

**ADVISORY COMMITTEE
ON
APPELLATE RULES**

**San Diego, CA
May 2, 2017**

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**Agenda for Spring 2017 Meeting of
Advisory Committee on Appellate Rules
May 2, 2017 - San Diego, CA**

1. Introductions and Table of Agenda Items

Opening Business

2. Approval of Minutes of October 2017 Meeting and Report on January 2017 Meeting of Standing Committee

Consideration of Comments on Published Proposals

3. Item 12-AP-D (Rules 8, 11, and 39)

4. Item 11-AP-D (Rule 25)

5. Item 15-AP-C (Rules 28.1 and 31)

6. Item 14-AP-D (Rule 29)

7. Item 13-AP-H (Rule 41)

8. Item 15-AP-E (Form 4)

Proposals for Publication

9. Items 08-APA, 11-AP-C, and 15-AP-D (Rule 3, et al.)

10. Item 08-AP-R (Rule 26.1)

Discussion Items/New Business

11. Item 16-AP-C (Rules 32.1 and 35)

12. Item 16-AP-D (Rule 28(j))

13. Item 17-AP-A (Rules 4 and 27)

14. Item 17-AP-B (Rule 28)

15. Efficiency in Federal Appellate Litigation

Adjournment

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TAB 1

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Advisory Committee on Appellate Rules Table of Agenda Items —May 2017

<u>FRAP Item</u>	<u>Proposal</u>	<u>Source</u>	<u>Current Status</u>
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 Discussed and retained on agenda 04/16 Discussed and retained on agenda 10/16
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 Discussed and retained on agenda 04/16 Discussed and retained on agenda 10/16
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 Discussed and retained on agenda 04/16 Discussed and retained on agenda 10/16
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 Draft approved 04/16 for submission to Standing Committee Approved for publication by Standing Committee 06/16

<u>FRAP Item</u>	<u>Proposal</u>	<u>Source</u>	<u>Current Status</u>
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 Draft approved 04/16 for submission to Standing Committee Approved for publication by Standing Committee 06/16
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 Draft approved 04/16 for submission to Standing Committee Approved for publication by Standing Committee 06/16
13-AP-H	Consider possible amendments to FRAP 41 in light of <i>Bell v. Thompson</i> , 545 U.S. 794 (2005), and <i>Ryan v. Schad</i> , 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 for publication by Standing Committee 01/16
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 Draft approved 04/16 for submission to Standing Committee Approved for publication by Standing Committee 06/16
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 Draft approved 04/16 for submission to Standing Committee Approved for publication by Standing Committee 06/16
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 for publication 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 Discussed and retained on agenda 04/16 Discussed and retained on agenda 10/16

<u>FRAP Item</u>	<u>Proposal</u>	<u>Source</u>	<u>Current Status</u>
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 Partially removed from Agenda and draft approved for submission to Standing Committee 4/16 Approved for publication by Standing Committee 06/16
16-AP-C	Suggestion to amend Federal Rules of Appellate Procedure 32.1 and 35 to require publication of orders granting rehearing en banc, etc.	Eric Bravo, Esq.	Awaiting initial discussion
16-AP-D	Suggestion to amend the Federal Rules of Civil Procedure to adopt an analog to FRCP 28(j) (how supplemental authority is to be filed)	John Vail, Esq.	Awaiting initial discussion
17-AP-A	Amend FRAP 4(a)(1)(B)(iv) and 27 to address certain subpoenas	Catherine M. Riga	Awaiting initial discussion
17-AP-B	Amend FRAP 28 to addressing placement and phrasing of questions or issues presented	Bryan Garner	Awaiting initial discussion

TAB 2

TAB 2A

DRAFT Minutes of the Fall 2016 Meeting of the
Advisory Committee on Appellate Rules

October 18, 2016
Washington, D.C.

Judge Neil M. Gorsuch, Chair, Advisory Committee on Appellate Rules, called the meeting of the Advisory Committee on Appellate Rules to order on Tuesday, October 18, 2016, at 9:00 a.m., at the Thurgood Marshall Federal Judicial Building in Washington, D.C.

In addition to Judge Gorsuch, the following members of the Advisory Committee on Appellate Rules were present: Judge Michael A. Chagares, Justice Judith L. French, Gregory G. Katsas, Esq., Neal K. Katyal, Esq., Judge Brett M. Kavanaugh, Judge Stephen Joseph Murphy III, Kevin C. Newsom, Esq., and Professor Stephen E. Sachs. Acting Solicitor General Ian Heath Gershengorn was represented by Douglas Letter, Esq. and H. Thomas Byron III, Esq.

Also present were: Judge David G. Campbell, Chair, Standing Committee on Rules of Practice and Procedure; Professor Daniel R. Coquillette, Reporter, Standing Committee on Rules of Practice and Procedure; Ms. Shelly Cox, Administrative Specialist, Rules Committee Support Office of the Administrative Office of the U.S. Courts (RCSO); Ms. Lauren Gailey, Rules Law Clerk, RCSO; Gregory G. Garre, Esq., Member, Standing Committee on the Rules of Practice and Procedure and Liaison Member, Advisory Committee on Appellate Rules; Bridget M. Healy, Esq., Attorney Advisor, RCSO; Marie Leary, Esq., Research Associate, Advisory Committee on Appellate Rules; Professor Gregory E. Maggs, Reporter, Advisory Committee on Appellate Rules; Scott Myers, Esq., Attorney Advisor, RCSO; Elisabeth A. Shumaker, Clerk of Court Representative, Advisory Committee on Appellate Rules; and Rebecca A. Womeldorf, Esq., Secretary, Committee on Rules of Practice & Procedure and Rules Committee Officer. Judge Pamela Pepper, Member, Advisory Committee on Bankruptcy Rules and Liaison Member, Advisory Committee on Appellate Rules, participated by telephone.

I. Introductions

Judge Gorsuch began the meeting by welcoming Judge Campbell, Justice French, Judge Pepper, Professor Sachs, and Ms. Shumaker to their first meeting of the Advisory Committee. He thanked Ms. Cox and Ms. Womeldorf for organizing the meeting and setting up a dinner that took place the evening before.

Judge Campbell greeted the Committee Members and said it was a privilege to be involved in the process. Ms. Womeldorf then introduced the staff of the Administrative Office. Every person present at the meeting then introduced himself or herself. Judge Gorsuch then expressed his gratitude to Judge Colloton, the former chair of the Advisory Committee, for clearing much of the

Committee's agenda before his term expired. Judge Gorsuch further thanked Judge Jeffrey Sutton, the former chair of the Standing Committee, for his assistance with the Advisory Committee's work.

II. Public Comment on Proposed Amendments to Rule 29

In August 2016, the Standing Committee published a proposed amendment to Rule 29(a).¹ The change would authorize a court of appeals to "strike or prohibit the filing of an amicus brief that would result in a judge's disqualification." The Advisory Committee heard comments on this proposed change from Associate Dean Alan Morrison of the George Washington University Law School, who also filed written comments prior to the meeting.² Dean Morrison asserted that there was no need for the amendment, that the amendment would not solve the problem that it is intended to solve, that the amendment might deprive the courts of information, and that the amendment will deny amici the opportunity to be heard.

A judge member mentioned that the proposed amendment was largely a codification of existing local rules. Dean Morrison responded that he had never seen a recusal based on an amicus brief. He asserted that most attorneys file amicus briefs well before knowing who the judges are. Accordingly, a client might hire a lawyer to write a brief and then have the brief stricken. Dean Morrison asserted that there would be nothing that the attorney could do about the possibility that the amicus brief might be stricken either before or after filing it. Dean Morrison also pointed out that the Supreme Court receives more amicus briefs than the appellate courts, that all of its Justices are known at the time of filing, and that recusal based on amicus briefs has never been a problem even though the Supreme Court does not have a rule like the one proposed.

Dean Morrison acknowledged that a brief causing a recusal could possibly be a problem when a case is reheard en banc and said that his written comments address this issue. He also said that a brief might be filed at the panel stage and then stricken when the case is reheard en banc. An attorney member asked whether, at the time an amicus brief is stricken, it would be too late to file a substitute brief. Dean Morrison said that it would be too late. The attorney member also noted when there is more than one amicus or more than one lawyer on the amicus brief, it might be unclear who caused the recusal. An academic member asked how often judges recuse themselves. Dean

¹ See Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure 41 (August 2016) [hereinafter August 2016 Proposed Amendments] (proposed revision of Appellate Rule 29), <http://www.uscourts.gov/file/20163/download>.

² See Comment from Alan Morrison, <https://www.regulations.gov/document?D=USC-RULES-AP-2016-0002-0003>.

Morrison did not have the statistics. The Advisory Committee took Dean Morrison's comments under advisement and will decide what action to take after the public comment period on Rule 29 ends on February 15, 2017.

III. Approval of Minutes of Spring 2016 Meeting and Report on June 2016 Meeting of the Standing Committee

The Committee approved the Minutes of the April 5, 2016 Meeting of the Advisory Committee, with the correction of one typographical error on page 7.³ The reporter mentioned that Judge Colloton had communicated with the chief judges of the various circuits about Item No. 15-AP-F (Appellate Rule 39(e) and Recovery of Appellate Fees) as the April 2016 Minutes indicated he would. Judge Gorsuch recounted items of interest from the June 2016 meeting of the Standing Committee.

IV. Action Item—Item 11-AP-C (Amendments to Rules 3(a) and (d))

Judge Gorsuch introduced this matter, which concerns amendments to Rules 3(a) and 3(d) to eliminate references to "mailing."⁴ The Advisory Committee first discussed the proposed change to Rule 3(a). The clerk representative suggested eliminating the proposed word "nonelectronic" in line 6 of the discussion draft because it might cause confusion. An attorney member suggested that "hard copy" might be a better word. A judge member then asked whether attorneys reading the rule might think that hard copies would always be needed. Judge Campbell asked whether the confusion might lead to extra paper being filed in the court. The clerk representative said that she did not think so. Judge Campbell also asked whether the second sentence of Rule 3(a) was needed at all, given that clerks can provide the necessary copies. The clerk representative said it probably would not make a difference. A judge member worried about imposing additional burdens on the clerks of court. The Advisory Committee then discussed the proposed changes to Rule 3(d). The reporter explained the purpose of the amendments. The clerk representative expressed agreement with the proposal.

Following the discussion, the Advisory Committee voted to recommend the proposed changes to Rule 3(d) but not to recommend any changes to Rule 3(a). But rather than sending the proposal to the Standing Committee, the Advisory Committee decided to hold the matter until the

³ See Advisory Committee on Rules of Appellate Procedure, Fall 2016 Meeting at 33 [hereinafter Fall 2016 Agenda Book] (draft minutes of the April 2016 meeting of the Advisory Committee), www.uscourts.gov/file/20243/download.

⁴ See *id.* at 51 (memorandum on Item 11-AP-C).

spring. In the meantime, the Advisory Committee asked the reporter to study all references to "mail" in the appellate rules and to prepare a memorandum suggesting revisions. At the Spring 2017 meeting, the Advisory Committee will determine whether to change other rules along with Rule 3(d). It was also the sense of the Advisory Committee that district court judges should be consulted about whether any alternative changes to Rule 3(a) should be considered.

V. Discussion Items

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

The Reporter introduced Item No. 12-AP-D, which concerns the treatment of appeal bonds under Civil Rule 62 and Appellate Rule 8.⁵ As explained in the memorandum addressing this issue, there is a discrepancy between the first and second clauses of the first sentence of the version of Rule 8(d) recently published for public comment.⁶ The memorandum suggested four possible options for addressing the discrepancy.

An attorney member said that he preferred the third option because it would correct all problems addressed in the memorandum. In response to a question from a judge member about the term "security" in line 27, the attorney member said that the word "security" in line 27 refers to "security" in line 21. Another attorney member explained the history of the rule. Judge Campbell asked whether Rule 8(d) should match Civil Rule 65.1. An attorney member expressed concern about limiting Rule 8(d) in this way. The Committee then considered additional proposals for redrafting the first sentence of Rule 8(d) so that all forms of security were listed in the first clause and then referred to generically in the second clause as "the security."

Following further discussion, the sense of the Committee was to change the first clause of Rule 8(b) to say "If a party gives security in the form of a bond, a stipulation, an undertaking, or other security, ~~a stipulation, or other undertaking~~ with . . ." and to change the second clause to say "affecting its liability on the security bond or undertaking may be served . . ." The Advisory Committee decided to postpone submitting the proposed changes to the Standing Committee until it receives all public comments on the recently published version of Rule 8.

⁵ See *id.* at 73 (memorandum on Item No. 12-AP-D).

⁶ See August 2016 Proposed Amendments, *supra* note 1, at 21-23 (proposed revision of Rule 8).

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

This item concerns proposed revisions to Appellate Rules 26.1 and 29(c), which require parties and amici curiae to make certain disclosures.⁷ The Advisory Committee first considered the proposed changes to Rule 26.1(a).⁸ A judge member expressed the view that the current rule should not be changed. An attorney member said that the coverage of the phrase "related matter" in (a)(2)-(4) "could be immense." Another attorney member said that D.C. Circuit local rules use the term "entity" because that term appears in the financial disclosure form. A judge member said that requiring the disclosure of the names of lawyers, witnesses, and judges could be very burdensome in bankruptcy cases because there could be ten related matters in a major chapter 11 reorganization. Another judge member said that deciding what is a "related matter" would be very difficult without more guidance. He then expressed doubt that the Committee should go forward with the proposal. Another judge member explained that the guiding thought was that judges don't want to dig into a case and then find out that there was a problem; he said the term "related state matter" was drafted with habeas cases in mind. He thought more disclosure could be helpful. Judge Campbell asked why Professor Daniel Capra had written the original memorandum about this item. An attorney member explained that there were complaints by judges that they did not have enough disclosure up front. The clerk representative said that the version of Rule 26.1(a) in the Agenda Book would generate many questions to clerks of court about what is a "related matter." An attorney member said that the costs appeared to be larger than the benefits. The clerk member also said that there is already a "certificate of interested parties" that is filed and that is used for recusal purposes. Another attorney suggested that unless the judges see a strong need for additional disclosure, then the lawyers

⁷ See Fall 2016 Agenda Book, *supra* note 3, at 89 (memorandum on Item No. 08-AP-R).

⁸ The discussion draft of Rule 26.1(a) under consideration read as follows:

Rule 26.1. Corporate Disclosure Statement

(a) Who Must File; What Must Be Disclosed. Any ~~nongovernmental~~ corporate party to a proceeding in a court of appeals must file a statement that lists:

- (1) any parent 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 in the matter and in any related [state] matter;
- (3) the names of all lawyers and legal organizations that have appeared or are expected to appear for the party in the matter [and any related matter]; and
- (4) the names of all witnesses who have testified on behalf of the party in the matter [and any related matter].

would rather not have it. A judge member said that there could be a benefit to judges and taxpayers, but recognized that it was burdensome. Following discussion, the Advisory Committee approved a motion to table further consideration of amendments to Rule 26.1(a). The Advisory Committee determined that the burdens imposed by the proposed additional disclosure requirements in Rule 26.1(a) would outweigh the likely benefits. The Advisory Committee remains open to a more targeted approach to amending Rule 26.1(a), but does not currently plan to pursue one.

The Advisory Committee next considered the proposed changes to Rule 26.1(d). The reporter explained that the language of the current discussion draft is copied from the recently published proposed revision of Criminal Rule 12.4(a)(2).⁹ The Committee discussed the matter briefly and then approved the proposed amendment.

The Advisory Committee then considered the discussion draft of Rule 26.1(b). The reporter explained that the proposed changes in this discussion draft would partially conform Rule 26.1(b) to the recently published proposed revision of Criminal Rule 12.4(b).¹⁰ A judge member spoke in favor of the proposed changes to both the title and the text of the rule. Following further discussion, the Advisory Committee voted in favor of the proposed amendment.

The Advisory Committee next considered the discussion draft of Rule 26.1(e), which concerns disclosures in bankruptcy cases. A judge member said that the Advisory Committee on Appellate Rules might not want to take the lead on this matter. An academic member suggested that the bankruptcy courts might not need a rule because they would already know the information. A judge member responded that a bankruptcy court would know the names of debtors at the time the case was filed but would not know additional information until it was developed later in the case. A judge member said that the proposal had been prompted by an ethics opinion. Judge Chagares and Judge Pepper volunteered to discuss the matter further with members of the Advisory Committee on Bankruptcy Rules. The sense of the Committee was to table consideration of Rule 26.1(e) until the Advisory Committee on Bankruptcy Rules provides a recommendation.

The Advisory Committee next considered the discussion draft of Rule 26.1(f), which would impose disclosure requirements on persons who want to intervene. The reporter explained the draft. Following a brief discussion, the Advisory Committee voted in favor of the proposed amendment.

⁹ See August 2016 Proposed Amendments, *supra* note 1, at 251-53 (proposed revision of Criminal Rule 12.4).

¹⁰ See *id.*

The Advisory Committee then considered the discussion draft of Rule 26.1(g), which would prevent local rules from increasing or decreasing the disclosure requirements of Rule 26.1(a). Following discussion, the Committee decided to remove section (g) because the section would only make sense if section (a) would be amended.

The Advisory Committee next considered the discussion draft of Rule 29(c)(1).¹¹ This provision would require persons who file amicus briefs to make the same disclosures required under the discussion draft of Rule 26.1(a). The Committee concluded that the amendment was not needed because the proposal to amend Rule 26.1(a) had been tabled. The Committee therefore also decided to table the proposal to amend Rule 29(c)(1).

Finally, the Advisory Committee considered the discussion draft of Rule 29(c)(5)(D), which would require a statement about whether a lawyer or legal organization authored the brief in whole or in part, and, if so, identifies each such lawyer or legal organization. Following brief discussion, the Advisory Committee rejected the change because there did not seem to be a huge need for it and because party briefs do not require this.

C. Item No. 12-AP-F (class action settlement objectors)

The Advisory Committee next considered Item No.12-AP-F, which concerns a possible problem with some objections to class action settlements.¹² Following a brief discussion, the sense of the Advisory Committee was that this item should be removed from the agenda because the Advisory Committee on the Civil Rules has fully addressed the matter in the recently published amendment to Rule 23.¹³ The Advisory Committee concluded that no conforming amendment to the Appellate Rules was necessary.

D. Item Nos. 15-AP-A, 15-AP-E, 15-AP-H (electronic filing by pro se litigants)

The Advisory Committee next considered Item Nos. 15-AP-A, 15-AP-E, and 15-AP-H.¹⁴ These three items concern proposals to modify the Appellate Rules so that they generally would

¹¹ See Fall 2016 Agenda Book, *supra* note 3, at 93.

¹² See Fall 2016 Agenda Book, *supra* note 3, at 133 (memorandum on Item No. 12-AP-F).

¹³ See August 2016 Proposed Amendments, *supra* note 1, at 211 (proposed revision of Civil Rule 23).

¹⁴ See Fall 2016 Agenda Book, *supra* note 3, at 145 (memorandum on Items Nos. 15-AP-A, 15-AP-E, 15-AP-H).

allow pro se litigants to file documents electronically. The Committee considered but did not approve these proposals when addressing the recent changes to Appellate Rule 25. The published proposed revision of Rule 25 retains the current rule that unrepresented parties may file papers electronically only if allowed by court order or local rule.¹⁵ One judge member thought the Committee should resume consideration of this matter, but the sense of the Committee was to remove the item from the agenda. Representatives from the Administrative Office said that they would continue to look at the subject of pro se filing and report back to the Committee.

The Committee then took a break for lunch.

E. Circuit Splits over the Meaning of Appellate Rules 4(c), 7, and 39(a)(4)

When the meeting resumed, the Committee discussed three circuit splits on the interpretation of the Appellate Rules and considered whether to add them to its Agenda.¹⁶ The Committee first considered a circuit split under Rule 4(c). Judge Gorsuch introduced the issue and explained that appellate courts disagree about whether the period for filing a notice of appeal may be extended if prison officials delay in notifying an inmate of the entry of a judgment or appealable decision. Mr. Byron said that the Bureau of Prisons had flagged two issues. First, it would be difficult to track and provide evidence of when an inmate actually receives notice of the district court's entry of judgment. Second, a prisoner's assertion of a delay could be burdensome to prison staff. A judge member said that the Third Circuit's decision was made before *Bowles v. Russell*, 551 U.S. 205 (2007), and the relevant arguments might not have been raised. Judge Campbell said that it would be rare for this issue to arise in a criminal case. No decision was made about including this issue on the agenda. For the spring meeting, the reporter will determine how often this issue arises in civil cases.

The Committee then discussed a circuit split under Rule 7 about whether the costs for which a bond may be required under Rule 7 can include attorney's fees. Some circuits take the position that, where there is a fee shifting statute, the bond on appeal can cover the fees. The D.C. and Third Circuits disagree, reasoning that requiring a bond to cover attorney's fees might deter non-frivolous appeals. A judge member noted that the Third Circuit opinion was not published. Judge Campbell asked how often district courts award fees before the appeal. The clerk representative said that attorney's fees cases usually come to the appellate courts independently. Mr. Byron also wondered how often these cases arise. No decision was made about including this issue on the agenda. For the spring meeting, the reporter will determine how often this issue arises.

¹⁵ See August 2016 Proposed Amendments, *supra* note 1, at 271 (proposed revision of Appellate Rule 25).

¹⁶ See Fall 2016 Agenda Book, *supra* note 3, at 163 (memorandum on circuit splits).

The Committee then considered a circuit split about whether an appellate court in awarding costs under Rule 39(a)(4) must specify the specific costs to be taxed. An academic member asked what the objection would be to giving the district court discretion to decide. Judge Campbell asked whether the word "court" refers to the appellate court or to the district court. A member suggested that the historical sections in Moore's Federal Practice and Wright & Miller might have some history on this topic. Following discussion, the Committee decided not to put this issue on the agenda.

F. Initiatives to Improve the Efficiency of Federal Appeals

The Advisory Committee next considered the subject of how amendments to the Appellate Rules might lower costs and make appeals faster and more efficient.¹⁷ Judge Gorsuch introduced the subject and referred to the law review cited in the reporter's memorandum on the subject. Mr. Letter said the Committee already had looked into the interlocutory appeals issue. A judge member said that some of Martin Siegel's suggestions might be ideas to send to the Chief Judge of each circuit. Professor Coquillette said that Rule 84 and the Rule 84 forms were abrogated. But he said that forms making litigation more efficient might be beneficial. Judge Campbell said that he would inquire about whether any of the proposed steps had been taken.

A judge member suggested the rules should require an introduction and summary together in the brief and not separately. Another judge member asked whether there might be ways to address interlocutory appeals. An attorney member said local rules on contents of briefs are a problem. As examples, he mentioned that the circuits have different rules on parallel citations and ways to cite the record or trial. Professor Sachs volunteered to study interlocutory appeals and report back to the Advisory Committee. Judge Kavanaugh volunteered to work with the representatives from the Department of Justice on the issues of sections of briefs and citations.

VI. New Business

Judge Gorsuch invited members of the Advisory Committee to propose possible new business for the Committee to consider.

Mr. Katyal said that the Eighth Circuit has a trap for the unwary. If a party seeks an interlocutory appeal on one issue, the party then cannot later appeal other issues. Other circuits have a different rule. Judge Gorsuch said that the topic will be on the agenda for the spring meeting and that the spring agenda book will include a memorandum on the subject prepared by Mr. Katyal. Prof. Coquillette said that it would be better for a committee to resolve this issue than to wait for the Supreme Court to resolve it through litigation.

¹⁷ See Fall 2016 Agenda Book, *supra* note 3, at 163 (memorandum on circuit splits).

Mr. Katyal separately discussed variations in the circuits on Appellate Rule 30 concerning joint appendices. He cited the example of whether supplemental joint appendices are allowed by motion or by right. Another issue is whether the joint appendix can be deferred until after all the briefs come in. Mr. Letter and Prof. Coquillette both supported the suggestion that the Committee should consider this issue. Ms. Shumaker agreed. Judge Chagares and Judge Kavanaugh, and others thought the Committee should consider the matter. Judge Campbell asked whether electronic filing would affect joint appendices. Ms. Shumaker said that hyperlinking between electronically filed briefs and the record will be possible in the future, and said that the Second and Ninth Circuit are already experimenting with a system. Judge Chagares said that there should not be a rule prohibiting all paper. Judge Murphy said that this is one of the most complicated things appellate lawyers have to deal with. He saw the benefit of a national rule but thought that such a rule might affect lawyers who know only the local practice. Judge Gorsuch asked Mr. Letter and Mr. Katyal to prepare a memorandum for the spring meeting.

Mr. Byron suggested another item of new business. He said that Rule 45 and Rule 40(b) provide lengths for rehearing en banc petitions but not for responses. The clerk representative said that the responding party just follows the petitioner's limit. She said that although it seems like there is a gap, the issue has not been a problem. Given that the rule was just amended and there was no confusion, the sense of the Committee was that this proposed item should not be included on the agenda.

Judge Gorsuch announced that the Committee had received a request to make a rule that courts publish orders granting en banc hearing. The worry is that a lawyer (or another court) will rely on a panel decision without knowing that rehearing en banc had been granted. A judge member believed that this is a sensible request. Mr. Byron said that a rule requiring publication might raise controversy and that "publication" is an unusual term given that most documents are available on Pacer. Judge Gorsuch asked the clerk representative for guidance. She said that Westlaw decides what order to publish, not the court. Mr. Letter said that maybe this is an issue for which a letter should be written. Mr. Byron asked whether there was a problem requiring publication. A judge member said that a 7th Circuit local rule says that it must be published in the Federal Reporter. These orders do appear on Pacer. Mr. Byron and Mr. Letter said they will work with others in investigating this issue.

Finally, the Advisory Committee considered Ms. Shumaker's memorandum in the Agenda Book.¹⁸ The memorandum explains that Rules 10, 11, 27, and 30 do not account (or do not account fully) for electronic records. She said that the current situation is difficult to address. Judge Campbell said that the Civil Rules contained too many references to paper to correct but they did not

¹⁸ See *id.* at 183 (memorandum on Potential Fed. R. App. P. Updates).

cause many problems. The clerk representative said that on appeal the problems are greater. The sense of the Committee was that this is a topic to look into; there should be an inventory of what has to be changed. The clerk representative and reporter will make a list of all places where the rules have to be changed to bring them into conformity with current practice without trying to change the practice.

VII. Adjournment

The meeting adjourned at 2:10 p.m.

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MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 3, 2017 | Phoenix, Arizona

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ATTENDANCE

The Judicial Conference Committee on Rules of Practice and Procedure (the “Standing Committee”) held its spring meeting at the Sandra Day O’Connor United States Courthouse in Phoenix, Arizona, on January 3, 2017. The following members participated in the meeting:

Judge David G. Campbell, Chair	Professor William K. Kelley
Judge Jesse M. Furman	Judge Amy St. Eve
Gregory G. Garre, Esq.	Professor Larry D. Thompson
Daniel C. Girard, Esq.	Judge Richard C. Wesley (by telephone)
Judge Susan P. Graber	Chief Justice Robert P. Young
Judge Frank Mays Hull	Judge Jack Zouhary
Peter D. Keisler, Esq.	

The following attended on behalf of the advisory committees:

Advisory Committee on Appellate Rules – Judge Neil M. Gorsuch, Chair Professor Gregory E. Maggs, Reporter	Advisory Committee on Criminal Rules – Judge Donald W. Molloy, Chair Professor Sara Sun Beale, Reporter (by telephone) Professor Nancy J. King, Associate Reporter (by telephone)
Advisory Committee on Bankruptcy Rules – Judge Sandra Segal Ikuta, Chair Professor S. Elizabeth Gibson, Reporter Professor Michelle M. Harner, Associate Reporter	Advisory Committee on Evidence Rules – Judge William K. Sessions III, Chair Professor Daniel J. Capra, Reporter
Advisory Committee on Civil Rules – Judge John D. Bates, Chair Professor Edward H. Cooper, Reporter Professor Richard L. Marcus, Associate Reporter	

Elizabeth J. Shapiro, Deputy Director of the Department of Justice’s Civil Division, represented the Department on behalf of the Honorable Sally Q. Yates, Deputy Attorney General.

Other meeting attendees included: Judge Paul W. Grimm, former member of the Advisory Committee on Civil Rules and Chair of the Pilot Projects Working Group; Judge Robert Dow, Jr., Chair of the Rule 23 Subcommittee, Advisory Committee on Civil Rules; Zachary Porianda, Attorney Advisor to the Court Administration and Case Management (CACM) Committee; Professor Bryan A. Garner, Style Consultant; and Professor R. Joseph Kimble, Style Consultant.

Providing support to the Standing Committee:

Professor Daniel R. Coquillette
Rebecca A. Womeldorf
Julie Wilson
Scott Myers
Bridget Healy (by telephone)
Hon. Jeremy D. Fogel
Dr. Emery G. Lee III
Dr. Tim Reagan
Lauren Gailey

Reporter, Standing Committee
Secretary, Standing Committee
Attorney Advisor, RCSO
Attorney Advisor, RCSO
Attorney Advisor, RCSO
Director, Federal Judicial Center (FJC)
Senior Research Associate, FJC
Senior Research Associate, FJC
Law Clerk, Standing Committee

OPENING BUSINESS

Welcome and Opening Remarks

Judge Campbell called the meeting to order. He introduced the Standing Committee’s new members, Judge Furman of the Southern District of New York, Judge Hull of the U.S. Court of Appeals for the Eleventh Circuit, attorney Peter Keisler of Sidley Austin, and Justice Young of the Michigan Supreme Court.

Judge Campbell discussed the timing and location of meetings. The Standing Committee holds a meeting in June, after the advisory committees’ spring meetings have been concluded, and in time to approve matters to be published in August. The Standing Committee’s winter meeting is held during the first week of January, after the advisory committees’ fall meetings (which run from September through November) and the holidays, but before the reporters’ spring semesters begin. Although it has been a tradition for the past few years to hold the winter meeting in Phoenix, Judge Campbell welcomed the members to suggest alternative locations.

In his previous role as Chair of the Advisory Committee on Civil Rules, Judge Campbell found the January meeting to be an invaluable opportunity to share proposals with the Standing Committee and solicit feedback from its members. Judge Campbell encouraged all to share their thoughts.

Report on Rules and Forms Effective December 1, 2016

The following Rules and Forms went into effect on December 1, 2016: Appellate Rules 4, 5, 21, 25, 26, 27, 28, 28.1, 29, 32, 35, and 40, and Forms 1, 5, 6, new Form 7, and the new Appendix; Bankruptcy Rules 1010, 1011, 2002, 3002.1, 7008, 7012, 7016, 9006, 9027, 9033, new Rule 1012, and Official Forms 410S2, 420A, and 420B; Civil Rules 4, 6, and 82; and Criminal Rules 4, 41, and 45 (*see* Agenda Book Tab 1B).

Judge Molloy reported that Congress is considering possible legislative action that would undo the recent amendment to Criminal Rule 41. Judge Campbell added that the Department of Justice (DOJ) had been helpful in advising Congress of the intent behind the rule change. Discussion followed.

*Report on September 2016 Judicial Conference Session,
Proposed Amendments Transmitted to the Supreme Court, and
Rules and Forms Published for Public Comment*

Rebecca Womeldorf reported on the September 2016 session of the Judicial Conference. In its semiannual report to the Judicial Conference, the Standing Committee submitted several rules amendments for final approval and requested approval for publication of a number of other proposed rule amendments.

The Judicial Conference approved the proposed amendments to Bankruptcy Rules 1001, 1006(b), and 1015(b), and Evidence Rules 803(16) and 902. These amendments were submitted to the Supreme Court on September 28, 2016. The Court will review the package and, barring any objection, adopt it and transmit it to Congress by May 1, 2017. If Congress takes no action, the amendments will go into effect on December 1, 2017.

The Judicial Conference also approved the Mandatory Initial Discovery Pilot Project and the Expedited Procedures Pilot Project.

The Standing Committee previously approved for public comment proposed amendments to the following Rules: Appellate Rules 8, 11, 25, 28.1, 29, 31, 39, 41, and Form 4; Bankruptcy Rules 3002.1, 3015, 3015.1 (New), 5005, 8002, 8006, 8011, 8013, 8015, 8016, 8017, 8018.1 (New), 8022, and 8023, Part VIII Appendix (New), and Official Forms 309F, 417A, 417C, 425A, 425B, 425C, and 426; Civil Rules 5, 23, 62, and 65.1; and Criminal Rules 12.4, 45, and 49. These rules and forms were published for public comment in July and August 2016. Many of these changes are non-controversial. The proposal to amend Civil Rule 23 has generated the most interest at public hearings; other hearing testimony has pertained to electronic filing changes affecting all rule sets.

APPROVAL OF THE MINUTES OF THE PREVIOUS MEETING

Upon a motion by a member, seconded by another, and by voice vote: **The Standing Committee approved the minutes of the June 6, 2016 meeting.**

INTER-COMMITTEE WORK

Coordination Efforts

Scott Myers of the RCSO delivered a report on coordination efforts regarding proposed rules amendments that affect more than one advisory committee. He described rules amendments currently out for public comment that have implications for more than one set of federal rules. The first example related to electronic filing, service, and signatures (proposed amendments to Appellate Rule 25, Bankruptcy Rule 5005, Civil Rule 5, and Criminal Rule 49). Mr. Myers noted that the advisory committees coordinated language prior to publication; any changes the advisory committees recommend when the rules are submitted to the Standing Committee for final approval will also go through the coordination process.

Mr. Myers explained that proposed amendments to Civil Rules 62 and 65.1 that would eliminate the term “supersedeas bond” also have inter-committee implications. The Appellate Rules Committee published proposed amendments to Appellate Rules 8, 11, and 39 that would eliminate the term, and that the Bankruptcy Rules Committee planned to do the same by recommending technical conforming amendments to Bankruptcy Rules 8007, 8010, and 8021. The advisory committees will need to coordinate any additional changes made as a result of comments received.

Proposed amendments published for comment to the criminal disclosure rule could impact the appellate, bankruptcy, and civil disclosure rules. As published, the criminal disclosure rule would change the timing for initial and supplemental corporate disclosure statements, and that parallel amendments to the appellate, bankruptcy, and civil disclosure rules would need to be made for consistency across the rules. A reporter to the Criminal Rules Committee said that this may be a case where factors specific to criminal procedure warrant a change that need not be adopted by the other advisory committees. Mr. Myers added that if parallel amendments are pursued by the Appellate, Bankruptcy, and Civil Rules Committees, the effective date of any changes to rules in those areas would trail the proposed criminal rule change by a year.

Finally, Mr. Myers noted that the Bankruptcy Rules Committee planned to address at its next meeting an amendment to its privacy rule to address redaction of personal identifying information from filed documents. The proposal responded to a suggestion from the CACM Committee after a national creditor sought assistance from the Administrative Office in efficiently removing personal identifying information from thousands of proof of claims it had filed across the country. The Civil and Criminal Rules Committees considered recommending similar amendments to their privacy rules, but both committees determined that courts have the tools needed to handle the relatively small number of documents filed on their dockets containing protected personal identifying information. Accordingly, the Civil and Criminal Rules Committees did not plan to follow the lead of the Bankruptcy Rules Committee in amending their privacy rules unless the Standing Committee believed amendments should be made to all the privacy rules in the interests of uniformity.

Judge Campbell solicited additional issues that will require or benefit from inter-committee coordination.

Five-Year Review of Committee Jurisdiction

Ms. Rebecca Womeldorf introduced discussion of the five-year review of committee jurisdiction required by the Judicial Conference. In 1987, the Judicial Conference established a requirement that “every five years, each committee must recommend to the Executive Committee, with a justification for the recommendation, either that the committee be maintained or that it be abolished.” In 2017, therefore, each Judicial Conference committee has been asked to complete a questionnaire to evaluate its mission, membership, operating procedures, and relationships with other committees in an effort to identify where improvements can be made.

As the Bankruptcy Rules Committee had completed a version of the Five-Year review, Judge Ikuta was invited to summarize its recommendations. Judge Ikuta discussed the Bankruptcy Rules Committee’s responses, focusing on three issues: (1) inter-committee coordination, (2) voting rights for non-member participants such as the representative from the DOJ and the bankruptcy clerk participant, and (3) background knowledge requirements for judge members.

With respect to the first issue of coordination, Judge Ikuta said she supported the addition of the coordination report to the Standing Committee’s agenda, but urged more coordination once overlap is identified, so that there is a clear process transparent to all, with perhaps one advisory committee leading the effort.

Judge Campbell asked Judge Ikuta what additional steps should be added to the Standing Committee’s current coordination efforts. Judge Ikuta suggested that the existing charts of overlapping rules could provide a starting point from which to identify overlap among rules. Once points of overlap are identified, the question becomes how best to proceed. Should one advisory committee take the lead? Should all of the committees discuss the issue first? Should the procedure vary, depending on the particular situation? Judge Ikuta took the position that a specific procedure for handling overlapping provisions should be adopted.

The stated goal of coordination is generally parallel language among identical rules provisions across rules sets, adopted during the same rules cycle. A reporter stated that a coordination procedure *is* currently in place—proposed changes with inter-committee implications are to be referred to a subcommittee of the Standing Committee—and that process was followed when the time counting amendments were made to all the rule sets. This procedure was not followed precisely with respect to the current round of amendments concerning electronic filing, service, and signatures, but the basic procedure of using a Standing Committee subcommittee to coordinate when necessary is available when needed.

Another reporter agreed and added that the structure of committee hierarchy can complicate coordination. Although the Standing Committee is charged with coordinating the work of the advisory committees, and suggesting proposals for them to study, it does not simply direct advisory committees to amend particular rules. Rather, proposed rule changes flow up from the advisory committees to the Standing Committee, and it is not always clear until an advisory committee presents a fully developed recommendation that coordination with other advisory committees is needed. Even so, the Standing Committee may—and has—set up subcommittees

for the purpose of persuading the advisory committees to cooperate regarding related rules changes.

A staff member asked what role the Standing Committee liaisons, as part of the coordination machinery, could be expected to play in the coordination process. A Standing Committee member agreed that, while liaison members do not have voting privileges, they could be helpful to the coordination efforts by alerting the Standing Committee to possible overlapping changes under consideration.

A third reporter said advisory committees need more information about the other advisory committees' agenda items. Specifically, beyond the general subject matter under discussion, what exact amendments are under consideration for a parallel rule? Armed with this information, the advisory committees could better consider parallel amendments in the same meeting cycle. A suggestion was made that the most effective way to disseminate this information is to ensure that each advisory committee's agenda book is shared with the chairs and reporters of all of the other advisory committees. There was agreement that sharing agenda books would benefit coordination. A reporter reiterated that more proactive use of subcommittees can go a long way toward solving coordination issues.

A reporter observed that the Bankruptcy Rules are more frequently affected by coordination issues because many of the rules either incorporate or are modeled on the Civil and Appellate Rules. A staff member added that often changes to Bankruptcy Rules have lagged by a year or more parallel Civil or Appellate Rules changes, without issue. It may sometimes be necessary to ask the other advisory committees to delay a change for a year if the Standing Committee wants parallel changes to go into effect at the same time, but the fact that a bankruptcy version of a change sometimes goes into effect a year later than a parallel appellate or civil rule change has not been a historical source of problems for courts or attorneys, if it has been noticed at all. A reporter pointed to the recent proposal dealing with payments to class-action objectors as one that required substantial coordination between the Civil and Appellate Rules Committees and the current system worked well. A Standing Committee member cited Civil Rules 62 and 65 as another example of a successful coordination effort.

Judge Campbell identified four actions to be taken to further the Standing Committee's coordination efforts: (1) the RCSO will continue to identify, track, and report on proposed rules amendments affecting multiple advisory committees; (2) agenda books will be shared by each advisory committee with the chairs and reporters of all of the other advisory committees; (3) the RCSO will assist in establishing coordination subcommittees when that seems appropriate; and (4) the Standing Committee will look for opportunities for coordination and future process improvements. A Standing Committee member added that advisory committees affected by a proposed rule change could send a member to participate in the proposing advisory committee's meeting. Judge Campbell agreed that this would be a good idea in appropriate circumstances.

Judge Ikuta's second bankruptcy-specific issue in the Five-Year review concerned whether the Bankruptcy Rules Committee's substantive experts – such as a recent Chapter 13 trustee invitee, the bankruptcy clerk advisor, and the representatives from the DOJ and the Office of the United States Trustees – should be made voting members, and whether Article III judges being

considered for membership on the Bankruptcy Rules Committee should be required to have some knowledge of the bankruptcy process. Judge Campbell asked why the Bankruptcy Rules Committee's expert members do not currently vote. One possible answer is that the Bankruptcy Rules Committee does not consider them full voting members because they were not appointed by the Chief Justice. Several Standing Committee members noted that the DOJ representative on other rules committees have always voted, though clerk representatives have not. It was observed that because the United States Trustee is an arm of the DOJ, the government would have two votes if voting rights were extended to both representatives on the Bankruptcy Rules Committee.

Providing additional historical perspective, a reporter explained that the DOJ is unique among the committees' membership because it represents the Executive Branch in addition to the interests of the justice system generally. To give all bankruptcy expert invitees a vote could set a problematic precedent as many interest groups would seek to join the rules committees to advance their views. The DOJ is deserving of an exception from advocacy, however, because it is an Executive Branch agency, and the other two branches of government are represented in the rulemaking process.

A Standing Committee member supported making the bankruptcy DOJ representative a voting member, as was the case on the other rules committees, but added that the United States Trustee and DOJ representatives should have only one vote between them because they are the same office. After further discussion, Judge Campbell suggested the Bankruptcy Rules Committee should be consistent with the other advisory committees in its treatment of its expert members; the DOJ member should vote, and any other expert advisors should be treated like the clerk members of the other committees, who play an informational role but do not vote. No member objected to this approach.

Judge Ikuta's third bankruptcy-specific item from the Five-Year review concerned whether Article III judges being considered for membership on the Bankruptcy Rules Committee should be required to have bankruptcy experience. Judge Campbell agreed that bankruptcy experience should be considered in recommending potential members to the Chief Justice.

After further discussion of the Five-Year review, it was agreed that the Standing Committee should submit a single report for the rules committees.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Bates and Professors Cooper and Marcus provided the report on behalf of the Civil Rules Committee, which met on November 3, 2016, in Washington, D.C. The Civil Rules Committee's single action item involved recommending to the Judicial Conference for approval a technical amendment to Rule 4(m).

Action Item

Technical Amendment to Rule 4(m) – Rule 4(m) establishes a time limit for serving the summons and complaint. The proposed rule text revises the final sentence of Rule 4(m), which was

amended on December 1, 2015, and again on December 1, 2016. The 2015 amendment shortened the time for service from 120 days to 90 days, and added to the list of exemptions to that time limit Rule 71.1(d)(3)(A), notices of a condemnation action. The 2016 amendment added to the list of exemptions Rule 4(h)(2) service on a corporation, partnership, or association at a place not within any judicial district of the United States. At the time the 2016 proposal was prepared, the advisory committee was working from Rule 4(m) as it was in 2014, because the 2015 amendment exempting service under Rule 71.1(d)(3)(A) had been proposed, but final action was more than a year in the future. For this reason, the part of the 2015 amendment adding Rule 71.1(d)(3)(A) was inadvertently omitted from the 2016 proposal. Therefore, that proposal, as published, recommended, and adopted, read:

This subdivision (m) does not apply to service in a foreign country under Rule 4(f), 4(h)(2), or 4(j)(1).

The Standing Committee explored with Congress's Office of the Law Revision Counsel (OLRC) the possibility of correcting the rule text as a scrivener's error. The OLRC declined to do so, but did place in an explanatory footnote the official print for the House of Representatives Committee on the Judiciary.

Because the OLRC declined to correct the omission of Rule 71.1(d)(3)(A), it must be corrected through the Rules Enabling Act process. Given that the provision has already been published, reviewed, and adopted, and because its omission was inadvertent, further publication is not required. The final sentence of Rule 4(m) should read:

This subdivision (m) does not apply to service in a foreign country under Rule 4(f), 4(h)(2), or 4(j)(1), or to service of a notice under Rule 71.1(d)(3)(A).

The Civil Rules Committee voted to recommend approval of this rule text for submission to the Judicial Conference in March 2017 as a technical amendment, looking toward adoption by the Supreme Court in the spring of 2017, for an effective date of December 1, 2017.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously voted to recommend the technical amendment to Rule 4(m) to the Judicial Conference for approval.**

Pilot Projects Working Group

Judge Bates, Judge Grimm, Judge Fogel, and Emery Lee of the FJC led the discussion of two pilot projects approved by the Judicial Conference in September 2016, both of which are intended to improve pre-trial case management and reduce the cost and delay of civil litigation: (1) the Expedited Procedures Pilot, which will utilize existing rules, practices, and procedures and is intended to confirm the merits of active case management under these existing rules and practices; and (2) the Mandatory Initial Discovery Pilot, which is intended to measure whether court-ordered, robust, mandatory discovery produced before traditional discovery will reduce cost, burden, and delay in civil litigation. It was noted that Chief Justice Roberts mentioned the pilot projects in his 2016 Year End Report.

Judge Bates advised that these projects are expected to be implemented beginning in the spring of 2017, likely with their starts staggered for administrative-convenience purposes. One key to the projects' success will be getting enough districts to participate.

To discuss these projects in more detail, Judge Bates called upon Judge Grimm, a former member of the Civil Rules Committee and Chair of the Pilot Projects Working Group. Judge Grimm noted that during the public comment period and in public hearings held on the 2015 Civil Rules Package, some practitioners questioned whether rule changes should be implemented absent empirical support. Other practitioners noted that active case management is essential to reducing the cost and delay of civil litigation. Both pilot projects are responsive to these concerns. The Mandatory Initial Discovery Pilot will provide empirical data regarding whether the procedures implemented in the pilot project are effective and warrant future rules amendments. The goal of the Expedited Procedures Pilot is to promote a culture change by confirming the benefits of active case management using existing procedural rules. The Pilot Projects Working Group is coordinating with the FJC to design the pilot projects to produce measurable markers that yield good data.

Judge Grimm reviewed the history of the Mandatory Initial Discovery Pilot. The concept of mandatory initial discovery was first introduced in the 1993 rules amendments. The idea was to create an obligation that parties exchange information relevant to claims and defenses underlying the litigation without a formal discovery request. "It was an idea whose time had perhaps not yet come." The 1993 amendments included opt-out provisions, and most opted out. As a result, mandatory initial discovery has been little-used, and there has been no opportunity to verify empirically whether such procedures would help to reduce the cost and length of litigation. Interestingly, approximately ten states have since adopted mandatory initial discovery, to great success.

The Mandatory Initial Discovery Pilot will be implemented through a standing order (*see* Agenda Book Tab 3B, Attachment 5). Participating courts will also have access to resources developed by the Pilot Projects Working Group, including a reference manual, model forms and orders, and additional educational materials.

Judge Grimm then turned to the Expedited Procedures Pilot, the goals of which include ensuring courts' compliance with the requirements of: a prompt Rule 16 conference; issuance of a scheduling order setting a definite period of discovery of no more than 180 days and allowing no more than one extension, and then only for good cause; the informal resolution of discovery disputes; a commitment on the part of judges to resolve dispositive motions within 60 days from the filing of a reply brief and a firm trial date. The trial date would be set either at the initial scheduling conference, after the filing of dispositive motions, or upon the resolution of those motions.

The Pilot Projects Working Group is continuing to develop and finalize the procedures and supporting materials for the pilot projects. Judge Grimm confirmed that the pilot projects will be staggered, with the Mandatory Initial Discovery Pilot beginning first. Once the pilot projects have begun, administrative support will be provided by RCSO and CACM. The pilots will last for three years, but data collection and analysis will continue for longer than three years.

Judge Grimm noted the need for additional recruitment of courts to participate. The original goal was to have at least five pilot courts participating in each project. The Pilot Projects Working Group sought diversity among participating courts, in terms of both size and geography, and had initially sought participation from all active and senior judges on each court. Recruitment efforts in the Northern District of Illinois resulted in a participation rate of approximately 75 percent, which will permit intra-district comparisons between participating and non-participating judges.

The District of Arizona will participate in the Mandatory Initial Discovery Pilot. Judge Campbell reported that because Arizona's state rules of civil procedure already include provisions similar to those the pilot projects are intended to test, the District of Arizona's judges have found the experiences of their state counterparts in handling these rules to be reassuring. Twenty years after the adoption of mandatory initial discovery in Arizona state court, a survey revealed that 74 percent of Arizona practitioners "prefer to be in state court" over federal court, as opposed to 41 percent nationally. When surveyed, lawyers in Arizona responded that they prefer state court because "[they] spend less money, and . . . cases [are] resolved more quickly." Judge St. Eve, whose Northern District of Illinois is confirmed to participate as well, suggested this information might be useful in helping judges to convince their colleagues to participate.

The District of Montana is also considering taking part. However, Judge Molloy expressed concerns about the standing order, which Judge Grimm confirmed was mandatory due to the need to ensure consistent measurement. Judge Molloy stated that the complexity of the standing order, and the bar's negative response to the attempt in the early 1990s to make initial discovery mandatory, were—although not dispositive—concerning to the District of Montana.

The Eastern District of Kentucky is confirmed to participate in the Expedited Procedures Pilot. Thanks to the efforts of Judges Diamond and Pratter in the Eastern District of Pennsylvania, that district remains a possibility, as do the Southern District of Texas, the District of Utah, and the District of New Mexico.

Judge Grimm shared several lessons learned as it has tried to recruit participating courts: the process takes time, success requires buy-in from multiple judges on a given court, and persuasion can be a challenge. Asked what percentage of a court's judges would constitute sufficient participation, Judge Grimm responded that 50 to 60 percent would provide a "center of gravity." A judge member requested clarification as to the term, "firm trial date," which Judge Grimm acknowledged had been an "area of concern" for some. He further acknowledged that the goal of disposing of 90 percent of cases within 14 months of either 90 days from service or 60 days from the entry of an appearance was "ambitious" by design.

Judge Fogel argued that "a culture change" is "quite difficult," but is necessary to drive up recruitment. Although the FJC has engaged in education methods such as webinars, receptivity to pilot project participation has largely been confined to so-called "baby judges," while "longer-tenured judges" seem "more comfortable with the status quo." Judge Fogel anticipated this topic would be discussed at the upcoming Chief District Judges meeting in March 2017. The FJC hopes to use adult education principles (specifically, by focusing training on certain areas of knowledge, skills, and abilities) to encourage judges to adopt active case management practices (*see* Agenda Book Tab 3B, Attachment 6). A judge member suggested the FJC consider

including a chambers staff member in the training, along with his or her judge. Judge Campbell also suggested including in the training process state judges who have experience with similar rules provisions.

Emery Lee then addressed the topic of data collection. He reviewed his November 29, 2016 memorandum to the Standing Committee, which addressed potential problems (*see* Agenda Book Tab 3B, Attachment 7). The first issue is whether and when to set the firm trial date. Available data from eight districts and 3,000 civil cases previously addressing this topic shows significant variance among district courts. In approximately forty-nine percent of cases, no trial date could be found. Second, the two pilot projects are very different from one another in terms of measures. The Expedited Procedures Pilot, which will require the tracking of motion practice and discovery disputes, is the easier of the two, although the lack of a definitive and consistent starting point for the “fourteen-month clock” is problematic.

Dr. Lee expressed interest in obtaining feedback through attorney surveys, which could be automated via the district’s CM/ECF system. When a “case-closing event” occurs in CM/ECF, it can trigger another “CM/ECF case event” directing attorneys to be noticed to a survey conducted by an outside vendor. Automation of the surveys in this manner will save significant time, but will require assistance from clerks’ offices.

A judge member asked whether, in addition to comparison among districts, the data collected would allow for a “before-and-after” comparison within a single district. The answer is yes by district and for individual judges, but the usefulness of the data can hinge on many factors over the next four to five years. Another judge member wondered whether “within-court data [was] *more* helpful” than data from a number of diverse districts, in that the former controls for more variables. Two other judges responded that the “self-selection bias” becomes an issue in that situation, as the judges opting in might already be using expedited procedures. In closing, another judge member pointed out the need to define the metrics: “What are we comparing?”

Information Items

Rules Published for Public Comment – Proposed amendments to Rules 5, 23, 62, and 65.1 were published for public comment in August 2016, and will be the subject of three hearings. The changes to Rule 23, which largely concern class-action settlements, have generated the most interest. Eleven witnesses testified at the November 3, 2016 hearing held in conjunction with the advisory committee’s fall 2016 meeting, and eleven more were scheduled to testify at the January 4, 2017 hearing. More than a dozen were already scheduled to testify at the February 16, 2017 hearing, which will be held by telephone.

Rule 30(b)(6) Subcommittee – The Civil Rules Committee has decided to explore whether it is feasible and useful to address some of the problems that bar groups have regularly identified with depositions of entities under Rule 30(b)(6). The Civil Rules Committee studied this issue ten years ago, but concluded that any problems were attributable to behavior that could not be effectively addressed by rule. When the question was reassessed a few years later, the advisory committee reached the same conclusion. Recently, certain members of the American Bar Association Section of Litigation submitted a suggestion reviving these concerns.

Judge Bates advised that a subcommittee has been formed, chaired by Judge Joan Ericksen, to consider possible amendments to Rule 30(b)(6). The Rule 30(b)(6) Subcommittee has begun to develop a tentative initial draft of a potential amendment to help to make the challenges of the process concrete, but it has not yet decided whether to recommend any amendments to the rule.

Redacting Improper Filings: Rule 5.2 – Court filings frequently include personal information that should have been redacted. Rule 5.2 (Privacy Protections for Filings Made with the Court) was designed to protect litigants’ privacy by permitting court filings to “include only: (1) the last four digits of the social-security number and taxpayer identification number; (2) the year of the individual’s birth; (3) the minor’s initials; and (4) the last four digits of the financial-account number.” The rule resulted from a coordinated process that led to the adoption of parallel provisions in the Appellate, Bankruptcy, and Criminal Rules.

The Bankruptcy Rules Committee intends to publish proposed new Bankruptcy Rule 9037(h), which would establish a procedure for replacing an improper filing with a properly-redacted filing, for public comment.

The Civil Rules Committee considered a parallel amendment to the Civil Rules that would have added a specific provision to Rule 5.2 for correcting papers that are filed without redacting personal identifying information in the manner that the rule requires. During its consideration of the proposed amendment at its fall 2016 meeting, the Civil Rules Committee determined that the district courts seem to be managing the problem well when it arises and, therefore, determined that there is no independent need for a national rule to correct improperly-redacted filings. The advisory committee decided to remove this item from its agenda.

Jury Trial Demand: Rules 38, 39, and 81(c)(3)(A) – Rule 81(c)(3) sets forth the procedure for demanding a jury trial in actions removed from state court. Specifically, Rule 81(c)(3)(A) provides that a party who demanded a jury trial in accordance with state law does not need to renew the demand after removal. Before the 2007 Style Project amendments, the rule provided that the party need not make a demand if state law “does not” require a demand (emphasis added). Recognizing that the Style Project amendments did not affect the substantive meaning of the rules, most courts continue to read Rule 81(c)(3)(A) as excusing a demand after removal only if state law does not require a demand at any point. However, as pointed out in a suggestion submitted in 2015 by Mark Wray, Esq. (Suggestion 15-CV-A), replacing “does” with “did” inadvertently created an ambiguity that may mislead a party who wants a jury trial to forgo a demand because state law, although requiring a demand at some point after the time of removal, did not require that the demand be made by the time of removal.

Discussion of this issue at the Standing Committee’s June 2016 meeting led Judges Gorsuch and Graber to suggest that the demand requirement in civil cases be reconsidered altogether (Suggestion 16-CV-F). Specifically, the suggestion would adopt the procedure currently used in criminal cases: a jury trial should be the default; a case would be tried without a jury only if all parties waive a jury trial, and the court must approve any waiver. The Civil Rules Committee has begun follow-up work on this suggestion. Preliminarily, the advisory committee surveyed local and state court rules and case law to determine how often parties who want a jury trial do not get one due to the failure to make a timely demand.

Service of Subpoenas: Rule 45(b)(1) – Under Rule 45(b)(1), a subpoena is served by “delivering a copy to the named person.” The majority of courts interpret this provision to require personal service, while some courts have recognized other means of delivery, most often by mail. The advisory committee will discuss at future meetings whether Rule 45 should expressly recognize other means of delivery.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Gorsuch and Professor Maggs provided the report on behalf of the Appellate Rules Committee, which met on October 18, 2016, in Washington, D.C. Judge Gorsuch succeeded Judge Steven M. Colloton as chair of the Appellate Rules Committee at the beginning of October 2016.

Judge Gorsuch reported that the Appellate Rules Committee had one action item, a proposed technical amendment, for which it sought the approval of the Standing Committee. The agenda also included five information items.

Action Item

Technical Amendment to Rule 4(a)(4)(B)(iii) – On December 14, 2016, OLRC informed the Appellate Rules Committee through RCSO that the published version of Appellate Rule 4 should not include subdivision (a)(4)(B)(iii), as that subsection had been inadvertently deleted in 2009. In 2009, Rules 4(a)(4)(B)(ii) and 4(a)(5) were amended as part of the Time Computation Project, but subsection (iii) was not amended. The redlined version of the proposed amendments, used during committee deliberations and published for public comment, included asterisks between subdivisions 4(a)(4)(B)(ii) and 4(a)(5) to show that the material between them—subdivision 4(a)(4)(B)(iii)—was not to be changed. However, the “clean version” combining the changes inadvertently omitted those asterisks, making it appear that subdivision 4(a)(4)(B)(iii) had been deleted. The Supreme Court’s order adopting the amendments to Rule 4(a) incorporated this version.

Accordingly, the OLRC deleted subdivision (iii) from its official document in 2009, but nonetheless the version from which the rules are printed did not include that change. For that reason, Rule 4(a)(4)(B)(iii) has continued to appear in the published version of the Appellate Rules. It was only recently that a publisher noticed the omission of subdivision (iii) from the 2009 Supreme Court order and inquired with the OLRC as to whether it was actually part of the Rule. The OLRC intends to publish Rule 4(a)(4)(B) without subdivision (iii), but include a footnote stating that the deletion was inadvertent.

Judge Gorsuch consulted with the members of the Appellate Rules Committee, who decided that the error was best remedied by a technical amendment restoring subdivision (a)(4)(B)(iii) to Rule 4. Because the change is non-substantive, publication is unnecessary. No member expressed objection or concern.

Judge Campbell added that if the Standing Committee approved the amendment, it could be approved by the Judicial Conference in March and transmitted to the Supreme Court, and

submitted to Congress by the first of May. It would then go into effect on December 1, 2017, assuming no action by Congress. There will be one year in which subdivision (a)(4)(B)(iii) will not be printed as part of Rule 4, but OLRC’s explanatory footnote will appear during that period.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously decided to recommend to the Judicial Conference for approval the technical amendment to restore Rule 4(a)(4)(B)(iii).**

Information Items

Judge Gorsuch presented the Appellate Rules Committee’s information items: (1) Appellate Rule 3(d)’s references to “mailing” in the context of electronic filing; (2) the references to security instruments in Appellate Rule 8(b); (3) possible conforming amendments to Rule 26.1’s corporate disclosure requirements; (4) possible conforming amendments in light of the Civil Rules amendments regarding class action objectors, and (5) possible amendments to Rule 25 regarding electronic filing and pro se litigants.

Rule 3(d) – Rule 3(d) governs service of the notice of appeal. After proposed amendments to Rule 25 were published in August 2016, the Appellate Rules Committee realized that Rule 3 still contained references to “mail,” and that the term “mail” appears throughout the Appellate Rules. The Appellate Rules Committee has discussed using the term “send” in place of “mail,” but those discussions are preliminary. Judge Gorsuch noted that the term “mail” is used in other federal rules as well, particularly the Civil and Bankruptcy Rules. As such, any terminology change may require coordination with the other committees, and he solicited input on these points.

One member cautioned that the effort could be a big undertaking, particularly for the Civil Rules. A reporter agreed the project would be substantial in scope, as there are words used in addition to “mailing” (e.g., “sending” and “delivering”) that would need to be examined as well. These instances might require a case-by-case determination as to whether electronic service is acceptable under the circumstances. To date, the Civil Rules Committee has not determined to replace these types of phrases throughout the Civil Rules. This issue had been explored by the Subcommittee on Electronic Filing two years ago, and the Subcommittee had decided not to take action due to the complexity of the problem and the potential for unintended consequences. Judge Gorsuch concluded that the Appellate Rules Committee will continue to pursue how to avoid confusion in the Appellate Rules between the references to electronic filing and references to mail.

Rule 8(b) – The Appellate Rules Committee is considering an amendment to clarify the recently-published draft of Rule 8(b) regarding security instruments. The proposed amendments initially came to the attention of the advisory committee as a result of the proposed amendment to Civil Rule 62, which clarifies that an appellant may post a security other than a bond in order to obtain a stay of proceedings to enforce a judgment. In June 2016, the Standing Committee approved for publication amendments to Rules 8(a)(1)(B), 8(a)(2)(E), 8(b), 11(g), and 39(e)(3) to conform to the amendment to Civil Rule 62 by replacing the term “supersedeas bond.”

After the publication of these proposed amendments in August 2016, the Appellate Rules Committee became aware of an internal inconsistency in the language of the published draft of Rule 8(b). While the first clause of the first sentence of the proposed text includes four forms of security—“a bond, other security, a stipulation, or other undertaking”—the second clause mentions only two: “a bond or undertaking.” At the October 2016 meeting, the advisory committee tentatively decided to replace the first clause in Rule 8(b) with “a bond, a stipulation, an undertaking, or other security,” and the second clause in the rule with the term “security,” to encompass all prior iterations, explanations, or alternatives without repetition.

The Appellate Rules Committee also discussed the possibility of eliminating the reference to “stipulation,” which appears in the Appellate Rules but not in the Civil Rules. Although no published case touches upon the subject, the Appellate Rules Committee determined to retain the reference, and have consulted with the reporter for the Civil Rules Committee. The Appellate Rules Committee will wait to receive all public comments on the published version of Rule 8(b) before taking further action.

A reporter asked whether the suggested parallel amendments to Rule 8(b)’s language create an obligation on the part of the other committees to similarly conform. For example, the word “stipulation” is in the Appellate Rule but not in the corresponding Civil or Bankruptcy Rule. A member proposed that “stipulators” be treated as “other security providers,” as stipulations to the form and amount of security are routinely approved at the district court level, but expressly declined to suggest that the term be removed from Appellate Rule 8(b).

Judge Campbell noted that Appellate Rule 8 describes the person who provides the security in two different ways: once as “sureties or other security provider,” and twice as a “security provider,” and suggested a stylistic change from “surety” to “security provider.” Another member noticed that this would require amending the subsection’s title (“Proceeding Against a Surety”) as well. Professor Maggs explained that the Appellate Rules Committee had retained the term surety because the amendments to Civil Rule 62 retained the term “bond or other security,” and the “surety” referred to the security provider for the bond.

Judge Gorsuch thanked the other members for their comments, and reported that the Appellate Rules Committee expects to finalize the new text of Rule 8(b) before its next meeting.

Rule 26.1 and Corporate Disclosure Statements – Appellate Rule 26.1(a) currently provides that corporate parties must disclose their subsidiaries and affiliates so that judges can make assessments of their recusal obligations. For several years, the Appellate Rules Committee has discussed the possibility of expanding disclosure obligations to publicly-held non-corporate entities, and to require the disclosure, in addition to the information currently required by Rule 26.1(a), of the entity’s involvement in related federal, state, and administrative proceedings.

A careful study, including a memorandum by Professor Capra, revealed substantial variation among the circuits’ disclosure requirements. Despite the significant costs on counsel who must understand the different sets of rules in different jurisdictions, the Appellate Rules Committee concluded that it was not inclined to act because it was unable to devise a satisfying solution. Two major problems led to this decision: (1) the amount of information that is necessary and

helpful in evaluating recusal decisions varies significantly among judges, and (2) efforts to delineate which entities would be subject to the disclosure requirements were unsuccessful. Given these complicated issues, the Appellate Rules Committee decided to not go forward with a rule amendment.

The Appellate Rules Committee did, however, tentatively decide to recommend conforming amendments to Appellate Rule 26.1 in light of the proposed amendments to Criminal Rule 12.4, which requires the disclosure of nongovernmental corporate parties and organizational victims. These proposed changes to subdivisions (b) and (d) are more limited in scope. Rule 26.1(b) would be modified to replace the references to “supplemental” filings to “later” filings. This term is more precise and would include a party that was unaware of the need to make a disclosure at the time it filed its principal brief. Subdivision (d) would also be added to mirror the proposed revision of Criminal Rule 12.4(a)(2), which requires the government to “file a statement identifying any organizational victim of the alleged criminal activity” absent a showing of good cause.

The Appellate Rules Committee also tentatively approved a proposal to add a new subdivision (f) to Rule 26.1, which would impose a disclosure requirement on intervenors. Although it is rare to see a party intervene on appeal, most circuits have local rules similar to the proposed change. Judge Campbell pointed out that if the Appellate Rules Committee moves forward with the proposal to impose disclosure requirements upon intervenors, it should also consider amending Rule 15(d), which sets forth the requirements for a motion for leave to intervene. He suggested that Rule 15(d) could be amended to add procedures for making disclosures. Judge Gorsuch agreed to take this good point under consideration.

A more complicated issue is whether to expand the disclosure requirements in bankruptcy appeals. Bankruptcy cases tend to involve a much higher number of corporate entities because of the creditor entities. An ethics opinion indicates that, ideally, more detailed disclosure obligations would be required. The Appellate Rules Committee decided to consult with the Bankruptcy Rules Committee before proceeding further. Judge Ikuta confirmed that the Bankruptcy Rules do not contain a disclosure requirement, and that the Bankruptcy Rules Committee has referred the matter of corporate disclosures in bankruptcy cases to a subcommittee.

