

**ADVISORY COMMITTEE
ON
APPELLATE RULES**

**Washington, D.C.
November 9, 2017**

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**Agenda for Fall 2017 Meeting of
Advisory Committee on Appellate Rules
November 8, 2017 – Washington, D.C.**

1. Introductions and Opening Business
2. Approval of Minutes of May 2017 Meeting
3. Report on June 2017 Meeting of Standing Committee
4. Item 09-AP-B (Rule 29)
5. Potential Amendments to Rule 5(a)(1), 21(a)(1) and (c), 26(c), 32(f), and 39(d)(1)
Regarding Proof of Service
6. Suggestion for Possible Amendment to Rule 3(c)(1)(B)
7. Suggestion for Possible Amendments to Rules 10, 11, and 12
8. Possible Amendment to Rule 7 Based on Circuit Split on Whether Attorney's Fees
are "Costs on Appeal"

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ADVISORY COMMITTEE ON APPELLATE RULES

Chair, Advisory Committee on Appellate Rules	Honorable Michael A. Chagares United States Court of Appeals United States Post Office and Courthouse Two Federal Square, Room 357 Newark, NJ 07102-3513
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Members, Advisory Committee on Appellate Rules	Honorable Jay S. Bybee United States Court of Appeals Lloyd D. George United States Courthouse 333 Las Vegas Boulevard South, Suite 7080 Las Vegas, NV 89101-7065 Honorable Noel Francisco Solicitor General (ex officio) United States Department of Justice 950 Pennsylvania Avenue, N.W. Washington, DC 20530 Honorable Judith L. French Ohio Supreme Court 65 South Front Street Columbus, OH 43215 Honorable Brett M. Kavanaugh United States Court of Appeals William B. Bryant United States Courthouse Annex 333 Constitution Avenue, N.W., Room 3004 Washington, DC 20001 Christopher Landau, Esq. Kirkland & Ellis LLP 655 Fifteenth Street, N.W. Washington DC 20005-5793 Honorable Stephen Joseph Murphy III United States District Court Theodore Levin United States Courthouse 231 West Lafayette Boulevard, Room 235 Detroit, MI 48226

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TAB 1

TAB 1A

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 Draft approved for submission to Standing Committee 05/17 Draft approved for publication by Standing Committee 06/17 Draft published for public comment 08/17
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 Discussed and retained on agenda 10/16 Draft approved for submission to Standing Committee 05/17 Draft approved for publication by Standing Committee 06/17 Draft published for public comment 08/17
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 Discussed and retained on agenda 10/16 Draft approved for submission to Standing Committee 05/17 Draft approved for publication by Standing Committee 06/17 Draft published for public comment 08/17

<u>FRAP Item</u>	<u>Proposal</u>	<u>Source</u>	<u>Current Status</u>
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 Revised draft approved 05/17 for resubmission to Standing Committee following public comments Revised draft approved by the Standing Committee 06/17 Draft approved by the Judicial Conference and submitted to the Supreme Court 09/17
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 Draft approved 05/17 for resubmission to Standing Committee following public comments Revised draft approved by the Standing Committee 06/17 Draft approved by the Judicial Conference and submitted to the Supreme Court 09/17
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 Revised draft approved 05/17 for resubmission to Standing Committee following public comments Revised draft approved by the Standing Committee 06/17 Draft approved by the Judicial Conference and submitted to the Supreme Court 09/17

<u>FRAP Item</u>	<u>Proposal</u>	<u>Source</u>	<u>Current Status</u>
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 Revised draft approved 05/17 for resubmission to Standing Committee following public comments Revised draft approved by the Standing Committee 06/17 Draft approved by the Judicial Conference and submitted to the Supreme Court 09/17
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 Revised draft approved 05/17 for resubmission to Standing Committee following public comments Revised draft approved by the Standing Committee 06/17 Draft approved by the Judicial Conference and submitted to the Supreme Court 09/17
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 Revised draft approved 05/17 for resubmission to Standing Committee following public comments Revised draft approved by the Standing Committee 06/17 Draft approved by the Judicial Conference and submitted to the Supreme Court 09/17

<u>FRAP Item</u>	<u>Proposal</u>	<u>Source</u>	<u>Current Status</u>
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 Draft approved 05/17 for resubmission to Standing Committee following public comments Revised draft approved by the Standing Committee 06/17 Draft approved by the Judicial Conference and submitted to the Supreme Court 09/17
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 Draft approved 05/17 for submission to Standing Committee Draft approved for submission to Standing Committee 05/17 Draft approved for publication by Standing Committee 06/17 Draft published for public comment 08/17
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 Revised draft approved 05/17 for resubmission to Standing Committee following public comments Revised draft approved by the Standing Committee 06/17 Draft approved by the Judicial Conference and submitted to the Supreme Court 09/17

TAB 2

TAB 2A

**DRAFT Minutes of the Spring 2017 Meeting of the
Advisory Committee on the Appellate Rules**

May 2, 2017
Washington, D.C.

Judge Michael A. Chagares, Chair, Advisory Committee on Appellate Rules, called the meeting of the Advisory Committee on the Appellate Rules to order on Tuesday, May 2, 2017, at 9:30 a.m., at the Thurgood Marshall Federal Judicial Building in Washington, D.C.

In addition to Judge Chagares, the following members of the Advisory Committee on the Appellate Rules were present: Judge Brett M. Kavanaugh, Judge Stephen Joseph Murphy III, and Professor Stephen E. Sachs. Acting Solicitor General Jeffrey B. Hall was represented by Douglas Letter, Esq., and H. Thomas Byron III, Esq. Justice Judith L. French and Neal Katyal, Esq., participated by telephone. Kevin C. Newsom, Esq., was absent.

Also present were: 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 the Appellate Rules; Bridget M. Healy, Esq., Attorney Advisor, RCSO; Professor Gregory E. Maggs, Reporter, Advisory Committee on the Appellate Rules; and Rebecca A. Womeldorf, Esq., Secretary, Standing Committee on the Rules of Practice and Procedure and Rules Committee Officer.

Judge David G. Campbell, Chair, Standing Committee on the Rules of Practice and Procedure, participated by video conference. The following persons participated by telephone: Judge Pamela Pepper, Member, Advisory Committee on the Bankruptcy Rules and Liaison Member, Advisory Committee on the Appellate Rules; Elisabeth A. Shumaker, former Clerk of Court Representative, Advisory Committee on the Appellate Rules; and Marcia M. Waldron, Clerk of Court Representative, Advisory Committee on the Appellate Rules.

I. Introduction

Judge Chagares opened the meeting and greeted everyone. He expressed congratulations to Justice Neil Gorsuch, the past chair of the Advisory Committee, on his appointment to the Supreme Court, and thanked him for his leadership, his wisdom, and all of his contributions as chair. He thanked Rebecca Womeldorf and her staff for organizing the meeting. He also thanked former attorney member Gregory Katsas and former clerk representative Betsy Shumaker, who have completed their service on the Committee. He also noted that this would be the final meeting for attorney members Neal Katyal and Kevin Newsom and liaison member

Gregory Garre, whose terms of service are expiring, and expressed his gratitude for their many contributions to the Committee.

II. Approval of Minutes

A motion to approve the draft minutes of the October 2016 meeting of the Advisory Committee was made, seconded, and approved.

III. Action Items

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

Mr. Byron presented Item 12-AP-D, which concerns the proposed amendments to Appellate Rules 8, 11, and 39 that were published for public comment in August 2016. The amendments eliminate references to "supersedeas bonds" so that the Appellate Rules will conform to a proposed amendment to Civil Rule 62(a). Materials concerning the item begin at page 82 of the Agenda Book.

The reporter reminded the Advisory Committee that Rule 8(b) corresponds to Civil Rule 65.1. He then informed the Advisory Committee that the Civil Rules Advisory Committee has approved a version of Civil Rule 65.1 that uses only the generic terms "security" and "security provider," and does not mention examples of specific types of security (e.g., bonds) or security providers (e.g., sureties). The Advisory Committee then discussed and approved a revised version of Rule 8(b), shown on page 84 of the Agenda Book, that follows the same approach as Civil Rule 65.1.

Mr. Byron suggested amending the Committee Note to make clear that the term "security" in the draft of Rule 8(b) includes but is not limited to the types of security previously listed expressly in Rule 8(b), namely, bonds, stipulations, and undertakings. The Committee approved this suggestion. The Committee also approved changing the word "mail" to "send" in line 11 of the draft on page 84.

The Advisory Committee decided to recommend that the Standing Committee approve (1) the amended version of Rule 8, (2) the amended Committee Note, and (3) the versions of Rules 11 and 39 that were published in August 2016.

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

The reporter presented Item 11-AP-D, which concerns the proposed amendments to Appellate Rule 25 that were published for public comment in August 2016. The amendments

address electronic filing, service, and signatures. Materials concerning the item begin at page 112 of the Agenda Book. The Advisory Committee then discussed issues concerning three subdivisions:

Rule 25(a)(2)(B)(iii). The reporter explained how public comments had criticized the published version of Rule 25(a)(2)(B)(iii) and its counterparts in the Civil, Criminal, and Bankruptcy Rules. The Advisory Committee then approved the revised version of Rule 25(a)(2)(B)(iii) that appears on page 113 of the Agenda Book, which accords with revisions recommended by the other Advisory Committees.

Rule 25(c)(2). The reporter explained that a public comment had revealed that the published version of Rule 25(c)(2) was difficult to understand. The Committee then approved the proposed revision that appears on page 115 of the Agenda Book. The reporter agreed to coordinate this change with the Bankruptcy Rules Advisory Committee, which is considering a very similar rule.

Rule 25(a)(2)(B)(ii). The reporter explained how public comments had criticized the published version of Rule 25(a)(2)(B)(ii), which concerns filing by unrepresented parties. The Advisory Committee previously had considered but rejected these objections at its October 2016 meeting. The Advisory Committee decided not to recommend changes to the published version of this subdivision.

The reporter explained that one public comment recommended adding a provision to Rule 25 that is similar to Criminal Rule 49(d), which concerns filings by non-parties. The Advisory Committee decided that this proposal went beyond the scope of the amendments to Rule 25 that were published for public comment. The reporter and Mr. Letter agreed to study the proposal as a new matter and report back to the Committee at its next meeting.

The Advisory Committee decided to recommend that the Standing Committee approve the proposed amendments to Rule 25, with the revisions discussed above.

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

Judge Chagares presented Item 15-AP-C, which concerns the proposed amendments to Appellate Rules 28.1 and 31 that were published for public comment in August 2016. The amendments would extend the time for filing reply briefs to 21 days. Materials concerning the item begin at page 214 of the Agenda Book.

The reporter explained that all public comments had supported the proposal. The Advisory Committee decided to recommend that the Standing Committee approved the proposed amendments as published.

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

Judge Chagares presented Item 14-AP-D, which concerns the proposed amendments to Appellate Rule 29 that were published for public comment in August 2016. The amendments would authorize courts by order or rule to strike or prohibit the filing of amicus briefs that would disqualify a judge. Materials concerning the item begin at page 224 of the Agenda Book.

Judge Chagares began by explaining that Rule 29 had been revised and renumbered for other reasons in December 2016. As a result, the changes proposed for public comment will now have to be made to the new subdivision (a)(2), instead of the old subdivision (a). The discussion draft on page 224 shows the change.

Judge Chagares then identified three issues for consideration: (1) whether the Advisory Committee should approved the proposed changes to subdivision (a)(2); (2) whether subdivision (a)(2) should be reworded; and (3) whether subdivision (b)(2) should also be amended.

A judge member said that the proposed change to subdivision (a)(2) is well grounded and well thought out. He asserted that the changes proposed to subdivision (a)(2) should also apply to the new subdivision (b)(2), which concerns amicus briefs on rehearing. He further suggested that the phrase "may strike or prohibit the filing of" should be reworded to say "may prohibit the filing of or strike" because putting the words in that order was more chronological. The Advisory Committee agreed.

A judge member asked whether it was necessary to allow a court to strike a brief filed during the rehearing stage because a brief can be filed only with leave.

Mr. Letter supported the published amendment but noted that it authorized non-uniform rules. An academic member discussed the Federal Bar Council's argument that existing local rules on the subject might not be inconsistent with the current Rule 29(a)(2). A judge member, however, said that the Advisory Committee needed to act because some local rules are now inconsistent.

An attorney member asked whether local rules might allow a court to prohibit a government amicus brief. A judge member said that he did not think that local rules could authorize a court to strike a government brief. No one knew of a situation in which a local rule had been applied to the government.

The Advisory Committee considered Judge Newman's comment arguing that "amicus-curiae brief" should not be changed to "amicus brief" in subdivision (a)(2). While the Committee sees the argument for this position, it observed that the December 2016 amendments had already changed "amicus-curiae brief" to "amicus brief" in other subdivisions of Rule 29. The proposed change was therefore necessary for consistency.

Following this discussion, the Advisory Committee approved the following four changes to the amendments published in August 2016. First, in light of the December 2016 revision of Rule 29, the amendments originally proposed for former subdivision (a) will be made to subdivision (a)(2). Second, the word order of the amendment in subdivision (a)(2) will be changed to "except that a court of appeals may prohibit the filing of or strike an amicus brief that would result in a judge's disqualification." Third, the same "except" clause will be added to the end of subdivision (b)(2). Fourth, in subdivision (b)(2), the term "amicus-curiae brief" will be changed to "amicus brief."

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

Judge Kavanaugh presented Item 13-AP-H, which concerns the proposed amendments to the Appellate Rule 41 that were published for public comment in August 2016. The amendments address stays of the mandate. Materials concerning the item begin at page 268 of the Agenda Book.

Judge Kavanaugh first discussed the comments of Judge Newman and the comments on behalf of the Second Circuit. These comments opposed the proposal to add a sentence to Rule 41(b) saying: "The court may extend the time only in extraordinary circumstances or under Rule 41(d)." The comments asserted that courts might wish to extend the time for good cause even if exceptional circumstances do not exist. For example, a court might wish to poll members about rehearing a case en banc.

Two judge members of the Advisory Committee expressed agreement with Judge Newman's comments. An academic member asked whether the standard in Rule 41(b) should be changed to "good cause." A judge member responded that a court would be unlikely to extend issuance of the mandate absent good cause. A judge member said that the original proposal to require exceptional circumstances arose from a concern that judges were delaying the mandate because they did not like the result of a case. Mr. Letter agreed that this was the original concern. A judge member said that adding the proposed words "by order" in the previous sentence of proposed Rule 41(b) would discourage extending the mandate for improper purposes. Another judge member agreed. Following this discussion, the Advisory Committee decided to recommend that the Standing Committee remove the proposed last sentence of Rule 41(b).

Judge Kavanaugh then discussed the National Association of Criminal Defense Lawyers (NACDL)'s proposal for modifying Rule 41(d). The proposal, as shown on page 271 of the Agenda Book, would allow a stay to exceed 90 days when a Justice of the U.S. Supreme Court extends the time for filing a petition for writ of certiorari.

A judge member commented that the proposal addresses a situation that sometimes arises. Mr. Letter thought it was a good idea and that there would be no downside to adding the language. An attorney member also thought that it would be a good idea.

A judge member asked whether the wording was appropriate. Another judge member said that the language does not fully address the problem. He explained that the stay should be entered automatically if a circuit justice has extended the time for filing a petition. He said that the Advisory Committee ought to make the rule self-executing. The Advisory Committee agreed with this position. It will consider by email an amended proposal to achieve the desired result.

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

Judge Chagares presented Item 15-AP-E, which concerns a proposed amendment to Form 4 that was published for public comment in August 2016. The amendment would delete a question that asks applicants for leave to proceed in forma pauperis to provide the last four digits of their social security numbers. Materials concerning the item begin at page 330 of the Agenda Book. Judge Chagares explained that all public comments supported the proposal. The Advisory Committee decided to recommend that the Standing Committee approve the proposal as previously published.

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

The reporter presented Items 08-AP-A, 11-AP-C, and 15-AP-D, which concern new proposals for amending Rules 3(d), 8(b), and 13(c) to change the words "mail" and "mailing" to "send" and "sending." Materials concerning these items begin at page 352 of the Agenda Book. The reporter reminded the Advisory Committee that it had approved changes to Rule 3(d) at its Fall 2016 meeting, but decided to search the rules for other instances of the word "mail" and "mailing" before making a recommendation to the Standing Committee. Following a brief discussion, the Advisory Committee agreed to recommend that the Standing Committee publish for public comment the proposed changes to Rule 3(d) and Rule 13(c) as shown on pages 353-56 of the Agenda Book. The amendment to Rule 8(b) should be made in connection with Item 12-AP-D (discussed above).

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

Judge Chagares presented Item 08-AP-R, which concerns the disclosures required by Rule 26.1. Materials concerning the item begin at page 360 of the Agenda Book. The reporter reviewed the previous decisions by the Advisory Committee and then raised the pending issues identified in his memorandum.

The Advisory Committee agreed to change the title of Rule 26.1 from "Corporate Disclosure Statement" to "Disclosure Statement" as shown in the discussion draft on page 362 of the Agenda Book. An attorney member recommended searching the Appellate Rules for cross-references to Rule 26.1 that might need to be changed.

The Advisory Committee next considered the proposed amendments to Rule 26.1(b). The reporter reminded the Advisory Committee that these amendments were designed to conform to proposed amendments to Criminal Rule 12.4(b). The reporter told the Advisory Committee that the reporter for the Criminal Rules Advisory Committee had informed him the Criminal Rules Advisory Committee had trimmed back the published version of Rule 12.4 so that it would simply track the current Civil Rule. Because of this change of direction, the reporter for the Criminal Rules Advisory Committee has recommended that no changes are needed in the Appellate Rules or other rules. The Advisory Committee therefore decided not to amend the title of Rule 26.1(b) or the text of Rule 26.1(b)'s last sentence.

A judge member suggested that Rule 26.1(b) should be moved to the end of Rule 26.1 so that it would clearly apply to all of the disclosure requirements in Rule 26.1, and not just to Rule 26.1(a). This proposal would also require revising the lettering of the subdivision and changing the reference to "Rule 26.1(a)" to "this Rule." The Advisory Committee agreed with this suggestion and the reporter agreed to prepare a draft.

The reporter next asked the Advisory Committee members if they wished to discuss the proposals for creating new subdivisions (d) and (f) to address organizational victims and intervenors. The Advisory Committee approved the drafts of these provisions on page 363 of the Agenda Book at its October 2016 meeting. A judge member said that he saw no reason not to adopt the changes. The Advisory Committee agreed.

The Advisory Committee then discussed the revised proposal to create a new subdivision (e) to address disclosures in bankruptcy cases. The reporter and Judge Chagares described their conversations about the issue with representatives from the Bankruptcy Rules Advisory Committee. Judge Campbell suggested changing line 2 to say ". . . if neither the debtor nor the trustee is a party" The Advisory Committee approved the proposal to create subdivision (d) and asked the reporter to confer with the Style Consultants.

III. Discussion Items

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

The reporter presented Item 16-AP-C, a new proposal to require courts to designate orders granting or denying rehearing as "published" decisions so that they would be easier to locate. Materials concerning the proposal begin at page 398 of the Agenda Book. The Advisory Committee decided to remove the item from its agenda based on considerations identified in the reporter's memorandum.

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

Judge Chagares presented Item 16-AP-D, a new proposal to amend the Civil Rules to include a provision similar to Appellate Rule 28(j). Materials concerning the proposal begin at page 408 of the Agenda Book. The reporter informed the Advisory Committee that the Civil Rules Advisory Committee had decided to remove the item from its agenda. The Appellate Rules Advisory Committee therefore also agreed to remove this item from its agenda.

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

The reporter presented Item 17-AP-A, a new proposal that concerns subpoenas. Materials concerning the proposal begin at page 414 of the Agenda Book. The Advisory Committee decided to remove the item from its agenda based on considerations identified in the reporter's memorandum.

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

Judge Chagares introduced Item 17-AP-B, a new proposal for amending Rule 28 to specify the manner of stating the question presented in appellate briefs. Materials concerning the proposal begin at page 420 of the Agenda Book. The proponent of the proposal, Style Consultant Bryan Garner, spoke to the Advisory Committee by telephone.

Mr. Garner explained that the precise question to be decided on appeal is the most important matter for an appellate court, but the wording of the question presented is often poorly phrased. He said that the manner of stating a question is not just a matter of presentation. On the contrary, it is a subject that directly affects the administration of justice. Mr. Garner asserted that the question presented should be moved to the front of the brief. He said that the fact that judges often don't pay attention is evidence that questions are not presented well. He said it was important to include examples of how to state the question presented in the Appellate Rules. He also said that the Rule could be made precatory rather than mandatory by including the words "preferably" or "preferably should," in proposed subdivisions (a)(1) and (a)(1)(D) on page 425 of the Agenda Book.

A judge member asked Mr. Garner if he thought that questions should never start with "whether." Mr. Garner said yes, explaining that the single sentence fragment necessarily precludes any discussion of the facts.

A judge member expressed concern that lawyers have difficulty complying with technical rules. He also said that a party could use the proposed technique of stating the question presented under the current Rules. He felt that it was a question of advocacy. He did not think it was possible to make lawyers better advocates by changing the Appellate Rules.

Another judge thought that it would make sense to move the statement of the question presented up to the front of the brief. He also thought Mr. Garner was correct in asserting that many issue statements are poor and could be improved.

Mr. Letter said that if judges found the proposal useful, then he would support it. An attorney member agreed that the Rules should impose a word limit on the statement of the question presented.

A judge member identified a different problem in many briefs. He said that it is often difficult to determine which issues have to be decided if others are decided (e.g., "If we agree on issue #1, do we have to reach issue #2?").

An attorney member agreed that the statement of the questions presented are often a problem. But he did not think that the proposed codification would help.

Two judge members thought that moving the statement of the question presented to the front of the brief would not be beneficial.

Following this discussion, the consensus was that the Advisory Committee should not go forward with the proposal. The Committee will remove it from the Table of Agenda Items.

IV. Improving Efficiency in Federal Appellate Litigation

The Committee next considered suggestions for improving efficiency in federal appellate litigation.

A. Collateral Order Doctrine

Professor Stephen E. Sachs presented his extensively researched memorandum on the Collateral Order Doctrine, which starts on page 432 of the Agenda Book. He first discussed the difficulty that appellate courts have in balancing factors to determine whether an order is

appealable. He suggested that to improve the situation, it might be possible to come up with a list of orders that are automatically appealable. But before going forward, he said that it might be valuable to obtain empirical evidence about these orders.

