge Jack Zouhary

The following attended on behalf of the advisory committees:

Advisory Committee on Appellate Rules –
Judge Steven M. Colloton, Chair
Professor Gregory E. Maggs, Reporter

Advisory Committee on Bankruptcy Rules –
Judge Sandra Segal Ikuta, Chair
Professor S. Elizabeth Gibson, Reporter (by teleconference)
Professor Michelle M. Harner, Reporter

Advisory Committee on Civil Rules –
Judge John D. Bates, Chair
Professor Edward H. Cooper, Reporter
Professor Richard L. Marcus, Reporter

Advisory Committee on Criminal Rules –
Judge Donald W. Molloy, Chair
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Reporter

Advisory Committee on Evidence Rules –
Judge William K. Sessions III, Chair
Professor Daniel J. Capra, Reporter

Elizabeth J. Shapiro, Esq., Deputy Director for the Civil Division of the Justice Department, represented the Department of Justice on behalf of the Honorable Sally Quillian Yates, Deputy Attorney General.

Other meeting attendees included: Judge David G. Campbell; Judge Scott Matheson, Jr. (teleconference); Judge Robert M. Dow (teleconference); Judge Phillip R. Martinez and Sean Marlaire, representing the Court Administration and Case Management Committee ("CACM"); Professor Bryan A. Garner, Style Consultant; Professor R. Joseph Kimble, Style Consultant; Professor Geoffrey C. Hazard, Jr., Consultant.

Providing support to the Committee:

Professor Daniel R. Coquillette	Reporter, Standing Committee
Rebecca A. Womeldorf (by teleconference)	Secretary, Standing Committee
Julie Wilson (by teleconference)	Attorney Advisor, RCSO
Scott Myers	Attorney Advisor, RCSO
Bridget M. Healy (by teleconference)	Attorney Advisor, RCSO
Shelly Cox	Administrative Specialist
Tim Reagan	Senior Research Associate, FJC
Derek A. Webb	Law Clerk, Standing Committee
Amelia G. Yowell (by teleconference)	Supreme Court Fellow, AO

INTRODUCTORY REMARKS

Judge Sutton called the meeting to order. He introduced two new members of the Standing Committee, Daniel Girard and William Kelley, welcomed back Bryan Garner as a Style Consultant, welcomed Judge John Bates as the new chair of the Advisory Committee on Civil Rules and Judge Donald Molloy as the new chair of the Advisory Committee on Criminal Rules, and introduced Greg Maggs as the new reporter for the Advisory Committee on Appellate Rules and Michelle Harner as a new reporter for the Advisory Committee on Bankruptcy Rules. He thanked Judge Phillip Martinez and Sean Marlaire for representing CACM. And he reminded the attendees that Justice O'Connor would attend the dinner meeting.

Judge Sutton reported that the civil rules package, which included revisions of Rules 1, 4, 16, 26, 30, 31, 33, 34, 37, and 55, and abrogation of Rule 84, and Bankruptcy Rule 1007, went into effect on December 1, 2015. He observed that Chief Justice Roberts devoted his year-end report to that package.

Judge Sutton also reported that the Judicial Conference submitted various rule proposals to the Supreme Court on October 9, 2015 (Appellate Rules 4, 5, 21, 25, 26, 27, 28, 28.1, 29, 32, 35, and 40, and Forms 1, 5, and 6, and proposed new Form 7; Bankruptcy Rules 1010, 1011, 2002, 3002.1, 9006(f), and new Rule 1012; Civil Rules 4, 6, and 82; and Criminal Rules 4, 41, and 45) and again on October 29, 2015 (Bankruptcy Rules 7008, 7012, 7016, 9027, and 9033, known as the "*Stern* Amendments").

APPROVAL OF THE MINUTES OF THE LAST MEETING

Upon a motion by a member, seconded by another, and by voice vote: **The Standing Committee approved the minutes of the May 28, 2015 meeting.**

INTER-COMMITTEE WORK

Judge Sutton reserved discussion of electronic filing, service, and notice requirements for the Advisory Committee on Criminal Rules' report on Criminal Rule 49.

Professor Capra discussed the 2015 study conducted by Joe S. Cecil of the Federal Judicial Center entitled *Unredacted Social Security Numbers in Federal Court PACER Documents*, which discussed unredacted social security numbers in documents filed in federal courts and thus available in PACER, notwithstanding the "privacy rules" adopted in 2007 that require redaction of such information. The Standing Committee concluded that this problem could not be resolved by another rule amendment, and offered to support those in CACM who would address implementation of the existing rule at their summer 2016 meeting.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Molloy reported that the Advisory Committee on Criminal Rules had no action items and six information items.

Information Items

Rule 49 – Rule 49 provides that service and filing must be made "in the manner provided for a civil action." The Advisory Committee is considering ways to amend this rule in anticipation of a likely change in the civil rules that will require all parties to file and serve electronically. After study by the Rule 49 Subcommittee chaired by Judge David Lawson, the Advisory Committee concluded that such an electronic default rule could be problematic in the criminal context for two reasons. First, pro se defendants and pro se prisoners filing actions under § 2254 and § 2255 rarely have unfettered access to the CM/ECF system. Second, the architecture of CM/ECF does not permit non-party filings in criminal cases. Therefore, the Advisory Committee favors severing the link to the civil rules governing service and filing and is drafting a stand-alone Rule 49 that does not incorporate Civil Rule 5. They plan to submit a final draft rule to the Standing Committee in June 2016.

The Standing Committee then discussed the general topic of incorporation by reference across the various sets of rules. Consensus formed around the idea that whenever an advisory committee is considering changing a rule that is incorporated by reference, or is parallel with language in another set of rules, it should always first coordinate with the committee responsible for those other rules before sending proposed changes out for notice and comment.

Members also agreed that the presumption in favor of parallel language across the rules suggested that changes to Rule 49 should depart as little as possible from the language of Civil Rule 5.

Rule 12.4(a)(2) – After an amendment in 2009, the Code of Judicial Conduct no longer treats as "parties" all victims entitled to restitution. The Department of Justice consequently recommended a corresponding amendment to Rule 12.4(a)(2), which assists judges in

determining whether to recuse themselves based on the identity of any organizational or corporate victims. The Advisory Committee agreed with this recommendation and created a subcommittee to draft a proposed amendment. Because a parallel provision exists in the Appellate Rules, the Advisory Committee on Criminal Rules is working with the Advisory Committee on Appellate Rules to draft the amendment.

Rule 15(d) – The Advisory Committee appointed a subcommittee to study whether to amend this rule and its accompanying note, which governs payment of deposition expenses, in light of an inconsistency between the text of the rule and the committee note. Judge Molloy said the text of the rule accurately identifies who bears the costs, but the note slightly mischaracterizes the rule by suggesting that the Department of Justice would have to pay for certain depositions overseas even if it did not request them. The Advisory Committee is struggling with how to fix this problem given the presumption that it cannot amend a note absent a rule revision. The Subcommittee will make its recommendations about how to fix this potential problem at the April 2016 meeting of the Advisory Committee.

Rule 32.1 – At the suggestion of Judge Graber, the Advisory Committee has examined whether Rule 32.1 should track the language of Rule 32 and require the court to give the government an opportunity to allocute at a hearing for revocation or modification of probation or supervised release. In a couple of cases, the United States Court of Appeals for the Ninth Circuit has held that the court must grant the government this opportunity and imported procedural rules from Rule 32 to fill "gaps" in Rule 32.1. After discussing the matter at its September 2015 meeting, the Advisory Committee decided to let this issue percolate and watch for developments in other circuits before considering any rule amendments.

Rule 23 – The Advisory Committee considered a suggestion to revise Rule 23 to allow oral waivers of trial by jury. The current rule requires a written stipulation from the defendant if they want to waive a jury trial and from the parties if they want to have a jury composed of fewer than twelve persons. Several cases have held that an oral waiver is sufficient if it is made knowingly and intelligently and have held that the failure to make the waiver in writing was harmless error. After study, the Advisory Committee decided against pursuing an amendment to Rule 23 because so many other criminal rules require written waivers and because the doctrine of harmless error covers this issue.

Rule 6 – In response to a suggestion to consider several amendments to Rule 6, which governs grand jury procedures, after a thorough discussion, the Advisory Committee decided to retain the current rule.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Colloton reported that the Advisory Committee on Appellate Rules had three action items in the form of three sets of proposed amendments to be published this upcoming summer for which it sought the approval of the Standing Committee.

Action Items

STAYS OF THE ISSUANCE OF THE MANDATE: RULE 41 – The Advisory Committee sought approval of several amendments to Rule 41 designed to respond to two Supreme Court cases that highlighted some ambiguity within the Rule and to remove some redundancy from the Rule.

The proposed amendment to Rule 41(b) clarifies that a circuit court can extend the time of a stay of its mandate "by order" and not simply by inaction. In response to a question from a member, the Standing Committee discussed the pros and cons of inserting "only" in front of "by order" but decided to leave the language as is, with the potential to revisit at the June 2016 Standing Committee meeting. The proposed amendment to Rule 41(d)(4) next clarifies that a circuit court can "in extraordinary circumstances" stay a mandate even after it receives a copy of a Supreme Court order denying certiorari, thereby adopting the same extraordinary circumstances standard that the Supreme Court has found is required to recall a mandate. Finally, the Advisory Committee proposed deleting Rule 41(d)(1), which replicates Rule 41(b) regarding the effect of a petition for rehearing on the mandate, and is therefore redundant.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed amendments to Rule 41 and their accompanying Committee Notes.**

AUTHORIZING LOCAL RULES ON THE FILING OF AMICUS BRIEFS: RULE 29(A) – The Advisory Committee sought approval of an amendment to Rule 29(a) that would authorize local rules that prohibit the filing of amicus briefs, even if the parties have consented to their filing, in situations where they would disqualify a judge. As it stands, Rule 29(a) appears to be inconsistent with such local rules because it implies that there is an absolute right to file an amicus brief if the parties consent: "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." The proposed amendment adds to that sentence "except that a court of appeals may by local rule prohibit the filing of an amicus brief that would result in the disqualification of a judge."

The Standing Committee members raised and discussed several potential stylistic issues with the proposed amendment. Judge Colloton noted in advance that he plans to shorten "the disqualification of a judge" to "a judge's disqualification." Judge Sutton recommended omitting the phrase "by local rule," which received support from the members. Others raised stylistic concerns with the "except that" phrase as a whole, preferring to start a new sentence beginning with "But" or "A court of appeals may," or breaking up the sentence with a semicolon and beginning the second clause with "provided however that." Others pointed out that a third sentence might suggest that the exception would also apply to the first sentence of Rule 29(a), which governs amicus briefs submitted by the government. Finally, some members raised a concern with the meaning of the phrase "prohibit the filing," asking whether it referred to prohibiting the actual submission of the document, its delivery to the panel, or its continued appearance in the record.

Judge Colloton decided to "remand" the proposal back to the Advisory Committee for further consideration of these largely stylistic revisions before re-submission to the Standing Committee.

EXTENSION OF TIME FOR FILING REPLY BRIEFS: RULES 31(A)(1) AND 28.1(F)(4) – The Advisory Committee sought approval of an amendment to Rules 31(a)(1) and Rule 28.1(f)(4), which would lengthen the time to serve and file a reply brief from 14 days to 21 days after the service of the appellee's brief. This amendment comes in anticipation of the elimination of the "three day rule," which would effectively reduce the time to file a reply brief from 17 to 14 days. After appellate lawyers on the Advisory Committee expressed the concern that this reduced window of time would adversely effect the quality of reply briefs, and in the hope that the extra time might lead to shorter reply briefs, the Advisory Committee decided to increase the time allowed. The Advisory Committee elected to shift from 14 days to 21 days in keeping with the established convention to measure time periods in 7-day increments where feasible. Judge Colloton noted that the phrase "the committee concluded that" will be deleted from the draft Committee Notes for both amended rules.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed amendments to Rule 31(a)(1) and Rule 28.1(f)(4) and their accompanying Committee Notes.**

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Sessions reported that the Advisory Committee on Evidence Rules had no action items and four information items.

Information Items

SYMPOSIUM ON HEARSAY REFORM – Judge Sessions reported on the Symposium on Hearsay Reform in Chicago on October 9, 2015. Inspired by a recent decision by Judge Posner in which he had suggested the removal of all the specific exceptions to the federal rule against hearsay in favor of greater discretion for the presiding judge, the symposium brought together prominent judges, lawyers, and professors to re-examine the continuing vitality of the hearsay rule and its exceptions. Participants considered reform of the hearsay rule in the context of the electronic information era and discussed the pros and cons of various potential amendments to the hearsay rule. Participants entertained a proposal to replace the rule-based system with a guidelines system akin to the Sentencing Guidelines. Another proposal favored replacing the system of exceptions with a Rule 403 balancing analysis. And yet another was to retain the current system while expanding use of the residual exception in Rule 807. Judge Sessions added that none of these changes was likely to happen soon, particularly in view of the nearly uniform position of the practicing attorneys that the specificity of the current rules works well. He and several members remarked upon how successful the symposium had been and thanked Judge St. Eve, Judge Schiltz and Professor Capra for their help with the event.

PROPOSED AMENDMENTS TO RULES 803(16) AND RULE 902 ISSUED FOR PUBLIC COMMENT – The Advisory Committee has two proposed amendments out for public comment. The first, Rule 803(16), eliminates the hearsay exception for ancient documents. The second, Rule 902, would ease the burden of authenticating certain electronic evidence. Judge Sessions reported that since November 2015 the Advisory Committee has received more than 100 letters on the first rule governing the ancient documents exception, principally from lawyers in asbestos and

environmental toxic litigation criticizing the proposed amendment. Most expressed concern that the proposed rule would prevent the admission of documents over 20 years old, a concern Judge Sessions believed misplaced because the proposed rule does not alter the rules for authenticity, but rather reliability. Judge Sutton asked whether a Committee Note might help clarify this issue, and Professor Capra concurred. With respect to Rule 902, the proposal elicited little public comment and seems to have been universally accepted. Professor Capra added that the magistrate judges support both proposed amendments.

PROPOSED AMENDMENTS TO THE NOTICE PROVISIONS IN THE FEDERAL RULES OF EVIDENCE – The Advisory Committee continues to consider ways to increase uniformity among the various notice provisions throughout the Federal Rules of Evidence. Uniformity cannot be achieved for all provisions. For example, the notice provisions of Rules 412–415 dealing with sex abuse offenses, are congressionally mandated and cannot therefore be amended through the rules process. The Advisory Committee continues to consider uniform language that would work for other notice provisions.

Turning to specific notice provisions, the Advisory Committee is considering removing the requirement in Rule 404(b) that a criminal defendant must request notice of the general nature of any evidence that the prosecutor intends to offer at trial. Judge Sessions added that the Advisory Committee believed the existing rule was a "trap for an incompetent lawyer" and unfair because it punishes defendants whose lawyers fail to request notice. The Advisory Committee is also considering inclusion of a good faith exception to the pretrial notice provision in Rule 807.

BEST PRACTICES MANUAL ON AUTHENTICATION OF ELECTRONIC EVIDENCE – In an effort to assist courts and litigants in authenticating electronic evidence such as e-mail, Facebook posts, tweets, YouTube videos, etc., and following a suggestion from Judge Sutton, the Advisory Committee is creating a best practices manual on the subject. Judge Sessions reported that Professor Capra has worked on this manual along with Greg Joseph and Judge Paul Grimm, and the final product should be completed for presentation to the Standing Committee by its June meeting.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Ikuta reported that the Advisory Committee had five action items and four information items to present to the Standing Committee. She also announced that the modernized bankruptcy forms became effective on December 1, 2015. She added that they have been well received and that the only "criticism" made against them is that they are so clear and easy to use that they might encourage more pro se filings.

Action Items

Judge Ikuta explained that because the first three action items (a proposed change to Rule 1015(b), proposed changes to Official Forms 20A and 20B, and a proposed change to Official Form 410S2) involved just minor or conforming changes, the Advisory Committee recommended to the Standing Committee that they go through the regular approval process but without notice and public comment. She added that this would result in a December 1, 2017

effective date for the rule rather than the December 1, 2016 effective date stated in the agenda book. The forms, she said, would remain on track to go into effect on December 1, 2016.

RULE 1015(B) (CASES INVOLVING TWO OR MORE RELATED DEBTORS) – In light of the Supreme Court's decision in *Obergefell v. Hodges*, 135 S. Ct. 2071 (2015), the Advisory Committee proposed that Rule 1015(b) be amended to substitute the word "spouses" for "husband and wife" in order to include joint bankruptcy cases of same-sex couples.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved the proposed amendment to Rule 1015(b).**

OFFICIAL FORMS 20A (NOTICE OF MOTION OR OBJECTION) AND 20B (NOTICE OF OBJECTION TO CLAIM) – The Advisory Committee proposed that Official Forms 20A and 20B be renumbered to 420A and 420B, to conform with the new numbering convention of the Forms Modernization Project. It also proposed substituting the word "send" for "mail" in this rule to encompass other permissible methods of service and to maintain consistency with other new forms.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved the proposed amendment to Official Forms 20A and 20B.**

OFFICIAL FORM 410S2 (NOTICE OF POSTPETITION FEES, EXPENSES, AND CHARGES) – The Advisory Committee proposed resolving an inconsistency between Rule 3002.1(c) and Official Form 410S2. The rule requires a home mortgage creditor to give notice to the debtor of all fees without excluding ones already ruled on by the bankruptcy court. The form that implements the rule, however, says that the creditor should not "include…any amounts previously…ruled on by the bankruptcy court." The Advisory Committee proposed deleting the form's inconsistent instruction and adding an instruction that tells the lender to flag the fees that have already been approved by the bankruptcy court.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved the proposed amendment to Official Form 410S2.**

RULE 3002.1(B) (NOTICE OF PAYMENT CHANGES) AND (E) (DETERMINATION OF FEES, EXPENSES, OR CHARGES) – The Advisory Committee sought approval from the Standing Committee of three proposed amendments to Rule 3002.1(b) for publication for public comment in August 2016. First, the Advisory Committee recommends creating a national procedure by which any party in interest can file a motion to determine whether a change in the mortgage payment made by the creditor is valid. Second, the Advisory Committee recommends giving the court the discretion to modify the 21-day notice requirement in the case of home equity lines of credit because the balance of such loans is constantly changing. And third, the Advisory Committee recommends amending Rule 3002.1(e) by allowing any party in interest, and not just a debtor or trustee as currently allowed under the rule, to object to the assessment of a fee, expense, or charge.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved the proposed amendments to Rule 3002.1(b) and 3002.1(e) for publication for public comment.**

REQUEST FOR A LIMITED DELEGATION OF AUTHORITY – The Advisory Committee requested a limited delegation of authority to allow it to make necessary non-substantive, technical, and conforming changes to the official bankruptcy forms that would be effective immediately but subject to retroactive approval by the Standing Committee and notice to the Judicial Conference. Judge Ikuta explained that there were three categories of such changes that would benefit from this procedure: 1) typos; 2) changes to the layout or wording of a form to ensure that CM/ECF can capture the data; and 3) conforming changes when statutes, rules, or Judicial Conference policies change in non-substantive ways. Discussion led to consensus around the idea that after the Advisory Committee identified the need for a minor change in a form, it would vote on the proposed change, and notify the chair of the Standing Committee during that approval process. Some members observed that because the process to amend forms concludes with approval by the Judicial Conference, and does not require the full Rules Enabling Act process, the delegation of authority to the Advisory Committee to make minor changes effective immediately, but subject to retroactive approval by the Standing Committee and notice to the Judicial Conference, posed no procedural problems.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously agreed to seek Judicial Conference delegation of authority to the Advisory Committee on Bankruptcy Rules to make non-substantive, technical, and conforming changes to official bankruptcy forms, with any such changes subject to retroactive approval by the Standing Committee and notice to the Judicial Conference.**

Information Items

STERN AMENDMENTS RESUBMITTED TO THE SUPREME COURT – Professor Gibson gave a brief update on the *Stern* Amendments. After the Supreme Court's decision in *Wellness International Network, Ltd. v. Sharif*, 135 S. Ct. 1932 (2015), which upheld the validity of party consent to bankruptcy courts entering final judgment on *Stern* claims, the Advisory Committee resubmitted to the Standing Committee its *Stern* Amendments. It had originally submitted these amendments in 2013, and secured the approval of the Standing Committee and the Judicial Conference, but the Judicial Conference withdrew them given the Supreme Court's decision to hear *Executive Benefits Insurance Agency v. Arkison*, 134 S. Ct. 2165 (2014). The Standing Committee reapproved the amendments by e-mail vote in October 2015 and the Judicial Conference approved them shortly thereafter. The Judicial Conference submitted them to the Supreme Court as a supplemental transmittal on October 29, 2015. If approved by the Supreme Court in the spring of 2016, they will go into effect on December 1, 2016. Professor Gibson and Judge Ikuta expressed the Advisory Committee's appreciation of the Standing Committee's quick action on the *Stern* Amendments.