Class Action Settlement Objectors – In August 2016, a proposed amendment to Civil Rule 23 was published that intended to address perceived problems with objections to class action settlements. Specifically, revised Civil Rule 23(e)(5) would require objectors to state to whom the objection applies, require court approval for any payment for withdrawing an objection or dismissing an appeal, and require the indicative ruling procedure to be used in the event that an objector seeks approval of a payment for dismissing an appeal after the appeal has already been docketed. At its October 2016 meeting, the Appellate Rules Committee considered whether conforming amendments to the Appellate Rules are necessary in light of the proposed changes to Civil Rule 23. The Appellate Rules Committee concluded that the Civil Rules amendments currently out for publication adequately address the objector problem, and complementary Appellate Rules are unnecessary.

Electronic Filing by Pro Se Litigants – In August 2016, a proposed amendment to Rule 25 was published that addressed the prevalent use of electronic service and filing. Proposed subdivision (a)(2)(B)(ii) leaves in place the current requirement that *pro se* parties may file papers electronically only if allowed by court order or local rule. In response to several suggestions submitted by members of the public, at its October 2016 meeting the Appellate Rules Committee considered whether to reconsider the current rule on electronic filing by *pro se* parties. After discussion, the Appellate Rules Committee determined that it would not recommend any additional changes; however, no action will be taken as to the published revised version of Rule 25 until all public comments have been received.

Additional Issues – Judge Gorsuch also raised the topic of efficiency in the appellate process, an issue that has garnered increased attention in recent years. The 2016 amendments reducing Rule 32(a)(7)(B)'s presumptive word-count limit from 14,000 to 13,000 has led some to question whether all of the brief sections required under Rule 28(a), such as the summary of the argument and the components of the statement of the case, should continue to be mandatory. In addition, the Appellate Rules Committee is considering the issue of the publication of *en banc* appeals. It will continue to explore these issues in addition to the other information items discussed above.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Ikuta and Professors Gibson and Harner presented the report on behalf of the Bankruptcy Rules Committee, which met on November 14, 2016, in Washington, D.C. The Bankruptcy Rules Committee had three action items for which it sought approval, including technical amendments and the new Chapter 13 package. There were also two information items.

Action Items

Chapter 13 Official Plan Form and Related Rules Amendments – The Bankruptcy Rules Committee submitted proposed amendments to Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009, new Rule 3015.1, and new Official Form 113, with a recommendation that they be approved and transmitted to the Judicial Conference.

The Bankruptcy Rules Committee first discussed the possibility of a national form for Chapter 13 plans at its spring 2011 meeting in response to two suggestions which criticized the variance among districts' plans and argued that a uniform plan structure would streamline the process for both creditors and judges. A working group was formed to draft an official form for Chapter 13 plans and any related rule amendments.

In August 2013, the proposed Chapter 13 plan form and proposed amendments to nine related rules were published for public comment. The Bankruptcy Rules Committee made significant changes to the rules and the form in response to the comments and republished the full package in August 2014. Because many of these comments from the second publication period strongly opposed a mandatory national form for Chapter 13 plans, the Bankruptcy Rules Committee explored the possibility of adding provisions that would allow districts to opt out under certain conditions. At its fall 2015 meeting, the advisory committee approved the proposed Chapter 13 plan form (Official Form 113) and related amendments to Rules 2002, 3002, 3007, 3012, 4003,

5009, 7001, and 9009, but deferred further action in order to continue to develop the opt-out “compromise proposal.”

At its spring 2016 meeting, the Bankruptcy Rules Committee decided to recommend publication of two rules that would implement the opt-out proposal, an amendment to Rule 3015 and proposed new Rule 3015.1. It also recommended a shortened comment period of three rather than six months, due to the two prior publications and the narrow focus of the revised rules. The Standing Committee approved this recommendation, and Rules 3015 and 3015.1 were published for public comment in July 2016. Despite some comments arguing that the form should be mandatory or, at the opposite end of the spectrum, opposing the requirement of any mandatory form, whether national or local, the advisory committee unanimously approved with minor changes Rules 3015 and 3015.1 at its fall 2016 meeting.

The Bankruptcy Rules Committee submitted Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009; new Rule 3015.1; and new Official Form 113 to the Standing Committee for approval. The Bankruptcy Rules Committee recommended that the entire package of rules and the Chapter 13 Official Plan Form be submitted to the Judicial Conference at its March 2017 session and, if approved, be sent to the Supreme Court immediately thereafter. The Court is expecting the early submission, and if it approves and sends the package to Congress by May 1, it would take effect on December 1, 2017 absent Congressional action.

A judge member proposed a minor change to the first sentence of amended Rule 3002(a), which states, “A secured creditor, unsecured creditor, or an equity security holder must file a proof of claim” The judge member suggested that indefinite articles be used consistently throughout that clause, either by deleting the word “an” before “equity security holder,” or inserting “an” before “unsecured creditor.” The Standing Committee agreed to remove “an.”

Upon a motion by a member, seconded by another, and by voice vote: **The Standing Committee unanimously approved the following for submission to the Judicial Conference for approval: Rules 2002, 3002 (subject to the removal of “an” from subdivision (a)), 3007, 3012, 3015, 4003, 5009, 7001, and 9009; new Rule 3015.1; and new Official Form 113.**

Technical and Conforming Amendments to Rule 7004(a)(1) and Official Form 101 – Judge Ikuta introduced two technical and conforming amendments not requiring publication: (1) updating Rule 7004’s cross-reference to a subsection of Civil Rule 4(d), and (2) correcting an error in Question 11 of Official Form 101.

Rule 7004(a) was amended in 1996 to incorporate by reference then-Civil Rule 4(d)(1), which provided, “A defendant who waives service of a summons does not thereby waive any objection to the venue or to the jurisdiction of the court over the person of the defendant.” In 2007, a number of amendments to Civil Rule 4(d) changed the former Rule 4(d)(1), renumbering it as subsection (d)(5) and altering its language to read, “**Jurisdiction and Venue Not Waived.** Waiving service of a summons does not waive any objection to personal jurisdiction or to venue.”

The cross-reference to Civil Rule 4(d)(1) in Bankruptcy Rule 7004(a) was not changed at that time. Accordingly, the Bankruptcy Rules Committee recommended to the Standing Committee an amendment to Rule 7004(a) to correct the cross-reference to Civil Rule 4(d)(5). Because the amendment is technical and conforming, the Bankruptcy Rules Committee recommended submitting it to the Judicial Conference for approval without prior publication.

The second proposed amendment involved a correction to Question 11 of Official Form 101, the form for voluntary petitions for individuals filing for bankruptcy. Under § 362(b)(22) of the Bankruptcy Code, the automatic stay will generally not halt an eviction where a landlord obtained a judgment of possession against a tenant before the tenant filed a bankruptcy petition. However, that exception is subject to § 362(l), which permits the automatic stay if a debtor meets certain procedural requirements. Under § 362(l)(5)(A), the debtor must indicate whether a landlord has obtained a judgment for possession and provide that landlord's name and address. Section 362(l)(1) also requires the debtor to file a certification requesting the bankruptcy court to stay the judgment.

As currently written, Official Form 101 requires only *debtors who wish to remain in their residences* to provide information about an eviction judgment. As such, it is inconsistent with the Code, which requires *all* debtors who have an eviction judgment against them to indicate that fact on the petition and to provide the landlord's name and address. To address this inconsistency, the Bankruptcy Rules Committee recommended changing Question 11 on the form to clarify that, whether or not a debtor wants to stay in the residence, he or she must provide the required information if the landlord obtained an eviction judgment before the petition was filed.

A judge member asked whether, even though the question whether the tenant wishes to stay in the residence is being removed from Question 11, that information would still be apparent from the certification, Official Form 101A (Initial Statement About an Eviction Judgment Against You), that the tenant would also file. Judge Ikuta responded that it would. No other questions or comments were offered.

Upon a motion by a member, seconded by another, and by voice vote: **The Standing Committee unanimously approved the proposed technical and conforming amendments to Rule 7004(a)(1) and Official Form 101 for submission to the Judicial Conference for final approval.**

Judge Campbell said the Supreme Court had been alerted that the Chapter 13 package will be transmitted after the Judicial Conference in March, as the Court will have “only a short time”—until May 1—to approve it if it is to stay on track to become effective on December 1, 2017. The Court has agreed to this expedited timeline. The March 2017 submission to the Court will not include the technical amendments to Rules 7004(a)(1) and Official Form 101, which are unrelated to the Chapter 13 materials. Those technical amendments will be submitted in September 2017, which will minimize the amount of material the Court would be asked to consider on an expedited basis. No member expressed disagreement.

Information Items

Conforming Amendments to Rule 8011 – As part of the coordinated inter-committee effort to account for electronic filing, signatures, service, and proof of service, the Bankruptcy Rules Committee intends to recommend an amendment to Rule 8011. Rule 8011 is the bankruptcy appellate rule that tracks Rule 25 of the Federal Rules of Appellate Procedure. Amendments to Appellate Rule 25 published for comment in August 2016 would address electronic filing (FRAP 25(a)), electronic signatures, (FRAP 25(a)(2)(B)(iii)), electronic service (FRAP 25(c)(2)), and electronic proof of service (FRAP 25(d)). The proposed amendment to Bankruptcy Rule 8011 would add provisions to mirror the new electronic procedures proposed for Appellate Rule 25.

The Bankruptcy Rules Committee recommends that this amendment be considered without publication for a number of reasons. First, publication would delay approval, resulting in a one-year “gap period” between the effective dates of the parallel amendments to Appellate Rule 25 and Bankruptcy Rule 8011. This would result in inconsistent treatment of electronic filing, service, and proof of service in the bankruptcy and appellate arenas. Second, the proposed amendments to Rule 8011 are materially identical to the proposed amendments to Appellate Rule 25 and do not raise bankruptcy-specific issues. The comments on the amendments to Appellate Rule 25 are therefore sufficient to identify any concerns as to the amendments to Rule 8011. Judge Gorsuch noted that the Appellate Rules Committee had received no comments so far on the amendment to Appellate Rule 25. A judge member asked whether the bankruptcy community would have an adequate opportunity to consider the impact of these proposed changes to electronic procedures if there was no publication. Professor Gibson responded that a related proposed amendment to Bankruptcy Rule 5005(a) regarding electronic procedures for filing is out for public comment at this time; so the basic issue is currently before the bankruptcy community. She added that the proposed changes to Rule 5005(a) had so far not received any comments.

Judge Ikuta said that Bankruptcy Rules Committee will review the proposed amendments to Rule 8011 at its April 2017 meeting in light of any public comments to Appellate Rule 25 and any feedback from the Appellate Rules Committee. Because the Standing Committee is authorized to eliminate the comment period for technical amendments, she said that the Bankruptcy Rules Committee will request approval of Rule 8011 without publication at the Standing Committee’s June 2017 meeting. No member objected to this proposal.

Noticing project and electronic noticing issues – The Bankruptcy Rules Committee has been asked on a number of occasions spanning many years to review noticing issues in bankruptcy cases, i.e., how noticing and service (other than service of process) are effectuated, and which of the numerous parties often involved in bankruptcy cases are entitled to receive notices or service. Approximately 145 Bankruptcy Rules address noticing or service.

In the fall of 2015, the Bankruptcy Rules Committee approved a work plan to study these issues, but an extensive overhaul of the Bankruptcy Rules’ noticing provisions was deferred pending further study of specific suggestions. The advisory committee decided to focus on a specific suggestion aimed at businesses, financial institutions, and other non-individual parties holding claims or other rights against the debtor. Because these parties, such as credit reporting agencies

and utilities, are likely to receive numerous notices and papers in multiple bankruptcy cases, permitting them to be electronically noticed and served has the potential to avoid significant expenditures. These funds would then be more likely to be available for distribution to creditors. The advisory committee is currently exploring an amendment to the Bankruptcy Rules that would allow such non-individual parties who are not registered CM/ECF users to opt into electronic noticing and service. The Standing Committee had no questions or comments regarding the noticing project.

Coordination – The subject of coordination arose with respect to Bankruptcy Rule 9037(h), which governs the redaction of private information. Judge Bates reported that the Civil Rules Committee has decided not to propose an amendment to the Civil Rules that would impose privacy-redaction requirements similar to those of Rule 9037(h).

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Professor Capra delivered the report on behalf of the Evidence Rules Committee, which last met on October 21, 2016, at Pepperdine University School of Law. A symposium was held in conjunction with the meeting. Professor Capra presented several information items.

Information Items

Fall Symposium – The fall 2016 symposium focused the Evidence Rules Committee’s working drafts of possible amendments to Rules 801(d)(1)(A) and 807, and the developing case law regarding Rule 404(b). In addition to the members of the Evidence Rules Committee, attendees included prominent judges, practitioners, and professors. A transcript of the symposium will be included in the Fordham Law Review.

The Third and Seventh Circuits have issued several opinions interpreting Rule 404(b) in a non-traditional way. Among the symposium participants was Judge David Hamilton of the U.S. Court of Appeals for the Seventh Circuit, which in recent years has decided a number of important Rule 404(b) cases. After the symposium, the Evidence Rules Committee discussed several proposals for amendments to Rule 404(b). The potential changes to the rule include that: (1) courts find the probative value of evidence of uncharged misconduct to be independent of any propensity inference, (2) notice be provided earlier in the proceedings to give the court an opportunity to focus on whether the purpose is permissible and whether the path of inferences linking the purpose and the act is independent of any propensity for misconduct, (3) the government’s description of the evidence to be more specific than the “general nature,” and (4) the government to state in the notice the permissible purpose and also to state how—without relying on a propensity inference—the evidence is probative of that purpose. The application of Rule 404(b) is a controversial topic, and the DOJ has an interest in how the rule is applied as several of the suggestions would require a change in noticing practices by the government. Professor Capra stressed that any proposed amendments to Rule 404(b) are in very early stages of consideration, and will be considered further at the spring 2017 meeting.

One member asked about the application of Rule 404(b) to civil cases, and whether Rule 609 was implicated. Professor Capra responded that most of the recent case law developments have

been in criminal cases, but the impact on civil cases is under consideration as well. Another member asked whether some of the issues under consideration might be part of case management. The group also discussed the first of the proposed changes and the standard of “independent of any propensity inference” and the noticing requirements.

Rule 807 (“Residual Exception”) – A comprehensive review of Rule 807 case law over past decade shows that reliable hearsay has been excluded, leading the Evidence Rules Committee to consider possible amendments to expand Rule 807’s “residual exception” to the rule against hearsay. Discussion of this issue began with the symposium held in 2015. At that time, the practitioners in attendance opposed the idea of eliminating the categorical hearsay exceptions (e.g., excited utterances, dying declarations, etc.) in favor of expanding the residual hearsay exception. The Evidence Rules Committee agreed that the exceptions should not be eliminated. Instead, it has developed a working draft of amendments intended to refine and expand Rule 807 to admit reliable hearsay even absent “exceptional circumstances,” as well as streamline the court’s task of assessing trustworthiness.

In developing the draft amendments, the Evidence Rules Committee is studying the equivalence standard; i.e., that the court find trustworthiness “equivalent” to the circumstantial guarantees of the Rule 803 and 804 exceptions. This “equivalence standard” is problematic because it requires the court to make a comparison of other exceptions that share no common indicator of trustworthiness, and it does not seem to be working as it should. The idea would be to permit the court to use a totality of circumstances standard in place of the equivalence standard. Also, the Evidence Rules Committee suggests deleting the language referring to materiality and the interests of justice because both terms are repetitive of other rules. Finally, the Evidence Rules Committee determined that the requirement that the hearsay be “more probative” than any other evidence that the proponent can obtain should be retained in order to prevent overuse of the residual exception. Discussion of the working draft will continue.

A Standing Committee member asked whether a “presumption of trustworthiness” could be associated with statements admissible under Rule 807. Professor Capra responded that the Evidence Rules Committee considered this idea, but considered it unworkable because of the shifting of the burden of proof for trustworthiness. He compared Rule 807 and Rules 803 and 804 as an example of this issue.

Rule 801(d)(1)(A) (Testifying Witness’s Prior Inconsistent Statement) – The Evidence Rules Committee is considering an expansion beyond what Rule 801(d)(1)(A) currently allows: prior inconsistent statements made under oath during a formal proceeding. The expansion under consideration would permit the substantive use of video-recorded prior inconsistent statements. This proposal was received favorably at the symposium.

A member asked whether, under this potential amended version of Rule 801(d)(1)(A), the videotaped statement would need to have been made under oath in order to be admissible, and Professor Capra explained that it would not, and added that the advisory committee is considering a suggestion that the rule would include statements that the witness concedes were made in addition to videotaped statements. A reporter asked whether these statements should properly fall under Rule 803 rather than Rule 801. Professor Capra responded that such a

reclassification would not be appropriate because, unlike the Rule 803 exceptions, these prior inconsistent statements were not made under circumstances more likely to make them reliable. Judge Campbell noted that what constitutes a videotaped statement was discussed at the symposium, and advised that this question will need to be resolved in developing any rule amendments.

Professor Capra next presented updates on several ongoing projects, including a possible exception for “e-hearsay.” Professor Capra, Judge Grimm, and Gregory Joseph have authored an article that courts and litigants could reference in negotiating the difficulties of authenticating electronic evidence. The pamphlet, entitled “Best Practices for Authenticating Digital Evidence,” was published by West Academic, and will be included as an appendix to its yearly publication.

Rule 702 (Testimony by Expert Witness) – There have been suggestions to revisit Rule 702 based on developments in case law. The issue of whether weight or credibility should be examined is one of the things that the Evidence Rules Committee will consider. There are several other issues that have been raised, particularly regarding forensic science and language in the committee note. A symposium will be held regarding Rule 702 in connection with its fall 2017 meeting, bringing together judges, practitioners, and experts in the sciences. One member noted the fact that Rule 702 is very broad, sometimes making application of the rule difficult, particularly in cases involving analysis under *Daubert*. Another member raised the issue of the impact of disputed facts on the analysis.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Molloy and Professors Beale and King provided the report for the Criminal Rules Committee, which met on September 19, 2016, in Missoula, Montana. Judge Molloy reviewed three pending items under consideration.

Information Items

Section 2255 Rule 5 Subcommittee – The Criminal Rules Committee has formed a subcommittee to consider a suggestion made by a member to amend Rule 5(d) of the Rules Governing Section 2255 Proceedings for the United States District Courts (The Answer and Reply). That rule—as well as Rule 5(e) of the Rules Governing Section 2254 Cases in the United States District Courts—provides that the petitioner/moving party “may submit a reply . . . within a time fixed by the judge.” While the committee note and history of the amendment demonstrate that this language was intended to give the inmate a right to file a reply, and courts have recognized this right, other courts have interpreted the rule as allowing a reply only if permitted by the court. The subcommittee presented its report to the Criminal Rules Committee at its fall 2016 meeting. The phrase “within a time fixed by the judge” was identified as the source of the ambiguity; several members read it to imply judicial discretion.

One factor weighing in favor of a rules-based solution is the limited reviewability of rulings denying reply briefs. Judge Molloy identified this scenario as an example of one “capable of repetition, but evading review.” Because appellate review is unlikely to address the issue—

most habeas petitioners are unrepresented and do not advance the argument, and a number of decisions denying the right to file a reply are several years old—the Criminal Rules Committee decided to consider an amendment. To assuage concerns that new language might add to rather than resolve the confusion, the reporters suggested language clarifying the rule’s intent that breaks the current text into two sentences.

The Criminal Rules Committee also discussed whether to add a time for filing. A RCSO survey of local rules and orders addressing this issue revealed significant variance among districts. No consensus has been reached as to whether to set a presumptive time limit or require judges or local rules to fix a time period. The subcommittee will discuss the issue further. The subcommittee will collaborate with the style consultants to draft an amendment, and aims to deliver the proposed text to the Criminal Rules Committee for consideration at the April 2017 meeting.

Rule 16 Subcommittee – The Criminal Rules Committee has also formed a subcommittee chaired by Judge Raymond Kethledge to consider two bar groups’ suggested amendments to Criminal Rule 16 (Discovery and Inspection), which would impose additional disclosure obligations upon the government in complex criminal cases. Although the subcommittee concluded that the groups’ proposed standard for defining a “complex case” and steps for creating reciprocal discovery were too broad, it decided to move forward with discussion of the problem and formulation of a possible solution. The subcommittee’s initial impression, however, was that the problems associated with complex discovery in criminal cases “were attributable to inexperience or indifference” that could not be addressed appropriately by rule.

The DOJ and members of the defense bar have developed a protocol for dealing with the discovery of electronically stored information, but practitioners still report problems, particularly when the judge has little experience handling discovery in complex criminal cases. The members of the Criminal Rules Committee agreed that judicial education and training materials would help to supplement an amendment, but would be insufficient on their own.

The subcommittee will hold a mini-conference on February 7, 2016 in Washington, D.C. to discuss whether an amendment to Rule 16 is warranted. Invited participants include criminal defense attorneys from large and small firms, public defenders, prosecutors, DOJ attorneys, discovery experts, and judges.

Cooperator Subcommittee – The Criminal Rules Committee’s Cooperator Subcommittee, chaired by Judge Lewis Kaplan, continues to consider rules amendments to address concerns regarding dangers to cooperating witnesses posed by access to information in case files. The subcommittee is currently studying several proposals, including the CACM proposal, and work is ongoing.

More recently, the Director of the Administrative Office has formed a Task Force on Protecting Cooperators to consider the CACM and Rules Committees’ conclusion that any rules amendments would be just one part of any solution to the cooperator problem. The Task Force is comprised of seven district judge members—including Judge Kaplan, who is serving as Chair of the Task Force, and Judge St. Eve of the Standing Committee—and will also

include key stakeholders from the DOJ, Bureau of Prisons (BOP), Sentencing Commission, Federal Public Defender, clerks of court, and U.S. Marshals Service. The Task Force is charged with taking a broad look at the issue of protecting cooperators and possible solutions, including possible rules amendments. It has held initial teleconferences and is developing working groups and a schedule. Judge St. Eve added that four working groups have been formed to address specific issues.

Judge Molloy emphasized his view that a problem exists. Because the BOP does not track the specific causes of harm to cooperators, further investigation is necessary to determine precisely what aspects of the system must be fixed and why. The Task Force's role is to determine *how* to address the issue. A national solution, uniformly applied in all districts and combining both rules and non-rules approaches, will be required.

The Criminal Rules Committee will complement the Task Force's work by drafting a proposed rule or rules to protect the privacy of cooperator information.

REPORT OF THE ADMINISTRATIVE OFFICE

Task Force on Protecting Cooperators

Julie Wilson of the RCSO provided additional information about the administrative status of the Task Force. The Task Force will report to the Director of the Administrative Office, and its charter is being drafted.

A judge member volunteered that his district court has already implemented its own local policy to protect cooperator information and is awaiting a uniform national policy. Judge St. Eve replied that local courts will play an important role in the Task Force's work; the Task Force is interested in learning more about local courts' practices with respect to cooperator information, and receiving feedback as to their experiences implementing the guidelines the Task Force develops.

A reporter raised two related issues with the potential to complicate the Task Force's efforts: "technological issues" and "First Amendment issues." The reporter explained that technology truly *is* the issue, as the availability of criminal docket documents online has given rise to both the cooperator problem and First Amendment implications regarding access to those documents. The reporter wondered whether, assuming the media would be affected by limitations on access to cooperator information, the Task Force might consider involving the media in the process of formulating the guidance. Judge Molloy noted that the reporters' analysis of the applicable First Amendment principles and the constitutional right to access by the media is already before the Task Force.

Another reporter suggested that data related to the cooperator problem be made available in the aggregate, as an objective showing of the extent of cooperator harm might mitigate the concerns of members of the criminal defense bar who oppose restrictions on access to cooperation information. Judge Molloy acknowledged that the bar's tendency to wear "two hats" as to this issue complicates matters: keeping the information away from those who would use it to harm a

cooperating defendant but having access for the purpose of evaluating the fairness of a given plea deal.

The Task Force will continue to work toward the development of a uniform, national approach to protecting cooperator information.

Legislative Report

Ms. Womeldorf reported that approximately twenty pieces of legislation introduced during the two years of the 114th Congress were very pertinent to the work of the rules committees in that they would have directly amended various rules. Discussion of specific legislation followed, including legislation introduced in the fall of 2016 that would have delayed the implementation of the 2016 amendments to Criminal Rule 41.

Judge Campbell discussed that direct channels of communication between the RCSO and Capitol Hill staff sometimes allow for opportunities to explain how legislation could have unintended consequences for the operation of the rules. Judge Campbell welcomed suggestions to preserve informed decision-making pursuant to the Rules Enabling Act process designated by Congress.

CONCLUDING REMARKS

Judge Campbell concluded the meeting by thanking the members and other attendees for their participation. The Standing Committee will next meet on June 13, 2017 in Washington, D.C.

Respectfully submitted,

Rebecca A. Womeldorf
Secretary, Standing Committee

TAB 2C

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SUMMARY OF THE
REPORT OF THE JUDICIAL CONFERENCE
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

The Committee on Rules of Practice and Procedure recommends that the Judicial Conference:

1. Approve the proposed amendment to Appellate Rule 4(a)(4)(B) and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the lawpp. 2–3

2.
 - a. Approve the proposed amendments to Bankruptcy Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009, and new Rule 3015.1 and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law; and

 - b. Approve the proposed new Official Form 113 to take effect at the same time as the above listed rules.....pp. 4–8

3. Approve the proposed amendment to Civil Rule 4(m) and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.....pp. 8–9

The remainder of this report is submitted for the record and includes the following items for the information of the Judicial Conference:

- Federal Rules of Appellate Procedurep. 3
- Federal Rules of Civil Procedure..... pp. 8-13
- Federal Rules of Criminal Procedure.....pp. 13–15
- Federal Rules of Evidencepp. 15–16
- Other Matterspp. 16–17

<p>NOTICE</p> <p>NO RECOMMENDATIONS PRESENTED HEREIN REPRESENT THE POLICY OF THE JUDICIAL CONFERENCE</p> <p>UNLESS APPROVED BY THE CONFERENCE ITSELF.</p>
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REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

**TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES:**

The Committee on Rules of Practice and Procedure (Standing Committee) met in Phoenix, Arizona on January 3, 2017. All members participated except Deputy Attorney General Sally Q. Yates.

Representing the advisory rules committees were: Judge Neil M. Gorsuch, Chair, and Professor Gregory E. Maggs, Reporter, of the Advisory Committee on Appellate Rules; Judge Sandra Segal Ikuta, Chair, Professor S. Elizabeth Gibson, Reporter, and Professor Michelle M. Harner, Associate Reporter, of the Advisory Committee on Bankruptcy Rules; Judge John D. Bates, Chair, Professor Edward H. Cooper, Reporter, and Professor Richard L. Marcus, Associate Reporter, of the Advisory Committee on Civil Rules; Judge Donald W. Molloy, Chair, Professor Sara Sun Beale, Reporter (by telephone), and Professor Nancy J. King, Associate Reporter (by telephone), of the Advisory Committee on Criminal Rules; and Professor Daniel J. Capra, Reporter, of the Advisory Committee on Evidence Rules.

Also participating in the meeting were: Professor Daniel R. Coquillette, the Standing Committee's Reporter; Professor R. Joseph Kimble and Professor Bryan A. Garner, consultants to the Standing Committee; Rebecca A. Womeldorf, the Standing Committee's Secretary; Bridget Healy (by telephone), Scott Myers, Derek Webb (by telephone), and Julie Wilson, Attorneys on the Rules Committee Support Staff; Lauren Gailey, Law Clerk to the Standing Committee; Judge Jeremy D. Fogel, Director, Dr. Tim Reagan, and Dr. Emery G. Lee III, of the

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Federal Judicial Center; Zachary A. Porianda, Attorney Advisor, Judicial Conference Committee on Court Administration and Case Management (CACM Committee); Judge Robert Michael Dow, Jr., Chair of the Rule 23 Subcommittee, Advisory Committee on Civil Rules; and Judge Paul W. Grimm, former member of the Advisory Committee on Civil Rules. Elizabeth J. Shapiro attended on behalf of the Department of Justice.

FEDERAL RULES OF APPELLATE PROCEDURE

Rule Recommended for Approval and Transmission

The Advisory Committee on Appellate Rules submitted a proposed technical amendment to Rule 4(a)(4)(B) to restore a subsection which had been inadvertently deleted in 2009, with a recommendation that the amendment be approved and transmitted to the Judicial Conference.

On December 14, 2016, the Office of the Law Revision Counsel (OLRC) in the U.S. House of Representatives advised that Rule 4(a)(4)(B)(iii) had been deleted by a 2009 amendment to Rule 4. Subdivision (iii), which concerns amended notices of appeal, states: “No additional fee is required to file an amended notice.” The deletion of this subdivision in 2009 was inadvertent due to an omission of ellipses in the version submitted to the Supreme Court. The OLRC deleted subdivision (iii) from its official document as a result, but the document from which the rules are printed was not updated to show deletion of subdivision (iii). As a result, Rule 4(a)(4)(B) was published with subdivision (iii) in place that year and every year since.

The proposed technical amendment restores subdivision (iii) to Rule 4(a)(4)(B). The advisory committee did not believe publication was necessary given the technical, non-substantive nature of this correction.

The Standing Committee voted unanimously to support the recommendation of the Advisory Committee on Appellate Rules.

Recommendation: That the Judicial Conference approve the proposed amendment to Appellate Rule 4(a)(4)(B) and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

The proposed amendment to the Federal Rules of Appellate Procedure is set forth in Appendix A, with a December 22, 2016 memorandum submitted to the Standing Committee detailing the proposed amendment.

Information Items

The advisory committee met on October 18, 2016 in Washington, D.C. In light of proposed changes to Appellate Rule 25 regarding electronic filing and service, the advisory committee considered whether Appellate Rules 3(a) and (d) should also be amended to eliminate references to mailing. The advisory committee will continue to review any proposed changes at its next meeting. It also discussed possible changes to Appellate Rule 8(b), which is currently out for public comment. The rule concerns proceedings to enforce the liability of a surety or other security provider who provides security for a stay or injunction pending appeal. The advisory committee learned of a problem in the published draft with the references to forms of security, but determined to postpone acting on the proposed changes until it receives all public comments on the published version of Rule 8(b).

The advisory committee discussed possible changes to Appellate Rule 26.1 regarding disclosure statements given the published proposed changes to Criminal Rule 12.4, also concerning disclosure statements. The advisory committee tentatively decided to recommend conforming amendments to Appellate Rule 26.1, but remains open to a more targeted approach to amending Rule 26.1(a). The advisory committee decided not to create special disclosure rules for bankruptcy cases, absent a recommendation from the Advisory Committee on Bankruptcy Rules.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules and Official Form Recommended for Approval and Transmission

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009, new Rule 3015.1, and new Official Form 113, with a recommendation that they be approved and transmitted to the Judicial Conference.

Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009, and a proposed official form for chapter 13 plans, Official Form 113, were circulated to the bench, bar, and public for comment in August 2013, and again in August 2014. Rule 3015 was published for comment for a third time, along with new Rule 3015.1, for a shortened three-month period in July 2016. The proposed amendments summarized below are more fully explained in the report from the chair of the advisory committee, attached as Appendix B.

Consideration of a National Chapter 13 Plan Form

The advisory committee began to consider the possibility of an official form for chapter 13 plans at its spring 2011 meeting. At that meeting, the advisory committee discussed two suggestions for the promulgation of a national plan form. Judge Margaret Mahoney (Bankr. S.D. Ala.), who submitted one of the suggestions, noted that “[c]urrently, every district’s plan is very different and it makes it difficult for creditors to know where to look for their treatment from district to district.” The States’ Association of Bankruptcy Attorneys (SABA), which submitted the other suggestion, stressed the impact of the Supreme Court’s then-recent decision in *United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367 (2010). Because the Court held that an order confirming a plan is binding on all parties who receive notice, even if some of the plan provisions are inconsistent with the Bankruptcy Code or rules, SABA explained that creditors must carefully scrutinize plans prior to confirmation. Moreover, SABA noted that the Court

imposed the obligation on bankruptcy judges to ensure that plan provisions comply with the Code, and thus uniformity of plan structure would aid not only creditors, but also bankruptcy judges in carrying out their responsibilities. Following discussion of the suggestions, the advisory committee approved the creation of a working group to draft an official form for chapter 13 plans and any related rule amendments.

A proposed chapter 13 plan form and proposed amendments to nine related rules were published for public comment in August 2013. Because the advisory committee made significant changes to the form in response to comments, the revised form and rules were published again in August 2014.

At its spring 2015 meeting, the advisory committee considered the approximately 120 comments that were submitted in response to the August 2014 publication, many of which—including the joint comments of 144 bankruptcy judges—strongly opposed a mandatory national form for chapter 13 plans. Although there was widespread agreement regarding the benefit of having a national plan form, advisory committee members generally did not want to proceed with a mandatory official form in the face of substantial opposition by bankruptcy judges and other bankruptcy constituencies. Accordingly, the advisory committee decided to explore the possibility of a proposal that would involve promulgating a national plan form and related rules, but that would allow districts to opt out of the use of the official form if certain conditions were met.

At its fall 2015 meeting, the advisory committee approved the proposed chapter 13 plan form (Official Form 113) and related amendments to Rules 2002, 3002, 3007, 3012, 4003, 5009, 7001, and 9009—with some technical changes made in response to comments. The advisory committee deferred submitting those items to the Standing Committee, however, in order to allow further development of the opt-out proposal. The advisory committee directed its forms

subcommittee to continue to obtain feedback on the opt-out proposal from a broad range of bankruptcy constituencies and to make a recommendation at the spring 2016 meeting regarding the need for additional publication.

At its spring 2016 meeting, the advisory committee unanimously recommended publication of the two rules that would implement the opt-out proposal, an amendment to Rule 3015 and proposed new Rule 3015.1. The advisory committee also unanimously recommended a shortened publication period of three rather than the usual six months, consistent with Judicial Conference policy, which provides that “[t]he Standing Committee may shorten the public comment period or eliminate public hearings if it determines that the administration of justice requires a proposed rule change to be expedited and that appropriate notice to the public can still be provided and public comment obtained.” *Guide to Judiciary Policy*, Vol. 1, § 440.20.40(d). Because of the two prior publications and the narrow focus of the revised rules, the advisory committee concluded that a shortened public comment period would provide appropriate public notice and time to comment, and could possibly eliminate an entire year from the period leading up to the effective date of the proposed chapter 13 plan package.

The Standing Committee accepted the advisory committee’s recommendation and Rules 3015 and 3015.1 were published for public comment on July 1, 2016. The comment period ended on October 3. Eighteen written comments were submitted. In addition, five witnesses testified at an advisory committee hearing conducted telephonically on September 27.

A majority of the comments were supportive of the proposal for an official form for chapter 13 plans with the option for districts to use a single local form instead. Some of those comments suggested specific changes to particular rule provisions, which the advisory committee considered. The strongest opposition to the opt-out procedure came from the National Association of Consumer Bankruptcy Attorneys (NACBA), and from three consumer

debtor attorneys who testified at the September 27 hearing. They favored a mandatory national plan because of their concern that in some districts only certain plan provisions are allowed, and plans with nonstandard provisions are not confirmed. In addition, the bankruptcy judges of the Southern District of Indiana stated that they unanimously opposed Rule 3015(c) and (e) and Rule 3015.1 because they said that mandating the use of a “form chapter 13 plan,” whether national or local, exceeds rulemaking authority.

At its fall 2016 meeting, the advisory committee unanimously approved Rules 3015 and 3015.1 with some minor changes in response to comments. In addition, it made minor formatting revisions to Official Form 113 (the official plan form previously approved by the advisory committee) and reapproved it.

Finally, the advisory committee recommended that the entire package of rules and the form be submitted to the Judicial Conference at its March 2017 session and, if approved, that the rules be sent to the Supreme Court immediately thereafter so that, if promulgated by the Supreme Court by May 1, they can take effect on December 1, 2017. The advisory committee concluded that promulgating a form for chapter 13 plans and related rules that require debtors to format their plans in a certain manner, but do not mandate the content of such plans, was consistent with the Rules Enabling Act. Further, given the significant opposition expressed to the original proposal of a mandatory national plan form, the advisory committee concluded that it was prudent to give districts the ability to opt out of using it, subject to certain conditions that would still achieve many of the goals sought in the original proposal. Finally, the advisory committee concluded it did not have the ability to address concerns that bankruptcy judges in some districts consistently refuse to confirm plans that are permissible under the Bankruptcy Code. Rather, litigants affected by such improper rulings should seek redress through an appeal.

The Standing Committee voted unanimously to support the recommendations of the Advisory Committee on Bankruptcy Rules.

Recommendation: That the Judicial Conference:

- a. Approve the proposed amendments to Bankruptcy Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009, and new Rule 3015.1 and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law; and
- b. Approve the proposed new Official Form 113 to take effect at the same time as the above listed rules.

The proposed amendments to the Federal Rules of Bankruptcy Procedure and the Official Bankruptcy Forms are set forth in Appendix B, with excerpts from the Advisory Committee's reports.

FEDERAL RULES OF CIVIL PROCEDURE

Rule Recommended for Approval and Transmission

The Advisory Committee on Civil Rules submitted a proposed technical amendment to restore the 2015 amendment to Rule 4(m), with a recommendation that it be approved and transmitted to the Judicial Conference.

Civil Rule 4(m) (Summons–Time Limit for Service) was amended on December 1, 2015, and again on December 1, 2016. In addition to shortening the presumptive time for service from 120 days to 90 days, the 2015 amendment added, as an exemption to that time limit, Rule 71.1(d)(3)(A) notices of a condemnation action. The 2016 amendment added to the list of exemptions Rule 4(h)(2) service on a corporation, partnership, or association at a place not within any judicial district of the United States.

The 2016 amendment exempting Rule 4(h)(2) was prepared in 2014 before the 2015 amendment adding Rule 71.1(d)(3)(A) to the list of exemptions was in effect. Once the 2015 amendment became effective, it should have been incorporated into the proposed 2016

amendment then making its way through the Rules Enabling Act process. It was not, and, as a result, Rule 71.1(d)(3)(A) was omitted from the list of exemptions in Rule 4(m) when the 2016 amendment became effective. The proposed amendment restores Rule 71.1(d)(3)(A) to the list of exemptions in Rule 4(m). The proposed amendment is technical in nature—it is identical to the amendment published for public comment in 2013, approved by the Judicial Conference, and adopted by the Court. Accordingly, re-publication for public comment is not required.

The Standing Committee voted unanimously to support the recommendation of the Advisory Committee on Civil Rules.

Recommendation: That the Judicial Conference approve the proposed amendment to Civil Rule 4(m) and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

The proposed amendment to the Federal Rules of Civil Procedure is set forth in Appendix C with an excerpt from the Advisory Committee’s report.

Information Items

Rules Published for Public Comment

On August 12, 2016, proposed amendments to Rules 5 (Serving and Filing Pleadings and Other Papers); 23 (Class Actions); 62 (Stay of Proceedings to Enforce a Judgment); and 65.1 (Proceedings Against a Surety) were published for public comment. The comment period closes February 15, 2017. Public hearings were held in Washington, D.C. on November 3, 2016, and in Phoenix, Arizona on January 4, 2017. Twenty-one witnesses presented testimony, primarily on the proposed amendments to Rule 23. A third telephonic hearing is scheduled for February 16, 2017.

Pilot Projects

At its September 2016 session, the Judicial Conference approved two pilot projects developed by the advisory committee and approved by the Standing Committee—the Expedited

Procedures Pilot Project and the Mandatory Initial Discovery Pilot Project—each for a period of approximately three years, and delegated authority to the Standing Committee to develop guidelines to implement the pilot projects.

Both pilot projects are aimed at reducing the cost and delay of civil litigation, but do so in different ways. The goal of the Expedited Procedures Pilot Project (EPP) is to promote a change in culture among federal judges generally by confirming the benefits of active case management through the use of the existing rules of procedure. The chief features of the EPP are: (1) holding a scheduling conference and issuing a scheduling order as soon as practicable, but not later than the earlier of 90 days after any defendant is served or 60 days after any defendant appears; (2) setting a definite period for discovery of no more than 180 days and allowing no more than one extension, only for good cause; (3) informal and expeditious disposition of discovery disputes by the judge; (4) ruling on dispositive motions within 60 days of the reply brief; and (5) setting a firm trial date that can be changed only for exceptional circumstances, while allowing flexibility as to the point in the proceedings when the date is set. The aim is to set trial at 14 months from service or the first appearance in 90 percent of cases, and within 18 months of service or first appearance in the remaining cases. Under the pilot project, judges would have some flexibility to determine exactly how to informally resolve most discovery disputes, and to determine the point at which to set a firm trial date.

In addition to finalizing the details of the EPP, work has commenced on developing supporting materials, including a “user’s manual” to give guidance to EPP judges, model forms and orders, and additional educational materials. Mentor judges will also be made available to support implementation among the participating judges.

The goal of the Mandatory Initial Discovery Pilot Project (MIDP) is to measure whether court-ordered, robust, mandatory discovery that must be produced before traditional discovery

will reduce cost, burden, and delay in civil litigation. Under the MIDP, the mandatory initial discovery will supersede the initial disclosures otherwise required by Rule 26(a)(1), the parties may not opt out, favorable as well as unfavorable information must be produced, compliance will be monitored and enforced, and the court will discuss the initial discovery with the parties at the initial Rule 16 case management conference and resolve any disputes regarding compliance.

To maximize the effectiveness of the initial discovery, responses must address all claims and defenses that will be raised by any party. Hence, answers, counterclaims, crossclaims, and replies must be filed within the time required by the civil rules, even if a responding party intends to file a preliminary motion to dismiss or for summary judgment, unless the court finds good cause to defer the time to respond in order to consider a motion based on lack of subject matter jurisdiction, lack of personal jurisdiction, sovereign immunity, absolute immunity, or qualified immunity. The MIDP will be implemented through a standing order issued in each of the participating districts. As with the EPP, a “user’s manual” and other educational materials are being developed to assist participating judges.

Now that the details of each pilot project are close to being finalized, recruitment of participating districts continues in earnest, with a goal of recruiting districts varying by size as well as geographic location. Although it is preferable to have participation by every judge in a participating district, there is some flexibility to use districts where only a majority of judges participate. The target for implementation of the MIDP is spring 2017, and for the EPP it is fall 2017.

Other Projects

Among the other projects on the advisory committee’s agenda is the consideration of the procedure for demanding a jury trial. This undertaking was prompted by a concern expressed to the advisory committee about a possible ambiguity in Rule 81(c)(3), the rule that governs

demands for jury trials in actions removed from state court. Rule 81(c)(3)(A) provides that a party who demanded a jury trial in accordance with state law need not renew the demand after removal. It further provides that a party need not make a demand “[i]f the state law *did* not require an express demand” (emphasis added). Before the 2007 Style Project amendments, this provision excused the need to make a demand if state law *does* not require a demand.

Recognizing that the Style Project amendments did not affect the substantive meaning of the rules, most courts continue to read Rule 81(c)(3)(A) as excusing a demand after removal only if state law does not require a demand at any point. However, as expressed to the advisory committee, replacing “does” with “did” created an ambiguity that may mislead a party who wants a jury trial to forgo a demand because state law, although requiring a demand at some point after the time of removal, did not require that the demand be made by the time of removal.

Robust discussion of this issue at the June 2016 meeting of the Standing Committee prompted a suggestion by some that the demand requirement be dropped and that jury trials be available in civil cases unless expressly waived, as in criminal cases. The advisory committee has undertaken some preliminary research of local federal rules and state court rules to compare various approaches to implementing the right to jury trial and to see whether local federal rules reflect uneasiness with the present up-front demand procedure. An effort also will be made to get some sense of how often parties who want a jury trial fail to get one for failing to make a timely demand.

The advisory committee is also reviewing Rule 30(b)(6) (Notice or Subpoena Directed to an Organization). A subcommittee has been formed to consider whether it is feasible and useful to address by rule amendment some of the problems that bar groups have regularly identified with depositions of entities. This is the third time in twelve years that Rule 30(b)(6) has been on the advisory committee’s agenda. It was studied carefully a decade ago. The conclusion then

was that the problems involve behavior that cannot be effectively addressed by a court rule. The question was reassessed a few years later with a similar conclusion. The issue has been raised again by 31 members of the American Bar Association Section of Litigation. The subcommittee has not yet formed any recommendation as to whether the time has come to amend the rule, but it has begun working on initial drafts of possible amendments in an effort to evaluate the challenges presented.

FEDERAL RULES OF CRIMINAL PROCEDURE

The Advisory Committee on Criminal Rules presented no action items.

Information Items

On August 12, 2016, proposed amendments to Rules 12.4 (Disclosure Statement); 45(c) (Additional Time After Certain Kinds of Service); and 49 (Serving and Filing Papers) were published for public comment. The comment period closes February 15, 2017.

At its spring 2016 meeting, the advisory committee formed a subcommittee to consider a suggestion that Rule 16 (Discovery and Inspection) be amended to address discovery in complex cases. The original proposal submitted by the National Association of Criminal Defense Lawyers and the New York Council of Defense Lawyers provided a standard for defining a “complex case” and steps to create reciprocal discovery. The subcommittee determined that this proposal was too broad, but determined that there might be a need for a narrower, targeted amendment. After much discussion at the fall 2016 meeting, the advisory committee determined that it would be useful to hold a mini-conference to obtain feedback on the threshold question of whether an amendment is warranted, gather input about the problems an amendment might address, and get focused comments and critiques of specific proposals. Invited participants include a diverse cross-section of stakeholders, including criminal defense attorneys from both

large and small firms, public defenders, prosecutors, Department of Justice attorneys, discovery experts, and judges. The mini-conference will be held on February 7, 2017, in Washington, D.C.

Another subcommittee was formed to consider a conflict in the case law regarding Rule 5(d) of the Rules Governing Section 2255 Proceedings for the United States District Courts (The Answer and Reply). That rule—as well as Rule 5(e) of the Rules Governing Section 2254 Cases in the United States District Courts—provides that the petitioner/moving party “*may* submit a reply . . . within a time period fixed by the judge” (emphasis added). The conflict involves the use of the word “*may*.” Some courts have interpreted the rule as affording a petitioner the absolute right to file a reply. Other courts have interpreted the rule as allowing a reply only if permitted by the court.

The subcommittee presented its preliminary report at the fall 2016 meeting. Discussion concluded with a request that the subcommittee draft a proposed amendment to be presented to the advisory committee at its next meeting.

As previously reported, the Standing Committee referred to the advisory committee a request by the CACM Committee to consider rules amendments to address concerns regarding dangers to cooperating witnesses posed by access to information in case files. A subcommittee was formed to consider the suggested amendments. In its preliminary consideration of the CACM Committee’s suggestions, the subcommittee concluded that any rules amendments would be just one part of any solution to the cooperator issue. This feeling was shared by others and, as a result, the Administrative Office Director created a task force to take a broad look at the issue and possible solutions. While the task force is charged with taking a broad view, the subcommittee will continue its work to develop possible rules-based solutions.

The task force is comprised of members of the rules committees and the CACM Committee and will also include participation of key stakeholders from the Criminal Law

Committee, the Department of Justice, the Bureau of Prisons, the Sentencing Commission, a Federal Public Defender, and a clerk of court. The Task Force held its first meeting on November 16, 2016. It anticipates issuing a final report, including any rules amendments developed and endorsed by the rules committees, in January 2018.

FEDERAL RULES OF EVIDENCE

The Advisory Committee on Evidence Rules presented no action items.

Information Items

The Advisory Committee on Evidence Rules met on October 21, 2016 at Pepperdine University School of Law in Los Angeles. On the day of the meeting, the advisory committee held a symposium to review case law developments on Rule 404(b), possible amendments to Rule 807 (the residual exception to the hearsay rule), and the advisory committee's working draft of possible amendments to Rule 801(d)(1)(A) to provide for broader substantive use of prior inconsistent statements.

At the meeting, the advisory committee discussed the comments made at the symposium, including proposals for amending Rule 404(b). The advisory committee will consider the specific proposals for amending Rule 404(b) at its next meeting.

The advisory committee also discussed possible amendments to Rule 801(d)(1)(A). It decided against implementing the "California rule," under which all prior inconsistent statements are substantively admissible, as it was concerned that there will be cases in which there is a dispute about whether the statement was ever made, making the admissibility determination costly and distracting. The advisory committee is considering whether the rule should be amended to allow substantive admissibility of a prior inconsistent statement so long as it was videotaped. The advisory committee will continue to deliberate on whether to amend Rule 801(d)(1)(A).

Over the past year, the advisory committee has been considering whether to propose an amendment to Rule 807, the residual exception to the hearsay rule. It has developed a working draft of an amendment to Rule 807, and that working draft was reviewed at the symposium. The advisory committee will continue to review and discuss the working draft with a focus on changes that could be made to improve the trustworthiness clause, and deletion of the superfluous provisions regarding material fact and interest of justice.

Also on the advisory committee's agenda are possible amendments to Rule 702 (Testimony by Expert Witnesses). A symposium will be held in conjunction with the Advisory Committee's fall 2017 meeting to consider possible changes to Rule 702 in light of recent challenges to forensic evidence, concerns that the rule is not being properly applied, and problems that courts have had in applying the rule to non-scientific and "soft" science experts.

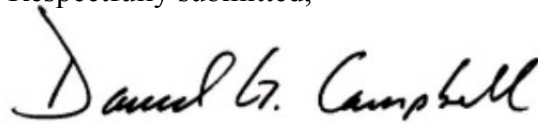
OTHER MATTERS

In 1987, the Judicial Conference established a policy that "[e]very five years, each committee must recommend to the Executive Committee, with a justification for the recommendation, either that the committee be maintained or that it be abolished." A committee's recommendations are presented to the Executive Committee in the form of responses to a Committee Self-Evaluation Questionnaire commonly referred to as the "Five Year Review." Among other things, the Five Year Review asks committees to examine not only the need for their continued existence but also their jurisdiction, workload, composition, and operating processes.

The Standing Committee discussed a version of the Five Year Review that had been completed by the Advisory Committee on Bankruptcy Rules and concluded that the answers to most questions applied across all the rules committees. Accordingly, the Standing Committee decided to complete and submit a single combined Five Year Review for all the rules

committees. Because the existence of the Standing Committee is required by statute, it recommended its continued existence. It also recommended the continued existence of each of the advisory committees as their work promotes the orderly examination and amendment of federal rules in their respective areas. With some elaboration, the Standing Committee also recommended maintaining the jurisdiction, workload, composition, and operating processes of all of the rules committees.

Respectfully submitted,



David G. Campbell, Chair

Jesse M. Furman	Amy J. St. Eve
Gregory G. Garre	Larry D. Thompson
Daniel C. Girard	Richard C. Wesley
Susan P. Graber	Sally Q. Yates
Frank M. Hull	Robert P. Young, Jr.
Peter D. Keisler	Jack Zouhary
William K. Kelley	

Appendix A – Proposed Amendment to the Federal Rules of Appellate Procedure

Appendix B – Proposed Amendments to the Federal Rules of Bankruptcy Procedure and Official Bankruptcy Forms

Appendix C – Proposed Amendment to the Federal Rules of Civil Procedure

TAB 3

TAB 3A

MEMORANDUM

DATE: April 2, 2017

TO: Advisory Committee on Appellate Rules

FROM: Gregory E. Maggs, Reporter

RE: Item No. 12-AP-D: Rules 8, 11, and 39 (amendments to replace "supersedeas bond" with "bond or other security" or similar language)

I. Introduction

In August 2016, the Standing Committee published proposed amendments to Appellate Rules 8(a)(1)(B), 8(a)(2)(E), 8(b), 11(g), and 39(e)(3) and Civil Rules 62 and 65.1 [attachment 1]. As explained in a March 2016 memorandum to the Advisory Committee [attachment 2], the proposed amendments to the Appellate Rules conformed them to a proposed amendment to Civil Rule 62(b) by replacing the words "supersedeas bond" with the words "bond or other security" or similar language. The only public comment came from the Pennsylvania Bar Association (Tracking No. 1k1-8un9-37e6). The Pennsylvania Bar Association "recommends no action with respect to the proposed amendments to Rules 8, 11 and 39, because they bring the rules into conformity with current practice." In this context, I interpret the phrase "no action" to mean that the proposed amendments do not require further revision before transmission to the Supreme Court.

At its May 2017 meeting, the Advisory Committee may wish to recommend that the Standing Committee transmit the proposed amendments to Rules 8, 11, and 39 to the Supreme Court. Before taking this action, however, the Advisory Committee may wish to continue its consideration of minor amendments to the published draft version of Appellate Rule 8(b). The Committee began this discussion at its October 2016 meeting but decided to wait until receiving public comments before completing it. The Reporter subsequently has received comments and suggestions about Rule 8(b) from a judge member of the Standing Committee and the Reporter for the Civil Rules Advisory Committee.

II. Revised Draft Rule 8(b) Produced at the October 2016 Meeting

At its October 2016 meeting, the Advisory Committee discussed a problem in the published draft of the proposed revision to Appellate Rule 8(b). The problem is that the first clause of the first sentence mentions four forms of security (i.e., "a bond, other security, a

stipulation, or other undertaking"), but the second clause mentions only two (i.e., "a bond or undertaking"). The Advisory Committee discussed this problem at its October 2016 meeting and tentatively decided that it should be corrected as shown in the following revised draft:

1 **Rule 8. Stay or Injunction Pending Appeal**

2 * * *

3 **(b) Proceeding Against a Surety or Other Security Provider.** If a party gives
4 security in the form of a bond, a stipulation, an undertaking, or other security, ~~a~~
5 ~~stipulation, or other undertaking~~ with one or more sureties or other security
6 providers, each ~~surety~~ provider submits to the jurisdiction of the district court and
7 irrevocably appoints the district clerk as ~~the surety's~~ its agent on whom any papers
8 affecting ~~the surety's~~ its liability on the security ~~bond or undertaking~~ may be
9 served. On motion, a ~~surety's~~ security provider's liability may be enforced¹ in the
10 district court without the necessity of an independent action. The motion and any
11 notice that the district court prescribes may be served on the district clerk, who
12 must promptly mail² a copy to each ~~surety~~ security provider whose address is
13 known.

As revised, the first clause of the first sentence lists the possible forms of security in a more logical order and then the second clause refers to them generically as "the security." Although the Advisory Committee believed that these corrections would address the problem, the Committee decided to postpone acting on the proposed changes until it received all public comments on the published version of Rule 8(b).

The Advisory Committee presented the draft revision of Rule 8(b) as a discussion item at the January 2017 meeting of the Standing Committee. A judge member of the Standing

¹ The Style Consultants previously approved the wording of the subject and verb in this sentence. But they have suggested to the reporter of the Civil Rules Advisory Committee that the corresponding sentence in Civil Rule 65.1 could be shortened from "a security provider's liability may be enforced . . ." to simply "liability may be enforced." While this phrase is shorter, it might confusing.

² A separate memorandum in the May 2017 Agenda Book on Items 08-AP-A, 11-AP-C, and 15-AP-D recommends changing the word "mail" to "send" in Appellate Rule 8(b).

Committee suggested revising lines 5 and 6 of the draft above by deleting "sureties or other." The Reporter of the Civil Rules Committee subsequently suggested a further revision to eliminate all examples of types of security in line 3 and simply use the word "security." If these changes are made, then the word "surety" in the heading would become unnecessary and could be deleted. Taken together, these suggestions would create the following revised draft:

1 **Rule 8. Stay or Injunction Pending Appeal**

2 * * *

3 **(b) Proceeding Against a Surety Security Provider.** If a party gives security in
4 ~~the form of a bond, a stipulation, or other undertaking~~ with one or more ~~sureties~~
5 security providers, each ~~surety~~ provider submits to the jurisdiction of the district
6 court and irrevocably appoints the district clerk as ~~the surety's~~ its agent on whom
7 any papers affecting ~~the surety's~~ its liability on the security ~~bond or undertaking~~
8 may be served. On motion, a ~~surety's~~ security provider's liability may be enforced
9 in the district court without the necessity of an independent action. The motion
10 and any notice that the district court prescribes may be served on the district clerk,
11 who must promptly mail³ a copy to each ~~surety~~ security provider whose address is
12 known.

These additional changes will simplify Rule 8(b) without altering its meaning. They will also conform Rule 8(b) to a proposed revision of the published draft amendment to Civil Rule 65.1, which also concerns proceedings against a surety or other security provider. The Reporter for the Civil Rules Advisory Committee has informed me that, at its April 2017 meeting, the Civil Rules Committee will consider amending Civil Rule 65.1 to say:

Whenever these rules (including the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions) require or allow a party to give security, and security is given with a security provider, each provider submits to the court's jurisdiction * * *, which also addresses proceedings against a security provider.

The only counterargument against the proposed additional changes to Rule 8(b) is that they go further than necessary. Deleting the examples of the kinds of security that might be

³ See *id.*

given (line 4) is not necessary to conform Appellate Rule 8(b) to the proposed change to Civil Rule 62(b). But I cannot see any clear harm from making the deletion. On the contrary, the deletion would appear to make the rule clearer.

IV. Conclusion

At the May 2017 meeting, only Appellate Rule 8(b) requires the further attention of the Advisory Committee. Once the Committee decides upon the wording of Rule 8(b), it can recommend that the Standing Committee transmit the proposed changes to Rules 8, 11, and 39 to the Supreme Court.

Attachments

1. Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure 21-23, 25-26, 45-46, 233-240 (August 2016) (proposed amendments to Appellate Rules 8, 11, and 39 and Civil Rules 62 and 65.1)
2. Memorandum to the Advisory Committee from Gregory E. Maggs regarding Item 12-AP-D: Civil Rule 62 and Appellate Rule 8 on Appeals Bonds (March 13, 2016)

TAB 3B

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**PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF APPELLATE PROCEDURE***

1 **Rule 8. Stay or Injunction Pending Appeal**

2 **(a) Motion for Stay.**

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

6 * * * * *

7 (B) approval of a ~~supersedeas bond~~ or other
8 security provided to obtain a stay of
9 judgment; or

10 * * * * *

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

15 * * * * *

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

2 FEDERAL RULES OF APPELLATE PROCEDURE

16 (E) The court may condition relief on a party's
17 filing a bond or other ~~appropriate~~ security in
18 the district court.

19 (b) **Proceeding Against a Surety or Other Security**

20 **Provider**. If a party gives security in the form of a
21 bond, other security, ~~or a~~ stipulation, or other
22 undertaking with one or more sureties or other
23 security providers, each ~~surety~~ provider submits to the
24 jurisdiction of the district court and irrevocably
25 appoints the district clerk as ~~the surety's~~ its agent on
26 whom any papers affecting ~~the surety's~~ its liability on
27 the bond or undertaking may be served. On motion, a
28 ~~surety's~~ security provider's liability may be enforced
29 in the district court without the necessity of an
30 independent action. The motion and any notice that
31 the district court prescribes may be served on the

32 district clerk, who must promptly mail a copy to each

33 ~~surety~~security provider whose address is known.

34 * * * * *

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.”

4 FEDERAL RULES OF APPELLATE PROCEDURE

1 **Rule 11. Forwarding the Record**

2 * * * * *

3 **(g) Record for a Preliminary Motion in the Court of**

4 **Appeals.** If, before the record is forwarded, a party

5 makes any of the following motions in the court of

6 appeals:

- 7 • for dismissal;
- 8 • for release;
- 9 • for a stay pending appeal;
- 10 • for additional security on the bond on appeal or
- 11 on a supersedeas bond or other security provided
- 12 to obtain a stay of judgment; or
- 13 • for any other intermediate order—

14 the district clerk must send the court of appeals any

15 parts of the record designated by any party.

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.”

1 **Rule 39. Costs**

2 * * * * *

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

- 7 (1) the preparation and transmission of the record;
8 (2) the reporter’s transcript, if needed to determine
9 the appeal;
10 (3) premiums paid for a ~~supersedeas~~ bond or other
11 ~~bond~~security to preserve rights pending appeal;
12 and
13 (4) the fee for filing the notice of appeal.

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.”

1 **Rule 62. Stay of Proceedings to Enforce a Judgment**

2 **(a) Automatic Stay; ~~Exceptions for Injunctions,~~**

3 **~~Receiverships, and Patent Accountings.~~** Except as

4 provided in Rule 62(c) and (d), ~~stated in this rule,~~ no

5 execution ~~may issue on a judgment, nor may~~ and

6 proceedings ~~be taken to enforce it;~~ are stayed for 30

7 days ~~until 14 days have passed after its entry,~~ unless

8 the court orders otherwise. ~~But unless the court orders~~

9 ~~otherwise, the following are not stayed after being~~

10 ~~entered, even if an appeal is taken:~~

11 ~~(1) an interlocutory or final judgment in an action~~

12 ~~for an injunction or a receivership; or~~

13 ~~(2) a judgment or order that directs an accounting in~~

14 ~~an action for patent infringement.~~

15 ~~(b) Stay Pending the Disposition of a Motion. On~~

16 ~~appropriate terms for the opposing party's security,~~

17 ~~the court may stay the execution of a judgment or~~

18 ~~any proceedings to enforce it—pending disposition of~~
19 ~~any of the following motions:~~

20 ~~(1) under Rule 50, for judgment as a matter of law;~~

21 ~~(2) under Rule 52(b), to amend the findings or for~~
22 ~~additional findings;~~

23 ~~(3) under Rule 59, for a new trial or to alter or~~
24 ~~amend a judgment; or~~

25 ~~(4) under Rule 60, for relief from a judgment or~~
26 ~~order.~~

27 **(b) Stay by Bond or Other Security.** At any time after
28 judgment is entered, a party may obtain a stay by
29 providing a bond or other security. The stay takes
30 effect when the court approves the bond or other
31 security and remains in effect for the time specified in
32 the bond or security.

33 **(c) Stay of an Injunction, Receivership, or Patent-**
34 **Accounting Order.** Unless the court orders

35 otherwise, the following are not stayed after being
36 entered, even if an appeal is taken:

37 (1) an interlocutory or final judgment in an action
38 for an injunction or receivership; or

39 (2) a judgment or order that directs an accounting in
40 an action for patent infringement.

41 **(d) Injunction Pending an Appeal.** While an appeal is
42 pending from an interlocutory order or final judgment
43 that grants, continues, modifies, refuses, dissolves, or
44 ~~denies~~refuses to dissolve or modify an injunction, the
45 court may suspend, modify, restore, or grant an
46 injunction on terms for bond or other terms that secure
47 the opposing party's rights. If the judgment appealed
48 from is rendered by a statutory three-judge district
49 court, the order must be made either:

50 **(1)** by that court sitting in open session; or

51 (2) by the assent of all its judges, as evidenced by
52 their signatures.

53 ~~(d) Stay with Bond on Appeal. If an appeal is taken, the~~
54 ~~appellant may obtain a stay by supersedeas bond, except in~~
55 ~~an action described in Rule 62(a)(1) or (2). The bond may~~
56 ~~be given upon or after filing the notice of appeal or after~~
57 ~~obtaining the order allowing the appeal. The stay takes~~
58 ~~effect when the court approves the bond.~~

59 * * * * *

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. A 30-day 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 enforcement of a judgment that does not involve a payment of money. The court may address the risks of immediate enforcement 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 that lasts longer or requires security.

Subdivision 62(b) carries forward in modified form the supersedeas bond provisions of former Rule 62(d). A stay may be obtained under subdivision (b) 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's text makes explicit the opportunity to post security in a form other than a bond. 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—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. Finally, subdivision (b) changes the provision in former subdivision (d) that “an appellant” may obtain a stay. Under new subdivision (b), “a party” may obtain a stay. For example, a party may wish to secure a stay pending disposition of post-judgment proceedings after expiration of the automatic stay, not yet knowing whether it will want to appeal.

1 **Rule 65.1. Proceedings Against a Surety or Other**
2 **Security Provider**

3 Whenever these rules (including the Supplemental
4 Rules for Admiralty or Maritime Claims and Asset
5 Forfeiture Actions) require or allow a party to give security,
6 and security is given through a bond, other security, or
7 other undertaking, with one or more sureties or other
8 security providers, each ~~surety~~provider submits to the
9 court's jurisdiction and irrevocably appoints the court clerk
10 as its agent for receiving service of any papers that affect
11 its liability on the bond, ~~or~~ undertaking, or other security.
12 The ~~surety's~~security provider's liability may be enforced
13 on motion without an independent action. The motion and
14 any notice that the court orders may be served on the court
15 clerk, who must promptly mail a copy of each to every
16 ~~surety~~security provider whose address is known.

Committee Note

Rule 65.1 is amended to reflect the amendments of Rule 62. Rule 62 allows a party to obtain a stay of a judgment “by providing a bond or other security.” Limiting Rule 65.1 enforcement procedures to sureties might exclude use of those procedures against a security provider that is not a surety. All security providers are brought into Rule 65.1 by these amendments.

TAB 3C

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.

1 **Rule 8. Stay or Injunction Pending Appeal**

2 **(a) Motion for Stay.**

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

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

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

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

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

13 * * *

14 (E) The court may condition relief on a party's filing a bond or other
15 appropriate² security in the district court.

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

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.)