A judge member was concerned that the empirical study would be a very large undertaking. Mr. Letter said that he and a former Advisory Committee member, Mr. Katsas, previously investigated a similar proposal. They found that coming up with an improved rule was too difficult because the circumstances varied so much. But he said that their lack of success was not a good reason not to look into the matter.

Two judge members agreed that Rule 23(f) is not popular. Professor Sachs elaborated further on how it might be possible to list some orders that are definitely appealable and some that are not, but otherwise leave the multi-factor test in place. Mr. Byron was worried that this might be difficult.

Two judge members expressed doubt about whether more resources should be devoted to this project. Another judge said that he did not think that changing the rule would make the appellate system more efficient. He further observed that proposed federal legislation may address this topic.

Following this discussion, the Advisory Committee decided not to include the matter on its agenda.

B. Suggestions of the American Academy of Appellate Lawyers

Judge Chagares presented the suggestions of the American Academy of Appellate Lawyers (AAAL), which appear in a memorandum beginning on page 474 of the Agenda Book.

After summarizing the memorandum, Judge Chagares asked the Advisory Committee about the proposal regarding pre-argument focus letters. A judge member said that such letters are often a good idea, but the proposal is not a good topic for a Rule. A judge member said that increased use of focus letters might be suggested to appellate judges as a good practice without changing the Appellate Rules.

An academic member next discussed the proposal concerning judicial notice. He said that there was already a rule on judicial notice, and perhaps judges were just misapplying the rules. An attorney member agreed with the AAAL that some bad practices existed, but did not think that the Appellate Rules needed to address them.

A judge member said that reply briefs are abused. But he did not think a satisfactory rule could be proposed.

Following the discussion, the Advisory Committee decided not to add any of the AALS's suggestions to its agenda at this time.

C. Suggestion Regarding Appellate Rule 47

Professor Sachs finally discussed the possibility of a rule requiring Circuit Courts to post on their website templates of briefs that comply with local rules. He suggested that litigants could download the templates and add the content of the brief. The templates would have all the proper word-processing formatting. The former clerk representative said that the Tenth Circuit does not have templates but they send litigants a checklist. She also said that they make one sample brief available. The current clerk representative said that the Third Circuit's practice is the same. She also worried about the inflexibility of templates. She was also concerned about phone calls from people complaining that the template might not work.

Professor Sachs said that if there was an error in the template, there would be a safe harbor rule. So if there was a problem, the lawyer would be safe. But Professor Sachs said that the proposal only makes sense if clerks often reject briefs. Mr. Letter said that many briefs filed in federal circuits are bounced for not being compliant.

VI. Concluding Remarks

The Administrative Office law clerk reported that she is working on a memorandum regarding Rule 7. Mr. Letter and Mr. Katyal reported that they are working on a memorandum regarding a problem that may arise when a party makes an interlocutory appeal of only one issue in a case that involved multiple appellate issues. Professor Sachs and the reporter said that they would investigate new language from Rule 41(d).

Judge Chagares thanked all of the members of the Advisory Committee and the staff of the Administrative Office. He noted the Committee will miss Mr. Katyal, Mr. Garre, and others who are completing their service.

The meeting of the Advisory Committee adjourned at 12:30 p.m.

TAB 3

TAB 3A

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MEMORANDUM

DATE: October 17, 2017

TO: The Advisory Committee on Appellate Rules

FROM: Gregory E. Maggs, Reporter

RE: Report regarding the Standing Committee's actions on the Advisory Committee's recent proposals

In May 2017, the Advisory Committee recommended that the Standing Committee (1) send proposed amendments to Appellate Rules 8, 11, 25, 26, 28.1, 29, 31, 39, and 41, and Forms 4 and 7 to the Judicial Conference of the United States and (2) publish proposed amendments to Appellate Rules 3, 13, 26.1, 28, and 32 for public comment. The Standing Committee acted on these recommendations at its June 2017 meeting. Attachment 1 to this memorandum is an excerpt from the Standing Committee's report to the Judicial Conference describing the Standing Committee's actions on the Advisory Committee's proposed amendments.

Proposed Amendments Submitted to the Judicial Conference

Attachment 2 shows the proposed amendments that the Standing Committee submitted to the Judicial Conference. The Standing Committee approved the amendments to Rules 8, 11, 28.1, 31, 39, and Form 4 and 7 as proposed by the Advisory Committee. The Standing Committee approved slight stylistic changes to the proposed amendments to Rules 25(a)(2)(B)(iii), 29(a)(2), and 41(d), rejected the proposed amendment to Rule 29(b) as unnecessary, but otherwise approved the amendments to Rules 25, 29, and 41 as proposed by the Advisory Committee. None of the Standing Committee's adjustments affected the substance of the proposed amendments. The Judicial Conference approved these proposals without further change in September 2017. The Supreme Court will now review these proposals.

Proposed Amendments Published for Public Comment

Attachment 3 shows the proposed amendments that the Standing Committee published for public comment in August 2017. The Standing Committee approved the amendments to Rules 3, 13, 28, and 32 as proposed by the Advisory Committee and made only slight stylistic changes to the proposed Committee Notes. The Standing Committee made stylistic changes to Rule 26.1(e) and (f). None of the Standing Committee's adjustments affected the substance of

the proposed amendments. Written comments from the public are due by February 15, 2018. The Advisory Committee will consider any comments received at its spring 2018 meeting.

Attachments

1. Excerpt of the 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 (September 2017)
2. Proposed amendments to Rules 8, 11, 25, 26, 28.1, 29, 31, 39, and 41, and Forms 4 and 7, as sent by the Standing Committee to the Judicial Conference in September 2017
3. Proposed Amendments to Rules 3, 13, 26.1, 28, and 32, as published by the Standing Committee for public comment in August 2017

TAB 3B

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FEDERAL RULES OF APPELLATE PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Appellate Rules submitted proposed amendments to Rules 8, 11, 25, 26, 28.1, 29, 31, 39, and 41, and Forms 4 and 7, with a recommendation that they be approved and transmitted to the Judicial Conference. Proposed amendments to these rules were circulated to the bench, bar, and public for comment in August 2016.

Rules 8 (Stay or Injunction Pending Appeal), 11 (Forwarding the Record), and 39 (Costs)

The proposed amendments to Rules 8(a) and (b), 11(g), and 39(e) conform the Appellate Rules to a proposed change to Civil Rule 62(b) that eliminates the antiquated term “supersedeas bond” and makes plain an appellant may provide either “a bond or other security.” One comment was filed in support of the proposed amendment.

The advisory committee recommended no changes to the published proposals to amend Rules 8(a), 11(g), and 39(e), but recommended minor revisions to Rule 8(b). First, to conform proposed amendments with Civil Rule 65.1, the advisory committee recommended rephrasing the heading and the first sentence of Rule 8(b) to refer only to “security” and “security provider” (and not to mention specific types of security, such as a bond, stipulation, or other undertaking). Second, the advisory committee changed the word “mail” to “send” in Rule 8(b) to conform Rule 8(b) to the proposed amendments to Rule 25. The advisory committee modified the Committee Note to explain these revisions. The Standing Committee approved the proposed amendments to Rules 8(a) and (b), 11(g), and 39(e).

Rule 25 (Filing and Service)

The proposed amendments to Rule 25 are part of the inter-advisory committee project to develop coordinated rules for electronic filing and service. The proposed amendment to

Rule 25(a)(2)(B)(i) requires a person represented by counsel to file papers electronically, but allows exceptions for good cause and by local rule.

The proposed amendment to subdivision (a)(2)(B)(iii) addresses electronic signatures and, in consultation with other advisory committees, establishes a uniform national signature provision. The proposed amendment to subdivision (c)(2) addresses electronic service through the court's electronic filing system or by using other electronic means that the person to be served consented to in writing. The proposed amendment to subdivision (d)(1) requires proof of service of process only for papers that are not served electronically.

After receiving public comments and conferring with the other advisory committees, the advisory committee recommended several minor revisions to the proposed amendments as published. First, minor changes were needed to take into consideration amendments to subdivision (a)(2)(C) that became effective in December 2016 and altered the text of that section. Second, public comments criticized the signature provision in the proposed new subdivision (a)(2)(B)(iii). The advisory committee recommended replacing the language published for public comment with a new provision drafted jointly with the other advisory committees. Third, another comment revealed an ambiguity in the clause structure of the proposed Rule 25(c)(2), which was addressed by separating the two methods of service using "(A)" and "(B)."

The advisory committee received several comments arguing that unrepresented parties should have the same right to file electronically as represented parties. These comments noted that electronic filing is easier and less expensive than filing non-electronically. The advisory committee considered these arguments at its October 2016 and May 2017 meetings, but decided against allowing unrepresented parties the same access as represented parties given potential difficulties caused by inexperienced filers and possible abuses of the filing system. Under the

proposed amendment, unrepresented parties have access to electronic filing by local rule or court order.

The Standing Committee approved the proposed amendments to Rule 25, as well as the electronic filing rules proposed by the other advisory committees, after making minor stylistic changes.

Rule 26 (Computing and Extending Time)

In light of the proposed changes to Rule 25 approved at the Standing Committee meeting, the advisory committee recognized the need for technical, conforming changes to Rule 26. Rule 26(a)(4)(C) refers to Rules 25(a)(2)(B) and 25(a)(2)(C). The recent amendments to Rule 25 have renumbered these subdivisions to be Rule 25(a)(2)(A)(ii) and 25(a)(2)(A)(iii). Therefore, the references in Rule 26 should be changed accordingly. Upon the recommendation of the advisory committee, the Standing Committee approved the proposed amendments to Rule 26.

Rules 28.1 (Cross-Appeals) and 31 (Serving and Filing Briefs)

The proposed amendments to Rules 28.1(f)(4) and 31(a)(1) respond to the shortened time to file a reply brief effectuated by the elimination of the “three day rule” (JCUS-SEP 15, pp. 28-30). These rules currently provide only 14 days after service of the response brief to file a reply brief. Previously, parties effectively had 17 days because Rule 26(c) formerly gave them three additional days in addition to the 14 days in Rules 28.1(f)(4) and 31(a)(1). The advisory committee concluded that effectively shortening the period for filing from 17 days to 14 days could adversely affect the preparation of useful reply briefs. To maintain consistency in measuring time periods in increments of seven days when possible, the advisory committee proposed that the time period to file a reply should be extended to 21 days.

The advisory committee received two comments in support of the published proposal. The advisory committee recommended approval of the proposed amendments without further

changes. The Standing Committee approved the proposed amendments to Rules 28.1(f)(4) and 31(a)(1).

Rule 29 (Brief of an Amicus Curiae)

Rule 29(a) specifies that an amicus curiae may 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 courts of appeals, however, 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. Given the arguable merit of these local rules, the advisory committee proposed to add an exception to Rule 29(a) providing “that a court of appeals may strike or prohibit the filing of an amicus brief that would result in a judge’s disqualification.”

At its May 2017 meeting, the advisory committee revised its proposed amendment to Rule 29 in two ways. First, amendments that went into effect in December 2016 renumbered Rule 29’s subdivisions and provided new rules for amicus briefs during consideration of whether to grant rehearing. To match the renumbering, the advisory committee moved the exception from the former subdivision (a) to the new subdivision (a)(2) and copied the exception into the new subdivision (b)(2). Second, the advisory committee rephrased the exception authorizing a court of appeals to “prohibit the filing of or strike” an amicus brief (rather than “strike or prohibit the filing of” the brief), making the exception more chronological without changing the meaning or function of the proposed amendment.

The advisory committee received six comments in opposition to the proposed amendment. These commenters asserted that the proposed amendment is unnecessary because amicus briefs that require the recusal of a judge are rare. They further asserted that the amendment could prove wasteful if an amicus curiae pays an attorney to write a brief which the court then strikes. The amicus curiae likely would not know the identity of the judges on the

appellate panel when filing the brief and would have no options once the court strikes the brief. The advisory committee considered these comments, but concluded that the necessity of the amendment was demonstrated by local rules carving out the exception and that the merits of the amendment outweigh the concerns.

One commenter observed that the proposed amendment should not change “amicus-curiae brief” to “amicus brief.” The advisory committee understands the criticism but recommended the change for consistency with the rest of Rule 29.

The Standing Committee approved the proposed amendment to Rule 29, after making minor revisions to the proposed rule and committee note.

Rule 41 (Mandate: Contents; Issuance and Effective Date; Stay)

In August 2016, the Standing Committee published proposed amendments to Rule 41. Five public comments were received, which prompted the advisory committee to recommend several revisions.

First, in response to commenters’ observations that a court might wish to extend the time for good cause even if exceptional circumstances do not exist, the advisory committee deleted the following sentence: “The court may extend the time only in extraordinary circumstances or under Rule 41(d).” Second, the advisory committee recommended renumbering subdivision (d)(2)(B) to subdivision (d)(2). In response to a comment regarding a potential gap in the rule, the advisory committee added a proposed new clause that will extend a stay automatically if a Justice of the Supreme Court extends the time for filing a petition for certiorari.

The Standing Committee approved the proposed amendments to Rule 41, after making minor revisions to the proposed rule and committee note.

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

In August 2016, the Standing Committee published for public comment a proposed amendment to Appellate Form 4. Litigants seeking permission to proceed *in forma pauperis* must complete Form 4, question 12 of which currently asks litigants to provide the last four digits of their social security numbers. The advisory committee undertook an investigation and determined that no current need exists for this information. Accordingly, the advisory committee recommended deleting this question.

The advisory committee received two comments in support of the proposal and recommended no changes to the proposed amendment. The Standing Committee approved the proposed amendments to Form 4.

Form 7 (Declaration of Inmate Filing)

In light of the proposed changes to Rule 25 approved at the Standing Committee meeting, the advisory committee recognized the need for a technical, conforming change to Form 7. Form 7 contains a note that refers to Rule 25(a)(2)(C). The recent amendments to Rule 25 have renumbered this subdivision as Rule 25(a)(2)(A)(iii). The reference in the note on Form 7 should be changed accordingly. Upon the recommendation of the advisory committee, the Standing Committee approved the proposed amendments to Form 7.

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

Recommendation: That the Judicial Conference approve the proposed amendments to Appellate Rules 8, 11, 25, 26, 28.1, 29, 31, 39, and 41, and Forms 4 and 7, 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.

The proposed amendments to the Federal Rules of Appellate Procedure are set forth in Appendix A, with an excerpt from the advisory committee's report.

Rules Approved for Publication and Comment

The advisory committee submitted proposed amendments to Rules 3(d), 13, 26.1, 28(a)(1), and 32(f) with a request that they be published for comment in August 2017.

Rules 3 (Appeal as of Right—How Taken) and 13 (Appeals from the Tax Court)

In light of the proposed changes to Rule 25, the advisory committee recommended changes to Rules 3(d) and 13(a) regarding the use of the term “mail.”

Rule 3(d) concerns the clerk’s service of the notice of appeal. The advisory committee concluded that subdivisions (d)(1) and (3) require two changes, changing the words “mailing” and “mails” to “sending” and “sends” to make electronic filing and service possible. In addition, the portion of subdivision (d)(1) providing that the clerk must serve the defendant in a criminal case “either by personal service or by mail addressed to the defendant” is deleted to eliminate any requirement of mailing. The clerk will determine whether to serve a notice of appeal electronically or non-electronically based on the principles in revised Rule 25.

Rule 13 concerns appeals from the Tax Court, and currently uses the word “mail” in both its first and second sentences. Changing the reference in the first sentence of the rule 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 does not recommend a change to the second sentence.

Rules 26.1 (Corporate Disclosure Statement), 28 (Briefs), and 32 (Form of Briefs, Appendices, and Other Papers)

Rule 26.1 currently requires corporate parties and amici curiae to file corporate disclosure statements. These disclosure requirements assist judges in making a determination whether they have any interest in a party’s related corporate entities that would disqualify them from hearing an appeal.

Various local rules require disclosures that go beyond the current requirements of Rule 26.1, and the advisory committee considered whether the national rules should be similarly amended.

The advisory committee proposes adding a new subdivision (b) requiring disclosure of organizational victims in criminal cases. This new subdivision (b) conforms Rule 26.1 to the amended version of Criminal Rule 12.4(a)(2) that was published for public comment in August 2016. The only differences are the introductory words “[i]n a criminal case” and the reference to “Rule 26.1(a)” instead of Criminal Rule 12.4(a)(1).

The advisory committee proposes adding a new subdivision (c) requiring disclosure of the name of the debtor or debtors in bankruptcy cases when they are not included in the caption. The caption might not include the name of the debtor in appeals from adversary proceedings, such as a dispute between two of the debtor’s creditors.

The advisory committee recommended moving current subdivisions (b) and (c) to the end of Rule 26.1 by designating them as subdivisions (e) and (f). These provisions address supplemental filings and the number of copies that must be filed. Moving the subdivisions will make it clear that they apply to all of the disclosure requirements. The advisory committee also considered amending current subdivision (b) to make it conform to the proposed amendments to Criminal Rule 12.4(b). The Criminal Rules Advisory Committee, however, informed the advisory committee of its intention to scale back its proposed revision of Criminal Rule 12.4(b), obviating the need for corresponding changes to Appellate Rule 26.1(b).

Changing Rule 26.1’s heading from “Corporate Disclosure Statement” to “Disclosure Statement” will require minor conforming amendments to Rules 28(a)(1) and 32(f). References to “corporate disclosure statement” must be changed to “disclosure statement” in each rule.

The Standing Committee unanimously approved all of the above amendments for publication in August 2017.

TAB 3C

**PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF APPELLATE PROCEDURE¹**

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

¹ New material is underlined; matter to be omitted is lined through.

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13 Rule 8(a)(1) may be made to the court of appeals
14 or to one of its judges.

15 * * * * *

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

30 and any notice that the district court prescribes may be
31 served on the district clerk, who must promptly ~~mail~~
32 send a copy to each ~~surety~~security
33 provider whose address is known.

34 * * * * *

Committee Note

The amendments to subdivisions (a) 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) allows a party to obtain a stay by providing a “bond or other security.” The word “mail” is changed to “send” to avoid restricting the method of serving security providers. Other rules specify the permissible manners of service.

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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) allows a party to obtain a stay by providing a “bond or other security.”

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.** If an institution
 29 has a system designed for legal
 30 mail, an inmate confined there
 31 must use that system to receive
 32 the benefit of this
 33 Rule 25(a)(2)~~(C)(A)(iii)~~. A

8 FEDERAL RULES OF APPELLATE PROCEDURE

34 paper ~~filed~~not filed electronically
35 by an inmate is timely if it is
36 deposited in the institution's
37 internal mail system on or before
38 the last day for filing and:
39 (i) it is accompanied by: ~~a~~
40 declaration in compliance
41 with 28 U.S.C. § 1746—or
42 a notarized statement—
43 setting out the date of
44 deposit and stating that
45 first-class postage is being
46 prepaid; or ~~a~~evidence (such
47 as a postmark or date
48 stamp) showing that the
49 paper was so deposited and
50 that postage was prepaid; or

51 (ii) the court of appeals
52 exercises its discretion to
53 permit the later filing of a
54 declaration or notarized
55 statement that satisfies
56 Rule 25(a)(2)(C)(i)(A)(iii).

57 ~~(D) **Electronic filing.**~~ A court of appeals may
58 by local rule permit or require papers to be
59 filed, signed, or verified by electronic
60 means that are consistent with technical
61 standards, if any, that the Judicial
62 Conference of the United States establishes.
63 A local rule may require filing by electronic
64 means only if reasonable exceptions are
65 allowed. A paper filed by electronic means
66 in compliance with a local rule constitutes a

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67 ~~written paper for the purpose of applying~~
68 ~~these rules.~~

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

70 **(i) By a Represented Person—**

71 **Generally Required;**

72 **Exceptions.** A person

73 represented by an attorney must

74 file electronically, unless

75 nonelectronic filing is allowed by

76 the court for good cause or is

77 allowed or required by local rule.

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

79 **When Allowed or Required. A**

80 person not represented by an

81 attorney:

- 82 • may file electronically only if
- 83 allowed by court order or by
- 84 local rule; and
- 85 • may be required to file
- 86 electronically only by court
- 87 order, or by a local rule that
- 88 includes reasonable
- 89 exceptions.

90 (iii) **Signing.** A filing made through

91 a person's electronic-filing

92 account and authorized by that

93 person, together with that

94 person's name on a signature

95 block, constitutes the person's

96 signature.

97 (iv) **Same as a Written Paper.** A

98 paper filed electronically is a

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99 written paper for purposes of
100 these rules.

101 (3) **Filing a Motion with a Judge.** If a motion
102 requests relief that may be granted by a single
103 judge, the judge may permit the motion to be
104 filed with the judge; the judge must note the
105 filing date on the motion and give it to the clerk.

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

111 (5) **Privacy Protection.** An appeal in a case whose
112 privacy protection was governed by Federal Rule
113 of Bankruptcy Procedure 9037, Federal Rule of
114 Civil Procedure 5.2, or Federal Rule of Criminal
115 Procedure 49.1 is governed by the same rule on

116 appeal. In all other proceedings, privacy
117 protection is governed by Federal Rule of Civil
118 Procedure 5.2, except that Federal Rule of
119 Criminal Procedure 49.1 governs when an
120 extraordinary writ is sought in a criminal case.

121 **(b) Service of All Papers Required.** Unless a rule
122 requires service by the clerk, a party must, at or before
123 the time of filing a paper, serve a copy on the other
124 parties to the appeal or review. Service on a party
125 represented by counsel must be made on the party's
126 counsel.

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

128 (1) ~~Service~~Nonelectronic service may be any of the
129 following:

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

132 (B) by mail;or

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133 (C) by third-party commercial carrier for
134 delivery within 3 days; ~~or,~~

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

137 (2) ~~If authorized by local rule, a party may use the~~
138 ~~court's transmission equipment to make~~
139 ~~electronic service under Rule 25(e)(1)(D)~~
140 Electronic service of a paper may be made (A)
141 by sending it to a registered user by filing it with
142 the court's electronic-filing system or (B) by
143 sending it by other electronic means that the
144 person to be served consented to in writing.