CHAPTER 13 PLAN FORM AND OPT-OUT PROPOSAL – Judge Ikuta gave a report on the history and current status of the Advisory Committee's plan to create a national Chapter 13 plan official form. The Advisory Committee commenced work on this at its spring 2011 meeting. It published its proposed plan form and related rules in August 2013. In response to comments received, the package was revised and republished in August 2014. The second publication prompted additional comments, most notably from numerous bankruptcy judges expressing their

preference to retain their local forms. In response, the Advisory Committee voted unanimously to consider a proposal to approve the plan form and most of the related rules with minor amendments, but to consider further rule revisions that would allow a district to use a single district-wide local plan form so long as it met certain criteria. At its April 2016 meeting, the Advisory Committee will decide whether to recommend that this "opt-out" proposal go forward without further notice and public comment. Judge Sutton and Professor Coquillette suggested that while republication might not be required because the Chapter 13 package has been published twice before, prudence might favor republication given the demonstrated public interest over the past two publication periods and the somewhat new concept of the opt-out proposal. Members generally supported the idea of further publication, but only to the rule changes needed to implement the proposed opt-out procedure, and, if acceptable to the Judicial Conference and the Supreme Court, on an accelerated basis that would allow for an effective date of December 2017, rather than December 2018. To accomplish this, the rule changes could be published for three months (August–November, 2016) and the entire Chapter 13 package could be considered by the Standing Committee in January 2017, the Judicial Conference in March 2017, and the Supreme Court by May 2017, with a target December 1, 2017 effective date assuming no contrary congressional action.

RULE 4003(C) (EXEMPTIONS – BURDEN OF PROOF) – Professor Harner reported the Advisory Committee's ongoing study regarding whether Rule 4003(c), which places the burden of proof in any litigation concerning a debtor's claimed exemptions on the objecting party, violates the Rules Enabling Act. In light of the Supreme Court's decision in *Raleigh v. Illinois Department of Revenue*, 530 U.S. 15 (2000), which held that the burden of proof is a substantive component of a claim, Chief Judge Christopher M. Klein, U.S. Bankruptcy Court for the Eastern District of California, suggested to the Advisory Committee that by placing the burden of proof on the objector, as opposed to the debtor which many states do, Rule 4003(c) alters a substantive right and thereby violates the Rules Enabling Act. Professor Harner explained that the Advisory Committee is studying whether, à la *Hanna v. Plumer*, the rule announced in *Raleigh* is substantive or procedural.

RULE 9037 (PRIVACY PROTECTION FOR FILINGS WITH THE COURT) – REDACTION OF PREVIOUSLY FILED DOCUMENTS – Judge Ikuta reported that the Advisory Committee is studying CACM's recent suggestion that it amend Rule 9037. CACM suggested that the rule require notice be given to affected individuals when a request is made to redact a previously filed document that mistakenly included unredacted information. Because a redaction request may flag the existence of unredacted information, consideration is being given to procedures to prevent the public from accessing the unredacted information before the court can resolve the redaction request. Further consideration at the Advisory Committee's spring 2016 meeting may result in a proposal.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Bates reported that the Advisory Committee on Civil Rules had no action items but four information items to put before the Standing Committee.

Information Items

RULE 23 SUBCOMMITTEE – Judge Bates reported on the work of the Rule 23 Subcommittee, chaired by Judge Robert Dow, which has been in existence since 2011. After various conferences and multiple submissions, the Subcommittee has identified six topics for possible rule amendments:

1. "Frontloading" in Rule 23(e)(1), requiring upfront information relating to the decision whether to send notice to the class of a proposed settlement.
2. Amendment to Rule 23(f) to clarify that a decision to send notice to the class under Rule 23(e)(1) is not appealable under Rule 23(f).
3. Amendment to Rule 23(c)(2)(B) to clarify that the Rule 23(e)(1) notice triggers the opt-out period under a Rule 23(b)(3) class action.
4. Another amendment to Rule 23(c)(2)(B) to clarify that the means by which the court gives notice may be "by United States mail, electronic means or other appropriate means."
5. Addressing issues raised by "bad faith" class action objectors. Finding a way to deter objectors from holding settlements "hostage" while pursuing an appeal until they receive a payoff and withdraw their appeal has received considerable attention. Members of the Subcommittee seem inclined to recommend a simple solution which would require district court approval of any payment in exchange for withdrawing an appeal. One potential issue with this solution is jurisdictional: Once the notice of appeal is filed, jurisdiction over a case typically transfers from the district court to the court of appeals. The Subcommittee is currently studying this issue. The Subcommittee is also considering a more complicated solution whereby it would amend both Rule 23 and Appellate Rule 42(c), on the model of an indicative ruling.
6. Refining standards for approval of proposed class action settlements under Rule 23(e)(2). The proposed amendment focuses and expands upon the "fair, reasonable, and adequate" standard incorporated into the rule in 2003 by offering a short list of core considerations in the settlement-approval setting.

The Standing Committee principally discussed the "bad faith" objector issue. Some members raised the question of whether sanctioning lawyers might help address the problem. Others asked whether securing district court approval for a payoff might actually worsen the problem by incentivizing bad faith objectors to do more work and run up a bill that they can justify to a court.

Judge Bates next reported on those issues that the Rule 23 Subcommittee has decided to place on hold.

1. Ascertainability. Because this issue is currently getting worked out by several circuit courts, is the subject of a few pending cert petitions to the Supreme Court, and may be affected by the class action cases already argued this term before the Court, the Subcommittee has decided not to propose a rule amendment at this time.
2. "Pick-off" offers of judgment. This issue has also recently been litigated in the circuit courts and, as of the time of the meeting, was pending before the Supreme Court in *Campbell-Ewald v. Gomez*, 136 S.Ct. 663 (2016).

3. Settlement class certification standards. Given the feeling of many in the bar that they and the courts can handle settlement class certification without the need for a rule amendment, the Subcommittee has decided to place this issue on hold.
4. Cy Pres. Given the many questions that have emerged in this controversial area, including the necessity of a rule and whether a rule might violate the Rules Enabling Act, the Subcommittee has decided to place this issue on hold.
5. Issue classes. The Subcommittee has concluded that whatever disagreement among the circuits there may have been on this issue at one time, it has since subsided.

RULE 62: STAYS OF EXECUTION – Judge Bates reported on the work of the joint Subcommittee of the Appellate and Civil Rules Advisory Committees chaired by Judge Scott Matheson. The Subcommittee has developed a draft amendment for Rule 62 that straightforwardly responds to three concerns raised by a district court judge and other members of the Appellate Rules Advisory Committee. First, the draft extends the automatic stay from 14 days to 30 days to eliminate a gap between the current 14-day expiration of the automatic stay and the 28-day time set for post-trial motions and the 30-day time allowed for appeals. Second, it allows security for a stay either by bond or some other security provided at any time after judgment is entered. And third, it allows security by a single act that will extend through the entirety of the post-judgment proceedings in the district court and through the completion of the appeal. Judge Bates concluded by noting that the Subcommittee had considered but withdrawn a proposal that spelled out several details of a court's inherent power to regulate several aspects of a stay. The Subcommittee withdrew it after discussion at the Advisory Committee meetings because a stay is a matter of right upon posting of a bond and because they concluded that such an amendment was not necessary to solve any problems. This preliminary draft has yet to be approved by either Advisory Committee. Judge Bates said that he planned to submit this to the Standing Committee in June 2016 for publication.

EDUCATIONAL PROGRAMS REGARDING THE CIVIL RULES PACKAGE – Judge Bates reported that the Advisory Committee has been collaborating with the Federal Judicial Center to create educational programs for judges and lawyers to help spread the word about the new discovery amendments that went into effect on December 1, 2015. Judge Campbell and others have starred in various educational videos highlighting the new rules. Judge Sutton and Judge Bates sent out letters to all chief judges of the circuit, district, and bankruptcy courts on December 1, 2015, explaining the changes. Various circuit courts are creating educational programs of their own for circuit conferences and other court gatherings. The American Bar Association and other bar groups have started to create programs as well. The Education Subcommittee, chaired by Judge Paul Grimm, is now working on additional steps in collaboration with the Federal Judicial Center. Judge Sutton underlined the ongoing responsibility of Standing Committee members to help support these local and national educational efforts.

PILOT PROJECTS – Judge Campbell reported on the ongoing work of the Pilot Project Subcommittee. The Subcommittee investigates ways to make civil litigation more efficient and collects empirical data on best practices to help inform rule making. The Subcommittee consists of members of the Advisory Committee on Civil Rules along with Judges Sutton, Gorsuch and St. Eve from the Standing Committee, Jeremy Fogel and others from the Federal Judicial Center, and in the near future one or more members of CACM. Over the past several months, members

of the Subcommittee have been researching pilot projects and various studies that have already been conducted, including 11 projects in 11 different states, efforts in 2 federal courts particularly noted for their efficiency, a pilot project conducted during the 1990s at the direction of Congress, the work of the Conference of State Court Chief Justices, and a multi-year FJC study conducted at CACM's request that examined the root causes of court congestion.

The Subcommittee has decided to focus on two possible pilot projects. First, it is looking into enhanced initial disclosures in civil litigation. Some research indicates that initial disclosure of helpful and hurtful information known by each party can improve the efficiency of litigation. But the experience with a mandatory disclosure regime in the 1990s under then Rule 26(a), which involved fierce opposition, a dissent by three Supreme Court Justices, multiple district court opt-outs, and eventual abandonment of the rule, provides something of a cautionary tale. The Subcommittee is exploring and conducting empirical and historical research on this topic at both the federal and state level. They have concluded that conducting pilot projects that test the benefits of more robust initial disclosures would be a sensible next step before proceeding to the drafting and publishing of any new possible rule amendments. Judge Campbell sought the perspective of members on several tough questions, including what the scope of the discovery requirement should be, how to handle objections to discovery obligations, how to handle electronically stored information, how to get around a categories-of-documents-based approach to discovery obligations, and how to measure the success of any pilot projects in this area (cost of litigation, time to disposition, number of discovery disputes, etc.).

The second category of possible pilot projects would focus upon expedited litigation. The Federal Judicial Center has shown that there exists a linear relationship between the length of a lawsuit and its cost. There are already a number of federal and state courts that have expedited schedules, including the Eastern District of Virginia, Southern District of Florida, Western District of Wisconsin, and the state courts of Utah and Colorado. Under the CJRA, researchers found in the 1990s that early judge intervention, efficient and firm discovery schedules, and firm trial dates are among the factors most helpful in moving cases along. Because Rule 16, in existence in its current form since 1983, already permits judges to do all of this, a change in a federal rule of procedure is less necessary than a change in local legal culture to help speed up case disposition times. The Subcommittee is considering running a pilot project that could address a court's legal culture by setting certain benchmarks for it, including requiring case management conferences within 60 days, setting firm discovery schedules and trial dates, and measuring how well the local court is meeting those benchmarks over a three-year period. At the same time, the Federal Judicial Center would provide training for the pilot judges in that court in accelerated case management.

Judge Campbell discussed another possible pilot project of having the Federal Judicial Center regularly publish a chart showing the average disposition time by a district court of different kinds of suits compared to the national average.

And finally, speaking on his own and not on behalf of the Pilot Project Subcommittee, Judge Campbell discussed with members the pros and cons of possibly shortening the time before cases and motions were placed on the CJRA list from 3 years to 2 years, and from 6 months to 3 months.

REPORT OF THE ADMINISTRATIVE OFFICE

REPORT ON THE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT'S CONSIDERATION OF PROTECTION OF COOPERATOR INFORMATION – Judge Martinez, assisted by Sean Marlaire, reported on CACM's work on the issue of harm or threat of harm to government cooperators and their families in criminal cases. This problem, which goes back at least a decade, has proven a tricky one, and seems to pit the interest in protecting cooperators from retaliation against the interest of access to court records and proceedings. CACM met in early December in Washington, D.C., where it discussed the issue. Judge Martinez reported that Judge William Terrell Hodges, the chair of CACM, recommends that the Standing Committee refer this issue to the Advisory Committee on Criminal Rules. CACM has concluded that a national approach, whether in the form of rule change or suggested best practices, would be preferable to one based on diverse local rules. Members of the Standing Committee generally agreed that the problem was a serious one that required collaboration across multiple committees and consultation with the Department of Justice and the Bureau of Prisons. Judge Molloy, on behalf of the Advisory Committee on Criminal Rules, and in consultation with his Reporters, welcomed the reference of the issue to his Committee. He added that he looked forward to inviting interested parties to the discussion, and pledged to keep the Advisory Committee on Appellate Rules informed of the Committee's work.

STRATEGIC PLAN FOR THE FEDERAL JUDICIARY – Judge Sutton observed that the Standing Committee had various ongoing initiatives that support the strategies and goals of the current *Strategic Plan for the Federal Judiciary*, which the Judicial Conference approved on September 17, 2015.

CONCLUDING REMARKS

Judge Sutton thanked the Reporters for all of the impressive work they had done on their memoranda for the meeting and the members of the Rules Committee Support Office for helping to coordinate the meeting. He then concluded the meeting. The Standing Committee will next meet in Washington, D.C., on June 6–7, 2016.

Respectfully submitted,

Rebecca A. Womeldorf
Secretary, Standing Committee

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MEMORANDUM

DATE: March 13, 2016

TO: Advisory Committee on Appellate Rules

FROM: Gregory E. Maggs, Reporter

RE: Item 12-AP-D: Civil Rule 62 and Appellate Rule 8 on Appeals Bonds

I. Background

As discussed at the October 2015 meeting, the Rule 62 Subcommittee is proposing amendments to Civil Rule 62 which concerns stays of judgments and proceedings to enforce judgments. Among other things, the amendments would alter Rule 62(b), which currently says: "If an appeal is taken, the appellant may obtain a stay by supersedeas bond . . . ." The alteration would eliminate the antiquated term "supersedeas" and would allow an appellant to provide forms of security other than a bond, such as a letter of credit. The latest proposed revision of Civil Rule 62(b)(2) says: "At any time after judgment is entered, a party may obtain a stay by providing a bond or other security." *See* Draft Report of the Rule 62 Subcommittee at 2, lines 10-11 (Feb. 25, 2016) (attached).

In the attached draft report, the Rule 62 Subcommittee recommends that the Standing Committee be asked in the summer of 2016 to approve the publication of its draft for comment. The Appellate Rules Committee may wish to propose conforming amendments to the Appellate Rules at the same time. Part II of this memorandum presents proposed conforming amendments. Part III discusses the policy issue of whether Rule 8(b) should apply not only to sureties but also to other providers of security. Part IV identifies additional possible changes to the Appellate Rules for future consideration.

II. Conforming Amendments to the Appellate Rules

The proposed revision of Civil Rule 62 would require conforming amendments to Appellate Rules 8, 11(g), and 39(e)(3) as shown below. The conforming amendments generally would change the term "supersedeas bond" to "bond" and would add the words "or other security" after the word "bond." Footnotes explain additional possible changes.

Rule 8. Stay or Injunction Pending Appeal

(a) Motion for Stay.

(1) **Initial Motion in the District Court.** A party must ordinarily move first in the district court for the following relief:

(A) a stay of the judgment or order of a district court pending appeal;

(B) approval of a ~~supersedeas~~ bond or other security [provided to obtain a stay a judgment or order of a district court pending appeal];[1] or

(C) an order suspending, modifying, restoring, or granting an injunction while an appeal is pending.

(2) **Motion in the Court of Appeals; Conditions on Relief.** A motion for the relief mentioned in Rule 8(a)(1) may be made to the court of appeals or to one of its judges.

* * *

(E) The court may condition relief on a party's filing a bond or other appropriate[2] security in the district court.

(b) Proceeding Against a Surety [or Other Security Provider].[3] If a party gives security in the form of a bond or stipulation or other undertaking with one or more sureties [or other security providers], each surety [or other security provider] submits to the jurisdiction of the district court and irrevocably appoints the district

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[1] The proposed Civil Rule 62 dispenses with the word "supersedeas." Accordingly, the Appellate Rules also should not use that qualifier. But deleting this word might cause ambiguity about the type of "bond or other security" in question. The proposed bracketed phrase provides clarification. The clarification may be necessary because the Appellate Rules address other types of bonds, such as bonds for costs. *See* Appellate Rule 7.

[2] The word "appropriate" does not appear in revised Civil Rule 62(b)(2) and is probably unnecessary, but retaining it would not appear to cause any harm.

[3] The current version of Rule 8(b) uses the term "surety" because it contemplates that a party will obtain a stay of judgment by providing a supersedeas bond. The proposed revision of Civil Rule 62, however, would allow a party to provide "other security," such as a letter of credit. The bracketed phrase would ensure that Rule 8(b) applies to all providers of security, such as the issuer of a letter of credit. Repeating the bracketed phrase five times is somewhat awkward but I did not see a simpler alternative. (Part III of this memo addresses the policy question of whether Rule 8(b) should apply only to sureties.)

clerk as the surety [or other security provider]'s agent on whom any papers affecting the surety [or other security provider]'s liability on the bond or undertaking may be served. On motion, a surety [or other security provider]'s liability may be enforced in the district court without the necessity of an independent action. The motion and any notice that the district court prescribes may be served on the district clerk, who must promptly mail a copy to each surety whose address is known.

ADVISORY COMMITTEE NOTE

The amendments to subdivisions (a)(1)(B) and (b) conform this rule with the amendment of Federal Rule of Civil Procedure 62. Rule 62 formerly required a party to provide a "supersedeas bond" to obtain a stay of the judgment and proceedings to enforce the judgment. As amended, Rule 62(b)(2) allows a party to obtain a stay by providing a "bond or other security."

Rule 11. Forwarding the Record

* * *

(g) Record for a Preliminary Motion in the Court of Appeals. If, before the record is forwarded, a party makes any of the following motions in the court of appeals:

- for dismissal;
- for release;
- for a stay pending appeal;
- for additional security on the bond on appeal or on a ~~supersedeas~~ bond or other security [provided to obtain a stay pending appeal];[4] or
- for any other intermediate order—

the district clerk must send the court of appeals any parts of the record designated by any party.

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[4] The bracketed language may be necessary for clarification if the term "supersedeas" is deleted. *See supra* note 1.

ADVISORY COMMITTEE NOTE

The amendment of subdivision (g) conforms this rule with the amendment of Federal Rule of Civil Procedure 62. Rule 62 formerly required a party to provide a "supersedeas bond" to obtain a stay of the judgment and proceedings to enforce the judgment. As amended, Rule 62(b)(2) allows a party to obtain a stay by providing a "bond or other security."