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

27 ADVISORY COMMITTEE NOTE

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

33 **Rule 11. Forwarding the Record**

34 * * *

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

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

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

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

46 ADVISORY COMMITTEE NOTE

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

52 **Rule 39. Costs**

53 * * *

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

57 (1) the preparation and transmission of the record;

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

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

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

62 ADVISORY COMMITTEE NOTE

63 The amendment of subdivisions (e)(3) conforms this rule with the amendment
64 of Federal Rule of Civil Procedure 62. Rule 62 formerly required a party to
65 provide a "supersedeas bond" to obtain a stay of the judgment and proceedings to
66 enforce the judgment. As amended, Rule 62(b)(2) allows a party to obtain a stay
67 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)

TAB 4

TAB 4A

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MEMORANDUM

DATE: April 10, 2017

TO: Advisory Committee on Appellate Rules

FROM: Gregory E. Maggs, Reporter

RE: Item No. 16-AP-D: Public comments on proposed revision of Appellate Rule 25 concerning electronic filing, service, signatures, and proof of service

I. Introduction

In August 2016, the Standing Committee published for public comment proposed amendments to Appellate Rule 25. These proposed amendments, which are shown in Attachment 1, address electronic filing, service, signatures, and proof of service. The Advisory Committee based the proposed amendments on similar amendments proposed for Civil Rule 5. The proposed Committee Note for Appellate Rule 25 explains:

The amendments conform Rule 25 to the amendments to Federal Rule of Civil Procedure 5 on electronic filing, signature, service, and proof of service. They establish, in Rule 25(a)(2)(B), a new national rule that generally makes electronic filing mandatory. The rule recognizes exceptions for persons proceeding without an attorney, exceptions for good cause, and variations established by local rule. The amendments establish national rules regarding the methods of signing and serving electronic documents in Rule 25(a)(2)(B)(iii) and 25(c)(2). The amendments dispense with the requirement of proof of service for electronic filings in Rule 25(d)(1).

The Standing Committee has received seven comments on the proposed revisions to Appellate Rule 25. Part II of this memorandum concerns the comments on proposed Rule 25(a)(2)(B)(iii) and suggests a revision conforming to what the Civil Rules Advisory Committee is considering for proposed Civil Rule 5(d)(3)(C). Part III of this memorandum concerns the comments on proposed Rule 25(c)(2) and suggests a revision conforming to what the Civil Rules Advisory Committee is considering for proposed Civil Rule 5(b)(2)(E). Part IV addresses a comments on electronic filing by persons not represented by counsel under Rule 25(a)(2)(B)(ii) but does not suggest a revision. Part V quotes or summarizes all of the public comments. Part VI states a conclusion identifying the principal issues for discussion at the May 2017 meeting.

II. Rule 25(a)(2)(B)(iii) — Electronic Signatures

Proposed Appellate Rule 25(a)(2)(B)(iii) [Attachment 1, lines 78-83] addresses electronic signatures. As published for public comment, the provision says:

78 (iii) Signing. The user name and
79 password of an attorney of
80 record, together with the
81 attorney's name on a signature
82 block, serves as the attorney's
83 signature.

This language is copied from proposed Civil Rule 5(d)(3)(C).

Several public comments have criticized the wording of this provision.¹ Reporter Ed Cooper of the Civil Rules Advisory Committee has summarized the three primary concerns as follows:

First, [the provision] might be misread to require that the user name and password appear on the signature block. . . . Second, the ever-changing world of security for electronic communications may mean that courts will move toward means of authentication more advanced than user names and logins. . . . Third, concerns were expressed about the means of becoming an attorney of record before, or with, filing the initial complaint.

The following paragraphs describe the public comments relating to Appellate Rule 25. I have included the comments as attachments to this memorandum if they are merely summarized below but not if the relevant portions are quoted in full below.

1 An authorized filing [made] through a person's electronic-filing account, together with the
2 person's name on a signature block, constitutes the person's signature.

¹ See Comment of Michael Rosman [Attachment 4]; Comment of Heather Dixon [Attachment 5]; Comment of the New York City Bar Association [Attachment 6]; Comment of Sai [Attachment 7].

See *id.* at 209, lines 185-188.

The Appellate Rules Advisory Committee may wish to recommend the same revision of proposed Civil Rule 25(a)(2)(B)(iii), both to address the problems with the published proposal and to maintain uniformity with Civil Rule 5(d)(3)(c). To facilitate comparison, I have included the new language in a text box next to the proposed version of Rule 25(a)(2)(B)(iii) [Attachment 1, lines 78-83].

III. Rule 25(c)(2) — Electronic Service

As published for public comment, Rule 25(c)(2) [Attachment 1, lines 127-131] says:

127 Electronic service may be made by sending a
128 paper to a registered user by filing it with the
129 court’s electronic-filing system or by using other
130 electronic means that the person consented to in
131 writing.

The goal in drafting this proposed provision was to match, as closely as possible, proposed revision of Civil Rule 5(b)(2)(E), which says:

(b) Service: How Made.

* * * * *

(2) Service in General. A paper is served under this rule by:

(A) handing it to the person;

* * * * *

(E) sending it to a registered user by filing it with the court’s electronic-filing system or sending it by other electronic means that the person consented to in writing — in either of which events service is complete upon filing or sending, but is not effective if the filer or sender learns that it did not reach the person to be served;

See Civil Rules Agenda Book at 214, lines 377-390 [Attachment 2].

The Committee has received two comments about this language. Ms. Cheryl L. Siler, Managing Attorney, Aderant CompuLaw Court Rules Department, suggests replacing the clause "or by using other electronic means" to "or sending it by other electronic means" so that it matches the language of the proposed amendment to Civil Rule 5(b)(2)(E). Ms. Siler argues that the two rules should be consistent. Judge Jon O. Newman of the U.S. Court of Appeals for the Second Circuit writes: "In proposed rule 25(c)(2), Draft 34, line 128, a comma is needed after "user"; on line 129, a comma is needed after "system" to conform to the style elsewhere (series of three items); and on line 130, the word "served" should be inserted after "person" as done at Draft 35, lines 142-43."

Ms. Siler has identified an unnecessary divergence between the proposed Appellate and Civil rules. Judge Newman's comment regarding punctuation reveals an ambiguity in the clause-structure of the proposed Appellate Rule 25(c)(2) and Civil Rule 5(b)(2)(E). The intent was to indicate two methods of serving a paper, not three. But the language is ambiguous because the proposals use the word "by" three times. A solution to this ambiguity might be to separate the two methods of service using "(i)" and "(ii)." In addition, including the word "served" as Judge Newman suggests—or "to be served" as used in the last line of Civil Rule 5(b)(2)(E) above—would clarify the provision.

As revised according to these suggested corrections, the proposed amendment of Rule 25(c)(2) would read as follows:

1 Electronic service of a paper may be made (i) by sending ~~a paper~~ it to a registered
2 user by filing it with the court's electronic-filing system or (ii) by ~~using~~ sending it
3 by other electronic means that the person [served] [to be served] consented to in
4 writing.

Under this suggested revision, the provision would be clearer and it would be more consistent with Civil Rule 5(b)(2)(E).

The National Association of Criminal Defense Lawyers (NADCL) agrees with the proposed change, but has suggested that the proposed revision with respect to service of papers should address filings by non-parties. NADCL's comment says:

The proposed amendment overlooks, however, an important change applicable to filings by non-parties. Rule 25(b) has not been, but should be, amended in the

same manner as the concurrently proposed amendment to Criminal Rule 45, so as to require service on all parties of papers filed not only by parties but also by non-parties.

This proposal to require non-parties to serve all parties and non-parties may have merit, but seems to go beyond the scope of the present proposal which merely seeks to adapt existing rules to the requirements of electronic filing. The Advisory Committee may wish to include the suggestion as a new item on its agenda and to study whether it warrants amending Rule 25 in the future.

IV. Rule 25(a)(2)(B)(ii) — Electronic Filing by a Person Not Represented by Counsel

The proposed amendment to Rule 25(a)(2)(B)(ii) [Attachment 1, lines 66-77] addresses electronic filing by a person not represented by counsel. This provision allows unrepresented parties to file electronically only if allowed by court order or a local rule. It further prohibits a court from requiring a party not represented by counsel to file electronically unless the order or a local rule "includes reasonable exceptions." As published, the proposal reads as follows:

66 (ii) By an Unrepresented Person—
67 When Allowed or Required. A
68 person not represented by an
69 attorney:
70 • may file electronically only if
71 allowed by court order or by
72 local rule; and
73 • may be required to file
74 electronically only by court
75 order, or by a local rule that
76 includes reasonable
77 exceptions.

This language is copied from the proposed Civil Rule 5(d)(3)(B).

Sai has submitted a comment in which he argues that Appellate Rule 25 should require courts to allow "pro se CM/ECF access on par with attorney filers" and permit only "individualized prohibitions on CM/ECF access for good cause, e.g. for vexatious litigants, and (in the notes) construe pre-enactment vexatious designation as such a prohibition." Comment of Sai [Attachment 7]. Additional details appear in Sai's written comment. *See id.*

The Advisory Committee considered the issue of electronic filing by pro se litigants in connection with Items 15-AP-A, 15-AP-E, and 15-AP-H at its October 2016 meeting. As recounted in the draft minutes, the Committee discussed the issue, but decided not to change the proposed amendment to Appellate Rule 25. The sense of the Committee was to remove the item from the agenda, although the Administrative Office will continue to look at the subject of pro se filing.

Sai made similar suggestions to the Civil Rules Advisory Committee with respect to the Civil Rule 5(d)(3)(B). *See Civil Rules Agenda Book at 217-218 [Attachment 2].* The reporter for the Civil Rules Advisory Committee has not included a change to Civil Rule 5(d)(3)(B) in the discussion draft for that Committee's spring meeting, which will take place on April 25-26. The results of that discussion will be available by the time of the May meeting of the Appellate Rules Advisory Committee.

V. Public Comments

The following paragraphs describe the public comments relating to Appellate Rule 25. I have included the comments as attachments to this memorandum if they are merely summarized below but not if the relevant portions are quoted in full.

Judge Jon O. Newman, U.S. Court of Appeals for the Second Circuit (Tracking No. 1k0-8s5o-se4r). This comment says: "In proposed rule 25(c)(2), Draft 34, line 128, a comma is needed after 'user'; on line 129, a comma is needed after 'system' to conform to the style elsewhere (series of three items); and on line 130, the word 'served' should be inserted after 'person' as done at Draft 35, lines 142-43." Part III of this memorandum addresses this comment.

Ms. Cheryl L. Siler, Managing Attorney Aderant CompuLaw Court Rules Department (Tracking No. 1k1-8ubz-6kyh) [Attachment 3]. This comment suggests a minor revision of the proposed Appellate Rule 25(c)(2) to make its wording uniform with that of proposed Civil Rule (5)(b)(2). Part III of this memorandum addresses this comment.

Mr. Michael Rosman (Tracking No. 1k1-8uif-8nfm) [Attachment 4]. This comment identifies problems with the proposed Rule 25(a)(2)(B)(iii). First, the proposal does not define "user name" or "password." Second, a person filing a paper might not yet be an attorney of record. Third, the rule does not address in a clear manner the requirements for documents (like agreements) that should be signed by both parties. Part II of this memorandum addresses this comment.

Heather Dixon, Esq. (Tracking No. 1k1-8uqp-tdg8) [Attachment 5]. This comment suggests that the signature provision should be revised to make it clear that the attorney's user name and password are not to be included in the signature block. Part II of this memorandum addresses this comment.

New York City Bar Association (Tracking No. 1k1-8ur5-btlv) [Attachment 6]. This comment supports the substantive revisions but expresses concern that proposed Rule 25(a)(2)(B)(iii) "could be read to mean that the attorney's user name and password should be included on any paper that is electronically filed." Part II of this memorandum addresses this comment.

Sai (Tracking No. 1k1-8ur8-zrqt) [Attachment 7]. This comment makes the following six suggestions (quoting from the comment's summary):

1. Remove the presumptive prohibition on pro se use of CM/ECF, and instead grant presumptive access. This includes CM/ECF access for case initiation filings.
2. Treat pro se status as a rebuttably presumed good cause for nonelectronic filing.
 - a. For pro se prisoners, this is treated as an irrebutable presumption, in the spirit of the FRCrP Committee's notes and for conformity across all the rules.
3. Require courts to allow pro se CM/ECF access on par with attorney filers, prohibiting any restriction merely for being pro se or a non-attorney, and prohibiting registration fees.
4. Permit individualized prohibitions on CM/ECF access for good cause, e.g. for vexatious litigants, and (in the notes) construe pre-enactment vexatious designation as such a prohibition
5. Change the "signature" paragraph for the reasons stated in my comment re proposed FRAP 25(a)(2)(B)(iii), USC-RULES-AP-2016-0002-0011, posted Feb 3, 2017
6. Conform the signature paragraph in the FRCrP version to the location used in the other rules.

Parts II and IV of this memorandum address this comment.

National Association of Criminal Defense Counsel (NACDL) (Tracking No. 1k1-8urf-a9eb):
The portion of this comment addressed to Appellate Rule 25 says in full:

NACDL is pleased to see the effective elimination, for papers filed electronically (which is to say, nearly all) of the requirement for a separate document called a “certificate of service,” Prop. Rule 25(d)(1).

We are satisfied with the Committee’s proposed resolution of the question of filing by unrepresented parties. Prop. Rule 25(a)(3)(B),(c). The proposed amendment overlooks, however, an important change applicable to filings by non-parties. Rule 25(b) has not been, but should be, amended in the same manner as the concurrently proposed amendment to Criminal Rule 45, so as to require *service* on all parties of papers filed not only by parties but also by non-parties. The First Amendment, for example, demands that the press have an efficient and effective way to seek intervention to enforce the public’s right of access to most criminal-case pleadings and proceedings. Yet the Rule, even as amended, would not make clear that when the press intervenes in an appellate case all of the intervenor’s or proposed intervenor’s papers must be served on the defendant-appellant or—appellee, who may have grounds to object. Qualified victims, who are not parties, also have a right to file papers in certain situations, including petitions for mandamus to enforce the Victims Rights Act, making it essential that Rule 25(b) be amended to make clear that it also governs filings by non-parties and requires service of all such papers (unless properly filed *ex parte* by leave of court) on the defendant appellant or—appellee—a practice that has heretofore been inconsistent.

Part III of this memorandum addresses this comment.

VI. Conclusion

At the May 2017 meeting, the Advisory Committee may wish to consider revising the proposed amendments to Appellate Rule 25(a)(2)(B)(iii) and Rule 25(c)(2). The revisions suggested above would respond to the public comments and make this provisions consistent with their counterparts in Civil Rule 5(d)(3)(C) and Civil Rule 5(b)(2)(E). The Committee also may wish to discuss adding to its agenda the NADCL's new proposal for requiring non-parties to serve all parties and non-parties. Finally, the Advisory Committee may wish to discuss reopening the issues raised by Sai regarding electronic filing by parties not represented by counsel.

Attachments

1. Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure 27-37 (August 2016) (proposed amendments to Appellate Rules 25)
2. Advisory Committee on Civil Rules, Agenda Book for April 25-26, 2017 Meeting 205-219 (April 2017) (memorandum on public comments on the proposed amendments to Civil Rule 5)
3. Comment of Ms. Cheryl L. Siler, Managing Attorney Aderant CompuLaw Court Rules Department (Tracking No. 1k1-8ubz-6kyh)
4. Comment of Mr. Michael Rosman (Tracking No. 1k1-8uif-8nfm)
5. Comment of Heather Dixon, Esq. (Tracking No. 1k1-8uqp-tdg8)
6. Comment of the New York City Bar Association (Tracking No. 1k1-8ur5-btlv)
7. Comment of Sai (Tracking No. 1k1-8ur8-zrqt)

TAB 4B

Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure 27-37 (August 2016).

Proposed amendments to Appellate Rule 25 with suggested revisions to Rule 25(a)(2)(B) (iii) and Rule 25(c)(2) shown in text boxes.

6 FEDERAL RULES OF APPELLATE PROCEDURE

1 **Rule 25. Filing and Service**

2 **(a) Filing.**

3 (1) **Filing with the Clerk.** A paper required or
4 permitted to be filed in a court of appeals must
5 be filed with the clerk.

6 (2) **Filing: Method and Timeliness.**

7 **(A) Nonelectronic Filing**

8 ~~(A)(i)~~ **In general.** ~~Filing~~For a paper
9 not filed electronically, filing
10 may be accomplished by mail
11 addressed to the clerk, but filing
12 is not timely unless the clerk
13 receives the papers within the
14 time fixed for filing.

15 ~~(B)(ii)~~ **A brief or appendix.** A brief or
16 appendix not filed electronically

17 is timely filed, however, if on or
18 before the last day for filing, it is:
19 ~~(i)~~ mailed to the clerk by ~~First-~~
20 ~~Class Mail~~ first-class mail,
21 or other class of mail that is
22 at least as expeditious,
23 postage prepaid; or
24 ~~(ii)~~ dispatched to a third-party
25 commercial carrier for
26 delivery to the clerk within
27 3 days.
28 ~~(C)~~ (iii) **Inmate filing.** A paper ~~filed~~ not
29 filed electronically by an inmate
30 confined in an institution is
31 timely if deposited in the
32 institution's internal mailing
33 system on or before the last day

8 FEDERAL RULES OF APPELLATE PROCEDURE

34 for filing. If an institution has a
35 system designed for legal mail,
36 the inmate must use that system
37 to receive the benefit of this rule.
38 Timely filing may be shown by a
39 declaration in compliance with
40 28 U.S.C. § 1746 or by a
41 notarized statement, either of
42 which must set forth the date of
43 deposit and state that first-class
44 postage has been prepaid.

45 ~~(D) **Electronic filing.** A court of appeals may~~
46 ~~by local rule permit or require papers to be~~
47 ~~filed, signed, or verified by electronic~~
48 ~~means that are consistent with technical~~
49 ~~standards, if any, that the Judicial~~
50 ~~Conference of the United States establishes.~~

51 ~~A local rule may require filing by electronic~~
52 ~~means only if reasonable exceptions are~~
53 ~~allowed. A paper filed by electronic means~~
54 ~~in compliance with a local rule constitutes a~~
55 ~~written paper for the purpose of applying~~
56 ~~these rules.~~

57 **(B) Electronic Filing and Signing.**

58 **(i) By a Represented Person—**

59 **Generally Required; Exceptions.**

60 A person represented by an
61 attorney must file electronically,
62 unless nonelectronic filing is
63 allowed by the court for good
64 cause or is allowed or required by
65 local rule.

66 **(ii) By an Unrepresented Person—**

67 **When Allowed or Required. A**

10 FEDERAL RULES OF APPELLATE PROCEDURE

68 person not represented by an
69 attorney:

- 70 • may file electronically only if
71 allowed by court order or by
72 local rule; and
- 73 • may be required to file
74 electronically only by court
75 order, or by a local rule that
76 includes reasonable
77 exceptions.

78 (iii) Signing. The user name and
79 password of an attorney of
80 record, together with the
81 attorney's name on a signature
82 block, serves as the attorney's
83 signature.

Suggested revision of the proposal for Rule 25(a)(2)(B)(iii) [lines 78-83] based on a suggested revision of the proposal for Civil Rule 5(d)(3)(C):

An authorized filing [made] through a person's electronic-filing account, together with the person's name on a signature block, constitutes the person's signature.

84 (iv) Same as Written Paper. A
85 paper filed electronically is a
86 written paper for purposes of
87 these rules.

88 (3) **Filing a Motion with a Judge.** If a motion
89 requests relief that may be granted by a single
90 judge, the judge may permit the motion to be
91 filed with the judge; the judge must note the
92 filing date on the motion and give it to the clerk.

93 (4) **Clerk’s Refusal of Documents.** The clerk must
94 not refuse to accept for filing any paper
95 presented for that purpose solely because it is not
96 presented in proper form as required by these
97 rules or by any local rule or practice.

98 (5) **Privacy Protection.** An appeal in a case whose
99 privacy protection was governed by Federal Rule
100 of Bankruptcy Procedure 9037, Federal Rule of

12 FEDERAL RULES OF APPELLATE PROCEDURE

101 Civil Procedure 5.2, or Federal Rule of Criminal
102 Procedure 49.1 is governed by the same rule on
103 appeal. In all other proceedings, privacy
104 protection is governed by Federal Rule of Civil
105 Procedure 5.2, except that Federal Rule of
106 Criminal Procedure 49.1 governs when an
107 extraordinary writ is sought in a criminal case.

108 **(b) Service of All Papers Required.** Unless a rule
109 requires service by the clerk, a party must, at or before
110 the time of filing a paper, serve a copy on the other
111 parties to the appeal or review. Service on a party
112 represented by counsel must be made on the party's
113 counsel.

114 **(c) Manner of Service.**

115 (1) ~~Service~~ Nonelectronic service may be any of the
116 following:

117 (A) personal, including delivery to a
 118 responsible person at the office of counsel;

119 (B) by mail; or

120 (C) by third-party commercial carrier for
 121 delivery within 3 days; or.

122 ~~(D) by electronic means, if the party being~~
 123 ~~served consents in writing.~~

124 (2) ~~If authorized by local rule, a party may use the~~
 125 ~~court's transmission equipment to make~~
 126 ~~electronic service under Rule 25(c)(1)(D)~~

127 Electronic service may be made by sending a
 128 paper to a registered user by filing it with the
 129 court's electronic-filing system or by using other
 130 electronic means that the person consented to in
 131 writing.

132 (3) When reasonable considering such factors as the
 133 immediacy of the relief sought, distance, and

**Suggested revision of
 the proposal for Rule
 25(c)(2) [lines 127-131]:**

Electronic service of a
 paper may be made (i)
 by sending a paper it to a
 registered user by filing
 it with the court's
 electronic-filing system
 or (ii) by using sending
 it by other electronic
 means that the person
 [served] [to be served]
 consented to in writing.

14 FEDERAL RULES OF APPELLATE PROCEDURE

134 cost, service on a ~~party~~person must be by a
135 manner at least as expeditious as the manner
136 used to file the paper with the court.

137 (4) Service by mail or by commercial carrier is
138 complete on mailing or delivery to the carrier.
139 Service by electronic means is complete on
140 ~~transmission~~filing or sending, unless the
141 ~~party~~person making service is notified that the
142 paper was not received by the ~~party~~person
143 served.

144 **(d) Proof of Service.**

145 (1) A paper presented for filing must contain either
146 of the following if it was served other than
147 through the court's electronic-filing system:

148 (A) an acknowledgment of service by the
149 person served; or

150 (B) proof of service consisting of a statement

151 by the person who made service certifying:

152 (i) the date and manner of service;

153 (ii) the names of the persons served; and

154 (iii) their mail or electronic addresses,

155 facsimile numbers, or the addresses of

156 the places of delivery, as appropriate

157 for the manner of service.

158 (2) When a brief or appendix is filed by mailing or

159 dispatch in accordance with

160 Rule 25(a)(2)(B)(2)(A)(ii), the proof of service

161 must also state the date and manner by which the

162 document was mailed or dispatched to the clerk.

163 (3) Proof of service may appear on or be affixed to

164 the papers filed.

165 (e) **Number of Copies.** When these rules require the

166 filing or furnishing of a number of copies, a court may

16 FEDERAL RULES OF APPELLATE PROCEDURE

167 require a different number by local rule or by order in
168 a particular case.

Committee Note

The amendments conform Rule 25 to the amendments to Federal Rule of Civil Procedure 5 on electronic filing, signature, service, and proof of service. They establish, in Rule 25(a)(2)(B), a new national rule that generally makes electronic filing mandatory. The rule recognizes exceptions for persons proceeding without an attorney, exceptions for good cause, and variations established by local rule. The amendments establish national rules regarding the methods of signing and serving electronic documents in Rule 25(a)(2)(B)(iii) and 25(c)(2). The amendments dispense with the requirement of proof of service for electronic filings in Rule 25(d)(1).

TAB 4C

1 **B. RULE 5: e-FILING AND SERVICE**

2 Although public comments and testimony on Rule 5 were
3 relatively sparse, several points were raised that warrant
4 revisions in the published rule texts. Discussions with the other
5 advisory committees have worked out common approaches to most of
6 these points.

7 *Rule 5(b): Service: How Made*

8 No changes are proposed for the published text of
9 Rule 5(b)(2)(E) on service by filing with the court's electronic-
10 filing system. But an addition to the Committee Note may be useful
11 to address the concern that the proposed rule might make the court
12 responsible for making effective service when attempted service
13 through the court's system bounces back. Apparently bouncebacks
14 commonly involve a secondary address – the message goes through to
15 the attorney's address, but not to an additional address (for
16 example, for the attorney's assistant). It seems better to use
17 enough words to set the context for failed delivery. This is
18 proposed as a new third paragraph in the Committee Note:

19 Service is complete when a person files the paper
20 with the court's electronic-filing system for
21 transmission to a registered user, or when one person
22 sends it to another person by other electronic means that
23 the other person has consented to in writing. But service
24 is not effective if the person who filed with the court
25 or the person who sent by other agreed-upon electronic
26 means learns that the paper did not reach the person to
27 be served. The rule does not make the court responsible
28 for notifying a person who filed the paper with the
29 court's electronic-filing system that an attempted
30 transmission by the court's system failed. But a filer
31 who learns that the transmission failed is responsible
32 for making effective service.

33 *Rule 5(d)(1)(B): Certificate of Service*

34 *No Certificate of Court-system Service?*

35 Two comments suggest that proposed Civil Rule 5(d)(1)(B) is
36 ambiguous. It says that a notice of electronic filing (NEF)
37 constitutes a certificate of service, but it could be read to say
38 that the NEF must be filed. That was not intended – the assumption
39 of the proposal was that the NEF is already in the court system,
40 and no one would think a party has a duty to tell the court what it
41 already knows. But there are two broader points. The first is
42 common across the different sets of rules. Proposed Appellate
43 Rule 25(d)(1)(B) dispenses with any certificate of service for
44 matters filed with the court's e-filing system. That sounds good,
45 and adopting it for the Civil and Criminal Rules would achieve
46 greater uniformity. This approach could be reflected in revised
47 rule text as suggested by the Style Consultants:

48 (B) *Certificate of Service*. No certificate of service is
49 required when a paper is served by filing it with
50 the court's electronic-filing system. When a paper
51 is served by other means, a certificate of service
52 must be filed within a reasonable time after
53 service or filing, whichever is later.

54 *Rule 5(d)(1)(A): Things Served but not Filed*

55 A second problem is peculiar to the Civil Rules. Proposed
56 Rule 5(d)(1)(A) carries forward the basic command of present
57 Rule 5(d)(1) that "Any paper after the complaint that is required
58 to be served must be filed [- together with a certificate of
59 service -]¹ within a reasonable time after service." Then comes the
60 qualification: "But disclosures under Rule 26(a)(1) or (2) and the
61 following discovery requests and responses must not be filed until
62 they are used in the proceeding or the court orders filing:
63 depositions, interrogatories, requests for documents or tangible
64 things or to permit entry onto land, and requests for admission."

65 The brackets shown in the Rule 5(d)(1) text quoted above mark
66 words that are deleted from proposed 5(d)(1)(A), and moved to
67 proposed 5(d)(1)(B). The current language says that a certificate
68 of service must be filed when previously served but unfiled
69 materials are filed because they are used in the action or the
70 court orders filing. Implicitly, the time is not a reasonable time
71 after service, but with - or perhaps within a reasonable time after
72 - filing. Proposed (d)(1)(B) as published might change that. It
73 directs that "A certificate of service must be filed within a
74 reasonable time after service," with the ensuing bit about a notice
75 of electronic filing. But it seems odd to require filing a
76 certificate of service for things that have not been filed, and
77 often never will be filed. And it could defeat the no-filing
78 mandate when, as seems to be common practice now, a "certificate
79 of service" is added as the final item in the paper that is served.

80 This potential problem is resolved by the draft set out above:

81 (B) *Certificate of Service*. * * * When a paper is served by
82 other means, a certificate of service must be filed
83 within a reasonable time after service or filing,
84 whichever is later.

85 (One comment raised a related question about the non-filing
86 mandate in Rule 5(d): Is a Rule 45 subpoena to produce a "request
87 for documents or tangible things or to permit entry onto land" that
88 is not to be filed? A similar question might be asked: is a Rule 45
89 subpoena for a deposition a "deposition" for this purpose? The
90 proposed rule text for Rule 5(d)(1)(A) carries forward the present
91 rule text unchanged. The current round of amendments does not seem

¹ The certificate of service requirement is relocated to Rule 5(d)(1)(B) in the published proposal.

92 an appropriate occasion for addressing these questions.)

93 *Rule 5(d)(3)(B): E-Filing by Pro Se Parties*

94 As published, Rule 5(d)(3)(B) allows a person not represented
95 by an attorney to "file electronically only if allowed by court
96 order or by local rule."

97 Sai, both in testimony at the November 3 Civil Rules hearing
98 and by a written comment, CV-0074, offers powerful arguments that
99 a pro se party should be allowed access to the court's e-filing
100 system without prior permission. The mode of filing would be at the
101 party's choice – filing with the court's e-filing system or on
102 paper. The only limit would be that the pro se party must satisfy
103 any training requirements that the court exacts of attorneys as a
104 condition of granting "case initiation privileges." (In the
105 Southern District of Indiana, for example, an attorney must take
106 on-line training and be certified.)

107 The essential arguments are familiar, resonating back to early
108 drafts of Civil Rule 5 that would have required pro se parties to
109 file with the court's e-filing system unless the court permits
110 paper filing. E-filing is faster, easier, and less expensive for
111 the filer. All other parties benefit. And a pro se party likewise
112 gains important advantages when being served by e-means. Although
113 the in forma pauperis statute speaks only to filing fees, it
114 reflects a policy that financial barriers to court access should be
115 reduced for i.f.p. litigants. Sai frames the question by lamenting
116 that "This inequity in access and delays results in two
117 procedurally different systems," "prohibiting pro se litigants from
118 accessing the benefits of CM/ECF on an equal basis with represented
119 litigants."

120 The argument anticipates some of the counter-arguments. It is
121 assumed that a pro se litigant cannot move for access to e-filing
122 until all the work has been done to file a paper complaint,
123 providing a "case" and thus access to motion practice. It may be
124 that a truly savvy pro se party could figure out how to file a
125 "miscellaneous case," and use that as a vehicle for the motion. But
126 even if that led to permission to file the real case with the
127 court's system, it would incur substantial delay and some added
128 expense.

129 The core counter-argument is simple. Sai has shown, by
130 repeated litigation, that Sai is fully competent to engage in, and
131 benefit from, filing with the court's e-filing system. Sai can
132 reasonably feel it is unfair to require Sai to get permission anew
133 in each successive case, even when the same court has already
134 granted permission in another case. There are likely to be other
135 pro se parties who are fully able to use the court's e-filing

136 system.² But the universe of pro se parties includes many who
137 should not be lured into an attempt to file with the court's system
138 without advance screening by the court. Permission is likely to be
139 given freely on a demonstration of ability to work within the
140 court's system.

141 There is yet another legitimate concern. Sai asserts that an
142 important reason for admitting pro se litigants to the CM/ECF
143 system is that it enables them to receive notices of electronic
144 filings in other cases. To the extent that this is so, it may open
145 the way for inappropriate actions even though further steps need be
146 taken to be allowed to file in another case. If case-specific
147 permission is required, the court can restrict access to just that
148 case.

149 The arguments for allowing pro se litigants a free choice
150 whether to rely on electronic filing are attractive. But this
151 dilemma must be resolved by heeding the wise lessons of practical
152 experience. A common accounting is that there is at least one pro
153 se party in about 25% of the civil cases on the federal docket. The
154 district clerks offices cannot reasonably be expected to tutor pro
155 se litigants in appropriate and effective use of the court's e-
156 filing system. If it could be done, it would be good to design a
157 process that a district could adopt for prefiling permission to e-
158 file for a pro se litigant who survives on-line screening. A rule
159 could be written to authorize such processes, but cannot be written
160 to design them.

161 Discussions with the other advisory committees have shown no
162 support for departing from the proposal that a pro se party be
163 allowed access to electronic filing only by court order or by local
164 rule. The fear that inept or malign litigants will impose
165 inappropriate burdens on the court and other parties has carried
166 the day. No change from the published proposal is recommended.

167 *Rule 5(d)(3)(C): Electronic Signature*

168 The published text reads: "The user name and password of an
169 attorney of record, together with the attorney's name on a
170 signature block, serves as the attorney's signature." Public
171 comments and further discussions among the advisory committees
172 identified two, or perhaps three, potential problems with this
173 language. First, it might be misread to require that the user name
174 and password appear on the signature block. It is easy enough to
175 revise the language to avoid that unintended reading. Second, the
176 ever-changing world of security for electronic communications may
177 mean that courts will move toward means of authentication more
178 advanced than user names and logins. Thumb prints and iris scans
179 are used in some current technology. Still more sophisticated means
180 may become common. Third, concerns were expressed about the means

² A likely example is provided by the proposal submitted by Robert M. Miller, Ph.D., 15-AP-G, 15-CV-JJ, 15-CR-E.

181 of becoming an attorney of record before, or with, filing the
182 initial complaint. This revised text is offered to address these
183 problems:

184 Revised text:

185 (C) An authorized filing [made] through a person's
186 electronic-filing account, together with the
187 person's name on a signature block, constitutes the
188 person's signature.

189 Neither this text nor the published text address signatures on
190 papers that are e-served but not filed with the court. If the
191 person served has agreed in writing to e-service, the mode of
192 signing can be included in the agreement; if nothing is said, it
193 can be inferred that the name alone suffices. If the paper is later
194 filed with the court's electronic-filing system, the filer's name
195 on a signature block provides the filer's signature. The signatures
196 on other papers included in the filing might be a problem – for
197 example, a party who responded to discovery requests might file the
198 requests and the responses together. Rather recent experience with
199 attempting to address like problems in the Bankruptcy Rules
200 suggests that it may be wiser not to attempt to address this issue
201 now.

202 **REVISED RULE TEXT**

203 (The overlining and underlining in the Rule 5 text reflect the
204 published proposal, indicating changes from present Rule 5, except
205 where footnotes and double underlining indicate changes from the
206 published proposal.)

207 **Rule 5. Serving and Filing Pleadings and Other Papers**

208 * * * * *

209 **(b) Service: How Made.**

210 * * * * *

211 **(2) Service in General.** A paper is served under this rule by:

212 **(A)** handing it to the person;

213 * * * * *

214 **(E)** sending it to a registered user by filing it with
215 the court's electronic-filing system or sending it
216 by other electronic means if that the person
217 consented to in writing—in either of which events
218 service is complete upon transmission filing or
219 sending, but is not effective if the serving party
220 filer or sender learns that it did not reach the

221 person to be served; or

222 * * * * *

223 ~~(3) Using Court Facilities. If a local rule so authorizes, a~~
224 ~~party may use the court's transmission facilities to make~~
225 ~~service under Rule 5(B)(2)(E).~~ [Abrogated (Apr. __, 2018,

226 eff. Dec. 1, 2018.)
227 * * * * *

228 (d) Filing.

229 (1) Required Filings; Certificate of Service.

230 (A) Papers after the Complaint. Any paper after the
231 complaint that is required to be served ~~together~~
232 ~~with a certificate of service~~ must be filed
233 within a reasonable time after service. But
234 disclosures under Rule 26(a)(1) or (2) and the
235 following discovery requests and responses must not
236 be filed until they are used in the proceeding or
237 the court orders filing: depositions,
238 interrogatories, requests for documents or tangible
239 things or to permit entry onto land, and requests
240 for admission.

241 (B) Certificate of Service. ~~A certificate of service~~
242 ~~must be filed within a reasonable time after~~
243 ~~service, but a notice of electronic filing~~
244 ~~constitutes a certificate of service on any person~~
245 ~~served by the court's electronic-filing system. No~~
246 ~~certificate of service is required when a paper is~~
247 ~~served by filing it with the court's electronic-~~
248 ~~filing system. When a paper is served by other~~
249 ~~means, a certificate of service must be filed~~
250 ~~within a reasonable time after service or filing,~~
251 ~~whichever is later.~~³

252 * * * * *

253 (2) Nonelectronic Filing ~~How Filing is Made in General.~~ A
254 paper not filed electronically is filed by delivering it:

255 (A) to the clerk; or

256 (B) to a judge who agrees to accept it for filing,
257 and who must then note the filing date on the paper
258 and promptly send it to the clerk.

³ Double underlining marks changes from the published version.

259 (3) ~~Electronic Filing, and Signing, or Verification.~~ A court
260 may, by local rule, allow papers to be filed, signed, or
261 verified by electronic means that are consistent with any
262 technical standards established by the Judicial
263 Conference of the United States. A local rule may require
264 electronic filing only if reasonable exceptions are
265 allowed.

266 (A) By a Represented Person—Generally Required;
267 Exceptions. A person represented by an attorney
268 must file electronically, unless nonelectronic
269 filing is allowed by the court for good cause or is
270 allowed or required by local rule.

271 (B) By an Unrepresented Person—When Allowed or Required.
272 A person not represented by an attorney:
273 (i) may file electronically only if allowed by
274 court order or by local rule; and
275 (ii) may be required to file electronically only by
276 court order, or by a local rule that includes
277 reasonable exceptions.

278 (C) Signing. The user name and password of an attorney
279 of record, together with the attorney's name on a
280 signature block, serves as the attorney's
281 signature.⁴ An authorized filing [made] through a
282 person's electronic filing account, together with
283 the person's name on a signature block, constitutes
284 the person's signature.⁵

285 (D) Same as a Written Paper. A paper filed
286 electronically in compliance with a local rule is a
287 written paper for purposes of these rules.

288 * * * * *

289 COMMITTEE NOTE

290 **Subdivision (b).** Rule 5(b) is amended to revise the provisions
291 for electronic service. Provision for electronic service was first
292 made when electronic communication was not as widespread or as
293 fully reliable as it is now. Consent of the person served to
294 receive service by electronic means was required as a safeguard.
295 Those concerns have substantially diminished, but have not
296 disappeared entirely, particularly as to persons proceeding without
297 an attorney.

298 The amended rule recognizes electronic service through the

⁴ The overlined sentence is the published proposal.

⁵ The underlined material supersedes the published proposal.

299 court's transmission facilities as to any registered user. A court
300 may choose to allow registration only with the court's permission.
301 But a party who registers will be subject to service through the
302 court's facilities unless the court provides otherwise. With the
303 consent of the person served, electronic service also may be made
304 by means that do not utilize the court's facilities. Consent can be
305 limited to service at a prescribed address or in a specified form,
306 and may be limited by other conditions.

307 Service is complete when a person files the paper with the
308 court's electronic-filing system for transmission to a registered
309 user, or when one person sends it to another person by other
310 electronic means that the other person has consented to in writing.
311 But service is not effective if the person who filed with the court
312 or the person who sent by other agreed-upon electronic means learns
313 that the paper did not reach the person to be served. The rule does
314 not make the court responsible for notifying a person who filed the
315 paper with the court's electronic-filing system that an attempted
316 transmission by the court's system failed. But a filer who learns
317 that the transmission failed is responsible for making effective
318 service.

319 Because Rule 5(b)(2)(E) now authorizes service through the
320 court's facilities as a uniform national practice, Rule 5(b)(3) is
321 abrogated. It is no longer necessary to rely on local rules to
322 authorize such service.

323 ~~Subdivision (d). Amended Rule 5(d)(1) provides that a notice~~
324 ~~of electronic filing generated by the court's electronic filing~~
325 ~~system is a certificate of service on any person served by the~~
326 ~~court's electronic-filing system. Under amended Rule 5(d)(1), a~~
327 ~~certificate of service is not required when a paper is served by~~
328 ~~filing it with the court's electronic-filing system. But if the~~
329 ~~serving party learns that the paper did not reach the party to be~~
330 ~~served, there is no service under Rule 5(b)(2)(E) and there is no~~
331 ~~certificate of (nonexistent) service.~~

332 When service is not made by filing with the court's electronic
333 filing system, a certificate of service must be filed and should
334 specify the date as well as the manner of service. [For papers that
335 are served but must not be filed until they are used in the
336 proceeding or the court orders filing, the certificate need not be
337 filed until a reasonable time after service or filing, whichever is
338 later.]

339 Amended Rule 5(d)(3) recognizes increased reliance on
340 electronic filing. Electronic filing has matured. Most districts
341 have adopted local rules that require electronic filing, and allow
342 reasonable exceptions as required by the former rule. The time has
343 come to seize the advantages of electronic filing by making it
344 generally mandatory in all districts for a person represented by an
345 attorney. But exceptions continue to be available. Nonelectronic
346 filing must be allowed for good cause. And a local rule may allow

347 or require nonelectronic filing for other reasons.

348 Filings by a person proceeding without an attorney are treated
349 separately. It is not yet possible to rely on an assumption that
350 pro se litigants are generally able to seize the advantages of
351 electronic filing. Encounters with the court's system may prove
352 overwhelming to some. Attempts to work within the system may
353 generate substantial burdens on a pro se party, on other parties,
354 and on the court. Rather than mandate electronic filing, filing by
355 pro se litigants is left for governing by local rules or court
356 order. Efficiently handled electronic filing works to the advantage
357 of all parties and the court. Many courts now allow electronic
358 filing by pro se litigants with the court's permission. Such
359 approaches may expand with growing experience in the courts, along
360 with the growing availability of the systems required for
361 electronic filing and the increasing familiarity of most people
362 with electronic communication. Room is also left for a court to
363 require electronic filing by a pro se litigant by court order or by
364 local rule. Care should be taken to ensure that an order to file
365 electronically does not impede access to the court, and reasonable
366 exceptions must be included in a local rule that requires
367 electronic filing by a pro se litigant. In the beginning, this
368 authority is likely to be exercised only to support special
369 programs, such as one requiring e-filing in collateral proceedings
370 by state prisoners.

371 ~~The user name and password of an attorney of record, together~~
372 ~~with the attorney's name on a signature block, serves as the~~
373 ~~attorney's signature. An authorized filing through a person's~~
374 ~~electronic filing account, together with the person's name on a~~
375 ~~signature block, constitutes the person's signature.~~

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RULE 5: CLEAN TEXT

Rule 5. Serving and Filing Pleadings and Other Papers

* * * * *

(b) Service: How Made.

* * * * *

(2) *Service in General.* A paper is served under this rule by:

(A) handing it to the person;

* * * * *

(E) sending it to a registered user by filing it with the court's electronic-filing system or sending it by other electronic means that the person consented to in writing – in either of which events service is complete upon filing or sending, but is not effective if the filer or sender learns that it did not reach the person to be served; or

* * * * *

(3) [Abrogated (Apr. __, 2018, eff. Dec. 1, 2018.)]

* * * * *

(d) Filing.

(1) Required Filings; Certificate of Service.

(A) *Papers after the Complaint.* Any paper after the complaint that is required to be served must be filed within a reasonable time after service. But disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed until they are used in the proceeding or the court orders filing: depositions, interrogatories, requests for documents or tangible things or to permit entry onto land, and requests for admission.

(B) *Certificate of Service.* No certificate of service is required when a paper is served by filing it with the court's electronic-filing system. When a paper is served by other means, a certificate of service must be filed within a reasonable time after service or filing, whichever is later.

* * * * *

413 (2) *Nonelectronic Filing.* A paper not filed electronically is
414 filed by delivering it:

415 (A) to the clerk; or

416 (B) to a judge who agrees to accept it for filing,
417 and who must then note the filing date on the paper
418 and promptly send it to the clerk.

419 (3) ***Electronic Filing and Signing.***

420 (A) *By a Represented Person—Generally Required;*
421 *Exceptions.* A person represented by an attorney
422 must file electronically, unless nonelectronic
423 filing is allowed by the court for good cause or is
424 allowed or required by local rule.

425 (B) *By an Unrepresented Person—When Allowed or Required.*
426 A person not represented by an attorney:
427 (i) may file electronically only if allowed by
428 court order or by local rule; and
429 (ii) may be required to file electronically only by
430 court order, or by a local rule that includes
431 reasonable exceptions.

432 (C) *Signing.* An authorized filing [made] through a
433 person's electronic filing account, together with
434 the person's name on a signature block, constitutes
435 the person's signature.

436 (D) *Same as a Written Paper.* A paper filed
437 electronically is a written paper for purposes of
438 these rules.

439 * * * * *

440 **SUMMARY OF COMMENTS: RULE 5**

441 *In General*

442 Hon. Benjamin C. Mizer, CV-2016-0004-0037: Says simply that the
443 Department of Justice supports these amendments.

444 Cheryl L. Siler, Esq., Aderant CompuLaw, CV-2016-0004-0058: The
445 proposed revisions are reasonable.

446 *Rule 5(b)*

447 Pennsylvania Bar Association, CV-0064: The rule should provide for
448 service by electronic means of papers not filed at the time of
449 service, notably disclosures and discovery materials. Service would
450 be by email addressed to attorneys of record at the addresses on
451 the court's electronic filing system. E-service is faster
452 generally, and reduces problems and uncertainty about service.

453 *Rule 5(d)(1)*

454 Andrew D'Agostino, Esq., 0035: It should be made clear that the
455 proof of service of the complaint or other case-initiating document
456 can be filed electronically.

457 Sergey Vernyuk, Esq., 0049: (1) Lawyers regularly include
458 certificates of service as part of the papers served, both in paper
459 form and e-form. The rule should clarify the status of an
460 anticipatory certificate – should the certificate always be a
461 separate document, prepared after actual service? (2) The bar
462 should be educated on the proposition that a certificate need not
463 be included in a disclosure or discovery paper that is not to be
464 filed. (3) Rule 5(d) will continue to direct that "discovery
465 requests and responses," including "depositions" and "requests for
466 documents [etc.]" not be filed. Does this mean that a Rule 45
467 subpoena to produce must not be filed as a discovery request to
468 produce documents? (4) The separation of the certificate
469 requirement from its place in the present rule creates an
470 ambiguity. Present Rule 5(d) directs that the certificate be filed
471 when the paper is filed, a reasonable time after service. That
472 means that the certificate is never filed if the paper is never
473 filed, given the direction that disclosures and most discovery
474 papers are to be filed only when the court orders filing or when
475 used in the action. Proposed Rule 5(d)(1)(B) says that the
476 certificate must be filed within a reasonable time after service;
477 on its face it contemplates filing the certificate even though the
478 paper has not been, and may never be, filed.

479 Michael Rosman, Esq., 0049: As written, Rule 5(d)(1)(B) is
480 ambiguous: the Notice of Electronic Filing constitutes a
481 certificate of service, but must the filer separately file the NEF?
482 It would be better to follow the lead of Appellate
483 Rule 25(d)(1)(B), dispensing with the proof-of-service requirement
484 as to any person served through the court's system.

485 Federal Magistrate Judges Association, 0094: With paper, the
486 practice has been to file with the court after making service. With
487 e-filing, filing effects service. If the language of the current
488 rule is retained, something should be added to reflect e-filing:
489 "Any paper after the complaint that is required to be served, **but**
490 **is served by means other than filing on the court's electronic**
491 **filing system**, must be filed within a reasonable time after
492 service."

493 *Rule 5(d)(2)*

494 Sai, 0074: The core message, elaborated over many pages, is direct:
495 The proposed rule impairs the right to appear pro se "by
496 prohibiting pro se litigants from accessing the benefits of CM/ECF
497 on an equal basis with represented litigants." "This inequity in
498 access and delays results in two procedurally different systems *
499 * *." "Before the law sit many gatekeepers. Let this not be one of
500 them."

501 A pro se litigant who completes whatever training is required
502 for an attorney to become a registered user should be allowed to be
503 a registered user without seeking additional permission, beginning
504 with the right to file a complaint, motion to intervene, or amicus
505 brief. If given access the ability to file a case initiation should
506 prove the filer's capacity. Inappropriate burdens are entailed by
507 requiring a preliminary motion for permission, burdens that are
508 particularly inappropriate if the filer is already a CM/ECF filer
509 in the same court. Indeed the rule, as written, would prohibit e-
510 filing even by a registered attorney user who appears pro se as a
511 party. Still worse, a motion cannot be filed unless the case has
512 already been initiated – a pro se plaintiff must always file a
513 paper complaint. The problems that arise when a pro se litigant is
514 not able to use the court's system effectively can be solved by
515 finding good cause to deny e-filing. But the inevitable small
516 problems can be fixed: "docket clerks routinely screen incoming
517 filings and will correct clear deficiencies or errors."

518 At the same time, it should be presumed that a pro se litigant
519 has good cause to file on paper, not in the electronic system. The
520 presumption should be irrebuttable for a pro se prisoner, who
521 should always have the option of paper filing.

522 The advantages of e-filing are detailed at length. It is
523 virtually instantaneous, and makes the most of applicable time
524 limits. A complaint can be perfected up to the very end of a
525 limitations period. After-hours filing is simple. Only e-filing may
526 be feasible for emergency matters, particularly a request for a TRO
527 or a preliminary injunction – the harm may be done before a paper
528 filing can be prepared and filed. A pro se defendant must wait to
529 be served by non-electronic means: "For litigants with disabilities,
530 who travel frequently, or reside overseas, such as me, waiting for
531 and accessing physical mail imposes routinely delays of weeks. This
532 is just to *receive* filings; one must also respond."

533 E-filing also is important for litigants with disabilities,
534 particularly those with impaired vision. A document scanned into
535 the court file from a paper original is more difficult to use, in

536 some settings much more difficult. E-documents "are more readable
537 on a screen; they can be more readily printed in large print or
538 other adaptive formats; they preserve hyperlinks; and they permit
539 PDF structuring, such as bookmarks for sections or exhibits."
540 "Being required to file on paper hinders *everyone's* access to the
541 litigant's filings * * *."

542 E-filing also is less expensive, and much less expensive for
543 long filings. Courts often "require multiple duplicates of case
544 initiation documents for service, chambers, etc." These costs are
545 particularly burdensome for i.f.p. litigants.

546 A registered user of the CM/ECF system can receive the same
547 notices of electronic filing as the parties to a case. That can
548 support tracking for an eventual motion to intervene or an amicus
549 brief. It can give access to arguments that can be cribbed or
550 anticipated and opposed, evidence found by litigants to other
551 cases, or information of "journalistic interest, where immediate
552 notification of developments is critical to presenting timely news
553 to one's audience." (There are other references to citizen
554 journalists, and observations that denying access of right to e-
555 filing operates as a prior restraint. The prior restraint
556 observations seem to extend beyond the citizen-journalist concern
557 to the broader themes of burden.) A nonparty pro se can be allowed
558 to file only an initiating document, such as a motion for leave to
559 file; improper filings can be summarily denied or sanctioned.

560 Nov. 3 Hearing, Sai, pp. 112-124: The argument is clearly made: pro
561 se litigants should be allowed to choose for themselves whether to
562 e-file. There should be no need to ask either for permission or for
563 exemption. This argument is supported by recounting the many
564 advantages Sai has experienced as a pro se litigant when allowed to
565 e-file, and the many disadvantages he has experienced when not
566 allowed to e-file. (1) Even in courts that allow a pro se litigant
567 to e-file, generally the litigant must first commence the action on
568 paper and then seek leave to e-file. That adds to delay and
569 expense. (2) e-filing is faster and less expensive. Last-minute
570 extensions, for example, can be sought after the clerk's office has
571 closed. A request for a TRO can be filed instantly, as compared to
572 the cost and delay of mail. And filings by other parties are
573 communicated instantly by the Notice of Electronic Filing, as
574 compared to the cost and delay of periodic access to the court file
575 through PACER. Sai is an IFP litigant, and the costs of printing
576 and mailing are inconsistent with the IFP policy. (3) When paper
577 filings are scanned into the court's e-files readability suffers,
578 and it is not possible to include links to exhibits, court
579 decisions, and like e-materials. "The structure of a PDF is
580 harmed." (4) The fears that underlie the "presumption" against pro
581 se e-filing are exaggerated. It should not be presumed that pro se
582 litigants are vexatious. Pro se litigants are not the only ones who
583 occasionally make mistakes in docketing – clerks do it too. Many
584 pro se litigants are fully capable of e-filing; Sai has done it
585 successfully in several cases after going through the chore of
586 getting permission.

587

Rule 5(d)(3): Electronic Filing

588 Michael Rosman, Esq., 0061: (1) The rule text does not define "user
589 name" or "password." It could be read to require that they be
590 included in the paper that is filed. But the only way to file
591 electronically is by entering the user name and password. It would
592 be better to say: "For all papers filed electronically by attorneys
593 who are registered users of the Court's electronic filing system,
594 the attorney's name on a signature block serves as the attorney's
595 signature." (2) What about papers that are not filed at the time of
596 service – disclosures and discovery materials? Rule 26(g) requires
597 that they be signed. They may be served by electronic means outside
598 the court's system. Some provision should be made. (3) An attorney
599 who files a complaint is not yet an attorney of record, so the
600 filing and name do not satisfy the draft rule text. Why not
601 substitute "attorney registered with the Court's electronic filing
602 system" for "attorney of record"?

603 Pennsylvania Bar Association, CV-0064: The proposed text on signing
604 should be clarified – the attorney's name on a signature block
605 serves as the attorney's signature if a paper is filed in the
606 court's system. Beyond that, something should be said about the
607 circumstance in which a paper is filed using an attorney's name and
608 password, but a different signature appears on the block.

609 Heather Dixon, Esq., 0067: The signature provision should be
610 revised to make it clear that the attorney's user name and password
611 are not to be included in the signature block.

612 New York City Bar Association, 0070: Again, the rule text should be
613 clear that the attorney's user name and password are not to appear
614 on the signature block.

615 Federal Magistrate Judges Association, 0094: The risk that the
616 published proposal will be read to require supplying the filer's
617 user name and password on the signature block can be addressed like
618 this: "For documents filed utilizing the court's electronic filing
619 system, inserting the attorney's name on the signature block and
620 filing the document using the attorney's user name and password
621 will constitute that attorney's signature."

TAB 4D



Document Details

Docket ID:	USC-RULES-AP-2016-0002
Docket Title:	Proposed Amendments to the Federal Rules of Appellate Procedure *
Document File:	
Docket Phase:	Notice
Phase Sequence:	1
RIN:	Not Assigned
Original Document ID:	USC-RULES-AP-2016-0002-DRAFT-0010
Current Document ID:	USC-RULES-AP-2016-0002-0009
Title:	Comment from Cheryl Siler, Aderant
Number of Attachments:	1
Document Type:	PUBLIC SUBMISSIONS *
Comment on Document ID:	USC-RULES-AP-2016-0002-0002
Comment on Document Title:	Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure
Status:	Posted
Received Date:	01/23/2017 *
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Current Assignee:	NA
Status Set By:	Skillman, Frances (USC)
Comment Start Date:	08/11/2016
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Additional Field 1:	

Tracking Number: 1k1-8ubz-6kyh 

**Total Page Count
Including Attachments:** 1

Submitter Info

Comment: Please see attached comments re Appellate Rule 25. 

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Government Agency:

Cover Page: 

Comment on proposed amendment to Appellate Rule 25(c)(2)

To promote consistency among the Federal Rules and to avoid confusion, we propose that the language used in the proposed amendment to Appellate Rule 25(c)(2) mirror that used in the proposed amendment to Civil Rule 5(b)(2)(E).

As proposed, Appellate Rule 25(c)(2) states:

Electronic service may be made by sending a paper to a registered user by filing it with the court's electronic-filing system or by using other electronic means that the person consented to in writing. [Emphasis added]

In contrast, proposed Civil Rule 5(b)(2)(E) reads:

Sending it to a registered user by filing it within the court's electronic-filing system or sending it by other electronic means that the person has consented to in writing... [Emphasis added]

We suggest that the proposed amendment to Appellate Rule 25(c)(2) be revised to use the same language as that used in Civil Rule 5(b)(2)(E). There seems to be no valid reason for using different wording in the Appellate Rule from that used in the Civil Rule. For consistency and clarity, it would be optimal if the proposed amendment to Appellate Rule 25(c)(2) were revised to read:

Electronic service may be made by sending a paper to a registered user by filing it with the court's electronic-filing system or by sending it by other electronic means that the person consented to in writing.


Thank you for your consideration of these comments.

Cheryl L. Siler
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TAB 4E



Document Details

Docket ID:	USC-RULES-AP-2016-0002 🔗
Docket Title:	Proposed Amendments to the Federal Rules of Appellate Procedure * 🔗
Document File:	 HTML
Docket Phase:	Notice
Phase Sequence:	1
RIN:	Not Assigned 🔗
Original Document ID:	USC-RULES-AP-2016-0002-DRAFT-0011
Current Document ID:	USC-RULES-AP-2016-0002-0010
Title:	Comment from Michael Rosman, NA 🔗
Number of Attachments:	1
Document Type:	PUBLIC SUBMISSIONS * 🔗
Comment on Document ID:	USC-RULES-AP-2016-0002-0002 🔗
Comment on Document Title:	Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure 🔗
Status:	Posted 🔗
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Current Assignee:	NA
Status Set By:	Skillman, Frances (USC)
Comment Start Date:	08/11/2016 🔗
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Additional Field 1:	Advisory Committee on Appellate Rules, Spring 2017 Meeting

Tracking Number: 1k1-8uif-8nfm 

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Including Attachments:** 1

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**Submitter's
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Government Agency:

Cover Page: 

Comments On Proposed Amendments To The Federal Rules of Appellate Procedure

I have the following comments on the proposed amendments to the Federal Rules of Appellate Procedure that were recommended by the Advisory Committee on Appellate Rules in its December 14, 2015 memorandum to the Standing Committee.

The Advisory Committee proposes an amendment to current Rule 25(a)(2), generally reorganizing its current structure. The second proposed subdivision (proposed Rule 25(a)(2)(B)) is entitled “Electronic Filing and Signing.” Proposed Rule 25(a)(2)(B)(iii) covers “Signing” and states: “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.”

This is a badly worded provision. First, the terms “user name” and “password” are nowhere defined. The attorney’s user name and password to what? Snapchat? Presumably, the Advisory Committee meant his/her user name and password to the Court’s electronic filing system, but it does not explain what the attorney is supposed to do with these things in order for them to “serve” as the attorney’s signature. Do they need to be included somewhere in the paper that is being filed (as the rest of the requirement for “signature equivalence” – the name on a signature block – presumably does)? If all that is being required is that the paper be filed electronically with the Court, then the provision should simply say that. In my experience, there is no way to file a paper through the Court’s electronic system without a user name and password, so it’s unclear why these items are being mentioned at all. I would recommend the following: “For all papers filed electronically by attorneys who are registered users of the Court’s electronic filing system, the attorney’s name on a signature block serves as the attorney’s

signature.”

The next problem with the rule is the phrase “attorney of record.” I assume it means an attorney who has appeared on behalf of a party in a given litigation. If that is right, then the first document filed by a given attorney – a motion to file an amicus brief, a motion to intervene, or just a notice of appearance by a new attorney on behalf of a party – does not come within the terms of the proposed amendment because the user name and password of the filing attorney are not those of “an attorney of record.” Accordingly, it must be separately signed to comply with Rule 32(d). There does not seem to be any cogent reason for this exception. I would recommend that, if the “user name and password” phrase is retained in the final rule, the phrase “attorney of record” be replaced by “attorney registered with the Court’s electronic filing system.”


Finally, I also note that proposed rule leads to some peculiar results when applied to documents reflecting agreements between the parties. *E.g.*, FRAP Rules 10(d), 42(b). Under the proposed Rule 25(a)(2)(B)(iii), the party filing a document along these lines need not reproduce a handwritten signature, but the other parties to the stipulation must. The Standing Committee might consider an exception to the proposed rule for such documents.

TAB 4F

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Document Details

Docket ID:	USC-RULES-AP-2016-0002 🌐
Docket Title:	Proposed Amendments to the Federal Rules of Appellate Procedure * 🌐
Document File:	 HTML
Docket Phase:	Notice
Phase Sequence:	1
RIN:	Not Assigned 🌐
Original Document ID:	USC-RULES-AP-2016-0002-DRAFT-0019
Current Document ID:	USC-RULES-AP-2016-0002-0014
Title:	Comment from H. Dixon, NA 🌐
Number of Attachments:	1
Document Type:	PUBLIC SUBMISSIONS * 🌐
Comment on Document ID:	USC-RULES-AP-2016-0002-0002 🌐
Comment on Document Title:	Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure 🌐
Status:	Posted 🌐
Received Date:	02/14/2017 * 🌐
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Submission Type:	Web
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Current Assignee:	NA
Status Set By:	Cox, Shelly (USC)
Comment Start Date:	08/11/2016 🌐
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Tracking Number: 1k1-8uqp-tdg8 

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Including Attachments:** 1

Submitter Info

Comment: I am separately submitting two comments: #1 - Amicus Curiae Briefs (submitted separately); #2 - Electronic Signature (attached here) 

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**Submitter's
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Government Agency Type:

Government Agency:

Cover Page: 

To: The Advisory Committee on Appellate Rules
Date: February 14, 2017

I write to comment on the provision proposed for electronic signing. (Appellate Rule 25 (a) (2)(B) (iii).)

The language currently proposed is very confusing and seems to request that a filer include his/her user name and password on the signature block in the document being filed.

In some types of cases, the filer could be a non-attorney (e.g., a prisoner or other pro se litigant) who is not accustomed to filing via ECF and does not have a good basis for interpreting the rule. Moreover, even an attorney who is inexperienced (either in using electronic filing, or in practice in general) could be confused into thinking he/she is required to spell out his/her user name and password in the document.

This is, of course, problematic, as ECF filings can generally be viewed by the public and that person's username and password would then be available to the general public (without even a quick and effective means of having it removed should he/she realize the mistake after filing).

Current proposed language:

(iii) **Signing.** The user name and password of an attorney of record, together with the attorney's name on a signature block, serves as the attorney's signature.

Recommended language:

(iii) **Signing.** Use by the filer (e.g., attorney of record or pro se filer) of the ECF user name and password when logging in to ECF, and inclusion of the filer's name on a signature block in the filed document, together comprise the filer's electronic signature.

or

(iii) **Signing.** The filer's electronic signature is comprised of the combination of (1) use by the filer (e.g., attorney of record or pro se filer) of the ECF user name and password when logging in to ECF, and (2) inclusion of the filer's name on a signature block in the filed document.

Respectfully Submitted,


Heather Dixon, Esq.

2ND CIRCUIT COURTS COMMITTEE, FEDERAL BAR COUNCIL (2012-2017)
FEDERAL BAR COUNCIL MEMBER (2009-2017)
FEDERAL JUDICIAL LAW CLERK (2009-2010, 2011-2017)
PRIVATE PRACTICE (2004-2008, 2010-2011)

TAB 4G



Document Details

Docket ID:	USC-RULES-AP-2016-0002 🌐
Docket Title:	Proposed Amendments to the Federal Rules of Appellate Procedure * 🌐
Document File:	 HTML
Docket Phase:	Notice
Phase Sequence:	1
RIN:	Not Assigned 🌐
Original Document ID:	USC-RULES-AP-2016-0002-DRAFT-0020
Current Document ID:	USC-RULES-AP-2016-0002-0017
Title:	Comment from Zachary Shemtob , New York City Bar Association 🌐
Number of Attachments:	1
Document Type:	PUBLIC SUBMISSIONS * 🌐
Comment on Document ID:	USC-RULES-AP-2016-0002-0002 🌐
Comment on Document Title:	Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure 🌐
Status:	Posted 🌐
Received Date:	02/15/2017 * 🌐
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Additional Field 1:	Advisory Committee on Appellate Rules, Spring 2017 Meeting

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**Submitter's
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Government Agency Type:

Government Agency:

Cover Page: 



**COMMENT OF THE NEW YORK CITY BAR ASSOCIATION
ON PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF APPELLATE PROCEDURE**

The New York City Bar Association (the “Association”), through its Committee on Federal Courts (the “Federal Courts Committee”), greatly appreciates the opportunity for public comment provided by the Judicial Conference’s Committee on Rules of Practice and Procedure on the amendments to the Federal Rules of Appellate Procedure.

The Association, founded in 1870, has over 24,000 members practicing throughout the nation and in more than fifty foreign jurisdictions. The Association includes among its membership many lawyers in every area of law practice, including lawyers generally representing plaintiffs and those generally representing defendants; lawyers in large firms, in small firms, and in solo practice; and lawyers in private practice, government service, public defender organizations, and in-house counsel at corporations.

The Association’s Federal Courts Committee is charged with responsibility for studying and making recommendations regarding proposed amendments to the Federal Rules of Appellate Procedure. The Federal Courts Committee respectfully submits the following comments on the proposed amendments:

I. Comment on Proposed Revision to Federal Rules of Appellate Procedure 25

The Appellate Rules Committee has proposed revisions to Appellate Rule 25 to follow the proposed revisions of Civil Rule 5, which address electronic filing, signatures, and proof of service. We support these substantive changes. We propose a small edit to the language of proposed Federal Rule of Appellate Procedure 25(a)(2)(B)(iii), which addresses electronic

signatures. As currently drafted, proposed Rule 25(a)(2)(B)(iii) specifies that when a paper is filed electronically, 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.” That could be read to mean that the attorney’s user name and password should be included on any paper that is electronically filed. To eliminate confusion, the Committee proposes the following language to replace Rule 25(a)(2)(B)(iii):

(iii) **Signing.**

The attorney’s name on a signature block serves as the attorney’s signature, provided the paper is electronically filed using the user name and password of that attorney of record.

Alternatively, the Committee proposes a committee note to explain that the user name and password should not be included on the paper itself, but rather that the user name and password that are used to access CM/ECF, together with that attorney of record’s name on a signature block, suffices as a “signature” under the meaning of this rule.

Additionally, the Committee proposes that a committee note be added to mirror the language of the note that follows FED. R. CIV. P. 5, which states:

Care should be taken to ensure that an order to file electronically does not impede access to the court, and reasonable exceptions must be included in a local rule that requires electronic filing by a pro se litigant. In the beginning, this authority is likely to be exercised only to support special programs, such as one requiring e-filing in collateral proceedings by pro se prisoners.

II. Comments on Proposed Revisions to Federal Rules of Appellate Procedure 41

We are concerned about the proposed amendment to Rule 41(b) that would apply the Supreme Court’s “extraordinary circumstances” standard for staying a court of appeals mandate to *all* cases in which the court of appeals has issued an opinion. We agree with the well-reasoned comments submitted by Judge Jon. O. Newman and recommend that the Committee

delete the proposed last sentence to Rule 41(b). *See* USC-Rules-AP-2016-0002-0006 (posted Dec. 29, 2016).