145 (3) When reasonable considering such factors as the
146 immediacy of the relief sought, distance, and
147 cost, service on a party must be by a manner at
148 least as expeditious as the manner used to file the
149 paper with the court.

150 (4) Service by mail or by commercial carrier is
151 complete on mailing or delivery to the carrier.
152 Service by electronic means is complete on
153 ~~transmission~~filing or sending, unless the party
154 making service is notified that the paper was not
155 received by the party served.

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

157 (1) A paper presented for filing other than through
158 the court's electronic-filing system must contain
159 either of the following:

160 (A) an acknowledgment of service by the
161 person served; or

162 (B) proof of service consisting of a statement
163 by the person who made service certifying:

164 (i) the date and manner of service;

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

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166 (iii) their mail or electronic addresses,
167 facsimile numbers, or the addresses of
168 the places of delivery, as appropriate
169 for the manner of service.

170 (2) When a brief or appendix is filed by mailing or
171 dispatch in accordance with
172 Rule 25(a)(2)~~(B)~~(A)(ii), the proof of service
173 must also state the date and manner by which the
174 document was mailed or dispatched to the clerk.

175 (3) Proof of service may appear on or be affixed to
176 the papers filed.

177 **(e) Number of Copies.** When these rules require the
178 filing or furnishing of a number of copies, a court may
179 require a different number by local rule or by order in
180 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 (c)(2). The amendments dispense with the requirement of proof of service for electronic filings in Rule 25(d)(1).

1 **Rule 26. Computing and Extending Time**

2 **(a) Computing Time.** The following rules apply in
3 computing any time period specified in these rules, in
4 any local rule or court order, or in any statute that
5 does not specify a method of computing time.

6 * * * * *

7 **(4) “Last Day” Defined.** Unless a different time is
8 set by a statute, local rule, or court order, the last
9 day ends:

10 (A) for electronic filing in the district court, at
11 midnight in the court’s time zone;

12 (B) for electronic filing in the court of appeals,
13 at midnight in the time zone of the circuit
14 clerk’s principal office;

15 (C) for filing under Rules 4(c)(1),
16 25(a)(2)~~(B)~~(A)(ii), and
17 25(a)(2)~~(C)~~(A)(iii)—and filing by mail

18 under Rule 13(a)(2)—at the latest time for
19 the method chosen for delivery to the post
20 office, third-party commercial carrier, or
21 prison mailing system; and
22 (D) for filing by other means, when the clerk’s
23 office is scheduled to close.

24 * * * * *

Committee Note

The amendments adjust references to subdivisions of Rule 25 that have been renumbered.

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 29. Brief of an Amicus Curiae**

2 **(a) During Initial Consideration of a Case on the**
3 **Merits.**

4 (1) **Applicability.** This Rule 29(a) governs amicus
5 filings during a court's initial consideration of a
6 case on the merits.

7 (2) **When Permitted.** The United States or its
8 officer or agency or a state may file an amicus-
9 ~~curiae~~ brief without the consent of the parties or
10 leave of court. Any other amicus curiae may file
11 a brief only by leave of court or if the brief states
12 that all parties have consented to its filing, but a
13 court of appeals may prohibit the filing of or
14 may strike an amicus brief that would result in a
15 judge's disqualification.

16 * * * * *

17 **(b) During Consideration of Whether to Grant**
18 **Rehearing.**

19 (1) **Applicability.** This Rule 29(b) governs amicus
20 filings during a court's consideration of whether
21 to grant panel rehearing or rehearing en banc,
22 unless a local rule or order in a case provides
23 otherwise.

24 (2) **When Permitted.** The United States or its
25 officer or agency or a state may file an amicus-
26 ~~curiae~~ brief without the consent of the parties or
27 leave of court. Any other amicus curiae may file
28 a brief only by leave of court.

29 * * * * *

Committee Note

The amendment to subdivision (a)(2) authorizes orders or local rules that prohibit the filing of or permit the striking of an amicus brief 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. A comparable amendment to

24 FEDERAL RULES OF APPELLATE PROCEDURE

subdivision (b) is not necessary. Subdivision (b)(1) currently authorizes local rules and orders governing filings during a court's consideration of whether to grant panel rehearing or rehearing en banc. These local rules or orders may prohibit the filing of or permit the striking of an amicus brief that would result in a judge's disqualification. In addition, under subdivision (b)(2), a court may deny leave to file an amicus brief that would result in a judge's disqualification.

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

26 FEDERAL RULES OF APPELLATE PROCEDURE

are best measured in increments of 7 days, the period is extended to 21 days.

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.

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Committee Note

The amendment of subdivision (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) allows a party to obtain a stay by providing a “bond or other security.”

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.

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

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

30 FEDERAL RULES OF APPELLATE PROCEDURE

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

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

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

30 ~~(B)~~ (2) **Duration of Stay; Extensions.** The stay must
31 not exceed 90 days, unless:
32 (A) the period is extended for good cause; or

33 ~~(B) unless~~ the party who obtained the stay files
34 a petition for the writ and so notifies the
35 circuit clerk in writing within the period of
36 the stay:

37 (i) that the time for filing a petition has
38 been extended, in which case the stay
39 continues for the extended period; or

40 (ii) that the petition has been filed. In that
41 case, in which case the stay continues
42 until the Supreme Court's final
43 disposition.

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

47 ~~(D)~~—(4) **Issuance of Mandate.** The court of appeals must
48 issue the mandate immediately ~~when~~ on receiving
49 a copy of a Supreme Court order denying the

50 ~~petition for writ of certiorari is filed, unless~~
51 extraordinary circumstances exist.

Committee Note

Subdivision (b). Subdivision (b) is revised to clarify that an order is required for a stay of the mandate.

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.

Subdivision (d). Three 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 and renamed 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.

Under the new subdivision (d)(2)(B), if the court of appeals issues a stay of the mandate for a party to file a petition for certiorari, and a Justice of the Supreme Court subsequently extends the time for filing the petition, the stay automatically continues for the extended period.

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

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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)(A)(i), setting a general rule that "filing is not timely unless the clerk receives the papers within the time fixed for filing"), but "on receiving a copy" is more specific and, hence, clearer.

1 **Form 4. Affidavit Accompanying Motion for**
2 **Permission to Appeal in Forma Pauperis**

3 * * * * *

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

5 Your daytime phone number: (____) _____

6 Your age: _____ Your years of schooling: _____

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

Form 7. Declaration of Inmate Filing

[insert name of court; for example,
United States District Court for the District of Minnesota]

A.B., Plaintiff
v.
C.D., Defendant

Case No. _____

I am an inmate confined in an institution. Today, _____ [insert date], I am depositing the _____ [insert title of document; for example, "notice of appeal"] in this case in the institution's internal mail system. First-class postage is being prepaid either by me or by the institution on my behalf.

I declare under penalty of perjury that the foregoing is true and correct (see 28 U.S.C. § 1746; 18 U.S.C. § 1621).

Sign your name here _____

Signed on _____ [insert date]

[Note to inmate filers: *If your institution has a system designed for legal mail, you must use that system in order to receive the timing benefit of Fed. R. App. P. 4(c)(1) or Fed. R. App. P. 25(a)(2)(C)(A)(iii).*]

TAB 3D

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Attachment 3: Proposed Amendments to Rules 3, 13, 26.1, 28, and 32, as published by the Standing Committee for public comment in August 2017

**PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF APPELLATE PROCEDURE¹**

1 **Rule 3. Appeal as of Right—How Taken**

2 * * * * *

3 **(d) Serving the Notice of Appeal.**

4 (1) The district clerk must serve notice of the filing
5 of a notice of appeal by ~~mailing~~sending a copy to
6 each party’s counsel of record—excluding the
7 appellant’s—or, if a party is proceeding pro se,
8 to the party’s last known address. When a
9 defendant in a criminal case appeals, the clerk
10 must also serve a copy of the notice of appeal on
11 the defendant, ~~either by personal service or by~~
12 ~~mail addressed to the defendant.~~ The clerk must
13 promptly send a copy of the notice of appeal and
14 of the docket entries—and any later docket

¹ New material is underlined in red; matter to be omitted is lined through.

2 FEDERAL RULES OF APPELLATE PROCEDURE

15 entries—to the clerk of the court of appeals
16 named in the notice. The district clerk must
17 note, on each copy, the date when the notice of
18 appeal was filed.

19 (2) If an inmate confined in an institution files a
20 notice of appeal in the manner provided by
21 Rule 4(c), the district clerk must also note the
22 date when the clerk docketed the notice.

23 (3) The district clerk’s failure to serve notice does
24 not affect the validity of the appeal. The clerk
25 must note on the docket the names of the parties
26 to whom the clerk ~~mails~~sends copies, with the
27 date of ~~mailing~~sending. Service is sufficient
28 despite the death of a party or the party’s
29 counsel.

30 * * * * *

Committee Note

Amendments to Subdivision (d) change the words “mailing” and “mails” to “sending” and “sends,” and delete language requiring certain forms of service, to allow electronic service. Other rules determine when a party or the clerk may or must send a notice electronically or non-electronically.

1 **Rule 13. Appeals From the Tax Court**

2 **(a) Appeal as of Right.**

3 * * * * *

4 (2) **Notice of Appeal; How Filed.** The notice of
5 appeal may be filed either at the Tax Court
6 clerk's office in the District of Columbia or by
7 ~~mail addressed~~ sending it to the clerk. If sent by
8 mail the notice is considered filed on the
9 postmark date, subject to § 7502 of the Internal
10 Revenue Code, as amended, and the applicable
11 regulations.

12 * * * * *

Committee Note

The amendment to subdivision (a)(2) will allow an appellant to send a notice of appeal to the Tax Court clerk by means other than mail. Other rules determine when a party must send a notice electronically or non-electronically.

1 **Rule 26.1 ~~Corporate~~ Disclosure Statement**

2 **(a) ~~Who Must File~~ Nongovernmental Corporate Party.**

3 Any nongovernmental corporate party to a proceeding
4 in a court of appeals must file a statement that
5 identifies any parent corporation and any publicly
6 held corporation that owns 10% or more of its stock or
7 states that there is no such corporation.

8 **(b) Organizational Victim in a Criminal Case. In a**
9 **criminal case, unless the government shows good**
10 **cause, it must file a statement identifying any**
11 **organizational victim of the alleged criminal activity.**
12 **If the organizational victim is a corporation, the**
13 **statement must also disclose the information required**
14 **by Rule 26.1(a) to the extent it can be obtained**
15 **through due diligence.**

16 **(c) Bankruptcy Proceedings. In a bankruptcy**
17 **proceeding, the debtor, the trustee, or, if neither is a**

6 FEDERAL RULES OF APPELLATE PROCEDURE

18 party, the appellant must file a statement that
19 identifies each debtor not named in the caption. If the
20 debtor is a corporation, the statement must also
21 identify any parent corporation and any publicly held
22 corporation that owns 10% or more of its stock, or
23 must state that there is no such corporation.

24 (d) **Intervenors.** A person who wants to intervene must
25 file a statement that discloses the information required
26 by Rule 26.1.

27 ~~(b)~~(e) **Time for Filing; Supplemental Filing.** A party
28 ~~must file the~~The Rule 26.1(a) statement **must be filed**
29 with the principal brief or upon filing a motion,
30 response, petition, or answer in the court of appeals,
31 whichever occurs first, unless a local rule requires
32 earlier filing. Even if the statement has already been
33 filed, the party's principal brief must include the
34 statement before the table of contents. A party must

35 ~~supplement its~~The statement must be supplemented
 36 whenever the information ~~that must be disclosed~~
 37 required under Rule 26.1(a) changes.

38 ~~(e)~~**(f) Number of Copies.** If the Rule 26.1(a) statement is
 39 filed before the principal brief, or if a supplemental
 40 statement is filed, ~~the party must file~~ an original and 3
 41 copies must be filed unless the court requires a
 42 different number by local rule or by order in a
 43 particular case.

Committee Note

The new subdivision (b) follows amendments to Criminal Rule 12.4(a)(2). It requires disclosure of organizational victims in criminal cases because a judge might have an interest in one of the victims. But the disclosure requirement is relaxed in situations in which disclosure would be overly burdensome to the government. For example, thousands of corporations might be the victims of a criminal antitrust violation, and the government may have great difficulty identifying all of them. The new subdivision (c) requires disclosure of the name of all of the debtors in bankruptcy proceedings. The names of the debtors are not always included in the caption in appeals of adversary proceedings. The new subdivision

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(d) requires persons who want to intervene to make the same disclosures as parties. Subdivisions (e) and (f) now apply to all of the disclosure requirements.

1 **Rule 28. Briefs**

2 **(a) Appellant's Brief.** The appellant's brief must
3 contain, under appropriate headings and in the order
4 indicated:

5 (1) a ~~corporate~~ disclosure statement if required by
6 Rule 26.1;

7 * * * * *

Committee Note

The phrase "corporate disclosure statement" is changed to "disclosure statement" to reflect the revision of Rule 26.1.

1 **Rule 32. Form of Briefs, Appendices, and Other Papers**

2 * * * * *

3 **(f) Items Excluded from Length.** In computing any
4 length limit, headings, footnotes, and quotations count
5 toward the limit but the following items do not:

- 6 • the cover page;
- 7 • a ~~corporate~~ disclosure statement;
- 8 • a table of contents;
- 9 • a table of citations;
- 10 • a statement regarding oral argument;
- 11 • an addendum containing statutes, rules, or
12 regulations;
- 13 • certificates of counsel;
- 14 • the signature block;
- 15 • the proof of service; and
- 16 • any item specifically excluded by these rules or
17 by local rule.

18

* * * * *

Committee Note

The phrase “corporate disclosure statement” is changed to “disclosure statement” to reflect the revision of Rule 26.1.

TAB 3E

MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 12-13, 2017 | Washington, D.C.

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ATTENDANCE

The Judicial Conference Committee on Rules of Practice and Procedure (“Standing Committee”) held its fall meeting at the Thurgood Marshall Federal Judiciary Building in Washington, D.C., on June 12-13, 2017. The following members participated:

Judge David G. Campbell, Chair
Judge Jesse M. Furman
Gregory G. Garre, Esq.
Daniel C. Girard, Esq.
Judge Susan P. Graber
Judge Frank Mays Hull

Peter D. Keisler, Esq.
Professor William K. Kelley
Judge Amy St. Eve
Professor Larry D. Thompson
Judge Richard C. Wesley
Judge Jack Zouhary

The advisory committees were represented by their chairs and reporters:

Advisory Committee on Appellate Rules –
Judge Michael A. Chagares, Chair
Professor Gregory E. Maggs, Reporter

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

Advisory Committee on Bankruptcy Rules –
Judge Sandra Segal Ikuta, Chair
Professor S. Elizabeth Gibson, 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

Deputy Attorney General Rod J. Rosenstein represented the Department of Justice along with Elizabeth J. Shapiro, Deputy Director of the DOJ’s Civil Division.

Present to provide support to the Committee:

Professor Daniel R. Coquillette	Reporter, Standing Committee
Professor Bryan A. Garner	Style Consultant, Standing Committee
Professor R. Joseph Kimble	Style Consultant, Standing Committee
Rebecca A. Womeldorf	Secretary, Standing Committee
Bridget Healy	Attorney Advisor, RCS
Scott Myers	Attorney Advisor, RCS
Julie Wilson	Attorney Advisor, RCS
Dr. Emery G. Lee III	Senior Research Associate, FJC
Dr. Tim Reagan	Senior Research Associate, FJC
Lauren Gailey	Law Clerk, Standing Committee

OPENING BUSINESS

Judge Campbell called the meeting to order and welcomed the participants. He announced this as the final meeting for Judge Wesley, Professor Thompson, and Greg Garre, who have been “invaluable contributors” to the rules committees. Judge Wesley called his appointment to the Committee an “incredible assignment” and thanked Judge Campbell and his predecessor, Judge Jeffrey S. Sutton, for their leadership. Mr. Garre expressed thanks for the “great privilege” of serving on the Committee. Professor Thompson thanked his fellow Standing Committee members, especially the judges, for their service, and was “happy to be just a small part” of the Committee’s work.

Judge Campbell acknowledged a number of other recent and impending departures. He thanked Judge Sessions, whose term as Chair of the Evidence Rules Advisory Committee is coming to an end, for his “quiet but very effective leadership.” Judge Campbell explained that former Standing Committee member Justice Robert P. Young recently stepped down from the bench to accept a position in private practice, and Bankruptcy Judge Michelle Harner left her position as Associate Reporter to the Bankruptcy Rules Advisory Committee upon her appointment to the bench. Another notable departure is that of Associate Justice Neil M. Gorsuch of the United States Supreme Court, who left his position as Chair of the Appellate Rules Advisory Committee upon his confirmation in April 2017.

Judge Campbell introduced Deputy Attorney General Rod Rosenstein, who was also confirmed in April 2017. DAG Rosenstein expressed his “deep appreciation” for the judiciary and thanked his colleague Betsy Shapiro, a career DOJ attorney whose duties for a number of years have included attending and participating in rules committee meetings, for her contributions.

Rebecca Womeldorf reported on the Judicial Conference session held on March 14, 2017, in Washington, D.C. Typically, the Standing Committee submits proposed rules amendments to the Judicial Conference for final approval at its September session. Approved rules are then submitted to the Supreme Court for consideration. Rules that the Court adopts are transmitted to

Congress by May 1 of the following year. Absent any action by Congress, the amendments go into effect on December 1 of that year.

This year, a “special circumstance”—the Bankruptcy Rules Advisory Committee’s rules package implementing the new national Chapter 13 plan form—necessitated a different timetable. The Standing Committee decided to expedite the approval of the Chapter 13 rules package so it could go into effect at the same time as the proposed changes approved at the Judicial Conference’s September 2016 session, which affect Bankruptcy Rules 1001, 1006(b), and 1015(b) and Evidence Rules 803(16) (the “ancient document” rule) and 902 (concerning self-authenticating evidence) (see Agenda Book Tab 1B).

At its January 2017 meeting, the Standing Committee approved the Chapter 13 package, consisting of proposed amendments to Bankruptcy Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009; new Rule 3015.1; and new Official Form 113. The Judicial Conference approved those amendments at its March 2017 session, along with technical amendments to Appellate Rule 4(a)(4)(B) and Civil Rule 4(m). The proposed amendments were submitted to the Supreme Court, which approved them on an expedited basis and transmitted them to Congress on April 27, 2017. If Congress does not take action, these amendments will take effect on December 1, 2017.

APPROVAL OF THE MINUTES OF THE PREVIOUS MEETING

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee approved the minutes of the January 3, 2017 meeting (see Agenda Book Tab 1A).**

INTER-COMMITTEE COORDINATION

Many provisions of the four procedural rule sets use near-identical language to address similar issues. For that reason when an advisory committee proposes an amendment to a rule with analogous provisions in other rule sets, and the other advisory committees determine that it is practical and worthwhile to make a parallel amendment, the advisory committees attempt to use identical or similar language unless issues specific to a rule set would justify diverging. The Standing Committee considered a number of these coordination items at the June 2017 meeting (see Agenda Book Tab 7B), including: electronic service and filing, stays of execution, disclosure rules, and redaction of personal identifiers.

Electronic Service and Filing:

Civil Rule 5, Appellate Rule 25, Bankruptcy Rules 5005 & 8011, and Criminal Rules 45 & 49

The Appellate, Bankruptcy, Civil, and Criminal Rules contain a number of similar provisions addressing service and filing, many of which needed to be updated to account for the use of electronic technology. Professor Cooper added that the number of interrelated provisions involved made for “a lot of moving parts,” but the advisory committees worked together to achieve “maximum desirable uniformity” in their amendments. Any remaining differences in “structure and expression” can be attributed to “the context of the individual rule set.”

Civil Rule 5. Professor Cooper presented the proposed changes to Civil Rule 5, which governs service and filing in civil cases (see Agenda Book Tab 4A, pp. 416-30).

Current Civil Rule 5(b)(2)(E) requires the written consent of the person to be served if a paper is to be served electronically. The proposed amended version would permit a paper to be served by filing it with the court’s electronic filing system (“CM/ECF”), which automatically sends an electronic copy to the registered users associated with that particular case, without consent. Consent in writing would still be required for methods of electronic service other than CM/ECF. This amended rule would abrogate Civil Rule 5(b)(3), which permits use of the court’s facilities to file and serve via CM/ECF if applicable local rules allow. These proposed amendments generated “very little comment.” In response to a concern raised by a clerk of court, a sentence was added to the committee note to clarify that the court is not required to notify the filer in the event that an attempted CM/ECF transmission fails.

Although the current version of Civil Rule 5(d)(1) requires a certificate of service, the proposed amendments would lift this requirement in part. The published version provided that, for documents filed through CM/ECF, the automatically-generated notice of electronic filing would constitute a certificate of service. Professor Cooper explained that after publication, the Civil Rules Advisory Committee followed the Appellate Rules Advisory Committee’s lead in revising Rule 5(d)(1)(B) to provide “simply that no certificate of service is required” for papers served through CM/ECF. For other papers, amended Rule 5(d)(1)(B) also addresses whether a certificate of service must be filed. “[T]he committees . . . are in accord” that if a paper is filed nonelectronically, “a certificate of service must be filed with it or within a reasonable time after service.” In civil practice, however, many papers, including “a very large share of discovery papers,” are exchanged among the parties but not filed. “Unique to Civil Rule 5,” therefore, is the “separate provision” stating that if a paper is not filed, a certificate of service generally need not be filed.

The proposed amendment to Civil Rule 5(d)(3) would make electronic filing mandatory for parties represented by counsel, except when nonelectronic filing is allowed or required by local rule or permitted by order for good cause. The proposed amendment would continue to give courts discretion to permit electronic filing by pro se parties, as long as the order or local rule allows for reasonable exceptions. The Civil Rules Advisory Committee elected not to require pro se parties to file electronically; while many pro se parties are willing and able to use CM/ECF, the Advisory Committee had “some anxiety” about the possibility of effectively denying access to those who are not. The Advisory Committee declined, in response to a public comment, to grant pro se litigants a right to file electronically.

A proposed new subparagraph, Civil Rule 5(d)(3)(C), establishes a uniform national signature provision. As published, the rule provided that “[t]he 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.” During the public comment period, concerns were raised that the first clause, read literally, required attorneys to place their usernames and passwords in the signature block. The advisory committees worked together to clarify the language, replacing that clause with, “An authorized filing made through a person’s electronic filing account.”