Rule 39. Costs

* * *

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

(1) the preparation and transmission of the record;

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

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

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

ADVISORY COMMITTEE NOTE

The amendment of subdivisions (e)(3) conforms this rule with the amendment of Federal Rule of Civil Procedure 62. Rule 62 formerly required a party to provide a "supersedeas bond" to obtain a stay of the judgment and proceedings to enforce the judgment. As amended, Rule 62(b)(2) allows a party to obtain a stay by providing a "bond or other security."

III. Policy Question of Whether to Amend Appellate Rule 8(b)

Rule 8(b) currently provides jurisdiction in the district court to enforce the obligation of a surety on a supersedeas bond. In addition to considering the conforming amendments identified above, the Committee also may wish to consider the policy question of whether Rule 8(b) should apply only to sureties or should be amended to apply more broadly to any security providers. For example, suppose that the appellant provides security in the form of a letter of credit. The policy

question is whether the obligation of the issuer of the letter of credit should be enforceable in the district court in the same way the liability of a surety could be enforced.

For consistency, the Committee may wish to treat the providers of all forms of security in the same manner. But whether treating all security providers alike is a good idea is uncertain. At this point, the Committee might be unsure of the full range of alternative forms of security that litigants might provide under amended Rule 62(b)(2). Differences may exist among providers of security that may or may not make Rule 8(b)'s automatic imposition of jurisdiction in the district court appropriate. Perhaps the Committee should wait for experience with other forms of security under the revised Civil Rule 62 before undertaking to revise Appellate Rule 8(b) to expand the kinds of security to which it applies. Past practice is not instructive. Very few reported and unreported cases have cited Rule 8(b), and they all appear to have involved sureties (which is unsurprising given the current text of Rule 62).

IV. Issues for Future Consideration

The conforming amendments discussed above concern bonds or other security provided for obtaining a stay of the judgment or proceedings to enforce the judgment under Civil Rule 62(b)(2). The Appellate Rules also address other kinds of bonds, such as bonds for costs (Rule 7) and bonds provided for staying an agency rule or decision (Rule 18). For consistency with Rule 62(b)(2)'s policy of allowing various kinds of security, the Committee might consider amending these rules to allow a party to provide a "bond or other security." But changes to these rules are not required to bring the Appellate Rules into conformity with Rule 62(b)(2).

Attachment:

Draft Report of the Rule 62 Subcommittee (February 25, 2016)

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B. Rule 62: Stay of Enforcement

The Rule 62 proposal has been developed by a joint subcommittee appointed by the Appellate and Civil Rules Committees. The Subcommittee is chaired by Judge Scott Matheson. Its members have included Judge Peter Fay, Judge Brett Kavanagh, Douglas Letter, Kevin Newsom, and Virginia Seitz. The Committee Chairs, Judge Steven Colloton and Judge John Bates, also participated in the Subcommittee's work.

A more elaborate draft was presented to the Committees for discussion at their fall meetings. The discussion in this Committee is described in the draft minutes for November 5. The Subcommittee prepared a revised draft that was presented to the Standing Committee for discussion in January. The revised draft deletes complicating provisions that seemed unnecessary. It also eliminates the provision that would have expressly authorized the court to refuse to approve a stay despite presentation of a satisfactory bond. The only question raised in the Standing Committee asked about the 30-day period recommended for the automatic stay in Rule 62(a). The explanation that 30 days accommodates the 28 days allowed for post-judgment motions and allows two more days to arrange security if the 28 days expire without a motion that suspends appeal time was readily accepted.

The Subcommittee continued work on the proposal presented to the Standing Committee after it met. The only change in the draft rule text deleted words suggesting that the stay can remain in effect "until a designated time~~[, which may be as late as issuance of the mandate on appeal]~~ * * *." Those words were found to imply an undesirable limit – it may be desirable to extend the stay beyond issuance of the mandate, recognizing the possibility of a petition for certiorari or post-mandate proceedings in the court of appeals.

The Committee Note also was simplified. Two paragraphs that briefly anticipated lengthier discussions in later paragraphs were deleted. Three more paragraphs that offered advice about issues that may arise in various circumstances were deleted to honor that tradition that the Note should not be used to offer advice beyond what is needed to explain the purpose and effect of the rule text amendments. Two sentences were removed from later paragraphs for similar reasons.

The Subcommittee now recommends that the Standing Committee be asked to approve publication of the present draft for comment.

This proposal serves all of the needs that prompted consideration of Rule 62. It eliminates the gap that exists under present Rule 62 between expiration of the automatic stay after 14 days after judgment and the court's authority to order a stay "pending disposition of" a motion that may be made up to 28 days after judgment. It expressly authorizes security in a form other than a bond. And it authorizes a single security that endures

from termination of the automatic stay through completion of all appellate proceedings.

Other changes reorganize the provisions of present Rule 62(a), (b), (c), and (d) to bring together closely related matters that had been separated. The remaining parts of Rule 62 were studied, some in detail, but the Subcommittee concluded that it is better to carry them forward without change.

The operation of the amended rule is described in the Committee Note.

Three versions of Rule 62 are set out below. The first is the clean text that is recommended for publication. The second shows the changes that have been made in the version that was presented to the Standing Committee in January. The third is the text of current Rule 62(a), (b), (c), and (d).

RULE 62 PROPOSED FOR PUBLICATION

Rule 62. Stay of Proceedings to Enforce a Judgment.

(a) *Automatic Stay.* Except as provided in Rule 62(c) and (d), 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, and may set appropriate terms for security or deny security.

(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.

(c) *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.

(d) *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.

* * * * *

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 order for a patent accounting are reorganized by consolidating them in new subdivisions (c) and (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 subdivisions (c) and (d) apply both to interlocutory injunction orders and to final judgments that grant, refuse, or otherwise deal with an injunction.

New Rule 62(a) 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 later 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 suffices in cases governed by a 60-day appeal period.

Amended Rule 62(a) expressly recognizes the court's authority to dissolve the automatic stay or supersede it by a court-ordered stay. One reason for dissolving the automatic stay may be a risk that the judgment debtor's assets will be dissipated. Similarly, it may be important to allow immediate execution of a judgment that does not involve a payment of money.

The court may address the risks of immediate execution by ordering dissolution of the stay only on condition that security be posted by the judgment creditor. Rather than dissolve the stay, the court may choose to supersede it by ordering a stay under Rule 62(b)(1) that lasts longer or requires security.

Subdivision (b)(1) recognizes the court's broad general and discretionary power to stay, or to refuse to stay, execution and proceedings to enforce a judgment. The court may set terms for security or deny security. 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.

Subdivision 62(b)(2) carries forward in modified form the supersedeas bond provisions of former Rule 62(d). A stay may be obtained under subdivision (b)(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(b)(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. The amount also may be set to reflect relief that is not an award of money but also is not covered by Rule 62 (c) and (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.

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) applies as on any appeal. The appellee may seek a stay under subdivision (b), 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.

RULE 62 PRESENTED TO STANDING COMMITTEE, WITH EDITS

Rule 62. Stay of Proceedings to Enforce a Judgment.

(a) *Automatic Stay.* Except as provided in Rule 62(c) and (d), 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]~~, and may set appropriate terms for security or deny security.

(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.

(c) *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.

(d) *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.

* * * * *

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 order for a patent accounting are reorganized by consolidating them in new subdivisions (c) and (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 subdivisions (c) and (d) apply ~~to~~ both to interlocutory injunction orders and to 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. 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. 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 (b)(2) provides for a stay by providing a bond or other security at any time after judgment is entered; it is no longer necessary to wait until a notice of appeal is filed. 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.~~

~~Subdivisions (a) and (b) address stays of all judgments, except as provided in subdivisions (c) and (d). Determining what the 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 subdivisions (c) and (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, for example, 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, before entry of a final judgment. 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 question is left to the court's inherent control of the contempt power and the authority to refuse a stay.~~

New Rule 62(a) 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 later 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 suffices in cases governed by a 60-day appeal period.

Amended Rule 62(a) expressly recognizes the court's authority to dissolve the automatic stay or supersede it by a court-ordered stay. One reason for dissolving the automatic stay may be a risk that the judgment debtor's assets will be dissipated. Similarly, it may be important to allow immediate execution of a judgment that does not involve a payment of money. The court may address the risks of immediate execution by ordering dissolution of the stay only on condition that security be posted by the judgment creditor. Rather than dissolve the stay, the court may choose to supersede it by ordering a stay under Rule 62(b)(1) that lasts longer or requires security.

Subdivision (b)(1) recognizes the court's broad general and discretionary power to stay, or to refuse to stay, execution and proceedings to enforce a judgment. The court may set terms for security or deny security. ~~An appellant may prefer a court-ordered stay under (b)(1), hoping for terms less demanding than the terms for obtaining a stay by posting a bond or other security under (b)(2).~~ 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.

Subdivision 62(b)(2) carries forward in modified form the supersedeas bond provisions of former Rule 62(d). A stay may be

obtained under subdivision (b)(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(b)(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 (c) and (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.

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) applies as on any appeal. The appellee may seek a stay under subdivision (b), 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.

PRESENT RULE 62(A), (B), (C), AND (D)

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 an order allowing the appeal. The stay takes effect when the court approves the bond.

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MEMORANDUM

DATE: March 13, 2016

TO: Advisory Committee on Appellate Rules

FROM: Gregory E. Maggs, Reporter

Re: 12-AP-F Civil Rule 23 Class Action Settlement Objections

I. Introduction

This item concerns class action settlement objections. As discussed at the October 2015 Meeting, class members sometimes object to settlements not because they have good faith objections but instead because they want to receive payments to withdraw their objections so that the settlements can go forward.

In preparation for the April 2016 meeting, members of the Appellate Committee should read the attached "Rule 23 Subcommittee Report" (Feb. 26, 2016). The Rule 23 Subcommittee has been working on the subject of class action settlement objections and now proposes that a package of amendments addressing these issues be forwarded to the Standing Committee with a recommendation that they be published for public comment. The Subcommittee's report says: "It is expected that the topic of class-action objector appeals will be on the agenda for the April meeting of the Appellate Rules Committee, and hoped that a report on the results of that discussion can be made during the Civil Rules meeting in Palm Beach."

A major development, discussed below, is that the Rule 23 Subcommittee has decided to propose amendment only to the Civil Rules, not the Appellate Rules. The Report calls this method of addressing the problem of class action settlement objections the "simple approach." This approach may allay concerns that members of the Appellate Committee expressed when the Subcommittee previously was considering amendments to both the Civil and Appellate Rules.

II. Review of the October 2015 Discussion

At the October 2015 meeting, Judge Robert Dow of the Civil Rules Committee explained that the Rule 23 Subcommittee was considering revisions to Civil Rule 23 and Appellate Rule 42 to address class action settlement objections. The proposed amendments to Rule 23 then under

consideration would have required objectors to state the grounds for objection and would have required a district court to approve any withdrawal of an objection. (See drafts of Civil Rules 23(e)(5)(A) & (C) in the October 2015 Agenda Book at 203-204.) The Rule 23 Subcommittee believed that these rules would discourage extortionate objections and prevent their enforcement.

Judge Dow explained that the Rule 23 Subcommittee was also considering an amendment to Rule 42 that would require (or at least permit) a court of appeals to refer a motion to withdraw an objection to the district court for disposition. The draft of the proposed Rule 42(c) then under consideration read as follows:

> **Rule 42**
>
> * * *
>
> (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.

October 2015 Agenda Book at 141.

This proposed revision of Rule 42 prompted extensive discussion at the October 2015 Appellate Rules Committee meeting. As described in more detail in the minutes, members of the Committee expressed concerns about requiring a district court to approve the withdrawal of an objection once the matter was before an appellate court. These concerns related to the respective jurisdictions of the two courts and the practicalities of such a requirement. Judge Dow agreed to take these concerns back to the Rule 23 Subcommittee for further study.

III. Subsequent Developments

After much deliberation, the Rule 23 Subcommittee has decided to propose modified amendments to Civil Rule 23 and no longer proposes amendments to Appellate Rule 42. The current version of the proposed revision of Civil Rule 23 appears on pages 3-5 of the Rule 23 Subcommittee Report. The new focus is on requiring the district court to approve payment made

to a class action settlement objector. The key provision, Rule 23(e)(5)(B) [lines 101-110], provides that "no payment or other consideration" can be given to an objector in exchange for withdrawing an objection without the district court's approval.

The Rule 23 Subcommittee believed that this approach would make any amendment to the Appellate Rules unnecessary. The Subcommittee's draft Advisory Committee Note thoroughly explains the rationale on pages 12-13 in lines 342-392. The logic might be summarized as follows. A class member will not object to a settlement in bad faith with the hope of extracting money for withdrawing the objection if the class member does not think a court will approve the consideration for withdrawing the objection. If a class member does make an objection, and then agrees to withdraw the objection, the district court might approve or disapprove the consideration. If the district court approves the consideration, there is no reason to restrict withdrawal of the objection at the court of appeals. If the district court does not approve the consideration, then the class objector presumably would not want to withdraw the objection. In any event, the appellate court retains its power to decide whether to allow or not allow withdrawal of an objection.

One legal question discussed by the Rule 23 Subcommittee is whether a district court can exercise jurisdiction to approve or disapprove the consideration for withdrawing an objection while the objection is before the court of appeals. Although the district court's decision would not directly require the court of appeals to take or refrain from taking any action, it would certainly influence the conduct of the objector while the matter is before the court of appeals. Judge Jeffrey Sutton's law clerk, Derek Webb, has addressed this question in the attached memorandum. He concludes that a district court can approve a side-payment to a class action settlement objector after the case has been appealed to the circuit court.

IV. Matters for Discussion at the April 2016 Meeting

At the April 2016 meeting, the Appellate Committee may wish to discuss both whether it considers the proposed "simple approach" a good solution to the problem of class action objections and whether it agrees that requiring a district court approval of consideration paid to an objector does not impermissibly interfere with an appellate court's jurisdiction.

Attachments:

1. Rule 23 Subcommittee Report (Feb. 26, 2016)

2. Memorandum to Judge John D. Bates, Chair of the Civil Rules Committee, from Derek Webb, Law Clerk to Judge Jeffrey Sutton, Subject: Class Action Objector Appeals Jurisdictional Question (Jan. 6, 2016)

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RULE 23 SUBCOMMITTEE REPORT

At the Advisory Committee's Nov., 2015, meeting, the Rule 23 Subcommittee presented its sketches of possible rule amendments to address six issues. It also recommended that certain issues it had examined be dropped from its current agenda, and that others be put "on hold" pending developments.

Since the November meeting, the Subcommittee has continued to work on these six issues. It has also added an issue mentioned by the Department of Justice during the November meeting -- extending the time for the Government to decide whether to take an appeal under Rule 23(f). This work has included six conference calls and a presentation at the January, 2016, meeting of the Standing Committee. Notes of the six conference calls (on Nov. 16, 2015, Nov. 23, 2015, Jan. 19, 2016, Jan. 29, 2016, Feb. 5, 2016, and Feb. 10, 2016) should be included in this agenda book.

The Subcommittee now proposes that the package of amendments addressing these issues be forwarded to the Standing Committee with a recommendation that they be published for public comment. That recommendation is contained in Part I of this report.

Since the Advisory Committee's last meeting, the Subcommittee has refined several of the items presented at the Advisory Committee's last meeting. In particular, after discussions with the Standing Committee and extensive help from Judge Colloton (Chair, Appellate Rules Committee) and Prof. Maggs (Reporter, Appellate Rules Committee), it has identified what it regards as the preferred method of addressing the problem of problem objectors to class-action settlements. As set forth below, it has decided to endorse the "simple" approach of proceeding with only a change to the civil rules. It is expected that the topic of class-action objector appeals will be on the agenda for the April meeting of the Appellate Rules Committee, and hoped that a report on the results of that discussion can be made during the Civil Rules meeting in Palm Beach.

Part II below is an informational report on other issues that are "on hold." One significant development has been the Supreme Court's decision of a case involving what have come to be called the "pick-off" issues. In the wake of that decision, discussion has continued to focus on amendment ideas included in the Subcommittee's mini-conference in September, 2015, but has also prompted a new idea -- providing explicitly in Rule 23 that when a proposed class representative is unable to serve (whether due to mootness or another reason) class counsel should have an opportunity to locate and present a substitute representative. The Subcommittee has begun to work through the sketches of rule provisions that might address these issues. The most recent sketches are included in an Appendix to the notes of the Feb. 10, 2016, conference call, included in this agenda book.

At the April meeting of the full Committee, the Subcommittee does not propose detailed discussion of these sketches. Instead, it hopes to explore the general issues, including whether it appears that the pick-off efforts have continued to occur since the Supreme Court's decision in January, 2016. It is particularly interested in receiving reactions to its one new idea -- a possible rule provision enabling putative class counsel to seek a replacement class representative if the original class representative cannot fulfill that position.

The other informational issue is what has come to be known as the "ascertainability" question. Two pending petitions for certiorari appear to raise such issues, and two cases not yet decided by the Supreme Court may also have some potential relevance to these issues.

The Subcommittee does not recommend proceeding with amendments regarding these "on hold" issues at this time, but it does recommend retaining them on its current agenda for further study. For that purpose, it invites reactions and ideas about the matters it continues to study.

I. **ACTION ITEM:** THE CURRENT PRELIMINARY DRAFT PACKAGE RECOMMENDED FOR TRANSMITTAL TO THE STANDING COMMITTEE

The Subcommittee recommends that the Advisory Committee forward the following preliminary draft of proposed amendments to Rule 23 to the Standing Committee for publication for public comment. These are the six items presented during the Committee's November, 2015, meeting, plus a further change to Rule 23(f) (mentioned during that meeting) extending the time for the United States to petition for review to 45 days.

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 United States mail, electronic means 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) *Notice to the class*

(A) The parties must provide the court with sufficient information to enable it to determine whether to give notice to the class

of the proposal.

(B) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is justified by the parties' showing that:

(i) the proposal is likely be approved; and

(ii) the court will likely be able to certify the class for purposes of judgment on the proposal.

(2) *Approval of the proposal.* If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether: ~~.~~

(A) the class representatives and class counsel have adequately represented the class;

(B) the proposal was negotiated at arm's length;

(C) the relief provided for the class is adequate, taking into account:

(i) the costs, risks, and delay of trial and appeal;

(ii) the effectiveness of the proposed method of distributing relief to the class, including the method of processing class-member claims, if required;

(iii) the terms of any proposed attorney-fee award, including timing of payment; and

(iv) any agreement required to be identified under Rule 23(e)(3); and

(D) class members are treated equitably relative to each other.

(3) *Identification of side agreements.* * * * * *

(4) *New opportunity to be excluded.* * * * * *

(5) *Class-member objections.*

(A) Any class member may object to the proposal if

it requires court approval under this subdivision (e)~~; the objection may be withdrawn only with the court's approval~~. The objection must state whether it applies only to the objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds for the objection.

(B) Unless approved by the court after a hearing, no payment or other consideration may be provided to an objector or objector's counsel in connection with:

(i) forgoing or withdrawing an objection, or

(ii) forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal.

* * * * *

(f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule, but not from an order under Rule 23(e)(1). ~~if a petition for to appeal is filed~~ A party seeking permission to appeal must file a petition with the circuit clerk within 14 days after the order is entered, or within 45 days after the order is entered if any party is the United States, a United States agency, or a United States officer or employee sued for an act or omission occurring in connection with duties performed on the United States' behalf . An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

COMMITTEE NOTE

Rule 23 is amended mainly to address issues related to settlement, and also to take account of issues that have emerged since the rule was last amended in 2003.

Subdivision (c)(2). 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 giving notice. This decision is sometimes inaccurately called "preliminary approval" of the proposed class certification in Rule 23(b)(3) actions, and it is common to send notice to the class 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 this notice practice. Requiring repeat notices to the class can be wasteful and confusing to class members.