Federal Rule of Appellate Procedure 41 governs the timing for the issuance of the mandate after a court of appeals issues an opinion, with provisions governing a host of procedural postures. Rule 41(d)(2)(D) provides that if the mandate of the court of appeals has been stayed by virtue of the filing of a petition for certiorari, the court of appeals shall issue the mandate “immediately” after the Supreme Court files an order denying certiorari. In *Ryan v. Schad*, the Supreme Court construed this last provision, and held that if a court of appeals has any discretion to stay the issuance of a mandate following denial of certiorari notwithstanding Rule 41(d)(2)’s use of the word “immediately,” the court could exercise such discretion only under ““extraordinary circumstances,”” such as in the event of ““grave, unforeseen contingencies.”” 133 S. Ct. 2548, 2551 (2013) (quoting *Calderon v. Thompson*, 523 U.S. 538, 550 (1998)). Even though both *Ryan* and *Calderon* involved death penalty sentences, no such “extraordinary circumstances” were present in either case. *Id.*

The proposed amendment to Rule 41(b) would apply this “extraordinary circumstances” standard for staying a court of appeals mandate to *all* cases in which the court of appeals has issued an opinion, regardless of whether the U.S. Supreme Court has denied certiorari. In particular, this Committee is concerned that the proposed amendment to Rule 41(b) could disrupt the panel rehearing and en banc procedures of the courts of appeals.

As Judge Newman aptly explains, the proposed “extraordinary circumstances” standard is a poor fit for Fed. R. App. 41(b). In cases in which no petition for panel rehearing or rehearing en banc is filed, there are situations in which a court of appeals acts well within its discretion to delay issuance of the mandate. For instance, delaying the mandate may be appropriate where a

member of the court is considering whether to call for a vote to rehear a case en banc even when no petition for rehearing en banc has been filed, or because the court has ordered a rehearing en banc on its own motion and no en banc opinion has yet been issued. Such en banc deliberation is an ordinary part of full appellate review, which need not be justified with regard to an "extraordinary circumstances" standard developed in an entirely different context, with different interests at stake. *See Ryan*, 133 S. Ct. at 2550 (after the U.S. Supreme Court has denied certiorari, the mandate must issue immediately absent extraordinary circumstances precisely because the mandate was stayed "solely to allow th[e] Court time to consider a petition for certiorari") (quoting *Thompson*, 545 U.S. at 806)); Fed. R. App. 41(d)(2)(D). Rule 41(b) recognizes that the mandate need not issue if a petition for panel rehearing or rehearing en banc has been filed. This reflects the sound policy justification that a mandate need not issue if the original opinion may be withdrawn. These same considerations support allowing the court to delay issuing the mandate if the court determines that en banc consideration or panel rehearing may be appropriate.

Dated: February 15, 2017

New York, New York

Respectfully submitted,

Committee on Federal Courts
New York City Bar Association

Laura G. Birger, Esq., *Chair*
Zachary Baron Shemtob, Esq., *Secretary*
Partha P. Chattoraj, Esq.
Cameron Alyse Bell, Esq.
Neil S. Binder, Esq.
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Partha P. Chattoraj, Esq.
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Hon. Steven Tiscione**
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William R. Weinstein, Esq.
Sam A. Yospe, Esq.
Richard M. Zuckerman, Esq.

** Did not participate in this report.

TAB 4H



Document Details

Docket ID:	USC-RULES-AP-2016-0002 🌐
Docket Title:	Proposed Amendments to the Federal Rules of Appellate Procedure * 🌐
Document File:	 HTML
Docket Phase:	Notice
Phase Sequence:	1
RIN:	Not Assigned 🌐
Original Document ID:	USC-RULES-AP-2016-0002-DRAFT-0021
Current Document ID:	USC-RULES-AP-2016-0002-0018
Title:	Comment from Sai NA, NA 🌐
Number of Attachments:	1
Document Type:	PUBLIC SUBMISSIONS * 🌐
Comment on Document ID:	USC-RULES-AP-2016-0002-0002 🌐
Comment on Document Title:	Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure 🌐
Status:	Posted 🌐
Received Date:	02/15/2017 * 🌐
Date Posted:	02/15/2017 🌐
Posting Restriction:	No restrictions 🌐
Submission Type:	Web
Number of Duplicate Submissions:	1 * 🌐


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Status Set Date:	02/15/2017
Current Assignee:	NA
Status Set By:	Cox, Shelly (USC)
Comment Start Date:	08/11/2016 🌐
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Additional Field 1:	Advisory Committee on Appellate Rules, Spring 2017 Meeting


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**Total Page Count
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Submitter Info

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**Submitter's
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Government Agency Type:

Government Agency:

Cover Page: 

Committee on Rules of Practice and Procedure of the Judicial Conference of the United States
Standing Committee and Advisory Committees on Federal Rules of Appellate, Bankruptcy,
Civil, and Criminal Procedure
Rebecca A. Womeldorf, Secretary
Rules_Support@ao.uscourts.gov

Comments re proposed changes to CM/ECF filing rules for *pro se* litigants

As the proponent of 15-AP-E, 15-BK-I, 15-CR-D, 15-CV-EE, and 15-CV-GG, which are in part to be discussed at the upcoming hearings, I submit these comments on the proposed amendments, in opposition to the proposed language that would require *pro se* litigants to obtain leave of court before being allowed to use CM/ECF, and proposing alternative rules that avoid these problems while accomplishing the legitimate objectives raised by the committees.

First, however, I would like to point out a problem of representation. While attorneys and judges are very well represented on the Committee — both as commenters and members — there are few if any proponents of the rights of *pro se* litigants. This is a structural problem; among other things, *pro se* litigants are mostly unaware of the judicial rulemaking process, are not invited to contribute, and (unlike other participants, like class action lawyers) have no organization.

As far as I can tell from the committee notes and minutes on this matter, not a single *pro se* litigant, except for myself and one brief commenter¹, has been involved in this rulemaking. Comments have been from people with a quasi-adversarial relationship with *pro se* litigants, such as having to manage difficult cases — resulting in a patronizing, limiting perspective that does not adequately weigh the impacts on the affected *pro se* litigants. I urge the Committee to take serious consideration of the one-sided nature of advocacy on this matter.

While I recognize that there are difficulties with *pro se* litigants, and have had some myself, these are not sufficient reasons for a rule that would presumptively treat all *pro se* litigants as vexatious, and impair their Constitutional rights to *equal* access to the courts.

Respectfully submitted,
/s/ Sai
legal@s.ai

¹ See suggestion of Dr. Robert Miller, 15-AP-H / 15-CR-EE / 15-CV-JJ.

A. Summary of proposed changes

The proposed changes below alter the Committee's proposal to:

1. Remove the presumptive prohibition on *pro se* use of CM/ECF, and instead grant presumptive access. This includes CM/ECF access for case initiation filings.
2. Treat *pro se* status as a rebuttably presumed good cause for nonelectronic filing.
 - a. For *pro se* prisoners, this is treated as an irrebutable presumption, in the spirit of the FRCrP Committee's notes and for conformity across all the rules.
3. Require courts to allow *pro se* CM/ECF access on par with attorney filers, prohibiting any restriction merely for being *pro se* or a non-attorney, and prohibiting registration fees.
4. Permit *individualized* prohibitions on CM/ECF access for good cause, e.g. for vexatious litigants, and (in the notes) construe pre-enactment vexatious designation as such a prohibition.
5. Change the "signature" paragraph for the reasons stated in my comment re proposed FRAP 25(a)(2)(B)(iii), USC-RULES-AP-2016-0002-0011, *posted* Feb 3, 2017.
6. Conform the signature paragraph in the FRCrP version to the location used in the other rules.

B. Proposed rules

The Committees have proposed the following parallel rule changes. On the left are the committee's proposed changes; on the right are my proposed alternatives. Differences marked in **bold**; ~~strikeout~~ is used only in the notes, so as to not conflict with ~~strikeout~~ of prior rule. Italics are additions to the prior rule.

I. F. R. Appellate P. — Rule 25. Filing and Service

A. ...

1. ...

2. Filing: Method and Timeliness.

a) ...

b) ...

*Electronic Filing and Signing**(1) By a Represented**Person— Generally Required; Exceptions.**A person represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.**(2) By an Unrepresented**Person— When Allowed or Required. A person not represented by an attorney:**(a) may file electronically only if allowed by court order or by local rule; and**(b) may be required to file electronically only by court order, or by a local rule that includes***II. F. R. Appellate P. — Rule 25. Filing and Service**

A. ...

1. ...

2. Filing: Method and Timeliness.

a) ...

b) ...

*Electronic Filing and Signing****(1) Generally Required.******Unless an exception or prohibition applies, every person must file electronically.******(2) Exceptions. A person may file******nonelectronically if:***
*(a) nonelectronic filing is allowed by the court for good cause, or is allowed or required by local rule, or****(b) the person is not represented by an attorney; unless the court orders, for good cause, that the person must file electronically.******(i) No court may require a prisoner not represented by an attorney***

reasonable exceptions.

(3) Signing. The user name and password of an attorney of record, together with the attorney's name on a signature block, serves as the attorney's signature.

Committee Note

The amendments conform Rule 25 to the amendments to Federal Rule of Civil Procedure 5 on electronic filing, signature, service, and proof of service. They establish, in Rule 25(a)(2)(B), a new national rule that generally makes electronic filing mandatory. The rule recognizes exceptions for persons proceeding without an attorney, exceptions for good cause, and variations established by local rule. The amendments establish national rules regarding the methods of signing and serving electronic documents in Rule 25(a)(2)(B)(iii) ...

to file electronically.

(3) Prohibition. A person must not file electronically if prohibited, for good cause, by court order.

(a) No court may prohibit electronic filing on the basis that a person is not represented by an attorney or is not an attorney.

(4) Signing. Any document filed electronically that has a signature block attributing the document to the filer is considered to be signed by the filer.

Committee Note

The amendments conform Rule 25 to the amendments to Federal Rule of Civil Procedure 5 on electronic filing, signature, service, and proof of service. They establish, in Rule 25(a)(2)(B), a new national rule that generally makes electronic filing mandatory. The rule recognizes exceptions for persons proceeding without an attorney, exceptions for good cause, and variations established by local rule. The amendments establish national rules regarding the methods of signing and serving electronic documents in Rule 25(a)(2)(B)(iv) ...

Rule 25(a)(2)(B)(iii). Orders issued before the enactment of this rule declaring a person to be a vexatious litigant, and otherwise silent on electronic filing, shall be considered to prohibit electronic filing. Orders issued after the enactment of this rule must clearly state a prohibition on

electronic filing. Such prohibitions may be modified by superceding order.

Rule 25(a)(2)(B)(iii)(a). Courts may require *pro se* or non-attorney filers to complete the same CM/ECF training, registration, or similar requirements ordinarily imposed on attorney filers, except for registration fees. Courts may also require that *pro se* or non-attorney filers sign an electronic affidavit about having read, understood, and agreed to the court's rules; and may require different affidavits from attorneys and non-attorneys.

Courts must permit, but not require, electronic case initiation and other filing by *pro se* or non-attorney filers, except on a case-by-case determination of good cause.

III. F. R. Bankruptcy P. — Rule 5005. Filing and Transmittal of Papers

A. FILING.

1. ...
2. *Electronic Filing and Signing by Electronic Means:*
 - a) *By a Represented Entity—Generally Required; Exceptions.* A court may by local rule permit or require documents to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes. An entity represented by an attorney shall file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule. A local rule may require filing by electronic means only if reasonable exceptions are allowed.
 - b) *By an Unrepresented Individual— When Allowed or Required.* An individual not represented by an attorney:
 - (1) may file electronically only if allowed by court order or by local rule; and
 - (2) may be required to file electronically only by court order, or by a local rule that includes reasonable exceptions.
 - c) *Signing.* The user name

IV. F. R. Bankruptcy P. — Rule 5005. Filing and Transmittal of Papers

A. FILING.

1. ...
2. *Electronic Filing and Signing by Electronic Means:*
 - a) A court may by local rule permit or require documents to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes. A local rule may require filing by electronic means only if reasonable exceptions are allowed. **Generally Required. Unless an exception or prohibition applies, every person must file electronically.**
 - b) **Exceptions. A person may file nonelectronically if:**
 - (1) nonelectronic filing is allowed by the court for good cause, or is allowed or required by local rule, or
 - (2) **the person is not represented by an attorney; unless the court orders, for good cause, that the person must file electronically.**
 - (a) No court may require a prisoner not represented by an attorney to file electronically.
 - c) **Prohibition. A person must not file electronically if**

and password of an attorney of record, together with the attorney's name on a signature block, serves as the attorney's signature.

prohibited, for good cause, by court order.

(1) No court may prohibit electronic filing on the basis that a person is not represented by an attorney or is not an attorney.

d) Signing. Any document filed electronically that has a signature block attributing the document to the filer is considered to be signed by the filer.

Committee Note

Electronic filing has matured. Most districts have adopted local rules that require electronic filing, and allow reasonable exceptions as required by the former rule. The time has come to seize the advantages of electronic filing by making it mandatory in all districts, except for filings made by an individual not represented by an attorney. But exceptions continue to be available. Paper filing must be allowed for good cause. And a local rule may allow or require paper filing for other reasons.

Filings by an individual not represented by an attorney are treated separately. It is not yet possible to rely on an assumption that pro se litigants are generally able to seize the advantages of electronic filing. Encounters with the court's system may prove overwhelming to some. Attempts to work within the system may generate substantial burdens on a pro se party, on other parties, and on the court. Rather than mandate electronic filing, filing by pro se litigants is left for governing by local rules or court order. Efficiently handled electronic filing works to the advantage of all parties and the court. Many courts now allow electronic

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Electronic filing has matured. Most districts have adopted local rules that require electronic filing, and allow reasonable exceptions as required by the former rule. The time has come to seize the advantages of electronic filing by making it mandatory in all districts, except for filings made by an individual not represented by an attorney. But exceptions continue to be available. Paper filing must be allowed for good cause. And a local rule may allow or require paper filing for other reasons.

A pro se litigant enjoys a rebuttable presumption (and for a pro se prisoner, an irrebuttable presumption) of having good cause not to file electronically. Unless ordered otherwise on a case by case basis, they may file either electronically or nonelectronically, including for case initiation. It is not yet possible to rely on an assumption that pro se litigants are generally able to seize the advantages of electronic filing. Encounters with the court's system may prove overwhelming to some. Attempts to work within the system may generate substantial burdens on a pro se party, on other parties, and on the court. Rather than mandate

filing by pro se litigants with the court's permission. Such approaches may expand with growing experience in these and other courts, along with the growing availability of the systems required for electronic filing and the increasing familiarity of most people with electronic communication.

The user name and password of an attorney of record, together with the attorney's name on a signature block, serves as the attorney's signature.

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~~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.~~

V. **F. R. Civil P. — Rule 5. Serving and Filing Pleadings and Other Papers**

A. ...

D. Filing.

1. ...

3. ~~Electronic Filing; and Signing, or Verification. 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) *By a Represented Person—Generally Required; Exceptions. A person represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.*

b) *By an Unrepresented Person—When Allowed or Required. A person not represented by an attorney:*
 (1) *may file electronically only if allowed by court order or by local rule; and*
 (2) *may be required to file electronically only by court order, or by a local rule that includes reasonable exceptions.*

c) *Signing. The user name and password of an attorney of record, together with the attorney's name on*

VI. **F. R. Civil P. — Rule 5. Serving and Filing Pleadings and Other Papers**

A. ...

D. Filing.

1. ...

3. ~~Electronic Filing; and Signing, or Verification. 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) ***Generally Required. Unless an exception or prohibition applies, every person must file electronically.***

b) ***Exceptions. A person may file nonelectronically if:***
 (1) *nonelectronic filing is allowed by the court for good cause, or is allowed or required by local rule, or*
 (2) ***the person is not represented by an attorney; unless the court orders, for good cause, that the person must file electronically.***

(a) ***No court may require a prisoner not represented by an attorney to file electronically.***

c) ***Prohibition. A person must not file electronically if prohibited, for good cause, by court order.***

a signature block, serves as the attorney’s signature.

(1) No court may prohibit electronic filing on the basis that a person is not represented by an attorney or is not an attorney.

d) Signing. Any document filed electronically that has a signature block attributing the document to the filer is considered to be signed by the filer.

Committee Note

Rule 5 is amended to reflect the widespread transition to electronic filing and service. Almost all filings by represented parties are now made with the court’s electronic-filing system.

...

Amended Rule 5(d)(3) recognizes increased reliance on electronic filing. Electronic filing has matured. Most districts have adopted local rules that require electronic filing, and allow reasonable exceptions as required by the former rule. The time has come to seize the advantages of electronic filing by making it generally mandatory in all districts for a person represented by an attorney. But exceptions continue to be available. Nonelectronic filing must be allowed for good cause. And a local rule may allow or require nonelectronic filing for other reasons.

Filings by a person not represented by an attorney are treated separately. It is not yet possible to rely on an assumption that pro se litigants are generally able to seize the advantages of electronic filing. Encounters with the court’s system may prove overwhelming to some. Attempts to work within the system may generate substantial burdens on a pro se party, on other parties,

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A pro se litigant enjoys a rebuttable presumption (and for a pro se prisoner, an irrebuttable presumption) of having good cause not to file electronically. Unless ordered otherwise on a case by case basis, they may file either electronically or nonelectronically, including for case initiation. ~~Filings by a person not represented by an attorney are treated separately. It is not~~

and on the court. Rather than mandate electronic filing, filing by pro se litigants is left for governing by local rules or court order.

Efficiently handled electronic filing works to the advantage of all parties and the court. Many courts now allow electronic filing by pro se litigants with the court's permission. Such approaches may expand with growing experience in these and other courts, along with the growing availability of the systems required for electronic filing and the increasing familiarity of most people with electronic communication. Room is also left for a court to require electronic filing by a pro se litigant by court order or by local rule. Care should be taken to ensure that an order to file electronically does not impede access to the court, and reasonable exceptions must be included in a local rule that requires electronic filing by a pro se litigant. In the beginning, this authority is likely to be exercised only to support special programs, such as one requiring e- filing in collateral proceedings by pro se prisoners.

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Efficiently handled electronic filing works to the advantage of all parties and the court. Many courts now allow electronic filing by pro se litigants with the court's permission; **this rule change requires that permission be given on the same terms as any other filer.** Such approaches may expand with growing experience in these and other courts, along with the growing availability of the systems required for electronic filing and the increasing familiarity of most people with electronic communication. Room is also left for a court to require electronic filing by a pro se litigant by court order or by local rule. Care should be taken to ensure that an order to file electronically does not impede access to the court, and reasonable exceptions must be included in a local rule that requires electronic filing by a pro se litigant. In the beginning, this authority is likely to be exercised only to support special programs, such as one requiring e- filing in collateral proceedings by pro se prisoners.

~~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.~~

Rule 5(d)(3)(C). Orders issued before the enactment of this rule declaring a person to be a vexatious litigant, and otherwise silent on electronic filing, shall be considered to

prohibit electronic filing. Orders issued after the enactment of this rule must clearly state a prohibition on electronic filing. Such prohibitions may be modified by superceding order.

Rule 5(d)(3)(C)(i). Courts may require *pro se* or non-attorney filers to complete the same CM/ECF training, registration, or similar requirements ordinarily imposed on attorney filers, except for registration fees. Courts may also require that *pro se* or non-attorney filers sign an electronic affidavit about having read, understood, and agreed to the court's rules; and may require different affidavits from attorneys and non-attorneys.

Courts must permit, but not require, electronic case initiation and other filing by *pro se* or non-attorney filers, except on a case-by-case determination of good cause.

**VII. F. R. Criminal P. — Rule 49.
Serving and Filing Papers**

- A. *Service on a Party.*
 - 1. ...
 - 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. A party not represented by an attorney 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 it did not reach the person to be served.*
 - b) ...
 - 4. ...
- B. *Filing.*
 - 1. ...
 - 2. *Means of Filing.*
 - a) *Electronically. A paper is filed electronically by filing it with 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) ...
 - 3. *Means Used by Represented and Unrepresented Parties.*

**VIII. F. R. Criminal P. — Rule 49.
Serving and Filing Papers**

- A. *Service on a Party.*
 - 1. ...
 - 3. *Service by Electronic Means.*
 - a) *Using the Court’s Electronic Filing System. A **registered user** may serve a paper on a registered user by filing it with the court’s electronic-filing system. A party not represented by an attorney **is not required to do so unless otherwise required** by court order or local rule. Service is complete upon filing, but is not effective if the serving party learns that it did not reach the person to be served.*
 - b) ...
 - 4. ...
- B. *Filing.*
 - 1. ...
 - 2. *Means of Filing.*
 - a) *Electronically. A paper is filed electronically by filing it with the court’s electronic-filing system. A paper filed electronically is written or in writing under these rules.*
 - b) ...
 - 3. **Electronic filing and signing**
 - a) **Generally Required. Unless an exception or prohibition applies, every person must file electronically.**
 - b) **Exceptions. A person may file nonelectronically if:**

- a) *Represented Party.* A party represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.
 - b) *Unrepresented Party.* A party not represented by an attorney must file nonelectronically, unless allowed to file electronically by court order or local rule.
4. ...
- 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 as required by Rule 49(a), but may use the court’s electronic-filing system only if allowed by court order or local rule.
- D. ...
- (1) nonelectronic filing is allowed by the court for good cause, or is allowed or required by local rule,
 - (2) **the person is not represented by an attorney; unless the court orders, for good cause, that the person must file electronically.**
 - (a) **No court may require a prisoner not represented by an attorney to file electronically.**
- c) **Prohibition.** A person must not file electronically if prohibited, for good cause, by court order.
- (1) **No court may prohibit electronic filing on the basis that a person is not represented by an attorney or is not an attorney.**
- d) **Signing.** Any document filed electronically that has a signature block attributing the document to the filer is considered to be signed by the filer.
4. ...
- 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 as required by Rule 49(a), but may use the court’s electronic-filing system only if allowed **Rule 49(b)(3)**, court order, or local rule.
- D. ...

Committee Note

Rule 49 previously required service and filing in a “manner provided” in “a civil action.” The amendments to Rule 49 move the instructions for filing and service from the Civil Rules into Rule 49. Placing instructions for filing and service in the criminal rule avoids the need to refer to two sets of rules, and permits independent development of those rules. Except where specifically noted, the amendments are intended to carry over the existing law on filing and service and to preserve parallelism with the Civil Rules.

Additionally, the amendments eliminate the provision permitting electronic filing only when authorized by local rules, moving—with the Rules governing Appellate, Civil, and Bankruptcy proceedings—to a national rule that mandates electronic filing for parties represented by an attorney with certain exceptions. Electronic filing has matured. Most districts have adopted local rules that require electronic filing by represented parties, and allow reasonable exceptions as required by the former rule. The time has come to seize the advantages of electronic filing by making it mandatory in all districts for a party represented by an attorney, except that nonelectronic filing may be allowed by the court for good cause, or allowed or required by local rule.

...

Rule 49(a)(3) and (4). Subsections (a)(3) and (4) list the permissible means of service. These new provisions duplicate the description of permissible means from Civil Rule 5, carrying them into the criminal rule.

By listing service by filing with the court’s electronic- filing system first, in (3)(A), the rule now recognizes the advantages of electronic filing and service and its

Committee Note

Rule 49 previously required service and filing in a “manner provided” in “a civil action.” The amendments to Rule 49 move the instructions for filing and service from the Civil Rules into Rule 49. Placing instructions for filing and service in the criminal rule avoids the need to refer to two sets of rules, and permits independent development of those rules. Except where specifically noted, the amendments are intended to carry over the existing law on filing and service and to preserve parallelism with the Civil Rules.

Additionally, the amendments eliminate the provision permitting electronic filing only when authorized by local rules, moving—with the Rules governing Appellate, Civil, and Bankruptcy proceedings—to a national rule that mandates electronic filing for parties represented by an attorney with certain exceptions. Electronic filing has matured. Most districts have adopted local rules that require electronic filing by represented parties, and allow reasonable exceptions as required by the former rule. The time has come to seize the advantages of electronic filing by making it mandatory in all districts for a party represented by an attorney, except that nonelectronic filing may be allowed by the court for good cause, or allowed or required by local rule.

...

Rule 49(a)(3) and (4). Subsections (a)(3) and (4) list the permissible means of service. These new provisions duplicate the description of permissible means from Civil Rule 5, carrying them into the criminal rule.

By listing service by filing with the court’s electronic- filing system first, in (3)(A), the rule now recognizes the advantages of electronic filing and service and its

widespread use in criminal cases by represented defendants and government attorneys.

But the e-filing system is designed for attorneys, and its use can pose many challenges for pro se parties. In the criminal context, the rules must ensure ready access to the courts by all pro se defendants and incarcerated individuals, filers who often lack reliable access to the internet or email. Although access to electronic filing systems may expand with time, presently many districts do not allow e-filing by unrepresented defendants or prisoners. Accordingly, subsection (3)(A) provides that represented parties may serve registered users by filing with the court’s electronic-filing system, but unrepresented parties may do so only if allowed by court order or local rule.

...

Rule 49(b)(2). New subsection (b)(2) lists the three ways papers can be filed. (A) provides for electronic filing using the court’s electronic-filing system and includes a provision, drawn from the Civil Rule, stating that the user name and password of an attorney of record serves as the attorney’s signature. The last sentence of subsection (b)(2)(A) contains the language of former Rule 49(d), providing that e-filed papers are “written or in writing,” deleting the words “in compliance with a local rule” as no longer

widespread use in criminal cases by represented defendants and government attorneys.

But the e-filing system is designed for attorneys, and its use can pose many challenges for pro se parties. In the criminal context, the rules must ensure ready access to the courts by all pro se defendants and incarcerated individuals, filers who often lack reliable access to the internet or email. Although access to electronic filing systems may expand with time, presently many districts do not allow e-filing by unrepresented defendants or prisoners. Accordingly, subsection (3)(A) provides that represented parties may serve registered users by filing with the court’s electronic-filing system, but unrepresented parties **are not required to do so** ~~may do so only if allowed by court order or local rule.~~ **A pro se litigant enjoys a rebuttable presumption (and for a pro se prisoner, an irrebuttable presumption) of having good cause not to file electronically. Unless ordered otherwise on a case by case basis, they may file either electronically or nonelectronically, including for case initiation. See also note re subsection (b)(3)(B)(ii)(a), below.**

...

Rule 49(b)(2). New subsection (b)(2) lists the three ways papers can be filed. (A) provides for electronic filing using the court’s electronic-filing system ~~and includes a provision, drawn from the Civil Rule, stating that the user name and password of an attorney of record serves as the attorney’s signature.~~ The last sentence of subsection (b)(2)(A) contains the language of former Rule 49(d), providing that e-filed papers are “written or in writing,” deleting the words “in compliance with a local rule” as no longer

necessary.

...

Rule 49(b)(3). New subsection (b)(3) provides instructions for parties regarding the means of filing to be used, depending upon whether the party is represented by an attorney.

Subsection (b)(3)(A) requires represented parties to use the court’s electronic-filing system, but provides that nonelectronic filing may be allowed for good cause, and may be required or allowed for other reasons by local rule. This language is identical to that adopted in the contemporaneous amendment to Civil Rule 5.

Subsection (b)(3)(B) requires unrepresented parties to file nonelectronically, unless allowed to file electronically by court order or local rule. This language differs from that of the amended Civil Rule, which provides that an unrepresented party may be “required” to file electronically by a court order or local rule that allows reasonable exceptions. A different approach to electronic filing by unrepresented parties is needed in criminal cases, where electronic filing by pro se prisoners presents significant challenges. Pro se parties filing papers under the criminal rules generally lack the means to e-file or receive electronic confirmations, yet must be provided access to the courts under the Constitution.

...

Rule 49(c). This provision is new. It recognizes that in limited circumstances nonparties may file motions in criminal cases. Examples include representatives of the media challenging the closure of proceedings, material witnesses requesting to be deposed under Rule 15, or victims asserting rights

necessary.

...

Rule 49(b)(3). New subsection (b)(3) provides instructions for parties regarding the means of filing to be used, ~~depending upon whether the party is represented by an attorney.~~

Subsection (b)(3)(A) requires represented parties to use the court’s electronic-filing system, but **subsection (b)(3)(B)** provides that nonelectronic filing may be allowed for good cause, and may be required or allowed for other reasons by local rule. This language is identical to that adopted in the contemporaneous amendment to Civil Rule 5.

Subsection (b)(3)(B)(ii)(a) **prohibits restriction on pro se prisoners' right to file nonelectronically** ~~requires unrepresented parties to file nonelectronically, unless allowed to file electronically by court order or local rule. This language differs from that of the amended Civil Rule, which provides that an unrepresented party may be “required” to file electronically by a court order or local rule that allows reasonable exceptions. A different approach to electronic filing by unrepresented parties is needed in criminal cases, where e~~Electronic filing by pro se prisoners presents significant challenges. Pro se parties filing papers under the criminal rules generally lack the means to e-file or receive electronic confirmations, yet must be provided access to the courts under the Constitution.

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Rule 49(c). This provision is new. It recognizes that in limited circumstances nonparties may file motions in criminal cases. Examples include representatives of the media challenging the closure of proceedings, material witnesses requesting to be deposed under Rule 15, or victims asserting rights

under Rule 60. Subdivision (c) permits nonparties to file a paper in a criminal case, but only when required or permitted by law to do so. It also requires nonparties who file to serve every party and to use means authorized by subdivision (a).

The rule provides that nonparties, like unrepresented parties, may use the court's electronic-filing system only when permitted to do so by court order or local rule.

under Rule 60. Subdivision (c) permits nonparties to file a paper in a criminal case, but only when required or permitted by law to do so. It also requires nonparties who file to serve every party and to use means authorized by subdivision (a).

The rule provides that nonparties, ~~like unrepresented parties,~~ may use the court's electronic-filing system ~~only when permitted to do so by court order or local rule~~ **on the same terms as any other person.**

...

Rule 49(b)(3)(C). Orders issued before the enactment of this rule declaring a person to be a vexatious litigant, and otherwise silent on electronic filing, shall be considered to prohibit electronic filing. Orders issued after the enactment of this rule must clearly state a prohibition on electronic filing. Such prohibitions may be modified by superceding order.

Rule 49(b)(3)(C)(i). Courts may require *pro se* or non-attorney filers to complete the same CM/ECF training, registration, or similar requirements ordinarily imposed on attorney filers, except for registration fees. Courts may also require that *pro se* or non-attorney filers sign an electronic affidavit about having read, understood, and agreed to the court's rules; and may require different affidavits from attorneys and non-attorneys.

Courts must permit, but not require, electronic case initiation and other filing by *pro se* or non-attorney filers, except on a case-by-case determination of good cause.

C. Introduction

My name is Sai². I do many things, but relevant here is my legal advocacy work³ and, to some extent, my disabilities. I have no formal training in law.

After being the victim of a series of abuses by the Transportation Security Administration (TSA) at airport checkpoints, I filed formal Rehabilitation Act complaints and Federal Tort Claims Act (FTCA) claims. This was followed by a variety of Freedom of Information Act (FOIA) and Privacy Act requests aimed both at investigating what happened to me and exposing TSA's secret policies and procedures.

When my efforts were met only by agency stonewalling, I sued — first under FOIA / Privacy Act, then under the APA / Rehabilitation Act. After a year of litigation in the latter, I prevailed and obtained an injunction⁴, and was subsequently awarded prevailing party status and costs.⁵

These cases were my introduction to litigation; I learned by doing. To paraphrase another, I am too sensible of my defects not to realize that I committed many errors. No civil procedure text is adequate preparation, when compared to experience.

I have been *pro se* not from pride or lack of attempt to get counsel, but because I am both poor and principled. I was unable to obtain counsel without submitting my IFP affidavit on public record, 149 F. Supp. 3d 99, 126-28, in violation of my rights to privacy, which I refused to do.

My cases are not frivolous, and I am not vexatious — just poor, unwilling to give up my civil rights, and unable to find *pro bono* counsel to handle my primary litigation.

Despite the Supreme Court's assumptions in *Kay v. Ehrler*, 499 US 432, 437 (1991) as to "the overriding statutory concern is the interest in obtaining independent counsel for victims of civil

² I am mononymic; Sai is my full legal name. I prefer to be addressed or referred to without any title (e.g. no "Mr.") and with gender-neutral language / pronouns (e.g. "they/their" or "Sai/Sai's").

³ See https://s.ai/work/legal_resume.pdf

⁴ *Sai v. DHS et al.*, 149 F. Supp. 3d 99, 110-21 (D. D.C. 2015)

⁵ *Id.*, ECF No. 93 (April 15, 2016)

rights violations" — and indeed the general prejudice that equates "*pro se*" with "frivolous" — it is still true that "some civil rights claimants with meritorious cases [are] unable to obtain counsel". *Bradshaw v. Zoological Soc. of San Diego*, 662 F. 2d 1301, 1319 (9th Cir. 1981).

This category of meritorious plaintiffs unable to obtain a lawyer and forced to proceed *pro se* includes me and many others like me. Even when not facing a Hobson's choice between privacy and access to counsel, *In re Boston Herald, Inc. v John J. Connolly, Jr.*, 321 F.3d 174, 188 (1st Cir. 2003), the financial and structural barriers to obtaining counsel are often insurmountable.

These barriers are compounded by inequities in accessing the courts *pro se*. Not only do I not have the skill and training of my opponents from the Department of Justice, I do not have access to a legal research staff, Lexis, WestLaw, or a law library. Due to my disabilities, I face further difficulties dealing with non-electronic documents. CM/ECF helps, and I use it regularly.

The Committee's proposed rule would worsen this situation — creating a presumptive *de facto* sanction akin to those applied to vexatious litigants — when instead it should be improved, by allowing *pro se* litigants fully equal access to CM/ECF and the many benefits thereof.

D. Argument

1. The proposed rule⁶ confuses permission with requirement

The official committee notes on the proposed rule, and the final committee comments, make clear that the intent of the rule is to protect *pro se* filers from the electronic filing mandate that the rules change would otherwise impose on represented plaintiffs.

I fully support this motivation, so far as it goes.⁷ It is indeed true that many *pro se* filers may not have the skills, equipment, Internet access, electronic document creation and redaction software, etc. that are required to fully participate in CM/ECF. This is particularly acute, as the FRCrP committee points out, for *pro se* prisoners, whose institutions may severely limit their access to email, computers, Internet, and other critical resources.

The proposed rule, for represented parties, permits non-electronic filing on a showing of good cause. In effect — and in my proposed alternative — *pro se* filers should be given a rebuttable presumption of this same good cause, permitting them to file non-electronically without first seeking leave of court. *Pro se* prisoners should be given an *irrebuttable* presumption, in consideration of their much more restrictive and sometimes unpredictable situations.

However, the proposed rule goes much farther: it does not merely permit non-electronic filing by *pro se* litigants (prisoners and otherwise). Rather, it *requires* non-electronic filing — *prohibiting* electronic filing — without a first showing of good cause.

This requirement imposes a wide array of seriously prejudicial, costly, and unequal effects on those *pro se* litigants who *are* capable of using electronic filing and desire to do so.

⁶ Because the proposed changes to the FRAP, FRBP, FRCrP, and FRCvP are essentially equivalent, I treat them as a single 'rule', noting differences only where applicable.

⁷ Prior committee minutes and comments make clear that there are in fact other motivations for the proposed rule that go beyond protection to prohibition. I oppose and address those below.

2. The proposed rule is overbroad, and ignores its procedural implications.

The proposed rule requires that a litigant obtain leave of court, *in each specific case*, to file electronically. Even if they have used CM/ECF before — indeed, even if they are currently a CM/ECF filer in the *same court* — they must obtain leave in each new case. The rule as drafted would even prohibit *attorneys* who are members of the court's bar from electronic filing if they appear *pro se*, i.e. without being "represented by" someone else.

Because leave of court cannot be obtained in a case before that case even exists on the docket, the procedural implication is that *pro se* filers — even those who would easily obtain leave of court — can *never* file case initiation by CM/ECF.

An attorney filer can simply fill out a form (often online), check their consent and agreement to the terms of use, possibly go through an online CM/ECF tutorial, and proceed — initiating the case electronically and having immediate NEFs of all proceedings.

A *pro se* filer must read the local rules (and CM/ECF guidelines) in detail, draft their own motion and affidavit noting every specific requirements of each court, file it by mail, and hope for the best. The rules give no form motion for this, and courts vary in their requirements. A response might come by mail or email, perhaps weeks later (if approved at all).

3. Harms from not allowing CM/ECF by *pro se* filers

Litigants have the right to appear pro se in all court proceedings. 28 U.S. Code § 1654.⁸ This right is Constitutionally backed in multiple aspects: the 6th Amendment right to refuse counsel; substantive and procedural due process rights under the 14th Amendment; Constitutional rights of action, such as 42 U.S. Code § 1983 / Bivens; and the per se right to equal access to the courts.⁹

The proposed rule impairs these rights by prohibiting pro se litigants from accessing the benefits of CM/ECF on an equal basis with represented litigants. It does so without any particularized determination that a given pro se litigant, contrary to their presumptive desire to opt in¹⁰, should

⁸ "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein."

⁹ I am aware of only one case that has analyzed differential CM/ECF rules for *pro se* litigants: *Greenspan v. Administrative Office of U.S. Courts*, No. 5:14-cv-02396 (N.D. CA. Dec. 4, 2014) at *13-14 (upholding CAND L.R. 5-1(b), which prohibits *pro se* electronic filing without leave of court, under rational basis review). However, *Greenspan* did not raise, and that court did not consider, the arguments presented here; the case was principally about whether *Greenspan* could represent his corporation *pro se*.

Even there, the court's reasoning ("a number of *pro se* litigants lack access to a computer ... or the skills needed to maneuver through the electronic case filing system", *id.* at *14) only supports a permissive rule exempting *pro se* litigants from otherwise-mandatory electronic filing (i.e. allowing them to file either way).

It does not indicate any rational basis for going further and *forbidding* all members of the class of *pro se* litigants from using electronic filing until leave of court is obtained, merely because some members of the class may not wish to, or may not be able to, take advantage of it.

This argument is especially weak when applied to *pro se* litigants who actively wish to opt in. If, given access, someone can file a case initiation — perhaps the most complex single docket entry in the CM/ECF system — it would surely be hard to find any rational basis to assume that they are *not* able to use CM/ECF. If they are not able to, no harm is done in allowing them to try.

¹⁰ I assume here that the *pro se* litigant in question would, if permitted, sign up for CM/ECF online and file everything electronically — but for a rule requiring them to first obtain leave of court. If they file on paper voluntarily, these harms are still present, but are at least consented to.

The alternative rule I proposed above would protect *pro se* litigants who can be presumed to have good cause not to use CM/ECF, by allowing them to continue to file by paper unless the

be barred from CM/ECF usage.¹¹

a. Total ban on pro se CM/ECF case initiation

Because a case must be initiated before a motion for CM/ECF access can even be filed and an order issued, any requirement to first obtain permission means all *pro se* case initiation must be filed on paper. No CM/ECF permission order, no matter how timely granted, can cure this.

The types of harms this causes are detailed below — but case initiation is unique.

The exact filing time can be dispositive, as when there is a statute of limitations or other jurisdictional deadline. This is especially so if the deadline is over a weekend or other time when the court is physically closed, or if the situation precludes the luxury of additional time to file.

In cases seeking PI/TRO relief — particularly an emergency *ex parte* TRO — case initiation delays can cause a winnable issue to be mooted, or exacerbate an irreparable harm. While TROs are only rarely merited, a plaintiff is no less entitled to such relief merely for being *pro se*.

Case initiation documents may be larger than other motions — particularly now, when cautious plaintiffs may feel forced to provide extensive affidavits or exhibits upfront to avoid an *Iqbal* challenge. Especially when courts require multiple duplicates of case initiation documents for service, chambers, etc., the printing and mailing costs are higher than for other filings.

All *pro se* litigants are irreparably harmed by a rule that requires post-initiation CM/ECF permission. In at least some situations, this alone can make or break a case.

b. Delays

Filing on paper imposes numerous delays.

CM/ECF access is directly linked to receiving notices of electronic filing (NEFs). Where a

court makes a particularized determination overcoming this presumption.

¹¹ For instance, a court might determine that a given litigant is vexatious; that they do not appear to receive adequate notice by email, and should be served by mail instead; or that for some reason their CM/ECF usage is so severely impaired or abusive, where their paper filings would *not* be, that they should be prohibited from using CM/ECF.

CM/ECF filer receives immediate notice of every filing by email, a non-electronic filer must wait for physical mail to arrive (and possibly to be forwarded, scanned, etc) before even being aware of the filing.¹² For litigants with disabilities, who travel frequently, or reside overseas, such as me, waiting for and accessing physical mail imposes routinely delays of weeks.

This is just to *receive* filings; one must also respond.

Whereas CM/ECF allows *immediate* filing and docketing, paper filings must first be printed, mailed, processed by the court's mailroom, processed by the court's clerk, and docketed.

Depending on the location of the litigant and court, the price paid for printing & mailing services, and other factors, this can routinely take about a week to complete.

In most situations, paper filing cannot be completed at all on weekends or after business hours. Where a CM/ECF filer might stay up late to finish a brief, realize that it won't be done in time, and timely file a motion for extension at 11:50 pm that is nearly certain to be granted, it would be impossible for a paper filer to do the same.

If a dispositive motion is pending, such as MTD or MSJ, then the court could rule on the "unopposed" motion, against the *pro se* litigant — dismissing their case before their motion for extension even has the chance to reach the courthouse.

Due to these delays, a *pro se* litigant is impaired should they seek to file a timely *amicus curiae* brief or to intervene in a case.

People who can afford lawyers are not the only ones who can or should be friends of the court. “An amicus brief should normally be allowed” when “the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.” *Cnty. Ass’n for Restoration of Env’t (CARE) v. DeRuyter Bros. Dairy*, 54 F. Supp. 2d 974, 975 (E.D. WA. 1999) (citing *Northern Sec. Co. v. United States*, 191 U.S. 555, 556 (1903)). Presumptive CM/ECF prohibition imposes another unnecessary burden on would-be *amici* who

¹² Alternatively, they must check PACER on a daily basis, incurring fees that NEF recipients do not while also incurring a different burden on their work habits.

do not have the resources to hire a lawyer. These burdens cause the courts lose the voices of many who have "unique information or perspective" to proffer. As with so many parts of our justice system, this systemically and selectively silences people and groups with less money.¹³

Seeking leave to intervene in a case is hardly a sign of a frivolous filing. Motions to intervene as a member of the press, in order to challenge seal or protective order, is part of the "long-established legal tradition [of] the presumptive right of the public to inspect and copy judicial documents and files". *In re Knoxville News Sentinel Co.*, 723 F.2d 470, 473-74 (6th Cir. 1983), citing *Nixon v. Warner Communications*, 435 U.S. 589, 597 (1978).¹⁴ In today's era of

¹³ Recently, the Language Creation Society (a non-profit organization I founded) filed an *amicus* brief in *Paramount v. Axanar*, No. 2:15-cv-09938 (C.D. CA., *amicus* filed April 27, 2016) (re copyrightability of the Klingon language). See <http://conlang.org/axanar>.

Fortunately, we were able to obtain the services of an excellent First Amendment lawyer *pro bono*. Without his generosity, we could not have afforded counsel, and I would likely have drafted and filed the *amicus* myself. Within the LCS, I had the best combination of legal and linguistic expertise to present the court with "unique information or perspective" on an issue — whether or not languages can be copyrighted — that the parties only touched on in passing.

In an entirely different context, I have done similarly on behalf of another nonprofit I founded — opposing a poorly crafted FEC advisory opinion request on Bitcoin based campaign finance contributions. The proposal was backed by both an extremely experienced campaign finance lawyer and the Bitcoin Foundation, but I had the unique perspective on the *intersection* of law and technology needed to point out many severe loopholes in the plan. My opposition was successful (FEC deadlocked 3-3) — as was my later alternative proposal (approved 6-0). See <https://www.makeyourlaws.org/fec/bitcoin/caf> and <https://www.makeyourlaws.org/fec/bitcoin/>.

I recognize that this may seem like an attempt to brag, but it is not. I am perhaps unique in my particular combination of skills, but so is everyone. That is the whole point of *amici*: to encourage third parties to contribute their unique perspectives to courts' decisionmaking. This purpose is not served by discouraging *amici* who cannot afford a lawyer.

¹⁴ The circuits are *unanimous* that third parties may permissively intervene for the specific purpose of accessing judicial records. *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 783 (1st Cir. 1988); *Martindell v. International Telephone and Telegraph Corp.*, 594 F.2d 291, 294 (2nd Cir. 1979); *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 778 (3rd Cir. 1994); *In re Beef Industry Antitrust Litigation*, 589 F.2d 786, 789 (5th Cir. 1979); *Meyer Goldberg, Inc. v. Fisher Foods, Inc.*, 823 F.2d 159, 162 (6th Cir. 1987); *Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 896 (7th Cir. 1994); *Beckman Industries, Inc. v. International Insurance Co.*, 966 F.2d 470, 473 (9th Cir. 1992); *United Nuclear Corp. v. Cranford Insurance Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990).

citizen journalism, it is not only large media organizations who can afford lawyers that need to exercise this right. Independent journalists do too — and must file a *pro se* intervention to do so.

This inequity in access and delays results in two procedurally different systems. In one, a litigant can routinely work right up to the deadline, and quickly make last-minute filings if necessary. In the other, a litigant faces a *de facto* one week reduction of all their drafting times, and a total bar to last-minute filings.¹⁵

This inequity goes beyond mere convenience. If non-consensual, it is a substantial burden added to *every part* of litigating a case — from reducing the time one has to draft filings and access for independent journalists all the way to being dispositive of certain causes of action or barring some critical forms of relief, like last-minute extensions on dispositive motions, altogether.

c. Costs

Filing electronically, if one has the computer and Internet access needed to participate in CM/ECF, costs nothing. The entire cost of making, transferring, and serving PDFs, even hundreds of pages' worth (a few megabytes at most), amounts to not barely one *milli-cent*.¹⁶

By contrast, printing costs about 10-20¢ per page, and mailing an average sized motion via certified mail costs about \$5. Paper filers must print and mail copies of every filing to the court and to all other parties. Court rules often require multiple copies for the court itself.¹⁷

This is on top of any cost or time required to get to a print shop or post office in the first place.

For litigants who are overseas or disabled, and therefore unable to access a U.S. post office in person in order to send certified mail, this creates additional costs and other barriers — requiring the use of online print and mail services, depending on friends, etc.

¹⁵ *Pro se* litigants are given no special consideration for procedural standards such as filing times.

¹⁶ See e.g. <https://aws.amazon.com/s3/pricing/> (storage and transfer costs ~2¢ per *gigabyte*).

¹⁷ See e.g. Ninth Circuit Rule 25-5(f), FRAP 27(d)(3) (ordinarily requiring no paper copies of motions for CM/ECF users — but for paper filers, requiring one 'original' plus three 'copies' for the court).

With each filing costing about \$5-20, and dozens of filings per case, these costs can easily accumulate to hundreds of dollars.

This is especially harmful for *pro se* litigants proceeding *in forma pauperis* ("IFP"), 28 U.S.C. § 1915. While IFP plaintiffs are excused from court fees, they are *not* protected from such costs. A court that requires a *pro se* IFP litigant to file on paper effectively imposes unnecessary extra costs on them — costs that their represented opponents do not bear. This goes directly against the intent of the IFP statute.

Even if the *pro se* IFP litigant is successful, and has the skill and awareness to file a motion for costs, such motions can generally only be filed after final judgment. In the meantime, the litigant must incur potentially hundreds of dollars — even though a court granting IFP status has already determined that its filing fee, ~\$400, is more than they can reasonably bear.

These costs also hinder equality on the merits. A *pro se* litigant without CM/ECF access may easily be deterred from filing evidence, such as exhibits or affidavits, that could make the critical difference to whether a case survives *Iqbal* (or 28 USC § 1915(e)(2)(B)) review.

d. Accessibility and presentability

Properly made electronic PDFs are dramatically more accessible than scanned paper. CM/ECF normally generates the former; a "non-electronic filing" necessarily generates the latter.

For people with disabilities such as blindness, this difference is critical. Modern optical character recognition (OCR) technology is very inaccurate; a scanned and OCR'd document is functionally inaccessible to adaptive technology such as screen readers — whereas the electronic document from which it was printed is likely to be largely accessible.¹⁸

Electronic documents are better for everyone than scanned paper. They are more readable on a

¹⁸ *Full* accessibility is more complicated, and requires paying attention to preserve structural metadata such as headers, as well adding metadata for some information, such as images. See e.g. the U.S. Access Board's new regulations under the Rehabilitation Act § 508: <https://www.access-board.gov/guidelines-and-standards/communications-and-it/about-the-ict-refresh/overview-of-the-final-rule>

screen; they can be more readily printed in large print or other adaptive formats; they preserve hyperlinks; and they permit PDF structuring, such as bookmarks for sections or exhibits.

These benefits are not only for the filer. Other parties' counsel may have disabilities¹⁹, as may the judge²⁰. Even for those without disabilities, very routine operations — for instance, copying a citation into a search engine, or pasting a quote into a draft response or opinion — are far easier with electronic documents, but can pose significant barriers with scanned paper documents.

Receiving paper filings hinders the litigant's own access to court documents.

Being required to file on paper hinders *everyone's* access to the litigant's filings, making them less likely to be read as carefully or treated as seriously as they might otherwise be — and creating yet another subtle but significant bias against the *pro se* litigant.²¹

e. Tracking cases of interest

Although not a formal part of the CM/ECF rules, part of how the current CM/ECF system works is that CM/ECF filers — but not ordinary PACER users — can track "cases of interest". This allows someone to receive the same NEFs as parties do (aside from certain sealed filings), for more or less any case in a court for which the person has CM/ECF access.

This is not merely a frivolous convenience. Cases of interest may be ones in which someone may wish to file an amicus or intervention. They frequently present similar issues to those one is litigating, and thereby give awareness of arguments to crib from or prepare against, evidence found by other litigants, or even intervening authority that may justify an FRAP 28(j) letter or a

¹⁹ See e.g. <http://www.blindlawyer.org/>

²⁰ For instance, Ninth Circuit Judge Ronald M. Gould, a widely respected and active jurist, has advanced multiple sclerosis. Although I do not know what specific tools Judge Gould uses, screen readers are a common adaptive technology for MS. See e.g.: <http://www.uscourts.gov/news/2013/12/16/focus-what-you-can-do-advises-judge-ms> http://www.gatfl.gatech.edu/tflwiki/images/5/59/UGA_-_AAC_DND_2014_Fall_Presentation.pdf

²¹ See e.g. Judge Alex Kozinski, *The Wrong Stuff* (discussing ways to annoy a judge and thereby lose one's case — including through the format of briefs).

motion for reconsideration. They may be of journalistic interest, where immediate notification of developments is critical to presenting timely news to one's audience.

There is no good reason to restrict this functionality — but as is, non-attorneys cannot routinely and readily get access to this extremely useful tool unless they are first granted CM/ECF access in a particular court.

4. Concerns particular to prisoners

As the FRCrP committee correctly noted in comments on its version of the proposed rule, prisoners are often unable to obtain or maintain reliable access to the basic tools needed to use CM/ECF. Prisons may prohibit access to email, Internet, or even word processing software, and this access may vary if a prisoner is transferred or subjected to administrative punishments.

Where most *pro se* litigants should be presumed to have good cause not to use CM/ECF, a *pro se* prisoner should get an *irrebuttable* presumption of good cause. The court, and indeed the prisoner, may not always know or be able to predict when their access will be impaired. To the extent that the prisoner wants and is able to participate in CM/ECF, it should still be allowed, for all the above reasons. However, prisoners should *always* have the option of filing by paper, even if they are otherwise CM/ECF participants, without needing to seek any leave of court. The prisoner is in the best position to determine which option is best for them at any given time.

While it is true that the 6th Amendment *per se* only protects the right to participate *pro se* in criminal proceedings. However, prisoners have just as much right to participate *pro se* in other matters as anyone else, including under [28 U.S.C. § 1654](#).

The Supreme Court has explicitly "reject[ed] the ... claim that inmates are ill-equipped to use the tools of the trade of the legal profession", *Bounds v. Smith*, 430 US 817, 826 (1977) (internal quotations omitted). CM/ECF is the modern "tool of the trade", and denying access to it would impair prisoners' "fundamental constitutional right of access to the courts", *id.* at 828, just as much in matters such as civil rights complaints as in criminal proceedings.

Filing accommodations that protect prisoners' rights to access the courts must therefore be made across *all* the rules of procedure, not just the criminal rules. My proposed alternative does so.

Further, not all *pro se* participants in criminal proceedings are prisoners. Some will be out on bail pending trial, or participating due to some post-release criminal proceeding. These *pro se* participants must have their 6th Amendment rights protected, and will often face the similar barriers to *pro se* IFP litigants, but do not have the concerns specific to the prison context.

5. Concerns raised in committee minutes not expressed in the final proposed note

The minutes of the committees discussing *pro se* access to CM/ECF demonstrate a range of concerns about possible abuse of the system. I believe it is clear that these concerns are the real reason — unexpressed in the final proposed note — for why the proposed rule goes beyond merely not requiring *pro se* CM/ECF use, to prohibiting it unless permission is first obtained.

As an initial matter, the Administrative Procedure Act, which applies to this rulemaking proceeding, does not permit such covert purposes. The official notes and comments simply do not support the extra step of a presumptive prohibition on *pro se* CM/ECF use; they only justify an exception from the CM/ECF requirement otherwise imposed on attorney filers.

If the Committee does wish to go this extra step, it must plainly justify its reasons, on the record.

I do not believe that any of the previously expressed concerns justify the proposed rule. In essence, it constitutes a presumptive sanction — equating "*pro se*" with "presumed vexatious".

Like all forms of prior restraint, this is anathema in our legal system.

The expressed concerns do not justify impairing the entire class of *pro se* litigants for the sins of a few; those sins are in some cases imaginary, or are even protected rights; and even for those few people who may abuse the system, a presumptive limitation on CM/ECF use *per se* either would not cure the issue or is not the appropriate remedy.

By analogy, suppose that an executive agency undergoing public APA notice & comment had a rule allowing lawyers to submit comments electronically immediately visible to everyone — but requiring that all others submit comments on paper, citing a concern that some citizens might file abusive content. That rule would surely be struck down on court challenge, as a clear example of First Amendment prior restraint.

This proposed rule is not exempt from the same inquiry, and the Committee should apply the same scrutiny it would apply to any other attempt at a prior restraint on speech.

With that said, let us examine the specific concerns raised.²²

a. Not having the capability to use CM/ECF

Certainly many *pro se* litigants, particularly prisoners, will not have the ability to use CM/ECF — either due to lack of skill or comfort with the CM/ECF system itself, or lack of Internet and computer access, or some other such impediment.

First off, this concern only justifies an exemption, not a prohibition. Each individual litigant is the person who should decide their own capabilities and comfort, and opt in or out of CM/ECF as they see fit.

I hope that the Committee does not believe that *pro se* litigants are presumptively so incapable of judging for themselves whether or not they can use CM/ECF, receive email dependably enough, satisfactorily complete whatever CM/ECF training is available, etc. — even where they can be required, like any registrant, to fill out online forms and agreements stating otherwise — that courts should paternalistically take this decision away from the entire *class* of *pro se* litigants.

This of course in no way prevents a court from making an *individualized* determination about a specific *pro se* litigant, based on good cause — either that they are sophisticated enough that they should be required to file electronically like an attorney, or that they are so bad at using CM/ECF that they should be ordered to only file on paper. Such orders can be contingent (e.g. on completing some training), limited to a given case, or applied presumptively for *all* future filings (as with vexatious litigant orders prohibiting filing in general without permission, but particular to electronic filing).

My proposed alternative rule permits courts to make such determinations. It simply requires that they be made on a case by case basis, giving the *pro se* litigant the benefit of an initial presumption of good cause.

²² I have not cited specific sources for each, as I do not wish to embarrass any individual Committee member. All can be found in the minutes and reports of committees' consideration of the proposed CM/ECF rules, except for one which was raised to me in person by a member of the FRCP committee following my testimony at the December 2016 hearing.

b. Filing pornographic or defamatory content

It is possible, though surely more apocryphal²³ than descriptive, that a *pro se* litigant may file pornographic or otherwise inappropriate material on the record.²⁴ But courts have wide powers to issue orders to show cause and create tailored sanctions for inappropriate behavior in court, including for abusive filings.²⁵

When used as a direct part of litigation filings, e.g. as a legal tactic, what would otherwise be defamation is protected by absolute litigation privilege.²⁶ It may be unwise or uncouth, but courts routinely permit *pro se* litigants to attempt all kinds of unwise arguments. Should it stray outside the bounds of what is privileged, the defamed party has their usual remedies.

It is improper for courts to filter filings because they will publicly appear on PACER and *might* contain inappropriate content. A document merely being filed and available on PACER does not imply any imprimatur of approval by the court. Even so, courts are free to strike or seal filings, or to sanction litigants, if there is cause to do so.

Curtailling individual CM/ECF access does not even prevent this issue. Litigants can trivially post anything they would post in a filing in a blog or other website, outside the court's control.

In short, this concern is nearly a textbook definition of prior restraint, with the textbook response: apply tailored sanctions only afterwards, when and if they are appropriate punishment.

²³ The legal humor site Lowering the Bar provides at least a couple examples, e.g.:

<https://loweringthebar.net/2015/04/to-f-this-court.html>

<https://loweringthebar.net/2011/12/note-catholic-beast-is-not-a-legal-term-of-art.html>

However, considering the huge number of *pro se* filings and tiny number of examples found even by such dedicated collectors as Kevin Underhill, this seems to be a case of the exception proving the rule.

²⁴ This assumes that the material is in fact inappropriate. There are surely some equally rare cases for which such material is entirely appropriate and necessary evidence.

²⁵ Lowering the Bar's case law hall of fame helpfully provides a florid example: *Washington v. Alaimo*, 934 F.Supp. 1395 (S.D. Ga. 1996).

²⁶ See e.g. <http://www.abi.org/abi-journal/the-boundaries-of-litigation-privilege> (collecting cases and noting several exceptions).

c. Improper docketing

Novice CM/ECF users may docket filings improperly — e.g. listing the wrong action or relief, joining separate motion documents in a single filing, misusing the 'emergency' label, failing to upload exhibits, etc. Some amount of this is simply part of learning the system.²⁷ Even in cases between giant corporations with very experienced counsel, one regularly sees docket clerk annotations of filing deficiencies or correcting docketing errors.

In non-electronic filing, the clerk must scan incoming documents, decide which sections are separate documents, exhibits, etc., and do all the docketing. Sometimes they too can get this wrong, e.g. attaching an affidavit as an exhibit to the wrong motion.

Even if someone is a somewhat inept CM/ECF user, docket clerks routinely screen incoming filings and will correct clear deficiencies or errors. Doing so based on at least the litigant's first pass attempt at classifying their own filing is surely easier than doing it whole cloth — and over time, *pro se* litigants will learn to avoid making the same mistakes.

If the litigant is truly so grossly incompetent and unable to improve that their use of CM/ECF filing is a serious burden to the court's clerks where their paper filings would not be, the court can of course determine that there is good cause to forbid CM/ECF use — presumably after first taking less drastic remedial measures, such as providing the litigant with learning materials, or ordering them to certify that they have completed online CM/ECF training.

This concern is inappropriately paternalistic, and does not justify the harms caused by lacking access to CM/ECF.

²⁷ As a personal example: recently, when attempting to file a large number of exhibits for an MSJ opposition, I received a strange ECF error. I was stumped — as was the court's ECF help desk.

After discussion with the ECF coordinator, it turned out that ECF fails if attachments take more than 20 minutes to upload. The solution: split the filing into two separate docket events to limit the upload time per event, and tag the second using the special 'additional large files' event.

To my knowledge, this is not covered by the court's CM/ECF guidance. As I discovered when I first started to use it, the same is true for many other aspects of the system.

d. Improper participation in others' cases

Pro se litigants might make filings in others' cases. But as discussed above re *amicus* briefs and interventions, this is not presumptively improper. The CM/ECF system already has the functionality to limit users to certain types of filings or certain cases.

Pro se litigants — and indeed all CM/ECF users — could properly be limited to initiatory actions (e.g. motions for leave to file and replies thereto) in cases for which they are not participants. Improper filings can be summarily denied or, if necessary, sanctioned.

e. Filing large documents

Pro se litigants, like any other, may occasionally make voluminous filings.

Some judges have their chambers automatically print all documents filed in their cases, but this is their own choice. They could instead choose not to print documents over a certain size, and either deal with them electronically or order the filer to mail a chambers copy where necessary.

Preventing *pro se* litigants from accessing CM/ECF does not prevent them from making voluminous filings, nor is it presumptively appropriate to do so. Sometimes relevant exhibits simply are voluminous. Cross-motions in a copyright dispute can easily be a thousand pages in total. Again, this should be dealt with on a case by case basis — not by a presumptive bar to accessing CM/ECF.

f. Sharing access credentials with others

If a litigant shares their access credentials with someone else, the other person can file for them. They are just as responsible for this — and might have the same needs — as in the situation where an attorney shares access credentials with their paralegal.²⁸

²⁸ I believe this is an inappropriate practice for security reasons, yet it is currently the mandated approach. *See* comment re proposed FRAP 25(a)(2)(B)(iii), USC-RULES-AP-2016-0002-0011, *posted* Feb 3, 2017.

6. Conclusion

Electronic filing comes with many benefits both to the filer and to all other participants. By the same token, any *prohibition* on electronic filing — including a requirement to first obtain leave of court — comes with many harms.

Pro se litigants should be allowed to make their own choice between paper and electronic filing, without having to seek any leave of court. In particular, they should be allowed full access to CM/ECF case initiation and case tracking. To do otherwise is to impose an unjustified, presumptive sanction on the entire class of *pro se* litigants, putting them at an unfair and unconstitutional disadvantage in exercising their rights to equal access to the courts.

Where a court makes an *individualized* determination of good cause, it should be permitted to require or prohibit a *pro se* litigant's use of CM/ECF — with the exception of prisoners, whose special situation requires protecting their absolute right to access the court, by paper if necessary.

My proposed alternative rule does all of the above. The proposed rule does not, and for the reasons detailed above, I oppose it.

I again urge the Committee to bear in mind both the standards that it would apply to any other governmental prior restraint on such fundamental rights as participation in the legal system, and the one-sided and unrepresentative nature of its own makeup and deliberation. There is an ironic dearth of zealous advocates of the rights of *pro se* litigants — and the Committee has its own biases, from habitually viewing *pro se* litigants as opponents or as problems to manage.

Pro se litigants' participation in the legal system presents many special challenges. From my own perspective as a flawed but successful *pro se* litigant, one of the biggest is in obtaining some semblance of equality with represented parties. At every step, we face numerous and systemic obstacles to the right of equality, yet are expected to keep pace with our represented opponents.

Before the law sit many gatekeepers. Let this not be one of them.

Respectfully submitted,
/s/ Sai

TAB 5

TAB 5A

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MEMORANDUM

DATE: March 28, 2017

TO: Advisory Committee on Appellate Rules

FROM: Gregory E. Maggs, Reporter

RE: Item No. 15-AP-C: Amending Rules 28.1(f)(4) and 31(a)(1) to allow 21 days for filing reply briefs

In August 2016, the Standing Committee published proposed amendments to Appellate Rules 28.1(f)(4) and 31(a)(1). As shown in the attachment to this memorandum, these amendments extend the time for filing a reply brief in an appeal or cross-appeal from 14 to 21 days. The Committee Note for each Rule explains the purpose of the amendments as follows:

Before the elimination of the "three-day rule" in Rule 26(c) attorneys were accustomed to a period of 17 days within which to file a reply brief, and the committee concluded that shortening the period from 17 days to 14 days could adversely affect the preparation of useful reply briefs. Because time periods are best measured in increments of 7 days, the period is extended to 21 days.

The Standing Committee received two brief comments on the proposed amendments. The Pennsylvania Bar Association "supports the amendments to Rules 28.1 and 31 as reasonable in light of the December 1, 2016 amendment to Rule 26(c)." Comments of the Pennsylvania Bar Association (Tracking No. 1k1-8un9-37e6). The National Association of Criminal Defense Lawyers (NADCL) similarly commented:

NACDL strongly supports the proposed amendments to Rule 28.1(f)(4) and 31(a)(1) extending to 21 days the former 14-day allowance for the filing of reply briefs. The committee is correct that with the elimination of the 3-day addition for papers served electronically, not only will the ability of practitioners to manage their workloads be enhanced by this change but the quality of reply briefing will also be improved.

National Association of Criminal Defense Lawyers (Tracking No. 1k1-8urf-a9eb).

At the May 2017 meeting, based on these positive comments, the Advisory Committee may wish to recommend that the Standing Committee forward the proposed amendments to the Supreme Court.

Attachment

Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure 39-43 (August 2016) (proposed amendments to Appellate Rules 28.1 and 31)

TAB 5B

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1 **Rule 28.1. Cross-Appeals**

2 * * * * *

3 **(f) Time to Serve and File a Brief.** Briefs must be
4 served and filed as follows:

5 (1) the appellant’s principal brief, within 40 days
6 after the record is filed;

7 (2) the appellee’s principal and response brief,
8 within 30 days after the appellant’s principal
9 brief is served;

10 (3) the appellant’s response and reply brief, within
11 30 days after the appellee’s principal and
12 response brief is served; and

13 (4) the appellee’s reply brief, within ~~14~~21 days after
14 the appellant’s response and reply brief is served,
15 but at least 7 days before argument unless the
16 court, for good cause, allows a later filing.

Committee Note

Subdivision (f)(4) is amended to extend the period for filing a reply brief from 14 days to 21 days. Before the elimination of the “three-day rule” in Rule 26(c), attorneys were accustomed to a period of 17 days within which to file a reply brief, and the committee concluded that shortening the period from 17 days to 14 days could adversely affect the preparation of useful reply briefs. Because time periods are best measured in increments of 7 days, the period is extended to 21 days.