Initially, the Bankruptcy Rules Advisory Committee omitted the word “authorized” from its version, citing an ambiguity as to whether the court was to authorize the filing, or “the attorney was authorizing someone else to do the filing” (the intended reading). The Appellate Rules Advisory Committee was inclined to omit the term as well. Because their concerns were not unique to a particular rule set, and “merely a question of wording,” Judge Campbell encouraged the advisory committees to adopt a uniform, mutually-agreeable solution at the Standing Committee meeting. The Standing Committee, advisory committee chairs and reporters, and style consultants worked together to refine the language, settling on, “A filing made through a person’s electronic-filing account and authorized by that person, together with that person’s name on a signature block, constitutes the person’s signature.” The Standing Committee agreed to use this language in the parallel provisions of all four rule sets.

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 proposed amendments to Civil Rule 5, with the revisions made during the meeting.**

Appellate Rules 25 and 26. Judge Chagares and Professor Maggs presented the proposed changes to appellate e-filing and service under Appellate Rule 25 (see Agenda Book Tab 2A, pp. 89-95; Agenda Book Supplemental Materials, pp. 2-3, 5-17).

Proposed amended Appellate Rule 25(a)(2)(B)(i) requires represented persons to file papers electronically but allows exceptions for good cause and by local rule. Appellate Rule 25(a)(2)(B)(iii), addressing electronic signatures, incorporates the uniform national signature provision developed in consultation with the other advisory committees (see discussion of Civil Rule 5(d)(3)(C), *supra*). Like the analogous Civil Rules provisions concerning electronic service, Appellate Rule 25(c)(2) has been amended to permit electronic service through the court’s CM/ECF system, or by other electronic means that the person to be served consented to in writing. The proposed amendment to Appellate Rule 25(d)(1) also omits the requirement of a certificate of service for papers filed via CM/ECF (see discussion of Civil Rule 5(d)(1)(B), *supra*).

The Advisory Committee made a number of revisions in response to public comments. Some criticized the proposed electronic signature provision, which subsequently incorporated the language drafted during the Standing Committee meeting (see discussion of Civil Rule 5(d)(3)(C), *supra*). To clarify that there are two available methods of electronic service under proposed Appellate Rule 25(c)(2), the Advisory Committee placed them in separate clauses: a paper can be served electronically by “(A) by sending it to a registered user by filing it with the court’s electronic-filing system or (B) by sending it by other electronic means that the person to be served consented to in writing.” Like the other advisory committees, the Appellate Rules Advisory Committee discussed but declined to make changes in response to a comment suggesting that pro se parties should have a right to file electronically.

The proposed amendment to Appellate Rule 25(a)(2)(C), which addresses inmate filings, was revised to incorporate amendments that took effect in December 2016. Professor Maggs added that the amended rules’ subheadings have also been altered to match the Civil Rules’ subheadings.

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 proposed amendments to Appellate Rule 25, with the revisions made during the meeting.**

After the Standing Committee meeting, the Advisory Committee recognized the need for technical and conforming changes to Appellate Rule 26(a)(4)(C), which contains references to Rules 25(a)(2)(B) and 25(a)(2)(C), and Appellate Form 7, which contains a note referring to Rule 25(a)(2)(C). The proposed amendments discussed above renumbered subparagraphs (B) and (C) as Rule 25(a)(2)(A)(ii) and 25(a)(2)(A)(iii), respectively, and the Advisory Committee recommended updating the references in Rule 26 and Form 7 accordingly. The Standing Committee approved the proposed amendments.

Bankruptcy Rules 5005 and 8011. Judge Ikuta presented the proposed amendments to Bankruptcy Rules 5005(a)(2) and 8011, governing electronic filing and signing in bankruptcy cases (see Agenda Book Tab 3A, pp. 192-94, 204).

The proposed amendments to Bankruptcy Rule 5005 generally track the proposed amendments to Civil Rule 5 (see discussion *supra*). When proposed amended Rule 5005 was published, most of the comments concerned the wording of new subparagraph (a)(2)(C), the electronic signature provision. Despite the Bankruptcy Rules Advisory Committee’s initial concern about the term “authorized filing,” it adopted the revised text drafted by the Standing Committee, which clarified that the attorney, not the court, is to authorize the filing (see discussion of Civil Rule 5(d)(3)(C), *supra*). Another comment opposed the presumption against electronic filing by pro se litigants, but, like the other advisory committees, the Bankruptcy Rules Advisory Committee declined to give pro se parties the right to e-file.

When the Advisory Committee recommended publication of proposed amendments to Bankruptcy Rule 5005, it overlooked the need for similar amendments to Rule 8011, its bankruptcy appellate counterpart. Accordingly, the Advisory Committee subsequently recommended amendments conforming Bankruptcy Rule 8011 to Civil Rule 5 and Appellate Rule 25 without publication, so all of the e-filing amendments can take effect at the same time. For consistency with the other rules, minor changes will be made to Rule 8011’s captions as originally drafted. Revisions will also be made to the committee notes.

The proposed amendments to the Bankruptcy Rules regarding electronic filing and service are not identical to the other rule sets’ parallel provisions. Beyond bankruptcy-specific language derived from the Bankruptcy Code—e.g., use of the term “individual” rather than “person,” and “entity” to describe a litigant represented by counsel—the amendments phrase their incomplete-service provisions differently. Instead of deeming electronic service complete unless the sender or filer “learns” or “is notified” that the paper was not received, the Bankruptcy Rules use the phrase “receives notice” to prevent litigants from “purposely ignor[ing] notice” to avoid “learning . . . that the document was not received.” Because these linguistic disparities have existed since the various rule sets were adopted, the reporters agreed the provisions did not need to be reconciled.

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 proposed amendments to Bankruptcy Rules 5005 and 8011, with the revisions made during the meeting.**

Criminal Rules 45 and 49. Professor Beale explained that the inter-committee effort to develop rules for electronic filing, service, and notice necessitated more substantial changes to Criminal Rule 49 (see Agenda Book Tab 5A, pp. 652-53, Tab 5B, pp. 665-80). The proposed amendments to Civil Rule 5 mandating electronic filing directly affect Criminal Rule 49(b) and (d) (service and filing must be done in the manner “provided for a civil action”) and Criminal Rule 49(e) (locals rule may require electronic filing only if reasonable exceptions are allowed). Although, as Professor King said, the Advisory Committee “worked diligently” to track the changes to the Civil Rules where possible, it concluded that the proposed default rule requiring represented parties to file and serve electronically could be problematic in criminal cases, where prisoners and unrepresented defendants often lack access to CM/ECF. In light of these differences, the Advisory Committee decided to draft and publish a stand-alone Criminal Rule to address electronic filing and service. Professor Beale explained that because the Advisory Committee would essentially be starting from scratch, it decided to take the opportunity “to more fully specify how [electronic filing and service were] going to work.”

There are a number of substantive differences between proposed Criminal Rule 49 and proposed Civil Rule 5. Instead of allowing courts to require by order or local rule (with reasonable exceptions) unrepresented parties to e-file, proposed Criminal Rule 49(b)(3)(B) requires them to file *nonelectronically*, unless permitted to e-file. Proposed subsection (c) also makes nonelectronic filing the default rule for all nonparties, whether they are represented or not. Proposed Criminal Rule 49(b)(4) borrows language from the signature provision of Civil Rule 11(a), and the text of Civil Rule 77(d)(1) regarding the clerk’s duty to serve notice of orders replaces current Criminal Rule 49(c)’s direction that the clerk serve notice “in a manner provided for in a civil action.” A conforming amendment to Criminal Rule 45 would update its cross-references accordingly (see Agenda Book Tab 5B, pp. 681-82).

The changes were not controversial. The Criminal Rules Advisory Committee considered a comment regarding extending electronic filing privileges to pro se parties (other than inmates, as well as inmates and nonparties) but, like the other advisory committees, declined to do so.

Following the public comment period, the Advisory Committee replaced the phrase “within a reasonable time after service” in Criminal Rule 49(b)(1) with “*no later than a reasonable time after service,*” to make clear that certain papers may be filed before they are served. Similarly, text addressing papers served by means other than CM/ECF now requires a certificate of service to “be filed with [the paper] or within a reasonable time after service or filing.” Paragraph (b)(1) was also revised to state explicitly that no certificate of service is required for papers served via CM/ECF. Like the Civil Rules Advisory Committee, the Criminal Rules Advisory Committee added a sentence to the committee note to Rule 49(a)(3) and (4) to make clear that the court is not responsible for notifying the filer that an attempted CM/ECF transmission failed (see discussion of Civil Rule 5(b), *supra*). The Advisory Committee adopted

the revisions made at the Standing Committee meeting to its electronic signature provision in proposed Criminal Rule 49(b)(2), with conforming changes to the committee note (see discussion of Civil Rule 5(d)(3)(C), *supra*).

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 proposed amendments to Criminal Rule 49 and conforming amendment to Criminal Rule 45, with the revisions made during the meeting.**

Stays of Execution:

*Civil Rules 62 & 65.1; Appellate Rules 8, 11, & 39; and
Bankruptcy Rules 7062, 8007, 8010, 8021, & 9025*

Civil Rules 62 and 65.1. The proposed amendments to Civil Rule 62, which governs stays of proceedings to enforce judgments, are the product of a joint subcommittee of the Civil Rules and Appellate Rules Advisory Committees known as the “Civil/Appellate Subcommittee.”

The proposed amendments make three changes (see Agenda Book Tab 4A, pp. 524-27). First, the automatic stay period is extended to eliminate a gap in the current rule between the length of the current automatic-stay period under Rule 62(a) and the length of a stay pending disposition of a post-judgment motion under Rule 62(b). This discrepancy arose when the Time Computation Project set the expiration of an automatic stay under Civil Rule 62(a) at 14 days after entry of judgment, and the time for filing a post-judgment motion under Rules 50, 52, or 59 at 28 days after entry of judgment. The unintended result was a “gap”: the automatic stay expires halfway through the time allowed to make a post-judgment motion. The proposed amendment to Civil Rule 62(a) addresses this gap by extending the automatic stay period to 30 days and providing that the automatic stay takes effect “unless the court orders otherwise.” In response to a judge member’s question, Judge Bates confirmed that the court has discretion to extend the stay beyond 30 days.

Second, the proposed amendments make clear that a judgment debtor can secure a stay that lasts from termination of the automatic stay through final disposition on appeal by posting a continuing security, whether as a bond or another form (see discussion of Appellate Rules 8(a), 11(g), and 39(e), *infra*). The amendments allow the security to be provided before the appeal is taken, and permit any party, not just the appellant, to obtain the stay. Third, subdivisions (a) through (d) have been rearranged, carrying forward with only a minor change the current provisions for staying a judgment in an action for an injunction or a receivership, or directing an accounting in a patent infringement action.

The proposed amendment to Civil Rule 65.1 reflects the expansion of Civil Rule 62 to include forms of security other than a bond (see Agenda Book Tab 4A, pp. 524, 528-29). Following the comment period, the Advisory Committee made additional changes to Civil Rule 65.1 for consistency with the proposed amendments to parallel Appellate Rule 8(b), substituting the terms “security” and “security provider” for “bond,” “undertaking,” and “surety” (see discussion *infra*). The Advisory Committee decided shortly before the Standing Committee

meeting to change the word “mail” in the last sentence to “send,” and will adopt the parallel Appellate Rule’s committee note language.

Judge Campbell noted that the proposed amendments to Civil Rules 62 and 65.1 represent “a real improvement” by eliminating the gap, replacing “arcane language,” and clarifying the structure. He thanked the Civil/Appellate Subcommittee, chaired by Judge Scott M. Matheson, Jr. of the Civil Rules Advisory Committee, for its efforts.

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 proposed amendments to Civil Rules 62 and 65.1.**

Appellate Rules 8, 11, and 39. Judge Chagares and Professor Maggs presented the Appellate Rules Advisory Committee’s proposed amendments to Appellate Rules 8 (stays or injunctions pending appeal), 11 (forwarding the record), and 39 (costs) (see Agenda Book Tab 2A, pp. 83-86). Also developed by the Civil/Appellate Subcommittee, they would conform Appellate Rules 8(a), 11(g), and 39(e) to proposed amended Civil Rule 62 by eliminating the “antiquated” term “supersedeas bond,” instead allowing an appellant to provide “a bond or other security.” The Advisory Committee also replaced “surety” with “security provider” and “a bond, a stipulation, or other undertaking” with the generic term “security”—the same changes made to proposed amended Civil Rule 65.1 (see discussion *supra*). The Advisory Committee also changed the word “mail” to “send” to conform Rule 8(b) to the proposed amendments to Appellate Rule 25. The committee note has been modified accordingly.

A judge member noted that the amended rule is consistent with current practice, as “other forms of security,” such as letters of credit, have long been used to secure stays or injunctions pending appeal. Another judge member pointed out that the proposed amendments use the phrase “gives security,” while “*provides* security” is used in practice and elsewhere in the rules. Professor Maggs explained that the Advisory Committee deliberately decided not to use “provides security” to avoid implying that a security provider—as opposed to a party—must provide the security.

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 proposed amendments to Appellate Rules 8, 11, and 39.**

Bankruptcy Rules 7062, 8007, 8010, 8021, and 9025. Judge Ikuta presented the Bankruptcy Rules Advisory Committee’s proposed conforming amendments to Rules 7062 (stays of proceedings to enforce judgments), 8007 (stays pending appeal), 8010 (transmitting the record), 8021 (costs), and 9025 (proceedings against sureties). Consistent with proposed amendments to Civil Rules 62 and 65.1 and Appellate Rules 8, 11, and 39, the proposed conforming amendments to the Bankruptcy Rules would broaden and modernize the terms “supersedeas bond” and “surety” by replacing them with “bond or other security” (see Agenda Book Tab 3A, pp. 204-06).

Because Bankruptcy Rule 7062 currently incorporates all of Civil Rule 62 by reference, this new terminology will automatically apply in bankruptcy adversary proceedings when Rule 62 goes into effect. However, the Bankruptcy Rules Advisory Committee did not adopt the amendment to Civil Rule 62(a) that lengthens the automatic stay period from 14 to 30 days (see discussion of Civil Rule 62, *supra*). As a judge member pointed out, the deadline for filing post-judgment motions in bankruptcy is 14 days, not 28—there is “no gap.” Accordingly, amended Rule 7062 would continue to incorporate Civil Rule 62, “except that proceedings to enforce a judgment are stayed for 14 days after its entry.”

Publication was deemed unnecessary because, as Professor Gibson explained, the proposed amendments simply adopt other rule sets’ terminology changes and “maintain[] the status quo” with respect to automatic stays in the bankruptcy courts.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously decided to recommend to the Judicial Conference for final approval without publication the proposed conforming amendments to Bankruptcy Rules 7062, 8007, 8010, 8021, and 9025.**

Disclosure Rules:

Criminal Rule 12.4 and Appellate Rules 26.1, 28, & 32

Criminal Rule 12.4. Criminal Rule 12.4 governs disclosure statements. Judge Molloy explained that when the rule was adopted in 2002, the committee note stated that it was intended “to assist judges in determining whether they must recuse themselves because of a ‘financial interest in the subject matter in controversy.’” The note quoted a provision of the 1972 judicial ethics code that treated all victims entitled to restitution as “parties” for the purpose of recusal. This is no longer the case. As amended in 2009, the Code of Conduct for United States Judges now requires disclosure only when a judge has an “interest that could be affected substantially by the outcome of the proceeding.”

In response to a suggestion from the DOJ, the proposed amendment to Criminal Rule 12.4(a) would align the scope of the required disclosures with the 2009 amendments to the Code by relieving the government of its obligation to make the required disclosures upon a showing of “good cause” (see Agenda Book Tab 5A, pp. 653-54, Tab 5B, pp. 683-86). In essence, the revised rule allows the court to use “common sense” to decline to require burdensome disclosures when numerous organizational victims exist, but the impact of the crime on each is relatively small. Criminal Rule 12.4(b) would also be amended, to specify in paragraph (b)(1) that the disclosures must be made within 28 days after the defendant’s initial appearance, and to replace paragraph (b)(2)’s references to “supplemental” filings with “later” filings. The final version of Rule 12.4(b)(2), which is modeled after language used in Civil Rule 7.1(b)(2), requires certain parties to “promptly file a later statement if any required information changes.”

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 proposed amendments to Criminal Rule 12.4.**

Appellate Rules 26.1, 28, and 32. Under Appellate Rule 26.1, corporate parties and amici curiae must file disclosure statements to assist judges in determining whether they have an interest in a related corporate entity that would disqualify them from hearing an appeal. Because some local rules require more information to be disclosed than Appellate Rule 26.1 does, the Advisory Committee considered whether the federal rule should be similarly amended and sought approval to publish proposed amendments for public comment.

The Advisory Committee proposed adding a new subdivision (b) to require disclosure of organizational victims in criminal cases (see Agenda Book Tab 2A, pp. 102-06), generally conforming Appellate Rule 26.1 to the amended version of Criminal Rule 12.4(a)(2). New subdivision (c) would require disclosure of the name(s) of the debtor(s) in a bankruptcy appeal if not included in the caption (as in some appeals from adversary proceedings, such as disputes among the debtor’s creditors). New subdivision (d) would require a “person who wants to intervene” to make the same disclosures as parties. At the Standing Committee meeting, the committee note was also revised to require “persons who want to intervene,” rather than “intervenors,” to “make the same disclosures as parties.”

The Advisory Committee moved current subdivisions (b) and (c), which address supplemental filings and the number of copies, to the end and re-designated them (e) and (f) to clarify that they apply to all of the preceding disclosure requirements. Because proposed new subdivision (d) makes the rule applicable to those seeking to intervene as well as parties, the Standing Committee rephrased subdivisions (e) and (f) in the passive voice to account for the possibility that non-parties may also be required to file disclosure statements. In addition to these revisions to subdivisions (d), (e), and (f), the Standing Committee made minor wording changes to proposed subdivision (c).

Current Appellate Rule 26.1(b) (redesignated (e)), like Criminal Rule 12.4(b), uses the term “supplemental filings.” The Appellate Rules Advisory Committee, aware that the Criminal Rules Advisory Committee was revising Rule 12.4(b) (see *supra*), considered amending Rule 26.1 to conform to a preliminary draft. The Criminal Rules Advisory Committee, however, informed the Appellate Rules Advisory Committee of its intention to scale back its draft amendments to Rule 12.4(b) and recommended no conforming changes to Appellate Rule 26.1(b).

The proposed change of Appellate Rule 26.1’s heading from “Corporate Disclosure Statement” to “Disclosure Statement” will require additional minor conforming amendments to Appellate Rules 28(a)(1) (cross-appeals) and 32(f) (formal requirements for briefs and other papers) and accompanying notes.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication in August 2017 the proposed amendments to Appellate Rules 26.1, 28(a)(1), and 32(f), subject to the revisions made during the meeting.**

Bankruptcy Rule 8012. Scott Myers (RCS) reported that the Bankruptcy Rules Advisory Committee will examine Bankruptcy Appellate Rule 8012, which governs disclosures in bankruptcy appeals, to

determine whether conforming changes are necessary in light of the proposed amendments to Appellate Rule 26.1.

*Redacting Personal Identifiers:
Bankruptcy Rule 9037*

The Bankruptcy Rules Advisory Committee sought approval to publish for comment proposed new Bankruptcy Rule 9037(h), which would provide a procedure for redacting personal identifiers in documents that were not properly redacted prior to filing (see Agenda Book Tab 3A, pp. 213-15). In response to a suggestion from the CACM Committee, new subdivision (h) lays out the steps a moving party must take to identify a document that needs to be redacted under Rule 9037(a) and for providing a redacted version (see Agenda Book Tab 3B, App'x B, pp. 385-88). When such a motion is filed, the court would immediately restrict access to the original document pending determination of the motion. If the motion is granted, the court would permanently restrict public access to the original filed document and provide access to the redacted version in its place.

The other advisory committees considered but declined to adopt similar privacy rules. A reporter explained that CACM's suggestion was specifically directed toward bankruptcy filings, which pose "a problem of a different order of magnitude." For example, when improperly-redacted documents are filed in a civil case, the filer and the clerk's office typically work together to address the problem "quickly" and "effectively." In bankruptcy cases, however, creditors often "make multiple filings, sometimes in different courts." Professor Gibson added that, although the other advisory committees were willing to add privacy rules for the sake of uniformity, they ultimately decided that bankruptcy's special circumstances warranted different treatment.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication in August 2017 the proposed amendment to Bankruptcy Rule 9037.**

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Molloy and Professors Beale and King provided the report of the Advisory Committee on Criminal Rules, which met on April 28, 2017, in Washington, D.C. In addition to final approval of inter-committee amendments to three rules, the Advisory Committee sought permission to publish a new rule and proposed amendments to two others. It also presented two information items.

Action Items

Inter-Committee Amendments. The Standing Committee approved for submission to the Judicial Conference amendments to three Criminal Rules with inter-committee implications: Criminal Rules 12.4, 45, and 49 (see "Inter-Committee Coordination," *supra*).

New Criminal Rule 16.1 – Disclosures and Discovery. Proposed new Criminal Rule 16.1 would set forth a procedure for disclosures and discovery in criminal cases. It originated from a suggestion submitted by two criminal defense bar organizations to amend Criminal Rule 16, which currently governs the parties' respective duties to disclose, to address cases involving voluminous information and electronically stored information ("ESI"). The Rule 16.1 Subcommittee was formed to consider this suggestion, but determined that the "lengthy" and "complicated" original proposal, which focused on district judges' procedures, was unworkable.

The Subcommittee concluded, however, that a need might exist for a narrower, more targeted amendment. "[A]fter a great deal of discussion" at the fall 2016 meeting, the Advisory Committee decided at Judge Campbell's suggestion to hold a mini-conference to obtain the views of various stakeholders on the problems and "complexities" posed by large volumes of digital information. The mini-conference was held in Washington, D.C. on February 7, 2017. Participants included criminal defense attorneys from large and small firms, public defenders, prosecutors, DOJ attorneys, discovery experts, and judges.

All participants agreed that (1) ESI discovery problems can arise in both small and large cases, (2) these issues are handled very differently between districts, and (3) most criminal cases now include ESI. In 2012, the DOJ, AO, and the Joint Working Group on Electronic Technology in the Criminal Justice System developed a set of "Recommendations for Electronically Stored Information (ESI) Discovery Production in Federal Criminal Cases," known as the "ESI Protocol." The defense attorneys and prosecutors at the mini-conference reached a consensus that there is a general lack of awareness of the ESI Protocol, and more training on it would be useful.