Subdivision (c)(2) is also amended to recognize contemporary methods of giving notice to class members. Since Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974), interpreted the individual notice requirement for class members in Rule 23(b)(3) class actions, many courts interpreted the rule to require notice by first class mail in every case. But technological change since 1974 has meant that other forms of communication are more reliable and important to many. Courts and counsel have begun to employ new technology to make notice more effective, and sometimes less costly. Because there is no reason to expect that technological change will halt soon, courts giving notice under this rule should consider existing technology, including class members' likely access to such technology, when selecting a method of giving notice.

Rule 23(c)(2)(B) is amended to take account of these changes, and to call attention to them. The rule calls for giving class members "the best notice that is practicable." 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. Instead of preferring any one means of notice, therefore, courts and counsel should focus on the means most likely to be effective to notify class members in the case before the court. The amended rule emphasizes that the court must exercise its discretion to select appropriate means of giving notice. In providing the court with sufficient information to enable it to decide whether to give notice to the class of a proposed class-action settlement under Rule 23(e)(1), it may often be important to include a report about the proposed method of giving notice to the class.

Professional claims administration firms have become expert in evaluating differing methods of reaching class members. There is no requirement that such professional guidance be sought in every case, but in appropriate cases it may be important, and provide a resource for the court and counsel.

In determining whether the proposed means of giving notice is appropriate, the court should give careful attention to the content and format of the notice and, if this notice is given under Rule 23(e)(1) as well as Rule 23(c)(2)(B), any claim form class members must submit to obtain relief. Particularly if the notice is by electronic means, care is necessary not only regarding access to online resources, but also to the manner of presentation and any response expected of class members. As the rule directs, the means should be the "best * * * that is practicable" in the given case. The ultimate goal of giving notice is to enable class members to

make informed decisions about whether to opt out or, in instances where a proposed settlement is involved, to object or to make claims. Means, 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 up in significant part of members likely to be less sophisticated. As with the method of notice, the form of notice should be tailored to the class members' likely understanding and capabilities.

Attention should focus also on the method of opting out provided in the notice. The proposed method should be as convenient as possible, while protecting against unauthorized opt-out notices. As with making claims, the process of opting out should not be unduly difficult or cumbersome. As with other aspects of the notice process, there is no single method that is suitable for all cases.

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 should also satisfy the notice requirements of amended Rule 23(c)(2)(B) for a class to be certified under Rule 23(b)(3), and trigger the class members' time to request exclusion. 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. The amended rule makes clear that the parties must provide the court with sufficient information to enable it to decide whether notice should be sent. The amended rule also specifies the standard the court should use in deciding whether to send notice -- that notice is justified by the parties' showing regarding the likely approval of the proposal. The prospect of final approval should be measured under amended Rule 23(e)(2), which provides criteria for the final settlement review.

If the court has not previously certified a class, this showing should also provide a basis for the court to conclude that it likely will be able to certify a class for purposes of settlement. Although the order to send notice is often inaccurately called "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. 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. But some general observations can be made.

One key element is class certification. If the court has already certified a class, the only information ordinarily necessary in regard to a proposed settlement is whether the proposal calls for any change in the class certified, or of the claims, defenses, or issues regarding which certification was granted. But if a class has not been certified, the parties must ensure that the court has a basis for concluding that it likely 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 regarding the prospects for certification without a suitable basis in the record. The 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 certification for settlement should not be considered in relation to the later request for litigation 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 anticipated rate of claiming by class members. The possibility that the parties will report back to the court on the actual claims experience after notice to the class is completed is also often important. And because some funds are often 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), information about the existence of other pending or anticipated litigation on behalf of class members involving claims that would be released under the proposal -- including the breadth of any such release -- 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 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 show it is likely that the court will have a basis to approve the proposal after notice to the class and a final approval hearing.

Subdivision (e)(2). The central concern in reviewing a proposed class-action settlement is that it be fair, reasonable, and adequate. This criterion emerged from case law implementing Rule 23(e)'s requirement of court approval for class-action settlements. It was formally recognized in the rule through the 2003 amendments. By then, courts had generated lists of factors to shed light on this central concern. Overall, these factors focused on comparable considerations, but each circuit developed its own vocabulary for expressing these concerns. In some circuits, these lists have remained essentially unchanged for thirty or forty years. The goal of this amendment is to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal, not to displace any of these factors.

One reason for this amendment is that a lengthy list of factors can take on an independent life, potentially distracting attention from the central concerns that inform the settlement-review process. A particular circuit's list might include a dozen or more separately articulated factors. Some of those factors -- perhaps many -- may not be relevant to a particular case or settlement proposal. Those that are relevant may be more or less important to the particular case. Yet counsel and courts may feel it necessary to address every single factor on a given circuit's list in every case. The sheer number of factors can distract both the court and the parties from the central concerns that bear on review under Rule 23(e)(2).

This amendment therefore directs the parties to present the settlement to the court in terms of a shorter list of central

concerns, by focusing on the central procedural considerations and substantive qualities that should always matter to the decision whether to approve the proposal.

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. Attention to these matters is an important foundation for scrutinizing the specifics of 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 in this or other cases, or the actual outcomes of other cases, 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 neutral or 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 its terms.

Paragraphs (C) and (D). These paragraphs focus on what might be called a "substantive" review of the terms of the proposed settlement. The relief that the settlement is expected to provide to class members is a central concern. Measuring the proposed relief may require evaluation of the proposed claims process and a predication of how many claims will be made; if the notice to the class calls for pre-approval submission of claims, actual claims experience may be important. The contents of any agreement identified under Rule 23(e)(3) may also bear on the adequacy of the proposed relief, particularly regarding the equitable treatment of all members of the class, and may also bear on the adequacy of representation and arm's-length negotiation.

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.

If the class has not yet been certified for trial, the court may also consider 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 facilitates filing of 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 demanding.

Paragraph (D) calls attention to a concern that may apply to some class action settlements -- inequitable treatment of some class members vis-a-vis other class members. Matters of concern could include whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of the release may affect class members in different ways that affect apportionment of relief.

Subdivision (e)(3). A heading is added to subdivision (e)(3) in accord with style conventions. This addition is intended to be stylistic only.

Subdivision (e)(4). A heading is added to subdivision (e)(3) in accord with style conventions. This addition is intended to be stylistic only.

Subdivision (e)(5). Objecting class members can play a critical role in the settlement-approval process under Rule 23(e). Class members have the right under Rule 23(e)(5) to submit objections to the proposal. The submissions required by Rule 23(e)(1) may provide information important to their decisions whether to object or opt out. Objections can provide the court with important information bearing on its determination under Rule 23(e)(2) whether to approve the proposal.

Subdivision (e)(5)(A). The rule is amended to remove the requirement of court approval for withdrawal of an objection. An objector should be free to withdraw on concluding that an objection is not justified. But Rule 23(e)(5)(B)(i) requires court approval of any payment or other consideration for withdrawing the objection.

The rule is also amended to clarify that objections must provide sufficient specifics to enable the parties to respond to them and to enable the court to evaluate them. One feature required of objections is specification whether the objection asserts interests of only the objector, or of some subset of the class, or of all class members. Beyond that, the rule directs that the objection state its grounds "with specificity." Failure to provide needed specificity may be a basis for rejecting an objection. Courts should take care, however, to avoid unduly burdening class members who wish to object, and to recognize that a class member who is not represented by counsel cannot be expected to present objections that adhere to technical legal requirements.

Subdivision (e)(5)(B). Good-faith objections can assist the court in evaluating a proposal under Rule 23(e)(2). It is legitimate for an objector to seek payment for providing such assistance under Rule 23(h). As recognized in the 2003 Committee Note to Rule 23(h): "In some situations, there may be a basis for making an award to other counsel whose work produced a beneficial result for the class, such as * * * attorneys who represented objectors to a proposed settlement under Rule 23(e)."

But some objectors may be seeking personal gain, and using objections to obtain benefits for themselves rather than assisting in the settlement-review process. At least in some instances, it seems that objectors -- or their counsel -- have sought to extract tribute to withdraw their objections or dismiss appeals from judgments approving class settlements. And class counsel sometimes may feel that avoiding the delay produced by an appeal justifies providing payment or other consideration to these objectors.

The court-approval requirement currently in Rule 23(e)(5) partly addresses this concern. Because the concern only applies when consideration is given for withdrawal of an objection, the amendment requires approval under Rule 23(e)(5)(i) only when such consideration is involved. The term "consideration" should be broadly interpreted, particularly when the withdrawal includes some arrangements beneficial to objector counsel. Under Rule 23(h), the court may approve payments to objector counsel who have contributed value to the litigation, and a court asked to approve such arrangements might approve payment for the contribution the objection made to the settlement-review process even if the settlement was approved as proposed.

Rule 23(c)(5)(B)(ii) applies to consideration for forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal. Because an appeal by a class-action objector may produce much longer delay than an objection before the district court, it is important to extend the court-approval requirement to apply in that context. Because the district court is best positioned to determine whether to approve such arrangements, the rule requires that the motion seeking approval be made to the district court.

Until the appeal is docketed by the circuit clerk, the district court may dismiss the appeal on stipulation of the parties. See Fed. R. App. P. 42(a). Thereafter, the court of appeals has authority to decide whether to dismiss the appeal. This rule's requirement of district court approval of any consideration in connection with such dismissal by the court of appeals has no effect on the authority of the court of appeals over the appeal. It is, instead, a requirement that applies only to providing consideration for forgoing, dismissing, or abandoning an appeal. A party dissatisfied with the district court's order under Rule 23(e)(5)(B) may appeal the order.

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 sometimes inaccurately characterized as "preliminary approval" of the proposed class certification. But it does not grant or deny class certification, and review under Rule 23(f) would be premature. This amendment makes it clear that an appeal under this rule is not permitted until the district court decides whether to certify the class.

The rule is also amended to extend the time to file a petition for review of a class-action certification order to 45 days whenever a party is the United States, one of its agencies, or a United States officer or employee sued for an act or omission occurring in connection with duties performed on the United States' behalf. In such a case, the extension applies to a petition to appeal by any party. This extension of time recognizes -- as under Rules 4(i) and 12(a) and Appellate Rules 4(a)(1)(B) and 40(a)(1) -- that the United States has a special need for additional time in regard to these matters. This extension applies whether the officer or employee is sued in an official capacity or an individual capacity; it may happen that the defense is conducted by the United States even though the action asserts claims against the officer or employee in an individual capacity. An action against a former officer or employee of the United States is covered by this provision in the same way as an action against a present officer or employee. Termination of the relationship between the individual defendant and the United States does not reduce the need

for additional time.

II. **INFORMATIONAL ITEMS FOR DISCUSSION:** ISSUES "ON HOLD"

During the November, 2015, meeting, the Rule 23 Subcommittee reported on two issues that it has considered with some care, but that it favored putting "on hold" pending further developments. The Subcommittee does not have recommendations at present for amendments responsive to those issues, in significant measure because developments on these issues remain in flux. It is therefore making this informational report in hopes of receiving reactions from the full Committee to inform its ongoing work on these issues.

On the first issue -- the "pick-off" question arising when defendant makes an offer to the class representative that may entirely satisfy the representative's claim and then seeks dismissal -- a Supreme Court decision in January, 2016, has clarified some aspects of the question but left others uncertain. The Subcommittee has concluded that there are sufficient questions about the present circumstances to make proposing an amendment now inappropriate. It invites reactions from the full Advisory Committee on these matters. It has also identified an additional amendment idea prompted by the pick-off issues that may have wider importance -- a rule provision authorizing or requiring that the court afford putative or actual class counsel a period of time to recruit a substitute class representative if the initial class representative proves inadequate for some reason, including mootness of that person's claims.

On the second issue -- "ascertainability" -- the case law continues to evolve. Petitions for certiorari have been filed in two cases that may present these issues to the Supreme Court, and the Court has pending two other cases whose resolution may have some bearing on this collection of issues. The Subcommittee did not bring forward an amendment proposal in part because of the uncertain state of the law.

A. PICK-OFF ISSUES

It is useful to begin with some general background. Mootness questions can emerge in distinctive ways in class actions. For example, if class members' claims are inherently short-lived, it could happen that before the time needed to decide a certification motion has elapsed the class representative's claim might be moot. In some such circumstances, the Supreme Court has said that later certification suffices to solve the mootness problem. See United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980). Yet another issue that could arise occurs when the district court denies class certification and the individual plaintiffs continue with their suit. If they prevail, but decide not to appeal the certification issue, is the case moot? In United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977), the Court held that other putative class members could then intervene to pursue appellate review of the certification issue.

A similar issue can arise if defendant offers the proposed class representative "full relief" and then argues that the class action should be dismissed even though no relief has been offered to any other member of the proposed class. This is the "pick-off" situation. The Supreme Court disapproved such a maneuver in Deposit Guaranty Nat. Bank v. Roper, 445 U.S. 326 (1980). But in the lower courts defendants sometimes pursued a similar strategy, sometimes employing Rule 68 offers of judgment as methods of mooting the putative class representative's claims. In some courts, a plaintiff could blunt that maneuver by making a class certification motion before the pick-off offer arrived, leading to what came to be called "out of the chute" class certification motions. Given the need for a complete record to support the class-certification decision, this was not a welcome development.

One additional piece of background is useful. Until 2003, Rule 23(e) had said that a "class action" could not be voluntarily dismissed without court approval and notice to the class. The virtually unanimous view of the courts of appeals was that such court approval was required after a suit was filed as a class action even if the settlement was only of the "individual" claim of the putative class representative and without prejudice to the rights of any other class member. Concern expressed about this sort of thing included the risk that plaintiffs might be claiming a premium for bringing a class action, and that other class members might be desisting from asserting their own claims in reliance on the class action. But in 2003, Rule 23(e) was amended to require court approval only of settlements that would bind the class. The way was thus opened for "individual" settlements with the class representative. Pick-off activity seemingly picked up.

In Genesis Healthcare Corp. v. Symczyk, 133 S.Ct. 1523 (2013), the Court held, by a 5-4 vote, that a Rule 68 offer of full compensation to the plaintiff in a proposed Fair Labor Standards

Act collective action did moot the case. Justice Kagan and three others argued in dissent that basic contract law -- and the provisions of Rule 68 itself -- defeat such pick-off efforts. A rejected offer to contract has no importance, and the rule says that an offer of judgment that is not accepted may not be filed or otherwise used until the case is resolved, although it may then bear on allocation of costs. The question whether class actions should be handled in the same way as FLSA actions persisted, but after the Supreme Court's decision in 2013 the courts of appeals all concluded that Rule 68 offers to the individual plaintiff could not moot class actions, and the Seventh Circuit (which formerly had said they could) changed its rule.

In Campbell-Ewald Co. v. Gomez, 136 S.Ct. 663 (2016), the Court held that a Rule 68 offer to a putative class representative does not moot the case because "an unaccepted settlement offer has no force." But the decision left open possibilities that the Subcommittee is monitoring and evaluating. Some detail about the Court's various opinions therefore seems helpful.

The majority adopted Justice Kagan's analysis in her dissent in the 2013 FLSA case, relying on "basic principles of contract law" because an offer imposes no obligation on the offeree unless it is accepted. The court also noted that Rule 68 "hardly supports the argument that an unaccepted settlement offer can moot a complaint." But the majority qualified its holding:

> We need not, and do not, now decide whether the result would be different if a defendant deposits the full amount of the plaintiff's individual claim in an account payable to the plaintiff, and the court then enters judgment for the plaintiff in that amount.

Justice Thomas concurred in the judgment, but relied on "the common law history of tenders," which he said had "many rigid formalities." Because those formalities had not been satisfied in the case before the Court, the Rule 68 offer and additional settlement offer by defendant did not eliminate the court's jurisdiction to decide the case. In his view, an offer was not enough, and the common law on which he relied required actually producing the sum at the time the offer was made. He added:

> [I]n state and federal courts, a tender of the amount due was deemed "an admission of a liability" on the cause of action to which the tender related, so any would-be defendant who tried to deny liability could not effectuate a tender.

Chief Justice Roberts dissented (joined by Justices Scalia and Alito) on the ground that the offer of "full redress" for the representative's claim mooted the case. He agreed with the majority that rejection of the settlement offer meant that it was a "legal nullity" as a matter of contract law, but insisted that

the pertinent issue was whether there was still a case or controversy under Article III. On that score, he said in footnotes that the fact the case was filed as a class action did not matter (footnote 1) and that Justice Thomas's insistence on a formal tender of the full amount also was wrong (footnote 3). He concluded:

> The good news is that this case is limited to its facts. The majority holds that an *offer* of complete relief is insufficient to moot a case. The majority does not say that *payment* of complete relief leads to the same result. For aught that appears, the majority's analysis may have come out differently if Campbell had deposited the offered funds with the District Court. This Court leaves that question for another day -- assuming there are other plaintiffs out there who, like Gomez, won't take "yes" for an answer.

As might be expected, the Court's decision produced much discussion about what parties to class actions would do in the future. But as of this writing the answer to that sort of inquiry is not clear. As reflected in the notes on Subcommittee conference calls after the Court's decision, it has spent considerable time considering whether it should return to one or more of the various possible sketches presented in the past. It has also identified a further possibility -- requiring by rule that class counsel be afforded time to find a substitute class representative should the original class representative be found inadequate due to mootness or for another reason.

Approaches previously presented

Before its mini-conference in September, 2015, the Subcommittee had developed three approaches to pick-off issues. It has resumed considering these ideas in light of the Supreme Court's decision. The current sketches themselves are in an Appendix to the notes on the Subcommittee's Feb. 10, 2016, conference call, included in these agenda materials. The purpose of this report is to provide a brief description of their features to enable a discussion not only about whether pick-off issues remain important, but also about possible rulemaking solutions. The approaches previously presented are:

> The "Cooper Sketch" -- This approach would direct that "tender of relief" could terminate a proposed class action only if the court has already denied class certification and finds that the tender "affords complete relief on the class member's personal claim." It would also provide that such a dismissal would not defeat standing for the class member to appeal the denial of certification. This approach is the one most focused on the issues addressed in the Supreme Court's decision, and it would seemingly preserve standing even if the defendant deposited "full relief" into court and the court

entered judgment in that amount in favor of the plaintiff.

Restoring part of pre-2003 Rule 23(e) -- This approach would restore the pre-2003 provision that an action filed as a class action may not be voluntarily dismissed without the court's approval, and require that any agreement made in connection with the proposed dismissal be disclosed to the court. It could also seek to preserve the right for the class representative to appeal denial of class certification.

Amending Rule 68 to specify that it does not apply in class actions or derivative actions -- This would amend Rule 68 in a way first formally proposed in 1984. But it does not seem to address directly the Supreme Court's decision, which placed emphasis on "basic principles of contract law" rather than Rule 68. So it might be a useful confirmation of other changes, but probably is not sufficient by itself to prevent pick-off maneuvers if those continue to occur.

New idea -- Affording a window of opportunity to recruit a substitute class representative

Subcommittee discussions after the Supreme Court decision prompted a further idea, which might be useful in dealing with pick-off issues and also other problems. The idea is that Rule 23 (perhaps Rule 23(c)) should guarantee an opportunity to recruit a replacement class representative when the original one was found wanting. There have been cases that said the court should afford such an opportunity. It may be difficult, however, to define in a rule what event triggers this opportunity, or how long it should last, or whether it should forbid a "revolving door" effort to locate an adequate representative somewhere. But it would move beyond the pick-off situation and include any instance of mootness, and also instances in which the class representative proved unsatisfactory for another reason.

Discussion at April, 2016, meeting

The Subcommittee intends to continue studying these issues. It welcomes reactions regarding the actual practice since the Supreme Court's decision as well as reactions to the three approaches it has previously presented to the full Committee. It also welcomes initial reactions to its new idea.