1 **Rule 31. Serving and Filing Briefs**

2 **(a) Time to Serve and File a Brief.**

3 (1) The appellant must serve and file a brief within
4 40 days after the record is filed. The appellee
5 must serve and file a brief within 30 days after
6 the appellant’s brief is served. The appellant
7 may serve and file a reply brief within ~~14~~21 days
8 after service of the appellee’s brief but a reply
9 brief must be filed at least 7 days before
10 argument, unless the court, for good cause,
11 allows a later filing.

12 * * * * *

Committee Note

Subdivision (a)(1) is revised to extend the period for filing a reply brief from 14 days to 21 days. Before the elimination of the “three-day rule” in Rule 26(c), attorneys were accustomed to a period of 17 days within which to file a reply brief, and the committee concluded that shortening the period from 17 days to 14 days could adversely affect the preparation of useful reply briefs. Because time periods

FEDERAL RULES OF APPELLATE PROCEDURE 21

are best measured in increments of 7 days, the period is extended to 21 days.

TAB 6

TAB 6A

MEMORANDUM

DATE: April 9, 2017

TO: Advisory Committee on Appellate Rules

FROM: Gregory E. Maggs, Reporter

RE: Item No. 14-AP-D: Public Comments on the Proposed Amendments to Rule 29

I. Introduction

In August 2016, the Standing Committee published proposed amendments to Appellate Rule 29(a). These proposed amendments, as shown in Attachment 1 to this memorandum, would replace the phrase "amicus-curiae brief" with "amicus brief," and would allow a court of appeals to strike or prohibit the filing of an amicus brief that would result in a judge's disqualification.

Two important developments have occurred since August 2016. First, the text of Appellate Rule 29 changed on December 1, 2016 when previously approved amendments became effective. *See* Attachment 2. Second, the Standing Committee received six comments from the public, all of which expressed at least some opposition to the proposed amendments.

Part II of this memorandum explains how the December 2016 amendments necessitate a slight revision of the proposed amendments published in August 2016. Part III summarizes the reasons that the Advisory Committee recommended the proposed amendments to Rule 29 to the Standing Committee. Part IV summarizes the public comments. Part V raises a new concern about Rule 29(b).

At the May 2017 meeting, the Advisory Committee should decide what to report back to the Standing Committee. One possibility is to report back a slightly revised proposal that accommodates the December 2016 revision of Rule 29. Another possibility is to recommend more extensive revisions based on suggestions in some of the public comments. A third possibility would be to recommend tabling the proposed amendments based on the arguments against them made in other public comments.

II. Amendment of Appellate Rule 29 in December 2016

The text of Appellate Rule 29 changed in December 2016 when previously approved amendments took effect. The current text of the Rule appears in Attachment 2. The Advisory Committee Note summarizes the December 2016 amendments as follows:

Existing Rule 29 is renumbered Rule 29(a), and language is added to that subdivision (a) to state that its provisions apply to amicus filings during the court's initial consideration of a case on the merits. . . .

New subdivision (b) is added to address amicus filings in connection with a petition for panel rehearing or rehearing en banc. Subdivision (b) sets default rules that apply when a court does not provide otherwise by local rule or by order in a case. A court remains free to adopt different rules governing whether amicus filings are permitted in connection with petitions for rehearing, and governing the procedures when such filings are permitted.

The December 2016 amendments require two slight revisions of the proposed amendments published in August 2016. First, instead of being made to subdivision (a), the proposed amendments should now be made to subdivision (a)(2) [see lines 8-10 below]. Second, for consistency, the proposed restyling of the phrase "amicus-curiae brief" as "amicus brief" should be made in both subdivision (a)(2) [see line 6 below] and the new subdivision (b)(2) [see line 17 below]. As revised the proposed amendment would be as follows:

1 **Rule 29. Brief of an Amicus Curiae**

2 **(a) During Initial Consideration of a Case on the Merits.**

3 **(1) Applicability.** This Rule 29(a) governs amicus filings during a
4 court's initial consideration of a case on the merits.

5 **(2) When Permitted.** The United States or its officer or agency or
6 a state may file an amicus-curiae brief without the consent of the parties or
7 leave of court. Any other amicus curiae may file a brief only by leave of
8 court or if the brief states that all parties have consented to its filing.

9 except that a court of appeals may strike or prohibit the filing of an amicus
10 brief that would result in a judge's disqualification.

11 * * * *

12 **(b) During Consideration of Whether to Grant Rehearing.**

13 **(1) Applicability.** This Rule 29(b) governs amicus filings during a
14 court's consideration of whether to grant panel rehearing or rehearing en
15 banc, unless a local rule or order in a case provides otherwise.

16 (2) **When Permitted.** The United States or its officer or agency or
17 a state may file an amicus curiae brief without the consent of the parties or
18 leave of court. Any other amicus curiae may file a brief only by leave of
19 court.

20 * * * * *

21 **Committee Note**

22 The amendment authorizes orders or local rules, such as those previously
23 adopted in some circuits, that prohibit the filing of an amicus brief by party
24 consent if the brief would result in a judge’s disqualification. The amendment
25 does not alter or address the standards for when an amicus brief requires a judge’s
26 disqualification.

III. Summary of the Advisory Committee's Reasons for Proposing the Amendments

Appellate Rule 29(a)(2) currently allows 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.” Several circuits have adopted local rules that forbid the filing of a brief by an amicus curiae when the filing could cause the recusal of one or more judges. For example, Second Circuit Local Rule 29.1(a) says: “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 rules are inconsistent with Rule 29(a) because they do not allow the filing of amicus briefs based solely on the consent of the parties. The memorandum indicates the Advisory Committee believed that courts of appeals should be able to issue orders or establish local rules that restrict the filing of amicus briefs because allowing the parties to take an action—i.e., consenting to the filing of an amicus brief—that requires disqualification of a judge seems contrary to the usual presumption that parties do not have the power to influence the identity of the judges who hear their cases. For more details, see Attachment 3 (Memorandum to the Advisory Committee from Gregory E. Maggs, Reporter, regarding possible changes to FRAP 29's authorization of amicus filings based on party consent (October 15, 2015)).

IV. Quotation or Summary of Public Comments

The Standing Committee received six comments on the proposed amendment to Rule 29. In the paragraphs below, I have quoted the shorter comments in full and summarized the longer comments (which are attached in full to this memorandum):

1. Judge Jon O. Newman. The portion of this comment that addresses the proposed amendments to Rule 29 says: "In proposed rule 29, Draft 41, line 3, the word 'curiae' should not be deleted. It's a 'friend of the court brief,' not a 'friend brief.'"

2. Associate Dean Alan B. Morrison [Attachment 4]: This comment suggests that the likelihood of strategic attempt to file an amicus brief that would cause the recusal of a judge is very small. The parties typically do not know the identity of the judges on the panel until shortly before the deadline for filing, and they also typically do not know the judge's recusal policies. The possible benefits of the rule do not outweigh its costs. Preventing the recusal of a judge might require all the money and effort put into an amicus brief to be wasted.

3. Pennsylvania Bar Association. The portion of this comment that addresses the proposed amendments to Rule 29 says:

"When an amicus brief is filed, like the filing of any other brief, it is well before the assignment of the case to a panel. Therefore, neither the amicus nor its counsel have any idea whether the filing of the brief would trigger recusal of a judge who ultimately would be assigned to the case. It seems unreasonable under such circumstances to prohibit or strike the amicus brief, instead of simply allowing the judge to recuse. If there is evidence that an amicus brief was filed for the express purpose of causing the recusal of a particular judge, that might be a basis for striking the amicus brief, but the proposed amendment is not so limited. Similarly, where an amicus engages counsel for the deliberate purpose of causing the recusal of a judge, that could be dealt with by disqualifying counsel, as has been done in several cases."

4. Federal Bar Council [attachment 5]. This comment suggests that the changes may be unnecessary. Several of the local rules only address amicus briefs filed at the stage of rehearing or rehearing en banc. The new subdivision (b) of Rule 29 now addresses such filings. The comment recommends that the Advisory Committee should wait until the courts of appeals have had sufficient experience with the new Appellate Rule 29(b) to assess whether it adequately addresses the problem of amicus briefs that might cause recusals.

5. Heather Dixon, Esq. [attachment 6]. This comment expresses general agreement with the objections of Associate Dean Alan Morrison. The comment then suggests alternative language for amending Rule 29(b) to address the Advisory Committee's concerns. Instead of amending the rule to say that a court might strike or prohibit the filing of an amicus brief, the comment suggests amending the rule to say:

Counsel for amicus curiae are advised that, once a panel of judges has been assigned to a case, amicus curiae briefing that would result in recusal of an assigned judge will only be permitted where the amicus curiae brief would (a) provide the Court with substantial assistance in understanding the issues presented by the parties, or (b) would shed light on a matter of broad public concern that (i) is reasonably expected to be directly impacted by the Court’s decision and (ii) has not been made known to the Court by the parties’ briefing.

6. National Association of Defense Counsel. The portion of this comment that addresses the proposed amendments to Rule 29 says:

NACDL files numerous appellate amicus briefs every year. We are not aware of any circumstance when our doing so has caused the recusal of a judge, either because of the judge’s connection with our Association or because of the judge’s relationship to an attorney signatory to the brief. Nevertheless, we can understand the concern that under-lies the proposed amendment. That said, we recommend a slight change in wording designed to emphasize that only important institutional interests in case-processing or a substantiated concern about judge-shopping would justify rejecting an amicus brief under the amended Rule. Otherwise, the filing of proper amicus briefs should be encouraged, and amicus parties (like NACDL) should be encouraged to seek out and employ their own choice of counsel who would be best suited, in the opinion of the amicus entity itself, to advance the arguments of the amicus curiae. On that basis, we suggest changing the final phrase in the amended rule (line 9) from the presently proposed reference to an “amicus brief that would result in a judge’s disqualification” to read instead, “strike or prohibit the filing of an amicus brief that would *necessitate* a judge’s disqualification.” This wording would better reflect the amendment’s apparent intent, as the Reporter’s Note refers to situations where the filing of “an amicus brief *requires* a judge’s disqualification.”

In sum, one comment suggests a stylistic change. One comment suggests waiting before taking any action until experience with the new subdivision (b) of Rule 29 can be assessed. Two comments suggest alternative language for the proposed amendments. Two comments strongly oppose the proposed amendments. The general tenor of the opposition is that the potential costs of the proposed amendments—especially striking expensive amicus briefs that have already been written—outweigh their likely benefits. As the comments explain, amicus briefs that require recusals are extremely rare. They are of greatest concern during the rehearing stage, and the new amendment to Rule 29(b) already addresses that topic.

The rewording proposed by Heather Dixon, Esq., would alter the function of the proposed amendment. Instead of allowing courts of appeals to establish their own local rules, or panels to issue orders in specific cases, the rewording would establish a new standard applicable to all courts of appeals. This approach might be desirable, but it goes beyond the Advisory Committee's original objective. If the Advisory Committee favors this approach, it might recommend that the Standing Committee seek public comment before sending the proposal to the Supreme Court.

V. New Concern about Rule 29(b)(2)

The proposed revision of Rule 29(a)(2) raises a question about whether further amendment to Rule 29(b)(2) is necessary. Under the proposed Rule 29(a)(2), at the panel stage, a court of appeals will have the authority to strike an amicus brief that has already been filed if the brief would cause a recusal. In contrast, Rule 29(b)(2) does not authorize striking a brief at the rehearing stage. The Advisory Committee thus may wish to consider whether the court of appeals, when considering a rehearing, should have authority to strike an amicus brief that was filed at the panel stage. On one hand striking the brief might be necessary to prevent a recusal on rehearing en banc. On the other hand, the initial panel may have already relied on the amicus brief in making its decision. Striking the brief thus might not fully address recusal concerns.

VI. Conclusion

At its May 2017 Meeting, the Advisory Committee should decide what to report back to the Standing Committee. As explained in the introduction, one possibility is to report back a slightly revised proposal that accommodates the December 2016 revision of Rule 29. Another possibility is to recommend more extensive revisions based on the public comments. A third possibility would be to recommend tabling the proposal based on the arguments made in the public comments.

Attachments

1. Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure 41 (August 2016) (proposed amendments to Appellate Rule 29)
2. Federal Rule of Appellate Procedure 29 (Effective December 2016)

3. Memorandum to the Advisory Committee from Gregory E. Maggs, Reporter, regarding possible changes to FRAP 29's authorization of amicus filings based on party consent (October 15, 2015)
4. Comments of Associate Dean Alan Morrison (Tracking No. 1k0-8s5o-se4r)
5. Comments of the Federal Bar Council (Tracking No. 1k1-8uwk-rvm0)
6. Comments of Heather Dixon Esq. (Tracking No. 1k1-8uqp-5gf1)

TAB 6B

1 **Rule 29. Brief of an Amicus Curiae**

2 **(a) When Permitted.** The United States or its officer or
3 agency or a state may file an amicus-curiae brief
4 without the consent of the parties or leave of court.
5 Any other amicus curiae may file a brief only by leave
6 of court or if the brief states that all parties have
7 consented to its filing, except that a court of appeals
8 may strike or prohibit the filing of an amicus brief that
9 would result in a judge's disqualification.

10

* * * * *

Committee Note

The amendment authorizes orders or local rules, such as those previously adopted in some circuits, that prohibit the filing of an amicus brief by party consent if the brief would result in a judge's disqualification. The amendment does not alter or address the standards for when an amicus brief requires a judge's disqualification.

TAB 6C

Federal Rule of Appellate Procedure 29
(as amended effective Dec. 1, 2016)

1 Rule 29. Brief of an Amicus Curiae

2 (a) During Initial Consideration of a Case on the Merits.

3 (1) Applicability. This Rule 29(a) governs amicus filings during a
4 court's initial consideration of a case on the merits.

5 (2) When Permitted. The United States or its officer or agency or a
6 state may file an amicus-curiae brief without the consent of the parties or
7 leave of court. Any other amicus curiae may file a brief only by leave of
8 court or if the brief states that all parties have consented to its filing.

9 (3) Motion for Leave to File. The motion must be accompanied by
10 the proposed brief and state:

11 (A) the movant's interest; and

12 (B) the reason why an amicus brief is desirable and why the
13 matters asserted are relevant to the disposition of the case.

14 (4) Contents and Form. An amicus brief must comply with Rule
15 32. In addition to the requirements of Rule 32, the cover must identify the
16 party or parties supported and indicate whether the brief supports
17 affirmance or reversal. An amicus brief need not comply with Rule 28, but
18 must include the following:

19 (A) if the amicus curiae is a corporation, a disclosure
20 statement like that required of parties by Rule 26.1;

21 (B) a table of contents, with page references;

22 (C) a table of authorities--cases (alphabetically arranged),
23 statutes, and other authorities-- with references to the pages of the
24 brief where they are cited;

25 (D) a concise statement of the identity of the amicus curiae,
26 its interest in the case, and the source of its authority to file;

27 (E) unless the amicus curiae is one listed in the first
28 sentence of Rule 29(a)(2), a statement that indicates whether:

29 (i) a party's counsel authored the brief in whole or
30 in part;

31 (ii) a party or a party's counsel contributed money
32 that was intended to fund preparing or submitting the brief;
33 and

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

38 (F) an argument, which may be preceded by a summary and
39 which need not include a statement of the applicable standard of
40 review; and

41 (G) a certificate of compliance under Rule 32(g)(1), if
42 length is computed using a word or line limit.

43 (5) Length. Except by the court's permission, an amicus brief may
44 be no more than one-half the maximum length authorized by these rules
45 for a party's principal brief. If the court grants a party permission to file a
46 longer brief, that extension does not affect the length of an amicus brief.

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

54 (7) Reply Brief. Except by the court's permission, an amicus curiae
55 may not file a reply brief.

56 (8) Oral Argument. An amicus curiae may participate in oral
57 argument only with the court’s permission.

58 (b) During Consideration of Whether to Grant Rehearing.

59 (1) Applicability. This Rule 29(b) governs amicus filings during a
60 court’s consideration of whether to grant panel rehearing or rehearing en
61 banc, unless a local rule or order in a case provides otherwise.

62 (2) When Permitted. The United States or its officer or agency or a
63 state may file an amicus-curiae brief without the consent of the parties or
64 leave of court. Any other amicus curiae may file a brief only by leave of
65 court.

66 (3) Motion for Leave to File. Rule 29(a)(3) applies to a motion for
67 leave.

68 (4) Contents, Form, and Length. Rule 29(a)(4) applies to the
69 amicus brief. The brief must not exceed 2,600 words.

70 (5) Time for Filing. An amicus curiae supporting the petition for
71 rehearing or supporting neither party must file its brief, accompanied by a
72 motion for filing when necessary, no later than 7 days after the petition is
73 filed. An amicus curiae opposing the petition must file its brief,
74 accompanied by a motion for filing when necessary, no later than the date
75 set by the court for the response.

76 ADVISORY COMMITTEE NOTE (2016 Amendments)

77 Rule 29 is amended to address amicus filings in connection with requests
78 for panel rehearing and rehearing en banc.

79 Existing Rule 29 is renumbered Rule 29(a), and language is added to that
80 subdivision (a) to state that its provisions apply to amicus filings during the
81 court’s initial consideration of a case on the merits. Rule 29(c)(7) becomes Rule
82 29(a)(4)(G) and is revised to accord with the relocation and revision of the
83 certificate-of-compliance requirement. New Rule 32(g)(1) states that “[a] brief

84 submitted under Rules 28.1(e)(2), 29(b)(4), or 32(a)(7)(B) . . . must include” a
85 certificate of compliance. An amicus brief submitted during initial consideration
86 of a case on the merits counts as a “brief submitted under Rule . . . 32(a)(7)(B)” if
87 the amicus computes Rule 29(a)(5)’s length limit by taking half of a type-volume
88 limit in Rule 32(a)(7)(B). Rule 29(a)(4)(G) restates Rule 32(g)(1)’s requirement
89 functionally, by providing that a certificate of compliance is required if an amicus
90 brief’s length is computed using a word or line limit.

91 New subdivision (b) is added to address amicus filings in connection with
92 a petition for panel rehearing or rehearing en banc. Subdivision (b) sets default
93 rules that apply when a court does not provide otherwise by local rule or by order
94 in a case. A court remains free to adopt different rules governing whether amicus
95 filings are permitted in connection with petitions for rehearing, and governing the
96 procedures when such filings are permitted.

TAB 6D

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MEMORANDUM

DATE: October 15, 2015

TO: Advisory Committee on Appellate Rules

FROM: Gregory E. Maggs, Reporter

RE: Item No. 14-AP-D (Consider possible changes to FRAP 29's authorization of amicus filings based on party consent)

This is a new item that concerns Federal Rule of Appellate Procedure (FRAP) 29(a). At the May 2014 Meeting of the Standing Committee, Judge Sutton observed that FRAP 29(a), which allows filing amicus briefs by consent during initial consideration of a case on the merits, may be in tension with some circuits' local rules. He suggested that the Advisory Committee on Appellate Rules consider whether FRAP 29(a) should be changed in the future. Judge Colloton agreed to add the matter to the Committee's agenda. *See* Minutes of the Committee on Rules and Practice Meeting of May 29-30, 2014, at 14 (excerpt attached).

A. Background and Potential Concern about Disqualification

FRAP 29(a) specifies when an amicus curiae may file a brief with or without leave of the court. The rule says:

(a) When Permitted. The United States or its officer or agency or a state may file an amicus-curiae brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing.

Under the last clause of this provision, if the parties to the lawsuit consent, then the amicus curiae does not have to obtain leave of the court.

A potential concern about the last clause is that the parties might consent to the filing of a brief by an amicus curiae, and that filing may cause the recusal of one or more judges on the panel hearing the case. For example, suppose that Corporation X has sued Corporation Y, and the matter is now on appeal. Both parties consent to the filing of an amicus brief by Corporation Z. Suppose further that, as the result of the amicus filing, a judge on the panel is disqualified. This might happen if the law firm that wrote the brief for Corporation Z is on the judge's recusal list because a relative of the judge works for the firm. *See* Code of Conduct for United States Judges, Canon 3(C)(1)(d)(iii).

Perhaps Corporation X and Corporation Y did not know that the judge would be disqualified by the filing of the amicus brief. Maybe one corporation knew and the other did not. Or perhaps they both knew but did not care about recusal or even favored recusal. In any event, allowing the parties to take an action that requires disqualification of a judge seems contrary to the usual presumption that parties do not have the power to choose the judges who hear their cases.

B. Response by Several Circuits in their Local Rules

Several Circuits have local rules that address the concern that amicus briefs may require recusal:

- DC Circuit Rule 29(b) states in part: “Leave to participate as amicus will not be granted and an amicus brief will not be accepted if the participation of amicus would result in the recusal of a member of the panel that has been assigned to the case or a member of the en banc court when participation is sought with respect to a petition for rehearing en banc.”
- Second Circuit Rule 29.1(a) states: “The court ordinarily will deny leave to file an amicus brief when, by reason of a relationship between a judge assigned to hear the proceeding and the amicus curiae or its counsel, the filing of the brief might cause the recusal of the judge.”
- Fifth Circuit Rule 29.4 states: “After a panel opinion is issued, amicus curiae status will not be permitted if the allowance would result in the disqualification of any member of the panel or of the en banc court.”
- Ninth Circuit Advisory Committee Note to Rule 29-2 states in part: “The Court will ordinarily deny motions and disallow stipulations for leave to file an amicus curiae brief where the filing of the brief would result in the recusal of a member of the en banc court. Any member of the Court who would be subject to disqualification in light of the amicus curiae brief may, of course, voluntarily recuse, thereby allowing the filing of the amicus curiae brief.”

In each of these Circuits, the local rule appears to address the concern about recusal raised by the hypothetical above concerning Corporations X, Y, and Z. Even if Corporation X and Corporation Y consented to the filing of an amicus brief by Corporation Z, the court would not have to accept the brief if doing so would disqualify a judge.

C. Consideration by the Committee

At the October 2015 Meeting, the Committee may wish to consider issues related to this Item. An initial question, raised by Judge Sutton above, is whether the local rules quoted above are inconsistent with FRAP 29(a). They certainly appear to be inconsistent in that they do not

allow the filing of amicus briefs based solely on consent of the parties in all instances. If these local rules are inconsistent, then an additional question is whether FRAP 29(a) should be amended either to authorize local rules of this type or to go further and mirror the substance of these local rules. Under FRAP 47(a)(1), local rules must be consistent with Federal Rules.


Attachment

Minutes of the Committee on Rules and Practice Meeting of May 29-30, 2014 (excerpt)

TAB 6E



Document Details

Docket ID:	USC-RULES-AP-2016-0002 ↻
Docket Title:	Proposed Amendments to the Federal Rules of Appellate Procedure * ↻
Document File:	 HTML
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Phase Sequence:	1
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Document Type:	PUBLIC SUBMISSIONS * ↻
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September 28, 2016

COMMENTS OF ALAN B. MORRISON
GEORGE WASHINGTON UNIVERSITY LAW SCHOOL
PROPOSED CHANGE TO APPELLATE RULE 29

Committee Members:

I am submitting these comments in response to the proposal to amend FRAP Rule 29 to permit courts of appeals to refuse to allow an amicus brief to be filed, or to strike one that has already been filed, if the filing “would result in a judge’s recusal.”

I currently teach civil procedure and constitutional law at George Washington University Law School. For most of my career, I was the co-founder and director of the Public Citizen Litigation Group, which was involved in hundreds of cases in which amicus briefs were filed (both by the Group and other interested parties). I am also a member of the American Academy of Appellate Lawyers and was its President in 1999-2000. I am not in a position to dispute that some judges may have recused themselves because of the filing of an amicus brief, but I do not recall ever seeing such a case. Moreover, as I explain below, it is doubtful that the need for recusal will be obviated by the rule change, and it is almost certain that its application will cause harm to amici and their counsel and will deny other judges the benefit of the contents of excluded amicus briefs. For these and other reasons explained below, I urge the committee not to move forward with this proposal.

As I understand it, the genesis of this proposal is that several circuits have a local rule that allows the court to strike an amicus brief, where its filing might result in a recusal of a judge on the assigned panel, even if the parties had consented to its filing. I agree that these local rules

are inconsistent with current Rule 29, and the committee should make that clear by expressly rejecting them. It should not, however, adopt what these courts of appeals have done.

1. I start by focusing on the proposed remedy when an amicus brief may trigger a perceived need for recusal, either because of the party on whose behalf the brief is filed or the lawyer who authored it. Suppose such a brief arrives in a judge's chambers, and the judge believes there is a basis for recusal. The judge would then know that the party or lawyer causing the recusal has an interest in the case and would almost certainly know on which side. If that is the case because, for example, the judge owns stock in the company which is the amicus, the judge would then know – without knowing what the amicus brief actually says – that she has an interest in the outcome and should not sit, even if there were no brief. The situation is analogous to a case in which one auto company challenges a rule that affects all auto companies, and the judge owns stock in an equally-affected auto company. The judge should not sit if the recusal standards are otherwise met. Moreover, even if the clerk's office screens an amicus brief under the judge's standing instructions, and precludes it from being filed, once the judge gets the briefs of the parties, she will quickly figure out that a company in which she has an interest will be affected, and so she must consider recusal. Put another way, it is doubtful that the remedy of refusing an amicus brief will solve whatever problems exist.

There is likely to be only one situation in which the filing of an amicus brief is being done to obtain the recusal of a particular judge: when a case is about to be heard en banc and the amicus files for the first time there, knowing who the judges are. If there is evidence that strategic recusals by amici are common at the en banc stage, perhaps the rule might be justified if limited in that way. But the proposed rule is not so limited.

In the vast majority of cases heard by three-judge panels, the parties in almost all circuits do not learn the identity of the panel until shortly before argument, after all briefs have been filed. For that reason, it is very unlikely that anyone would know the identity of the panel early enough to use the filing of an amicus brief to induce a particular judge's recusal. In addition, most judges do not have public recusal policies, so that an amicus generally will not be able to figure out if a particular disfavored judge will recuse in that situation (even if the panel is known). And even if a judge has a published policy on when the judge will not sit based on the identity of the *party* or counsel (such as prior law partners), the judge may treat *amicus* participation differently, especially given the limited restrictions under 28 U.S.C. § 144 and the ethics guidance from various codes of judicial conduct. Because many amicus briefs are filed by trade associations or by interest groups with ideological (but not stock ownership) interests, disqualification of a judge based on the presence of an amicus is less likely to be legally required or be desirable in light of the downsides resulting from any recusals. For these reasons, the likelihood of a strategic amicus filing that would obtain the recusal of a possible adverse judge seems quite remote in cases heard by three judge panels.

Recusals based on family relationships or prior close professional relationships are hard to prevent. However, the main cause of recusals, at least at the Supreme Court where the public knows of every recusal (although not always the reason), appears to be (based on public financial disclosures) stock ownership in a party. In the past, judges declined to sell stocks in companies that were likely to come before them because of adverse tax consequences. Congress has now fixed that by including judges and their spouses among those who can sell investments and roll over the proceeds into mutual funds and other neutral investments, not likely to be cause for recusal, without paying tax on any gain. 26 U.S.C. § 1043. Recently, Supreme Court Justices

have taken advantage of this provision to reduce the number of their potential recusals, and the judges on the courts of appeals should be encouraged to do likewise as the best means to deal with this problem.

Finally, if strategic amicus participation by amici and their counsel were a problem, one would expect to see a rule like this for the Supreme Court, where the stakes are higher and amicus participation much more frequent, but no rule has ever been proposed, let alone adopted.

2. Equally if not more important, there are benefits from the filing of amicus briefs that would be lost from the proposed change that would more than offset any potential advantages of adopting this proposal. From the perspective of the judges hearing the case, a rejected amicus brief can mean the loss of important information. It may be a different legal argument, or it may be information about the case's impact not raised or even known by the parties. To be sure, not all amicus briefs are useful, but unless the committee believes that none of them are worth reading, the proposed change is not a sensible way of separating the wheat from the some of the chaff.


From the perspective of the amicus and its counsel whose brief is rejected or stricken after filing, all of their work and money spent would be wasted. The problem could not have been avoided because there is no way that they could know in advance whether there will be a recusal as the judges and their recusal policies are unknown when the decision to file and retention of counsel occurs. In addition, counsel for the parties often co-ordinate with potential amici to fill gaps in the arguments, but those efforts can go for naught if, for reasons not knowable in advance, an amicus brief is denied filing. And, in circuits like the District of Columbia, where amici are strongly encouraged to file a single brief, a denial may mean that no amicus brief is filed on one side of the case, perhaps giving a misleading signal to the panel.

If there were significant harms from the current rule in many cases, perhaps the change might be justified. However, as far as I am aware, there is no evidence of even a modest number of amicus-based recusals. There may be a need to make it clear that current local rules that permit the rejection or striking of amicus briefs filed with the consent of all parties are not authorized, but the case for any other change has not been made, and the negative consequences of adopting this proposal are considerable. I urge the committee not to recommend it.

TAB 6F



Document Details

Docket ID:	USC-RULES-AP-2016-0002 ↻
Docket Title:	Proposed Amendments to the Federal Rules of Appellate Procedure * ↻
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Serving the courts and legal community
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Federal Bar Council

DAVID R. SCHAEFER
President

JOAN R. SALZMAN
Executive Director

February 13, 2017

VIA U.S. MAIL AND REGULATIONS.GOV

The Honorable Steven M. Colloton
Chair, Judicial Conference Advisory Committee on Appellate Rules
c/o United States Court of Appeals for the Eighth Circuit
Thomas F. Eagleton Courthouse
111 South 10th Street, Room 24.329
St. Louis, MO 63102

Dear Judge Colloton:

I am the President of the Federal Bar Council (the “Council”), an organization of over 3,000 federal court practitioners and judges focusing on practice before the federal courts in the Second Circuit. The Council’s Second Circuit Courts Committee has reviewed the Judicial Conference Advisory Committee on Appellate Rules’ proposed amendments to the Federal Rules of Appellate Procedure (the “Appellate Rules”) set forth in the Judicial Conference Committee on Rules of Practice and Procedure’s August 2016 publication of proposed amendments. We understand that the Appellate Rules Committee and the Rules of Practice and Procedure Committee are accepting public comments on the proposed amendments.¹ On behalf of the Council, I respectfully submit the below comment, which addresses the proposed amendment to Rule 29 of the Appellate Rules.

The Appellate Rules Committee has proposed revising Appellate Rule 29(a) to permit federal appellate courts to “strike or prohibit the filing of an amicus brief [by a non-government amicus] that would result in a judge’s disqualification.” Request for Comment at 41. As explained below, this proposed revision is unnecessary in light of intervening amendments to the Appellate Rules that became effective on December 1, 2016, and we therefore recommend that the Appellate Rules Committee consider revisiting the proposed revision after the United States Courts of Appeals have had sufficient time to assess the impact of the current Appellate Rule 29

¹ Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Request for Comment on Proposed Rules Amendments 3–4 (Aug. 12, 2016) [hereinafter “Request for Comment”], <https://www.regulations.gov/document?D=USC-RULES-AP-2016-0002-0002>.

on the concerns that motivated the Appellate Rules Committee’s most recent proposed amendment.

Prior to the amendments to the Appellate Rules that became effective December 1, 2016, Appellate Rule 29 permitted non-government amici to file an amicus brief “by leave of court or if the brief states that all parties have consented to its filing.” Fed. R. App. P. 29(a) (repealed Dec. 1, 2016). On its face, that version of Appellate Rule 29 did not give courts discretion to reject the filing of an amicus brief at any stage of the appeal, so long as all parties had consented. In proposing the revision to Appellate Rule 29 under consideration, the Appellate Rules Committee noted that the United States Courts of Appeals for the District of Columbia, Second, Fifth, and Ninth Circuits had issued local rules permitting the rejection of certain non-government amicus briefs where the filing might cause the recusal of a judge assigned to hear the proceeding. Request for Comment at 17. The Appellate Rules Committee observed that these rules were “inconsistent with Rule 29(a),” and accordingly has proposed revising Appellate Rule 29 to allow the courts of appeals flexibility to reject certain non-government amicus briefs that would cause the recusal of one of the assigned judges. *Id.* at 17–18 (reflecting the Appellate Rules Committee’s belief that “this is a matter appropriately left to the discretion of local circuits” and “the United States or a State should be permitted to file [an amicus brief] without leave of court”).

The Appellate Rules Committee’s Request for Comment discusses a policy objection to the proposed rule as to whether “allowing a court to prohibit the filing of an amicus brief that would cause a judge’s disqualification . . . might block an amicus brief that raises an awkward but important issue about disqualification that the parties themselves do not wish to raise,” but decided that this concern did not warrant a change to the proposed amendment because “local circuits should be permitted to conclude that the benefits of avoiding recusals in a three-judge panel or an en banc court outweigh the potential benefits of an amicus brief.” *Id.* at 18.

Effective December 1, 2016, Appellate Rule 29 was revised “to address amicus filings in connection with requests for panel rehearing and rehearing en banc.” Fed. R. App. P. 29 advisory committee’s note. As revised, Appellate Rule 29 replaces former subsections (a) (governing permission for the filing of an amicus brief on consent or by government amici) and (b) (governing motions for leave to file), with new subsections (a) (permitting the filing of an amicus brief during the initial merits stage by government amici, or by other amici with consent of all parties or with leave of court) and (b) (permitting the filing of an amicus brief during the rehearing stage of an appeal by government amici or by other amici with leave of court). *Compare* Fed. R. App. P. 29(a)–(b) (repealed Dec. 1, 2016) *with* Fed. R. App. P. 29 (a)–(b). Thus, unlike former Appellate Rule 29, the newly revised Appellate Rule 29 only permits a non-government amicus to file a brief on consent during the merits stage, and requires leave of court for the filing of such a brief at the rehearing stage. Fed. R. App. P. 29(b).

For the following reasons, the recent revisions to Appellate Rule 29 obviate the concerns that motivated the proposed amendment under consideration.

First, the local rules of the Fifth and Ninth Circuit Courts of Appeal only limit the ability of non-government amici to file briefs during the rehearing stage of an appeal, and thus are consistent with the current Appellate Rule 29. Fifth Cir. L.R. 29.4 (“After a panel opinion is issued, amicus curiae status will not be permitted if the allowance would result in the disqualification of any member of the panel or of the en banc court.”); Ninth Cir. L.R. 29-2 (During the consideration of whether to grant rehearing or during the pendency of rehearing, “[a]ny . . . amicus curiae [other than the United States] may file a brief only by leave of court or if the brief states that all parties have consented to its filing.”); Ninth Cir. L.R. 29-2 advisory committee note (“The Court will ordinarily deny motions and disallow stipulations for leave to file an amicus curiae brief where the filing of the brief would result in the recusal of a member of the en banc court.”).

Second, it is not clear that the Second Circuit’s local rule ever conflicted with Appellate Rule 29. The Second Circuit’s local rule states that “[t]he 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.” Second Cir. L.R. 29.1(a) (emphasis added). The phrase “deny leave to file” does not necessarily mean “refuse to accept” or “reject.” Under both the prior and current versions of Appellate Rule 29, leave of court is not required for the filing of an amicus brief on consent during the merits phase and thus the Second Circuit’s local rule appears consistent with current Appellate Rule 29.

Third, of the thirteen federal courts of appeals, only the D.C. Circuit maintains a local rule that can be read to permit the rejection of a non-government amicus brief at the merits stage despite the consent of all parties to the appeal. D.C. Circuit Rule 29(b), which was revised effective December 1, 2016, states that “[I]eave to participate as amicus will not be granted and an amicus brief will not be accepted if the participation of amicus would result in the recusal of a member of the panel that has been assigned to the case.” D.C. Cir. R. 29(b). On its face, it is ambiguous whether the clause “an amicus brief will not be accepted” applies to amicus briefs filed on consent. The clause could be read either as an elaboration of the preceding clause— “[I]eave to participate as amicus will not be granted”—or as a separate and independent grant of authority for the court to reject amicus briefs filed on consent at the merits stage. We suggest that the former approach is sounder because the ambiguous text in the local rule should be interpreted, if possible, as being consistent with the Federal Rules. Even under the alternative reading, the D.C. Circuit rule would rarely result in the striking of an amicus brief at the merits stage because it typically would be filed before the merits panel is assigned.

At the rehearing stage, unlike the initial merits stage, there is good reason to allow the Courts of Appeals to reject amicus briefs that will result in the recusal of a panel judge. When members of a panel are publicly known and their positions with respect to an appeal have been stated in the decision on the merits, the potential for strategic use of an amicus filing to cause the recusal of one of the assigned judges is at its highest. Although such conduct appears to be rare, we do not dispute that the Courts of Appeals should be permitted to adopt reasonable rules that mitigate the potential harm to judicial administration that could result from the recusal of a judge

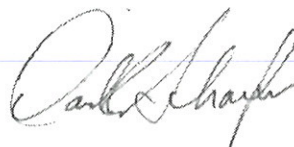
that has already devoted substantial amounts of time to oral argument, deliberation, and the drafting of an opinion on an appeal. In the context of the merits stage, however, the potential for strategic use of amicus briefs to cause the recusal of a particular judge is low because generally, the composition of the panel is not known to the parties or any amici until after all briefing has been completed,² and the panel members' views of the appeal have not been stated publicly. The cost to both the amicus that has devoted substantial time and resources to preparing its brief in good faith and to the panel that is deprived of a valuable perspective that may not be represented by the parties to the appeal strikes us as outweighing the relatively low risk for gamesmanship at the merits stage.

We therefore suggest that the Appellate Rules Committee should consider further revisions to Appellate Rule 29 only after allowing sufficient time for the Courts of Appeals to develop experience with the current rule.

* * *

We appreciate the opportunity to comment on these important issues. If the Council can be of any further assistance, please do not hesitate to contact me.

Respectfully submitted,



David R. Schaefer
President

cc: Sarah L. Cave, Esq.
Chair, Federal Bar Council Second Circuit Courts Committee

Joan R. Salzman, Esq.
Executive Director, Federal Bar Council

² Case Management Procedures in the Federal Courts of Appeals at 68 (First Circuit), 80 (Second Circuit), 92 (Third Circuit), 104 (Fourth Circuit), 116 (Fifth Circuit), 127 (Sixth Circuit), 142 (Seventh Circuit), 156 (Eighth Circuit), 175 (Ninth Circuit); 194 (Tenth Circuit), 209 (Eleventh Circuit), 217 (Federal Circuit); U.S. Court of Appeals for the D.C. Cir., *Handbook of Practice and Internal Procedures* at 8 (“The composition of the merits panel will be posted on the Court’s internet site, usually 30 days before the date of oral argument, and will not be disclosed before that time.”), 36 (“Typically, the final brief will be due at least 45 days before the argument date.”).

TAB 6G

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Document Details

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To: The Judicial Conference Advisory Committee on Appellate Rules
Date: February 14, 2017

I write to comment on the proposed change to Appellate Rule 29 (a) pertaining to amicus curiae briefs.

In light of the change to Rule 29(a) that was implemented in December 2016 (after the current proposed amendments were issued in August 2016), my suggestion addresses the substance of the change proposed in August 2016 in the context of the now-current (as of December 2016) Rule, which now separately addresses the filing of amicus curiae briefs at two different stages of the proceedings: (1) the initial/merits phase, and (2) upon motion for rehearing.

The change proposed by the Advisory Committee would seem to be aimed primarily at avoiding an unfair “gaming” of the system by parties/amici curiae who anticipate an unfavorable ruling by a particular judge and wish to obtain his/her recusal. While this seems to be a legitimate and important concern, the impact and efficacy of the change proposed by the Advisory Committee (as written) would seem to depend on the particulars of the process a Circuit uses for assigning judges to a panel and/or reassigning judges after a recusal (e.g., how judges are assigned in the merits stage, how re-assignment is done upon recusal of a judge, when/how the parties become aware of the judge/panel assignments, the amount of time thereafter that is permitted for amici curiae to seek to enter the case, the stage (merits or rehearing) at which amici are permitted to enter, etc.). As such, it seems the proposal, as written, could impact different Circuits differently (and, thus, would perhaps not necessarily have the same efficacy across Circuits in achieving the apparent purpose of warding off unfair “gaming” of the system by the parties and/or amici curiae).

It seems to me that the concerns surrounding amicus curiae filings that the amendment seeks to address need to be approached with language and provisions that would more precisely target that objective.

The changes to the proposed language that I suggest below are intended to reflect and balance the following important factors and concerns, most of which have been raised by the comments of Professor Morrison (with whose comments and concerns I largely agree):

- (1) The importance of informed decisions by appellate courts;
- (2) The importance of fair and unbiased decision of matters of public and private concern;
- (3) The lack of any particular judge’s interest/stake in the outcome of any one case (i.e., the reasonable availability of recusal and reassignment of the case when appropriate);
- (4) The lack of party status of amici curiae (i.e., the lack of any “right”/“entitlement” to participate in the litigation);
- (5) The concern about potential unfair “gaming” of the system by parties and/or amici curiae to obtain recusal of judges expected to rule adversely to a particular interest;
- (6) The general rationale for permitting amicus curiae briefing in the federal court system;
- (7) The value of time/resources expended by counsel for potential amici curiae; and
- (8) The importance of the appellate judges’/courts’ ability to manage their dockets and panel assignments.

In short, the language changes that I suggest (see below) would do five things: (1) prohibit amici curiae from coming into a case and causing a recusal after the initial decision on the merits (i.e., at the stage of the motion for rehearing/reconsideration, where the potential for unfair “gaming” of the system is greatest); (2) in general, permit amicus curiae filings at the merits stage that result in recusal of a judge only if there is a specific good reason that serves the purpose for which amicus curiae briefing is intended (e.g., to provide substantial assistance to the Court in understanding the issues, or to raise issues of broad

public concern that are not addressed by the parties and that would be directly impacted by the court's decision); (3) permit amicus curiae filings only upon leave of court (and not upon mere consent of the parties¹); (4) permit amicus curiae counsel to obtain leave to file briefing before investing significant time and resources in preparing the brief (which would address the concerns raised by Professor Morrison's comments); and (5) permit judges to make a decision as to which amicus curiae briefing to allow before the brief has actually been submitted/reviewed (i.e., before the "harm" of potentially unnecessary/extraneous but potentially conflict/bias-inducing information/briefing is presented to a judge and "injected" into the record such that the neutrality/objectivity of the judge could be viewed as having been "tainted" by a brief that the court would decide not to permit).

- Language Currently Proposed by Advisory Committee (emphasis on proposed change/addition):

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 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, except that a court of appeals may strike or prohibit the filing of an amicus brief that would result in a judge's disqualification.

- Suggested Language (emphasis on suggested changes/additions):

Rule 29. Brief of an Amicus Curiae

(a) **During Initial Consideration of a Case on the Merits.**

(1) **Applicability.** This Rule 29(a) governs *amicus curiae* filings during a court's initial consideration of a case on the merits.

(2) **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.~~ Counsel for amicus curiae are advised that, once a panel of judges has been assigned to a case, amicus curiae briefing that would result in recusal of an assigned judge will only be permitted where the amicus curiae brief would (a) provide the Court

¹ Generally speaking, it seems odd that there would be a situation where both sides of the litigation would desire participation of any given amicus curiae, or that there would be a situation where the Court would be adverse to granting leave for participation of amicus curiae where there is a good reason for such participation.

Why would/should the parties be allowed to decide among themselves which amici curiae briefing is permitted? I cannot think of any good reason for this. It has the feel of the parties teeing up an issue, setting a curriculum, and assigning homework to the Court in order to advance a mutual agenda (something akin to party-steered, legislative issue-teeing via the judicial branch rather than presentation of a genuine dispute between the parties).

The ability of the parties to determine among themselves which amici curiae may participate in the briefing – when coupled with an ability to “game” the system by way of seeking judicial recusal – would seem to present an even greater issue: it would seem to leave the court system open for “control” by private parties/interest groups such that the potential would exist for the courts to be used as a vehicle for something amounting to court-processed legislation by private parties/interest groups. This would seem to be problematic, pursuant to Articles I and III of the Constitution.

with substantial assistance in understanding the issues presented by the parties, or (b) would shed light on a matter of broad public concern that (i) is reasonably expected to be directly impacted by the Court's decision and (ii) has not been made known to the Court by the parties' briefing.

(3) **Motion for Leave to File.** The motion must be accompanied by the proposed brief and state:

- (A) the movant's interest; and
- (B) the reason why an amicus *curiae* brief is desirable and why the matters asserted are relevant to the disposition of the case.

(b) During Consideration of Whether to Grant Rehearing.

(1) **Applicability.** This Rule 29(b) governs amicus *curiae* filings during a court's consideration of whether to grant panel rehearing or rehearing en banc, unless a local rule or order in a case provides otherwise.

(2) **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, and only if such filing presents no reason for recusal of a judge who participated in decision of the case during the initial stage of considering the case on its merits.

(3) **Motion for Leave to File.** Rule 29(a)(3) applies to a motion for leave.

To the extent that the Committee is interested in reading further discussion of the history of – and policy considerations surrounding – amicus curiae briefing in the federal court system, the following academic articles may be of interest:

- Linda Sandstrom Simard, An Empirical Study of Amici Curiae in Federal Court: A Fine Balance of Access, Efficiency, and Adversarialism, 27 Rev. Litig. 669 (2008)
- John Harrington, NOTE, Amici Curiae in the Federal Courts of Appeals: How Friendly Are They?, 55 Case W. Res. L. Rev. 667 (2005)
- Nancy Bage Sorenson, COMMENT, The Ethical Implications of Amicus Briefs: A Proposal for Reforming Rule 11 of the Texas Rules of Appellate Procedure, 30 St. Mary's L.J. 1219 (1999)

Respectfully Submitted,

Heather Dixon, Esq.

2ND CIRCUIT COURTS COMMITTEE, FEDERAL BAR COUNCIL (2012-2017)

FEDERAL BAR COUNCIL MEMBER (2009-2017)

FEDERAL JUDICIAL LAW CLERK (2009-2010, 2011-2017)

PRIVATE PRACTICE (2004-2008, 2010-2011)

TAB 7

TAB 7A

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MEMORANDUM

DATE: April 9, 2017

TO: Advisory Committee on Appellate Rules

FROM: Gregory E. Maggs, Reporter

RE: Item No. 13-AP-H: Public Comments on the Proposed Amendments to Rule 41

I. Introduction

In August 2016, the Standing Committee published proposed amendments to Appellate Rule 41, which concerns the content, issuance, effective date, and stays of the mandate. *See* Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure 47-52 (August 2016) [Attachment 1]. These proposed amendments would make the following five changes:

- Rule 41(b), line 12: The amendment would add the words "by order" to the sentence authorizing a court of appeals to shorten or extend the time when the mandate issues. The proposed Committee Note explains that these words will clarify that a court of appeals cannot stay the mandate by mere inaction.
- Rule 41(b), lines 12-14: The amendment would add the following sentence to the end of subdivision (b): "The court may extend the time only in extraordinary circumstances or under Rule 41(d)." The proposed Committee Note explains that this new limitation "reflects the strong systemic and litigant interests in finality."
- Rule 41(d), lines 17-46: The amendment would delete subdivision (d)(1), which says that a timely petition or motion for a stay of the mandate stays the mandate until disposition of the petition or motion. As explained in the proposed Committee Note, subdivision (d)(1) is redundant because subdivision (b) already specifies that a timely filing of such a petition or motion stays the mandate until disposition. As a result of this proposed deletion, the amendment would renumber subdivisions (d)(2)(A)-(D) as subdivisions (d)(1)-(4).
- Rule 41(d), lines 43 & 45: The amendment would change the time when a court of appeals must issue the mandate following a denial of a writ of certiorari. The current rule

says the time is immediately after "the filing" of the Supreme Court's order. The proposed revision would say immediately "upon receiving a copy" of the Supreme Court's order. The proposed Committee Note explains that the standard of "'upon receiving a copy' is more specific and, hence, clearer."

- Rule 41(d), lines 45-46: The amendment would qualify the requirement that a court must issue the mandate immediately upon the denial of certiorari with the words "unless extraordinary circumstances exist." This sentence would conform Rule 41(d) to the Supreme Court's decision in *Ryan v. Schad*, 133 S. Ct. 2548, 2551 (2013) (per curiam), which ruled that any further stay of the mandate after the denial of certiorari could be exercised only in "extraordinary circumstances."

A memorandum written by Reporter Cathie Struve provides additional background on the proposed changes and the rationales behind them. *See* Memorandum to Advisory Committee on Appellate Rules from Reporter Catherine T. Struve regarding Item No. 13-AP-H (Apr. 9, 2015) [Attachment 2].

The Standing Committee received five public comments about the proposed amendments to Rule 41. Four of these comments object to the proposal to amend Rule 41(b) to say the court of appeals may stay the mandate only in "exceptional circumstances." One of these four comments also recommends an amendment to Rule 41(d)(2)(B). The fifth comment appears to be mistaken about the purpose and effect of the proposed amendments.¹ At its May 2017 meeting, the Committee should consider these comments and decide what to report back to the Standing Committee.

III. Public Comments

A. Objections to the Amendment to Rule 41(b)

In his comments to the Standing Committee, Judge Jon Newman of the U.S. Court of Appeals for the Second Circuit identifies a significant issue with respect to the proposal to amend Rule 41(b) by adding the sentence: "The court may extend the time only in extraordinary circumstances or under Rule 41(d)." *See* Comments of Judge Jon Newman (Tracking No. 1k0-8tv5-az1) [Attachment 3]. Judge Newman explains that a court of appeals might wish to extend the mandate even if extraordinary circumstances do not exist. He explains:

¹ *See* Comments of Ms. Megan Maurer (Tracking No. 1k0-8ss2-yej5) [Attachment 7].

[When] a party has not filed a petition for panel rehearing or a petition for rehearing en banc, a court of appeals sometimes delays issuance of the mandate because one or more members of the court of appeals are considering whether to request a poll of active judges to consider a rehearing in banc or because the court has ordered a rehearing en banc on its own motion and is considering the disposition of such a rehearing. Neither of these circumstances would qualify as "extraordinary circumstances."

Judge Newman further explains that delaying issuance of the mandate in either of these circumstances does not raise the concerns of the Supreme Court in *Ryan v. Schad* about delaying issuance of the mandate after denial of certiorari only for extraordinary circumstances. He therefore recommends deleting the proposed new sentence in subdivision (d)(2). He asserts that "the proposed Rule 41(d)(4) alone meets the concerns expressed by the Supreme Court"

Chief Judge Robert A. Katzmann of the U.S. Court of Appeals for the Second Circuit indicates that other members of the Second Circuit agree with Judge Newman's comment. *See* Comments of Chief Judge Robert A. Katzman (Tracking No. 1k1-8uql-ftr6) [Attachment 4]. Chief Judge Katzman writes: "On behalf of the members of the Second Circuit, I am writing to advise the Rules Committee that all the active judges of the Court and all the senior judges who have had the opportunity to review Judge Newman's comment wish to be recorded as endorsing the views expressed in urging reconsideration of FRAP 41(b)."

The New York City Bar Association shares the same concerns. *See* Comments of the New York City Bar Association (Tracking No. 1k1-8ur5-btlv) [Attachment 5]. The Association's comment says: "We agree with the well-reasoned comments submitted by Judge Jon O. Newman and recommend that the Committee delete the proposed last sentence to Rule 41(b)." The National Association of Criminal Defense Lawyers (NACDL) similarly comments: "We also believe that the 'extraordinary circumstances' standard for withholding issuance of a mandate is too restrictive and too strong in its wording to cover all the unanticipated circumstances that might arise, particularly in – but not limited to – capital cases." Comments of the National Association of Criminal Defense Lawyers (Tracking No. 1k1-8urf-a9eb) [Attachment 6].²

Based on these comments, the Committee may wish to reconsider its proposal to add the extraordinary circumstances requirement to Rule 41(b). In her memorandum to the Advisory Committee, Reporter Cathy Struve explains that Judge Richard C. Tallman proposed adding the

² The heading of the relevant portion of the NACDL's comment appears to have a typographical error. The heading says "APPELLATE RULE 29 – ISSUANCE OF THE MANDATE," but the comment actually addresses Appellate Rule 41.

extraordinary circumstances requirement because otherwise "the courts of appeals can and will use Rule 41(b) to stay mandates in cases that do not fall under Rule 41(d)(2) (otherwise said, in cases where no certiorari petition is filed)." See Attachment 2, at 5-7. The memorandum does not directly address stays that a court of appeals may wish to issue *sua sponte* while deciding whether to grant a motion for a panel rehearing or rehearing en banc. Deleting the sentence would preserve this authority and would not affect cases where certiorari has been denied.

If the proposed sentence regarding extraordinary circumstances is deleted, the proposal to amend subdivision (b) should be revised to read as follows:

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

In addition, the third paragraph of the Committee Note, which explains the purpose for adding a new sentence to the end of subdivision (b), should be deleted.

B. Recommended Additional Amendments to Rule 41(d)

In its comment, the NACDL recommends changes to subdivision (d)(2)(B), which will become subdivision (d)(2) under the proposed amendment. The recommendation is to add the following indicated words:

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

The NADCL gives the following explanation for its recommendation to the words shown above:

Justices of the Supreme Court, sitting as Circuit Justice, often extend the time for filing a petition for periods of up to 60 days under the Court's own rules. Where a Justice has deemed an extension of the certiorari period to be appropriate, it

should not be necessary also to move the Court of Appeals for an extension of the stay of mandate. Rather, the stay should automatically continue for the same period for which the time to file a timely cert petition has been extended. This apparent gap in the present rule could be corrected by revising the subsection to provide that the stay “must not exceed 90 days, *or any longer period allowed by a Justice of the Supreme Court for filing a timely petition*, unless the part[y] who obtained the stay files a petition for the writ and so notifies the circuit clerk” The judges of the court of appeals should not be placed in the petition [position?] of second-guessing the Circuit Justice, as the present proposal does.

At the May 2017 meeting, the Advisory Committee may wish to discuss the merits of this recommendation. A possible response to the NACDL's explanation is that the amendment may be unnecessary. The NACDL has not cited any actual instances in which the current 90-day limit has presented a problem. In addition, if a Circuit Justice grants an extension of the time to file a petition for the writ of certiorari, the Circuit Justice presumably also can stay the mandate of the court of appeals under the Supreme Court's Rules. *See* Supreme Court Rule 23.1 (“A stay may be granted by a Justice as permitted by law.”); *Planned Parenthood of Southeast Pennsylvania v. Casey*, 510 U.S. 1309, 1310 (1994) (Souter, J., opinion as Circuit Justice) (explaining the circumstances in which a Circuit Justice may stay the mandate of the court of appeals pending the filing of a petition for certiorari). My research, however, did not uncover any actual instances in which a Circuit Justice both extended the time for filing a petition for certiorari and stayed the mandate.

If the Advisory Committee agrees with the NACDL's proposal, it will have to decide whether to recommend that the Standing Committee propose the additional change to Rule 41(d) to the Supreme Court or instead whether the Standing Committee should first publish the additional change for public comment. The latter course of action would seem appropriate given that the NACDL's proposal goes somewhat beyond the changes published for public comment in August 2016. If the NADCL proposal is published for public comment, the Standing Committee may decide to wait to see the public comments before sending the other proposed amendments to Rule 41 to the Supreme Court.

V. Conclusion

At its May 2017 meeting, the Advisory Committee should consider the public comments on the proposed amendments to Appellate Rule 41. These comments raise significant objections to the proposed new final sentence to subdivision (b) and suggest an additional change to subdivision (d).

Attachments

1. Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure 47-52 (August 2016) (proposed amendments to Appellate Rule 41)
2. Memorandum to Advisory Committee on Appellate Rules from Reporter Catherine T. Struve regarding Item No. 13-AP-H (Apr. 9, 2015)
3. Comments of Judge Jon Newman (Tracking No. 1k0-8tv5-az1)
4. Comments of Chief Judge Robert A. Katzman (Tracking No. 1k1-8uql-ftr6)
5. Comments of the New York City Bar Association (Tracking No. 1k1-8ur5-btlv)
6. Comments of the National Association of Criminal Defense Lawyers (Tracking No. 1k1-8urf-a9eb)
7. Comments of Ms. Megan Maurer (Tracking No. 1k0-8ss2-yej5)

TAB 7B

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24 FEDERAL RULES OF APPELLATE PROCEDURE

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

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

7 **(b) When Issued.** The court's mandate must issue 7 days
8 after the time to file a petition for rehearing expires, or
9 7 days after entry of an order denying a timely petition
10 for panel rehearing, petition for rehearing en banc, or
11 motion for stay of mandate, whichever is later. The
12 court may shorten or extend the time by order. The
13 court may extend the time only in extraordinary
14 circumstances or under Rule 41(d).

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

17 (d) Staying the Mandate Pending a Petition for
18 Certiorari.

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

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

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

32 ~~(B)~~ (2) The stay must not exceed 90 days, unless the
33 period is extended for good cause or unless the

26 FEDERAL RULES OF APPELLATE PROCEDURE

34 party who obtained the stay files a petition for
35 the writ and so notifies the circuit clerk in
36 writing within the period of the stay. In that
37 case, the stay continues until the Supreme
38 Court's final disposition.

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

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

Committee Note

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

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

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

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

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

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

The reference in prior subdivision (d)(2)(D) to the *filing* of a copy of the Supreme Court’s order is replaced by a reference to the court of appeals’ *receipt* of a copy of the

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

TAB 7C

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MEMORANDUM

DATE: April 9, 2015
TO: Advisory Committee on Appellate Rules
FROM: Catherine T. Struve
RE: Item No. 13-AP-H

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

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

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

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

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

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

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

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

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

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

Although a circuit could address this issue by local rule, the dearth of local provisions on point⁴ suggests that local rulemaking on the topic is unlikely. Moreover,

² See *Bell*, 545 U.S. at 804.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

No. 99.

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

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

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

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

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

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

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

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

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

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

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

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

The existence of these parallel provisions in Rules 41(b) and 41(d)(1) appears to be an artifact of the way in which the Rule developed over time. Original Rule 41(a) contained forerunners to both current Rule 41(b) and current Rule 41(d)(1). However, in the original Rule, the forerunner to current Rule 41(b) merely set the default date for issuance of the mandate (measured from entry of judgment) and authorized court-ordered alterations in that date; that part of the Rule made no mention of petitions for rehearing.²³ In 1994, Rule 40 was amended to provide a 45-day period for rehearing petitions in “civil cases in which the United States or an agency or officer thereof” was a party. In the light of that amendment, the original Rule’s presumptive deadline for issuance of the mandate (21 days after entry of judgment) required adjustment. Thus, in 1994 the first sentence of Rule 41(a) was amended to set the presumptive deadline for the mandate’s issuance at “7 days after the expiration of time for filing a petition for rehearing unless such a petition is filed”; meanwhile, no material change²⁴ was made in the last two sentences of then-Rule 41(a) (which already discussed the mandate’s timing in connection with dispositions and denials of rehearing petitions).²⁵ The 1998 amendments extensively restructured Rule 41,

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

²³ Original Rule 41(a) provided:

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

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

²⁴ “Shall” became “must.”

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

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

breaking Rule 41(a) into Rules 41(a), (b), and (d)(1) and giving those provisions substantially²⁶ their current language. What had been the first and last sentences of Rule 41(a) became Rule 41(b). What had been the penultimate sentence of Rule 41(a) became Rule 41(d)(1). New Rules 41(b) and 41(d)(1) were amended to refer to petitions for en banc as well as panel rehearing, and to refer to motions to stay the mandate. The 1998 Committee Note does not discuss the overlap between Rules 41(b) and 41(d)(1).

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

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

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

(Emphases added.)

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

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

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

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

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

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

²⁹ Here are the rules in question:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Committee Note

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

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

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

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

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

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

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

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

IV. Conclusion

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

Encls.

TAB 7D

PUBLIC SUBMISSION

As of: February 17, 2017
Tracking No. 1k0-8tv5-az1t
Comments Due: February 15, 2017

Docket: [USC-RULES-AP-2016-0002](#)

Proposed Amendments to the Federal Rules of Appellate Procedure

Comment On: [USC-RULES-AP-2016-0002-0002](#)

Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: [USC-RULES-AP-2016-0002-0006](#)

Comment from Jon Newman, NA

Submitter Information

Name: Jon Newman

Organization: NA

General Comment

I write to comment on the proposed amendments to the Federal Rules of Appellate Procedure.

Rule 41. My most serious objection concerns Rule 41. That Rule now requires a court of appeal to issue its mandate "7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later" and also permits a court of appeals to shorten or extend the 7-day interval. To this existing language two changes are proposed.

1. First, the proposed amendment adds to Rule 41(b) a new last sentence, which would permit a court of appeals to extend the 7-day interval "only in extraordinary circumstances or under Rule 41(d)." Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure ("Draft") 47, lines 12-14. This sentence would adopt a standard of "extraordinary circumstances" for mandate extensions in two entirely different contexts. The first is a mandate extension before consideration of a case by the Supreme Court. The second is a mandate extension after consideration of a case by the Supreme Court.

The "extraordinary circumstances" standard is appropriate for the second context. Indeed, the Supreme Court announced that standard in a case where a court of appeals had delayed issuance of its mandate long after the Supreme Court had denied a petition for a writ of certiorari. See *Ryan v. Schad*, 133 S. Ct. 2548, 2551 (2013). The Court had previously ruled that a delay in issuing a mandate after the Supreme Court's denial of a petition for a writ of certiorari was an abuse of discretion. See *Bell v. Thompson*, 545 U.S. 794 (2005). The proposed new last sentence to Rule 41(b) implements *Ryan* by cross-referencing Rule 41(d), which, in proposed Rule 41(d)(4), requires a court of appeals to "issue the mandate immediately on receiving a copy of a Supreme Court order denying the petition [for a writ of certiorari] unless extraordinary circumstances exist. See Draft 49, lines 42-46.

However, the "extraordinary circumstances" standard is not appropriate for the first context - where a court of appeals extends the time to issue the mandate before Supreme Court consideration of the case. In a case where the losing party has not filed a petition for panel rehearing or a petition for rehearing en banc, a court of appeals sometimes delays issuance of the mandate because one or more members of the court of appeals are considering whether to request a poll of active judges to consider a rehearing in banc or because the court has ordered a rehearing en banc on its own motion and is considering the disposition of such a rehearing. Neither of these circumstances would qualify as "extraordinary circumstances."

Moreover, extending issuance of the mandate in either of these circumstances raises none of the concerns expressed by the Supreme Court in *Ryan* or *Bell*. Those cases not only concerned mandate delays after Supreme

Court denial of a petition for a writ of certiorari but also were habeas corpus challenges to state court criminal convictions, the type of case where delay implicates consideration of federalism and state prerogatives with respect to prompt enforcement of its criminal law.

There is no more justification for imposing an "extraordinary circumstances" standard for extending the time to issue a mandate before Supreme Court consideration of a case than there would be for setting a time limit for a court of appeals to decide an appeal and imposing that standard on extension of such a time limit.

I urge the Committee to delete the proposed new last sentence to Rule 41(b); the proposed Rule 41(d)(4) alone meets the concerns expressed by the Supreme Court in Ryan and Bell.

2. My second issue and my comments on Rules 25 and 29 are set forth in the attached document.

Thank you for considering these and the attached comments. Judge Jon O. Newman

Attachments

Appellate Rules comments

I write to comment on the proposed amendments to the Federal Rules of Appellate Procedure.

Rule 41. My most serious objection concerns Rule 41. That Rule now requires a court of appeal to issue its mandate “7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later” and also permits a court of appeals to shorten or extend the 7-day interval. To this existing language two changes are proposed.

1. First, the proposed amendment adds to Rule 41(b) a new last sentence, which would permit a court of appeals to extend the 7-day interval “only in extraordinary circumstances or under Rule 41(d).” Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure (“Draft”) 47, lines 12-14. This sentence would adopt a standard of “extraordinary circumstances” for mandate extensions in two entirely different contexts. The first is a mandate extension *before* consideration of a case by the Supreme Court. The second is a mandate extension *after* consideration of a case by the Supreme Court.

The “extraordinary circumstances” standard is appropriate for the second context. Indeed, the Supreme Court announced that standard in a case where a court of appeals had delayed issuance of its mandate long *after* the Supreme Court had denied a petition for a writ of certiorari. *See Ryan v. Schad*, 133 S. Ct. 2548, 2551 (2013). The Court had previously ruled that a delay in issuing a mandate *after* the Supreme Court’s denial of a petition for a writ of certiorari was an abuse of discretion. *See Bell v. Thompson*, 545 U.S.

794 (2005). The proposed new last sentence to Rule 41(b) implements *Ryan* by cross-referencing Rule 41(d), which, in proposed Rule 41(d)(4), requires a court of appeals to “issue the mandate immediately on receiving a copy of a Supreme Court order denying the petition [for a writ of certiorari] unless extraordinary circumstances exist. *See* Draft 49, lines 42-46.

However, the “extraordinary circumstances” standard is not appropriate for the first context – where a court of appeals extends the time to issue the mandate *before* Supreme Court consideration of the case. In a case where the losing party has not filed a petition for panel rehearing or a petition for rehearing en banc, a court of appeals sometimes delays issuance of the mandate because one or more members of the court of appeals are considering whether to request a poll of active judges to consider a rehearing in banc or because the court has ordered a rehearing en banc on its own motion and is considering the disposition of such a rehearing. Neither of these circumstances would qualify as “extraordinary circumstances.”

Moreover, extending issuance of the mandate in either of these circumstances raises none of the concerns expressed by the Supreme Court in *Ryan* or *Bell*. Those cases not only concerned mandate delays *after* Supreme Court denial of a petition for a writ of certiorari but also were habeas corpus challenges to state court criminal convictions, the type of case where delay implicates consideration of federalism and state prerogatives with respect to prompt enforcement of its criminal law.

There is no more justification for imposing an “extraordinary circumstances” standard for extending the time to issue a mandate *before* Supreme Court consideration of

a case than there would be for setting a time limit for a court of appeals to decide an appeal and imposing that standard on extension of such a time limit.