The major initial point of disagreement at the mini-conference was whether a rule amendment was necessary and desirable. The prosecutors were not convinced of the need for a rule change. The defense attorneys strongly favored one, but acknowledged problematic threshold questions: Would the rule only apply in "complex" cases? And if so, what *is* a complex case? For example, even "the simplest" criminal case can become "complicated" when it involves electronic evidence such as cell-phone tower location information. None of the attendees supported a rule that would require defining or specifying a "type" of case. A consensus emerged that any rule the Subcommittee might draft should (1) be simple and place the principal responsibility for implementation on the lawyers rather than the court, and (2) encourage use of the ESI Protocol. The prosecutors and DOJ felt strongly that the rule must be flexible in order to address variation between cases.

Guided by the "really helpful information and perspective" shared at the mini-conference, as well as existing local rules and orders addressing ESI discovery, the Subcommittee drafted and the Advisory Committee unanimously approved proposed new Criminal Rule 16.1 (Pretrial Discovery Conference and Modification) (see Agenda Book Tab 5A, pp. 654-56, Tab 5C, pp. 689-90). Subdivision (a) requires that, in every case, counsel must confer no more than 14 days after the arraignment and "try to agree" on the timing and procedures for disclosure. Subdivision (b) emphasizes that the parties may seek a modification from the court to facilitate preparation. Because technology changes rapidly, proposed Rule 16.1 does not attempt to specify standards for the manner or timing of disclosure. Rather, it provides a process that

encourages the parties to confer early in the case to determine whether the standard discovery procedures should be modified and neither “alter[s] local rules nor take[s] discretion away from the court.” So far, the proposal has been “satisfactory” to all, including the groups who made the initial suggestion.

Judge members asked why the new language has been added as a proposed stand-alone rule rather than an addition to Rule 16. Professors Beale and King responded that, while Rule 16 specifies *what* must be disclosed, Rule 16.1 concerns the timing of and procedures for disclosure. Whereas Rule 16 is a discovery rule, the new rule addresses activity that occurs prior to discovery. Judge Molloy added that, unlike Rule 16(d), the new rule governs the behavior of lawyers, not judges.

Several members wondered whether the rule’s directive that the parties confer “in person or by telephone” excluded other “equally effective” modes of communication, such as live videoconferencing, that are either currently in use or will come into use as technology progresses. Judge Molloy responded that the rules define “telephone” broadly enough to encompass other means of live electronic communication, and Professors Beale and King explained that the Subcommittee consciously chose that language in order to promote live interaction. A reporter noted that removing the language would more closely track parallel Civil Rule 26(f), and Judge Campbell added that the term “confer” already implies real-time communication. A judge member moved to delete the phrase “in person or by telephone” from the proposed rule, the motion was seconded, and the Standing Committee unanimously voted in favor of the motion. The Advisory Committee and Standing Committee will pay attention to this issue during the public comment period.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication in August 2017 proposed new Criminal Rule 16.1, as modified by the Standing Committee.**

Rules 5 of the Section 2254 and Section 2255 Rules – Right To File a Reply. In response to a conflict in the case law identified by Judge Wesley, the Advisory Committee proposed an amendment to Rule 5(d) of the Rules Governing Section 2255 Proceedings for the United States District Courts to make clear that a petitioner has the right to file a reply. The Advisory Committee also proposed amending the parallel provision in Rule 5(e) of the Rules Governing Section 2254 Cases in the United States District Courts (see Agenda Book Tab 5A, pp. 657-58, Tab 5C, pp. 691, 693).

The current text of those rules provides that the petitioner or moving party “may submit a reply . . . within a time period fixed by the judge.” Although this language was intended to create a right to file a reply, a significant number of district courts have read “fixed by the judge” to allow a reply only if the judge determines that a reply is warranted and sets a time for filing. Reasoning that this particular reading was unlikely to be corrected by appellate review, the Subcommittee formed to study the issue proposed an amendment that would confirm that the moving party has a right to file a reply by placing the provision concerning the time for filing in a separate sentence: “The moving party may file a reply to the respondent’s answer or other pleading. The judge must set the time to file, unless the time is already set by local rule.” The

proposal does not set a presumptive time for filing, recognizing that practice varies by court, and the time for filing is sometimes set by local rule.

The word “may” was retained because it used in many other rules, and the Advisory Committee did not want to cast doubt on its meaning. However, to prevent the word “may” from being misread, the following sentence was added to the committee note: “We retain the word ‘may,’ which is used throughout the federal rules to mean ‘is permitted to’ or ‘has a right to.’”

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication in August 2017 the proposed amendments to Rule 5(e) of the Rules Governing Section 2254 Cases in the United States District Courts and Rule 5(d) of the Rules Governing Section 2255 Proceedings for the United States District Courts.**

Information Items

Manual on Complex Criminal Litigation. The FJC has confirmed that it has received approval to publish a manual for trial judges on complex criminal litigation (see Agenda Book Tab 5A, p. 662). The Advisory Committee has formed a subcommittee to determine which subjects to include.

Cooperators. In response to an FJC study concluding that hundreds of criminal defendants had been harmed after court documents revealed that they had cooperated with the government, the Judicial Conference Committee on Court Administration and Case Management (“CACM”) in 2016 released “interim guidance” to the district courts on managing cooperation information. The CACM guidance requires, for example, every plea agreement to include a sealed addendum for cooperation information and a bench conference to be held to discuss cooperation during every plea hearing, whether or not the defendant is actually cooperating.

Judge Jeffrey S. Sutton, then Chair of the Standing Committee, directed the Criminal Rules Advisory Committee to consider rules changes that would implement the recommendations in the CACM guidance, before making a normative recommendation as to whether some, all, or none, of those changes should be adopted. Recognizing the breadth of the cooperator-harm issue, Judge Sutton encouraged that other stakeholders, such as the DOJ and Bureau of Prisons, be included in the discussion. In response, Director James C. Duff of the Administrative Office of the U.S. Courts (“AO”) created a Task Force on Protecting Cooperators, consisting of CACM and Criminal Rules Advisory Committee members, as well as a variety of experts and advisors.

The Advisory Committee has since formed a Cooperator Subcommittee, which continues to explore possible rules amendments to mitigate the risks that access to information in case files poses to cooperating witnesses. In addition to rules that would implement the CACM guidance, the Subcommittee is also considering alternative approaches. The Subcommittee intends to present its work to the full Advisory Committee at the fall 2017 meeting. The Advisory Committee will then make its recommendation to the Task Force, which plans to issue its report and recommendations—including any amendments to the Criminal Rules—in 2018 (see Agenda

Book Tab 5A, pp. 658-62).

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Chagares and Professor Maggs provided the report of the Advisory Committee on Appellate Rules, which met on May 2, 2017, in Washington, D.C. Judge Chagares succeeded Justice Gorsuch as chair in April 2017. The Advisory Committee sought approval of several action items and presented a list of information items.

Action Items

Inter-Committee Amendments. The Standing Committee approved for submission to the Judicial Conference proposed amendments to Appellate Rules 25 (electronic filing and signing), 8, 11, and 39 (stays and injunctions pending appeal), and approved proposed amendments to Appellate Rules 26.1, 28, and 32 (disclosures) for publication in August 2017 (see “Inter-Committee Coordination,” *supra*).

Appellate Rules 28.1 and 31 – Time To File a Reply Brief. Rules 28.1(f)(4) and 31(a)(1) currently set the time to file a reply brief at 14 days after service of the response brief. Until the 2016 amendments eliminated the “three day rule” for papers served electronically, however, parties effectively had 17 days because Appellate Rule 26(c) allowed three additional days when a deadline ran from service that was not accomplished same-day as well as service completed electronically. The Advisory Committee concluded that “shortening” this period from 17 days to 14 could hinder the preparation of useful reply briefs. Accordingly, the Advisory Committee proposed extending the time to file a reply to 21 days, the next seven-day increment (see Agenda Book Tab 2A, pp. 81-82). The Advisory Committee received two comments in support of the published amendments and recommended approval without further changes.

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 proposed amendments to Appellate Rules 28.1 and 31.**

Appellate Form 4. Question 12 of Appellate Form 4 currently asks litigants seeking permission to proceed in forma pauperis to provide the last four digits of their social security numbers. Due to privacy and security concerns, the Advisory Committee asked its clerk representative to investigate whether this information was necessary for administrative purposes. When the clerks who were surveyed reported that it was not, the Advisory Committee recommended deleting the question (see Agenda Book Tab 2A, pp. 82-83). The proposed amendment received two positive comments when it was published, and the Advisory Committee recommended no further changes.

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 proposed amendments to Appellate Form 4.**

Appellate Rule 29 – Limitations on Amicus Briefs Filed by Party Consent. Appellate Rule 29(a) currently permits an amicus curiae to file a brief either with leave of the court or with the parties' consent. Several courts of appeals, however, have adopted local rules forbidding the filing of an amicus brief that could result in the recusal of a judge. Of particular concern is the use of "gamesmanship" to try to affect the court's decision by forcing particular judges to recuse themselves. Given the arguable merit of these local rules, the Advisory Committee proposed adding an exception to Appellate Rule 29(a) providing "that a court of appeals may strike or prohibit the filing of an amicus brief that would result in a judge's disqualification" (see Agenda Book Tab 2A, pp. 87-89).

The Advisory Committee received six comments opposing the proposed amendment. The commenters argued that the proposed amendment is unnecessary because amicus briefs that force the recusal of a judge are rare. In any event, the amicus curiae could not be expected to predict who the panel judges would be at the time the brief is filed and would have no recourse if the court strikes the brief—wasting time and money through no fault of the amicus curiae or its counsel. The Advisory Committee considered these comments, but determined that the interests in preventing gamesmanship and resolving the conflict among local rules outweighed the concerns.

The Advisory Committee made two revisions at its May 2017 meeting. First, to match the 2016 amendments renumbering Rule 29's subparts and adding new rules governing amicus briefs at the rehearing stage, the Advisory Committee moved the exception from the former subdivision (a) to new paragraph (a)(2) and added the exception to the new paragraph (b)(2) regarding rehearing. Second, the Advisory Committee rephrased the exception from "strike or prohibit the filing of" to "prohibit the filing of or . . . strike" to make it more chronological without changing its meaning or function.

Discussion during the Standing Committee meeting was robust. An attorney member recommended deleting from paragraph (b)(2) the proposed language regarding prohibiting or striking briefs at the rehearing stage, reasoning that the court already had discretion to do so, existing local rules would continue to stand under either version of the proposal, and republication would not be required. A judge member disagreed, arguing that the language in (b)(2) would at least give an amicus curiae an indication as to why its brief had been barred. The Standing Committee reached a compromise: the language would be deleted from (b)(2), but the committee note would explain that the court already has discretion to strike an amicus brief at the rehearing stage if it could cause recusal, and confirm that local rules and orders allowing such briefs to be barred are permissible. The language "such as those previously adopted in some circuits" would be deleted from the note.

The Standing Committee accepted a style consultant's recommendation to replace "except that" with "but" in paragraph (a)(2). A member repeated a commenter's suggestion to change the phrase "amicus brief" to "amicus-curiae brief" for accuracy, but the Advisory Committee and style consultants preferred to continue to use "amicus" as an adjective and "amicus curiae" as a noun for consistency with the other rules.

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 proposed amendments to Appellate Rule 29, subject to the revisions made during the meeting.**

Appellate Rule 41 – Stays of the Mandate. The Advisory Committee proposed amendments to Appellate Rule 41, which governs the contents, issuance, effective date, and stays of the mandate. Among other changes, the Advisory Committee initially added a sentence to Rule 41(b) permitting the court to extend the time to issue the mandate “only in extraordinary circumstances” (see Agenda Book Tab 2A, pp. 95-99).

The proposed amendments were published in August 2016, and the Advisory Committee made several revisions to account for the five comments received. In response to observations that a court might wish to extend the time for good cause in circumstances that are not “extraordinary,” the Advisory Committee deleted the proposed sentence from Rule 41(b). The Advisory Committee also added subheadings, renumbered subparagraph (d)(2)(B) as (d)(2), and, in response to a comment warning of a potential gap in the rule, added a clause that would extend a stay automatically if a Supreme Court Justice extends the time for filing a petition for certiorari. The Advisory Committee made further revisions after its May 2017 meeting (see Agenda Book Supplemental Materials, pp. 3-4, 18-24).

As shown here, at the Standing Committee meeting the style consultants and an attorney member suggested additional changes to Appellate Rule 41(d)(2)(B) ((d)(2) as amended), which prohibits a stay from exceeding 90 days 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: (i) that the time for filing a petition ~~for a writ of certiorari in the Supreme Court~~ has been extended, in which case the stay continues for the extended period; or (ii) that the petition has been filed, in which case the stay continues until the Supreme Court’s final disposition.”

Three appellate judge members pointed out that unlike most courts of appeals, which circulate opinions to the full court prior to publication, their courts instead have the option to place a “hold” on the mandate while the full court reviews a panel’s decision and considers whether to rehear the case en banc. They disagreed among themselves as to whether Rule 41(b)’s new provision allowing the court to extend the time to file the mandate “by order” was an appropriate solution, as it was unclear whether a standing order or clerk’s order (as opposed to an order issued by an individual judge) would suffice. Satisfied that it would, and that the rule did not impose a time limit for issuing the order, the Standing Committee approved the rule as modified. Accordingly, the first sentence of the committee note would be revised as follows: “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.~~”

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 proposed amendments to Appellate Rule 41, subject to the revisions made during the meeting.**

Technical Amendments to Rules 3(d) and 13 – References to “Mail.” In light of the proposed changes to Appellate Rule 25 to account for electronic filing and service (see “Inter-

Committee Coordination,” *supra*), the Advisory Committee recommended eliminating the term “mail” from other provisions (see Agenda Book Tab 2A, pp. 100-02).

Appellate Rule 3(d) concerns the clerk’s service of the notice of appeal. The Advisory Committee changed “mailing” and “mails” to “sending” and “sends” in paragraphs (d)(1) and (3), and eliminated the mailing requirement from the portion of paragraph (d)(1) that directs the clerk to serve a criminal defendant “either by personal service or by mail addressed to the defendant.” Instead, the clerk will determine whether to serve a notice of appeal electronically or nonelectronically based on the principles of revised Rule 25. The Standing Committee modified the committee note as follows: “Amendments to Subdivision (d) change the words ‘mailing’ and ‘mails’ to ‘sending’ and ‘sends,’ and delete language requiring certain forms of service, to make allow electronic service possible.”

Amended Rule 13, which governs appeals from the Tax Court, currently uses the word “mail” in its first and second sentences. The Advisory Committee recommended changing the reference in the first sentence to allow an appellant to send a notice of appeal to the Tax Court clerk by means other than mail, but not the second sentence, which expresses a rule that applies to notices sent by mail.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication in August 2017 the proposed amendments to Appellate Rules 3(d) and 13, subject to the revisions to the committee note made during the meeting.**

Information Items

At its spring 2017 meeting, the Advisory Committee declined to move forward with several unrelated suggestions: (1) amending Appellate Rules 32.1 and 35 to require courts to designate orders granting or denying rehearing as “published” decisions, (2) adding a provision similar to Appellate Rule 28(j) to the Civil Rules, (3) addressing certain types of subpoenas in Appellate Rules 4 and 27, and (4) prescribing in Appellate Rule 28 the manner of stating questions presented in appellate briefs.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Ikuta and Professor Gibson presented the report of the Advisory Committee on Bankruptcy Rules, which met on April 6-7, 2017, in Nashville, Tennessee. The Advisory Committee sought approval of thirteen action items and shared two information items.

Action Items

Inter-Committee Amendments. The Standing Committee approved for submission to the Judicial Conference proposed amendments to Bankruptcy Rules 5005 and 8011 (electronic filing and signing) and 7062, 8007, 8010, 8021, and 9025 (stays and injunctions pending appeal), and approved for publication in August 2017 a proposed new subdivision to Rule 9037 (redaction of

personal identifiers) (see “Inter-Committee Coordination,” *supra*).

Bankruptcy Rule 3002.1 – Home Mortgage Claims in Chapter 13 Cases. In chapter 13 cases in which a creditor has a security interest in a debtor’s home, Bankruptcy Rule 3002.1(b) and (e) imposes noticing requirements on the creditor that enable the debtor or trustee to make mortgage payments in the correct amount while the bankruptcy case is pending (see Agenda Book Tab 3A, pp. 191-92). The proposed amendments to subdivisions (b) and (e) create flexibility regarding a notice of payment change for home equity lines of credit; create a procedure for objecting to a notice of payment change; and expand the category of parties who can seek a determination of fees, expenses, and charges owed at the end of the case.

The proposed amendments were published in August 2016. A comment noted that, although the amendments purported to prevent a proposed payment change from taking effect in the event of a timely objection, under the time-counting rules the deadline for filing the objection would actually be later than the payment change’s scheduled effective date. The Advisory Committee revised the proposed amendment to eliminate this possibility and clarify that “if a party wants to stop a payment change from going into effect, it must file an objection *before* the change goes into effect” (see Agenda Book Tab 3B, App’x A, pp. 223-24).

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for submission to the Judicial Conference for approval the proposed amendments to Bankruptcy Rule 3002.1.**

Conforming Amendments to the Bankruptcy Part VIII Appellate Rules and Related Forms. The proposed amendments to Bankruptcy Part VIII Appellate Rules 8002, 8011, 8013, 8015, 8016, 8017, and 8022; Official Forms 417A and 417C; and the new Part VIII Appendix conform the Bankruptcy Rules to the December 1, 2016 Appellate Rules amendments (see Agenda Book Tab 3A, pp. 194-97). Because the Bankruptcy Appellate Rules generally follow the Appellate Rules, the Advisory Committee tracked the Appellate Rules absent a bankruptcy-specific reason not to.

Bankruptcy Rule 8002(b) and its counterpart, Appellate Rule 4(a)(4), list the post-judgment motions that toll the time for filing an appeal. The 2016 amendment to Appellate Rule 4(a)(4) added an express requirement that, in order to toll this deadline, the motion must be filed within the time period the rule the motion is made under specifies. The Bankruptcy Rules Advisory Committee published a similar amendment to Rule 8002(b) in August 2016 and received no comments.

Bankruptcy Rules 8002(c) (time to file a notice of appeal) and 8011(a)(2)(C) (filing, signing, and service) contain inmate-filing provisions virtually identical to the parallel provisions of Appellate Rule 4(c) and rule currently numbered Appellate Rule 25(a)(2)(C). The proposed amendments would conform to those rules by treating inmates’ notices of appeal and other papers as timely filed if they are deposited in the institution’s internal mail system on or before the last day for filing. The new inmate-declaration form designed to effectuate this rule is replicated by a director’s form for bankruptcy appeals, and an amendment to Official Form 417A would direct inmate filers to the director’s form.

The 2016 Appellate Rules amendments also affected the length limits in Bankruptcy Rules 8013, 8015, 8016, and 8022 and Official Form 417C, and necessitated the new Part VIII Appendix. Amended Appellate Rules 5, 21, 27, 35, and 40 converted page limits to word-count limits for documents prepared using a computer and reduced the existing word limits for briefs under Appellate Rules 28.1 (cross-appeals) and 32 (principal, response, and reply briefs). Appellate Form 6, the model certificate of compliance, was amended accordingly. Amended Appellate Rule 32(e) authorizes the court to vary the federal rules' length limits by order or local rule, Rule 32(f) lists the items that may be excluded from the length computation, and a new appendix collecting all of the length limits in one chart was added. The Bankruptcy Rules Advisory Committee proposed parallel amendments to Rules 8013(f) (motions), 8015(a)(7) and (f) (briefs), 8016(d) (cross-appeals), and 8022(b) (rehearing), along with Official Form 417C (model certificate of compliance). It also proposed an appendix to Part VIII similar to the Appellate Rules appendix.

Bankruptcy Rule 8017, addressing amicus filings, is the bankruptcy counterpart to Appellate Rule 29, which was amended in 2016 to address for the first time amicus briefs filed in connection with petitions for rehearing. The 2016 amendment does not require courts to accept amicus briefs at the rehearing stage, but provides guidelines for briefs that *are* permitted. In August 2016, the Appellate Rules Advisory Committee published an additional amendment to Appellate Rule 29(a) that would authorize a court of appeals to prohibit the filing of or strike an amicus brief that could cause the recusal of a judge (see discussion *supra*). To maintain consistency, the Bankruptcy Rules Advisory Committee proposed and published a parallel amendment to Rule 8017.

A commenter pointed out that, because amicus briefs are usually filed before a panel is assigned, an amicus curiae could not possibly predict whether its brief could lead to a recusal. The Advisory Committee rejected this comment because the proposed amendment does not *require*, but merely permits, the brief to be struck. Another comment suggested a more extensive and detailed rewrite that was beyond the scope of the proposed amendment. The Bankruptcy Rules amendments and committee note will be conformed to the revisions made to Appellate Rule 29 at the Standing Committee meeting (see discussion *supra*).

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for submission to the Judicial Conference for approval the proposed amendments to Bankruptcy Rules 8002, 8011, 8013, 8015, 8016, 8017, and 8022; Official Forms 417A and 417C; and the new Part VIII Appendix; subject to the conforming revisions to Bankruptcy Rule 8017 made during the meeting.**

Additional Bankruptcy Appellate Rules Amendments: Rules 8002, 8006, and proposed new Rule 8018.1. In addition to the conforming amendments to the Part VIII rules, amendments to Bankruptcy Appellate Rules 8002, 8006, and 8023 and new Bankruptcy Appellate Rule 8018.1 were published in August 2016 and received no comments. Following discussion of these amendments at the spring 2017 meeting, the Advisory Committee recommended final approval of Rules 8002, 8006, and 8018.1 as published (see Agenda Book Tab 3A, pp. 197-200), but sent Rule 8023 back to a subcommittee for further consideration (see Information Items,

infra).