B. ASCERTAINABILITY

During the Committee's April, 2015, meeting, the Subcommittee was urged to look carefully at issues surrounding the concern with "ascertainability." Decisions by the Third Circuit had raised considerable concerns in other courts, and the Third Circuit had revised its views somewhat. The Subcommittee did focus on this issue, and presented a sketch of what it regarded as a "minimalist" approach at the mini-conference it held in September, 2015. Several participants at the mini-conference regarded the Subcommittee's sketch as adopting a strong version of the Third Circuit view that many have questioned. The Subcommittee remains uncertain what should be in a rule amendment if one is warranted.

At the Advisory Committee's November, 2015, meeting, the Subcommittee reported that it felt both the difficulty of identifying a suitable response to these issues and the shifting case law in the area made it wise to put these issues "on hold."

Meanwhile, there have been other developments. The Seventh Circuit, in Mullins v. Direct Digital, LLC, 795 F.3d 654 (7th Cir. 2015), petition for certiorari filed (no. 15-549), Oct. 28, 2015, articulated a view of ascertainability that contrasts with the view seemingly endorsed by the Third Circuit. In Rikos v. Procter & Gamble Co., 799 F.3d 497 (6th Cir. 2015), mandate stayed, Oct. 28, 2015, petition for certiorari filed (no. 15-835), Dec. 28, 2015, the Sixth Circuit rejected ascertainability objections to a consumer class action. As of this writing, the Supreme Court has not acted on these petitions for certiorari. In addition, the Court has before it two cases -- Spokeo, Inc. v.Robins, 742 F.3d 409 (9th Cir. 2014), cert. granted, 135 S.Ct. 1892 (2015), and Tyson Foods, Inc. v. Bouaphakeo, 765 F.3d 791 (8th Cir. 2015), cert. granted, 135 S.Ct. 2806 (2015), whose resolution might also bear on these issues.

Under these circumstances, the Subcommittee believes it wise to retain these issues on its agenda, but "on hold" without a formal amendment proposal. It invites input from the full Committee.

MEMORANDUM

TO: Judge John D. Bates, Chair of the Civil Rules Committee

FROM: Derek Webb, Law Clerk to Judge Jeffrey Sutton

RE: Class Action Objector Appeals Jurisdictional Question

DATE: January 6, 2016

Question: Can a district court approve the withdrawal of a class action objector's appeal and/or the side-payment to the objector after the case has already been appealed to the circuit court and the district court has been divested of its jurisdiction over the case?

Answer: Yes.

For starters, there does not appear to be an absolute, categorical bar on district courts exercising limited jurisdiction over a case even after it has been appealed to the circuit court. In a surprisingly large number of areas of the law, district courts do just that. And in a few areas of law, circuit courts expressly ask the district court to do this to aid them in their handling of the appeal.

1) First principles

It is helpful to start with several broad, canonical statements of first principles regarding the jurisdictional question.

First, even stated at its most categorical, the rule that jurisdiction transfers from the district court to the circuit court upon the filing of an appeal always allows for the exception of those instances in which retaining some jurisdiction over the case would "aid the appeal." Consider these four statements from several circuit courts:

> Shewchun v. U.S., 797 F.2d 941 (11th Cir. 1986).
>
> > It is the general rule of this Circuit that the filing of a timely and sufficient notice of appeal acts to divest the trial court of jurisdiction over the matters at issue in the appeal, except to the extent that the trial court must act in aid of the appeal. United States v. Hitchmon, 602 F.2d 689, 692 (5th Cir. 1979) (en banc).
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> Matter of Jones, 768 F.2d 923 (7th Cir. 1985) (J. Posner, concurring)
>
> > The filing of the notice of appeal from a final judgment ordinarily divests the district court of jurisdiction over the case and shifts it to the court of appeals; anything the district judge does with the case thereafter, unless and until the case is remanded to him by the court of appeals, is a nullity. See, e.g., Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58, 103 S.Ct. 400, 402, 74

> L.Ed.2d 225 (1982) (per curiam);… This is a judge-made rule, and naturally there are exceptions to it. The purpose of the rule is to keep the district court and the court of appeals out of each other's hair, and when simultaneous proceedings would be productive and expediting rather than duplicative and delaying-as where the court of appeals asks the district court to clarify a jurisdictional uncertainty-the rule is not applied.

U.S. v. Hitchman, 602 F.2d 689, 692 (5th Cir. 1979)

> The filing of a timely and sufficient notice of appeal transfers jurisdiction over matters involved in the appeal from the district court to the court of appeals. The district court is divested of jurisdiction to take any action with regard to the matter except in aid of the appeal. Resnick v. La Paz Guest Ranch, 289 F.2d 814, 818 (9th Cir. 1961); 9 Moore's Federal Practice P 203.11 at 734-736 (2d ed. 1975).

Resnick v. La Paz Guest Ranch, 289 F.2d 814, 818 (9th Cir. 1961)

> As a general rule, of course, once an appeal has been taken— once notice of appeal has been timely filed— the district court is divested of jurisdiction to take any action except in aid of the appeal. 7 moore, Federal Practice 3158-59. Miller v. United States, 7 Cir., 114 F.2d 267, certiorari denied 313 U.S. 591, 61 S.Ct. 1114, 85 L.Ed. 1545.

There are exceptions to the rule that jurisdiction transfers from district to circuit court upon filing the notice of appeal, it seems, because the rule is itself not a jurisdictional rule anchored in any statute or federal rule of civil or appellate procedure. Rather it is, as Judge Posner put it in *Matter of Jones*, a "judge-made rule." Moore's Federal Practice expands upon this point nicely:

> It is often said that filing a timely notice of appeal immediately transfers jurisdiction to the circuit court and divests the district court of jurisdiction over all matters relating to the appeal. However, the use of the term "transfer of jurisdiction" is not entirely accurate. The principle is not derived from the jurisdictional statutes or from the rules. It is a judge-made doctrine, designed to promote judicial economy and avoid the confusion and inefficiency that might flow from putting the same issue before two courts at the same time. Although the general rule should ordinarily be followed, courts have noted that it is not absolute, nor always desirable, and it should not be employed to defeat its purposes or to induce endless paper shuffling. Moore's Federal Practice 3D § 303.31[1]

And to the extent any statutes bear on this question, they seem to cut in favor of a broad reading of the authority of courts of appeals to direct district courts to carry out "further proceedings" that might aid in the appeal. As 28 USC § 2106 says:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

2) Examples of district courts retaining jurisdiction over cases while on appeal

Various circuit court decisions and the rules of civil, appellate, and criminal procedure themselves have recognized, and in certain contexts expanded, the authority of district courts to make certain decisions regarding ancillary issues in cases even after the notice of appeal had been filed.

1) A district court can enforce its order while the case is on appeal.

> "[A]lthough a district court may not expand upon an order after the notice of appeal has been filed, it may take action to enforce its order in the absence of a stay pending appeal." N.L.R.B. v. Cincinnati Bronze, Inc., 829 F.2d 585, 588 (6th Cir. 1987).

2) A district court can continue to supervise conduct under its order and modify its injunctions while the case is on appeal.

> "The action attempted by the district court was similar to the use of contempt to enforce a money judgment that remains pending on appeal, and was not within the rule that a district court may continue to supervise ongoing conduct and modify an injunction pending appeal." Donovan v. Mazzola, 761 F.2d 1411, 1414–1415 (9th Cir. 1985).

3) FRAP 7: "In 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."

4) FRAP 8: Parties must make a motion first in the district court for a stay of its judgment/order/modification of an injunction/approval of a supersedeas bond while the case is on appeal.

> The Committee Note for FRAP 8 seems particularly relevant:
>
> > The statement of the requirement in the proposed rule would work a minor change in present practice. FRCP 73 (e) requires that if a bond for costs on appeal or a supersedeas bond is offered after the appeal is docketed, leave to file the bond must be obtained from the court of appeals. There appears to be no reason why matters relating to supersedeas and cost bonds should not be initially presented to the district court whenever they arise prior to the disposition of the appeal. The requirement of FRCP 73 (e) appears to be a concession to the view that once an appeal is perfected, the district court loses all power over its judgment. See In re

Federal Facilities Trust, 227 F.2d 651 (7th Cir., 1955) and cases—cited at 654–655. No reason appears why all questions related to supersedeas or the bond for costs on appeal should not be presented in the first instance to the district court in the ordinary case.

5) FRAP 9(b) and Criminal Rule 46(c) contemplate that the district court has authority to determine, in the first instance, whether a defendant should be released while the case is on appeal.

The Committee Note for Criminal Rule 46(c) reads:

> Although the general rule is that an appeal to a circuit court deprives the district court of jurisdiction, Rule 46(c) recognizes the apparent exception to that rule—that the district court retains jurisdiction to decide whether the defendant should be detained, even if a notice of appeal has been filed. See, e.g., United States v. Meyers, 95 F.3d 1475 (10th Cir. 1996), cert. denied,

The Committee Note for FRAP 9(b) reads:

> This subdivision regulates procedure for review of an order respecting release at a time when the jurisdiction of the court of appeals has already attached by virtue of an appeal from the judgment of conviction. Notwithstanding the fact that jurisdiction has passed to the court of appeals, both 18 U.S.C. §3148 and FRCrP 38 (c) contemplate that the initial determination of whether a convicted defendant is to be released pending the appeal is to be made by the district court.

6) FRAP 23(a) grants the district court whose habeas decision is on appeal authority to determine whether to transfer custody of habeas petitioners. "When, upon application, a custodian shows the need for a transfer, the court, justice, or judge rendering the decision under review may authorize the transfer and substitute the successor custodian as a party."

7) FRAP 24(a) recognizes authority in the district court to permit those who appeal from its decisions to proceed *in forma pauperis*. "a party to a district-court action who desires to appeal in forma pauperis must file a motion in the district court."

8) FRCivP 60(a) granted district courts the power to correct a clerical mistake even after the case was upon appeal, but only with permission from the circuit court. This 1946 amendment set forth a new rule that departed from the rule laid out by several circuits:

> "The amendment incorporates the view expressed in Perlman v. 322 West Seventy-Second Street Co., Inc. (C.C.A.2d, 1942) 127 F.(2d) 716; 3 Moore's Federal Practice (1938) 3276, and further permits correction after docketing, with leave of the appellate court. Some courts have thought that upon the taking of an appeal the district court lost

its power to act. See Schram v. Safety Investment Co. (E.D.Mich. 1942) 45 F.Supp. 636; also Miller v. United States (C.C.A.7th, 1940) 114 F.(2d) 267."

9) A district court can enter a certificate of appealability even after a notice of appeal has been filed.

Local P-171, Amalgamated Meat Cutters and Butcher Workmen of North America v. Thompson Farms Co., 642 F.2d 1065, 1073–1074 (7th Cir. 1981).

"The general rule is that the filing of a notice of appeal with the district court deprives that court of power to act further on the cause appealed from. According to that principle, the district court was without power to amend the order appealed from in any way after the notice of appeal was filed. But that principle has always been shot through with exceptions where a fair construction of the Federal Rules of Civil Procedure so requires. Washington v. Board of Education, 498 F.2d 11, 15-16 (7 Cir. 1979); Elgen Manufacturing Corp. v. Ventfabrics, Inc., 314 F.2d 440, 444 (7 Cir. 1963). We hold that another exception to that principle exists to permit a district court to amend an otherwise appealable order after the filing of a notice of appeal so as to add a Rule 54(b) certificate.

After a notice of appeal has been filed, a district court retains power to enter a certification that will make the order appealable under Civil Rule 54(b). The purposes of the ordinary rule that a notice of appeal divests the district court of power to act further are not involved. Dismissal of the appeal because the certification was belated would result in mere empty paper shuffling. The bare addition of the certification after the notice of appeal does not create any potential for conflict between the district court and the court of appeals. It would be anomalous, moreover, to adopt a rule that forecloses such district-court action—the seeming result would be that neither the court of appeals nor the district court has power to act on the order appealed from. The rule that ordinarily divests district-court power is judge-made, and is sufficiently flexible to avoid such untoward consequences."

10) A district court may adjudicate the question of attorney's fees while the case is on appeal. Courts have said that this is so because this does not entail the district court adjudicating the same issues that are on appeal before the circuit court.

Terket v. Lund, 623 F.2d 29, 33–34 (7th Cir. 1980).

"[W]e note first that the general rule divesting the district court of "jurisdiction" upon the filing of a notice of appeal does not refer to the court's jurisdiction under any statute or mandatory rule. "It is a judge-made doctrine designed to avoid the confusion and waste

of time that might flow from putting the same issues before two courts at the same time. It should not be employed to defeat its purposes not to induce needless paper shuffling." 9 Moore's Federal Practice P 203.11, p. 3-45 n. 1 (2d ed. 1980).

We believe that the rationale of *Washington* should be applied to post-judgment motions for attorneys' fees. It is true that in ruling on the issue of attorneys' fees a district court must take into account both the relative merit of the plaintiff's case and the result obtained. See Muscare v. Quinn, supra. But this is not the sort of reconsideration of the merits which could lead to altering the substantive judgment or in any way interfere with the pending appeal. The district court merely takes the merits into account, along with many other factors, in making a discretionary decision entirely distinct from the underlying judgment. Thus the policy against two courts treating the same issues concurrently does not require withdrawing the district court's power to decide attorneys' fees motions while an appeal is pending."

3) Examples of Circuit Courts asking District Courts to make a Ruling or offer its View

There are a few instances in which the court of appeals can expressly invite a district court judge who handled the case below to make a ruling or offer its perspective on a question even after the case has been appealed and jurisdiction has transferred.

1) Extraordinary writs
    - FRAP 21(b)(4): In the context of writs of mandamus or prohibition, or other extraordinary writs, the court of appeals can "invite or order the trial-court judge to address the petition or may invite an amicus curiae to do so. The trial-court judge may request permission to address the petition but may not do so unless invited or ordered to do so by the court of appeals."
    - The reason the Court of Appeals might ask the district court judge to weigh in is because he is uniquely positioned to offer relevant insight regarding the writ. As the 1996 Committee Note observes:
        - "If the court of appeals desires to hear from the trial court judge, however, the court may invite or order the judge to respond. In some instances, especially those involving court administration or the failure of a judge to act, it may be that no one other than the judge can provide a thorough explanation of the matters at issue."

2) Limited remand
    - Although the federal rules do not expressly provide for this, various circuit courts have held that they can issue "limited remands" to the district court on a specific, stated question while the court of appeals retains jurisdiction over the case. On such a

limited remand, the district court must focus its attention exclusively on the question presented to it by the circuit court and cannot go beyond its charge to address any of the other merits questions on appeal.

- United States v. Wooden, 230 F. App'x 243, 244 (4th Cir. 2007) (per curiam)

  "[T]he only issue before the district court by reason of our limited remand was a determination of the date on which Wooden gave his notice of appeal to prison officials so that we could determine whether Wooden's appeal in No. 04-6793 was timely noted.... [T]he district court was without authority to act on Wooden's motions which involved aspects of the case involved in the appeal.").

- Situations in which circuit courts have issued limited remands to district courts:
  - When district courts failed to offer findings in support of a ruling.
    - Seeley v. Chase, 443 F.3d 1290, 1297 (10th Cir. 2006)

      "Because we cannot review a district court's decision to admit Rule 415 evidence unless it makes a reasoned, recorded statement of its 403 decision, the case is REMANDED to the district court for an articulated analysis of its ruling under Rule 403. This court will retain jurisdiction of the appeal pending the district court's further rulings, which shall be certified to this court as a supplemental record. In the interim, the case is abated."
  - When circuit courts wanted the district court to consider other facts it had previously neglected when it made its ruling.
  - When circuit courts wanted district courts to examine claims of privilege by performing in camera review of documents and responding to specific questions about the documents.
  - When circuit courts wanted district courts to supply information that was relevant to whether the appellate court had jurisdiction.
    - United States v. D.L. Kaufman, Inc., 175 F.3d 970, 973 (Fed. Cir. 1999)

      "An appellate court should not be required to search the record in an attempt to ascertain the bases for the district court's action. We therefore conclude that the appropriate procedure in this case is partially to remand to the district court to clarify the bases for its decision. We shall retain jurisdiction of the appeal and dispose of it in light of what the district court states."
  - Post-Booker cases
    - U.S. v. Paladino, 401 F.3d at 483-84 (7th Cir. 2005)

> "[W]hat an appellate court should do in Booker cases in which it is difficult for us to determine whether the error was prejudicial is, while retaining jurisdiction of the appeal, order a limited remand to permit the sentencing judge to determine whether he would (if required to resentence) reimpose his original sentence. If so, we will affirm the original sentence against a plain-error challenge provided that the sentence is reasonable . . . ."

3) Indicative rulings
   - FRAP 12.1 and FRCivP 62.1, created in 2009, allow the district court, even after its judgment has been appealed, to indicate its willingness to grant a Rule 60 motion of relief from final judgment upon the basis of mistake, surprise, excusable neglect, newly discovered evidence, fraud, or other reason.
   - FRCivP 62.1: Upon receiving a motion for relief from judgment, the district court could defer considering the motion, deny the motion, or "state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue."
   - FRAP 12.1: "If the district court states that it would grant the motion or that the motion raises a substantial issue, the court of appeals may remand for further proceedings but retains jurisdiction unless it expressly dismisses the appeal."

Conclusion

Despite the general rule that upon filing a notice of appeal, jurisdiction transfers from the district court to the circuit court, court cases and the federal rules acknowledge many exceptions to this judge-made rule, particularly when doing so would "aid in the appeal." And circuit courts have on occasion expressly invited district courts to weigh in on certain questions when the district courts were uniquely positioned to aid the circuit court and when doing so would not undermine comity between the courts or involve both courts in reviewing the same questions at the same time.

Of all these examples, the limited remand seems the closest analogue. Upon encountering a question beyond the competence of the circuit court judge but well within that of the district court, circuit courts have directed district courts to resolve certain specific questions while the circuit court retained jurisdiction over the case. Indicative rulings and extraordinary writs are also similar, and have the advantage of being set forth in the federal rules of civil and appellate procedure, but they are focused exclusively on whether the district court judgment itself should be vacated and are crafted specifically for that context. Indicative rulings have the added complexity of granting the district court the authority to merely indicate what it would do if the circuit court were to remand the case back to it. In the context of the class action objector

appeal, the focus is not on the correctness of the decision by the district court to approve the settlement, but rather on whether the motion to dismiss the appeal from the settlement should be granted and the side-payment approved. A limited remand on this discrete question would allow the court best situated to answer that question to do so, keep jurisdiction over the case in the circuit court, and aid in the appeal without, it seems, running afoul of any jurisdictional problems.

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MEMORANDUM

DATE: March 12, 2016

TO: Advisory Committee on Appellate Rules

FROM: Gregory E. Maggs, Reporter

RE: Item No. 16-AP-A [FRAP 4(b)(1) time for filing notice of appeal]

I. Introduction

This new item concerns a proposal by Thomas L. Wright, Esq., of El Paso, Texas. Mr. Wright proposes amending Appellate Rule 4(b)(1)(A) to increase the period of 14 days for filing a notice of appeal in a criminal case to 30 days.

In the attached letter, Mr. Wright briefly explains the rationale for his proposal as follows: "Many U.S. defendants are housed at facilities quite some distance from their attorneys which can make discussing the advisability of an appeal within the 14 day time limit difficult. That is especially true when some District Judges and /or U.S. Marshals do not allow counsel adequate time after sentencing to fully discuss the advisability of an appeal."

II. Previous Rejection of a Similar Proposal

The Appellate Rules Committee previously considered and rejected essentially the same proposal. Item 11-AP-E concerned a suggestion by Dr. Roger Roots that Appellate Rule 4(b) be amended to accord criminal defendants the same 30-day appeal period that applies to government appeals in criminal cases. As described in the attached minutes, the Committee discussed Item 11-AP-E at its Spring 2012 and Fall 2012 meetings and then voted to remove the item from the Agenda without taking action.