I urge the Committee to delete the proposed new last sentence to Rule 41(b); the proposed Rule 41(d)(4) alone meets the concerns expressed by the Supreme Court in *Ryan and Bell*.

2. Second, the proposed amendment would amend the last sentence of existing Rule 41(b) by requiring that shortening or extending the time to issue the mandate must be accomplished “by order.” Draft 47, line 12. As the Committee Note explains, this requirement responds to the Supreme Court’s concern, expressed in *Bell*, that absence of an order extending issuance of a mandate creates uncertainty.

My concern about the “order” requirement pertains to the common situation where a court of appeals shortens the time for issuing the mandate by stating in its opinion disposing of an appeal, “The mandate shall issue forthwith.” That opinion, of course, appears on the court’s docket, thereby meeting the concern of the Supreme Court in *Bell*. However, it is not clear whether a statement in an opinion that the mandate shall issue forthwith qualifies as an “order” for purposes of amended Rule 41(b). Compare *In re D’Arcy*, 142 F.2d 313, 315 (3d Cir. 1944) (statement in an opinion is not an “order” for purposes of appellate jurisdiction) with *In re Oster*, 584 F.2d 594, 598 (2d Cir. 1978) (statement in an opinion that the mandate shall issue forthwith, see *Ostrer v. United States*, 577 F.2d 782, 789 (2d Cir. 1978), is an “order” for purposes of Fed. R. App. P. 23(d)).

Of course, a court of appeals could easily incorporate its direction to issue the mandate forthwith in a separate order, and perhaps that is what the Committee prefers. Alternatively, the Committee might state in the Committee Note that a statement in an opinion to issue the mandate forthwith would be an “order” within the meaning of Rule 41(b).

Rule 25. In proposed rule 25(c)(2), Draft 34, line 128, a comma is needed after “user”; on line 129, a comma is needed after “system” to conform to the style elsewhere (series of three items); and on line 130, the word “served” should be inserted after “person” as done at Draft 35, lines 142-43.

Rule 29. In proposed rule 29, Draft 41, line 3, the word “curiae” should not be deleted. It’s a “friend of the court brief,” not a “friend brief.”

Thank you for considering these comments.

TAB 7E

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Document Details

Docket ID:	USC-RULES-AP-2016-0002
Docket Title:	Proposed Amendments to the Federal Rules of Appellate Procedure *
Document File:	
Docket Phase:	Notice
Phase Sequence:	1
RIN:	Not Assigned
Original Document ID:	USC-RULES-AP-2016-0002-DRAFT-0017
Current Document ID:	USC-RULES-AP-2016-0002-0016
Title:	Comment from Catherine O'Hagan Wolfe, United States Court of Appeals for the Second Circuit
Number of Attachments:	1
Document Type:	PUBLIC SUBMISSIONS *
Comment on Document ID:	USC-RULES-AP-2016-0002-0002
Comment on Document Title:	Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure
Status:	Posted
Received Date:	02/14/2017 *
Date Posted:	02/15/2017
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Current Assignee:	NA
Status Set By:	Cox, Shelly (USC)
Comment Start Date:	08/11/2016
Comment Due Date:	02/15/2017
Legacy ID:	

Additional Field 1:

Tracking Number: 1k1-8uql-ftr6 

Total Page Count Including Attachments: 1

Submitter Info

Comment: Second Circuit comment on proposed FRAP 41 * 

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Organization Name: United States Court of Appeals for the Second Circuit * 

Submitter's Representative: Chief Judge Robert A. Katzmann, Judge Richard C. Wesley

Government Agency Type: Federal

Government Agency: USJC - JUDICIAL CONFERENCE OF THE UNITED STATES

Cover Page: 

United States Court of Appeals
for the Second Circuit

CHAMBERS OF
ROBERT A. KATZMANN
CHIEF JUDGE

PHONE (212) 857-2180
FAX (212) 857-2189

February 14, 2017

Judicial Conference Committee
on Rules of Practice and Procedure
Tenth Circuit Judge Neil Gorsuch, Chair
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, NE
Washington, D.C. 20544

Dear Judge Gorsuch:

Second Circuit Judge Jon O. Newman, on December 29, 2016, submitted a public comment regarding the proposed amendment to Federal Rule of Appellate Procedure 41, which pertains to the issuance of a court of appeals mandate. The comment, which is available on the United States Courts website, subsequently circulated among Judge Newman's colleagues at the Second Circuit.

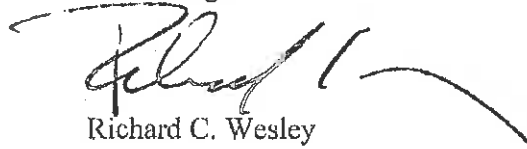
On behalf of the members of the Second Circuit, I am writing to advise the Rules Committee that all the active judges of the Court and all the senior judges who have had the opportunity to review Judge Newman's comment wish to be recorded as endorsing the views he expressed in urging reconsideration of FRAP 41 (b).

Our Court greatly appreciates the Rules Committee's dedicated service on behalf of all judges and the bar to improve the courts' practices and procedures. As the Committee continues consideration of the current proposed amendments, please consider our Court as a resource if further discussion of FRAP 41 would be helpful.

Very truly yours,



Robert A. Katzmann
Chief Judge




Richard C. Wesley
Standing Committee on Rules and
Procedure

40 Foley Square, New York, N.Y. 10007

TAB 7F



Document Details

Docket ID:	USC-RULES-AP-2016-0002 🌐
Docket Title:	Proposed Amendments to the Federal Rules of Appellate Procedure * 🌐
Document File:	 HTML
Docket Phase:	Notice
Phase Sequence:	1
RIN:	Not Assigned 🌐
Original Document ID:	USC-RULES-AP-2016-0002-DRAFT-0020
Current Document ID:	USC-RULES-AP-2016-0002-0017
Title:	Comment from Zachary Shemtob , New York City Bar Association 🌐
Number of Attachments:	1
Document Type:	PUBLIC SUBMISSIONS * 🌐
Comment on Document ID:	USC-RULES-AP-2016-0002-0002 🌐
Comment on Document Title:	Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure 🌐
Status:	Posted 🌐
Received Date:	02/15/2017 * 🌐
Date Posted:	02/15/2017 🌐
Posting Restriction:	No restrictions 🌐
Submission Type:	Web
Number of Duplicate Submissions:	1 * 🌐


Document Optional Details

Status Set Date:	02/15/2017
Current Assignee:	NA
Status Set By:	Cox, Shelly (USC)
Comment Start Date:	08/11/2016 🌐
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Legacy ID:	
Additional Field 1:	Advisory Committee on Appellate Rules, Spring 2017 Meeting

Tracking Number: 1k1-8ur5-btlv 

**Total Page Count
Including Attachments:** 1

Submitter Info

Comment: These comments are on behalf of the NYC Bar Association. * 

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Organization Name: New York City Bar Association * 

**Submitter's
Representative:** Debbie Greenberger

Government Agency Type:

Government Agency:

Cover Page: 



**COMMENT OF THE NEW YORK CITY BAR ASSOCIATION
ON PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF APPELLATE PROCEDURE**

The New York City Bar Association (the “Association”), through its Committee on Federal Courts (the “Federal Courts Committee”), greatly appreciates the opportunity for public comment provided by the Judicial Conference’s Committee on Rules of Practice and Procedure on the amendments to the Federal Rules of Appellate Procedure.

The Association, founded in 1870, has over 24,000 members practicing throughout the nation and in more than fifty foreign jurisdictions. The Association includes among its membership many lawyers in every area of law practice, including lawyers generally representing plaintiffs and those generally representing defendants; lawyers in large firms, in small firms, and in solo practice; and lawyers in private practice, government service, public defender organizations, and in-house counsel at corporations.

The Association’s Federal Courts Committee is charged with responsibility for studying and making recommendations regarding proposed amendments to the Federal Rules of Appellate Procedure. The Federal Courts Committee respectfully submits the following comments on the proposed amendments:

I. Comment on Proposed Revision to Federal Rules of Appellate Procedure 25

The Appellate Rules Committee has proposed revisions to Appellate Rule 25 to follow the proposed revisions of Civil Rule 5, which address electronic filing, signatures, and proof of service. We support these substantive changes. We propose a small edit to the language of proposed Federal Rule of Appellate Procedure 25(a)(2)(B)(iii), which addresses electronic

signatures. As currently drafted, proposed Rule 25(a)(2)(B)(iii) specifies that when a paper is filed electronically, 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.” That could be read to mean that the attorney’s user name and password should be included on any paper that is electronically filed. To eliminate confusion, the Committee proposes the following language to replace Rule 25(a)(2)(B)(iii):

(iii) **Signing.**

The attorney’s name on a signature block serves as the attorney’s signature, provided the paper is electronically filed using the user name and password of that attorney of record.

Alternatively, the Committee proposes a committee note to explain that the user name and password should not be included on the paper itself, but rather that the user name and password that are used to access CM/ECF, together with that attorney of record’s name on a signature block, suffices as a “signature” under the meaning of this rule.

Additionally, the Committee proposes that a committee note be added to mirror the language of the note that follows FED. R. CIV. P. 5, which states:

Care should be taken to ensure that an order to file electronically does not impede access to the court, and reasonable exceptions must be included in a local rule that requires electronic filing by a pro se litigant. In the beginning, this authority is likely to be exercised only to support special programs, such as one requiring e-filing in collateral proceedings by pro se prisoners.

II. Comments on Proposed Revisions to Federal Rules of Appellate Procedure 41

We are concerned about the proposed amendment to Rule 41(b) that would apply the Supreme Court’s “extraordinary circumstances” standard for staying a court of appeals mandate to *all* cases in which the court of appeals has issued an opinion. We agree with the well-reasoned comments submitted by Judge Jon. O. Newman and recommend that the Committee

delete the proposed last sentence to Rule 41(b). *See* USC-Rules-AP-2016-0002-0006 (posted Dec. 29, 2016).

Federal Rule of Appellate Procedure 41 governs the timing for the issuance of the mandate after a court of appeals issues an opinion, with provisions governing a host of procedural postures. Rule 41(d)(2)(D) provides that if the mandate of the court of appeals has been stayed by virtue of the filing of a petition for certiorari, the court of appeals shall issue the mandate “immediately” after the Supreme Court files an order denying certiorari. In *Ryan v. Schad*, the Supreme Court construed this last provision, and held that if a court of appeals has any discretion to stay the issuance of a mandate following denial of certiorari notwithstanding Rule 41(d)(2)’s use of the word “immediately,” the court could exercise such discretion only under ““extraordinary circumstances,”” such as in the event of ““grave, unforeseen contingencies.”” 133 S. Ct. 2548, 2551 (2013) (quoting *Calderon v. Thompson*, 523 U.S. 538, 550 (1998)). Even though both *Ryan* and *Calderon* involved death penalty sentences, no such “extraordinary circumstances” were present in either case. *Id.*

The proposed amendment to Rule 41(b) would apply this “extraordinary circumstances” standard for staying a court of appeals mandate to *all* cases in which the court of appeals has issued an opinion, regardless of whether the U.S. Supreme Court has denied certiorari. In particular, this Committee is concerned that the proposed amendment to Rule 41(b) could disrupt the panel rehearing and en banc procedures of the courts of appeals.

As Judge Newman aptly explains, the proposed “extraordinary circumstances” standard is a poor fit for Fed. R. App. 41(b). In cases in which no petition for panel rehearing or rehearing en banc is filed, there are situations in which a court of appeals acts well within its discretion to delay issuance of the mandate. For instance, delaying the mandate may be appropriate where a

member of the court is considering whether to call for a vote to rehear a case en banc even when no petition for rehearing en banc has been filed, or because the court has ordered a rehearing en banc on its own motion and no en banc opinion has yet been issued. Such en banc deliberation is an ordinary part of full appellate review, which need not be justified with regard to an "extraordinary circumstances" standard developed in an entirely different context, with different interests at stake. *See Ryan*, 133 S. Ct. at 2550 (after the U.S. Supreme Court has denied certiorari, the mandate must issue immediately absent extraordinary circumstances precisely because the mandate was stayed "solely to allow th[e] Court time to consider a petition for certiorari") (quoting *Thompson*, 545 U.S. at 806)); Fed. R. App. 41(d)(2)(D). Rule 41(b) recognizes that the mandate need not issue if a petition for panel rehearing or rehearing en banc has been filed. This reflects the sound policy justification that a mandate need not issue if the original opinion may be withdrawn. These same considerations support allowing the court to delay issuing the mandate if the court determines that en banc consideration or panel rehearing may be appropriate.

Dated: February 15, 2017

New York, New York

Respectfully submitted,

Committee on Federal Courts
New York City Bar Association

Laura G. Birger, Esq., *Chair*
Zachary Baron Shemtob, Esq., *Secretary*
Partha P. Chattoraj, Esq.
Cameron Alyse Bell, Esq.
Neil S. Binder, Esq.
Olga Kaplan Buland, Esq.

Partha P. Chattoraj, Esq.
James R. Cho, Esq.
James Clare, Esq.
Al J. Daniel, Jr., Esq.
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Seth Eichenholtz, Esq.
Margaret Garnett, Esq.
Jason E. Glick, Esq.
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Debra Greenberger, Esq.
Jason M. Halper, Esq.
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Leigh G. Llewelyn, Esq.
Elaine K. Lou, Esq.
John M. Lundin, Esq.
Lillian M. Marquez, Esq.
Benjamin P.D. Mejia, Esq.
Parvin D. Moyne, Esq.
Cheryl Plambeck, Esq.
J. David Reich, Esq.
Stuart M. Riback, Esq.
Nancy Rosenbloom, Esq.
Anjan Sahni, Esq.
Jorge Salva, Esq.
Daniel E. Seltz, Esq.
David B. Shanies, Esq.
Robyn Tarnofsky, Esq.
Hon. Steven Tiscione**
Leonid Traps, Esq.
Jeffrey A. Udell, Esq.
William R. Weinstein, Esq.
Sam A. Yospe, Esq.
Richard M. Zuckerman, Esq.

** Did not participate in this report.

TAB 7G

PUBLIC SUBMISSION

As of: February 17, 2017
Tracking No. 1k1-8urf-a9eb
Comments Due: February 15, 2017

Docket: [USC-RULES-AP-2016-0002](#)

Proposed Amendments to the Federal Rules of Appellate Procedure

Comment On: [USC-RULES-AP-2016-0002-0002](#)

Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: [USC-RULES-AP-2016-0002-0019](#)

Comment from Peter Goldberger, National Association of Criminal Defense Lawyers

Submitter Information

Name: Peter Goldberger

Organization: National Association of Criminal Defense Lawyers

General Comment

Comments on the proposed amendments to Fed.R.App.P. 25, 28.1, 29, 31 and 41, and to Form FRAP-4 on behalf of the National Association of Criminal Defense Lawyers are attached.

Attachments

NACDL comments FRAP 021517

National Association of Criminal Defense Lawyers
12th Floor, 1660 L Street, NW
Washington, DC 20036

February 15, 2017

Rebecca A. Womeldorf, Esq.
Secretary, Committee on Practice & Procedure
Judicial Conference of the United States

AMENDMENTS TO APPELLATE RULES PROPOSED FOR COMMENT, Aug. 2016

Dear Ms. Womeldorf:

The National Association of Criminal Defense Lawyers is pleased to submit our comments on the proposed changes to Rules 25, 28.1, 29, 31 and 41 of the Federal Rules of Criminal Procedure and to Appellate Form 4.

Our organization has nearly 10,000 direct members; in addition, NACDL's 94 state and local affiliates, in all 50 states, comprise a combined membership of some 40,000 private and public defenders. NACDL, founded in 1958, is the preeminent organization in the United States representing the views, rights and interests of the defense bar and its clients.

APPELLATE RULE 25 – SERVICE

NACDL is pleased to see the effective elimination, for papers filed electronically (which is to say, nearly all) of the requirement for a separate document called a "certificate of service," Prop. Rule 25(d)(1).

We are satisfied with the Committee's proposed resolution of the question of filing by unrepresented parties. Prop. Rule 25(a)(3)(B),(c). The proposed amendment overlooks, however, an important change applicable to filings by non-parties. Rule 25(b) has not been, but should be, amended in the same manner as the concurrently proposed amendment to Criminal Rule 45, so as to require *service* on all parties of papers filed not only by parties but also by non-parties. The First Amendment, for example, demands that the press have an efficient and effective way to seek intervention to enforce the public's right of access to most criminal-case pleadings and proceedings. Yet the Rule, even as amended, would not make clear that when the press intervenes in an appellate case all of the intervenor's or proposed intervenor's papers must be served on the defendant-appellant or -appellee, who may have grounds to object. Qualified victims, who are not parties, also have a right to file papers in certain situations, including petitions for mandamus to enforce the Victims Rights Act, making it essential that Rule 25(b) be amended to make clear that it also governs filings by non-parties and requires service of all such papers (unless properly filed *ex parte* by leave of court) on the defendant-appellant or -appellee – a practice that has heretofore been inconsistent.)

APPELLATE RULES 28.1 and 31 – TIME TO FILE REPLY BRIEF

NACDL strongly supports the proposed amendments to Rule 28.1(f)(4) and 31(a)(1) extending to 21 days the former 14-day allowance for the filing of reply briefs. The committee is correct that with the elimination of the 3-day addition for papers served electronically, not only will the ability of practitioners to manage their workloads be enhanced by this change but the quality of reply briefing will also be improved.

APPELLATE RULE 29 – AMICUS BRIEFS and JUDICIAL DISQUALIFICATION

NACDL files numerous appellate amicus briefs every year. We are not aware of any circumstance when our doing so has caused the recusal of a judge, either because of the judge's connection with our Association or because of the judge's relationship to an attorney signatory to the brief. Nevertheless, we can understand the concern that underlies the proposed amendment. That said, we recommend a slight change in wording designed to emphasize that only important institutional interests in case-processing or a substantiated concern about judge-shopping would justify rejecting an amicus brief under the amended Rule. Otherwise, the filing of proper amicus briefs should be encouraged, and amicus parties (like NACDL) should be encouraged to seek out and employ their own choice of counsel who would be best suited, in the opinion of the amicus entity itself, to advance the arguments of the amicus curiae. On that basis, we suggest changing the final phrase in the amended rule (line 9) from the presently proposed reference to an "amicus brief that would result in a judge's disqualification" to read instead, "strike or prohibit the filing of an amicus brief that would *necessitate* a judge's disqualification." This wording would better reflect the amendment's apparent intent, as the Reporter's Note refers to situations where the filing of "an amicus brief *requires* a judge's disqualification."

APPELLATE RULE 29 – ISSUANCE OF THE MANDATE

NACDL supports the deletion of the redundant subsection FRAP 41(d)(1), but otherwise opposes the proposed amended rule as presented. First, if a stay of mandate pending certiorari is granted under the criteria of Rule 41(d)(2) (which would become Rule 41(d)(1)), it is inappropriate that the stay be limited to 90 days unless a petition is timely filed within that time. *See* Prop. Rule 41(d)(2). Justices of the Supreme Court, sitting as Circuit Justice, often extend the time for filing a petition for periods of up to 60 days under the Court's own rules. Where a Justice has deemed an extension of the certiorari period to be appropriate, it should not be necessary also to move the Court of Appeals for an extension of the stay of mandate. Rather, the stay should automatically continue for the same period for which the time to file a timely cert petition has been extended. This apparent gap in the present rule could be corrected by revising the subsection to provide that the stay "must not exceed 90 days, *or any longer period allowed by a Justice of the Supreme Court for filing a timely petition*, unless the party who obtained the stay files a petition for the writ and so notifies the circuit clerk" The judges of the court of appeals should not be placed in the position of second-guessing the Circuit Justice, as the present proposal does.

We also believe that the “extraordinary circumstances” standard for withholding issuance of a mandate is too restrictive and too strong in its wording to cover all the unanticipated circumstances that might arise, particularly in – but not limited to – capital cases. The “good cause shown” standard that applies in so many other parts of the rules for extensions of other important deadlines and times limits would do just fine here. Our judges can be trusted to make sound decisions about the issuance of the mandate, as they do in so many other situations, without having their hands tied by an unduly negative formulation of the standard that looks disapprovingly over their shoulders as they try to ensure justice in individual cases.

APPELLATE FORM 4 – *IN FORMA PAUPERIS*

NACDL strongly supports the proposed amendment to form FRAP-4 to eliminate any call for any part of the applicant’s Social Security Number.

We thank the Committee for its excellent work and for this opportunity to contribute our thoughts. NACDL looks forward to continuing our longstanding relationship with the advisory committee as a regular submitter of written comments.

Respectfully submitted,
THE NATIONAL ASSOCIATION
OF CRIMINAL DEFENSE LAWYERS

By: Peter Goldberger
Ardmore, PA

William J. Genego
Santa Monica, CA
*Co-Chairs, Committee on
Rules of Procedure*

Cheryl D. Stein
Washington, DC

Alexander Bunin
Houston, TX


Please respond to:
Peter Goldberger, Esq.
50 Rittenhouse Place
Ardmore, PA 19003
E: peter.goldberger@verizon.net

TAB 7H

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Document Details

Docket ID:	USC-RULES-AP-2016-0002 ↻
Docket Title:	Proposed Amendments to the Federal Rules of Appellate Procedure * ↻
Document File:	 HTML
Docket Phase:	Notice
Phase Sequence:	1
RIN:	Not Assigned ↻
Original Document ID:	USC-RULES-AP-2016-0002-DRAFT-0004
Current Document ID:	USC-RULES-AP-2016-0002-0004
Title:	Comment from Megan Maurer, NA ↻
Number of Attachments:	1
Document Type:	PUBLIC SUBMISSIONS * ↻
Comment on Document ID:	USC-RULES-AP-2016-0002-0002 ↻
Comment on Document Title:	Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure ↻
Status:	Posted ↻
Received Date:	10/31/2016 * ↻
Date Posted:	11/01/2016 ↻
Posting Restriction:	No restrictions ↻
Submission Type:	Web
Number of Duplicate Submissions:	1 * ↻

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Current Assignee:	NA
Status Set By:	Skillman, Frances (USC)
CFR:	↻
FR Citation:	↻
Federal Register Number:	↻
Start-End Page:	↻

Comment Start Date: 08/11/2016 

Comment Due Date: 02/15/2017 

Legacy ID:

Additional Field 1:

Additional Field 2:


Page Count:


**Total Page Count
Including Attachments:** 2


**Count of Public
Submissions in FDMS on
this FR:** 0

**Total Sum of Public
Submissions Received:** 0

Submitter Info

Comment: I am thoroughly and passionately against the amendment to Rule 41! * 

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State or Province: California

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Organization Name: NA * 

**Submitter's
Representative:**






Government Agency Type:

Government Agency:

Cover Page: 

Status Set Date: 11/01/2016
Current Assignee: NA
Status Set By: Skillman, Frances (USC)
Comment Start Date: 08/11/2016 
Comment Due Date: 02/15/2017 
Legacy ID:
Additional Field 1:
Tracking Number: 1k0-8ss2-yej5 
Total Page Count Including Attachments: 1

Submitter Info

Comment: I am thoroughly and passionately against the amendment to Rule 41! * 
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Country: United States
State or Province: California
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Email Address: msclvsme@aol.com *
Phone Number: 8052316921 *
Fax Number:
Organization Name: NA * 
Submitter's Representative:
Government Agency Type:
Government Agency:
Cover Page: 

Megan Maurer
San Francisco, CA
October 31st, 2016

I am submitting my comment on the possible amendment to Rule 41. In short, I believe this to be against my constitutional rights to be protected from hacking whether it be from a private participant or a government agency. I believe this to only perpetuate the problem of hackers by justifying it: if you can, why can't they. I don't find it appropriate that someone across the country can give clearance to hack my computer for an ambiguous reason.

Thank you for your time.

TAB 8

TAB 8A

MEMORANDUM

DATE: March 28, 2017

TO: Advisory Committee on Appellate Rules

FROM: Gregory E. Maggs, Reporter

RE: Item No. 15-AP-E: Form 4 (deletion of question asking for last four SSN digits)

I. Introduction

In August 2016, the Standing Committee published for public comment an amendment to Appellate Form 4 (Affidavit Accompanying Motion for Permission to Appeal in Forma Pauperis). The amendment deletes the portion of question 12 that asks for the last four digits of the social security number of a party seeking to proceed in forma pauperis (attachment 1). The Standing Committee received two comments on this proposal. Both comments supported the amendment. At its May 2017 meeting, the Advisory Committee therefore may wish to recommend that the Standing Committee transmit the proposed amendment to Appellate Form 4 to the Supreme Court without further revision.

II. Background

The Advisory Committee recommended deleting the question seeking the last four digits of the social security number for two reasons. First, collecting partial social security numbers raises security and privacy concerns. Second, the question appears to be unnecessary. The clerk representative to the Advisory Committee investigated the matter and reported that the general consensus of the clerks of court is that the last four digits of a social security number are not used for any purpose and that the question could be eliminated.

The Standing Committee received comments from The World Privacy Forum (attachment 2) and the National Association of Criminal Defense Lawyers (attachment 3). Both comments offer unqualified support for the proposed amendment.

III. Action at the May 2017 Meeting

At its May 2017 meeting, the Advisory Committee may wish to recommend that the Standing Committee transmit the proposed amendment to Form 4 to the Supreme Court.

Attachments

1. Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure 30 (August 2016), <http://www.uscourts.gov/file/20163/download> (proposed amendments to Form 4)
2. Public Comment of The World Privacy Forum (Tracking No. 1k1-8tyn-4iq4)
3. Public Comment of the National Association of Criminal Defense Lawyers (Tracking No. 1k1-8urf-a9eb).

TAB 8B

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30 FEDERAL RULES OF APPELLATE PROCEDURE

**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: _____~~

TAB 8C



Document Details

Docket ID:	USC-RULES-AP-2016-0002
Docket Title:	Proposed Amendments to the Federal Rules of Appellate Procedure *
Document File:	
Docket Phase:	Notice
Phase Sequence:	1
RIN:	Not Assigned
Original Document ID:	USC-RULES-AP-2016-0002-DRAFT-0009
Current Document ID:	USC-RULES-AP-2016-0002-0008
Title:	Comment from Pam Dixon, World Privacy Forum
Number of Attachments:	1
Document Type:	PUBLIC SUBMISSIONS *
Comment on Document ID:	USC-RULES-AP-2016-0002-0002
Comment on Document Title:	Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure
Status:	Posted
Received Date:	01/03/2017 *
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Additional Field 1:	Advisory Committee on Appellate Rules, Spring 2017 Meeting

Tracking Number: 1k1-8tyn-4iq4 

**Total Page Count
Including Attachments:** 1

Submitter Info

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Government Agency Type:

Government Agency:

Cover Page: 



WORLD **PRIVACY** FORUM

Comments of the World Privacy Forum

To the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States

Regarding proposed amendments to Form 4, Affidavit Accompanying Motion for Permission to Appeal in Forma Pauperis

Via Regulations.gov

Honorable Jeffrey S. Sutton, Chair
Committee on Rules of Practice and Procedure of the Judicial Conference of the United States
Washington, D.C. 20544

January 3, 2017

The World Privacy Forum welcomes the opportunity to comment on the proposed change to Appellate Form 4 used by petitioners seeking to proceed in forma pauperis. The proposal seeks to eliminate the requirement to include on the form the last four digits of a litigant's Social Security Number.

The World Privacy Forum is a non-profit public interest research and consumer education group. We publish in-depth research papers, policy comments, and consumer education focusing on privacy and security issues. Much of our work explores emerging technology and privacy issues, including health, biometrics, consent, data analytics, and many other rapidly evolving areas of privacy. You can see our publications and more information at www.worldprivacyforum.org.

The World Privacy Forum supports the proposed change to Form 4. We offer three primary reasons.

First, the collection and maintenance of *any* personally identifiable information (such as a SSN, whether whole or partial) creates a concern about personal privacy for both the data subject *and* the data steward. Any responsible data steward collecting personally identifiable information

should assess the privacy risk associated with collection and should be prepared to take reasonable action (including the possibility of notifying the data subject about the breach) if and when the information falls into the hands of third parties who were not intended to have the information.¹ Those third parties may include innocent bystanders, hackers, thieves, or members of the staff of the data steward who have no need to access the information. Not collecting or keeping personally identifiable information in the first place lessens or eliminates the burden on the data steward while also protecting the privacy of the data subject.²

Second, an SSN does a poor job of identification and authentication. SSNs are widely available from governmental or commercial sources, and it is not difficult to find or even predict the SSN for any given individual.³ Thus, any litigant seeking to represent himself or herself as another individual could easily acquire the SSN of that individual. In any event, we suggest that the likelihood of a litigant posing as another individual is highly unlikely. While financial, medical, and other forms of identity theft are commonplace today, we have never seen a report that an identity thief posed as another individual in litigation. Even if it happened, other parties to the litigation would identify an imposter in the ordinary course of litigation.

Third, the advisory committee reported the general consensus of clerks of court that the last four digits of a SSN serve no purpose and could be eliminated.⁴ This reason alone justifies the proposed change without further consideration. We observe that both state and federal agencies have taken legislative and other actions to reduce reliance on SSNs in recent decades.⁵

¹ Federal Trade Commission Report, *Security in Numbers: SSNs and ID Theft*, FTC, (December 2008.) <https://www.ftc.gov/sites/default/files/documents/reports/security-numbers-social-security-numbers-and-identity-theft-federal-trade-commission-report/p075414ssnreport.pdf>.

² One of the best historic conversations about SSNs and early concerns is contained in the archive of the HEW meetings, the results of which eventually led to the modern-day Fair Information Practices. It is remarkable that the same concerns discussed in these meetings are largely extant today. See: Hoofnagle, Chris Jay, *The Origin of Fair Information Practices: Archive of the Meetings of the Secretary's Advisory Committee on Automated Personal Data Systems (SACAPDS)* (July 15, 2014). Available at SSRN: <https://ssrn.com/abstract=2466418> or <http://dx.doi.org/10.2139/ssrn.2466418>.


³ Alessandro Acquisti, Ralph Gross. *Predicting Social Security Numbers from public data*, *Proceedings of the National Academy of Science*, PNAS 2009 106 (27) 10975-10980. <http://www.pnas.org/content/106/27/10975.full.pdf>.

⁴ Preliminary Draft of Proposed Amendment, Excerpt of Memorandum from Judge Steven M. Colloton, Chair, Advisory Committee on Appellate Rules, to Judge Jeffrey S. Sutton, Chair, Committee on Rules of Practice and Procedure (May 18, 2016), *Report of the Advisory Committee on Appellate Rules*, p. 18. <https://www.regulations.gov/document?D=USC-RULES-AP-2016-0002-0002>.

⁵ Every state now has an identity theft statute, most of which constrain use of SSNs in some way. See National Conference of State Legislatures, *State Identity Theft Statutes*, <http://www.ncsl.org/research/financial-services-and-commerce/identity-theft-state-statutes.aspx>.

Thank you again for the opportunity to comment on the proposed change to the federal rules of practice and procedure.

Respectfully,


A handwritten signature in cursive script that reads "Pam Dixon".

Pam Dixon
Executive Director,
World Privacy Forum
www.worldprivacyforum.org

TAB 8D



Document Details

Docket ID:	USC-RULES-AP-2016-0002 ↻
Docket Title:	Proposed Amendments to the Federal Rules of Appellate Procedure * ↻
Document File:	 HTML
Docket Phase:	Notice
Phase Sequence:	1
RIN:	Not Assigned ↻
Original Document ID:	USC-RULES-AP-2016-0002-DRAFT-0014
Current Document ID:	USC-RULES-AP-2016-0002-0012
Title:	Comment from PA Bar Association, PA Bar Association ↻
Number of Attachments:	1
Document Type:	PUBLIC SUBMISSIONS * ↻
Comment on Document ID:	USC-RULES-AP-2016-0002-0002 ↻
Comment on Document Title:	Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure ↻
Status:	Posted ↻
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Status Set By:	Skillman, Frances (USC)
Comment Start Date:	08/11/2016 ↻
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Tracking Number: 1k1-8un9-37e6 

**Total Page Count
Including Attachments:** 1

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Government Agency Type:

Government Agency:

Cover Page: 



February 10, 2017

Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Administrative Office of the United States Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Suite 7-240
Washington, D.C. 20544

Re: Proposed Amendments to the Federal Rules of Appellate Procedure

Dear Sir or Madam:

The Pennsylvania Bar Association, upon the recommendation of its Federal Practice Committee, respectfully submits the following comments in response to the proposal by the Advisory Committee on Appellate Rules.

Respectfully,

Sara A. Austin, Esq., President
Pennsylvania Bar Association



**COMMENTS OF THE PENNSYLVANIA BAR ASSOCIATION ON PROPOSED
AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE**

The Pennsylvania Bar Association makes the following comments with respect to the proposed Appellate Rule changes:

Appellate Rules 8, 11, 25, 28.1, 29, 31, 39, and 41, and Form 4

- The Pennsylvania Bar Association recommends no action with respect to the proposed amendments to Rules 8, 11 and 39, because they bring the rules into conformity with current practice.
- The Pennsylvania Bar Association recommends no action with respect to the proposed amendments to Rule 25.
- The Pennsylvania Bar Association supports the amendments to Rules 28.1 and 31 as reasonable in light of the December 1, 2016 amendment to Rule 26(c).
- The Pennsylvania Bar Association opposes the proposed amendment to Rule 29.
- The Pennsylvania Bar Association takes no action on the proposed amendment to Rule 41.
- The Pennsylvania Bar Association takes no action on the proposed amendment to Form 4.

PBA FEDERAL PRACTICE COMMITTEE
COMMENTS ON THE
PROPOSED AMENDMENTS TO THE FEDERAL RULES OF
APPELLATE, BANKRUPTCY, CIVIL, AND CRIMINAL PROCEDURE

HON. D. MICHAEL FISHER
CHAIR

NANCY CONRAD
CO-VICE CHAIR

MELINDA GHILARDI
CO-VICE CHAIR

KATHLEEN WILKINSON
BOG LIAISON

MEMBERS OF THE SUB-COMMITTEE

STEVEN BAICKER-MCKEE, ESQUIRE
(HON.) ROBERT L. BYER, ESQUIRE
KRISTY CASTAGNA, ESQUIRE
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HAROLD M. GOLDNER, ESQUIRE
MELISSA GUDDY, ESQUIRE
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BRETT G. SWEITZER, ESQUIRE
HENRY W. VAN ECK, ESQUIRE
THOMAS G. WILKINSON, JR., ESQUIRE
MARC J. ZUCKER, ESQUIRE

MEMORANDUM

TO: Pennsylvania Bar Association

FROM: Federal Practice Committee

DATE: January 10, 2017

RE: Report of Federal Practice Committee on Proposed Amendments to Appellate Rules

I. Introduction

The Federal Practice Committee of the Pennsylvania Bar Association (the “Committee”) has reviewed the amendments proposed in connection with the Federal Rules of Appellate Procedure and has made the recommendations set forth below.¹ The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States circulated the proposed amendments in draft form in August of 2016 in a document available online at the following link: <http://www.regulations.gov/document?D=USC-RULES-CV-2016-0004-0002>. All written comments are due by February 15, 2017.

¹ The Federal Practice Committee gratefully acknowledges the assistance of a subcommittee focused on the Appellate Rule amendments including (Hon.) Robert L. Byer and Stephanie L. Hersperger, Esquire.

Rules 8, 11 and 39

Purpose of the Proposed Amendment

The proposed amendments would modify various provisions of Rules 8, 11 and 39, clarifying that security for a supersedeas, stay or injunction pending appeal is not limited to a bond, but instead could include “other security.”

Recommendation

The Federal Practice Committee recommends no action with respect to these proposed amendments, because they bring the rule into conformity with current practice.

Rule 25

Purpose of the Proposed Amendment

The proposed amendments to Rule 25, concerning filing and service, make certain technical changes related to electronic filings and certain non-electronic filings. Part of the purpose is to make uniform practices that currently are regulated by Local Appellate Rules in various Circuits. The most significant change to Third Circuit practice is that the proposed amendment to Rule 25(d)(1) eliminates and requirement of a proof of service on a paper that a party files electronically, unless the paper is served by non-electronic means (e.g. on a *pro se* litigant).

Recommendation

The Federal Practice Committee does not recommend any action with respect to the proposed amendments to Rule 25.

Rules 28.1 and 31

Purpose of the Proposed Amendment

These proposed amendments enlarge the time for filing a reply brief to 21 days after service of the brief for appellee.

Rationale for the Proposed Amendment

The rationale for this change is that the elimination of the “three-day rule” for papers served electronically under Rule 26(c), as amended effective December 1, 2016, effectively reduced a 17-day period to 14-days. The Advisory Committee concluded that 21 days is a more reasonable time for filing a reply brief.

Recommendation

The Federal Practice Committee recommends that the Pennsylvania Bar Association support the amendments to Rules 28.1 and 31 as reasonable in light of the December 1, 2016 amendment to Rule 26(c).

- The Federal Practice Committee recommends that the Pennsylvania Bar Association takes no action on the proposed amendment to .

Rule 29

Purpose of the Proposed Amendment

This proposed amendment would add a provision to Rule 29(a) that notwithstanding the permissible filing of an amicus brief, “a court of appeals may strike or prohibit the filing of an amicus brief that would result in a judge’s disqualification.”

Arguments Against the Proposed Amendment

When an amicus brief is filed, like the filing of any other brief, it is well before the assignment of the case to a panel. Therefore, neither the amicus nor its counsel have any idea whether the filing of the brief would trigger recusal of a judge who ultimately would be assigned to the case. It seems unreasonable under such circumstances to prohibit or strike the amicus brief, instead of simply allowing the judge to recuse. If there is evidence that an amicus brief was filed for the express purpose of causing the recusal of a particular judge, that might be a basis for striking the amicus brief, but the proposed amendment is not so limited. Similarly, where an amicus engages counsel for the deliberate purpose of causing the recusal of a judge, that could be dealt with by disqualifying counsel, as has been done in several cases.

Recommendation

The Federal Practice Committee recommends that the Pennsylvania Bar Association oppose this amendment.

Rule 41

Purpose of Proposed Amendment

The proposed amendment clarifies that a Court of Appeals may postpone the issuance of its mandate only to facilitate the filing of a petition for certiorari in the Supreme Court or “in extraordinary circumstances.”

Recommendation

The Federal Practice Committee does not recommend that the Pennsylvania Bar Association take any action with respect to this amendment.

Form 4

Purpose of Proposed Amendment

This amendment would eliminate the requirement in Form 4 concerning affidavits accompanying motions to appeal in *forma pauperis*, to eliminate any requirement that the moving party provide the last four digits of the social security number.

Recommendation

The Federal Practice Committee does not recommend that the Pennsylvania Bar Association take any action on this amendment.

TAB 9

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MEMORANDUM

To: Advisory Committee on Appellate Rules

From: Gregory E. Maggs, Reporter

Date: March 28, 2017

Subject: Items 08-AP-A, 11-AP-C, 15-AP-D: Address references to "mail" and "mailing" in Rules 3(d), 4(c), 8(b), 13(a), 25, 26(a)

I. Introduction

At the October 2016 meeting, the Advisory Committee decided to propose several minor changes to Rule 3(d), which concerns serving a notice of appeal. The changes would replace the word "mail" with "send" to permit electronic service of process. But instead of immediately transmitting these proposals to the Standing Committee, the Advisory Committee decided to determine whether other Appellate Rules that use the word "mail" also require amendment.

In searching the Appellate Rules, I discovered that Rules 4(c), 9(b), 13(a), 25, and 26(a) use the word "mail." As discussed in this memorandum, the Advisory Committee may wish to propose minor amendments to Rules 8(b) and 13(a)(2). The other rules do not require amendment for reasons explained below.

II. Review of the Proposed Changes to Rule 3(d)

In August 2016, the Standing Committee published proposed changes to Appellate Rule 25 to address the electronic filing and service of documents.¹ In light of the proposed changes to Rule 25, the Advisory Committee subsequently considered whether Rules 3(a) and (d) should also be amended. Rule 3(a) addresses the filing of a notice of appeal. Rule 3(d) concerns the clerk's service of the notice of appeal.

The Advisory Committee concluded that subdivision (a) requires no amendment, but that subdivisions (d)(1) and (3) need two changes. The proposed changes are shown in the discussion

¹ See Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure 27 (August 2016) (proposed revision of Appellate Rule 25), <http://www.uscourts.gov/file/20163/download>.

23 determine when a party or the clerk may or must send a notice electronically or
24 non-electronically.

As described in the draft minutes, the Advisory Committee discussed and tentatively approved these suggested changes to Rule 3(d), but decided to postpone sending any proposal to the Standing Committee.

III. Other Rules Referring to "Mail"

In addition Rules 3(d), Rules 4(c), 8(b), 13(a)(2), 25, and 26(a)(4)(C) also use the term mail. I found these rules by electronically searching a digital copy of the Appellate Rules. Only Rules 8(b) and 13(a)(2) require amendment.

A. Rule 4(c)

Rule 4(c) addresses appeals by inmates confined in an institution. As amended in December 2016, Rule 4(c) says in part: "If an institution has a system designed for legal mail, an inmate confined there must use that system to receive the benefit of this Rule 4(c)(1)." Rule 4(c)(1) specifies the rules for when mail deposited by inmates is timely. Rule 4(c) does not appear to require any changes. The Rule does not require filing by mail but instead establishes principles that apply when inmates use an institution's system for legal mail (which they may continue to do notwithstanding the changes to Rule 25).

B. Rule 8(b)

The Advisory Committee currently is considering numerous changes to Rule 8(b) to make it consistent with Civil Rule 62(b) and Civil Rule 65.1. *See* Memorandum to the Advisory Committee on Appellate Rules from Gregory E. Maggs regarding Item No. 12-AP-D: Rules 8, 11, and 39 (March 18, 2017) (amendments to replace "supersedeas bond" with "bond or other security" or similar language). The Committee separately may wish to propose changes to Rule 8(b) to replace the word "mail" in the second sentence with "send." The following draft shows the proposed change to the current version of Rule 8(b):

1 **Rule 8. Stay or Injunction Pending Appeal**

2 * * * * *

3 **(b) Proceeding Against a Surety.** If a party gives security in the form of a bond
4 or stipulation or other undertaking with one or more sureties, each surety submits

5 to the jurisdiction of the district court and irrevocably appoints the district clerk as
6 the surety's agent on whom any papers affecting the surety's liability on the bond
7 or undertaking may be served. On motion, a surety's liability may be enforced in
8 the district court without the necessity of an independent action. The motion and
9 any notice that the district court prescribes may be served on the district clerk,
10 who must promptly ~~mail~~ send a copy to each surety whose address is known.

11 ADVISORY COMMITTEE NOTE

12 The amendment to Subdivisions (b) changes the word "mail" to "send" to
13 make delivery other than by mail possible. Other rules determine when a party or
14 the clerk may or must send a notice electronically or non-electronically.

One question is whether the Advisory Committee could recommend including this change with the other changes to Rule 8(b) that have been published for public comment. But given that the change relates to a different subject, that it is a part of a set of similar changes to Rules 3 and 13, and that the public has not had a chance to comment, I recommend treating the proposed change to Rule 8(b) separately.

C. Rule 13(a)(2)

Rule 13 concerns appeals from the Tax Court. This rule uses the word "mail" in both its first and second sentences. Changing the reference in the first sentence as shown in the discussion draft below would allow an appellant to send a notice of appeal to the Tax Court clerk by means other than mail. The second sentence expresses a rule that applies when a notice is sent by mail, which is still a possibility. Accordingly, the Advisory Committee should not change the second rule.

1 **Rule 13. Appeals From the Tax Court**

2 * * * * *

3 **(a) Appeal as of Right.**

4 * * * * *

5 **(2) Notice of Appeal;** How Filed. The notice of appeal may be filed either at the
6 Tax Court clerk's office in the District of Columbia or by ~~mail-addressed~~ sending

7 it to the clerk. If sent by mail the notice is considered filed on the postmark date,
8 subject to § 7502 of the Internal Revenue Code, as amended, and the applicable
9 regulations.

10 * * * * *

11 ADVISORY COMMITTEE NOTE

12 The amendment to Subdivisons (a)(2) allow an appellant to send a notice
13 of appeal to the Tax Court clerk by means other than mail. Other rules determine
14 when a party must send a notice electronically or non-electronically.

D. Rule 25

Rule 25 concerns filing and service. This Rule currently uses the term "mail" in twelve places. The Advisory Committee, however, has already proposed extensive revisions of Rule 25 to address electronic filing and service. A separate memorandum in this Agenda Book addresses those changes.

E. Rule 26(a)(4)(C)

Rule 26, as amended in 2016, specifies rules for computing and extending time. Subdivision (a)(4)(C) defines the term "last day" as follows:

Unless a different time is set by a statute, local rule, or court order, the last day ends: . . . (C) for filing under Rules 4(c)(1), 25(a)(2)(B), and 25(a)(2)(C)—and filing by mail under Rule 13(a)(2)—at the latest time for the method chosen for delivery to the post office, third-party commercial carrier, or prison mailing system

Although this provision uses the words "mail" and "mailing," it does not require revision. The Rule specifies the method for calculating time when mail is used. It does not specify when mail may or may not be used.

IV. Conclusion

In addition to proposing the changes already considered in Rule 3(d), the Advisory Committee may wish to propose changes to Rules 8(b) and 13(a)(2).

TAB 10

TAB 10A

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MEMORANDUM

To: Advisory Committee on Appellate Rules

From: Gregory E. Maggs, Reporter

Date: March 28, 2017

Subject: Item 08-AP-R: Disclosure Requirements in Rules 26.1 and 29

I. Introduction

Item 08-AP-R, which the Advisory Committee has discussed at its past several meetings, concerns amendments to the corporate disclosure requirements in Rule 26.1 and Rule 29. The attached memorandum from October 2016 recounts the history of this item.¹ At the October 2016 meeting, the Committee tentatively approved several proposed changes to Rule 26.1 but tabled or rejected other proposed amendments to Rule 26.1 and rejected both of the proposed amendments to Rule 29. The Advisory Committee decided to postpone sending the approved proposals to the Standing Committee until after consulting with the other Advisory Committees.

At the Spring 2017 meeting, the Advisory Committee may wish to (1) review its past decisions with respect to Rule 26.1 and Rule 29; (2) reconsider the proposed amendment to Rule 26.1(b) in light of comments from the reporter of the Civil Rules Advisory Committee; and (3) consider a new proposal on disclosure requirements in bankruptcy appeals based on recommendations from a subcommittee of the Bankruptcy Rules Advisory Committee.

II. Review of Decisions at the October 2016 Meeting and New Discussion Draft

As described in the draft minutes of the October 2016 meeting, the Advisory Committee considered numerous possible revisions of Rule 26.1 and Rule 29 (shown in the discussion drafts on pages 3-8 of Attachment 1). Following substantial discussion, the Committee tentatively approved the following three proposed amendments:

- Rule 26.1(b) (Time for Filing; Supplemental Filing): The Committee approved the proposed amendment to Rule 26.1(b), which would conform the provision to the

¹ See Memorandum to the Appellate Rules Advisory Committee from Gregory E. Maggs, reporter, regarding Item No. 08-AP-R: Rule 26.1 & 29(c) disclosure requirements to the Advisory Committee on Appellate Rules (October 2016) [Attachment 1].

recently published proposed revision of Criminal Rule 12.4(b).² More discussion of this proposal appears in Part III of this memorandum.

- Rule 26.1(d) (Organizational Victim in a Criminal Case): The Committee approved the proposal to create a new subdivision (d) to conform the provision to the recently published proposed revision of Criminal Rule 12.4(a)(2).³
- Rule 26.1(f) (Intervenors): The Committee approved a proposal to create a new subdivision (f) to impose disclosure requirements on persons who want to intervene.

The Advisory Committee, however, tabled consideration of or rejected the following five proposed amendments:

- Rule 26.1(a) (Who Must File): The Committee tabled consideration of proposed amendments to Rule 26.1(a), which would have expanded the disclosures required for corporations and would have required disclosure of the judges, lawyers, witnesses in prior and related proceedings. The Committee determined that the burdens imposed by the proposed additional disclosure requirements outweighed the benefits.
- Rule 26.1(e) (Bankruptcy Proceedings): The Committee decided to table consideration of a proposal to create a new subdivision (e) to address disclosures in bankruptcy cases. The Committee thought it best to receive input from the Bankruptcy Rules Advisory Committee before taking any action. More discussion of this proposal appears in Part IV of this memorandum.
- Rule 26.1(g) (Local Rules): The Committee disapproved the proposed new subdivision (g), which would have barred local rules from altering the disclosure requirements because the amendment would only make sense if Rule 26.1(a) were amended.
- Rule 29(c)(1) (Contents and Form): The Committee rejected the proposed amendment to Rule 29(c)(1), which would have conformed Rule 29 to the proposed

² See Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure 251-253 (August 2016) (proposed amendments to Criminal Rule 12.4) [Attachment 2].

³ See *id.*

amendment to Rule 26.1(a). The Committee concluded that the amendment was not needed after the proposal to amend Rule 26.1(a) was tabled.

- Rule 29(c)(5)(D) (Contents and Form): The Committee rejected the proposed amendment to Rule 29(c)(5)(D), which would have required amicus briefs to disclose the names of lawyers and organizations who had authored them in whole or in part. The Advisory Committee concluded that there was little need for the proposed additional disclosures and that these proposed additional disclosures went beyond what is required for party briefs.

The following new discussion draft of Rule 26.1 reflects these decisions. No new discussion draft of Rule 29 is necessary because the Advisory Committee rejected both of the proposed amendments to Rule 29.

1 **Rule 26.1. Corporate Disclosure Statement**

2 * * * * *

3 **(b) Time for to Filing; Supplemental Later Filing.** A party must file the Rule
4 26.1(a)⁴ statement with the principal brief or upon filing a motion, response, petition,
5 or answer in the court of appeals, whichever occurs first, unless a local rule requires
6 earlier filing. Even if the statement has already been filed, the party's principal brief
7 must include the statement before the table of contents. A party must promptly⁵ file
8 a statement if the party learns of any additional required information or any changes
9 in required information ~~supplement its statement whenever the information that must~~
10 ~~be disclosed under Rule 26.1(a) changes.~~

11 * * * * *

⁴ In this revised discussion draft, I have deleted the reference to subdivision (a) because subdivisions (d) and (f) now also impose disclosure requirements. More discussion of this point appears in Part III below.

⁵ The October 2016 draft used the phrase ". . . must file a statement promptly . . ." The Style Consultants have recommended moving the word "promptly." The Advisory Committee for the Criminal Rules will make a comparable stylistic change to the proposed amendment to Criminal Rule 12.4(b).

12 (d) Organizational Victim in a Criminal Case. In a criminal case, unless the
13 government shows good cause, it must file a statement identifying any organizational
14 victim of the alleged criminal activity. If the organizational victim is a corporation,
15 the statement must also disclose the information required by Rule 26.1(a)(1) to the
16 extent it can be obtained through due diligence.

17 * * * * *

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

20 COMMITTEE NOTE

21 The amendment to subdivision (b) follows the amendments to Criminal Rule
22 12.4(b). A later filing is required not only when information that has been disclosed
23 changes, but also when a party learns of additional information that is subject to the
24 disclosure requirements. Subdivision (d) follows amendments to Criminal Rule
25 12.4(a). It requires disclosure of organizational victims in criminal cases because a
26 judge might have an interest in one of the victims. But the disclosure requirement
27 is relaxed in situations in which disclosure would be overly burdensome to the
28 government. For example, thousands of corporations might be the victims of a
29 criminal antitrust violation, and the government may have great difficulty identifying
30 all of them.

III. Reconsideration of the Proposed Amendment to Rule 26.1(b)

The proposed amendment to Appellate Rule 26.1(b) in the discussion draft above would conform Rule 26.1's rule on supplemental filings to the recently published draft amendments to Criminal Rule 12.4(b)(2) [Attachment 2]. The Criminal Rules Advisory Committee has explained the proposed amendment to its Rule as follows:

⁶ This subdivision should be redesignated as subdivision (e) if the Advisory Committee decides not to add the proposed subdivision (e) on bankruptcy disclosures discussed in part IV of this memorandum.

The proposed amendment to Rule 12.4(b) . . . makes clear that a supplemental filing is required not only when information that has been disclosed changes, but also when a party learns of additional information that is subject to the disclosure requirements.

At its October 2016 meeting, following a brief discussion, the Advisory Committee decided to adopt the same changes to Appellate Rule 26.1(b) primarily for the purpose of promoting uniformity.

After the October 2016 meeting, the reporters for the Advisory Committees on the Civil Rules and Bankruptcy Rules informed me that they do not anticipate conforming amendments to Civil Rule 7.1 or Bankruptcy Rule 7007.1. Their sense is that conforming amendments would not substantially change the existing rules and that uniformity on the issue of supplemental filing is not necessary. The reporter for the Civil Rules Advisory Committee, Professor Edward Cooper, has explained this position in an email to the other reporters as follows:

This is a perfect case study in the ways in which uniformity can become a problem. The present parallel rules [i.e., Criminal Rule 12.4, Appellate Rule 26.1, Civil Rule 7.1, and Bankruptcy Rule 7007.1] express the same thought in somewhat different ways. But I would have said that each rule says just what the amended Rule 12.4(b) would say in more words. The present rules require supplementation when the required information "changes." To me, there is a change in either of two events—new information comes into existence, or preexisting information comes to be recognized. We seem to be confronting a question of uniformity arising from a wish to clarify the language adopted in parallel fashion some time ago. I hesitate because I do not think clarification is needed. As described below, the 2002 Committee Note to Appellate Rule 26.1 expresses the understanding of "changes" that I have had.

* * *

As of 2002, the Appellate, Civil, and Criminal Rules provided for supplementing an initial disclosure statement in almost exactly the same words. The Civil and Criminal Rules both directed that a party must "promptly file a supplemental statement upon any change in the information that the statement requires." Criminal Rule 12.4(b)(2) still reads that way. In a symbol of what comes from these efforts, in 2007 the Style Project changed [Civil] Rule 7.1 to read: "promptly file a supplemental statement if any required information *changes*." (The Criminal Rules were styled before the Civil Rules, but there is no resting point in styling.)

Bankruptcy Rule 7007.1 is similar: "A party shall file a supplemental statement promptly upon any change in circumstances that this rule requires the party to identify or disclose."

Appellate Rule 26.1(b) now is very close to the Civil and Criminal Rules: "A party must supplement its statement whenever the information that must be disclosed under Rule 26.1(a) changes."

Looking at the Committee Notes, the most useful is the 2002 Note for Appellate Rule 26.1(b): It provides an "example" of what it means that "there is a change in the information that Rule 26.1(a) requires the parties to disclose. For example, if a publicly held corporation acquires 10% or more of a party's stock after the party has filed its disclosure statement, the party should file a supplemental statement identifying that publicly held corporation."

The Appellate Rule Note confirms what I would have said about the present language of Criminal Rule 12.4(b) and Civil Rule 7.1 and Bankruptcy Rule 7007.1.

Based on the likelihood that the Civil and Bankruptcy Rules Advisory Committees will not recommend conforming changes and the questionable need for the amendment—especially in light of the 2002 Committee Note cited above—the Advisory Committee on Appellate Rules may wish to reconsider the need for amending Rule 26.1(b) at its May 2017 meeting. Because the Advisory Committee has not yet proposed anything to the Standing Committee, reversing course would not require anything other than a decision to do so.

But even if the Advisory Committee decides not to make the proposed amendment to subdivision (b) to conform to Criminal Rule 12.4(b), it may wish to delete the references to disclosures required by "Rule 26.1(a)" as opposed to "Rule 26.1" as a whole. The proposed new subdivisions (d) on victims in criminal cases and (f) on intervenors also require disclosure, as would a new subdivision on disclosures in bankruptcy cases. Parties should make supplemental filings if the information required to be disclosed under any of these subdivisions changes. So amended, Rule 26.1(b) would read as follows:

1 **(b) Time for Filing; Supplemental Filing.** A party must file the Rule 26.1(a)
2 statement with the principal brief or upon filing a motion, response, petition, or
3 answer in the court of appeals, whichever occurs first, unless a local rule requires
4 earlier filing. Even if the statement has already been filed, the party's principal brief
5 must include the statement before the table of contents. A party must supplement its

6 statement whenever the information that must be disclosed under Rule 26.1(a)
7 changes.

IV. Advice on Bankruptcy Disclosures

Following the October 2016 meeting, the Advisory Committee considered a proposal to create the following new provision on disclosures in bankruptcy cases:

- 1 **(e) Bankruptcy Proceedings.** In a bankruptcy proceeding, the debtor or the
2 trustee of the bankruptcy estate—or the appellant if the debtor or trustee is not a
3 party—must file a statement that lists:
4 (1) any debtor not named in the caption;
5 (2) the members of each committee of creditors;
6 (3) the parties to any adversary proceeding; and
7 (4) any active participants in a contested matter.

Although the sense of the Advisory Committee was that a rule on bankruptcy disclosure might help judges decide when to recuse themselves, the Committee decided not to propose a new provision until the Advisory Committee on Bankruptcy Rules provides a recommendation.

Following October 2017 meeting, a subcommittee of the Bankruptcy Rules Advisory Committee studied the matter of disclosures in depth. Professor Elizabeth Gibson, the reporter for the Bankruptcy Rules Advisory Committee, prepared the attached detailed report.⁷ The report explains how Professor Dan Capra originally drafted the proposed amendment to Appellate Rule 26.1 to help judges comply with the Committee on Codes of Conduct's Advisory Opinion No. 100 on “Identifying Parties in Bankruptcy Cases for Purposes of Disqualification.” The report then discusses certain ambiguities in the proposed amendment above and how it might affect the Bankruptcy Rules.

On February 23, 2017, Judge Chagares and I participated in a conference call with the members of the subcommittee of the Advisory Committee on Bankruptcy Rules. We discussed Prof.

⁷ See Memorandum to the Subcommittee on Privacy, Public Access, and Appeals of the Bankruptcy Rules Advisory Committee from Elizabeth Gibson, Reporter, Subject: Possible Amendment to FRAP 26.1 Regarding Bankruptcy Proceedings (Feb. 17, 2017) [Attachment 3].

Gibson's memorandum and each portion of the discussion draft of the proposed Rule 26.1(e) above. The following paragraphs described the sense of the participants in the conference call.

Subdivision (e)(1): This section requires disclosure of any debtor not named in the caption. The provision might apply, for example, if an appellate court heard an appeal in an adversary proceeding between two creditors. The sense of the participants on the conference call was that the requirement of disclosing the name of the debtor in such a case would be helpful to the appellate judges. And if the debtor is a corporation, the rule should require the parties to identify any parent corporation of the debtor that owns 10% or more of its stock.

Subdivision (e)(2): This section requires disclosures of each committee of creditors. The sense of the participants in the conference call was this requirement should be omitted because it is both under-inclusive and over-inclusive. The requirement is under-inclusive because a bankruptcy committee often has more than one type of official committee, not just committees of creditors. The proposed requirement is over-inclusive because the members of a committee of creditors would not necessarily have any interest in a particular appeal.

Subdivisions (e)(3) & (4): These sections require disclosure of the parties to any adversary proceeding and any active participants in a contested matter. The sense of the participants on the conference call was that paragraphs (3) and (4) should be omitted because they are unnecessary. Rule 26.1(a) will require disclosure of the adversary parties involved in the appeal, and appellate judges do not need the names of other adversaries and other participants in contested matters if those matters are not before the court.

Based on Prof. Gibson's memorandum and the teleconference, I have prepared the following revised discussion draft of Rule 26.1(e):

1 **(e) Bankruptcy Proceedings.** In a bankruptcy proceeding, the debtor or the
2 trustee of the bankruptcy estate—or the appellant if the debtor or trustee is not a
3 party—must file a statement that identifies (1) any debtor not named in the caption;
4 and (2) if any debtor is a corporation, any parent corporation and any publicly held
5 corporation that owns 10% or more of its stock or states that there is no such
6 corporation.

7 * * * * *

8 COMMITTEE NOTE

9 Subdivision (e) requires disclosures unique to bankruptcy cases. Appeals in
10 bankruptcy cases do not always involve the debtor. For example, the parties on the
11 appeal might be creditors with competing claims. In such cases, the caption of an
12 adversary proceeding will not always contain the name of the debtor. Disclosing the
13 name of any debtor will assist the judges in determining whether any conflicts exist.

14
15 At its May 2017 meeting, the Advisory Committee may wish to discuss this new proposal
16 and the advice received from the conference call.

17 18 **V. Conclusion**

19
20 The Advisory Committee has made substantial progress in its consideration of proposed
21 amendments to Appellate Rule 26.1. The remaining issues are whether to press forward with the
22 proposed revision of subdivision (b) and whether to approve a proposed new subdivision (e) to
23 address disclosures in bankruptcy cases. The Advisory Committee may then wish to send any
24 approved proposals to the Standing Committee.

25 26 27 Attachments

- 28
29 1. Memorandum to the Appellate Rules Advisory Committee from Gregory E. Maggs, reporter,
30 regarding Item No. 08-AP-R: Rule 26.1 & 29(c) disclosure requirements to the Advisory Committee
31 on Appellate Rules (October 2016)
- 32
33 2. Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the
34 United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate,
35 Bankruptcy, Civil, and Criminal Procedure 251-253 (August 2016) (proposed amendments to
36 Criminal Rule 12.4.)
- 37
38 3. Memorandum to the Subcommittee on Privacy, Public Access, and Appeals of the Bankruptcy
39 Rules Advisory Committee from Elizabeth Gibson, Reporter, Subject: Possible Amendment to
40 FRAP 26.1 Regarding Bankruptcy Proceedings (Feb. 17, 2017)

TAB 10B

MEMORANDUM

DATE: September 20, 2016

TO: Advisory Committee on Appellate Rules

FROM: Gregory E. Maggs, Reporter

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

I. Introduction

This item concerns proposed revisions to Appellate Rules 26.1 and 29(c), which require parties and amici curiae to make certain disclosures. Part II describes the current versions of these rules and reviews the impetus for possibly changing them. Part III presents updated discussion drafts for the Advisory Committee to consider at the October meeting. Part IV then identifies a number of specific questions that the Advisory Committee may wish to resolve.

II. Background

Appellate Rule 26.1 requires any "nongovernmental corporate party" to make certain disclosures when filing briefs and other documents so that the judges assigned to the case can determine whether to recuse themselves. The rule currently says:

1 **Rule 26.1. Corporate Disclosure Statement**

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

6 **(b) Time for Filing; Supplemental Filing.** A party must file the Rule 26.1(a)
7 statement with the principal brief or upon filing a motion, response, petition, or
8 answer in the court of appeals, whichever occurs first, unless a local rule requires
9 earlier filing. Even if the statement has already been filed, the party's principal
10 brief must include the statement before the table of contents. A party must
11 supplement its statement whenever the information that must be disclosed under

12 Rule 26.1(a) changes.

13 (c) **Number of Copies.** If the Rule 26.1(a) statement is filed before the
14 principal brief, or if a supplemental statement is filed, the party must file an
15 original and 3 copies unless the court requires a different number by local rule or
16 by order in a particular case.

Appellate Rule 29(c)(1) and (5) also require certain disclosures in amicus briefs for the same purpose. These provisions currently provide:

1 **Rule 29. Brief of an Amicus Curiae**

2 * * *

3 (c) **Contents and Form.** An amicus brief must comply with Rule 32. In
4 addition to the requirements of Rule 32, the cover must identify the party or
5 parties supported and indicate whether the brief supports affirmance or reversal.
6 An amicus brief need not comply with Rule 28, but must include the following:

7 (1) if the amicus curiae is a corporation, a disclosure statement like
8 that required of parties by Rule 26.1;

9 * * *

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

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

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

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

19 * * *

Local rules in some circuits currently impose disclosure requirements that go beyond those found in Appellate Rules 26.1 and 29(c). In addition, judges may need additional information in order to comply with their ethical duties to recuse themselves in certain situations. In March 2015, Professor Dan Capra prepared the attached memorandum on the subject, and

proposed a number of possible amendments for discussion.

The Advisory Committee has discussed Prof. Capra's proposed amendments to Rule 26.1 and 29(c) at its last several meetings. The Criminal Rules Advisory Committee also has been working on the subject of disclosure statements. At its Spring 2016 meeting, it proposed revisions to Criminal Rule 12.4, which is the analogue of Appellate Rule 26.1. The revisions to Criminal Rule 12.4 address the identification of organizational victims of crimes and the filing of supplemental disclosure statements. The Standing Committee discussed the Criminal Rules Advisory Committee's proposed revisions to Rule 12.4 at its June 2016 meeting and, in August 2016, published them for public comment. An excerpt from the report of the Criminal Rules Advisory Committee on to the Standing Committee is attached.

II. Revised Discussion Drafts of Appellate Rule 26.1 and Rule 29(c)

The discussion drafts below are modified versions of the discussion drafts that first appeared in Prof. Capra's memorandum. These modified drafts reflect (1) changes discussed at the Advisory Committee's October 2015 and April 2016 meetings; (2) proposed modifications to make Rule 26.1 conform to the proposed revisions of Criminal Rule 12.4; and (3) several suggested additional revisions. Footnotes indicate the locations of the changes in the discussion drafts since the April 2016 meeting.

1 **Rule 26.1. Corporate Disclosure Statement**

2 **(a) Who Must File; What Must Be Disclosed.** Any ~~nongovernmental~~
3 ~~corporate~~ party to a proceeding in a court of appeals must file a statement that
4 lists:¹

5 (1) any parent² corporation, and any publicly held ~~corporation~~ entity,³ that

¹ The April 2016 discussion draft said: "~~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" As recounted in the draft minutes of the April 2016 meeting, the Advisory Committee decided to eliminate the "except" clause in Rule 26.1(a). The Committee believed that non-corporate parties should make the disclosures listed in Rule 26.1(a)(2)-(4). Non-corporate parties—like many corporate parties—simply will have nothing to disclose under Rule 26.1(a)(1).