Bankruptcy Rule 8002(a) generally requires a notice of appeal to be filed within 14 days of the entry of judgment. The proposed amendment would add a new paragraph (a)(5), which defines “entry of judgment” for this purpose. It would also clarify that, in contested matters and adversary proceedings where Civil Rule 58 does not require the entry of judgment to be filed as a separate document, the time for filing the notice of appeal begins to run when the judgment, order, or decree is entered on the docket (see Agenda Book Tab 3B, App’x A, pp. 237-43). In adversary proceedings where Civil Rule 58(a) *does* require a separate document, the time for filing a notice of appeal generally runs from when the judgment, order, or decree is docketed as a separate document or, if no separate document is prepared, 150 days from docket entry.

Bankruptcy Rule 8006 implements 28 U.S.C. § 158(d)(2)(A), which permits all parties to jointly certify a proceeding for direct appeal to the court of appeals. Because, as Professor Gibson explained, this “somewhat odd procedure” gives the parties the option to certify an appeal, new paragraph 8006(c)(2) authorizes the bankruptcy court, district court, or Bankruptcy Appellate Panel to, Judge Ikuta reported, “provide its views about the merits of such a certification to the court of appeals” (see Agenda Book Tab 3B, App’x A, pp. 245-46). Professor Gibson added that the proposed amendment was intended as “the counterpart” to existing rules that allow the parties to file a statement when the judge certifies an appeal: “If the parties get to comment on the judge’s certification, the judge ought to be able to comment on the parties’ [certification].” The judge would not be required to do so, and the court of appeals still has discretion to decide whether to accept the appeal.

Proposed new Rule 8018.1 addresses district court review of a judgment that the bankruptcy court lacked constitutional authority to enter under *Stern v. Marshall*, 564 U.S. 462 (2011), which held that certain claims, now dubbed “*Stern* claims,” must be decided by an Article III court rather than a bankruptcy court. In *Executive Benefits Insurance Agency v. Arkison*, 134 S. Ct. 2165 (2014), the U.S. Supreme Court held that bankruptcy judges may hear *Stern* claims and submit proposed findings of fact and conclusions of law, but they lack the authority to enter judgment on them; the district court is empowered to enter judgment after a de novo review. Under the existing rules, when a district court that determines that the bankruptcy court has entered final judgment in a *Stern* claim despite its lack of constitutional authority to do so, the case must be remanded to the bankruptcy court so the judgment can be recharacterized as proposed findings of fact and conclusions of law. New Bankruptcy Rule 8018.1 would bypass this process by authorizing the district court to simply treat the bankruptcy court’s judgment as proposed findings and conclusions that it can review de novo (see Agenda Book Tab 3B, App’x A, pp. 289-90).

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for submission to the Judicial Conference for approval the proposed amendments to Bankruptcy Rules 8002 and 8006 and new Bankruptcy Rule 8018.1.**

Official Form 309F – Notice of Chapter 11 Bankruptcy Case (Corporations and Partnerships). The instructions at line 8 of Form 309F currently require a creditor seeking to

have its claim excepted from the discharge under § 1141(d)(6)(A) of the Bankruptcy Code to file a complaint by the stated deadline. But because the applicability of the deadline is unclear in some circumstances, the proposed revision to the instructions would allow the creditor to decide whether the deadline applies to its claims. When the proposed amendment was published in August 2016, a commenter pointed out that it necessitated a similar change to line 11 of the form (see Agenda Book Tab 3A, pp. 200-02). Accordingly, the Advisory Committee amended the last sentence of line 11 in a manner similar to the amendment to line 8 and recommended both changes for final approval.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for submission to the Judicial Conference for approval the proposed amendments to Official Form 309F.**

Official Forms 25A, 25B, 25C, and 26 – Chapter 11 Small Business Debtor Forms and Periodic Report. Most bankruptcy forms have been modernized over the past several years through the Forms Modernization Project, but the Advisory Committee deferred consideration of Official Forms 25A, 25B, 25C, and 26, which relate to chapter 11 cases. The Advisory Committee has now reviewed these forms extensively, revised and renumbered them, and published them for comment in August 2016 (see Agenda Book Tab 3A, pp. 202-04).

The small business debtor forms, Forms 25A, 25B, and 25C, are renumbered as Official Forms 425A, 425B, and 425C (see Agenda Book Tab 3B, App'x A, pp. 315-59). Official Forms 425A and 425B contain an illustrative form plan of reorganization and a disclosure statement, respectively, for chapter 11 small business debtors. Official Form 425C is the monthly operating report that small business debtors must file with the court and serve on the U.S. Trustee. Official Form 26, renumbered as Official Form 426 and rewritten and formatted in the modernized form style, requires periodic disclosures by chapter 11 debtors concerning the value, operations, and profitability of entities in which they hold a substantial or controlling interest (see Agenda Book Tab 3B, App'x A, pp. 361-73).

The Advisory Committee made “minor, non-substantive” changes in response to the three comments received, the “most substantial” of which was to add a section to Form 425A where the parties can address whether the bankruptcy will retain jurisdiction of certain matters after the plan goes into effect (see Agenda Book Tab 3B, App'x A, p. 318).

Upon motion, seconded by a member, and by voice vote: **The Standing Committee unanimously approved for submission to the Judicial Conference for approval the proposed amendments to Official Forms 25A, 25B, 25C, and 26 (renumbered respectively as 425A, 425B, 425C and 426).**

Conforming Amendments to Official Forms 309G, 309H, and 309I – Notices to Creditors in Chapter 12 and 13 Cases. Bankruptcy Rule 3015 governs the filing, confirmation, and modification of chapter 12 and chapter 13 plans. Absent contrary congressional action, as of December 1, 2017, an amendment to Rule 3015 adopted as part of the chapter 13 plan form package will no longer authorize a debtor to serve a plan summary, rather than a copy of the plan itself, on the trustee and creditors. This change will affect Official Forms 309G, 309H, and 309I,

the form notices sent to creditors to inform them of the hearing date for confirmation of the chapter 12 or 13 plan and the associated objection deadlines. The current versions of the forms also indicate whether a plan summary or the full plan is included with the notice. In accordance with the pending changes to Bankruptcy Rule 3015, the proposed amendments to Official Forms 309G, 309H, and 309I remove references to a “plan summary,” which will no longer be an available option (see Agenda Book Tab 3A, p. 206, Tab 3B, App’x A, pp. 301-08). The Advisory Committee recommended approval of these conforming changes without publication so that they can take effect at the same time as the pending change to Rule 3015.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for submission to the Judicial Conference for approval without publication the proposed conforming amendments to Official Forms 309G, 309H, and 309I.**

Bankruptcy Rule 4001 – Obtaining Credit. Bankruptcy Rule 4001(c) governs the process by which a debtor in possession or a trustee can obtain credit outside the ordinary course of business while a bankruptcy case is pending. Among other things, the rule outlines eleven different elements of post-petition financing that a motion for approval of a post-petition credit agreement must address. These detailed disclosure requirements, which are intended supply the kind of specific information necessary for credit approval in chapter 11 business cases, are unhelpful and unduly burdensome in chapter 13 consumer bankruptcy cases, where typical post-petition credit agreements involve loans for items such as personal automobiles or household appliances. Accordingly, the Advisory Committee sought approval to publish for public comment a new paragraph to Rule 4001(c) that would make the disclosure provision inapplicable in chapter 13 cases (see Agenda Book Tab 3A, pp. 207-08, Tab 3B, App’x B, p. 379). Judge Ikuta reported that “many bankruptcy courts have already adopted [similar] local rules that impose less of a burden on chapter 13 debtors.”

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication in August 2017 the proposed amendments to Bankruptcy Rule 4001.**

Bankruptcy Rules 2002 & 9036 and Official Form 410 – Electronic Noticing. The proposed amendments to Bankruptcy Rules 2002(g) (Addressing Notices) and 9036 (Notice by Electronic Transmission) and Official Form 410 (Proof of Claim) are part of the Advisory Committee’s effort to reduce the cost and burden of notice. Section 342 of the Bankruptcy Code gives creditors in chapter 7 and chapter 13 cases the right to designate an address to receive service. As part of the rules committees’ efforts to ensure that the rules are consistent with modern technology, the Advisory Committee originally considered an opt-out provision under which electronic notice would be the default, but rejected it due to concerns that it might run afoul of § 342 or be incompatible with creditors’ existing systems for processing notice by mail.

Instead, the proposed amendments make three changes that would allow creditors to opt in to electronic notice. First, a box has been added to Official Form 410, the proof-of-claim form, that creditors who are not CM/ECF users can check to receive notices electronically (see Agenda Book Tab 3B, App’x B, p. 389). Second, the proposed change to Rule 2002(g) would expand the rule’s references to “mail” to include other means of delivery and delete “mailing”

before “address” so creditors can receive notices by email (see Agenda Book Tab 3B, App’x B, pp. 377-78). Third, amended Rule 9036 would allow registered users to be served via the court’s CM/ECF system, and non-CM/ECF users by email if they consent in writing (see Agenda Book Tab 3B, App’x B, pp. 383-84).

A judge member wondered whether it was appropriate for the rules to refer to documents sent electronically as “papers.” The Standing Committee determined to continue to use the term “papers,” which is generic and is already used throughout the rules with respect to both electronic and hard-copy documents.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication in August 2017 the proposed amendments to Bankruptcy Rules 2002 and 9036 and Official Form 410.**

Bankruptcy Rule 6007 – Motions To Abandon Property. Under § 554(a) and (b) of the Bankruptcy Code, only the trustee or debtor in possession has authority to abandon property of the estate. A hearing is not mandatory if the abandonment notice or motion provides sufficient information concerning the proposed abandonment; is properly served; and neither the trustee, debtor, nor any other party in interest objects. Bankruptcy Rule 6007, which concerns the service of abandonment papers under § 554, treats notices to abandon property filed by the trustee under subdivision (a) and motions filed by the parties in interest to compel the trustee to abandon property under subdivision (b) inconsistently (see Agenda Book Tab 3A, pp. 211-13). Specifically, Rule 6007(a) identifies the parties the trustee is required to serve with its notice to abandon, but Rule 6007(b) is silent regarding the service of a motion to compel abandonment.

“So that the procedures are essentially the same in both cases,” the proposed amendment to Rule 6007(b) would specify the parties to be served with the motion to abandon and any notice of the motion, and establish an objection deadline. The proposed amendment would also make clear that, if the motion to abandon is granted, the abandonment is effected without further notice, unless the court directs otherwise (see Agenda Book Tab 3B, App’x B, pp. 381-82).

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication in August 2017 the proposed amendments to Bankruptcy Rule 6007.**

Information Items

Bankruptcy Rule 2002 – Noticing in Chapter 13 Cases. The current version of Bankruptcy Rule 2002(f)(7) requires the clerk to give notice to the debtor and all creditors of the “entry of an order confirming a chapter 9, 11, or 12 plan,” but not a chapter 13 plan. The committee note identifies no reason for treating chapter 13 plans differently, and the Advisory Committee’s meeting minutes are silent as to why it rejected a 1988 effort to make Rule 2002(f) applicable to a plan under any chapter. Seeing no reason to continue to exclude chapter 13 plans, the Advisory Committee intends to propose an amendment to Bankruptcy Rule 2002(f) (see Agenda Book Tab 3A, pp. 215-16).

Similarly, the Advisory Committee will propose an amendment expanding to chapter 13 cases the exception to Rule 2002(a)'s general noticing requirements. Current Rule 2002(h) allows a court to limit notice in a chapter 7 case to, among others, creditors holding claims for which proofs of claim have been filed. The Advisory Committee has concluded that the cost and time savings generated by limiting notices under Rule 2002(h) in chapter 13 cases support an amendment (see Agenda Book Tab 3A, p. 216).

Because the time provisions of Rule 2002(f)(7) will also need to be amended when a pending 2017 amendment to Rule 3002 changes the deadline for filing a proof of claim, the Advisory Committee decided to wait to publish the amendments to the noticing provisions in subdivisions (f) and (h) so that they can be proposed as a package along with the timing changes in 2018.

Bankruptcy Rule 8023 – Voluntary Dismissal. In response to a comment submitted after the publication of the Part VIII amendments (see *supra*), the Advisory Committee proposed an amendment to Bankruptcy Appellate Rule 8023 that would add a cross-reference to Bankruptcy Rule 9019, which provides a procedure for obtaining court approval of settlements. The amendment was intended as a reminder that, when dismissal of an appeal is sought as the result of a settlement, Rule 9019 might require the settlement to be approved by the bankruptcy court (see Agenda Book Tab 3A, pp. 216-17).

No comments were submitted when the proposed amendment to Rule 8023 was published in August 2016. At the spring 2017 meeting, the Advisory Committee's new DOJ representative raised a concern that, although Rule 9019 is generally interpreted to require court approval of a settlement only when a trustee or debtor in possession is a party to it, amended Rule 8023 can be read to suggest that no voluntary dismissal of a bankruptcy appeal in the district court or BAP may be taken without the bankruptcy court's approval. Other Advisory Committee members wondered whether amended Rule 8023's reference to Rule 9019 could be read to require district and BAP clerks to make a legal determination as to whether Rule 9019 applies to a particular voluntary dismissal and, if so, whether the bankruptcy court has jurisdiction to consider the settlement while the appeal is pending. A question was also raised about whether the current version of Rule 8023, which does not state that it is subject to Rule 9019, has caused any problems. After discussing these issues, the Advisory Committee decided to send the Rule 8023 amendment "back to the drawing board" for further consideration by a subcommittee. The Advisory Committee expects to "suggest[] a different change" and will discuss the matter further at its fall 2017 meeting.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Bates and Professors Cooper and Marcus provided the report of the Advisory Committee on Civil Rules, which met on Tuesday, August 25, in Austin, Texas. In addition to two sets of inter-committee amendments, the Advisory Committee sought approval of one action item—proposed amendments to Civil Rule 23—and presented two information items.

Action Items

Inter-Committee Amendments. The Advisory Committee submitted proposed amendments to Civil Rules 5 (electronic filing and signing) and 62 and 65.1 (stays and injunctions pending appeal) for final approval. The Standing Committee approved the amendments for transmission to the Judicial Conference, subject to the revisions made during the meeting (see “Inter-Committee Coordination,” *supra*).

Civil Rule 23 – Class Actions. The proposed amendments to Civil Rule 23 (see Agenda Book Tab 4A, pp. 431-51) are the product of more than five years of study and consideration by the Civil Rules Advisory Committee and its Rule 23 Subcommittee. The effort was motivated by a number of factors: (1) the passage of time since Rule 23 was last amended in 2009; (2) the development of a body of case law on class action practice; and (3) recurring interest in Congress, including the 2005 adoption of the Class Action Fairness Act. In developing the proposed amendments, members of the Subcommittee attended nearly two dozen meetings and bar conferences and held a mini-conference in September 2015 to gather additional feedback from a variety of stakeholders.

After extensive consideration and study, the Subcommittee narrowed the list of issues to be addressed and published these proposed amendments (see Agenda Book Tab 4A, pp. 431-41):

- Rule 23(c)(2) has been updated to recognize contemporary means of providing notice to individual class members in Rule 23(b)(3) class actions.
- The amendments to Rule 23(e)(1) clarify that the parties must supply information to the court to enable it to decide whether to notify the class of a proposed settlement, that the court must direct notice if it is likely to be able to approve the proposal and certify the class, and that class notice triggers the opt-out period in Rule 23(b)(3) class actions.
- Amended Rule 23(e)(2) identifies substantive and procedural “core concerns”—as opposed to a “long list of factors” like those some courts use—for the parties to address and the court to consider in deciding whether to approve a settlement proposal.
- Rule 23(e)(5) has been amended to address “bad faith” class-action objectors. Specifically, the proposed amendments require that specific grounds for the objection be provided to the court, the person on whose behalf the objection is being made be identified, and the court approve payment or other consideration received in exchange for withdrawing an objection.
- Amended Rule 23(f) makes clear that there is no interlocutory appeal of a decision to send class notice under Rule 23(e)(1).
- At the suggestion of the DOJ, the amendments to Rule 23(f) extend to 45 days the time to seek permission for an interlocutory appeal when the United States is a party.

The Advisory Committee considered but declined to address other topics, such as issue classes and ascertainability.

Almost all of the comments received during the August 2016 public comment period concerned the Rule 23 proposals. Most addressed the modernization of notice methods under Rule 23(c)(2) and the handling of objections to proposed settlements. Some comments proposed additional topics, while others urged reconsideration of topics the Subcommittee had decided not to pursue. After carefully considering the comments, the Advisory Committee and Subcommittee made minor changes to the proposed rule text and clarified and shortened the committee note. The Advisory Committee has concluded that “the community is very satisfied” with the proposed amendments, which are “important improvements” but “not dramatic changes.”

A judge member asked whether a litigant could argue that the court had not adequately reviewed the settlement proposal if it did not consider one of the “core concerns” under Rule 23(e)(2). Professor Marcus explained that the Subcommittee initially considered requiring the court to find that each factor was satisfied, but ultimately decided “to introduce the considerations” but not *require* the court to find each one in order to approve the settlement. The rule does not require the trial judge to “make findings” or address each factor on the record—the judge need only “consider” the information the parties supply under Rule 23(e)(1)(A) and any objections under Rule 23(e)(5). A judge member added that district courts should be given broad discretion to review these factors.

Another judge member raised the possibility of adding a “catchall” category to those listed in Rule 23(e)(2) and (e)(2)(C). Professor Marcus clarified that the list is not intended to require a judge to ignore important factors that should obviously be considered in a given situation, and the judge member agreed that the current language allows sufficient flexibility. A different judge member added that the four general categories set out in the amended rule are a “good compromise” between the need to add structure and guidance to the settlement-approval process on one hand, and the “long lists of factors” identified by the courts of appeals on the other.

Judge Campbell commended the Rule 23 Subcommittee, chaired by Judge Robert M. Dow, Jr., for its work.

Upon motion, seconded by a member, and on a voice vote: **The Committee unanimously voted to recommend the proposed amendments to Civil Rule 23 to the Judicial Conference for approval.**

Information Items

Social Security Disability Review Cases. The Administrative Conference of the United States (“ACUS”) recently submitted a suggestion to the Judicial Conference that a uniform set of procedural rules be developed for district court review of final administrative decisions in Social Security cases under 42 U.S.C. § 405(g), which provides that an individual may obtain review of a final decision of the Commissioner of Social Security “by a civil action.” The suggestion was referred to the Civil Rules Advisory Committee, which is responsible for studying and recommending rules governing civil actions in the district courts (see Agenda Book Tab 4A, pp. 532-50).

More than 17,000 Social Security review cases are brought in the district courts every year, accounting for “a fairly large numerical proportion”—about seven percent—of civil filings. The national average remand rate is approximately forty-five percent, ranging from twenty percent in some districts to seventy percent in others—sometimes even within a single circuit. Different districts use a variety of procedures and standards in reviewing these actions.

The Advisory Committee first discussed the ACUS suggestion at the spring 2017 meeting. Although judges might be apprehensive about the possibility of a “special set of rules” for Social Security cases, the Advisory Committee will explore “whether, and if so, how” rule changes could address the problems that have been identified: the high remand rate, delays in the process, and a lack of uniformity among the district courts. The Advisory Committee plans to gather more information and form a subcommittee to fully consider various options, including a new Civil Rule addressing these types of cases or even a separate set of rules.

Professor Cooper welcomed input from the members of the Standing Committee. Judge members suggested examining circuit law and local rules addressing Social Security issues. Another judge proposed asking the DOJ to formulate a position as to whether district court review procedures should be modified. Although some members felt that more uniformity in the rules might help to reduce variance among the remand rates, a professor member cautioned that the variance might be attributable to the substantive law (such as the treating physician rule, a judge noted), rather than differences in the rules. A reporter added that a change in district court review procedures would be unlikely to affect how administrative law judges review Social Security cases. There was a general consensus that the rules committees should not attempt to “fix the [Social Security] system generally.” The Civil Rules Advisory Committee will continue to study and discuss these issues.

Civil Rule 30(b)(6) – Organizational Depositions. In April 2016, the Advisory Committee formed a Rule 30(b)(6) Subcommittee chaired by Judge Joan N. Ericksen to consider whether reported problems with Rule 30(b)(6) depositions can be addressed by rule amendment (see Agenda Book Tab 4A, pp. 555-86). The Subcommittee initially focused on drafting provisions that might address the problems attorneys claim to encounter. Guided by feedback from the Advisory Committee and Standing Committee, and equipped with additional legal research, the Subcommittee continues to narrow the issues that could feasibly be remedied by rule amendment.

Specifically, the Subcommittee has solicited comment about six potential amendment ideas through a posting on the federal judiciary’s rulemaking website (see Agenda Book Tab 4A, pp. 557-59): (1) including Rule 30(b)(6) depositions among the topics for discussion at the Rule 26(f) conference and in the Rule 16 report, (2) confirming that a 30(b)(6) deponent’s statements do not function as “judicial admissions” (an issue which, a judge member added, is a source of much of the “angst” surrounding these depositions), (3) requiring and permitting supplementation of Rule 30(b)(6) testimony, (4) forbidding contention questions, (5) adding a provision for objections, and (6) addressing the applicability to Rule 30(b)(6) of limits on the duration and number of depositions. Members of the Subcommittee continue to gather feedback by participating in bar conferences around the country.

When a district judge observed that litigants do not frequently approach him with Rule 30(b)(6) disputes, another judge added that active case management cures many of the problems that do arise. An attorney member who finds the current version of the rule useful cautioned the Advisory Committee not to change Rule 30(b)(6) so much that the problem it was designed to resolve—“hiding the ball”—has room to recur. Professor Marcus, reporter to the Rule 30(b)(6) Subcommittee, explained that the old problem of “bandying” has been replaced by a new one: 30(b)(6) notices listing numerous deposition topics are sent at the last minute, just before the close of discovery, to “imped[e] preparation for trial.” The potential for abuse of the Rule 30(b)(6) process can therefore cut in both directions, and although case management may be the only workable solution, the subcommittee will continue to explore possible rule changes.

Pilot Projects Update. Judge Bates updated the Standing Committee on the Civil Rules Advisory Committee’s two ongoing pilot projects, Mandatory Initial Discovery Pilot (“MIDP”) and Expedited Procedures Pilot (“EPP”) (see Agenda Book Tab 4A, pp. 587-89). The MIDP, which is designed to explore whether mandating the production of robust discovery prior to traditional discovery will reduce costs, burdens, and delays in civil litigation, is “well underway” in two districts and expects to add another one to two courts. Judge Campbell reported that the MIDP began in the District of Arizona on May 1, 2017, and Dr. Emery Lee and the FJC were already monitoring 170 cases filed on or after that date. The district’s judges have all agreed to participate and will become personally involved at the case management conference stage. The MIDP began in the Northern District of Illinois one month later, on June 1.