In deciding not to amend Rule 4(b)(1)(A), members of the Committee discussed various policy considerations. Several arguments counseled against extending the time for filing a notice of appeal. First, for criminal defendants, the decision whether to appeal is typically not difficult. Second, empirically, very few appeals are dismissed for being untimely. Third, generally there is a period between conviction and sentencing at which the defendant and counsel might discuss whether to appeal.

Even though the Committee previously decided to take no action on this matter, the Committee is free to revisit the issue. But this memorandum will be brief because the minutes from the Spring and Fall of 2012 already cover the main considerations.

III. Discussion

The current Appellate Rule 4(b)(1) reads as follows:

> **Rule 4. Appeal as of Right—When Taken**
>
> * * *
>
> **(b) Appeal in a Criminal Case.**
>
> (1) **Time for Filing a Notice of Appeal.**
>
> (A) In a criminal case, a defendant's notice of appeal must be filed in the district court within 14 days after the later of:
>
> (i) the entry of either the judgment or the order being appealed; or
>
> (ii) the filing of the government's notice of appeal.

Extending time periods always involves a tradeoff. On one hand, extending the period for filing a notice of appeal would provide defendants and their counsel more time to make an informed decision. This additional time could be helpful for the reasons that Mr. Wright suggests. On the other hand, filing deadlines exist so that cases move through the court system expeditiously. Increasing the time period for filing a notice of appeal inevitably will cause some delay.

One argument, against extending the period for filing a notice of appeal, which was not mentioned in the 2012 minutes, is that Rule 4(b)(4) already allows a defendant to seek additional time for good cause. Rule 4(b)(4) provides: "Upon a finding of excusable neglect or good cause, the district court may—before or after the time has expired, with or without motion and notice—extend the time to file a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this Rule 4(b)." Not having adequate time after sentencing to discuss the advisability of an appeal with counsel would appear to be good cause for seeking an extension. *See, e.g.*, *Ida v. United States*, No. 00 CIV. 8544(LAK), 2002 WL 31356310, at *1 (S.D.N.Y) (illness of counsel during the filing period was good cause for granting an extension under Rule 4(b)(4)).

The period for filing a notice of appeal in a civil case is 30 days, rather than the 14 days in a criminal case. *See* Appellate Rule 4(a)(1)(A). I could not find a clear explanation for why appellants have more time in civil cases than criminal cases. Professor Lissa Griffin, however, offers the following practical explanation for why the difference may be less significant than it would first appear:

> Although the appeal period is longer in civil cases, it may be easier to secure an extension to file a notice of appeal in a criminal case. U.S. v. Reyes, 759 F.2d 351, 353 (4th Cir. 1985) (motion to extend the time to file a notice of appeal is required under Rule 4(a) but not under Rule 4(b)); Mann v. Lynaugh, 840 F.2d 1194, 1199, 10 Fed. R. Serv. 3d 1193 (5th Cir. 1988) (noting that under Rule 4(a), a motion is required to request an extension of time to file a notice of appeal as well as to request a finding of excusable neglect); Pratt v. McCarthy, 878 F.2d 331, 332, 14 Fed. R. Serv. 3d 1049 (9th Cir. 1989). Some courts have interpreted the differences between these rules as warranting that greater deference be accorded to a district court's finding of excusable neglect under Rule 4(b) than in civil appeals under Rule 4(a). Pratt v. McCarthy; U.S. v. Ferrer, 613 F.2d 1188, 1190-91 (1st Cir. 1980) . . . .

Lissa Griffin, 1 Federal Criminal Appeals § 6:4 (July 2015).

Finally, in considering this item, the Committee may recall that the period for filing a notice of appeal under Rule 4(b)(1) was extended in 2009 from 10 days to 14 days. *See* Advisory Committee Note to Appellate Rule 4 (2009). This extension was made because of a change in the way dates were computed; it generally did not give defendants more time to appeal. *See* Advisory Committee Note to Appellate Rule 26 (2009).

Attachments:

1. Letter from Thomas L. Wright to Clerk, U.S. Supreme Court (Dec. 23, 2015)
2. Excerpt from the Minutes of Spring 2012 Meeting of Advisory Committee on Appellate Rules
3. Excerpt from the Minutes of Fall 2012 Meeting of Advisory Committee on Appellate Rules

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TAB 5B

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Thomas L. Wright
Attorney at Law
Practice Limited to Criminal Law
521 Texas Avenue
El Paso, Texas 79901
915-526-4299

23
December 7, 2015

Clerk
U.S. Supreme Court

Re: 14 day time limit to file a Notice of Appeal

Ladies and Gentlemen:

What would be the proper way to attempt to initiate a rule-making to possibly increase the 14 day time limit to 30 days?

Many U.S. defendants are housed at facilities quite some distance from their attorneys which can make discussing the advisability of an appeal within the 14 day time limit difficult. That is especially true when some District Judges and /or U.S. Marshalls do not allow counsel adequate time after sentencing to fully discuss the advisability of an appeal.

I believe that the time limit should be increased to 30 days in the interest of justice.

Sincerely,

Tom Wright

CC: Chief Judges U.S. Court of Appeals for the 5th and 10th Circuits

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Excerpt from the Minutes of Spring 2012 Meeting of Advisory Committee on Appellate Rules

VI. Additional Old Business and New Business

A. Item No. 11-AP-E (FRAP 4(b) / criminal appeal deadlines)

Judge Sutton invited the Reporter to introduce this item, which concerned a suggestion by Dr. Roger Roots that Appellate Rule 4(b) be amended to accord criminal defendants the same 30-day appeal period that applies to government appeals in criminal cases. The Reporter suggested that it would be difficult to argue that the difference between the defendant's and the government's appeal time is unconstitutional. A more significant question is whether the current 14-day appeal time period poses a hardship for defendants. Another question arises from the fact that the appeal times in Rule 4 depend on the categorization of the appeal as civil or criminal; at the margins, there is the possibility that the differential in appeal times between civil and criminal cases could give rise to difficulties if there is uncertainty over how to categorize a particular appeal. A third question is whether there should be symmetry between the appeal times that apply to the opposing parties in a given type of case.

As to the question of hardship, the Reporter suggested a few considerations. Fourteen days is a short period, and it is shorter than the period for civil appeals. The notice of appeal is a simple document. In some cases there may be challenges involved in identifying colorable issues for appeal, or difficult strategic questions where a defendant has received a lower sentence than he or she might receive if re-sentenced; but setting such instances aside, ordinarily the decision whether to appeal should not be a difficult one. Additionally, some safeguards exist. In

cases where there is a difficulty the defendant can seek an extension of the time to appeal under Rule 4(b)(4). At sentencing, the district court must advise the defendant of his or her right to take an appeal, and if the defendant requests, the clerk will file the notice of appeal on the defendant's behalf. When an incarcerated defendant files the notice of appeal himself or herself, Rule 4(c)'s inmate-filing provision would apply. These features, the Reporter suggested, might alleviate possible hardships. But she noted her lack of experience in criminal law; those with such experience are better situated to assess this question.

With respect to the question of categorization, it turns out that, at the margins, there are some cases that may be difficult to categorize as civil or criminal. If a defendant errs by viewing the case as criminal when it is actually civil, then the harm would be that the defendant files a notice of appeal earlier than is actually necessary. A defendant who is aware of a difficult categorization question and is unsure whether the case counts as civil or criminal can protect himself or herself by filing within the deadline set by Rule 4(b). But a litigant who wrongly assumes that a case is civil when it is actually criminal could lose his or her appeal rights by filing too late. The Reporter observed that this concern had surfaced a decade ago, when the Committee last discussed a proposal to lengthen Rule 4(b)'s appeal deadline for criminal defendants.

As to the question of symmetry between litigants, the Reporter observed that there is an attraction to the idea that if one litigant receives additional time to appeal, their opponent should also have the benefit of the longer period. That principle is applied in Appellate Rule 4(a), which provides additional time to all litigants when one of the litigants is a United States government entity. Perhaps counterbalancing that, there are a number of asymmetries in criminal practice – such as asymmetries in discovery and asymmetries in rights to take an appeal.

The Reporter observed that if the Committee were to be interested in proceeding with this item, it would be important to consult the Criminal Rules Committee. Moreover, if one were to amend Rule 4(b) on grounds of symmetry, that might also raise a question about Civil Rule 12(a) (which provides federal government defendants with additional time to respond to the complaint).

A member stated that he was unpersuaded by the constitutional arguments and the arguments concerning symmetry. However, he suggested that it would be useful for the Committee to obtain data that would bear on the hardship argument. How often do criminal defendants fail to take an appeal, and why? For example, are appeals foregone for strategic reasons or are they forfeited due to lawyer incompetence? This member noted that there might be an alternative approach to protecting appeal rights; one could adopt a system in which the default is that there will be an appeal, and leave it up to the litigant to opt out if he or she does not wish to take an appeal.

Mr. Byron reported that he had discussed this item with Mr. Letter prior to the meeting; Mr. Letter had discussed the issue of hardship with a friend who is a federal public defender in the District of Columbia, who reported that in the experience of that office this typically is not a

problem. Most criminal defendants who wish to file appeals tend to do so expeditiously. A district judge member stated that he would have no objection to a rule that gave criminal defendants 30 days to appeal. He observed, though, that all criminal defendants are represented by counsel unless they decide, after a waiver, that they don't want a lawyer. And by the time of sentencing, the defendant and the lawyer have already had time (often, a lot of time) to consider possible issues of trial error. So the only issues that would arise shortly before the appeal deadline would relate to possible sentencing error. And, as noted, the judge informs the defendant at sentencing concerning the right to take an appeal. In sum, this member stated, he did not see the 14-day appeal time period posing a problem in his district; but, he suggested, a 30-day appeal time period could be useful if the defendant needs to think through a tricky sentencing issue. On the other hand, he noted, the latter sort of difficulty can be addressed under the current rules if the judge grants a request to extend the appeal time.

An attorney member asked why it is important to require the defendant to decide within 14 days whether to appeal; what events, this member wondered, turn on the date on which the defendant's appeal time runs out? A district judge member queried whether the timing had any implications for speedy trial requirements. The attorney member asked whether the expiration of the time to appeal would have implications for the timing of a remand to custody, or whether there is any similar systemic interest in getting the defendant's punishment started sooner rather than later. The district judge member responded that he did not think so; he observed that the question of whether the defendant can stay out on bond after sentencing is governed by statute. He noted that in a given circuit, the timing of the notice of appeal might affect the appellate briefing schedule.

Mr. Byron observed that the DOJ has an interest in the speedy resolution of criminal cases. Even the government's appeal time period in criminal cases, he noted, is shorter than the government's appeal time period in civil cases. An attorney member asked why one would not adopt a system in which the 14-day appeal time period applied to both sides in criminal cases; the government could file protective notices of appeal and then withdraw the notices if it decided not to appeal. Another member responded that there would be serious costs to a system that required the government to file a notice of appeal before it had had time to fully consider whether it wished to take an appeal. This member observed that to the public, the government's filing of a notice of appeal is not treated as merely an administrative act; it would be counter-productive if the government either had to decide whether to appeal within a very short time period or else withdraw a protective notice of appeal that it had previously filed. The attorney member who raised the question about applying the 14-day period to both sides suggested that if the 14-day deadline would impose those sorts of costs on the government, it was worth considering whether that deadline imposes similar costs on the defendant. The other member responded that he viewed those costs as asymmetric; when a criminal defendant files a notice of appeal it does not trigger the same sorts of public, institutional concerns that arise when the government files a notice of appeal.

An appellate judge stated that, in his experience, defendants in the Eleventh Circuit are not denied the right to an appeal due to a late notice. If the defendant asked his lawyer to file the

notice and the lawyer did not do so, then the court of appeals sends the case back to the district court for resentencing and the entry of a new judgment. He suggested that the Committee should be cautious about altering a time period that is so long-established.

Returning to the fact that the Committee had considered a similar proposal a decade earlier, Judge Sutton asked who had submitted the proposal on that earlier occasion. An attorney member asked what reasons had been given for the Committee's rejection of that prior proposal. Mr. Byron agreed to provide the Committee with the materials that Mr. Letter had submitted to the Committee in connection with that earlier discussion. The Reporter noted that she would locate the initial proposal that triggered the earlier discussion, and that she would update the Criminal Rules Committee Chair and Reporters concerning the Committee's discussion. By consensus, the Committee decided to retain this item on its study agenda. Judge Sutton thanked Dr. Roots for raising this issue with the Committee.

B. Item No. 11-AP-E (FRAP 4(b) / criminal appeal deadlines)

Judge Sutton invited Judge Fay to present this item, which arises from a suggestion by Dr. Roger Roots that Appellate Rule 4(b) be amended to lengthen the deadline for a criminal defendant to take an appeal. Judge Fay reviewed the suggestion and observed that the Committee had discussed a similar proposal roughly a decade earlier. At that time, after a very broad discussion, the Committee had voted to remove the proposal from its agenda. More recently, the Committee at its Spring 2012 meeting discussed Dr. Roots' proposal. Much of the discussion focused on whether the current 14-day deadline poses a hardship for defendants. Participants in that discussion observed that it is typically easier for a criminal defendant to decide whether to appeal than it is for the

government to decide whether to appeal. And there is ordinarily a time lapse between conviction and sentencing, so that (except as to sentencing issues) defendants tend to have more than 14 days within which to consider possible bases for appeal.

Judge Fay noted that the agenda materials for the current meeting included some figures concerning the rate at which federal criminal defendants appeal; he stated that he was surprised by the low proportion of such defendants who appeal. The agenda materials also indicated that the choice of deadlines for criminal defendants' appeals is not likely to have major implications for speedy trial requirements. It appears, Judge Fay noted, that relatively few appeals are dismissed on untimeliness grounds. District courts are likely to grant extensions where warranted. After *Bowles v. Russell*, 551 U.S. 205 (2007), courts are unlikely to regard a criminal defendant's appeal deadline as jurisdictional. The DOJ has opposed altering criminal defendants' appeal time limit, and has pointed out that there are big differences between the government and criminal defendants in terms of the time needed to decide whether to appeal. In sum, Judge Fay suggested, the current Rule works well and there is no reason to change it.

The Reporter thanked Ms. Leary for her very helpful research on criminal defendants' appeals. Ms. Leary noted that she had done a preliminary search, looking only at criminal appeals terminated in the Third Circuit since January 1, 2011. Among those appeals, nine were dismissed because the pro se defendant failed to meet Appellate Rule 4(b)'s 14-day deadline. But, she noted, in all but one of those cases, the defendant's delay was lengthy and would have rendered the appeal untimely even if the relevant deadline had been 30 days rather than 14 days. A member asked whether Ms. Leary had looked at all relevant appeals in the Third Circuit during the stated time period; she responded that the search was comprehensive.

A district judge member observed that very few cases go to trial. There is typically a long delay between conviction and sentencing. And where a criminal defendant needs more time to file a notice of appeal, caselaw in the Seventh Circuit supports the view that the district court should grant an extension under Rule 4(b)(4). Mr. Byron reiterated the DOJ's view that no amendment is needed.

A motion was made and seconded to remove this item from the Committee's agenda. The motion passed by voice vote without dissent.

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MEMORANDUM

DATE: March 13, 2016

TO: Advisory Committee on Appellate Rules

FROM: Gregory E. Maggs, Reporter

RE: Item No. 14-AP-D: Amicus Briefs Filed by Consent of the Parties, FRAP 29(a)

I. Review of Discussion at the October 2015 Meeting

At the October 2015 Meeting, the Committee considered revisions to Appellate Rule 29(a), which currently authorizes an amicus curiae to file a brief with leave of the court or without leave of the court "if the brief states that all parties have consented to its filing." A potential concern is that the parties might consent to the filing of a brief by an amicus curiae, and that filing may cause the recusal of one or more judges.

Several Circuits have adopted local rules to address this concern. For example, 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." The D.C., Fifth, and Ninth Circuits have similar local rules. These local rules appear to be inconsistent with Rule 29(a) because they do not allow the filing of amicus briefs based solely on consent of the parties in all instances.

After discussing the matter at its October 2015 meeting, the Committee decided to recommend an amendment to Rule 29(a) to authorize local rules limiting the filing of amicus briefs in situations when they would disqualify a judge. The proposed amendment and new Advisory Committee Note are underlined below:

Rule 29. Brief of an Amicus Curiae

(a) **When Permitted.** The United States or its officer or agency or a state may file an amicus-curiae[1] brief without the consent of the parties or leave of court.

[1] The Style Consultants proposed removing the hyphen between the words "amicus-curiae" in line 3. The Standing Committee did not discuss this proposal. The words "amicus curiae" without a hyphen appear in the title of the Rule and in line 4. For consistency, they

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, except that a court of appeals may [by local rule][2] prohibit [reject][3] the filing of an amicus brief that would result in a judge's disqualification.[4]

* * *

ADVISORY COMMITTEE NOTE

Under current Rule 29(a), by the parties' consent alone, an amicus curiae might file a brief that results in the disqualification of a judge who is assigned to the case or participating in a vote on a petition for rehearing. The amendment authorizes local rules, such as those previously adopted in some circuits, that prohibit the filing of such a brief. The amendment does not alter or address the standards for when an amicus brief requires a judge's disqualification.[5]

II. Concerns of the Standing Committee and the Style Consultants

At its January 2016 meeting, the Standing Committee considered the proposed amendments to Rule 29(a) and was generally favorable toward them. But the Standing

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should all be the same.

[2] The Appellate Committee approved a version of this rule that said ". . . may by local prohibit rule . . . ." A member of the Standing Committee proposed deleting the words "by local rule" in line 6 so that judges could act either by order in an individual case or by creating a local rule. The Standing Committee appeared to support this change, as did the Style Consultants.

[3] A member of the Standing Committee raised a question about the word "prohibit" in line 6, asking what happens if a court does not realize that a brief creates a recusal problem until after the brief has already been filed. In that case, the court could not "prohibit" the filing because it already has occurred. The word "reject" is broader and perhaps could apply to a filing before or after it has occurred.

[4] The Style Consultants proposed replacing the words "disqualification of a judge" with "a judge's disqualification." The Standing Committee supported this change.

[5] The last sentence of the advisory committee note was added for clarification after the January 2016 meeting of the Standing Committee.

Committee and the Style Consultants identified four issues that may require further consideration. I recommend that the Appellate Rules Committee consider, and if appropriate, vote on each of the following matters.

A. "Except" Clause vs. "But" Sentence

The Style Consultants objected to the clause beginning with the word "except" in line 5. They proposed ending the second sentence with the word "filing" and creating a new sentence beginning with the word "But." They argued that the proposed sentence with the "except" clause is too long and that it is customary to create an exception to a general rule with a sentence beginning with "But." This Style Consultants' initial revision of Rule 29(a) read as follows:

(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. But a court of appeals may [by local rule] prohibit [reject] the filing of an amicus brief that would result in a judge's disqualification.

This proposed style revision generated two objections. One objection was that the third sentence appeared to contradict the second sentence rather than merely to create an exception to the second sentence. The other objection was that the third sentence would appear to impose a limit on both the first and second sentences of Rule 29(a), suggesting that a court could prevent the United States or a state (or their agencies and officials) from filing amicus briefs. In response to these concerns, the Style Consultants proposed a second revision of Rule 29(a) that would subdivide it as follows:

(a) **When Permitted.**

(1) **Federal or State Amicus.** 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.

(2) **Other Amici**. 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.

(3) **Rejection of a Disqualifying Amicus Brief.** A court of appeals may [by local rule] reject the filing of an amicus brief that would result in a judge's disqualification.

This second style revision does not appear to resolve either of the two concerns previously raised. Section (3) still appears to contradict the authorization granted in section (2) rather than merely create an exception to that authorization. Section (3) also would still allow a court to reject a governmental amicus brief. In addition, if the goal of the style revision was originally to reduce complexity, breaking the section into subdivisions may in fact add complexity.