² Earlier discussion drafts would have required parties to list any "affiliated" corporation in addition to any parent corporation, adopting a requirement of a Fourth Circuit local rule. But at the April 2016 meeting, the Advisory Committee decided to eliminate the requirement of

6 ~~owns 10% or more of its stock~~ that has a 10% or greater ownership interest in
7 the party or states that there is no such corporation or entity;

8 (2) the names of all judges in the matter⁴ and in any related [state]⁵ matter;

9 (3) the names of all lawyers and legal organizations that have appeared or
10 are expected to appear for the party in the matter [and any related matter]⁶; and

11 (4) the names of all witnesses who have testified on behalf of the party in
12 the matter [and any related matter].⁷

13 **(b) Time for to Filing; Supplemental Later Filing.**⁸ A party must file the

disclosing affiliated corporations because of the difficulty of defining the term "affiliated."

³ The Appellate Rules do not define the term "publicly held entity." Professor Capra's memorandum suggests that the term might apply to certain trade associations and limited partnerships. One of the questions in Part IV below is whether the lack of a definition should preclude this proposed change.

⁴ At the April 2016 meeting, the Advisory Committee decided to use the term "matter" instead of "case" or "proceeding" in Rule 26.1(a)(2)-(4) because some appeals come directly from federal agencies. The term "matter" is broad enough to cover any kind of previous proceeding.

⁵ The previous discussion draft did not include brackets around the word "state" in this discussion draft. I have added the brackets because the Advisory Committee may wish to delete the word "state." The deletion would change the proposed revision to require disclosure of the names of the judges in any related matter, whether it was a federal or state matter.

⁶ I have added the bracketed words "and any related matter." Including this phrase would make the disclosure requirement in Rule 26.1(a)(3) similar to the disclosure requirement in Rule 26.1(a)(2).

⁷ As recounted in the draft minutes of the April 2016 meeting, the Advisory Committee discussed deleting the proposed requirement of disclosing the names of witnesses because of its potential burden. The Committee, however, did not reach a conclusion on the issue. In addition, I have added the bracketed words "and any related matter" to make the disclosure requirement in Rule 26.1(a)(4) similar to the disclosure requirement in Rule 26.1(a)(2).

⁸ The previous discussion drafts of Rule 26.1 did not propose any changes to Rule 26.1 (b). The proposed changes in this discussion draft would partially conform Rule 26.1(b) to the

14 Rule 26.1(a) statement with the principal brief or upon filing a motion, response,
15 petition, or answer in the court of appeals, whichever occurs first, unless a local
16 rule requires earlier filing. Even if the statement has already been filed, the party's
17 principal brief must include the statement before the table of contents. A party
18 must supplement file a statement promptly if the party learns of any additional
19 required information or any changes in required information upon its statement
20 whenever the information that must be disclosed under Rule 26.1(a) changes.

21 * * *

22 **(d) Organizational Victim in a Criminal Case.**⁹ [In a criminal case,] unless
23 the government shows good cause, it must file a statement identifying any
24 organizational victim of the alleged criminal activity. If the organizational victim
25 is a corporation,¹⁰ the statement must also disclose the information required by
26 Rule Rule 26.1(a)(1) to the extent it can be obtained through due diligence.

27 **(e) Bankruptcy Proceedings.**¹¹ In a bankruptcy proceeding, the debtor or the

recently published proposed revision of Criminal Rule 12.4(b). Further discussion of this matter appears in Part IV of this memorandum.

⁹ The language of the current discussion draft is copied from the recently published proposed revision of Criminal Rule 12.4(a)(2). Further discussion of this matter appears in Part IV of this memorandum. The April 2016 discussion draft of Appellate Rule 26.1(d) said: "In a criminal case if an 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. 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."

¹⁰ This proposal (following Criminal Rule 12.4) refers only to corporations. In contrast, the proposed revision of Rule 26.1(a)(1) refers to both corporations and "publicly held entities." The Committee may wish to reconcile this discrepancy. Further discussion of this matter appears in Part IV of this memorandum.

¹¹ The Bankruptcy Rules do not currently require these disclosures and the Bankruptcy Rules Advisory Committee is not currently contemplating any changes to disclosure requirements. Further discussion of this matter appears in Part IV of this memorandum.

28 trustee of the bankruptcy estate—or the appellant if the debtor or trustee is not a
29 party—must file a statement that lists:

- 30 (1) any debtor not named in the caption;
- 31 (2) the members of each committee of creditors;
- 32 (3) the parties to any adversary proceeding; and
- 33 (4) any active participants in a contested matter.

34 **(f) Intervenors.** A person who wants to intervene¹² must file a statement that
35 discloses the information required by Rule 26.1.

36 **(g) Local Rules.** A local rule may not impose greater or lesser disclosure
37 requirements on a party.]¹³

38 COMMITTEE NOTE

39 Under federal law and ethical standards, judges must decide whether to recuse
40 themselves from participating in cases for various reasons. Prior to this
41 amendment Rule 26(a) required corporations to disclose only "any parent
42 corporation and any publicly held corporation that owns 10% or more of its
43 stock." Local rules of court have attempted to help judges determine whether
44 recusal is necessary by requiring the parties to make additional disclosures. The
45 amendment to subdivision (a) follows the lead of these local rules by requiring the
46 listed additional disclosures. The change to subdivison (b) establishes that a
47 supplemental filing is required not only when information that has been disclosed
48 changes, but also when a party learns of additional information that is subject to

¹² At its April 2016 meeting, the Advisory Committee approved the phrase "a person who wants to intervene," which comes from Rule 15.1(d). The October 2015 draft had used the word "intervenors."

¹³ This suggested provision is new. One of the reasons for amending Rule 26.1 is to bring it in line with local rules. Barring local rules from increasing or decreasing the required disclosures could further this goal. Further discussion of this matter appears in Part IV of this memorandum.

49 the disclosure requirements.¹⁴ Subdivision (d) requires disclosure of
50 organizational victims in criminal cases because a judge might have an interest in
51 one of the victims. But the disclosure requirement is relaxed in situations in
52 which disclosure would be overly burdensome to the government. For example,
53 thousands of corporations might be the victims of a criminal antitrust violation,
54 and the government may have great difficulty identifying all of them. Subdivision
55 (e) is based on local rules and requires disclosures unique to bankruptcy cases.
56 Subdivision 26.1(f) imposes disclosure requirements on persons who want to
57 intervene because their intervention, if allowed, might require a judge's recusal.
58 The amendments to this rule change only the disclosure requirements and do not
59 change the standards for recusal.¹⁵ [In order to make federal appellate practice
60 more uniform, Subdivision 26.1(g) prohibits local rules from increasing or
61 decreasing disclosure requirements.]¹⁶

62 **Rule 29. Brief of an Amicus Curiae**

63 * * *

64 (c) **Contents and Form.** * * * An amicus brief need not comply with Rule
65 28, but must include the following:

66 (1) ~~if the amicus curiae is a corporation,~~ a disclosure statement with
67 the information required of parties by Rule 26.1(a)(1), unless the amicus
68 curiae is an individual or governmental unit;

69 * * *

¹⁴ This sentence is new. It explains the purpose of the proposed amendment to Rule 26.1(b) on supplemental filings. As explained above, this proposed amendment follows the proposed revision of Criminal Rule 12.4(b).

¹⁵ The last sentence of this note is new. At the April 2016 meeting, the Advisory Committee concluded that the Advisory Committee Note should indicate that the Committee is not trying to change existing recusal requirements by mandating additional disclosures.

¹⁶ This sentence would explain the purpose of the proposed new Rule 26.1(g).

70 (5) unless the amicus curiae is one listed in the first sentence of Rule
71 29(a), a statement that indicates whether:
72 (A) a party’s counsel authored the brief in whole or in part;
73 (B) a party or a party’s counsel contributed money that was
74 intended to fund preparing or submitting the brief;
75 (C) a person— other than the amicus curiae, its members, or its
76 counsel— contributed money that was intended to fund preparing or
77 submitting the brief and, if so, identifies each such person; and
78 (D) a lawyer or legal organization authored the brief in whole or in
79 part, and, if so, identifies each such lawyer or legal organization.¹⁷

80 COMMITTEE NOTE

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

IV. Issues for Discussion at the October 2016 Meeting

At the October 2016 meeting, the Advisory Committee may wish to consider the following issues about the discussion drafts above.

A. Questions about the Proposed Revision to Rule 26.1(a)

1. Should efforts to amend Rule 26.1(a) continue?

Although the Committee has discussed the text of proposed revisions of Rule 26.1(a), it has not formally decided the fundamental question of whether to recommend any revision. Even at this late date, the Committee still might decide that the benefit of requiring additional disclosures does not justify the effort required to amend Rule 26.1(a) and to coordinate the

¹⁷ At the April 2016 meeting, the Advisory Committee had no objection to the phrasing of Rule 29(c)(5)(D).

changes with the other Advisory Committees. The current language of Rule 26.1(a) is almost identical to the current version of Civil Rule 7.1(a), Criminal Rule 12.4(a)(1), and Bankruptcy Rules 7007.1(a) and 8012(a). The other Advisory Committees are not currently considering revisions to these provisions. (The Criminal Rules Advisory Committee did not propose amendments to Criminal Rule 12.4(a)(1) when it recommended the recently published proposed revisions of other parts of Criminal Rule 12.4.)

2. Should the term "publicly held corporation" be changed to "publicly held entity" in Rule 26.1(a)(1)?

The discussion draft of Rule 26.1(a)(1) proposes changing the term "publicly held corporation" to "publicly held entity." Making this change may cause some uncertainty because the Appellate Rules do not define the term "publicly held entity." Professor Capra's memorandum suggests that the term might apply to certain trade associations and limited partnerships.

If the Committee approves the proposal to change the word "corporation" to "entity" in Rule 26.1(a) then it also may wish to add a definition. Although I could find no specific definition of "publicly held entity" in federal law, various legal treatises use the term. A typical definition is: "A publicly held entity is an entity whose interests are traded in a public exchange." John M. Cunningham & Vernon R. Proctor, *Drafting Limited Liability Company Operating Agreements* § 3.02 (2016). In addition, the Committee also may wish to change the term "corporation" to "entity" in Rule 26.1(d).

3. Should the phrase "any related state matter" be changed to "any related matter" in Rule 26.1(a)(2)?

The discussion draft of Rule 26.1(a)(2) proposes requiring a party to disclose the names of the judges in "any related state matter." The Advisory Committee may wish to delete the word "state" so that the provision would require disclosure of the names of the judges in any related matter, whether it is a federal or state matter.

4. Should the proposed provision of disclosure of witnesses be included in Rule 26.1(a)(4)?

At the April 2016 meeting, several members of the Advisory Committee suggested that the additional disclosure requirements in Rule 26.1(a) might be overly burdensome to litigants. These members questioned whether the benefits of additional disclosures were actually worth the cost. As recounted in the draft minutes of the April 2016 meeting, the Advisory Committee discussed deleting the proposed requirement of disclosing the names of witnesses in Rule

26.1(a)(4) because of its potential burden. The Advisory Committee did not reach a conclusion on the issue. Disclosure might be easy when a case contains a record of a complete trial because such a record usually contains a list of the witnesses who testified. But it might be more difficult in other cases.

5. How should the Advisory Committee coordinate revisions of Rule 26.1(a) with the other Advisory Committees?

As noted above, Civil Rule 7.1(a), Criminal Rule 12.4(a)(1), and Bankruptcy Rules 7007.1(a) and 8012(a) are very similar to Appellate Rule 26.1(a). If the Advisory Committee decides to propose changes Rule 26.1(a), it presumably should have a plan to coordinate changes with the other Advisory Committees. Anticipating this possibility, the Criminal Rules Advisory Committee's report to the Standing Committee says: "Efforts to coordinate the changes will continue if the Appellate Rules Committee decides to move forward with an amendment on this subject [i.e., disclosures under Rule 26.1(a)]." One possibility would be to create a joint subcommittee.

B. Questions about the Proposed Revision to Rule 26.1(b)

The Criminal Rules Advisory Committee has proposed changes to Criminal Rule 12.4(b), which the Standing Committee has now published for public comment (see the second attachment to this memorandum). The changes concern supplemental disclosure statements. The changes are as follows:

1 **Criminal Rule 12.4**

2 * * *

3 **(b) Time for to Filing; Supplemental Later Filing.** A party must:

4 (1) file the Rule 12.4(a) statement within 28 days after~~upon~~ the
5 defendant's initial appearance; and

6 (2) ~~promptly~~ file a ~~supplemental~~ statement at a later time promptly if the
7 party learns of any additional required information or any changes in required
8 information~~upon any change in the information that the statement requires.~~

The Criminal Rules Advisory Committee has explained the proposed amendments as follows:

The proposed amendment to Rule 12.4(b) makes two changes. It specifies that the time for making the disclosures is within 28 days after the initial appearance, and

it makes clear that a supplemental filing is required not only when information that has been disclosed changes, but also when a party learns of additional information that is subject to the disclosure requirements.

The discussion drafts of Rule 26.1 that the Advisory Committee considered at previous meetings did not address supplemental disclosure statements. Assuming that the Advisory Committee would want to follow the Criminal Rules Advisory Committee on this matter, I have now addressed supplemental filing statements in the discussion draft of Rule 26.1(b) above.

The discussion draft of Rule 26.1(b) copies the language in the proposed revision of Criminal Rule 12.4(b)(2) regarding the requirement of filing supplemental statements. But the proposed revision does not attempt to conform Appellate Rule 26.1 to the first change in Criminal Rule 12.4(b)(1), which now requires the initial disclosure statement to be filed within 28 days after the initial appearance. Instead, the time for filing under Rule 26.1(b) remains the time when the first brief or other listed document is filed. I see no reason that the Appellate Rules and Criminal Rules must be uniform on this matter given the differences between trial and appellate procedure.

The Advisory Committee may wish to decide whether this is the correct approach. In addition, the Committee may wish to decide whether to propose this change to the Standing Committee even if the Committee does not recommend revisions to other parts of Rule 26.1.

C. Questions about the Proposed Revision to Rule 26.1 (d)

In the discussion draft above, Rule 26.1(d) now follows the language of the recently published revised version of Criminal Rule 12.4(a)(2) (see the second attachment to this memorandum). The text of the previous discussion draft of Rule 26.1(d) is shown in footnote 9. The substance is not much different, but Criminal Rule 12.4(a)(2) is slightly less detailed.

As with the proposed revision to Rule 26.1(b), the Advisory Committee may wish to decide whether this is the correct approach. In addition, the Committee may wish to decide whether to propose this change to the Standing Committee even if it does not recommend revisions to other parts of Rule 26.1.

D. Questions about the Proposed Revision to Rule 26.1(d)

Bankruptcy Rules 7007.1(a) and 8012(a) require corporate disclosure statements in bankruptcy cases. These Bankruptcy Rules are very similar to the current version of Appellate Rule 26.1. A possible argument against the proposed revisions in the discussion draft of Rule 26.1(d) above is that the Bankruptcy Rules Advisory Committee is not currently considering

changes to Rules 7007.1 and 8012. Although Prof. Capra included a proposed version of Rule 26.1(d) in his memorandum, he advised the Committee: "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." Based on this concern, the Advisory Committee may wish to consider whether it would be more appropriate to allow the Bankruptcy Rules Advisory Committee to take the lead on this matter.

E. Questions about the Proposed Revision to Rule 26.1(g)

As described in Professor Capra's memorandum, various local rules require disclosures that are not currently required by Rule 26.1. One of the purposes of revising Rule 26.1 is to incorporate those local rules to make federal practice uniform. To prevent future disunity, the newly suggested Rule 26.1(g) in the discussion draft would prohibit local rules from imposing greater or lesser disclosure requirements on a party. The Committee has not previously consider this question but may wish to do so at it October 2016 meeting.

Attachments:

1. Memorandum from Prof. Daniel J. Capra to the Advisory Committee on Appellate Rules, Subject: Item No. 08-AP-R (March 31, 2015)
2. Excerpt from the May 14, 2016 Report of the Advisory Committee on Criminal Rules (Revised July 6, 2016), as reprinted in Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure 248, 249, 251-253 (Aug. 2016)

TAB 10C

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**PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF CRIMINAL PROCEDURE¹**

1 **Rule 12.4. Disclosure Statement**

2 **(a) Who Must File.**

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

10 **(2) *Organizational Victim.*** Unless the government
11 shows good cause, it must file a statement
12 identifying any organizational victim of the
13 alleged criminal activity.~~If an organization is a~~
14 ~~victim of the alleged criminal activity, the~~

¹ New material is underlined in red; matter to be omitted is lined through.

2 FEDERAL RULES OF CRIMINAL PROCEDURE

15 ~~government must file a statement identifying the~~
16 ~~victim.~~ If the organizational victim is a
17 corporation, the statement must also disclose the
18 information required by Rule 12.4(a)(1) to the
19 extent it can be obtained through due diligence.

20 **(b) Time ~~for~~to Filing; Supplemental ~~Later~~ Filing.** A
21 party must:

- 22 (1) file the Rule 12.4(a) statement within 28 days
23 after~~upon~~ the defendant's initial appearance; and
24 (2) ~~promptly file a supplemental statement~~ at a later
25 time promptly if the party learns of any
26 additional required information or any changes
27 in required information~~upon any change in the~~
28 ~~information that the statement requires.~~

Committee Note

Subdivision (a). Rule 12.4 requires the government to identify organizational victims to assist judges in complying with their obligations under the Judicial Code of

Conduct. The 2009 amendments to Canon 3(C)(1)(c) of the Judicial Code require recusal only when a judge has “an interest that could be substantially affected by the outcome of the proceeding.” In some cases, there are numerous organizational victims, but the impact of the crime on each is relatively small. In such cases, the amendment allows the government to show good cause to be relieved of making the disclosure statements because the organizations’ interests could not be “substantially affected by the outcome of the proceedings.”

Subdivision (b). The amendment specifies that the time for making the disclosures is within 28 days after the initial appearance, and it makes clear that a supplemental filing is required not only when information that has been disclosed changes, but also when a party learns of additional information that is subject to the disclosure requirements.

Because a filing made after the 28 day period may disclose organizational victims in cases in which none were previously known or disclosed, the caption and text have also been revised to refer to a later, rather than a supplemental, filing.

TAB 10D

MEMORANDUM

TO: SUBCOMMITTEE ON PRIVACY, PUBLIC ACCESS, AND APPEALS

FROM: ELIZABETH GIBSON, REPORTER

SUBJECT: POSSIBLE AMENDMENT TO FRAP 26.1 REGARDING BANKRUPTCY PROCEEDINGS

DATE: FEBRUARY 17, 2017

The Advisory Committee on Appellate Rules has sought our Committee’s advice on a possible amendment to FRAP 26.1 (Corporate Disclosure Statement) that would add a provision requiring the disclosure, for conflict screening purposes, of the names of certain participants in a bankruptcy proceeding. Consideration of this amendment is part of a broader project by the Appellate Rules Committee regarding the scope of disclosures under FRAP 26.1. The bankruptcy-related amendment would adopt the view of an advisory opinion issued by the Committee on Codes of Conduct (Advisory Opinion No. 100), which addressed who is “a party to a proceeding” for purposes of recusal in bankruptcy cases. The Appellate Rules Committee discussed the possible bankruptcy amendment at its fall 2016 meeting and decided to seek input from our Committee before proceeding further with it. This matter is on the Subcommittee’s agenda for the February 23 conference call.

The Proposed Amendment

The amendment under consideration would add a new subsection (e) to FRAP 26.1 and would read as follows:

(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.

It appears that the obligations imposed by this proposed subdivision would be in addition to any other applicable provisions of the rule. For example, under the current version of the rule, subdivision (a) requires any nongovernmental corporate party to file a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock. The Appellate Rules Committee is also considering whether to expand subdivision (a) to require all parties other than a governmental unit or individual to disclose the names of the trial judges in the proceeding or any related state proceeding; the names of all law firms, partners, and associates that have appeared or will appear for the party in the proceeding; and the names of all witnesses who have testified on behalf of the party in the proceeding.¹

The Appellate Rules Committee was not comfortable proceeding with the bankruptcy-related amendment without seeking input from our Committee. The reporter, Professor Dan Capra, noted that the Committee on Codes of Conduct had suggested in 2008 that our Committee might “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.” Nevertheless, our Committee had never adopted any change to the disclosure rule. In light of that inaction, Professor Capra advised the Appellate Rules Committee to proceed with caution regarding disclosures in bankruptcy appeals, “as one would think that the Bankruptcy

¹ The reporter’s memo to the Appellate Rules Committee pointed out that there is no reason that individual parties should not also have to make the nonfinancial disclosures (trial judges, lawyers, witnesses), but for ease of drafting and purposes of discussion the draft before the committee was not so expanded.

Rules would be the primary source for defining who is a party in a bankruptcy for purposes of the disclosure rules.”

Advisory Opinion No. 100 and This Committee’s Prior Deliberations

In 2001 the Committee on Codes of Conduct issued an advisory opinion (No. 100) on “Identifying Parties in Bankruptcy Cases for Purposes of Disqualification.” The opinion began by pointing out that Canon 3C requires recusal when the judge or a close relative has a financial interest in “a party to the proceeding” or is such a party. It then stated that determining who is a party to a proceeding in bankruptcy cases is often more complicated than in civil and criminal cases because of the larger number of affected entities and their changing status during the course of a bankruptcy case. Merely being a creditor does not make one a party, the opinion said, nor does filing a proof of claim or voting on a reorganization plan. A more significant interest and involvement in the bankruptcy case are required.

Advisory Opinion No. 100 concluded that the following participants in a bankruptcy case are sufficiently involved to constitute parties: members of a creditors committee, the debtor, a trustee, parties to an adversary proceeding, and participants in a contested matter. Because of their role or active participation, the opinion stated that these entities “are sufficiently akin to parties that they should be treated as such for purposes of judicial disqualification.”

In May 2008 Judge Gordon Quist, chair of the Committee on Codes of Conduct, wrote Judge Lee Rosenthal, chair of the Standing Committee, concerning three issues related to conflict screening that he said might merit amendments to the federal rules of procedure. Among them was the issue of identifying parties to bankruptcy proceedings. Judge Quist said that creditors’ and other interested persons’ changing status had the potential to complicate the

implementation of conflict-screening software. “Accordingly,” he wrote, “the [Codes of Conduct] Committee suggests that the Standing Committee on Rules 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.”

Judge Rosenthal referred the matter to this Committee, and the suggestion was on the agenda for the fall 2008 meeting. A memorandum on the suggestion was prepared for the agenda book of that meeting, but the matter was not discussed because, according to the minutes, further clarification of the letter was sought. The minutes of the spring 2009 meeting stated that the Committee was still waiting for clarification, and thereafter the matter disappeared from the Committee’s agenda.

Proposed FRAP 26.1(e) and Issues for Consideration

As currently drafted, proposed FRAP 26.1(e) would require the disclosure to a court of appeals of the names of the participants in a bankruptcy case that are deemed to be parties under Advisory Opinion No. 100: debtor, trustee, members of creditors’ committees, parties to adversary proceedings, and active participants in contested matters. It is modeled in part on the Third Circuit’s Local Rule 26.1.1(c).²

There is some ambiguity in the provision as currently worded. Do the references to “the parties to an adversary proceeding” and “the active participants in a contested matter” mean that the parties and active participants in all adversary proceedings and contested matters in the bankruptcy case must be disclosed or only those in the adversary proceeding or contested matter

² Local Appellate Rule 26.1.1(c) states: “In all bankruptcy appeals, counsel for the debtor or the trustee of the bankruptcy estate must promptly file with the clerk a list identifying (1) the debtor, if not named in the caption, (2) the members of the creditors’ committee or the top 20 unsecured creditors, and (3) any entity not named in the caption which is an active participant in the proceeding. If the debtor or trustee of the bankruptcy estate is not a party, the appellant must file this list with the clerk.”

on appeal? If the meaning is the former, in some large chapter 11 cases the lists would be extensive and extremely burdensome. If it is the latter, those names would frequently be revealed already by the caption of the appeal and thus be unnecessary to disclose. The Third Circuit rule on which the proposed provision was based limits this disclosure to the proceeding before the court of appeals and only requires the identification of entities not named in the caption. Advisory Opinion No. 100, on the other hand, concluded that all active participants in adversary proceedings and contested matters are “sufficiently akin to parties that they should be treated as such for purposes of judicial qualification.” The Subcommittee might want to recommend that this wording be clarified.

A related issue is what is the intended relationship of proposed subdivision (e) to subdivision (a) of FRAP 26.1. Subdivision (a) specifies who must file a corporate disclosure statement, and it currently applies to “[a]ny nongovernmental corporate party.”³ As currently drafted, subdivision (e) imposes a stand-alone obligation to disclose the identity of certain participants in a bankruptcy case. It is not a definitional provision that prescribes who is a party to a bankruptcy proceeding. Thus, it does not appear that corporations identified under (e) who are not actively participating in the appeal—for example, members of a creditors’ committee or objectors to confirmation who are neither appellants nor appellees—have to disclose information about any parent corporation or owner of 10% or more of its stock. If that is the intended reading, the obligation imposed by subdivision (e) is relatively modest (especially if only parties to the proceeding before the court have to be disclosed). If, however, the provision is intended to identify who are all the parties to the underlying bankruptcy case for purposes of giving the

³ As discussed above, the Appellate Rules Committee is considering proposals that would expand the applicability and scope of subdivision (a).

judges information needed for conflict screening, some revision of the language of either (a) or (e) may be needed.

A third issue was raised by a Committee member when the draft of proposed FRAP 26.1(e) was called to the Committee's attention last fall. Ms. Michaux questioned whether the provision is intended to apply to consumer cases or only to corporate bankruptcies. She passed along a comment by an attorney at the National Consumer Rights Center that the provision does not seem necessary in consumer cases and could be burdensome to individual debtors and amici. The wording of FRAP 26.1 does not suggest any exclusion of consumer cases. The Subcommittee may therefore wish to discuss whether there is a basis and desire for such an exclusion.

Consistency with Bankruptcy Rules Disclosure Requirements

An issue that is not directly before the Subcommittee but that may be appropriate to take into consideration is how the Bankruptcy Rules would need to be amended to remain consistent with FRAP 26.1 if subdivision (e) is added to it. There are currently several Bankruptcy Rules that require corporate disclosures. Rule 7007.1 (Corporate Ownership Statement) is the main rule. It applies to adversary proceedings and requires corporate parties other than the debtor or a governmental unit to file a statement that identifies any nongovernmental corporation that owns, directly or indirectly, 10% or more of any class of the corporation's equity interests. Other rules impose this requirement on nongovernmental corporations at other stages of a bankruptcy case: Rule 1007(a)(1) (debtor in a voluntary case), Rule 1007(a)(4) (foreign representative in a chapter 15 case), 1010(b) (petitioner in an involuntary case), 1011(f) (debtor in an involuntary case); and 8012 (party to an appeal to the district court or BAP).

Amendment of FRAP 26.1 would most directly affect Rule 8012 since that appellate rule is modeled on FRAP 26.1. The Committee would likely want to require the same disclosures in appeals to the district courts and BAPs as are required in the courts of appeals. This Subcommittee will therefore need to remain in close touch with the Appellate Rules Committee regarding the scope of any proposed amendments to FRAP 26.1.

With regard to the rules requiring disclosures in the bankruptcy courts, any expansion of the disclosure requirements in FRAP 26.1 will necessitate consideration of amending Rule 7007.1 to remain consistent with the disclosure requirements of the parallel federal rules, as well as with Advisory Opinion No. 100. The most significant issue is likely to be whether to impose disclosure requirements to contested matters. In response to the original publication for public comment of Rule 7007.1, one comment was submitted that suggested the rule be made applicable to contested matters as well as to adversary proceedings. The Committee at that time chose to limit the applicability of the rule to adversary proceedings. One of the reasons for that decision was that so many contested matters are resolved with little or no court involvement or very quickly, requiring the filing of a corporate disclosure statement would be unnecessary or even futile. The considerations are somewhat different at the appellate stage. If a contested matter has resulted in litigation and an appeal, the same need for conflict-screening disclosures exists as for an adversary proceeding on appeal. But at the trial level, the Committee would need to consider when and under what circumstances to require disclosures in a contested matter.

TAB 11

TAB 11A

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MEMORANDUM

DATE: April 9, 2017

TO: Advisory Committee on Appellate Rules

FROM: Gregory E. Maggs, Reporter

RE: Item No. 16-AP-C: Amending Rules 32.1 and 35 to require publication of orders granting or denying rehearing or rehearing en banc

I. Introduction

This new item is based on the attached suggestion submitted by attorney Eric Bravo of the Lane Alton law firm. Mr. Bravo proposes "amending Federal Rules of Appellate Procedure 32.1 and 35 to provide that [a] Court of Appeals' Order 1) granting a motion for initial hearing en banc or rehearing en banc, or 2) denying such a motion and which includes a concurring or dissenting opinion, be designated as a 'published' decision."

Mr. Bravo explains that orders granting or denying a motion for hearing or rehearing en banc are typically characterized as "unpublished orders." For this reason, he asserts, commercial databases like Lexis do not include them. Instead, such orders typically appear only on Pacer and on the official court websites.¹ As a result, Mr. Bravo explains, a "practitioner is bound to go beyond Lexis and review the PACER docket of every case on which he or she will rely . . . [because] a PACER docket review seems the only way to learn of the original panel's holding being invalid."

Mr. Bravo does not suggest that the Appellate Rules actually could require Lexis and Westlaw to include any types of orders in their databases. Lexis and Westlaw are private businesses; they are free to decide what to include and what to omit. Instead, Mr. Bravo's theory is that Lexis and Westlaw would be more inclined to include orders granting or denying rehearing en banc if the courts of appeals routinely designated such orders as "published." His proposed amendments to Rules 32.1 and 35 would require such a designation.

¹ Mr. Bravo's initial email submission suggested that the orders do not appear on the courts' official websites. But his subsequent email submission indicates that they are included as unpublished orders in the daily list of decisions.

II. Research

In researching this issue, I have discovered that the kind of information that Mr. Bravo seeks about unpublished court orders in recent cases is in fact available on Westlaw and Lexis. Here is how to find these orders:

- Lexis: In the "Explore Content" box on the main search page, click on "Dockets." Then search for the document number (e.g, "15-1366").
- Westlaw: When reviewing a recently decided case, click on the "filings" tab, and then click on the filing labeled "Docket."

On both Lexis and Westlaw, the docket retrieved for the case contains a listing of all the orders, including orders granting or denying rehearing and rehearing en banc. These databases may be linked in some way to Pacer because they appear to contain the same information.

III. Recommendation

I recommend removing Item No. 16-AP-C from the Committee's agenda without further action for two reasons. First, the proposed amendments are unnecessary because unpublished orders granting or denying rehearing or rehearing en banc are available on commercial databases, on Pacer, and on official court websites. Second, the Appellate Rules do not currently address the question of which kinds of documents should be designated as "published" and which should be designated as "unpublished." Attempting to create rules on this subject would be complicated and would invite controversy because traditionally the question of whether to designate decisions and orders as "published" or "unpublished" has been left to the discretion of the judges involved.

Attachment

Emails to the Advisory Committee for Appellate Rules from Attorney Eric Bravo on Orders Regarding Motions for En Banc Hearing (Sept. 30, 2016)

TAB 11B

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To: 'Rules_Support@ao.uscourts.gov' <Rules_Support@ao.uscourts.gov>
Cc: [REDACTED] <gmaggs[REDACTED]>; [REDACTED] <abarrett[REDACTED]>
Subject: Federal Rules of Appellate Procedure -- Orders Regarding Motions for En Banc Hearing

Dear Members of the Advisory Committee on the Federal Rules of Appellate Procedure, Including Professors Barrett and Maggs:

Thank you very much for your time. I write to propose amending Federal Rules of Appellate Procedure 32.1 and 35 to provide that an Court of Appeals' Order 1) granting a motion for initial hearing en banc or rehearing en banc, or 2) denying such a motion and which includes a concurring or dissenting opinion, be designated as a "published" decision.

I write because of my realization that such orders, although vacating an earlier panel decision (in the case of en banc rehearing grant), or at least of academic interest (in the case of a denial featuring a concurring or dissenting opinion), are -- at least in the Sixth and Seventh Circuits -- almost completely hidden from view. In being designated "Orders," they are not only absent from the courts' websites' list of new decisions, but do not even appear in Lexis.

If I may address two examples. On May 17, 2016, the Seventh Circuit issued a 2-1 published decision in *United States v. Johnson*, 823 F.3d 408, an interesting and publicized Fourth Amendment traffic stop case. I first noted the decision while checking the court's website that day for newly-issued decisions. I was surprised, though, to just read in an ABA Journal article that on August 8 the court granted a motion for rehearing en banc in the case. That order, being designated merely as an "Order," does not appear on the court's website as an issued "decision" -- published or unpublished -- and thus would not be discovered by those reviewing the website to see the list of that day's issued decisions. Neither is it found on Lexis. As far as I can tell, only the PACER docket has it. (I don't know if Westlaw has it or not.)

Also of interest is *Michigan State A. Philip Randolph Institute v. Johnson*, a Sixth Circuit case of national interest. On August 17, 2016, in a published decision, the court denied appellant's motion for stay of the district court's judgment pending appeal. (Appellant then sought a stay in the Supreme Court, which was denied by a 7-2 vote.) On August 18, appellant moved the Sixth Circuit for an en banc initial hearing on the merits. The divided whole court denied that motion by a September 1, 2016 "Order" featuring concurring and dissenting opinions. And that Order, too, being designated merely as an "Order," does not appear on the court's website as an issued "decision" and thus would not be found by those reviewing the website to see the list of that day's issued

decisions. It is also not on Lexis.

There is no dispute that the grant of a motion for en banc hearing is a rare and significant occurrence (and is an occurrence which, as known at anyone hearing a Circuit judge speak on the topic, the courts prefer to keep rare.) As such, the grant should be prominently set forth in a published decision rather than deeply hidden in a buried "Order." I think the same holds true for a denial of a motion for en banc hearing which at least one judge of the court believes merits a concurring or dissenting opinion. While I realize that such Orders are accessible via PACER (which is how I obtained the two Orders discussed above), it seems wrong that a grant of an en banc hearing -- or denial with a concurring or dissenting opinion -- while certainly of interest to all who have read the original underlying decision, and which in the case of a grant of a motion for en banc rehearing fully vacates the underlying decision, does not even appear as a "decision" on the court's website.

And the concern goes beyond mere academic interest in a case; while the Seventh Circuit's August 8, 2016 grant of the motion for rehearing en banc in *United States v. Johnson* vacated the Fourth Amendment holding in the panel's May 17, 2016 decision, such vacatur is not noted at all through reviewing the May 17 decision on Lexis, as Shepardizing the case fails to reveal the Order granting the en banc hearing. A practitioner performing this exercise might therefore erroneously argue the panel's May 17 holding in support of an argument he or she presents to another court. Further, it certainly can't be the case that this practitioner is bound to go beyond Lexis and review the PACER docket of every case on which he or she will rely, but unless that practitioner is fortunate enough to see the same article I did, such a PACER docket review seems the only way to learn of the original panel's holding being invalid.

The Ninth Circuit Court of Appeals lists their en banc grants, and en banc denials featuring a concurring or dissenting opinion, as published decisions. I think this is the proper practice and should be required through amendments to Federal Rules of Appellate Procedure 32.1 and 35.

Thank you very much for your time.

Sincerely,

Eric Bravo
Attorney
Lane Alton
Two Miranova Place, Suite 220



To: "Rules_Support@ao.uscourts.gov" <Rules_Support@ao.uscourts.gov>,
 "██████████" <gmaggs██████████>, "abarret██████████"
 "██████████"
Cc: ██████████
Bcc:
Subject: FW: Federal Rules of Appellate Procedure -- Orders Regarding Motions for En Banc Hearing
From: Eric Bravo <ebravo@lanealton.com> - Friday 09/30/2016 03:12 PM

Dear Committee Members:

I'm sorry to take your time to have to correct a mistake I made below. Sixth Circuit grants of motions for rehearing en banc, though titled "Orders" rather than "Decisions," are indeed included on the court's website's daily list of decided cases, under the group of unpublished decisions. While I believe these Orders should be designated as published rather than unpublished decisions, I apologize for wrongly stating below that these Orders did not appear at all on the court's website's daily list of decisions.

Eric Bravo

Attorney

Lane Alton

Two Miranova Place, Suite 220

Columbus, Ohio 43215

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From: Eric Bravo

Sent: Friday, September 30, 2016 11:31 AM

Columbus, Ohio 43215

(614) 228-6885 (Office)

(614) 233-4775 (Direct)

(614) 595-7997 (Cell)

(614) 228-0146 (Fax)

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TAB 12

TAB 12A

MEMORANDUM

DATE: April 6, 2017

TO: Advisory Committee on Appellate Rules

FROM: Gregory E. Maggs, Reporter

RE: Item No. 16-AP-D: Supplemental Authority

This new item concerns a suggestion to amend the Federal Rules of Civil Procedure by Mr. John Vail. In the attached email to the Administrative Office, Mr. Vail writes: "I suggest the Committee consider adopting, for the District Courts, an analog to FRAP 28(j). Currently how supplemental authority is to be filed, whether a response is permitted, whether a reply is permitted are ambiguous, as is the timing for any of those events." Appellate Rule 28(j) says:

(j) Citation of Supplemental Authorities. If pertinent and significant authorities come to a party's attention after the party's brief has been filed—or after oral argument but before decision—a party may promptly advise the circuit clerk by letter, with a copy to all other parties, setting forth the citations. The letter must state the reasons for the supplemental citations, referring either to the page of the brief or to a point argued orally. The body of the letter must not exceed 350 words. Any response must be made promptly and must be similarly limited.

The Federal Rules of Civil Procedure do not contain a comparable provision.

Because this item concerns a proposed amendment to the Federal Rules of Civil Procedure, the Civil Rules Advisory Committee must take the lead in deciding whether to act on it. The Appellate Rules Advisory Committee, however, should monitor developments on the matter. For example, if the Civil Rules Advisory Committee proposes a provision that similar but not identical to Appellate Rule 28, the Appellate Rules Advisory Committee may wish to work with the Civil Rules Advisory Committee to maintain conformity. In the meantime, the Advisory Committee may wish to keep the item on its agenda without acting on it.

Attachment

Email to the Administrative Office of the U.S. Courts from Mr. John Vail, Subject: A Suggestion (Nov. 2, 2016)

TAB 12B

16-AP-D



A suggestion

john vail

to:

Rules_Support

11/02/2016 03:22 PM

Hide Details

From: john vail <j.vail5@verizon.net>

To: Rules_Support@ao.uscourts.gov

I suggest the Committee consider adopting, for the District Courts, an analog to FRAP 28(j). Currently how supplemental authority is to be filed, whether a response is permitted, whether a reply is permitted are ambiguous, as is the timing for any of those events.

John Vail

john@johnvaillaw.com

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Washington DC 20001

202 589 1300

www.johnvaillaw.com

"Always do what is right. This will gratify some people and astonish the rest." Mark Twain

NOTICE: This electronic message and its attachments contain information from the John Vail Law PLLC that may be privileged and confidential attorney work product or attorney-client communication. The information is intended to be for the use of the addressee only. If you are not the addressee, do not read, distribute, or reproduce this transmission. Any disclosure, copying, distribution, or use of the contents of this message is prohibited. If you received this message in error, please notify the sender immediately by return email or at (202) 589 1300. Thank you.

TAB 13

TAB 13A

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MEMORANDUM

DATE: March 21, 2017

TO: Advisory Committee on Appellate Rules

FROM: Gregory E. Maggs, Reporter

RE: Item No. 17-AP-A: Rules 4(a)(1)(B)(iv) and 27

This new item addresses a proposal by Ms. Catherine M. Riga to amend Appellate Rules 4(a)(1)(B)(iv) and 27 [Attachment]. Although difficult to summarize, the proposal would appear to authorize a clerk of court to issue a subpoena "to avoid consum[ing] court resources for lawsuits" when one U.S. government employee attempts to thwart the performance of another U.S. government employee.

At its May 2017 meeting, the Advisory Committee may wish to consider removing this item from its agenda without taking any action. Whatever the merits of the proposal, it appears to be outside the scope of the Advisory Committee's responsibilities. The Federal Rules of Appellate Procedure do not currently address subpoenas. Subpoenas in civil cases are addressed by the Federal Rules of Civil Procedure.

Attachment:

Proposal of Ms. Catherine M. Riga (March 3, 2017, as revised March 30, 2017)

TAB 13B

March 30, 2017

Catherine M. Riga
3162 Saint Johns Bluff Rd
Jacksonville, FL 32246

Committee on Rule of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

FOREWORD

On March 3, 2017, Catherine M. Riga submitted suggestions to the rules committee. The submission was a little premature because the suggestions were not as thorough as they could have been if thought out more carefully. Additions to the revised suggestions below are inserted in red.

REVISED VERSION OF SUGGESTION DATED 3/3/17 MARKED 17-AP-A

Concern: President Trump's **sworn duties and** good faith intentions(to protect the United States) are being obstructed and thwarted.

Suggestion (1): Amend FRAP 4(a)(1)(B)(iv) to assert:

If a **current or former** United States employee(s) **in poor faith willfully chooses to** abandon his/her civic obligations **and/or** engages in unreasonable/**pervasive/threatening**/intimidating/ill-willed decision making practice(s) that could thwart/jeopardize the job responsibilities **including sworn duties** of another United States employee(s) **and/or harm his or her family**, the victimized United States employee who is "exercising" his or her constitutional rights to "express" his/her United States **sworn** duties can submit to a United States Clerk of Court a "request to subpoena/**order** another United States

employee(s) to correct **threatening** ill-willed actions” rather than consume court resources for lawsuits that would ultimately lead to such a subpoena **and order**.

A United States government policy should already be actively enforcing such actions. Further, FRAP 4(a)(1)(B)(iv) acknowledges an omission of a United States employee’s duties as being appealable and individually responsible. **When United States employees threaten the sworn duties of other United States employee and rejects an order or subpoena, sanctions should include, but not limited to, suspension or revocation of any professional license and/or fiduciary responsibilities.**

Suggestion (2):

Amend FRAP 27 11th Cir. R. 27-1(b) Emergency Motions(2) to include:

(v) discuss: a United States employee “request to subpoena/**order** another United States employee(s) to correct ill-willed action” rather than consume court resources for lawsuits that would ultimately lead to a subpoena/**order** and discuss request as being a government policy that should already exist.

IMPORTANCE OF ABOVE SAID SUGGESTED AMENDMENTS

Although not limited to the following, the importance of the above said amendments is to efficiently protect good faith people with good faith intentions to protect the United States of America. By illuminating a more modern form of human trafficking composed of less aggressive threats of intimidation directed at constitutional rights of expression that may not be considered the typical egregious horrific forms of human trafficking, the amendments should pursue closing loop holes that nearly allow ill willed conduct to exist.

Exercising the practice of an employee’s job responsibilities is a form of expression and intimidation onto such an employee is the ill-will intention to silence the employee from “expressing” those sworn job duties to satisfy another person’s poor faith agenda and/or obstruct justice.

Sincerely,

Electronic signature not available

Catherine M. Riga

TAB 14

TAB 14A

MEMORANDUM

DATE: April 6, 2017

TO: Advisory Committee on Appellate Rules

FROM: Gregory E. Maggs, Reporter

RE: Item No. 17-AP-B: Revising Rule 28 to specify how to state the issue presented

This new item concerns a proposal by Style Consultant Bryan Garner for revising Rule 28. As explained in the attachment, the revision would specify how parties must state the issue presented in their briefs. Because Mr. Garner has explained his proposal very clearly and concisely, I will not attempt to summarize it here.

Please note that the attachment refers to an "Annex B." Annex B, however, is not included in the Agenda Book because it is a 129-page work protected by copyright. Mr. Garner and I are seeking a way to make this material available. Mr. Garner will be available to discuss the proposal at the May 2017 meeting.

Attachment

Letter to the Hon. Neil M. Gorsuch from Mr. Bryan A. Garner (Jan. 12, 2017) (including Annex A but not Annex B)

TAB 14B



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12 January 2017

Hon. Neil M. Gorsuch
Chair, Appellate Rules Advisory Committee
1823 Stout Street
Denver, CO 80257

Proposed Revision of Appellate Rule 28

Dear Judge Gorsuch:

I write to propose an important revision to Federal Rule of Appellate Procedure 28. It has to do with the placement and the phrasing of the issues or questions presented—which are properly seen as a crucial part of a brief, but in fact are often overlooked or slighted by counsel and judges alike.

As you may know, I’ve written a great deal about the subject of “deep issues” over the years. Justice Scalia and I wrote jointly about them in *Making Your Case: The Art of Persuading Judges* 85–88 (2008), where we strongly endorsed the type of question presented that I’m recommending here. In fact, in our final appearance together, last February, Justice Scalia called the deep issue the greatest single development in legal advocacy in his lifetime.

My most thorough exposition of the subject appears in *The Winning Brief* 77–131 (3d ed. 2014). The idea is to abolish the one-sentence *Whether*-issue and to replace it with a multisentence issue with a strict limit of 75 words.¹

There is nothing newfangled about the idea: I developed it 25 years ago, I’ve taught it for a quarter-century (so have many others now), and I’ve coached thousands of lawyers in writing issue statements this way. I’ve provided hundreds of examples of deep issues in print.

¹ See *Black’s Law Dictionary* 959 (10th ed. 2014) (defining *deep issue* as “the fundamental issue to be decided by a court in ruling on a point of law,” adding that it “is usu. briefly phrased in separated sentences, with facts interwoven (in chronological order) to show precisely what problem is to be addressed”).

The advantages of deep issues are several: (1) they consist of shorter, more readable sentences (typically three); (2) they allow the salient facts to unfold chronologically, so that judges will more readily comprehend them in a single reading; and (3) they come to the question mark briskly, within 75 words (a number I arrived at after much experimentation with judicial readers and have used now for more than two decades).

Here's the example that Justice Scalia and I give on pages 87 and 88 of *Making Your Case*:

Conventional Issue	Deep Issue
Whether there was a violation of the OSHA rule requiring every incident-investigation report to contain a list of factors that contributed to the incident, when the investigation report on the June 2002 explosion at the Vespante plant listed the contributing factors in an attachment to the report entitled "Contributing Factors," as opposed to including them in the body of the report?	OSHA rules require every incident-investigation report to contain a list of factors that contributed to the incident. The report on the June 2002 explosion at the Vespante plant listed the contributing factors not in the body of the report but in an attachment entitled "Contributing Factors." Did the report thereby violate OSHA rules?

The facile (and even worse) way of presenting the conventional issue is to omit all facts and to say, simply, "Whether the Vespante report violated OSHA Rule 281.4(c)(1)(B)?" I've fictionalized the number, but you get the idea because you and your colleagues so often see this type of unhelpful issue statement.

So if deep issues help the judge far more than the conventional *Whether*-issue, can they be encouraged or mandated by rule? Absolutely. Deep issues quite predictably take this format: Major Premise, then Minor Premise, then Conclusion followed by a question mark. They should be written dispassionately and nonargumentatively, highlighting just the logic that underlies the particular point.


As you know, conventional appellate issues, as they've developed over the years, load everything into a single sentence, are stated ungrammatically as a sentence fragment beginning with *Whether*, and frame the problem in the most abstract way possible. They require intense concentration, which is rewarded only by an understanding that the statement is going to remain incomprehensible until the reader plows much more deeply into the brief. In short, they're the hallmark of poor exposition.

Attached as Annex A is my proposed amendment. It mimics the eminently sensible Supreme Court Rules (14.1(A), 24(1)(A)) requiring the questions presented to be the first thing the reader sees. And it gives examples, which are a crucial part of the rule. The rule will simply confuse people if they don't see model examples. The Illinois appellate rules give examples—a great idea if you want to help brief-writers—but they unfortunately give useless *Whether*-issues.

Attached as Annex B is a fuller explanation of the deep-issue technique, with answers to the most common questions about it. If the Advisory Committee for any reason wishes to replace one of the proposed examples in Proposed Rule 28(a)(1)(G), there are dozens of others to choose from in these materials. The amplitude of examples is purposeful: it demonstrates the workability of the technique in a wide variety of legal contexts.

The purpose of the amendment is to contribute to the improvement of brief-writing, the ease of judicial brief-reading, and the quality of justice administered by our federal appellate courts. I hope the Advisory Committee will consider it favorably. Thank you.

Sincerely,



Bryan A. Garner

Copies to: Professor Gregory E. Maggs
Rebecca Womeldorf, Esq.

Annex A

Proposed Rule 28 Change

Rule 28. Briefs

(a) **Appellant's Brief.** The appellant's brief must contain, under appropriate headings and in the order indicated:

- (1) a statement of the issues presented for review, with no other information on the page, expressed in this form:
 - (A) each issue must include dispassionately phrased legal and factual premises in separate sentences, leading up to the final sentence ending with a question mark;
 - (B) no citations should appear within the issues presented;
 - (C) the facts included in the issue must be concise and chronological;
 - (D) no single issue presented may exceed 75 words;
 - (E) no issue may begin with *whether* or be phrased in a single sentence; and
 - (F) if two or more issues are presented, each should be prefaced with a concise, neutral heading, which does not count toward the 75-word limit;
 - (G) the issues presented should be modeled on these examples:
 - Federal circuit courts may hear and rule on final orders only. Summary-judgment orders granting foreclosure are not considered final orders. Wilson has appealed the trial court's grant of summary judgment on First Bank's foreclosure count. Is that appeal properly before this court?
 - For a criminal-sentencing enhancement to be constitutional, the enhancement must be either found by the jury or admitted by the defendant. At Smith's sentencing, the Government conceded that Smith's three-level-organizer sentencing enhancement was neither found by the jury nor

admitted by Smith—yet the Court imposed it anyway. Is Smith entitled to resentencing without the enhancement?

- At trial, the chief prosecutor mentioned in closing that Jeffries had decided to represent himself at trial—a statement that Jeffries did not object to at the time or in his motion for new trial. On appeal, Jeffries raises the objection for the first time. Did he properly preserve this complaint for appellate review?

~~(1)~~ (2) a corporate disclosure statement if required by Rule 26.1;

~~(2)~~ (3) a table of contents, with page references;

~~(3)~~ (4) a table of authorities—cases (alphabetically arranged), statutes, and other authorities—with references to the pages of the brief where they are cited;

~~(4)~~ (5) a jurisdictional statement, including:

(A) the basis for the district court’s or agency’s subject-matter jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction;

(B) the basis for the court of appeals’ jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction;

(C) the filing dates establishing the timeliness of the appeal or petition for review; and

(D) an assertion that the appeal is from a final order or judgment that disposes of all parties’ claims, or information establishing the court of appeals’ jurisdiction on some other basis;

~~(5)~~ a statement of the issues presented for review;

(6) a concise statement of the case setting out the facts relevant to the issues submitted for review, describing the relevant procedural history, and identifying the rulings presented for review, with appropriate references to the record (see Rule 28(e));

(7) a summary of the argument, which must contain a succinct, clear, and accurate statement of the arguments made in the body of the brief, and which must not merely repeat the argument headings;

(8) the argument, which must contain:

(A) appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies; and

(B) for each issue, a concise statement of the applicable standard of review (which may appear in the discussion of the issue or under a separate heading placed before the discussion of the issues);

(9) a short conclusion stating the precise relief sought; and

(10) the certificate of compliance, if required by Rule 32(g)(1).

(b) Appellee's Brief.

(1) The appellee's brief must conform to the requirements of Rule 28(a)(1)–(8) and (10), except that none of the following need appear unless the appellee is dissatisfied with the appellant's statement:

(A) the jurisdictional statement;

~~(B) the statement of the issues;~~

(B) the statement of the case; and

(C) the statement of the standard of review.

(2) The appellee's brief must contain its own statement of issues presented on appeal, presumably with premises differing from those in the appellant's brief. Otherwise, the appellee's issues presented should comply with Rule 28(a).

(c) **Reply Brief.** The appellant may file a brief in reply to the appellee's brief. Unless the court permits, no further briefs may be filed. A reply brief must contain a table of contents, with page references, and a table of authorities—

cases (alphabetically arranged), statutes, and other authorities—with references to the pages of the reply brief where they are cited.

(d) **References to Parties.** In briefs and at oral argument, counsel should minimize use of the terms “appellant” and “appellee.” To make briefs clear, counsel should use the parties’ actual names or the designations used in the lower court or agency proceeding, or such descriptive terms as “the employee,” “the injured person,” “the taxpayer,” “the ship,” “the stevedore.”

(e) **References to the Record.** References to the parts of the record contained in the appendix filed with the appellant’s brief must be to the pages of the appendix. If the appendix is prepared after the briefs are filed, a party referring to the record must follow one of the methods detailed in Rule 30(c). If the original record is used under Rule 30(f) and is not consecutively paginated, or if the brief refers to an unreproduced part of the record, any reference must be to the page of the original document. For example:

- Answer p. 7;
- Motion for Judgment p. 2;
- Transcript p. 231.

Only clear abbreviations may be used. A party referring to evidence whose admissibility is in controversy must cite the pages of the appendix or of the transcript at which the evidence was identified, offered, and received or rejected.

(f) **Reproduction of Statutes, Rules, Regulations, etc.** If the court’s determination of the issues presented requires the study of statutes, rules, regulations, etc., the relevant parts must be set out in the brief or in an addendum at the end, or may be supplied to the court in pamphlet form.

(g) **[Reserved]**

(h) **[Reserved]**

(i) **Briefs in a Case Involving Multiple Appellants or Appellees.** In a case involving more than one appellant or appellee, including consolidated cases, any number of appellants or appellees may join in a brief, and any party may adopt by reference a part of another’s brief. Parties may also join in reply briefs.

(j) **Citation of Supplemental Authorities.** If pertinent and significant authorities come to a party’s attention after the party’s brief has been filed—or after oral argument but before decision—a party may promptly advise the circuit clerk by letter, with a copy to all other parties, setting forth the citations. The

letter must state the reasons for the supplemental citations, referring either to the page of the brief or to a point argued orally. The body of the letter must not exceed 350 words. Any response must be made promptly and must be similarly limited.

TAB 15

TAB 15A

MEMORANDUM

DATE: April 9, 2017

TO: Advisory Committee on Appellate Rules

FROM: Gregory E. Maggs, Reporter

RE: Further Discussion of Ideas for Making Federal Appellate Litigation More Efficient

I. Introduction

At its October 2016 Meeting, the Advisory Committee discussed several ideas for making federal appellate litigation more efficient. Judge Neil Gorsuch also invited members of the Advisory Committee and members of the public to suggest additional ideas. At the May 2017 meeting, to follow up on this previous discussion, the Advisory Committee may wish to consider:

- the attached memorandum from Professor Stephen E. Sachs on the collateral order doctrine;
- the attached memorandum from the American Academy of Appellate Lawyers (AAAL) Task Force of Federal Appellate Rules on possible topics for the Advisory Committee to consider;
- a suggestion from Professor Stephen E. Sachs regarding possible amendment of Appellate Rule 47; and
- the status of other research which the reporter and members of the Advisory Committee agreed to undertake at the October 2016 meeting.

These matters are not currently on the Advisory Committee's agenda, but discussing them may lead to the creation of new agenda items.

II. Memorandum on the Collateral Order Doctrine

Professor Stephen E. Sachs volunteered at the October 2016 meeting to revisit the Advisory Committee's prior efforts to codify or revise the collateral order doctrine. He has

prepared the attached memorandum that describes the recent history of the Advisory Committee's consideration of the issue, identifies some areas for investigation, and explores some available avenues for reform. As discussed in Part 2 of his memorandum, the Committee may wish to decide whether to seek empirical data on certain issues. The Administrative Office and the Federal Judiciary Center have informed Professor Sachs that they have the capacity to produce the data, but it would require significant research and coding.

III. Memorandum from the American Academy of Appellate Lawyers

The AAAL has appointed a task force to study and provide input to the Federal Appellate Rules Advisory Committee on areas where the rules might be modified or improved. In the attached memorandum, the AAAL suggests five areas of concern that amendments to the Appellate Rules might address.

IV. Suggestion Regarding Appellate Rule 47

Professor Stephen E. Sachs has observed that circuit courts sometimes establish different style rules and certificate requirements for their own briefs and motions. For instance, in the Second Circuit, local Rule 32.1(a)(1) requires that "[t]he docket number of the case must appear in type at least one inch high," but other circuits have no such requirements. Professor Sachs has suggested that the Advisory Committee may wish to consider proposing an amendment to Rule 47 requiring each circuit court of appeals that imposes special form requirements to maintain sample copies of compliant papers on its website in word-processing format. The sample copies might include every form listed in the FRAP appendix of forms, as well as every other paper listed in the FRAP length-limit appendix (briefs, motions, supplemental letters, etc.). The hope is that many lawyers could just download the template and start filling in the blanks; everyone would always have to check the local requirements, but there would be many fewer cases of accidental violation.

V. Other Matters Previously Committed to Further Study

As recounted in Parts V.E. and V.F. of the draft minutes of the October 2016 meeting, the reporter and various members of the Advisory Committee also volunteered to study the following subjects: (a) circuit splits over the meaning of Appellate Rules 4(c) and 7; (b) rules on the contents of briefs; and (c) a conflict over whether an interlocutory appeal of one issue later precludes appeal of other issues. The volunteers involved may wish to discuss their research to date with the Advisory Committee.

Attachments

1. Memorandum from Professor Stephen E. Sachs to the Appellate Rules Advisory Committee regarding the Collateral Order Doctrine (Apr. 3, 2017) (includes Attachments A and B)
2. Memorandum from the American Academy of Appellate Lawyers—Task Force on Federal Appellate Rules to the Federal Appellate Rules Advisory Committee Regarding Topics for Rules Committee Consideration (Mar. 13, 2017)

TAB 15B

MEMORANDUM

TO: Appellate Rules Advisory Committee
FROM: Stephen E. Sachs
DATE: April 8, 2017
RE: **Collateral Order Doctrine**

This memorandum addresses Judge Gorsuch’s suggestion at the October 18, 2016, meeting that the Committee revisit its prior efforts to codify or revise the collateral order doctrine. It describes the recent history of the Committee’s consideration of the issue, identifies some areas for investigation, and explores some available avenues for reform.

1. Background

The collateral order doctrine treats certain orders of the district courts as if they were “final decisions” for purposes of appellate jurisdiction under 28 U.S.C. § 1291. (Subsequent references to the U.S. Code, unless otherwise indicated, are to Title 28.)

Ordinarily, a “final decision” is one “by which a district court disassociates itself from a case”—one that “ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.” *Gelboim v. Bank of Am. Corp.*, 135 S. Ct. 897, 902 (2015) (internal quotation marks omitted). The collateral order doctrine, often described as a “gloss” on § 1291’s language, *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 875 (1994), expands this category to permit appeals from all orders that:

- (1) “are conclusive,”
- (2) “resolve important questions separate from the merits,” and
- (3) “are effectively unreviewable on appeal from the final judgment in the underlying action.”

Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 106 (2009) (internal quotation marks omitted); see *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).

The doctrine serves as an important safety valve for correcting errors in the district courts. There is good reason to allow review of conclusive, separate, and important rulings that would otherwise be effectively unreviewable. Yet the doctrine sometimes threatens to create an “array of line-drawing difficulties,” *Mohawk*, 558 U.S. at 113, in part because it requires courts to consider these underlying reasons in each case. Losing litigants have every reason to portray new categories of orders as

“important” and “effectively unreviewable,” repeatedly inviting the courts of appeals to decide whether such cases are worth deciding. At the same time, courts may shrink from granting review to potentially meritorious appeals, for fear of committing to hear every appeal in the same or a similar category. Amid all this, the doctrine itself has not been free of lingering doubt over its statutory pedigree. See, e.g., *Mohawk*, 558 U.S. at 115–17 (Thomas, J., concurring in part and concurring in the judgment).

These concerns are hardly new. Nearly thirty years ago, the Federal Courts Study Committee described the law of appealability as “unsatisfactory in several respects”: “produc[ing] much purely procedural litigation,” “blur[ring] the edges of the finality principle,” “requir[ing] repeated attention from the Supreme Court,” and “in some circumstances restrict[ing] too sharply the opportunity for interlocutory review.” Report of the Federal Courts Study Committee 95 (Fed. Judicial Ctr. 1990). That Committee recommended dealing with the issue through the rulemaking process instead. *Id.* at 95–96.

Following this recommendation, Congress authorized the Supreme Court to rewrite the law of appellate jurisdiction, adding the following subsection to § 2072:

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

§ 2072(c); see H.R. Rep. No. 101-734, at 18 (1990); Thomas E. Baker, *A Primer on the Jurisdiction of the U.S. Courts of Appeals* § 3.01, at 37 (Fed. Judicial Ctr. 2d ed. 2009). Shortly thereafter, the Court was given similar power to expand the routes of interlocutory appeal, in a new subsection of § 1292:

(e) The Supreme Court may prescribe rules, in accordance with section 2072 of this title, to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under [§ 1292(a)–(d)].

§ 1292(e); see H.R. Rep. No. 102-1006, pt. I, at 18 (1992); Baker, *supra*, § 4.01, at 52.

The Court has used the latter power on occasion, such as by providing for discretionary appeal of class certification decisions under Civil Rule 23(f). But it has not addressed the system of appealability as a whole—despite describing the rulemaking process as “the preferred means for determining whether and when prejudgment orders should be immediately appealable.” *Mohawk*, 558 U.S. at 113.

This Committee’s recent discussion of appellate jurisdiction has been similarly circumscribed. Much of its activity has focused on the issues presented in *Mohawk*, which involved appeals from disclosure orders adverse to claims of attorney-client

privilege. These previous discussions are summarized in the Memorandum of Lauren Gailey to Stephen E. Sachs & Gregory E. Maggs (Oct. 25, 2016) (included here as Attachment A). (The 127 pages of materials cited in that memorandum are not attached here, but they are all available from the Administrative Office, as well as online.) During this period, the Committee briefly discussed broader revisions to the law of interlocutory appeal. See, *e.g.*, Memorandum of Andrea L. Kuperman to Judge Steven M. Colloton & Prof. Catherine T. Struve (Sept. 20, 2013) (included here as Attachment B). After exploring the full scope of the problem, however, the Committee retreated to the narrower issues posed by attorney-client privilege. Eventually it took no action, though calls for it to do so have continued. See, *e.g.*, Suggestion No. 15-AP-G (Prof. Alan B. Morrison).

2. Areas for Investigation

If the Committee is interested in revisiting the topic of collateral orders, it would be helpful to know the details of the situation. For instance, the Committee might wish to know:

- How much collateral order litigation is there? What proportion of appeals, in various types of cases, arise on collateral order grounds? How does this compare to mandamus, or to particular types of appeals under 18 U.S.C. § 3731 (criminal), 28 U.S.C. § 1292(b) or Civil Rule 54(b) (civil), or 28 U.S.C. 158(d)(2) (bankruptcy)?
- How often do assertions of collateral order jurisdiction succeed, and how often do they fail? How does this success rate compare to other types of interlocutory appeals? In other words, are litigants good at predicting whether a collateral order appeal is permitted, or do they place the burden on the courts of appeals to separate the wheat from the chaff?
- Are collateral order appeals especially time-consuming? Does it take longer to dispose of them than of similar cases brought through other interlocutory routes, or brought on ordinary appeal after final judgment?

According to the Administrative Office and the Federal Judicial Center, data on these and similar topics are not immediately available and may require substantial research and coding. However, they are not outside the capacity of the AO and FJC to investigate. Should the Committee wish to revisit the subject, one useful step might be to identify the areas of research which the Committee, the AO, and the FJC should undertake.

3. Avenues for Reform

Looking forward to when the data will be in hand, it may also be helpful for the Committee to consider in advance a few potential avenues for reform. As did the Study Committee, Judge Gorsuch noted a perception that the collateral order doctrine produces a great deal of procedural litigation. It is not hard to understand why that might be. The doctrine takes an unusual approach to identifying appealable issues: it identifies a number of good reasons for permitting appeals in general, and it then instructs the courts to apply those reasons directly to each proposed category of cases. The difficulty comes in deciding, as each new category arises, whether these criteria have in fact been met.

The uncertainty generated by this process is particularly worrisome because it relates to jurisdiction. Jurisdictional issues are nonwaivable and go to the appellate court's power to hear the case. As the Supreme Court has previously recognized, "administrative simplicity is a major virtue" in jurisdictional matters: "Complex jurisdictional tests complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims." *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010).

Other routes to interlocutory appeal take different strategies for avoiding uncertainty. Sometimes, for example, the law chooses a standard so exacting as to make unclear cases somewhat less frequent—such as by requiring, for a writ of mandamus under § 1651(a), a "clear and indisputable" right without any "other adequate means" of relief. *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 380–81 (2004). At other times, it automatically permits appeals from an identified, discrete category of nonfinal orders—such as injunctions or receiverships under § 1292(a), or particular orders in criminal cases under 18 U.S.C. § 3731. At still other times, it vests case-by-case discretion in particular gatekeepers—such as by letting district courts direct entry of a partial final judgment under Civil Rule 54(b), or by requiring two courts' consent to hear a certified question of law under § 1292(b).

These strategies avoid the need for courts to opine, in any particular case, on the desirability of a general category of interlocutory appeals. And they can also be used in combination—as in Civil Rule 23(f)'s discretionary appeal from class certification decisions, or § 2253(c)'s requirement of a certificate of appealability in habeas cases and in postconviction review.

By adopting these or similar strategies, it might be possible to reduce some of the uncertainty surrounding collateral orders. The following discussion tentatively identifies a variety of possible approaches and highlights some of their costs and benefits. In considering these approaches (as well as others), it is important to note that—as

with any reform project—there would be no way to precisely replicate the collateral order doctrine’s outputs without replicating the doctrine itself. An attempt to simplify the law would necessarily change it, with the result that some appeals might be newly accepted or rejected. But it might be possible to reproduce more of the doctrine’s advantages than its uncertainties, by expanding on these or similar strategies for providing interlocutory review.