The EPP, which is intended to confirm the benefits of active judicial management of civil cases, “has hit a few roadblocks.” At this time, only the U.S. District Court for the Eastern District of Kentucky has agreed to participate; vacancies, workloads, and other factors have hindered efforts to recruit participating courts. If more courts do not join despite renewed recruitment efforts, the Eastern District of Kentucky will be moved to the MIDP, and the EPP will be delayed.

Judge Campbell thanked Judge Paul W. Grimm, Chair of the Pilot Projects Working Group and a former member of the Civil Rules Advisory Committee, for his “tremendous effort,” and the FJC and Rules Committee Support Office for their contributions.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Sessions and Professor Capra delivered the report of the Advisory Committee on Evidence Rules, which met on April 21, 2017, in Washington, D.C. The Advisory Committee presented one action item and two information items.

Action Item

Evidence Rule 807 – Residual Exception. The Advisory Committee has considered possible changes to Evidence Rule 807, the residual exception to the hearsay rule, for two years. One approach would involve broadening the residual exception, which is invoked “narrowly and

infrequently.” After extensive deliberation the Advisory Committee decided to pursue a more “conservative,” less “dramatic” approach that does not expand the hearsay exception.

Instead, the proposed amendment is intended to “improve[]” current Rule 807 in a number of ways (see Agenda Book Tab 6A, pp. 736-41, Tab 6B, pp. 749-54). First, it no longer defines “trustworthiness” in terms of the “equivalent circumstantial guarantees” of the Rule 803 and 804 exceptions; because those rules contain no such “circumstantial guarantees,” there is “no unitary standard” of trustworthiness. Under amended Rule 807, the court would simply determine whether the residual hearsay is supported by sufficient guarantees of trustworthiness. Second, the proposed amendment resolves a conflict among the courts by making clear that corroborating evidence may be considered in determining trustworthiness. Third, current Rule 807(a)’s requirements that the residual hearsay relate to a “material fact” and “serve the purposes of the[] rules and the interests of justice” have proved “meaningless” and will be deleted. “[I]nterests of justice” has been particularly troublesome, as some courts have relied on it to expand their discretion to admit hearsay evidence under Rule 807. Removing the phrase reinforces that the Advisory Committee does not “advocat[e for] the use of 807 more broadly.”

“Most important” was the Advisory Committee’s decision to continue to require under Rule 807(a)(3) that the residual hearsay be “more probative . . . than any other evidence” the proponent can reasonably obtain. The “more probative” requirement ensures that the rule will be used only when necessary, reinforcing the Advisory Committee’s intent to refine but not broaden the residual exception. The Advisory Committee has made clear in amended subdivision (a)(1) that the proponent cannot invoke the residual exception unless the proffered hearsay is not otherwise admissible under any of the Rule 803 or 804 exceptions.

The Advisory Committee has also proposed “significant” amendments to Rule 807’s notice requirement. Currently, Rule 807(b) does not include a good-cause exception for untimely notice, creating a conflict as to whether courts may excuse notice when a proponent has acted in good faith. Adding a good-cause provision would authorize district judges to admit evidence under these circumstances during trial, as well as conform Rule 807 to the Evidence Rules’ other notice provisions. Other changes include replacing the confusing word “particulars” with “substance,” requiring notice to be given in writing, and deleting the requirement that the proponent provide the declarant’s address.

A judge member warned that the language of proposed amended Rule 807(a)(1) describing the hearsay statement as “not specifically covered by a hearsay exception in Rule 803 or 804” could be interpreted as requiring the judge to make a finding of inadmissibility under Rules 803 and 804. Professor Capra argued that the language is not new, but has merely “dropp[ed] down” from its existing position in the current version of the rule. In any event, some courts have interpreted the *current* text to require such a finding. Professor Capra explained that the amended language was simply intended “to get the parties to explain to the court why they’re not using 803 and 804.” Another judge member wondered whether removing the provision now would inadvertently “signal” to district judges that the analysis under Rules 803 and 804 is unimportant when, in fact, “the whole point of this provision is to get them to look [to Rules 803 and 804] first.” The Advisory Committee will pay attention to this issue during the public comment period and will consider addressing it in the committee note.

A judge member asked whether the language, “after considering . . . any evidence corroborating the statement,” in revised paragraph (a)(2) was intended to require courts to “heavily weigh” corroborating evidence, thus “effectively narrow[ing]” the rule. She proposed instead, “evidence, if any, corroborating the statement”—language the DOJ and U.S. Attorneys had supported during the drafting process. Professor Capra reported that the Advisory Committee had considered “the existence or absence of any” corroborating evidence, but were satisfied with that the word “any” in the current draft, coupled with the committee note, made sufficiently clear that “you don’t have to have [corroborating evidence], but it’s good to have.” Judge Sessions and Professor Capra agreed to add “if any” to the published version of the proposed amendments. Another judge member asked whether the amended rule implied that the corroborating evidence must be admitted at trial; Professor Capra clarified that it did not, and will consider making that clear in the note. The Advisory Committee will continue to discuss the topic of corroborating evidence in the future.

A reporter wondered what “negative implications” removing the term “material,” or equating materiality with relevance, could have for other rules. Professor Capra explained that Rule 807’s use of “material,” which does not appear anywhere else in the Evidence Rules, is a historical anomaly: Congress added paragraph (a)(2) when the Evidence Rules were first enacted, despite the Advisory Committee’s deliberate decision not to use the word “material.” Courts struggled to define the term, finally equating materiality with relevance for the purposes of Rule 807. In Professor Capra’s opinion, these complications were “all the better reason to take it out.”

On the subject of the notice provision, a judge member emphasized that lawyers and judges would “*vastly* prefer” the residual hearsay to be proffered before—rather than during—trial to give the court adequate time to rule on its admissibility. She suggested that the Advisory Committee make clear in the committee note that use of “the good-cause exception will be unusual or rare.” Although, as Judge Sessions added, the timing of the proffer is a factor “inherent within good cause,” the Advisory Committee will consider emphasizing the importance of timely notice in reducing surprise and promoting early resolution of the issue.

Two members raised issues related to deleting the requirement of the declarant’s address from the notice provision. Citing privacy concerns, an academic member proposed removing the requirement of the declarant’s name as well. Judge Sessions and Professor Capra felt that this would not give sufficient notice; whereas a known declarant’s address is easily obtainable from other sources, the declarant would be virtually impossible to identify without a name. And in any event, a protective order can be sought in the event of security concerns. An attorney member wondered whether removing the address requirement, which forces the proponent to exercise care in confirming the declarant’s identity, might create practical problems. He suggested soliciting input from attorneys as to potential unintended consequences. Professor Capra said that the Advisory Committee had already done so in the New York area and had not received any negative feedback, but will monitor the issue during the comment period. He added that the committee note makes clear that an attorney in need of an address can seek it through the court.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication in August 2017 the proposed amendments to Evidence Rule 807, subject to the modification made during the meeting.**

Information Items

Evidence Rule 801(d)(1)(A) – Audio-Visual Recordings of Prior Inconsistent Statements. Evidence Rule 801(d)(1) exempts certain out-of-court statements from the rule against hearsay—making them admissible as substantive evidence rather than for impeachment only—when the witness is present and subject to cross-examination. Prior inconsistent statements, which raise reliability concerns, are deemed “not hearsay” under Rule 801(d)(1)(A) if they were made “under penalty of perjury at a trial, hearing, or other proceeding or in a deposition.”

The Advisory Committee is considering whether to expand Rule 801(d)(1)(A)’s exemption for prior inconsistent statements beyond those made under oath during a legal proceeding (see Agenda Book Tab 6A, pp. 741-42). The Advisory Committee has already rejected one approach used in some states—admitting *all* prior inconsistent statements—due to concerns that, absent more, there is no way to ensure their reliability. Instead, it is considering a more “modest,” “conservative” approach: broadening Rule 801(d)(1)(A) to include prior inconsistent statements recorded audio-visually. The advantages of this approach are that the audio-visual record confirms that the statement was, in fact, made, and the possibility of using statements as substantive evidence should encourage law enforcement to record interactions with suspects. The DOJ has also proposed making prior inconsistent statements admissible substantively when the witness acknowledges having made the statement. The Advisory Committee is in the process of seeking comments from stakeholders on the practical effect of more liberal admission of prior inconsistent statements and will continue to discuss the issue.

Evidence Rule 606(b) – Juror Testimony after Peña-Rodriguez. Evidence Rule 606(b) generally prohibits jurors from testifying about “any statement made or incident that occurred during the jury’s deliberations,” subject to limited exceptions. On March 6, 2017, the U.S. Supreme Court held in *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017), that an analogous state rule had to yield so the trial court could consider the Sixth Amendment implications of a juror’s “clear statement” that he “relied on racial stereotypes or animus to convict [the] criminal defendant.” The Advisory Committee is considering whether and how to amend Evidence Rule 606(b) in light of *Peña-Rodriguez* (see Agenda Book Tab 6A, pp. 742-43).

Evidence Rule 404(b) – “Bad Acts” Evidence. The current version of Rule 404(b)(2) requires the prosecution to give reasonable notice of evidence of crimes, wrongs, or other “bad acts” that will be introduced at trial—but only if the defendant so requests. Because this requirement disproportionately affects inmates with less competent counsel, “all sides agree” that it should be revisited (see Agenda Book Tab 6A, pp. 743-44). “More controversial,” especially for the DOJ, is a proposal that would require the proponent of propensity evidence to set forth in a notice the chain of inferences showing that the evidence is admissible for a permissible purpose under Rule 404(b)(2). This issue will be considered at future meetings.

Upcoming Symposium – Rule 702 and Expert Evidence. In conjunction with its fall 2017 meeting, the Advisory Committee will host a symposium on scientific and technological developments regarding expert testimony, including challenges raised in the last few years to forensic expert evidence, which might justify amending Evidence Rule 702 (see Agenda Book Tab 6A, pp. 744-45). The symposium will take place on Friday, October 27, 2017, at Boston College Law School.

Judge Sessions reminded the Standing Committee that this meeting would be his last as chair and that he would be succeeded by Judge Debra A. Livingston, a current member of the Advisory Committee. Professor Capra and the members of the Standing Committee commended Judge Sessions for his work.

LEGISLATIVE REPORT

Julie Wilson delivered the Legislative Report, which summarized RCS’s efforts to track legislation implicating the federal rules. The 115th Congress has introduced a number of bills that would either directly or effectively amend the Civil Rules, Criminal Rules, and Section 2254 Rules (see Agenda Book Supplemental Materials, pp. 30-35). The Standing Committee discussed two bills that have already passed the House of Representatives, the *Lawsuit Abuse Reduction Act of 2017* (“LARA”) and the *Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017*.

CONCLUDING REMARKS

Judge Campbell thanked the Standing Committee members and other attendees for their preparation and their contributions to the discussion before adjourning the meeting. The Standing Committee will next meet on January 4-5, 2018, in Phoenix, Arizona.

Respectfully submitted,

Rebecca A. Womeldorf
Secretary, Standing Committee

TAB 4

TAB 4A

MEMORANDUM

DATE: October 13, 2017

TO: The Advisory Committee on Appellate Rules

FROM: Gregory E. Maggs, Reporter

RE: Item No. 09-AP-B: Revisiting proposals to amend Rule 29 to allow Indian tribes and cities to file amicus briefs without leave of the court or consent of the parties

I. Introduction

Rule 29(a) allows the federal and state governments to file amicus briefs without leave of the court or consent of the parties. In 2009, the Committee received proposals from Daniel Rey-Bear and others to amend Rule 29(a) to extend this privilege to federally recognized Indian tribes and to cities. The Committee discussed this matter at several meetings and solicited input from the courts of appeals. At its April 2012 meeting, however, the Advisory Committee decided to postpone action on the item. Judge Jeffrey Sutton, who was then the chair of the Advisory Committee, wrote a letter to the chief judges of each of the courts of appeals explaining that the Committee would revisit the item in five years. *See, e.g.*, Letter from Hon. Jeffrey S. Sutton to Hon. Sandra L. Lynch (May 29, 2012) [Attachment 1]. As five years have now passed, the Advisory Committee may wish to resume consideration of the item at its November 2017 meeting.

II. Rule 29(a)

Rule 29(a), as amended in December 2016, provides in relevant part:

1 **Rule 29. Brief of an Amicus Curiae**

2 **(a) During Initial Consideration of a Case on the Merits.**

3 * * * * *

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

6 court. Any other amicus curiae may file a brief only by leave of court or if the
7 brief states that all parties have consented to its filing.¹

8 * * * * *

The proposed amendment would add Indian tribes and cities to Rule 29(a)(2) so that they, like the United States and the States, would have the right to file amicus curiae briefs without first obtaining the consent of the parties or leave of the court.

III. Competing Considerations and the Advisory Committee's Decision Not to Act

In his May 2012 letter to the chief judges of each of the courts of appeals, Judge Sutton concisely explained that the proposal to amend Rule 29(a) to include Indian tribes and cities implicated competing considerations. Judge Sutton wrote:

On the one hand, it seems strange to give the Federal Government and the States a right to file amicus briefs without permission under Rule 29(a) but to deny the same privilege to cities and federally recognized Tribes. . . . To the extent Rule 29(a) is designed to respect the dignity of two sovereigns (the States and National Government), it is unclear why the dignity of another sovereign, if a unique sovereign (the Tribes), should not also be reflected in the Federal Rules of Appellate Procedure and perhaps the Supreme Court Rules.

On the other hand, no court of appeals has used its local rulemaking powers to permit either group to file amicus briefs without permission. A study by the Federal Judicial Center of amicus brief requests filed by Tribes over the last several years shows that they were rarely denied. And in response to our survey, several circuits opposed the idea of creating a national rule for amicus filings by Tribes and cities at this point. One circuit also raised the possibility that a national rule in this area might create recusal issues, particularly for circuits with relatively few judges.

Letter from Hon. Jeffrey S. Sutton to Hon. Sandra L. Lynch (May 29, 2012) [Attachment 1].

¹ The Advisory Committee recommended amending this provision at its May 2017 meeting to allow a court of appeals to reject or strike an amicus brief that would result in a judge's recusal. The Advisory Committee also recommended changing "amicus-curiae brief" to "amicus brief." In September 2017, the Judicial Conference forwarded these proposals to the Supreme Court.

After describing these competing considerations, Judge Sutton explained the Committee's decision not to act but instead to revisit the issue in five years:

[Because] so far as we can tell, cities and Tribes who wish to file an amicus brief routinely are allowed to do so, the committee believes that it makes sense to show restraint in nationalizing the issue. Until now, no one to our knowledge has urged the Advisory Committee on the Federal Rules of Appellate Procedure or any individual circuit court to pass a rule permitting amicus briefs to be filed by Tribes or cities without consent. In response to our inquiry, at least one circuit indicated that, in the absence of a national rule, some members of the court might favor addressing this issue through a local rule. Time, we anticipate, may bring to light further strengths or weaknesses of this proposal, and as a result we plan to take it up again in five years.

Id. Further information about the Advisory Committee's deliberations on the proposals to add Indian tribes and cities to Rule 29(a) appears in the attached Memorandum from Reporter Catherine Struve to Advisory Committee (March 28, 2012) [Attachment 2] and the attached excerpt from the Minutes of the Advisory Committee's April 2012 Meeting [Attachment 3].

IV. Review of Local Rules and Reported Cases

In preparing this memorandum, I have reviewed the local rules of the courts of appeals for each of the Federal Circuits. Although all of the courts of appeals have local rules on amicus briefs, no local rules allow Indian tribes or cities to file amicus briefs without the consent of the parties or leave of the court. I also searched for cases on Westlaw in which Indian tribes and cities have sought to file amicus briefs. I could find no cases since 2012 in which a court of appeals denied them leave.²

V. Conclusion

At its November 2017 meeting, the Advisory Committee may wish to decide whether to reopen the proposal to allow Indian tribes and cities to file amicus briefs without consent of the

² In *Amador County v. U.S. Dep't of the Interior*, 772 F.3d 901 (D.C. Cir. 2014), the court of appeals affirmed a district court's decision to deny an Indian tribe's motion to intervene. In recounting the procedure of the case, the court of appeals mentioned that the district court also had denied, without explanation, the Indian tribe's motion to participate as amicus curiae. *See id.* at 902. The issue of whether the Indian tribe should have been allowed to participate as amicus curiae was not before the court of appeals.

parties or leave of the court or instead to remove the item from its agenda. In either event, the chair of the Committee may wish to write a letter to the chief judges of each of the courts of appeals explaining the Advisory Committee's decision.

Attachments

1. Letter from Hon. Jeffrey S. Sutton to Hon. Sandra L. Lynch (May 29, 2012)
2. Memorandum from Reporter Catherine Struve to Advisory Committee (March 28, 2012)
3. Excerpt from the Minutes of the Advisory Committee's April 2012 Meeting

TAB 4B

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

MARK R. KRAVITZ
CHAIR

PETER G. McCABE
SECRETARY

May 29, 2012

CHAIRS OF ADVISORY COMMITTEES

JEFFREY S. SUTTON
APPELLATE RULES

EUGENE R. WEDOFF
BANKRUPTCY RULES

DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

The Honorable Sandra L. Lynch
Chief Judge
United States Court of Appeals
for the First Circuit
John Joseph Moakley
U.S. Courthouse
1 Courthouse Way, Room 8710
Boston, Massachusetts 02210

Dear Chief Judge Lynch:

In my capacity as the Chair of the Advisory Committee on the Federal Rules of Appellate Procedure, I write (1) to thank you for your input about a proposal to amend Appellate Rule 29(a) to permit Indian Tribes and municipalities to file amicus curiae briefs without consent of the parties or leave of court, and (2) to tell you what we did with the proposal.

First, thank you. We received formal responses from nearly every circuit in the country, and all of the responses (informal and formal) informed our deliberations. The responses covered the gamut—from opposition to indifference to encouragement—and all of them gave us food for thought.

Second, our resolution of the issue reflects this range of views. We have decided to take no action for now but to revisit the issue in five years.

From the outset, this proposal has implicated two competing strands of thought. On the one hand, it seems strange to give the Federal Government and the States a right to file amicus briefs without permission under Rule 29(a) but to deny the same privilege to cities and federally recognized Tribes. The validity of laws enacted by all four entities is put at issue in federal lawsuits, and all four entities may have a useful public perspective on other issues litigated by private parties in federal court. All of this may explain why the Rules of the United States Supreme Court allow cities to file amicus briefs without leave of court. To the extent Rule 29(a) is designed to respect the dignity of two sovereigns (the States and National Government), it is unclear why the dignity of another sovereign, if a unique sovereign (the Tribes), should not also be reflected in the Federal Rules of Appellate Procedure and perhaps the Supreme Court Rules.

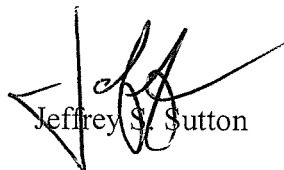
The Honorable Sandra L. Lynch
May 29, 2012
Page 2

On the other hand, no court of appeals has used its local rulemaking powers to permit either group to file amicus briefs without permission. A study by the Federal Judicial Center of amicus brief requests filed by Tribes over the last several years shows that they were rarely denied. And in response to our survey, several circuits opposed the idea of creating a national rule for amicus filings by Tribes and cities at this point. One circuit also raised the possibility that a national rule in this area might create recusal issues, particularly for circuits with relatively few judges.

The committee has been considering this proposal since 2009. We usually act more quickly than that. The length of our deliberations shows that the committee thought the proposal was a serious one. Yet in view of the range of reactions to the proposal by the circuits and the reality that, so far as we can tell, cities and Tribes who wish to file an amicus brief routinely are allowed to do so, the committee believes that it makes sense to show restraint in nationalizing the issue. Until now, no one to our knowledge has urged the Advisory Committee on the Federal Rules of Appellate Procedure or any individual circuit court to pass a rule permitting amicus briefs to be filed by Tribes or cities without consent. In response to our inquiry, at least one circuit indicated that, in the absence of a national rule, some members of the court might favor addressing this issue through a local rule. Time, we anticipate, may bring to light further strengths or weaknesses of this proposal, and as a result we plan to take it up again in five years.

Thank you for your assistance.

Sincerely,



Jeffrey S. Sutton

JSS:jmf

cc: The Honorable Mark R. Kravitz
Professor Daniel R. Coquillette
Professor Catherine T. Struve

TAB 4C

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MEMORANDUM

DATE: March 28, 2012
TO: Advisory Committee on Appellate Rules
FROM: Catherine T. Struve, Reporter
RE: Item No. 09-AP-B

During the Committee's consideration of the proposal to treat federally recognized Native American tribes the same as states for purposes of Rule 29's amicus-filing provisions, participants suggested that additional information would be useful. This memo encloses the results of those further inquiries.

As the Committee discussed at its fall 2011 meeting, Judge Sutton had previously consulted the Chief Judges in the Eighth, Ninth, and Tenth Circuits – the three circuits in which Indian tribes most frequently file amicus briefs. Participants at the fall meeting suggested that it would be useful for Judge Sutton to consult the Chief Judges of the remaining circuits for their circuits' views on whether the list of amicus filers who do not need party consent or court leave should include municipalities and Indian tribes. I enclose Judge Sutton's letter and the responses received to date (from judges in the First, Fourth, Seventh, Eleventh, and Federal Circuits).

In addition, a participant in the fall 2011 discussions suggested that it would be helpful to know what other provisions in the Appellate Rules (or other sets of national Rules) treat states differently from other litigants. I enclose a spreadsheet showing the results of my research concerning such provisions in the Appellate Rules and Civil Rules (time constraints prevented me from completing this research with respect to the other sets of national rules). The spreadsheet suggests to me the following initial observations:

- There are three provisions that refer generically to governments without specifying which governments. See Appellate Rule 26.1(a) (referring to a “nongovernmental corporate party”); Civil Rule 7.1(a) (same); Civil Rule 25(d) (referring to a “public officer”).
- There are a number of rules that treat the federal government specially. Two of those rules – Appellate Rules 4 and 40 – were the subject of a proposal, a few years ago, to revise the rules to treat states the same as the federal government; the Committee decided not to proceed with that proposal.
- There are many rules that treat states specially; some of these rules also treat the federal government specially. One or two rules (Civil Rule 4(j)(2) and arguably Civil Rule 26(a)(1)(B)) treat state and local governments specially. In some instances, a rule does not concern states as litigants but rather mandates or permits the application of state law.