The Appellate Committee now has three proposed options: (1) the original "except" clause; (2) the "But" sentence without subdivisions; and (3) the revised style version with subdivisions. The Committee may wish to select one of these options or devise some alternative phrasing the would accomplish the same intended result.

B. Policy Objection

A consultant to the Standing Committee raised a policy objection to allowing a court to prohibit the filing of an amicus brief that would cause a judge's disqualification. The objection was that a court might block amicus briefs that raise an awkward but important issue about disqualification that the parties themselves do not wish to raise. In such situations, the parties may consent to having an amicus party raise the issue. The Standing Committee discussed this issue without resolving it.

C. National Rule vs. Local Rules

A member of the Standing Committee also raised the question whether Rule 29(a) should announce a national rule instead of leaving the matter to local rules or court orders. A possible response to this question is that circuit courts apparently have different views about the matter and it is not clear whose view is best. The Standing Committee discussed this issue but did not reach any conclusion.

D. Allowing Amicus Briefs Only By Leave of Court

A member of the Standing Committee also raised the question whether Rule 29(a) should be simplified so that it allows filing of an amicus brief only by leave of the court. A revision might take away the current right to file an amicus brief merely because the parties have

consented to the filing. The Standing Committee discussed this alternative but it did not appear to have significant support.

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MEMORANDUM

DATE: March 14, 2016

TO: Advisory Committee on Appellate Rules

FROM: Gregory E. Maggs, Reporter

RE: Item No. 08-AP-R: Rule 26.1 & 29(c) disclosure requirements

I. Introduction

As the Committee has discussed at past meetings, local rules in various circuits impose disclosure requirements that go beyond those found in Appellate Rules 26.1 and 29(c), which call for corporate parties and amici curiae to file corporate disclosure statements. In March 2015, Professor Dan Capra prepared an extensive memorandum on this subject, which was previously included in the Committee's agenda books and is again attached.

At its October 2015 meeting, the Committee considered the discussion drafts of Rules 26.1 and 29(c) in Professor Capra's memorandum. Although the Committee left several issues open for future discussion, it appeared to reach consensus on four points:

1. In the discussion draft of Rule 26.1(a)(2), the word "trial" should be deleted.

2. In the discussion draft of Rule 26.1(a)(3), the words "partners and associates" should be replaced with "lawyers."

3. In the discussion draft of Rule 26.1(a)(3), the words "law firms" should be replaced with "legal organizations," and in Rule 29(c)(5)(D), the words "law firm" should be replaced with "legal organization."

4. In the discussion draft of Rule 29(c)(5)(D), the phrase "contributed to the preparation" should be replaced with "authored in whole or part."

Part II below presents a revised discussion draft. Parts III identifies additional issues for the Committee to consider.

II. Revised Discussion Drafts of Rule 26.1 and Rule 29

The following draft revisions of Rule 26.1 and Rule 29 include the amendments outlined by Professor Capra and discussed in October 2015 and the four modifications described above. The drafts also incorporate several helpful style changes proposed by the Style Consultants.

Rule 26.1. ~~Corporate~~ Disclosure Statement

(a) Who Must File; What Must Be Disclosed. ~~Any nongovernmental corporate~~ Except for an individual or a governmental unit, any party to a proceeding in a court of appeals must file a statement that lists:

(1) any parent [or affiliated][1] 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 or entity;

(2) the names of all judges[2] in the [proceeding]{case}[3] and in any related state [proceeding]{case};

(3) the names of all lawyers and legal organizations[4] that have appeared or are expected to appear for the party in the [proceeding]{case}; and

(4) the names of all witnesses who have testified on behalf of the party in the [proceeding]{case}.

* * *

(d) Organizational Victim in a Criminal Case. In a criminal case if an

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[1] The October 2015 discussion draft proposed adding the words "or affiliated." As discussed in Part III below, the Committee may wish to omit these words because the term "affiliated" is vague.

[2] The October 2015 discussion draft said "trial judges."

[3] The October 2015 discussion draft said "proceeding." The Style Consultants asked whether "proceeding" means the trial court proceeding or any proceeding in the case. The term "case" is broader and would cover all proceedings.

[4] The October 2015 discussion draft said "law firms and the partners and associates."

organization is a victim of [the alleged] criminal activity, the government must file a statement identifying the victim[, unless the government shows good cause for not complying with this requirement].[5] If the organizational victim is a corporation or publicly held entity, 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 that lists:

(1) any debtor not named in the caption;

(2) the members of each committee of creditors;

(3) the parties to any adversary proceeding; and

(4) any active participants in a contested matter.

(f) Intervenors. A person who wants to intervene must file a statement that discloses the information required by Rule 26.1.[6]

ADVISORY COMMITTEE NOTE

ALTERNATIVE A: Drawing on local rules, the amendment requires additional disclosures that may inform a judge's decision about whether recusal is warranted.

ALTERNATIVE B: Under federal law and ethical standards, judges must decide whether to recuse themselves from participating in cases for various reasons. Before this amendment Rule 26(a) required corporations to disclose only "any parent corporation and any publicly held corporation that owns 10% or more of its stock." Local rules of court have attempted to help judges determine whether

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[5] The bracketed phrase comes from a recent discussion draft of a proposed amendment to Criminal Rule 12.4 and is discussed in Part III.

[6] The October 2015 discussion draft used the word "intervenors." The Committee noted that this word was problematic because the rule concerns putative intervenors who have not yet been allowed to intervene. The phrase "a person who wants to intervene" comes from Appellate Rule 15.1(d).

recusal is necessary by requiring the parties to make additional disclosures. The amendment to subdivision (a) follows the lead of these local rules by requiring the listed additional disclosures. Subdivision (d) requires disclosure of organizational victims in criminal cases because a judge might have an interest in one of the victims. But the disclosure requirement is relaxed in situations in which disclosure would be overly burdensome to the government. For example, thousands of corporations might be the victims of a criminal antitrust violation, and the government may have great difficulty identifying all of them. Subdivision (e) is based on local rules and requires disclosures unique to bankruptcy cases. Subdivision (f) imposes disclosure requirements on a person who wants to intervene so that judges may decide whether they are disqualified from ruling on the intervention motion.

Rule 29. Brief of an Amicus Curiae

* * *

(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 with the information required of parties by Rule 26.1(a)(1), unless the amicus curaie is an individual or governmental unit;

* * *

(5) unless the amicus curiae is one listed in the first sentence of Rule 29(a), 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 legal organization[7] authored the brief in whole or in part, and, if so, identifies each such lawyer or legal organization.[8]

COMMITTEE NOTE

Subdivision (c)(1) conforms this rule with the amendment to Rule 26.1(a). Subdivision (c)(5)(D) expands the disclosure requirements to include disclosures about the lawyers and legal organizations who participated in writing an amicus brief because a judge also may need this information in order to decide whether recusal is required.

III. Specific Issues for Discussion

In considering the discussion drafts of Rules 26.1 and 29(c) at the April 2016 meeting, the Committee may wish to consider the following five specific questions:

1. Rule 26.1(a)(1) [line 5]: Should the words "or affiliated" be omitted or revised?

Rule 26.1(a) currently requires a corporation to disclose "any parent corporation and any publicly held corporation that owns 10% or more of its stock." The discussion draft would go further and require a corporation to disclose any "affiliated" corporation. Discussion at the October 2015 meeting raised the question whether the term "affiliated" is so vague that it might invite litigation. The Appellate, Bankruptcy, Civil, and Criminal Rules do not define the term "affiliated," and there is no generally applicable statutory definition. (The Bankruptcy Code contains a very complicated, page-long definition 11 U.S.C. § 101(2).) Black's Law Dictionary (10th ed. 2014) defines "affiliate" to mean "[a] corporation that is related to another corporation by shareholdings or other means of control; a subsidiary, parent, or sibling corporation."

The Committee might address concern about the vagueness of the term "affiliated" in three ways. First, it could retain the word and allow litigation to resolve difficult cases if they arise. Second, it could omit the term, leaving in place the current rule which requires disclosure only of a parent corporation and a publicly held corporation that owns 10% or more of its stock. Third, it could find an alternative term. For example, borrowing from Black's Law Dictionary, the Committee might amend Rule 26.1 to require disclosure

[7] The October 2015 discussion draft said "law firms."

[8] The October 2015 discussion draft said "contributed to the preparation."

of "any subsidiary or sibling corporation."

2. Rule 26.1(d) [lines 16-22]: Should the Rule contain a "good cause" exception to the requirement that the government disclose organizational victims?

At the October 2015 meeting, the committee discussed the difficulty the government might have in identifying organizational victims in some cases. For example, thousands of organizations might be victims of an antitrust violation by a popular computer software provider. A recent discussion draft of proposed amendments to Criminal Rule 12.4(a)(2) addresses this possibility by including a good cause exception.[9] Good cause might excuse the government from making a disclosure even if the government already has the names of organizational victims in its possession if making the disclosure would be burdensome to the government and also pointless because the court would never fully review the disclosure (e.g., the disclosure lists the names of millions of entities that have suffered minor injuries).

3. Rule 26.1(a)(4) [lines 13-14]: Should the amendment require disclosure of witnesses?

The proposal in Rule 26.1(a)(4) to require the disclosure of witnesses does not come from a local rule. Instead, as recounted in Professor Capra's memorandum, it was suggested by a member of the Standing Committee. The Committee might decide to omit this disclosure requirement on grounds that the amendment should focus only on the concerns of the circuits as evidenced by their local rules. The counter argument is that having a list of witnesses could help a judge decide whether recusal is necessary and the parties in many cases will already have a list of witnesses or will be able to obtain a list from the trial transcript.

4. Rule 26.1(a)(1)-(4) [lines 9-13]: Should individuals and governmental units be

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[9] The Rule 12.4 Subcommittee's discussion draft, dated February 4, 2016, would revise Criminal Rule 12.4(a)(2) to read as follows:

> **(2) Organizational Victim.** Unless the government shows good cause, it must file a statement identifying any organizational victim of the alleged criminal activity. ~~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.

exempt from having to disclose names of judges, lawyers, and witnesses?

As currently written, individuals and government units are exempt from all of the disclosure requirements in Rule 26.1(a)(1)-(4). Individuals and governmental units certainly should be exempt from the disclosures required by Rule 26.1(a)(1) because they have no corporate affiliates. But the Committee may wish to consider whether the individuals and governmental units should have to disclose the names of judges, lawyers, and witnesses under Rule 26.1(a)(2)-(4).

5. *Rule 26.1(a)(2)-(4) [lines 9-14]: Does the term "proceeding" refer to the entire litigation or just proceedings before the trial court?*

The Style Consultants asked whether the term "proceeding" in Rule 26.1(a)(2)-(4) refers to the entire litigation or just to the proceedings before the trial court. The discussions at the October 2015 meeting seem to suggest that the term "proceeding" should refer to the entire litigation. The Committee, in fact, deleted the word "trial" before "judges" so as not to limit disclosure to trial judges. If the Committee sees the term "proceeding" as ambiguous, it might consider another word such as "case."

Attachment:

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

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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.**

---

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.

* * *

(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 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.

* * *

(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>

---

[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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MEMORANDUM

DATE: March 14, 2016

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

I. Introduction

The Committee discussed this item at its fall 2015 meeting. As Reporter Cathie Struve has explained in the attached memorandum, the item concerns a proposal to add a parenthetical phrase to the instructions that accompany Question 4 on Appellate Form 4. The amended instruction would read as follows:

> If you are a prisoner seeking to appeal a judgment in a civil action or proceeding (not including a decision in a habeas corpus proceeding or a proceeding under 28 U.S.C. § 2255), 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.

The current language, without the parenthetical phrase, comes directly from 28 U.S.C. § 1915(a)(2) .[1] But the language may be confusing to prisoners. According to Reporter Struve's research, case law has established 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

[1] Section 1915(a)(2) says: "A prisoner seeking to . . . appeal a judgment in a civil action or proceeding without prepayment of fees or security therefor . . . 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."

proceedings under 28 U.S.C. § 2255 or 28 U.S.C. § 2241." Although habeas actions are considered civil actions for many purposes, the courts have concluded that "habeas corpus proceedings, and appeals of those proceedings, are not 'civil actions' for purposes of §§ 1915(a)(2) and (b)." *McIntosh v. U.S. Parole Comm'n*, 115 F.3d 809, 811-12 (10th Cir. 1997). The proposed parenethetical phrase is consistent with the case law and may prevent some confusion.

Reporter Struve identified risks both in amending Question 4 and in not amending Question 4. On one hand, the current language might mislead some prisoners and cause them to file institutional account statements when they do not need to file them. These unnecessary filings would burden both the prisoners and the prisons. On the other hand, the proposed amendment might have unintended consequences. Professor Struve cautioned that prisoners sometimes confuse habeas proceedings with § 1983 and *Bivens* actions. Adding the proposed parenthetical phrase might cause prisoners filing § 1983 and *Bivens* actions to think mistakenly that they do not have to file institutional account statements.

At the fall 2015 meeting, the Committee decided to keep the item on the Agenda but not to take action until it had more information.

II. New Information

After the October 2015 meeting, the Clerk Representative to the Appellate Rules Committee informally solicited the views of the clerks of the courts of appeals. He writes:

> The general consensus of the clerks is that habeas petitioners should not be required to file account statements because the PLRA [i.e. Prison Litigation Reform Act] does not apply to them. That being said, the Seventh Circuit does have a 1999 case, *Longbehn v. United States* (no. 98-3388), that says a district court judge can require a partial filing fee in habeas cases but cannot use the collection method set out in Sec. 1915(b)(2). The clerk indicates there is no apparent confusion and that the court can require an account statement should one be needed. The Third Circuit states: "Although we do not do assessments in habeas and 2255 cases, our local rules require the 6 month account statement in all prisoner cases. The reasoning is that 1915(a) sets out what needs to [be] filed to apply for IFP and another section, 1915(b), requires the assessment. Since 1915(a)(2) requires the 6 month statement, we apply it to all cases. That being said, if a prisoner in a habeas or 2255 case doesn't give us the 6 months account statement, we don't go after him for it. We also do not make assessments in mandamus cases unless they are using mandamus to avoid the 1915(b) assessment." An outlier - the First Circuit does require it - "The Clerk's Office has

been requiring the institutional account statement in habeas and 2255 cases. When the Form was amended to clarify that the account statement was only required in civil cases, we did talk about the issue a bit. I think we concluded that it would be easier, for case management purposes, to have a bright line rule - criminal v. civil. Sometimes it can be tricky to identify whether a case is a habeas or not. In any civil case we reject the Form 4 as non-compliant when an account statement is not attached. But the fact of the matter is we don't apply the PLRA in habeas or 2255 proceedings. So, I have no objection to the additional language."

In addition, Mr. Douglas Letter informally solicited the views of the U.S. Department of Justice (DOJ) Criminal Division, Bureau of Prisons (BOP), and Executive Office of United States Attorneys (EOUSA). Mr. Letter reports:

> The Criminal Division reported that they are not aware of any collection of data that DOJ would have that would be of any use on the issues here.
>
> The Bureau of Prisons reported to me that the normal practice throughout their system is that, when an inmate asks for a statement of his financial account, that statement is routinely provided, and BOP does not inquire why the inmate wants the statement. Thus, BOP does not collect data that would show that inmates are asking for such statements for a litigation reason or some other reason (such as preparing materials for a possible divorce). BOP therefore has no data indicating whether the inmate will be using the account statement to attach to a FRAP Form 4, and if that form is being filed in connection with a habeas action or some other litigation, such as a *Bivens* claim. Moreover, BOP reminded me that they also would not have any data about practices involving the much larger population of state prisoners, who can file actions in federal courts and thus are also filing FRAP Form 4. The bottom line is that BOP has no way of knowing if inmates are mistakenly attaching financial account statements to the FRAP Form 4's that they are filing, and does not view the current situation as a burden or problem.
>
> EOUSA also told me that they do not have any collected data that would be of use on this matter. . . . [The office] did an informal survey of the Civil Chiefs from US Attorneys' offices around the US. Most Civil Chiefs did not know whether prisoner account information was being attach[ed] to FRAP Form 4 in support of IFP motions in habeas appeals (or had not seen this happen). Four districts did report that they had observed prison account information being attached in this circumstance.

III. Options for the Committee

At the spring 2016 meeting, the Committee has two principal options:

One option is to take no action with respect to the form. An argument for taking no action is that Question 4 follows the statutory language in § 1915(a)(2). Any deviation from that language might cause more confusion than it prevents. Another argument for taking no action is that the problem which the parenthetical language seeks to solve—i.e., prisoners filing institutional account statements when they are not needed—is not a large problem. The new information from the Clerk Representative and Mr. Letter suggest that obtaining and filing an institutional account statement is not very burdensome for the prisoners, the prisons, or the courts.

The other option is to add the parenthetical phrase. The phrase is consistent with the case law. Accordingly, this option might prevent some prisoners from filing unnecessary institutional account statements. But as Reporter Stuve cautioned, the amendment also might have the unintended consequence of confusing some prisoners and causing them not to include institutional account statements when these statements are necessary.

Mr. Letter's research suggests that further study is not likely to uncover additional facts because no one collects data on requests for institutional account statements.

Attachment

Memorandum to the Advisory Committee on Appellate Rules from Reporter Catherine T. Struve, regarding Item No. 12-AP-B (Aug. 29, 2012)

TAB 8B

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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.

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MEMORANDUM

DATE: March 14, 2016

TO: Advisory Committee on Appellate Rules

FROM: Gregory E. Maggs, Reporter

RE: Item 15-AP-E: Amendments relating to social security numbers; sealing of affidavits; provision of authorities to pro se litigants; and electronic filing by pro se litigants

As addressed in the attached memorandum from the October 2015 meeting, this item concerns proposals to amend the Appellate Rules to provide: (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 *in 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. The Committee previously discussed these proposals but did not reach any final conclusions. To move forward, it might help for the Committee to focus its attention on the following five specific questions:

1. Should Appellate Form 4 be amended to remove the question that asks litigants seeking leave to proceed *in forma pauperis* to provide the last four digits of their social security numbers?

The Committee generally favored removing this question from Form 4 but reserved a decision until it had more information. The Clerk Representative to the Committee has investigated the matter and reports that the general consensus of the clerks of court is that the last four digits of the Social Security number are not needed and the question could be eliminated. The Clerk Representative reported that the clerk of the Third Circuit had suggested that the last four digits could be useful in identifying a non-prisoner who is using a fake name to avoid a sanctions order, but she could not point to an instance where that had arisen. She had no objection to eliminating the requirement. The proposed deletion is as follows:

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

* * *

12. State the city and state of your legal residence.

Your daytime phone number: (___) _____

Your age: _____ Your years of schooling: _____

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

2. Should Appellate Rule 25(a)(5) be amended to prohibit filings from containing the last four digits of a social security number?

Civil Rule 5.2(a)(1) authorizes a filing to include the last four digits of a social-security number. Appellate Rule 25(a)(5) incorporates the privacy standards established by Civil Rule 5.2. Accordingly, if the Committee believes that filings in the courts of appeals should not contain any portion of a social security number, it could either wait to see if the Civil Rules Committee proposes changes to Civil Rule 5.2 or it could propose amendments to Rule 25(a)(5). The sense of the Committee at the October 2015 meeting was to wait to see what action if any the Civil Rules Committee would take.

3. Should Appellate Rule 24(a)(1) be amended to require or presumptively require the sealing of an affidavit filed in support of a motion for leave to proceed *in forma pauperis*?

Appellate Rule 24(a)(1) requires a party seeking leave to proceed *in forma pauperis* to file a financial affidavit but does not require the court to seal the affidavit or review the affidavit in an ex parte manner. After discussion of various considerations on both sides at the October 2015 meeting, the sense of the Committee was that Rule 24 should not be amended. Since the October 2015 meeting, the proponent of this item has sent the attached email clarifying: "I do not suggest that an IFP / CJA *motion* be sealed or ex parte. Rather, I only propose that the affidavit in support be presumptively sealed and ex parte."