3.1. Defining “Final Decisions”

Reducing ancillary litigation over the collateral order doctrine might involve two moves: defining the scope of “final decisions” under § 2072(c), and then identifying particular grounds for interlocutory appeal under § 1292(e).

Identifying particular grounds for interlocutory appeal, as was done in Civil Rule 23(f), might well reduce jurisdictional litigation in cases involving those grounds. But because the collateral order doctrine acts as a gloss on “final decisions,” new grounds alone would not solve the problem. Litigants could still invoke the doctrine to argue that other types of orders, for which no provision had yet been made, would continue to qualify as appealable “final decisions.”

To settle these questions, one possible method would be for the Court to use its power under § 2072(c) to define “final decisions” to include only those decisions that are truly final—those by which the district court disassociates itself from the case, ending the litigation on the merits and leaving nothing for the court to do but execute the judgment. See *Gelboim*, 135 S. Ct. at 902. The definition of “final decision” might also include a few specific categories of orders analogous to those that end a case—such as partial final judgments under Civil Rule 54(b), appealable contempt orders, or various postjudgment orders from which no other appeal would lie. Yet the vast majority of topics on which immediate appeal ought to be available, including many of those currently handled through the collateral order doctrine, would then be addressed under § 1292(e).

(In almost all cases, the Court’s statutory authority for this redefinition would be clear, as it has power under § 2072(c) to define “when a ruling of a district court is final for the purposes of appeal under [§ 1291].” But statutes other than § 1291 also use the term “final decision,” and they have also been read to permit the appeal of collateral orders. See, e.g., § 158(d)(1) (appeals in bankruptcy); § 1295 (Federal Circuit jurisdiction); see also *Lariscey v. United States*, 861 F. 2d 1267, 1269 (CAFC 1988) (construing § 1295). Unless other statutory authority is available, it might be argued that the Court lacks power to redefine “final decision” as it appears in these *other* provisions. Then again, given that the collateral order doctrine is a Court-imposed

“gloss” in the first place, perhaps the Court’s endorsement of a redefinition of § 1291 would be thought sufficient to re-gloss the other provisions as well.)

If “final decision” were redefined, the Court would also need to supply new criteria for whichever appeals of nonfinal decisions were to survive the redefinition—without invoking standards as uncertain and as productive of litigation as the collateral order doctrine is now. The following sections discuss some options along these lines.

3.2. Preserving the Status Quo

In *Mohawk*, the Court expressed skepticism toward future assertions of collateral order jurisdiction, describing “rulemaking, not expansion by court decision, as the preferred means for determining the availability of interlocutory appeals.” 558 U.S. at 113 (internal quotation marks omitted); see also *id.* at 115 (Thomas, J., concurring in part and concurring in the judgment) (suggesting that the doctrine be limited to cases “on all fours with orders we previously have held to be appealable”). One possibility, then, would be simply to freeze the status quo in place. Along the lines of Civil Rule 59(a)(1)’s “heretofore” rule for new trials, the Court might permit interlocutory appeals from any specific category of orders that has heretofore been recognized as appealable under the collateral order doctrine.

The advantage of such a rule is that it would avoid litigation over new types of collateral orders, without substantively altering the law on the ground. (It might be particularly useful as a temporary rule, put in place during the pendency of a broader-ranging rulemaking project.) The disadvantage is that it might simply rephrase existing challenges in terms of new procedural questions: what counts as a specific category, whether a given order is similar enough to an existing category to fall within it, whether the category would have to have been recognized by the Supreme Court or just by the relevant court of appeals, and so on. Such questions have little to do with the underlying reasons for having interlocutory appeals, and there may be little reason for forcing courts to answer them. (Indeed, even *Mohawk* left the door open to new categories, and its skepticism may have been more useful as a cautionary note to the courts of appeals than it would be as a hard-and-fast rule.)

3.3. Codifying Categories of Orders

Another possibility, and the simplest in theory, would be to list the various types of nonfinal decisions from which appeals will henceforth be permitted. Instead of navigating the collateral order doctrine, litigants considering an interlocutory appeal would merely consult the list.

The efficiency advantages of such a list are plain. Developing it would also offer an opportunity to rationalize existing categories of collateral order jurisdiction, which

have thus far been developed one case at a time. The doctrine currently combines many different strands of reasoning: some appealable decisions are truly independent of the underlying merits, while others involve issues highly relevant to the merits but which might nonetheless benefit from immediate appeal. (Say, decisions rejecting a claimed immunity from suit—which may in fact be quite intertwined with the merits, but as to which the law can be said to treat the litigation itself as a form of injury, not remediable in the ordinary course.) A rule-based list of appealable decisions would be better able than a single abstract doctrine to reflect the wide variety of distinct reasons that justify immediate appeal in certain circumstances.

On the other hand, the effort involved in producing a good list would be substantial—as indicated by the wide range of topics listed in Attachment B. It might require, not only broad public participation, but extensive subject-matter expertise in the various fields in which collateral order appeals are found. (Those who rarely encounter admiralty law, say, might have difficulty assessing the importance of the exception for orders vacating the attachment of a vessel. See *Swift & Co. Packers v. Compania Colombiana Del Caribe, S.A.*, 339 U.S. 684 (1950).) Were the Committee to pursue this path, it might consider a joint effort with other Advisory Committees, whose members could speak to the potential consequences of any changes on criminal, civil, or bankruptcy procedure.

No matter how much expertise is brought to bear, there is always a danger that the list would leave out something important. This danger could be reduced by including a “catchall” or reserve provision. Too broad of a provision, however, might undermine the entire project: the end result might be to march the collateral order doctrine out the front door, only to let it climb back in through the window. Rather than trying to write elements for a new “catchall” standard, it might be preferable to invoke other devices for reducing uncertainty, such as freezing various elements of the status quo or delegating the decision to particular gatekeepers.

3.4. Delegating to Gatekeepers

A number of regimes for immediate appeals delegate appealability questions to various gatekeepers, who exercise discretion based on the facts of each case as it arises. For example, § 1292(b) imposes a substantive standard for particular civil appeals; the appealed issue must be a question of law, on which there is substantial ground for difference of opinion, the resolution of which would materially advance the litigation. But § 1292(b) also delegates to particular institutions the decision of whether that standard has been met, requiring the joint assent of the district court and of the court of appeals before any appeal can go forward.

Other gatekeeper regimes have been proposed. One approach would simply turn all of these decisions over to the courts of appeals, letting each litigant seek discretionary review of any adverse order of the district court. See, *e.g.*, Am. Bar Ass’n, Standards Relating to Appellate Courts § 3.12, at 30–31 (1994). That system would be very simple in one sense, though it might also increase (perhaps substantially) the workload of motions panels and the complexity of litigation overall. A court of appeals facing a wide variety of petitions for review could not help but develop new standards for disposing of them; and if it were easy to identify good standards, it might also be easy to list those standards explicitly as identified grounds for appeal.

Other gatekeeping approaches would involve the litigants more directly. For example, § 158(d) permits discretionary appeals in bankruptcy based on the joint assent of the appellate court and of the parties on both sides. Or a rule under § 1292(e) could permit appeals as of right—that is, without the permission of the court of appeals—if all parties as well as the district court see them as necessary. (Or unless the district court affirmatively finds the appeals *unnecessary*, or)

Still other approaches would combine discretion with a more carefully specified standard. For example, the court of appeals might conceivably be given discretion to accept appeals meeting the existing elements of the collateral order doctrine. The underlying standard would be unchanged, but it would be applied (and subsequently reviewed) as a matter of discretion rather than of right—with case-by-case issues of importance or effective unreviewability decided on a case-by-case basis rather than categorically. Cf. *Mohawk*, 558 U.S. at 118 (Thomas, J., concurring in part and concurring in the judgment) (noting that the facts of a particular case may present benefits to immediate appeal that plainly outweigh the costs).

Yet other approaches might seek to combine the benefits of case-by-case and categorical decisionmaking through the use of local rules. If there are particular issues on which interlocutory appeals are necessary but unavailable, the individual courts of appeals will likely discover them long before this Committee does. At the same time, the costs of permitting unnecessary appeals fall most heavily (and noticeably) on the very same courts. So one alternative might be to identify certain categories of nonfinal decisions as appealable nationwide, and then to empower the courts of appeals to accept appeals of other decisions as limited by their local rules. Such an approach would, of course, diminish the national uniformity of the Appellate Rules. Yet a case is usually pending in only one circuit at a time, and the variation across circuits might let new reforms percolate and be tested in particular places before being adopted or rejected on a national scale. (There might also be questions of statutory authority for local rules; the power “to provide for an appeal of an interlocutory decision” is conferred by § 1292(e) on the Supreme Court, without mentioning local rules. Yet the jurisdictional discretion potentially conferred on the courts of appeals would

not be fundamentally broader than their existing authority to accept or reject cases under Civil Rule 23(f), or their vast discretion under Rule 2.)

4. Further Steps

This memorandum is wholly preliminary in nature. Without prejudging the wisdom of a reform effort, it seeks to identify possible approaches to a project relating to collateral orders, so that the Committee may consider for itself whether such a project would be worth pursuing.

Partly for this reason, this memorandum does not address the many procedural issues that might be addressed in the course of implementing changes to the doctrine. (For example, whether to impose a different time limit on interlocutory appeals than on appeals from final judgment, whether interlocutory appeals should presumptively stay or not stay the litigation in district court, whether a party should be allowed only a certain number of interlocutory appeals in a single case, and so on.)

If the Committee does take an interest in the project, it might usefully begin by identifying next steps. These might include, among other topics, the research that might be helpful for the AO, the FJC, and Committee members to pursue; the efforts, if any, that should be coordinated with other Advisory Committees; and the general approaches to reform which those tasked with the project should keep in mind.

Attachment A

MEMORANDUM

TO: Professor Stephen E. Sachs
Reporter, Appellate Rules Advisory Committee

FROM: Lauren Gailey
Rules Law Clerk

DATE: October 25, 2016

RE: Appellate Rules Advisory Committee’s Examination of Collateral Order Doctrine
Post-*Mohawk*

At the October 18, 2016 Appellate Rules Advisory Committee meeting, Judge Gorsuch expressed interest in revisiting a project explored previously: codifying aspects of the collateral order doctrine through the rulemaking process. This memorandum describes the chronological progression of the project and identifies key documents¹ containing substantive research and recording the committee’s actions.

2009

- *Mohawk decision*
- *Suggestion No. 09-AP-D*

On December 8, 2009, the U.S. Supreme Court held in *Mohawk Industries v. Carpenter*, 558 U.S. 100 (2009), that an order compelling production of purportedly attorney-client-privileged information was not immediately appealable under the collateral order doctrine. *Id.* at 103.

Two days later, then-Standing Committee member John Kester e-mailed then-Chair Judge Rosenthal about *Mohawk*, which he believed “could [be] read . . . as an invitation to bring some order to the somewhat ad hoc *Cohen* [collateral order] jurisprudence through rulemaking” (italics added). This informal e-mail exchange, where Mr. Kester further suggested that the Standing Committee “refer the topic to the Appellate Advisory Committee for them to ponder,” became suggestion No. 09-AP-D.

2010

- *April 2010 Appellate Rules agenda book (containing March 13, 2010 Reporter’s Memo)*
- *April 2010 Appellate Rules meeting minutes*
- *June 2010 Standing meeting minutes*
- *October 2010 Appellate Rules agenda book (containing September 16, 2010 Reporter’s Memo)*
- *October 2010 Appellate Rules meeting minutes*

¹ The accompanying PDF contains bookmarks for each document referenced in this memorandum.

Then-Reporter Professor Catherine Struve circulated to the Appellate Rules Advisory Committee in April 2010 a memorandum discussing *Mohawk* and possible rulemaking responses. At its April 2010 meeting, the Appellate Rules Advisory Committee seemed reluctant to expand any such response beyond privilege rulings, but agreed to undertake further study in conjunction with other advisory committees. Judge Sutton, then the chair, reviewed the project at the Standing Committee's June 2010 meeting.

In the fall of 2010, Professor Struve circulated a memorandum exploring possible avenues that the advisory committee had proposed in April. The advisory committee decided to begin with privilege rulings, reserving other types of orders (e.g., denials of qualified immunity) for later discussion, and decided to solicit input from the other advisory committees.²

2011–12

- *March 2011 Report of the Standing Committee to the Judicial Conference*

Over the next two years, the topic of *Mohawk*/collateral order doctrine went dormant. Its only noteworthy appearance in the committees' meeting records during this period was a brief mention among other ongoing projects in the Standing Committee's March 2011 report to the Judicial Conference.

2013

- *April 2013 Appellate Rules agenda book (containing March 25, 2013 Reporter's Memo and suggestion No. 11-AP-F)*
- *April 2013 Appellate Rules meeting minutes*
- *October 2013 Appellate Rules agenda book and supplement (containing September 20, 2013 Rules Law Clerk Memo)*

Meanwhile, in March 2010 practitioner Amy Smith submitted a written suggestion (No. 11-AP-F) to amend the Civil Rules in light of *Mohawk* to make adverse privilege rulings immediately appealable. In preparation for the April 2013 Appellate Rules Advisory Committee meeting, Professor Struve circulated that suggestion, the September 2010 Reporter's Memorandum, and a new memorandum discussing the status of the *Mohawk* project.

During the April meeting, Judge Colloton, who replaced Judge Sutton as committee chair, raised the possibility of expanding the discussion beyond attorney-client-privilege rulings to other types of interlocutory orders. In September 2013, the Rules Law Clerk circulated a comprehensive memorandum addressing the appealability of a wide variety of prejudgment orders. However, the October 2013 meeting was cancelled due to a government shutdown.

² As of the April 2013 Appellate Rules Advisory Committee meeting, "the other Committees ha[d] not . . . moved forward with that proposal." Memorandum from Catherine T. Struve to Advisory Committee on Appellate Rules (Mar. 25, 2013) (on file with the Rules Committee Support Office). The April 2013 Appellate Rules meeting minutes reflect that "[t]he project had not developed momentum in the other Advisory Committees, but the Evidence Rules Committee had stressed the need for consultation if the Appellate Rules Committee were to proceed in this area."

2014

- *April 2014 Appellate Rules agenda book*
- *April 2014 Appellate Rules meeting minutes*
- *October 2014 Appellate Rules agenda book (containing October 3, 2014 Reporter's Memo)*
- *October 2014 Appellate Rules meeting minutes*

The advisory committee next discussed the collateral order issue at the April 2014 meeting. The discussion centered on the appropriate scope of the committee's rulemaking efforts: should the committee attempt to overhaul the courts' treatment of interlocutory issues generally, or address each type of order one by one at the time a concern arises? Reluctant to abandon the effort entirely, Greg Katsas and Doug Letter agreed to work with Professor Struve to prepare a report as to the feasibility of interlocutory attorney-client-privilege appeals.

The project was discussed for the last time at the October 2014 meeting. Professor Struve circulated another memorandum, this time discussing alternative remedies available to those seeking interlocutory review. The memorandum also addressed the possibility that interlocutory privilege review would overburden the courts. In light of this concern, and the overwhelming scale of a project that would codify the entire collateral order doctrine, the committee elected to remove the project from its agenda.

2015

On May 4, 2015, the Supreme Court decided in *Bullard v. Blue Hills Bank*, 135 S. Ct. 1686 (2015), that a bankruptcy court's rejection of a Chapter 13 debtor's plan is not an appealable final order. *Id.* at 1690. Interpreting *Bullard* as "confirm[ing] the need for a new way to look at this problem," Dean Alan B. Morrison submitted suggestion No. 15-AP-G on May 7, encouraging the committees to revisit the possibility of codifying the collateral order doctrine via rulemaking.

Attachment B

MEMORANDUM

DATE: September 20, 2013

TO: Judge Steven M. Colloton
Professor Catherine T. Struve

CC: Judge Jeffrey S. Sutton

FROM: Andrea L. Kuperman

SUBJECT: Immediate Appealability of Prejudgment Orders

The Appellate Rules Committee is considering whether to undertake a project that would address the appealability of prejudgment orders. The issue arises from the Supreme Court's observation in *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100 (2009), and *Swint v. Chambers County Commission*, 514 U.S. 35 (1995), that the rulemaking process is the preferred means for determining whether and when prejudgment orders should be immediately appealable.¹ At this preliminary stage, the Committee is interested in determining whether it would be useful and practical to undertake a large project that might specify by rule the universe of interlocutory orders that should be appealable, or whether it would be more appropriate to consider only the appealability of particular categories of orders that are brought to the Committee's attention, such as the attorney-client privilege ruling at issue in *Mohawk Industries*.²

¹ Under 28 U.S.C. § 2072(c), the Supreme Court is granted the power to prescribe rules of practice and procedure that "define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title." Section 1291 of Title 28 provides that courts of appeals have jurisdiction over all final decisions of the district courts. So far the only exercise of this rulemaking power has been to authorize permissive interlocutory appeals of a district court order granting or denying class action certification. *See* THOMAS E. BAKER, A PRIMER ON THE JURISDICTION OF THE U.S. COURTS OF APPEALS 52 (Fed. Jud. Ctr. 2009). Notably, "[t]he congressional delegation is a jurisdictional ratchet, a one-way device: judicial rulemaking can be used only to expand appellate jurisdiction and not to contract appellate jurisdiction that is otherwise granted by statute." *Id.*

² It is worth noting that even a more narrow approach will take a good bit of refining to determine the appropriate scope. For example, if the Committee decides to address privilege, it will have to decide

To aid in its examination of this issue, the Committee asked me to do some initial research on the state of the law on the appealability of prejudgment orders. Specifically, I have been asked to research the state of the law and identify groups: (1) categories of claims that are appealable under current Supreme Court decisional law; (2) categories of claims that have divided the lower courts; and (3) categories of claims that have been rejected by Supreme Court, but may warrant consideration in rulemaking.

I. Overview

It has proven quite difficult to pin down all the issues and matters that might fall into each of these categories, and there are thousands of cases, articles, and lengthy treatises devoted to this topic.³ In an effort to be able to give the Committee something to discuss for its Fall 2013 meeting, Professor Struve and I discussed coming up with an outline of topics and a list of resources that can be used for the Committee's initial discussion of this topic. An initial outline follows below, and a bibliography of resources is attached. I have not yet researched the individual topics; nor is this

whether to address all privilege, some privileges and not others, only attorney-client privilege, attorney-client privilege only when the lower court finds that there was privilege but that it was waived, etc. As another example, if the Committee decides to address official immunity appeals, it may want to consider whether to address other types of immunity appeals and the scope of such appeals.

³ For example, *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), the case primarily known for setting out the "collateral order doctrine" that allows for immediate appeal of orders before final judgment when certain criteria are met, has been cited over 14,000 times, including almost 6,000 cases and over 1,000 law review articles. "'Under *Cohen*,' . . . 'an order is appealable if it (1) conclusively determines the disputed question; (2) resolves an important issue completely separate from the merits of the action; and (3) is effectively unreviewable on appeal from a final judgment.'" *Mohawk*, 558 U.S. at 105.

As another example, the Federal Practice and Procedure treatise has three full volumes devoted to jurisdiction in the courts of appeals, the majority of which is devoted to the final judgment rule and interlocutory appeals. The volumes span hundreds of pages with many more footnotes. Nearly every footnote contains its own potential issue or issues related to finality, the collateral order doctrine, and/or interlocutory appeals.

an exhaustive list of all of the issues the Committee may want to consider in this area. Rather, I have come up with a list of topics and issues that the Committee may wish to examine as it goes forward, as a starting point for discussion.⁴ Depending on the type of project with which the Committee decides to proceed, further research will be needed into individual topics and issues, and if a broader project is undertaken, further research to uncover additional topics, issues, and resources will certainly be needed. This is meant as an overview of some potential issues, to give the Committee a taste of the types of matters that might fall within a project on appellate jurisdiction over prejudgment orders. It is hoped that what follows is at least helpful for starting the discussion on these issues as the Committee determines the scope of any potential project in this area.

One conclusion I have reached in my initial research is that just identifying the areas that are problematic will be an enormous undertaking. It would be a very large task to establish categories of interlocutory orders that are always appealable, never appealable, and sometimes appealable because there is great variety in what the lower courts do. Further, it might be quite difficult to come up with bright-line rules. *See Gillespie v. United States Steel Corp.*, 379 U.S. 148, 153 (1964) (“And our cases long have recognized that whether a ruling is ‘final’ within the meaning of § 1291 is frequently so close a question that decision of that issue either way can be supported with equally forceful arguments, and that it is impossible to devise a formula to resolve all marginal cases coming within what might well be called the ‘twilight zone’ of finality.”). Thus, what follows is an outline

⁴ I also have not thoroughly examined all of the cases and resources in the attached bibliography. Rather, these are resources I have come across in my initial research that will likely prove useful for further examination if the Committee decides to proceed with a more in-depth analysis of these issues.

of some issues that may be worth considering.⁵

II. Categories of Orders that the Supreme Court has Recognized as Appealable

The following categories of pretrial orders have been recognized by the Supreme Court at some point as subject to immediate appeal, usually under the collateral order doctrine.

- Order denying reduction of bail.
 - *See Stack v. Boyle*, 342 U.S. 1 (1951).
 - *See also* 15A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, AND EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3911.3, at 397 (2d ed. 1992) [hereinafter W&M⁶].
 - *See also* GREGORY A. CASTANIAS & ROBERT H. KLONOFF, FEDERAL APPELLATE PRACTICE AND PROCEDURE IN A NUTSHELL 85 (2008) [hereinafter NUTSHELL].
- Order denying motion to dismiss an indictment on double jeopardy grounds.
 - *See Abney v. United States*, 431 U.S. 651 (1977) (former jeopardy appeal allowed under collateral order doctrine).
 - *See also Richardson v. United States*, 468 U.S. 317 (1984) (claim that second trial after acquittal on one count of federal narcotics violations and after mistrial was declared on remaining counts because jury was unable to agree was barred on double jeopardy grounds because the Government failed to introduce legally sufficient evidence to go to the jury at the first trial raised a colorable double jeopardy claim appealable as a final judgment).
 - *See also* W&M § 3911, at 340.
 - *See also* NUTSHELL at 87.
 - *See also* THOMAS E. BAKER, A PRIMER ON THE JURISDICTION OF THE U.S. COURTS OF APPEALS 75 (Fed. Jud. Ctr. 2009) [hereinafter FJC].
- Order denying motions to dismiss an indictment on Speech or Debate Clause grounds.
 - *See Helstoski v. Meanor*, 442 U.S. 500 (1979);
 - *See also Flanagan v. United States*, 465 U.S. 259 (1984).
- Order requiring criminal defendant to receive medication involuntarily in order to render him competent to stand trial.
 - *See Sell v. United States*, 539 U.S. 166 (2003).
- Order denying absolute immunity.
 - *See Nixon v. Fitzgerald*, 457 U.S. 731 (1982).

⁵ The categories and issues described below have been collected from reviewing a variety of books, treatises, law review articles, and case summaries. Where applicable, I have noted the source or sources discussing these topics, so that they can be consulted as needed later, depending on the scope of the project that the Committee decides on.

⁶ Subsequent references are to Volume 15A unless otherwise indicated.

- *See also Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (noting, without disapproval, that senior aides and advisors to the President of the United States took immediate appeal of order denying absolute immunity defenses pursuant to collateral order doctrine).
- *See also* W&M § 3911, at 341, 343–45 (addressing appealability of pretrial orders denying absolute and qualified immunity).
- *See also* NUTSHELL at 86–87.
- Order holding that Petition Clause of the First Amendment does not provide absolute immunity from liability for libel.
 - *See McDonald v. Smith*, 472 U.S. 479 (1985).
- Order denying qualified immunity.
 - *See Mitchell v. Forsyth*, 472 U.S. 511 (1985).
 - *See also Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (order denying qualified immunity can fall within the collateral order doctrine, so long as the order turns on an issue of law).
 - *See also Behrens v. Pelletier*, 516 U.S. 299 (1996) (defendant’s immediate appeal of an unfavorable qualified-immunity ruling on his motion to dismiss did not deprive the court of appeals of jurisdiction over a second appeal based on qualified immunity following denial of summary judgment).
 - *But see Johnson v. Jones*, 515 U.S. 304 (1995) (defendant entitled to invoke qualified immunity may not appeal district court’s summary judgment order that determines whether pretrial record sets forth a genuine issue of fact for trial).
 - *See also* W&M § 3911, at 346.
- Order denying request to require posting of security.
 - *See Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949).
 - *See also* NUTSHELL at 84.
- Order vacating attachment of vessel in admiralty.
 - *See Swift & Co. Packers v. Compania Colombiana Del Caribe, S.A.*, 339 U.S. 684 (1950).⁷
- Order imposing notice costs in class action.
 - *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974).
 - *See also* W&M § 3911, at 338.
 - *See also* W&M § 3911.3, at 397 (comparing different courts of appeals’ approaches to appealability of class action notice issues).
- Order granting motions to abstain and stay the federal litigation pending similar state litigation.
 - *See Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996) (order remanding case to state court based on *Burford* abstention was immediately appealable).
 - *See Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 8–13

⁷ The *Swift* Court noted that the situation would be different in the case of an order upholding an attachment, in which case the rights of the parties are protected while the litigation on the main claim proceeds.

- (1983) (order staying federal court action pending resolution of state court action was immediately appealable).
- Order remanding to Secretary of Health and Human Services a case challenging Secretary's decision denying disability benefits and which effectively invalidated Secretary's regulations.
 - *See Sullivan v. Finkelstein*, 496 U.S. 617 (1990).
 - Order denying a state's claim to 11th Amendment immunity.
 - *See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993).
 - *See also Tennessee v. Lane*, 541 U.S. 509 (2004).
 - *See also Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).
 - *See also* NUTSHELL at 87.
 - Order rejecting the Attorney General's certification that a federal employee named as a defendant in a state court action was acting within the scope of employment and refusing to substitute the United States as a defendant in the removed action.
 - *See Osborn v. Haley*, 127 S. Ct. 881 (2007).
 - Order preventing putative intervenor from becoming a party in any respect.
 - *See Brotherhood of R.R. Trainmen v. Baltimore & Ohio R. Co.*, 331 U.S. 519 (1947).
 - Order allocating expense of identification of class members, for purpose of sending individual notice.
 - *See Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340 (1978).
 - State court order authorizing a temporary injunction, where the controversy was beyond the state court's power and instead within the exclusive domain of the National Labor Relations Board.
 - *See Local No. 438 Constr. & Gen. Laborers' Union, AFL-CIO v. Curry*, 371 U.S. 542 (1963).
 - State court denial of a stay of injunction.
 - *See Nat'l Socialist Party of Am. v. Village of Skokie*, 432 U.S. 43 (1977) (per curiam).
 - Order denying leave to proceed *in forma pauperis*.
 - *Roberts v. United States Dist. Ct.*, 339 U.S. 844 (1950) (per curiam).
 - *See* W&M § 3911, at 336–37.
 - *See also* NUTSHELL at 85.
 - Order dismissing a False Claims Act action over the United States' objection.
 - *See United States ex rel. Eisenstein v. City of N.Y.*, 556 U.S. 928 (2009).
 - Order deciding controversy as to whether Jones Act supplied exclusive remedy for damages for death of seaman aboard vessel docked in Ohio and whether there could be a recovery for benefit of brother and sisters of deceased whose mother was living.
 - *See Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964).
 - State court judgment setting aside lease and awarding execution, relief assertedly within the exclusive power of the Federal Communications Commission, appealable even though accounting still remained to be done in state court.
 - *See Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120 (1945).

- Order denying motion to quash subpoena duces tecum directing a witness to appear before a grand jury.
 - *See Cobbledick v. United States*, 309 U.S. 323 (1940).

III. Categories of Orders that Have Divided the Lower Courts

The following are some examples of categories of orders that have caused controversy in the courts of appeals. This area could be greatly expanded upon with further research. For now, given limited time, I have included some examples discussed in some of the treatises and law review articles, but there are surely many more to be discovered.

- Whether the press gets an appeal or mandamus to challenge closure orders and gag orders.
 - *See* FJC at 82.
 - *See United States v. McVeigh*, 119 F.3d 806, 810 (10th Cir. 1997) (describing circuit split on applicability of collateral order doctrine vs. mandamus to orders denying the press access to documents or proceedings).
 - *See also* FJC at 82 (noting that media appeals of closure orders and gag orders are usually brought by mandamus and that “[b]ecause the substantive rights involved are so important and well-established, and because these mandamuses are so commonplace, these challenges to nonparty orders arguably are a candidate for rule-making recognition as a new category of entitled appeal”).
- Application of *Abney v. United States*, 431 U.S. 651 (1977), which addressed collateral order doctrine’s applicability to claims of former jeopardy.
 - *See San Filippo v. United States Trust Co. of N.Y.*, 470 U.S. 1035 (1985) (dissent from denial of certiorari notes confusion in the lower courts).
- Order denying a civil rights plaintiff’s motion for appointment of counsel.
 - *See Welch v. Smith*, 484 U.S. 903 (1987) (White, J., dissenting) (dissenting from denial of certiorari and noting circuit split).
 - *See also* W&M § 3911.3, at 409–10 (describing various approaches and possible circuit split on appealability of orders refusing to appoint counsel for an indigent litigant).
- A variety of issues regarding qualified immunity orders.
 - For example, confusion in appellate courts has resulted from the statement in *Mitchell v. Forsyth* that denial of qualified immunity is appealable “to the extent that it turns on an issue of law.” Some appellate courts have thus avoided fact-bound appeals. *See* W&M § 3911, at 346. The *Mitchell* Court left open whether appeal can be taken if the defendant must bear the burden of trial on a claim for injunctive or declaratory relief growing out of the same facts.
- Orders denying class status if the putative class member is willing to waive his or her individual claims (effectively creating a final judgment).

- See NUTSHELL at 99–100.

IV. Categories of Orders that Have Been Rejected by the Supreme Court

The following categories of pretrial orders have been recognized by the Supreme Court at some point as not subject to immediate appeal.

- Order denying attorney-client privilege.
 - See *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100 (2009).
 - See also NUTSHELL at 85, 87 (but case law likely out of date after *Mohawk*).
 - There are a number of cases that have used mandamus to review orders requiring disclosure of documents for which privilege or work product is asserted. See 16 W&M § 3935.3, at 710–14 nn.6, 7.
- Order determining that action may not go forward as a class action.⁸
 - See *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978).
 - See also W&M § 3911, at 340.
 - See also NUTSHELL at 88.
 - See also FED. R. CIV. P. 23(f) (“A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.”).
- Order refusing to disqualify opposing counsel in a civil case.
 - See *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981).
 - See also *Flanagan v. United States*, 465 U.S. 259 (1984) (same for order disqualifying criminal defense attorney).
 - See also W&M § 3911, at 341, 343.
- Order disqualifying counsel in a civil case.
 - See *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424 (1985).
 - See also NUTSHELL at 88 (citing *Cole v. U.S. Dist. Ct. for Dist. of Idaho*, 366 F.3d 813, 817 (9th Cir. 2004), as holding that order disqualifying counsel because of a conflict of interest is not immediately appealable).
- Order denying motion to abstain and stay federal litigation pending similar state litigation.
 - See *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988).

⁸ A bar organization recently submitted a comment to the Civil Rules Committee suggesting that the committee consider rule amendments to provide a right to interlocutory appeal of decisions to certify, modify, or decertify a class. See LAWYERS FOR CIVIL JUSTICE, FEDERATION OF DEFENSE & CORPORATE COUNSEL, DRI- THE VOICE OF THE DEFENSE BAR, AND INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL, COMMENT: TO RESTORE A RELATIONSHIP BETWEEN CLASSES AND THEIR ACTIONS: A CALL FOR MEANINGFUL REFORM OF RULE 23 (Aug. 9, 2013) (on file with the Rules Committee Support Office).

- Order denying motion to dismiss made on the ground that an extradited person was immune from civil process.
 - *See Van Cauwenberghe v. Biard*, 486 U.S. 517 (1988).
- Order denying motion to dismiss on ground of forum non conveniens.
 - *See Van Cauwenberghe*, 486 U.S. 517 (1988).
 - *See also* NUTSHELL at 88.
- Order refusing to apply Federal Tort Claims Act’s judgment bar.
 - *See Will v. Hallock*, 546 U.S. 345 (2006).
- Order vacating dismissal predicated on the parties’ settlement agreement.
 - *See Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863 (1994).
 - *See also* NUTSHELL at 87–88.
- Order denying defendant’s motion to dismiss a damages action on the basis of a contractual forum-selection clause.
 - *See Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495 (1989).
 - *See also* NUTSHELL at 88.
- Order imposing sanctions on attorney for discovery abuses under Rule 37.
 - *See Cunningham v. Hamilton Cty.*, 527 U.S. 198 (1999).
 - *See also* NUTSHELL at 88.
- Order denying dismissal of murder indictment on grounds of denial of speedy trial.
 - *See United States v. MacDonald*, 435 U.S. 850 (1978).
 - *See also* FJC at 75.
- Order granting permissive intervention but denying intervention as of right.
 - *See Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370 (1987).
- Order denying motion to dismiss grand jury indictment for alleged violation of rule prohibiting public disclosure by Government attorneys of matters occurring before the grand jury.
 - *See Midland Asphalt Corp. v. United States*, 489 U.S. 794 (1989).
- Order denying summary judgment for county commission where commission argued that sheriff who led raids at issue was not a policy maker for the county.
 - *See Swint v. Chambers Cty. Comm’n*, 514 U.S. 35 (1995).
- Order denying motion to dismiss based on prosecutorial vindictiveness.
 - *See United States v. Hollywood Motor Car Co.*, 458 U.S. 263 (1982).
- Order denying relief to sitting federal judge on claim of vindictive or selective prosecution.
 - *See Claiborne v. United States*, 465 U.S. 1305 (1984) (denial of certiorari).
- Order dismissing first indictment after a second indictment had been obtained.
 - *See Parr v. United States*, 351 U.S. 513 (1956).
- Order denying criminal defendant’s motion to dismiss based on alleged unconstitutionality of statute providing for appointment of an independent counsel to investigate alleged impropriety of Government officials.
 - *See Deaver v. United States*, 483 U.S. 1301 (1987).
- Order denying pre-indictment motion to suppress evidence.
 - *See Di Bella v. United States*, 369 U.S. 121 (1962).
- Order granting motion to suppress before trial in a criminal case, regardless of whether

the effect of suppressing evidence would be to force dismissal of indictment for lack of evidence.

- *See Carroll v. United States*, 354 U.S. 394 (1957).
- *See also* FJC at 75 (Orders in criminal cases “dealing with the suppression of evidence or the return of property are subject to a ‘confusing web of decisions’” on appealability.).
- FTC’s issuance of a complaint.
 - *FTC v. Standard Oil Co. of Calif.*, 449 U.S. 232 (1980).

V. Other Issues the Committee May Wish to Consider

In reviewing the treatises and other literature on this issue, I came across a variety of different issues that the Committee may wish to consider but that did not fit neatly into the previously mentioned categories. As with the above lists, this is not intended to be an exhaustive list of potential issues, but I thought including issues as I came across them in the initial research might be helpful for the Committee’s preliminary deliberations.

- Magistrate judges’ ability to certify judgment for appeal under § 1292(b).
 - *See* W&M § 3901.1, at 48.
- Ability of appellate court to review district court’s nonfinal appellate decision on magistrate judges’ decisions, or before there has been any district court judgment at all.
 - *See* W&M § 3901.1, at 50.
- The extent to which orders involving nonparties or parties in roles subordinate to the main litigation—such as orders imposing sanctions on counsel or limiting media access to court proceedings—may be appealable.
 - *See* W&M § 3911.3, at 414–16.
 - *See also* W&M § 3911, at 367.
- Extraordinary writs are often used to allow interlocutory review of agency actions.
 - *See* FJC at 91–92.
- The proper formulation of the collateral order doctrine. Most courts cite a three-part test – the order must conclusively determine the disputed question, resolve an important question completely separate from the merits, and be effectively unreviewable on appeal from final judgment. Judge Posner observed that this test is redundant, incomplete, and unclear. The First Circuit has a 4-part formula – separability, finality, urgency, and importance.
 - *See* W&M § 3911, at 351–52.
- When to require that there be an important and unsettled question of law for collateral appeal. Usually no important question is required for absolute immunity, qualified immunity, double jeopardy. A number of courts of appeals have stated this requirement, despite lack of clear foundation in Supreme Court opinions.

- See W&M § 3911.5, at 430–32; W&M § 3911, at 335.
- See also NUTSHELL at 85–86 (some courts have included this fourth requirement, but most have limited it to the three *Cohen* factors).
- Whether and how time limits of Rule 4 apply to collateral order appeals.
 - See W&M § 3911, at 357.
- Whether the time to appeal a collateral order starts to run before entry of a formal judgment under Civil Rule 58. Courts have held that it does.
 - See W&M § 3911, at 357–58.
- Whether the time to appeal a collateral order can be suspended by a motion to reconsider. The Sixth Circuit has suggested that Rule 4(a)(4), suspending time to appeal by motions under Civil Rules 50(b), 52(b), or 59(e), applies.
 - See W&M § 3911, at 358–59 (suggesting that an appellant should be permitted to suspend appeal time by a motion for reconsideration filed within 10 days of the order, either by reading Civil Rule 59(e) this way or by reading Appellate Rule 4 that way).
- The scope of appeal from a properly appealable collateral order, *i.e.*, whether it includes other non-collateral matters.
 - See W&M § 3911.2, at 393–95 (noting significant disagreement on the scope of immunity appeals; also noting that a flexible approach as to the scope of collateral order appeals has been used and it would be difficult to come up with a clear rule).
- Accounting for the fact that appeal is not automatically available simply because effective review cannot be had on appeal from a final judgment. Some matters are left to district court discretion, without review.
 - See W&M § 3911.3, at 404–05.
 - See W&M § 3911.3, at 406–12 for some examples of orders held to not be immediately appealable despite the potential lack of effective post-judgment appeal, including: order denying intervention as of right but permitting limited permissive intervention; order dismissing criminal indictment in favor of indictment in another division, resulting in trial in an inconvenient forum (could not be appealed even though final judgment appeal would not effectively remedy the right to be tried in a convenient forum); order denying claims of lack of subject matter jurisdiction, personal jurisdiction, primary jurisdiction in an administrative agency, or forum non conveniens; order denying claim of denial of right to speedy trial; order denying interest of representative plaintiffs in pursuing a class action; orders denying or granting disqualification of opposing counsel; order refusing to appoint counsel for an indigent litigant; orders affecting the ability to pay counsel; a variety of orders likely to impact results of class actions, including orders refusing to approve proposed settlements.
- Appealability of “death knell” orders – those that end the litigation as a practical matter, although there is no final judgment.
 - See W&M § 3912 (describing examples, including interlocutory rulings on injunctive relief and denials of class certification (previous circuit split, now resolved by Supreme Court in denying such appeals as a matter of right (*see* NUTSHELL at 101)); noting that only the core of the death knell doctrine remains

- those cases where there is as a practical matter nothing left to be done in the district court).
- Application of pragmatic finality – a balancing approach to finality that considers whether the costs of piecemeal appeals are outweighed by denying justice by delay.
 - *See* W&M § 3913 (noting that some courts have approved of it, without much expansion).
- Potential rule amendments’ interaction with statutory bases for interlocutory appeal.
 - *See* NUTSHELL at 89–97.
 - Appeals from imposition of injunctions.
 - *See* 28 U.S.C. § 1292(a)(1).
 - Preliminary injunctions are generally appealable, while temporary restraining orders are not. *See* FJC at 54.
 - Appeals from appointment of a receiver.
 - *See* 28 U.S.C. § 1292(a)(2).
 - Appeals from decrees “determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.”
 - *See* 28 U.S.C. § 1292(a)(3).
 - Classified Information Procedures Act.
 - Federal Arbitration Act. Orders stopping arbitration are appealable; orders allowing arbitration are not.
 - 28 U.S.C. § 1292(b) – allowing immediate appeal of interlocutory orders with permission of the district and appellate court.
 - Statutory bases for interlocutory appeal in criminal matters.
 - Orders requiring pretrial detention or imposing conditions on release are governed by the Bail Reform Act of 1984, 18 U.S.C. §§ 3141, 3142, 3143–45, which mirrors the collateral order doctrine.
 - *See* FJC at 74.
 - *See* FJC at 78 (Appeals from a release or detention order, or from an order denying revocation or amendment of such an order may be permissible if they satisfy 28 U.S.C. § 1291 finality, if brought by an accused, or the restrictions on government appeals, if brought by the prosecution. An appeal by the Government must not unduly postpone the proceeding so long as to violate the defendant’s constitutional and statutory right to a speedy trial.).
- Interlocutory appeals in criminal matters.
 - *See* FJC at 75 (noting that there are “appealability precedents governing various and sundry pretrial orders, including but not limited to the following kinds of pretrial matters: the preliminary hearing; determinations of competence to stand trial; determinations whether to try the defendant as an adult or a juvenile; transferring or removing or remanding; extradition; the disposition of property; the denial of a defendant’s motion to dismiss; the granting of the government’s motion to dismiss without prejudice; pleadings; appointment and appearance of counsel; disqualification of the judge; discovery; access to trial; and contempt”).
 - 18 U.S.C. § 3731 authorizes appeals by the prosecution from: (1) a final order dismissing an indictment or information or granting a new trial after verdict or

judgment on any one or more counts, unless the Double Jeopardy Clause prohibits further prosecution; (2) an interlocutory order suppressing or excluding evidence or requiring the return of property; and (3) an interlocutory order granting the release of the defendant, before or after conviction or denying the government's motion to revoke or to modify the conditions of release.

- Writs of mandamus as another means of interlocutory appeal.⁹
 - See NUTSHELL at 97.
- Whether to address pendant appellate jurisdiction.
 - See 16 W&M § 3937.
- Additional categories of interlocutory appeal that the Committee might want to consider providing for or prohibiting:
 - Orders denying immunity under the Foreign Sovereign Immunities Act.
 - See *Fed. Ins. Co. v. Richard I. Rubin & Co., Inc.*, 12 F.3d 1270 (3d Cir. 1993) (within collateral order doctrine).
 - See NUTSHELL at 87.
 - Orders refusing to dismiss an indictment for grand jury irregularity unrelated to the substance of the prosecution.
 - See W&M § 3911.2, at 382 (citing *United States v. Benjamin*, 812 F.2d 548 (9th Cir. 1987), as holding such an order is collateral and appealable).
 - See also FJC at 74 (noting that some orders relating to grand jury proceedings are deemed final and some are not).
 - Orders requiring that plaintiffs preferring to remain pseudonymous identify themselves.
 - See W&M § 3911.2, at 383 (citing *Doe v. Stegall*, 653 F.2d 180 (5th Cir. 1981), and *Southern Methodist Univ. Ass'n of Women Law Students v. Wynne & Jaffe*, 599 F.2d 707 (5th Cir. 1979), as allowing immediate appeal).
 - Orders granting disqualification of trial judge.
 - See W&M § 3911.2, at 383 (citing *In re Cement Antitrust Litig.*, 673 F.2d 1020 (9th Cir. 1981) (order was collateral but could not be appealed because other requirements of collateral order doctrine not satisfied)).
 - Orders denying substitution of parties.
 - See W&M § 3911.2, at 383 (citing *In re Covington Grain Co.*, 638 F.2d 1357 (5th Cir. 1981), as allowing immediate appeal).
 - Orders involving privacy or secrecy and orders barring media or others from obtaining information about ongoing proceedings.
 - See W&M § 3911.3, at 398–99.
 - Orders involving the supposed right not to be subject to the burdens of trial, such as official immunity or double jeopardy claim, or the right of a plaintiff to take a

⁹ One possible avenue of further research might be finding out how mandamus is used to address review of certain areas of interlocutory orders, such as privilege rulings. If it can be determined that mandamus is rarely sought on a particular type of ruling, or that mandamus is effectively addressing problematic orders on particular types of claims, the Committee may conclude that rulemaking is unnecessary.

voluntary dismissal with prejudice.

- See W&M § 3911.3, at 402.
- See also W&M § 3911.4, at 424–26 (collateral order appeal not automatically available to review a number of matters that could be described as intended to protect against the burdens of trial – e.g., orders denying motion to dismiss for failure to state a claim, orders denying summary judgment, orders granting or denying a stay in favor of proceedings in a different court, orders refusing to dismiss in deference to an injunction barring litigation against a company placed in receivership by a state court, rejection of an argument that repetitious litigation is barred by res judicata, or rejection of a speedy trial claim).
- Orders granting recusal of trial judge.
 - See W&M § 3911.3, at 405.
- Orders involving jurisdictional decisions, including personal jurisdiction, whether the limits of Article III are satisfied, improper refusal to remand to state court, and limits arising from special statutory schemes.
 - See W&M § 3911.4, at 423 (generally not immediately appealable).
 - See also NUTSHELL at 108–09 (remand orders generally not immediately appealable).
- Orders granting or denying arbitration.
 - See W&M § 3911.4, at 426–27 (noting that arbitration’s purpose is to avoid litigation in court, but requests for collateral order appeals are frequently denied).
- Orders granting or denying security pending trial.
 - See W&M § 3911.4, at 429 (noting that orders granting security are usually denied interlocutory appeal, while orders denying security are usually allowed to be appealed, and that it is unclear why one form of hardship is favored over the other).
- Orders denying an attorney’s motion to withdraw.
 - See NUTSHELL at 87 (citing *Whiting v. Lacara*, 187 F.3d 317 (2d Cir. 1999), and *Fid. Nat’l Title Ins. Co. of NY v. Intercounty Nat’l Title Ins. Co.*, 310 F.3d 537 (7th Cir. 2002), as cases finding such orders within collateral order doctrine).
- Orders requiring the posting of security for the release of an impounded ship.
 - See NUTSHELL at 88 (citing *Seguros Banvenez S.A. v. S/S Oliver Drescher*, 715 F.2d 54 (2d Cir. 1983), as holding such orders not immediately appealable).
- Orders appointing guardian ad litem for an ERISA plan.
 - See NUTSHELL at 88 (citing *In re Pressman-Gutman Co., Inc.*, 459 F.3d 383 (3d Cir. 2006), as holding such orders not immediately appealable).
- Orders denying a so-called *Rooker-Feldman* defense (i.e., that the Supreme Court is the only federal court that can review a state court judgment).
 - See NUTSHELL at 88 (citing *Bryant v. Sylvester*, 57 F.3d 308 (3d Cir. 1995), *vacated and remanded*, 516 U.S. 1105 (1996), as holding such orders not

- immediately appealable).
- Discovery orders.
 - *See* NUTSHELL at 88–89 (generally not immediately appealable, but there are some exceptions; noting that whether trial court abused its discretion in denying reimbursement of costs to several nonparty witnesses who produced substantial discovery under subpoena has been held immediately appealable (citing *United States v. Columbia Broad. Sys., Inc.*, 666 F.2d 364 (9th Cir. 1982))).
 - Criminal pretrial orders on procedures to be followed at trial.
 - *See* FJC at 75 (generally not appealable).
 - Evidentiary rulings.
 - *See* FJC at 75 (generally not appealable in civil or criminal cases).
 - Orders on rights provided for in the Crime Victims’ Rights Act of 2004.
 - Mandamus allowed for crime victims if the rights provided for in the Crime Victims’ Rights Act of 2004 are violated. *See* FJC at 82–83.

VI. Conclusion

Getting a full grasp on the state of the law on interlocutory appeals and collateral orders is quite a challenge, given that the issue has been raised in so many different contexts, involving nearly every type of pretrial order. This outline is meant to provide a sampling of some of the issues that the Committee may wish to consider in deciding the scope of a potential project on appellate jurisdiction over interlocutory orders. Further and more focused research will likely be needed once the Committee decides on the scope of the project. Should the Committee decide to do a comprehensive project, further research will be needed to identify circuit splits and areas that have caused problems in interlocutory appeals. If the Committee decides to focus on just a few areas, more in-depth research will be needed to discover how the courts and commentators have treated issues within those areas.

Resources on Appealability of Pretrial Orders

CASES

Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100 (2009) (addressing appealability of orders denying claims of privilege).

United States ex rel. Eisenstein v. City of N.Y., 556 U.S. 928 (2009) (noting that under the collateral order doctrine, the United States can appeal the dismissal of a False Claims Act action over its objection).

Ashcroft v. Iqbal, 556 U.S. 662 (2009) (order denying qualified immunity can fall within the collateral order doctrine, so long as the order turns on an issue of law).

Osborn v. Haley, 549 U.S. 225 (2007) (district court order rejecting the Attorney General's certification that federal employee named as defendant in state court action was acting within scope of his employment, and refusing to substitute the United States as defendant, was reviewable under collateral order doctrine).

Will v. Hallock, 546 U.S. 345 (2006) (extensively discussing collateral order doctrine and holding that an order rejecting the judgment bar of the Federal Tort Claims Act as a defense to the instant action was not immediately appealable under the collateral order doctrine).

Tennessee v. Lane, 541 U.S. 509 (2004) (recognizing applicability of collateral order doctrine to denial of a claim to Eleventh Amendment immunity).

Sell v. United States, 539 U.S. 166 (2003) (order requiring criminal defendant to involuntarily receive medication in order to render him competent to stand trial immediately appealable as a collateral order).

Cunningham v. Hamilton Cty., 527 U.S. 198 (1999) (order imposing sanctions on attorney for her discovery abuses, not on contempt theory but solely pursuant to the Federal Rules of Civil Procedure, not immediately appealable).

Johnson v. Fankell, 520 U.S. 911 (1997) (noting that some state courts have picked different categories of cases to fall within their own collateral order doctrines).

United States v. McVeigh, 119 F.3d 806, 810 (10th Cir. 1997) (describing circuit split on applicability of collateral order doctrine vs. mandamus to orders denying the press access to documents or proceedings).

Quackenbush v. Allstate Ins. Co., 517 U.S. 706 (1996) (order remanding case to state court based on *Burford* abstention was immediately appealable).

Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) (recognizing that collateral order

doctrine allows immediate appeal of order denying claim of Eleventh Amendment immunity).

Behrens v. Pelletier, 516 U.S. 299 (1996) (denial of summary judgment on grounds of qualified immunity was appealable final judgment even if other claims remained for trial).

Johnson v. Jones, 515 U.S. 304 (1995) (district court's determination that summary judgment record in qualified immunity case raised genuine issue of fact was not immediately appealable).

Swint v. Chambers Cty. Comm'n, 514 U.S. 35 (1995) (order denying county commission's request for summary judgment based on the fact that the sheriff who authorized the raids at issue was not a policymaker for the county did not fall within collateral order doctrine, and there is no pendant party appellate jurisdiction).

Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863 (1994) (refusal to enforce settlement agreement claimed to shelter party from suit altogether did not supply basis for immediate appeal under collateral order doctrine; detailed examination of collateral order doctrine).

Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139 (1993) (order denying State's Eleventh Amendment immunity claim is immediately appealable under the collateral order doctrine).

Sullivan v. Finkelstein, 496 U.S. 617 (1990) (order remanding case challenging decision of Secretary of Health and Human Services that denied disability benefit effectively invalidated Secretary's regulations and was immediately appealable as a final decision; concurrence thought it was not a final decision but that immediate appeal was authorized under the collateral order doctrine).

Lauro Lines S.R.L. v. Chasser, 490 U.S. 495 (1989) (order denying motion to dismiss damages action on basis of contractual forum selection clause was not immediately appealable under the collateral order doctrine).

Midland Asphalt Corp. v. United States, 489 U.S. 794 (1989) (order denying motion to dismiss grand jury indictment for alleged violation of rule prohibiting public disclosure by Government attorneys on matters occurring before the grand jury not immediately appealable under the collateral order doctrine).

Van Cauwenberghe v. Biard, 486 U.S. 517 (1988) (refusal to dismiss for forum non conveniens does not fall within the collateral order doctrine; order denying motion to dismiss made on the ground that an extradited person was immune from civil process not immediately appealable).

Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271 (1988) (district court order denying motion to stay or dismiss action when similar suit is pending in state court was not immediately appealable under collateral order doctrine)..

Welch v. Smith, 484 U.S. 903 (1987) (White, J., dissenting) (dissenting from denial of certiorari and noting circuit split about whether an order denying a civil rights plaintiff’s motion for appointment of counsel is immediately appealable).

Deaver v. United States, 483 U.S. 1301 (1987) (denial of criminal defendant’s motion to dismiss based on alleged unconstitutionality of statute providing for appointment of an independent counsel to investigate alleged impropriety of Government officials did not fall within the collateral order doctrine).

Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370 (1987) (order granting permissive intervention but denying intervention as of right was not immediately appealable)

Mitchell v. Forsyth, 472 U.S. 511 (1985) (rejection of a claim to qualified immunity is immediately appealable under the collateral order doctrine).

McDonald v. Smith, 472 U.S. 479 (1985) (recognizing, without disapproval, that appellate court accepted jurisdiction based on a “serious and unsettled question” concerning absolute immunity, specifically, whether the Petition Clause of the First Amendment provides absolute immunity from liability for libel).

Richardson-Merrell, Inc. v. Koller, 472 U.S. 424 (1985) (order disqualifying counsel in civil cases was not a collateral order subject to immediate appeal).

San Filippo v. United States Trust Co. of N.Y., 470 U.S. 1035 (1985) (White, J., dissenting) (noting confusion in lower courts over application of Supreme Court’s holding in *Abney v. United States*, 431 U.S. 651, which held that appellate courts may exercise jurisdiction under the collateral order doctrine over an appeal from a pretrial order denying motion to dismiss an indictment on double jeopardy grounds).

Richardson v. United States, 468 U.S. 317 (1984) (claim that second trial after acquittal of one count of federal narcotics violations and after mistrial was declared on remaining counts because jury was unable to agree was barred on double jeopardy grounds because the Government failed to introduce legally sufficient evidence to go to the jury at the first trial raised a double jeopardy claim appealable as a final judgment).

Claiborne v. United States, 465 U.S. 1305 (1984) (order denying relief to sitting federal judge on claim of vindictive or selective prosecution not immediately appealable under collateral order doctrine).

Flanagan v. United States, 465 U.S. 259 (1984) (order denying request to disqualify counsel in civil case not immediately appealable under the collateral order doctrine).

Moses H. Cone Mem. Hosp. v. Mercury Construction Corp., 460 U.S. 1 (1983) (order staying federal court action pending resolution of state court action was immediately appealable).

United States v. Hollywood Motor Car Co., 458 U.S. 263 (1982) (order denying motion to dismiss based on prosecutorial vindictiveness not appealable before trial)

Harlow v. Fitzgerald, 457 U.S. 800 (1982) (noting, without disapproval, that senior aides and advisors to the President of the United States took immediate appeal of order denying absolute immunity defenses pursuant to collateral order doctrine).

Nixon v. Fitzgerald, 457 U.S. 731 (1982) (order rejecting absolute immunity is immediately appealable under the collateral order doctrine)..

Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981) (orders denying motions to disqualify opposing party's counsel in civil cases are not appealable before final judgment in underlying litigation).

FTC v. Standard Oil Co. of Calif., 449 U.S. 232 (1980) (FTC's issuance of a complaint was not a collateral order subject to appellate review before the conclusion of the administrative adjudication).

Boeing Co. v. Van Gemert, 444 U.S. 472 (1979) (appellate court assumed jurisdiction over challenge to portion of district court's judgment providing for attorney's fees to be collected out of the full judgment fund, not just the portion claimed by class members, but dissent argued that the attorney's fees portion of the litigation was ongoing and appeal was not appropriate even under the collateral order doctrine).

Helstoski v. Meanor, 442 U.S. 500 (1979) (direct appeal available for refusal to dismiss an indictment challenged under the Speech and Debate clause).

Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978) (order denying class action status is not immediately appealable; "death knell" doctrine does not support appellate jurisdiction of a prejudgment order denying class certification).

Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340 (1978) (order allocating expense of identification of class members, for purpose of sending individual notice, was appealable under the collateral order doctrine).

United States v. MacDonald, 435 U.S. 850 (1978) (defendant may not, before trial, appeal a district court's order denying his motion to dismiss an indictment because of an alleged

violation of his Sixth Amendment right to a speedy trial).

Nat'l Socialist Party of Am. v. Village of Skokie, 432 U.S. 43 (1977) (per curiam) (order by state supreme court that denied a stay of an injunction entered by lower court was appealable as a final judgment under the collateral order doctrine).

Abney v. United States, 431 U.S. 651 (1977) (addressing collateral order doctrine's applicability to claims of former jeopardy).

Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) (district court's order resolving notice problems in a class action constituted a final decision under the collateral order doctrine).

Gillespie v. United States Steel Corp., 379 U.S. 148 (1964) (appealability of order striking portions of complaint was a close question, but court of appeals did not choose wrongly in deciding to determine on the merits the controversy as to whether Jones Act supplied exclusive remedy for damages for death of seaman aboard vessel docked in Ohio and whether there could be a recovery for benefit of brother and sisters of deceased whose mother was living).

Local No. 438 Constr. & Gen. Laborers' Union, AFL-CIO v. Curry, 371 U.S. 542 (1963) (state court order authorizing a temporary injunction was immediately appealable where the controversy was beyond the state court's power and instead within the exclusive domain of the National Labor Relations Board).

Di Bella v. United States, 369 U.S. 121 (1962) (order denying pre-indictment motion to suppress evidence not immediately appealable).

Carroll v. United States, 354 U.S. 394 (1957) (order granting motion to suppress before trial in a criminal case was not appealable by the government as a final decision, regardless of whether the effect of suppressing evidence would be to force dismissal of indictment for lack of evidence).

Parr v. United States, 351 U.S. 513 (1956) (order dismissing first indictment after a second indictment had been obtained was not appealable).

Stack v. Boyle, 342 U.S. 1 (1951) (order denying motion to reduce bail appealable before trial).

Swift & Co. Packers v. Compania Colombiana Del Caribe, S.A., 339 U.S. 684 (1950) (order vacating foreign attachment of a vessel immediately appealable under collateral order doctrine).

Roberts v. U.S. Dist. Ct., 339 U.S. 844 (1950) (per curiam) (denial of leave to proceed in forma pauperis is an immediately appealable order).

Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949) (recognizing the collateral order doctrine; order denying request for posting of security was immediately appealable).

Brotherhood of R.R. Trainmen v. Baltimore & Ohio R. Co., 331 U.S. 519 (1947) (order preventing putative intervenor from becoming a party in any respect subject to immediate review).

Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945) (state court judgment setting aside lease and awarding execution, relief assertedly within the exclusive power of the Federal Communications Commission, was appealable even though accounting still remained to be done in state court).

Cobbledick v. United States, 309 U.S. 323 (1940) (order denying motions to quash subpoenas duces tecum directing a witness to appear before a grand jury was immediately reviewable).

STATUTES AND RULES

28 U.S.C. § 1291 (granting appellate jurisdiction over final decisions of the district courts).

28 U.S.C. § 1292(a) (granting appellate jurisdiction over interlocutory orders involving injunctions, receiverships, and orders determining rights and liabilities of parties to admiralty cases in which appeals from final decrees are allowed).

28 U.S.C. § 1292(b) (allowing district court to certify nonfinal orders for immediate appeal).

28 U.S.C. § 2072(c) (granting rulemaking authority to define when a ruling of a district court is final for purposes of appeal under § 1291).

18 U.S.C. §§ 3141–45 (Bail Reform Act of 1984).

18 U.S.C. § 3731 (addressing appeals by the prosecution in criminal matters).

18 U.S.C. App. 3 §§ 1–16 (Classified Information Procedures Act).

9 U.S.C. §§ 1–14 (Federal Arbitration Act).

FED. R. CIV. P. 23(f) (authorizing courts of appeals to permit appeal from an order granting or denying class-action certification).

TREATISES/BOOKS

THOMAS E. BAKER, A PRIMER ON THE JURISDICTION OF THE U.S. COURTS OF APPEALS (Fed. Jud.

Ctr. 2009).

GREGORY A. CASTANIAS & ROBERT H. KLONOFF, *FEDERAL APPELLATE PRACTICE AND PROCEDURE* (2008) (chapter 4 covers final judgment rule and collateral order doctrine).

CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, *FEDERAL PRACTICE AND PROCEDURE*, VOLS. 15A, 15B & 16 (2012) (covering jurisdiction of the courts of appeals).

ARTICLES

Lloyd C. Anderson, *The Collateral Order Doctrine: A New “Serbonian Bog” and Four Proposals for Reform*, 46 *DRAKE L. REV.* 539 (1998).

William E. Denham, IV, *Kennedy v. St. Joseph’s Ministries, Inc.: The Fourth Circuit’s Troubling Interpretation of Interlocutory Appellate Procedure in Federal Courts Under 28 U.S.C. § 1292(b)*, 8 *SETON HALL CIRCUIT REV.* 285 (2012).

Howard B. Eisenberg and Alan B. Morrison, *Discretionary Appellate Review of Non-Final Orders: It’s Time to Change the Rules*, 1 *J. APP. PRAC. & PROCESS* 285 (1999).

Brad D. Feldman, *An Appeal for Immediate Appealability: Applying the Collateral Order Doctrine to Orders Denying Appointed Counsel in Civil Rights Cases*, 99 *GEO. L.J.* 1717 (2011).

Kristin B. Gerdy, *“Important” and “Irreversible” but Maybe Not “Unreviewable”*: *The Dilemma of Protecting Defendants’ Rights Through the Collateral Order Doctrine*, 38 *U.S.F. L. REV.* 213 (2004).

Timothy P. Glynn, *Discontent and Indiscretion: Discretionary Review of Interlocutory Orders*, 77 *NOTRE DAME L. REV.* 175 (2001).

Bryan Lammon, *Rules, Standards, and Experimentation in Appellate Jurisdiction*, 74 *OHIO ST. L. J.* 423 (2013).

Aaron R. Petty, *The Hidden Harmony of Appellate Jurisdiction*, 62 *S.C. L. REV.* 353 (2010).

James E. Pfander, *Collateral Review of Remand Orders: Reasserting the Supervisory Role of the Supreme Court*, 159 *U. PA. L. REV.* 493 (2011).

James E. Pfander & David R. Pekarek Krohn, *Interlocutory Review by Agreement of the Parties: A Preliminary Analysis*, 105 *NW. U. L. REV.* 1043 (2011).

Andrew S. Pollis, *The Need for Non-Discretionary Interlocutory Appellate Review in*

- Multidistrict Litigation*, 79 *FORDHAM L. REV.* 1643 (2011).
- Edward Reines & Nathan Greenblatt, *Interlocutory Appeals of Claim Construction in the Patent Reform Act of 2009, Part II*, 2010 *PATENTLY O-PAT. L.J.* 7 (2010).
- Cassandra Burke Robertson, *Appellate Review of Discovery Orders in Federal Court: A Suggested Approach for Handling Privilege Claims*, 81 *WASH. L. REV.* 733 (2006).
- Bradley Scott Shannon, *Why Denials of Summary Judgment Should be Appealable*, 80 *TENN. L. REV.* 45 (2012).
- Michael E. Solimine, *Revitalizing Interlocutory Appeals in the Federal Courts*, 58 *GEO. WASH. L. REV.* 1165 (1990).
- Joan Steinman, *The Scope of Appellate Jurisdiction: Pendant Appellate Jurisdiction Before and After Swint*, 49 *HASTINGS L.J.* 1337 (1998).
- Matthew O. Wagner, *Fixing Perlman: How the Misapplication of a 100-Year-Old Doctrine Threatens to Undermine Mohawk Industries, Inc. v. Carpenter*, 79 *U. CIN. L. REV.* 1631 (2011).

TAB 15C



AMERICAN ACADEMY OF APPELLATE LAWYERS

MEMORANDUM

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DATE: MARCH 13, 2017
TO: FEDERAL APPELLATE RULES ADVISORY COMMITTEE
FROM: AMERICAN ACADEMY OF APPELLATE LAWYERS -- TASK FORCE ON FEDERAL APPELLATE RULES
RE: TOPICS FOR RULES COMMITTEE CONSIDERATION

Founded in 1990, the American Academy of Appellate Lawyers is an invitation-only group consisting of over 300 experienced appellate lawyers, former appellate judges, and academics, representing almost every state in the country. The advancement of fair and efficient administration of justice in the appellate courts is central to the Academy's mission. To that end, the Academy has appointed a task force to study and provide input to the Federal Appellate Rules Advisory Committee on areas where the rules might be modified/improved.

In this memorandum, we identify areas that are of concern to our fellows, as suggestions for possible Rules Committee consideration. Should the Rules Committee decide to explore any of these areas more fully, the Academy will undertake a deeper analysis of those areas and provide more extensive input to the Committee.

In no particular order, our suggestions are:

1. The Committee should consider whether/how better use could be made of pre-argument focus letters in appropriate cases. Such letters would set forth the issues that the panel advises that counsel should be particularly prepared to address during oral argument. This practice is helpful in complicated, multi-issue cases, both making the attorneys' preparation most effective and efficient and their assistance to the court most helpful. Of course, focus letters would not preclude the panel from asking questions about any issues in the case. In addition, should the panel have concerns in areas that have not been briefed, it should advise counsel prior to the argument and consider permitting supplemental briefing on those issues.
2. The Committee should clarify when cross-appeals are necessary. The law of the circuits is inconsistent on this point, causing confusion and potential waiver traps.
3. The Committee should address the issue of reply briefs. The Academy is concerned that judges may not be reading reply briefs in every case because of a preconception that many reply briefs simply (and only) repeat arguments made in the opening brief, rather than responding to appellee's brief. The Committee may want to explore rules changes that would make reply briefs most effective.

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4. There is an abiding concern about local rules inconsistency among the circuits. The Committee should address the circumstances in which preemption of local rules is appropriate.
5. The Academy is aware that judges are increasingly doing independent factual research and considering extra-record evidence in some cases. We encourage the Committee to consider adopting a rule that would give parties notice and an opportunity to be heard on any extra-record evidence the court considers.

Thank you for your consideration. We look forward to working with you on this important project.