At the Fall 2015 meeting, the Committee already was focused on the sealing of the affidavit rather than the motion. The clarification thus only raises the question whether a presumption in favor of sealing and ex parte review, as opposed to a firm rule, should be adopted. The proponent elaborates that the presumption could be overcome with a proper showing: "An opposing party may, of course, file for access to an affidavit if they can demonstrate both that there is actual reason to believe that the affiant lied to the court, and a reasonable need for the document." The Committee did not previously consider this specific issue. The argument in favor of a presumption is that the presumption would protect privacy at little cost because the presumption could be overcome in appropriate cases. The counter argument is that it would be difficult for the opposing party to demonstrate reason to believe that the affiant is lying about his or her assets and liabilities without seeing the affidavit.

4. Should Appellate Rule 32.1(b) be amended to require litigants to provide pro se applicants with unpublished opinions that are not available *without cost* from a publicly accessible database?

As discussed at the October 2015 meeting, Appellate Rule 32.1(b) currently says: "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." The Advisory Committee Note indicates that the term "publicly accessible database" includes "a commercial database maintained by a legal research service." This rule ensures that a party can gain access to an unpublished opinion cited by the other party. But the attached email indicates that the proponent of this item would like the rule to go further and require a party citing an unpublished opinion to provide a copy unless the opinion is available without cost from a publicly available database. He contrasts Google Scholar, which is free, with Westlaw and Lexis, which are not free.

5. Should Appellate Rule 25(d)(2)(D) be amended to allow pro se litigants to file or serve documents electronically?

Other items currently before the Appellate Committee present the same issue. At the October 2015 meeting, the sense of the Committee was that the Committee should consider all matters relating to electronic filings, service, and signatures together and that it should wait until the Civil, Criminal, and Bankruptcy Committees have acted before taking any action itself.

Attachments

1. Memorandum to the Advisory Committee on Appellate Rules, from Gregory E. Maggs, Reporter, Subject: 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) (October 14, 2015)

2. Emails to Committee on Rules of Practice and Procedure from Sai, Subject: Proposed rule changes for fairness to pro se and IFP litigants (January 5 & 6, 2015)

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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 01/05/2016 08:50 PM

History: This message has been forwarded.

1 attachment

Sai v TSA et al 1-15-cv-13308-WGY D MA 2015-08-28 Sai IFP motion.pdf

Dear Committee on Rules of Practice and Procedure -

Having reviewed the civil and appellate committees' agenda books and draft minutes on my proposals (2015-10, 2015-11, 2016-01 re. 15-AP-E & 15-CV-EE), I would like to clarify a couple issues that I believe may be unclear in my original email.

Re. my proposal #2 (IFP affidavit privacy):

I do not suggest that an IFP / CJA *motion* be sealed or ex parte. Rather, I only propose that the affidavit in support be presumptively sealed and ex parte.

See primarily:
* In re Boston Herald, Inc. v John J. Connolly, Jr., 321 F.3d 174, 175-76, 179-81, 184-91 (1st Cir. 2003)
- Holding: A CJA affidavit is not a judicial document to begin with; only judicial documents have a presumption of public access; even if a CJA affidavit were a judicial document, the affiant's privacy interests far outweigh any liminal presumption of public interest in its availability.

* United States v. Amodeo, 71 F.3d 1044, 1049 (2d Cir. 1995) ["Amodeo II"]
- discussing levels of presumption of access to judicial records and privacy balancing tests

In addition to privacy concerns, there are also 5th Amendment rights implicated, especially if the US (or an agency) is a party.

I am not aware of any cases (other than my own) that raise this issue directly, but it is addressed in dicta in two cases I know of:
* In re Boston Herald, at 188
* Seattle Times Company v. U.S. District Court for Western District of Washington, 845 F.2d 1513, 1518-19 and n. 4, 1519-20, 1526 (9th Cir. 1988)

An opposing party may, of course, file for access to an affidavit if they can demonstrate both that there is actual reason to believe that the affiant lied to the court, and a reasonable need for the document.

See e.g. US v Benzer, No. 2:13-cr-00018 (D. NV. April 10, 2014). The court granted seal to all co-defendants' CJA affidavits and denied the US access to those affidavits.

However, the court granted the US access to one defendant's CJA affidavit, still under seal, after the US made an unopposed public motion giving particularized evidence to believe that affiant had lied to the court, and that it wanted the affidavit in order to prosecute the affiant for perjury.

The court had previously denied without prejudice the US' ex parte motion for the same. See ECF Nos. 245, 248, 258, 273, 334, 634, 636, and 732.

Note that even in this fairly unusual circumstance, the court still refused to *unseal* the challenged CJA affidavit, ECF No. 42, when requested to do so by the Las Vegas Review Journal, ECF No. 634-36. See order, ECF No. 732. Only its presumptive ex parte status was overturned.

FYI, this issue of IFP affidavit privacy is being raised in my pending collateral appeal, Sai v TSA et al., No. 15-2526 (1st Cir.).

For your convenience, I have attached the motion that I made pro se in Sai v TSA et al, No. 1:15-cv-13308 (D. MA.), from which the appeal arises.

My motion makes detailed legal and policy arguments in support of my proposal.

Re. my proposal #4 (presumption of CM/ECF access for pro se litigants):

D. MA. denied my motion for CM/ECF access without explanation, which is why I am providing you with my original electronic version, rather than the scanned docketed version (ECF No. 2 & 3).

I respectfully submit that this directly illustrates the multiple problems with a default denial of CM/ECF access to pro se litigants, which my would prevent.

I do not believe it is just to treat all pro se litigants, in effect, as presumptively vexatious. While orders restraining pro se filings may well be needed in some cases, this should not be the default.

Requiring non-vexatious pro se litigants to file case initiation documents exclusively on paper, or presumptively denying them CM/ECF access, causes unjustly disparate treatment merely for being pro se, as discussed in my original email.

Re. my proposal #3 (providing authorities to pro se litigants):

In my D. D.C. cases (1:14-cv-403, 1:14-cv-1876), AUSA Jeremy Simon refused to provide me with unpublished citations when I requested it informally.

He did so only after Judge Moss informally directed the parties (in conference) to follow the rule I proposed. No formal order was issued.

In my 1st Cir. case, Sai v. Neffenger, No. 15-2356, Sharon Swingle, the DOJ attorney representing the respondent, likewise refused to

provide me with unpublished citations, so today I filed a motion to compel provision of unpublished citations, asking the 1st Circuit to adopt proposal #3 (and the logic of the 2nd Circuit in Lebron v. Sanders) as its rule.

The Committee may want to check the 1st Circuit's ruling on this motion in its future consideration of this proposal.

Although it may well be the informal practice of individual AUSAs or districts to provide unpublished papers to pro se litigants, and individual judges likely do support the practice when asked to do so, I believe this should be the clear default.

Pro se litigants are already at a major disadvantage, and should not have to argue for something as basic as access to the authorities used by opponents and the court.

Google Scholar, which I use primarily (I do not have Lexis or Westlaw access), does not generally have F. App., F.R.D., LEXIS, WL, or unpublished citations available. However, it does generally have F., F. 2d, F. 3d, F. Supp., U.S., and S. Ct. series publications.

Sincerely,
Sai

On Mon, Sep 7, 2015 at 3:36 PM, Sai <dccc@s.ai> wrote:
> 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).
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> 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).
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>> 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:
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>> (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
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>> 3. Add new rule 7.2, matching that of S.D. & E.D. NY:
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>> previously cited by any party.
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>> See:
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>> 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.
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>> 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.

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>> 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.
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>>
>>
>> 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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Re: Proposed rule changes for fairness to pro se and IFP litigants

Sai to: Rules_Support 01/06/2016 02:27 PM

Also, regarding proposal #3:

I am aware of only one court other than EDNY & SDNY that has an equivalent rule. It is D. Utah Civ. R. 7-2(c).

Sincerely,
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On Wed, Jan 6, 2016 at 1:49 AM, Sai <dccc@s.ai> wrote:
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> Having reviewed the civil and appellate committees' agenda books and draft minutes on my proposals (2015-10, 2015-11, 2016-01 re. 15-AP-E & 15-CV-EE), I would like to clarify a couple issues that I believe may be unclear in my original email.
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>>> 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
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>>>
>>> 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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TAB 10

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TAB 10A

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MEMORANDUM

DATE: March 14, 2016

TO: Advisory Committee on Appellate Rules

FROM: Gregory E. Maggs, Reporter

RE: Item No. 15-AP-F: Recovery of Appellate Docketing Fee after Reversal

I. Background

This item, which the Committee discussed for the first time at the October 2015 Meeting, concerns the procedure by which an appellant who prevails on appeal may recover the $5 fee for filing a notice of appeal and the $500 fee for docketing an appeal. As explained in detail in the attached previously circulated memorandum, Rule 39(e)(4) says that the fee for filing a notice of appeal is taxable as a cost in the district court. But Rule 39 does not expressly address the $500 docketing fee. In most circuits, the $500 docketing fee is seen as a cost taxable in the court of appeals, but at least three circuits require appellants to recover this fee in the district court.

The Item contains a proposal to amend Rule 39 to require courts of appeals to follow what is now the majority approach. When the Committee discussed the issue, a judge member of the committee asked whether an amended rule was necessary. The judge member suggested the possibility that the circuits that do not allow for the recovery of costs in the circuit court may simply not be following Rule 39. Although Rule 39 does not expressly address docketing fees, the Rule allows fees taxable as costs to be taxed in the court of appeals unless Rule 39(e) directs them to be taxed in the district court.

Following the October 2015 meeting, the Clerk Representative to the Committee raised the subject with other clerks of court. He reports that the consensus of the clerks seems to be that consistency would be a good thing and that it would probably take a change in the rule to accomplish that. The clerks also seem to think that it would be best to tax both the filing fee and the docketing fee in the Court of Appeals.

II. Options for the Committee

At the Spring 2016 meeting the Committee might decide either to take no action or to amend Appellate Rule 39 to resolve the disagreement.

A. Taking No Action

The Committee might decide to take no action on the theory that the current version of Rule 39 properly addresses the issue of costs and that any conflict stems from a misinterpretation of Rule 39. If the Committee takes no action, the conflict among the circuits is likely to persist. The small amount in controversy in any particular case probably will not justify litigation to straighten out the disagreement. Although uniformity would be desirable, the conflict on this issue would not appear to be very burdensome. Most appellants who prevail on appeal will know where in their circuits to seek recovery of the notice of appeal and docketing fees and will act accordingly.

B. Amending Appellate Rule 39

The Committee alternatively could address the conflict by amending Appellate Rule 39. One possible approach would be to add a new section. As noted above Rule 39(e) currently lists the various costs taxable in the district court. A new parallel section, Rule 39(f), might expressly list the various costs taxable in the courts of appeals, including the $500 docketing fee.

The following is a draft of what the amendment might look like:

Rule 39. Costs

* * *

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

(1) the preparation and transmission of the record;

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

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

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

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

(1) the docketing fee;[1]

(2) the cost of producing necessary copies of a brief or appendix, or copies of records authorized by Rule 30(f);[2] [and]

(3) the cost of copies of exhibits designated for inclusion in the appendix pursuant to Rule 30(e)[3] [; and

(4) any other taxable costs not listed in Rule 39(e)].

This proposed amendment is not intended to change the law other than to straighten out the conflict about whether docketing fees are taxable as costs in the district court or the court of appeals. The three categories of costs listed in draft Rule 39(f)(1)-(3) are identified in 16AA Fed. Prac. & Proc. Juris. § 3985 (Catherine Struve, ed., 4th ed. 2015).

Expressly listing the costs taxable in the court of appeals would alter the current approach of Rule 39. As noted above, the Rule now makes any taxable cost recoverable in the court of appeals unless the cost is listed in Rule 39(e). A risk in creating the proposed Rule 39(f) is that some category of taxable costs might be omitted, either inadvertently or because of a later change in the statute. A possible solution to this risk would be to add the catch-all clause in proposed Rule 39(f)(4).

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[1] Under 28 U.S.C. § 1920(1), "A judge or clerk of any court of the United States may tax as costs the following: (1) Fees of the clerk and marshal . . . ." In *Winniczek v. Nagelberg*, 400 F.3d 503 (7th Cir. 2005), the court held that this provision covers docketing fees. The court explained: "A docketing fee is a fee charged by a court for filing a claim, and the clerk is the court official who administers the collection of court fees. So we think the docketing fee is a proper cost item . . . ." *Id.* at 504-505.

[2] This phrase comes from Rule 39(c), which directs court of appeals to fix the maximum rates for such copies. Such costs are authorized by 28 U.S.C. § 1920(4) ("A judge or clerk of any court of the United States may tax as costs the following: . . . (4) Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case .").

[3] Rule 30(f) provides: "Exhibits designated for inclusionin the appendix may be reproduced in a separate volume, or volumes, suitably indexed. Four copies must be filed with the appendix, and one copy must be served on counsel for each separately represented party." Authority for taxing the costs of these copies would also appear to come from 28 U.S.C. § 1920(4).

Attachment

Memorandum to Advisory Committee on Appellate Rules, from Gregory E. Maggs, Reporter, Subject: Item No. 15-AP-F (Recovery of Appellate Docketing Fee after Reversal) (Oct. 15, 2015)

TAB 10B

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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 11

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TAB 11A

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MEMORANDUM

DATE: March 14, 2016

TO: Advisory Committee on Appellate Rules

FROM: Gregory E. Maggs, Reporter

RE: Items 08-AP-A, 11-AP-C, 11-AP-D, 15-AP-A, 15-AP-D, 15-AP-H: Electronic Filing and Service

I. Background

These six Items all concern issues relating to electronic filing, service, and signature. At the October 2015 meeting, Judge Chagares led the Committee's discussion of three key issues. The first was whether pro se litigants should be permitted to file electronically. Judge Chagares reported that a consensus appears to be emerging among the Advisory Committees that pro se litigants should be barred from using electronic filing unless local rules allow it. The second issue was how to handle signatures on electronically filed and served documents. Judge Chagares suggested that the rules might specify that logging into the court's computer system and sending a document constitutes a signature. The third issue was whether a certificate of service should be required when documents are served electronically. Judge Chagares recommended that proof of service should not be required when there is electronic filing.

After this discussion, Judge Colloton proposed that the Committee should wait until the Advisory Committees on the Civil and Criminal Rules have considered these matters, and that the advisory committees should coordinate their approaches. This was the sense of the Committee.

II. Criminal Rule 49

After the Appellate Committee's October 2015 meeting, a "Rule 49 Subcommittee" made substantial progress in studying changes to Criminal Rule 49. The attached discussion draft of Criminal Rule 49 (Mar. 4, 2016) includes detailed provisions addressing the service, filing, and signature of electronic documents. The proposed changes would allow a represented party who uses the court's electronic-filing system to serve documents electronically without the consent of the other parties (*see* lines 13-15) and without the authorization of local rules (*see* lines 81-85).

Additional changes are also consistent with the three principles that Judge Chagares discussed at the October 2015 meeting:

- pro se litigants may use the court's electronic filing system only if authorized by local rules (*see* lines 15-16);

- the user name and password of an attorney of record serves as the attorney's electronic signature (*see* lines 44-45); and

- a certificate of service is not required for electronically filed documents (*see* lines 39-41).

II. Civil Rule 5

The Civil Committee is also working on revisions to Civil Rule 5 to address electronic filing, service, and signature issues. Although a complete discussion draft is not available, Reporter Edward Cooper circulated a memorandum on February 22, 2016 describing several key draft amendments. These draft amendments, although still preliminary, are also consistent with what Judge Chagares reported in October 2015. Contemplated amendments to Civil Rule 5(d)(3) would generally require that filings be made by electronic means "except those made by a person proceeding without an attorney." Contemplated amendments to Civil Rule 5(d)(1)(B) would provide that "a notice of electronic filing constitutes a certificate of service on any party served through the court's transmission facilities." And contemplated amendments to Civil Rule 4(d)(3)(C) would provide that 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."

III. Appellate Rule 25

The Committee may find the discussion draft of Criminal Rule 49 especially instructive because Criminal Rule 49 is very similar to Appellate Rule 25 in its structure and content. If the Committee ultimately decides to follow the same approach, it most likely would want to revise Appellate Rule 25(a)(2)(D) to address electronic filing, to revise Appellate Rule 25(c)(2) and (d) to address service and proof of service, and to add a new provision on electronic signatures. The new provisions in Appellate Rule 25 might be similar to the discussion draft of Criminal Rule 49(b)(2)(A) on filing, 49(a)(3) on service, and 49(b)(4) on signatures.

In addition, the Committee ultimately will need to review all references to filing (about 239), service (about 67), and signing and signatures (about 18) in the Appellate Rules to make sure that they are compatible with any changes to Appellate Rule 25. For example, Appellate Rule 3(d) currently provides: "The district clerk must serve notice of the filing of a notice of

appeal by mailing a copy to each party's counsel of record . . . ." A revision of the Appellate Rules should allow the district court to serve notice electronically and not just by mail.

IV. Points for Discussion at the April 2016 Meeting

At the April 2016 meeting, the Appellate Committee may wish to discuss: (1) the general merits of the approach of the draft amendments to Criminal Rule 49 and Civil Rule 5; (2) whether a similar approach would be best for the Appellate Rules; and (3) whether it makes sense to refer the Items to a subcommittee that includes members from other Committees because electronic service, filing, and signature issues cut across all of the Committees.

Attachments

Criminal Rule 49 Discussion Draft (Mar. 4, 2016)

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Rule 49. Serving and Filing Papers

(a) Service on a Party

(1) ***When Required.*** ~~A party must serve on every other party~~ Each of the following must be served 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) ***Serving a Party's Attorney***. Unless the court orders otherwise, 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) ***Service by Electronic Means***.

(A) *Using the Court's Electronic Filing System*. A party represented by an attorney may serve a paper on a registered user by filing it with the court's electronic-filing system. An unrepresented party may do so only if allowed by court order or local rule. Service is complete upon filing, but is not effective if the serving party learns that [the notice of electronic filing] did not reach the person to be served.

(B) *Using Other Electronic Means*. A paper may be served by any other electronic means that the person consented to in writing. Service is complete upon transmission, but is not effective if the serving party learns that [it/the paper] did not reach the person to be served.

(4) ***Service by Nonelectronic Means***. 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; Certificate of Service.*** Any paper that is required to be served—together with a certificate of service—must be filed within a reasonable time after service. A notice of electronic filing constitutes a certificate of service on [any person/a party] served by using the court's electronic-filing system ~~through the court's transmission facilities~~.

(2) ***Means of Filing.***

(A) *Electronically.* A paper is filed electronically by using the court's electronic-filing system. 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 is written [or in writing] under these rules.

(B) *Nonelectronically.* A paper 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 and promptly send it to the clerk.

(3) ***Means Used by Represented and Unrepresented Parties.***

(A) *Represented Party.* A party represented by an attorney must file electronically, but nonelectronic filing must be allowed for good cause, and may be required or allowed for other reasons by local rule.

(B) *Unrepresented Party.* An unrepresented party must file nonelectronically, unless allowed to file electronically by court order or local rule.

(4) **Signature.** Every written motion and other paper must be signed by at least one attorney of record in the attorney's name – or by a person filing a paper if the person is unrepresented. The paper must state the signer's address, e-mail address, and telephone number. [Unless a rule or statute specifically states otherwise, a

pleading need not be verified or accompanied by an affidavit.] The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or person's attention.

(5) ***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) Service and Filing by Nonparties. A nonparty may serve and file a paper only if doing so is required or permitted by law. A nonparty must serve every party using means authorized by Rule 49(a), but may use the court's electronic-filing system only if allowed by court order or local rule.

(d) 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~~ serve notice of the entry, by the means in Rule 49(a), on each party. [A party also may serve notice of the entry, by the same means.] 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.~~

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