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TAB 7B

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

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CHAIR

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SECRETARY

December 22, 2011

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The Honorable Sandra L. Lynch
United States Court of Appeals
for the First Circuit
John Joseph Moakley U.S. Courthouse
One Courthouse Way, Room 8710
Boston, Massachusetts 02210

Dear Sandy:

I write in my capacity as Chair of the Judicial Conference Advisory Committee on Appellate Rules, to seek your Circuit's input concerning a proposal to amend Appellate Rule 29(a)'s list of entities that may file amicus briefs without party consent or court leave. In particular, we would like to know your court's reaction to amending the list to include municipalities and federally recognized Native American Tribes.

The proposal arose from a suggestion that the Appellate Rules be amended to treat federally recognized Native American Tribes the same as States under Rule 29(a). Rule 29(a) says: "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." Rule 1(b) defines "state" to "include[] the District of Columbia and any United States commonwealth or territory." The proponent of the suggestion argues that Rule 29(a) should accord Tribes the same dignity as States—namely, the ability to file amicus briefs without having to seek party consent or court leave.

The Rule 29(a) list, you may be interested to know, differs from the list found in Supreme Court Rule 37.4. That rule says: "No motion for leave to file an amicus curiae brief is necessary if the brief is presented on behalf of the United States by the Solicitor General; on behalf of any agency of the United States allowed by law to appear before this Court when submitted by the agency's authorized legal representative; on behalf of a State, Commonwealth, Territory, or Possession when submitted by its Attorney General; or on behalf of a city, county, town, or similar entity when submitted by its authorized law officer." Like Rule 29(a), Supreme Court Rule 37.4 omits Tribes from the list of consent-free amicus filers; unlike Rule 29(a), it includes municipal governments on the list.

At the committee's request, Marie Leary of the Federal Judicial Center studied amicus filings in the courts of appeals to determine whether and how often the Tribes are denied leave to file amicus briefs. I enclose a copy of her report. Ms. Leary and her colleagues at the FJC searched the CM/ECF database of the courts of appeals; the search was limited to the time span after the relevant courts of appeals had gone "live" in CM/ECF. (For that reason, the FJC study excluded the Second, Eleventh, and Federal Circuits. *See* the enclosed report at page 2 and footnote 1.) Ms. Leary found 180 motions filed by Tribes seeking court permission to file an amicus brief. Of those, 157 were granted, 12 were not ruled on and 11 were denied (no explanations were given for 7 and the other 4 were denied for procedural reasons).

Because Ms. Leary found that most of the activity occurred in the Eighth, Ninth, and Tenth Circuits, I wrote the Chief Judges of those circuits to share with them Ms. Leary's research and to ask for their views on the question of whether a rule authorizing Tribes to file amicus briefs without party consent or court leave should be adopted either in the Appellate Rules or in local circuit rules. The responses varied widely, with one court favoring a change through a national rule, one court expressing indifference, and one court opposing the change.

At our most recent meeting, several committee members urged me to write the other circuits to seek input on the proposed amendment and to broaden the question to whether the list of amicus filers who do not need consent should include Tribes and municipalities. Hence this letter.

In thinking about this proposal, you may wish to consider one other thing—the intersection between the list of amicus filers who do not need consent and Rule 29(c)(5). Rule 29(c)(5) says that, "unless the amicus curiae is one listed in the first sentence of Rule 29(a)," an amicus brief must include:

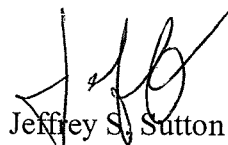
a statement that indicates whether: (A) a party's counsel authored the brief in whole or in part; (B) a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and (C) a person – other than the amicus curiae, its members, or its counsel – contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person.

This authorship-and-funding disclosure requirement, added in 2010, is modeled on a similar requirement in Supreme Court Rule 37.6.

The Honorable Sandra L. Lynch
December 22, 2011
Page 3

Any input on the proposal, whether formal or informal, would be greatly appreciated, particularly if possible before our next meeting (April 12 and 13). I will follow up this letter with a phone call in the next month or so. Thank you for your consideration and hope you are well.

Sincerely,



Jeffrey S. Sutton
Chair, Advisory Committee on Appellate Rules

JSS:jmf
Enclosures

Copies (without enclosures):

Peter G. McCabe
Secretary
Judicial Conference Standing Committee
on Rules of Practice and Procedure

Jonathan C. Rose
Rules Committee Officer

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January 24, 2012

Honorable Jeffrey S. Sutton
United States Court of Appeals
Joseph P. Kinneary
United States Courthouse
85 Marconi Boulevard, Room 260
Columbus, OH 43215

RE: Appellate Rule 29A

Dear Jeff:

This will respond to your December 22, 2011 letter to me concerning possible changes in Appellate Rule 29(a). I circulated your letter to the members of the court and wanted to report back on the various views. Some had no views or were indifferent.

Of those expressing views, there was more support for allowing the Native American tribes an entitlement to file an amicus brief, as states have. This would recognize the fact that the tribes are sovereign entities. That said, at least one judge noted that some circuits have denied such requests and thought there must have been good reasons.

There were more mixed views on whether municipalities should have a similar entitlement. Many of the judges on the court would disfavor this proposal for a variety of reasons. Municipalities are not sovereign entities but merely creatures of the state. One judge suggested that the attorney general for the state should be making the decision about whether the municipality ought to play a role in the federal court litigation.

My overarching concern with both proposals is that they not lead to the recusal of any member of this court, which each has the potential to do. We are a small court (of only six active judges) and the recusal of any one judge creates a major problem for us. It may well determine whether en banc review is granted. In my view, the chances of recusal go up when municipalities are involved, because of the identity of both the municipality and of counsel. At least in this circuit, I think the tribes pose less of a risk of recusal. The Supreme Court does not have the same recusal concerns the Courts of

Appeals have and, in that respect, their rules on amicus are not an appropriate model. By the same token, the recusal of one judge on the Ninth Circuit does not have the effect the recusal of one judge has on the First Circuit. This goes to the issue of the wisdom of a national rule.

I attach a memorandum from our Clerk of Court and Head of our Staff Attorneys which, inter alia, covers this topic.

No one commented on the intersection of this issue with Rule 29(c)(5). My personal view is the information required is very useful to have and would be useful to have for both tribes and municipalities.

I hope this information will be of some use and that the committee in making its decisions will be mindful of the variations among the circuits and whether there is really a need for a national rule.

Sincerely,

Sandra L. Lynch

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**UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

MEMORANDUM

TO: Chief Judge Lynch

FROM: Margaret Carter
Kathy Lanza

DATE: January 23, 2012

RE: Proposed Amendments to Appellate Rule 29(a)

We have reviewed the proposed amendment to Fed. R. App. P. 29(a) and the judges' comments. We agree that there is a strong symbolic argument for amending the rule to include Native American Tribes among the entities entitled to file an amicus brief without leave of court. The argument is less strong for municipalities, which are not sovereign entities but rather creatures of the state. Judge Howard raises a good point that by granting unilateral power to a municipality to file an amicus brief we would preclude the state attorney general from objecting to, and perhaps, preventing such a filing.

There is another issue to consider. Amicus briefs can cause recusals, either because of the potential amici or the attorneys representing them. We are a small court and recusals can create serious problems. If the Rules Committee expands the list of entities that can file an amicus brief as of right, it thereby increases the risk that there will be unavoidable recusals. This could potentially be a problem for our court. It is unclear whether we have the authority to strike a brief that creates a recusal problem where the amicus has a right to file the brief without party consent or court leave.

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Appellate Rule 29(a)

Jef
Judge William B Traxler Jr to: fre 12/29/2011 03:17 PM
y

Sent by: Mary Lee Mowry

Dear Judge Sutton:

I am indifferent as to whether Appellate Rule 29(a) is amended as mentioned in your letter. To the best of my knowledge, we have never had the question raised. Perhaps these are issues best left to the individual circuits.

Sincerely,

Bill Traxler

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UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
219 SOUTH DEARBORN STREET
CHICAGO, ILLINOIS 60604

FRANK H. EASTERBROOK
CHIEF JUDGE

March 16, 2012

Hon. Jeffrey S. Sutton
Chair, Advisory Committee on Appellate Rules
260 Joseph P. Kinneary Courthouse
85 Marconi Boulevard
Columbus, Ohio 43215

Dear Jeff:

Your letter of December 22, 2011, asks for this circuit's views about a proposed amendment to Fed. R. App. P. 29(a) that would treat Indian tribes the same as states for the purpose of filing amicus briefs. (Actually your letter asks about "Native American Tribes," but the word in the Constitution of the United States is "Indian," which is good enough for me. Even those with a penchant for political correctness should recognize that most tribes call themselves Indians.)

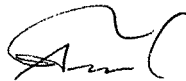
I have asked several of my colleagues, and the universal response is a yawn. The table from the FJC shows that there have been no requests by tribes in this circuit. If there were to be one, it is unlikely to be turned down (let alone ignored, which seems to be common in the ninth circuit). The upshot is that the circuit has no advice to offer the Advisory Committee.

For my own part, however, I have one query: has the Advisory Committee considered whether native corporations in Alaska should be treated as tribes? The Alaska Native Claims Settlement Act of 1970 abolished tribes (and tribal reservations) and substituted 13 corporate organizations. Tribal members were given shares in the corporations. (The web site of Olgoonik Development Corp., www.olgoonik.com, shows the nature and scope of the ventures.) Today each corporation can decide who owns shares. Most have restricted new ownership to children of existing shareholders, and people who claim native descent in Alaska refer to themselves as "shareholders" rather than "tribal members", though many continue to identify their ethnicity as Inupiat, Tlingit, Chugach, or another of the historical tribes.

The corporations are profit-making businesses, which suggests treating them as corporations for the purpose of Rule 29. But they also have assumed many of the social-welfare and community-development functions of the former tribes, which suggests classifying them as tribes for the purpose of Rule 29 (should it be amended). I don't have any view on how the rule should be worded. I just want to ensure that Alaska's native organizations aren't overlooked.

All the best.

Sincerely,

A handwritten signature in black ink, appearing to read "Frank H. Easterbrook", written in a cursive style.

Frank H. Easterbrook

Cc: Peter G. McCabe
Jonathan C. Rose

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United States Court of Appeals

ELEVENTH CIRCUIT

MONTGOMERY, AL 36101-0867

JOEL F. DUBINA
CHIEF JUDGE

P.O. BOX 867
TELEPHONE (334) 954-3560

January 31, 2012

Honorable Jeffrey S. Sutton
Chair, Advisory Committee on Appellate Rules
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Washington, D.C. 20544

Re: Proposal to Amend Appellate Rule 29(a)'s List of Entities That May
File Amicus Briefs Without Party Consent or Court Leave

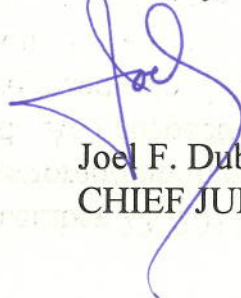
Dear Jeff:

After I received your letter of December 22, 2011, concerning the above issue, I sent a copy of your letter and memorandum to my colleagues asking them for their views on the proposal to amend. As I suspected, my colleagues were about equally divided on whether the proposed rule change that expands the list of entities that may file amicus briefs without party consent or court leave should be adopted. I know that this is probably not much help to you or your committee but, that is the way the court came out on the issue.

I will look forward to seeing you in Washington in March.

Warmest personal regards.

Cordially,



Joel F. Dubina
CHIEF JUDGE

JFD:dv

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United States Court of Appeals
for the Federal Circuit

12-AP-A

Chambers of
Alan D. Lourie
Circuit Judge

717 Madison Place, N.W.
Washington, D.C. 20439
Phone: 202-633-5851

January 30, 2012

The Honorable Jeffrey S. Sutton, Chair
Advisory Committee on Appellate Rules
United States Court of Appeals for the Sixth Circuit
Joseph P. Kinneary United States Courthouse
85 Marconi Boulevard, Room 260
Columbus, OH 43215

Dear Judge Sutton:

Chief Judge Rader has asked me, as chairman of our court's Rules Committee, to respond to your December 22, 2011 request for our views on whether Appellate Rule 29(a) should be amended to permit Native American Tribes to submit amicus briefs to appellate courts without leave of court or consent of all the parties.

Your letter included an analysis by the FJC, the results of which show that most such requests for leave to file in other circuits (81-100%) are granted. Our court was not included because we are not yet on CM/ECF.

Our experience at the Federal Circuit is that Indian tribes are more likely to be parties in our court than to file amicus briefs. They sue the government in the Court of Federal Claims under the Tucker Act for damages, generally for breach of trust or contract, or takings. We hear the appeals. In the last ten years, we have had close to 40 such cases with Indian tribes as parties. In the same period, we have had five requests from Indian tribes to file amicus briefs and they have all been granted. Thus, whether or not the rule is changed doesn't especially matter to us. If we receive motions to file amicus briefs, we will likely grant them. On the other hand, if they were able to be filed without a motion, that should not impact us especially as we would likely have granted them anyway. In fact, a few of our judges suggested that might be preferable. Thus, we would be prepared to accept whatever view the Committee adopts.

The Honorable Jeffrey S. Sutton
Page Two
January 30, 2012

I hope this brief recitation of our views is helpful.

Sincerely,



Alan D. Lourie

cc: Chief Judge Rader

✓ Mr. Peter C. McCabe, Secretary
Judicial Conference Standing Committee
on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, N.E.
Washington, DC 20544

Mr. Jonathan C. Rose,
Rules Committee Officer
Administrative Office of the United States Courts
One Columbus Circle, N.E., Room 7-290
Washington, DC 20544

TAB 4D

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V. Discussion Items

A. Item No. 09-AP-B (definition of “state” and Indian tribes)

Judge Sutton invited Justice Eid to introduce this issue, which concerns a proposal that Appellate Rule 29 be revised to treat federally recognized Native American tribes the same as states for purpose of amicus filings.

Justice Eid reminded the Committee that this item came to the Committee at the suggestion of Daniel Rey-Bear, who asked the Committee to consider adding Indian tribes to the list of entities that can file amicus briefs as of right. The Committee received letters in support

of Mr. Rey-Bear's proposal from a number of groups. The Committee further benefited from a report by Ms. Leary, who examined the frequency of tribal amicus filings and the rate at which leave to file was granted. Ms. Leary found that most such filings occur in the Eighth, Ninth, and Tenth Circuits and that leave to file is typically granted. At the Committee's request, Judge Sutton wrote to the Chief Judges of those three circuits to ask for those circuits' views on the adoption of a local or national rule authorizing filings as of right by tribal amici. The three circuits' responses varied, with the Ninth Circuit expressing support for a national rule, the Tenth Circuit expressing a contrary view, and the Eighth Circuit evincing mixed views. More recently, Judge Sutton wrote to the Chief Judges of the remaining circuits to solicit their views on a possible rule change that would add both tribes and municipalities to the list of entities that can file amicus briefs as of right. Among the circuits that have thus far responded to that letter, the views have been mixed. The Eleventh Circuit appears ambivalent; the First Circuit is more supportive of the idea of authorizing amicus filings by tribes, but also expresses concern about the possible effects of the change on recusal issues (especially if municipalities are included along with tribes); the Seventh Circuit has not expressed a view and does not receive many amicus filings from tribes.

Justice Eid observed that in the Committee's previous discussions, participants have expressed varying views. Justice Eid favors the proposal and views it as a question of dignity for tribes. She noted that she had practiced in the field of federal Indian law, that she lives in a state where two large tribes are located, and that her husband practices federal Indian law. She observed that some participants in the discussion had asked whether the inclusion of tribes on the list of those who can file amicus briefs as of right would place the Committee on a slippery slope by leading to requests to include other types of entities. Participants had suggested, for example, that if the Rule is amended to treat tribes the same as states then the expanded category should include municipalities as well as tribes. Participants had also asked what, if anything, the addition of tribes to the list would suggest about tribal sovereignty generally. Justice Eid suggested that, at this point, the Committee may wish to consider whether it has done all the research that can be done on this issue. Perhaps the Committee could ask Judge Sutton to write to the circuits, summarizing the Committee's research and discussions and leaving the question, for the moment, to each circuit for treatment on a local basis.

Judge Sutton observed that one reason the Committee's discussions expanded to encompass municipalities as well as states was that the Supreme Court's rule authorizes amicus filings (without court permission or party consent) by municipalities but not tribes. He noted that, if municipalities as well as tribes were added to the list of entities that can make amicus filings as of right, the change would not correlate with sovereignty issues because municipalities are not sovereign. Thus far, he observed, there did not appear to be support for adding foreign governments to the list. He noted that, when the Standing Committee has previously discussed this item, participants expressed varying views. Among the responses that the Committee has received thus far from the circuits, a negative response has been received from the Tenth Circuit; and the First Circuit has expressed concern about recusal issues (though that concern arose more with respect to the possible inclusion of municipalities). An attorney member asked whether the Committee knows what, exactly, the recusal practices are in each circuit. Mr. Letter responded

that the practices vary from circuit to circuit, but that he can think of instances when a request to file an amicus brief has been denied because of a recusal issue, and other instances in which a judge has recused from a case because of an amicus filing.

Judge Sutton asked whether – as an interim approach – Committee members favored writing to the circuits to report on the Committee’s discussions to date. The letter would explain that the Committee thinks the issue warrants serious consideration but that the Committee is not sure that now is the time to adopt a national rule change on this issue, and that the Committee plans to revisit the issue in five years. A member stated that this approach sounds right to him, and that he would be very concerned about proceeding with a national rule in the light of the possible recusal issues mentioned by the First Circuit. Mr. Letter noted that the DOJ urges that the Committee consult tribes for their views on this issue. The DOJ, he stated, favors the proposed national rule change for tribes but not for municipalities; the DOJ considers this to be an issue relating to sovereignty and believes that the change would not burden the courts because tribes’ requests to file amicus briefs are usually granted. On the other hand, Mr. Letter observed, the Committee’s discussions have raised some very real practical considerations. The DOJ would not oppose a proposal that would allow circuits to study the issue and adopt a local rule on the subject if they would like. An appellate judge member expressed support for the approach suggested by Judge Sutton; another appellate judge member agreed. Professor Coquillette observed that, in the past, other committees have dealt with some issues in a similar way.

Mr. Letter suggested that Judge Sutton’s letter should note that there is substantial support, within the Committee, for the proposal. Judge Sutton suggested that the letter could say that all members of the Committee believe that the proposal implicates serious dignity issues and think that the proposal warrants serious consideration. Mr. Letter asked whether the letter should say that the Committee believes that the idea of a local rule on the subject is worthy of consideration. Judge Sutton responded that it would be problematic to set a precedent of urging circuits to adopt local rules. A district judge member predicted that a letter from Judge Sutton, representing the sense of the Committee, would usefully generate discussion in circuits where the judges have not previously considered the issue.

A motion was made in support of the proposal that Judge Sutton write to the Chief Judges of each circuit. The motion was seconded and passed by voice vote without opposition. Judge Sutton promised to circulate a draft letter to the Committee members for their feedback during the spring.

TAB 5

TAB 5A

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MEMORANDUM

DATE: October 14, 2017

TO: The Advisory Committee on Appellate Rules

FROM: Gregory E. Maggs, Reporter

RE: New Discussion Item Regarding References to "Proof of Service" in Appellate Rules 5(a)(1), 21(a)(1) and (c), 26(c), 32(f), and 39(d)(1)

I. Introduction

The recently proposed amendments to Appellate Rule 25(d)—which are now before the Supreme Court—will eliminate the requirement of proof of service when a party files a paper using the court's electronic filing system. The elimination of this requirement is potentially problematic for Appellate Rules 5(a)(1), 21(a)(1) and (c), 26(c), and 39(d)(1) because they all refer to "proof of service." This memorandum suggests minor amendments to these Rules. Rule 32(f) also refers to proof of service, but for reasons explained below, this Rule does not require amendment.

II. Elimination of Proof of Service in the Proposed Amendment to Rule 25(d)

Rule 25(d) currently requires filed papers to contain either an acknowledgment of service or proof of service. The Advisory Committee, Standing Committee, and Judicial Conference, however, have proposed a revision of Rule 25(d)(1) that will eliminate these requirements for papers filed through the court's electronic filing system. The provision, if amended, will provide:

Rule 25

* * * * *

(d) Proof of Service.

(1) A paper presented for filing other than through the court's electronic-filing system must contain either of the following:

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

(B) proof of service consisting of a statement by the person who

made service certifying:

9 (i) the date and manner of service;
10 (ii) the names of the persons served; and
11 (iii) their mail or electronic addresses, facsimile numbers, or
12 the addresses of the places of delivery, as appropriate for the
13 manner of service.

14 (2) When a brief or appendix is filed by mailing or dispatch in
15 accordance with Rule 25(a)(2)(~~B~~)(A)(ii), the proof of service must
16 also state the date and manner by which the document was mailed
17 or dispatched to the clerk.

18 (3) Proof of service may appear on or be affixed to the papers filed.

19 * * * * *

The Advisory Committee proposed this amendment to Rule 25(d) to match a comparable amendment to Civil Rule 5(d)(1)(B), which if approved will say: "No certificate of service is required when a paper is served by filing it with the court's electronic-filing system."

II. Appellate Rules Referring to "Proof of Service"

Appellate Rules 5(a)(1), 21(a)(1) and (c), 26(c), 32(f), and 39(d)(1) all refer to "proof of service." The following discussion addresses possible amendments to these rules.

A. Rule 5(a)(1)

Rule 5(a)(1) requires a party requesting permission to appeal to file a petition "with proof of service on all other parties." This requirement of proof of service is problematic for two reasons. First, Rule 5(a)(1) contains no exception for petitions filed electronically. Second, addressing proof of service in Rule 5(a)(1) is unnecessary because Rule 25(d) separately specifies when proof of service is required. A solution to both of these problems may be to delete the reference to proof of service in Rule 5(a)(1), leaving the requirement of proof of service to Rule 25(d). The following discussion draft shows the proposed change:

1 **Rule 5. Appeal by Permission**

2 **(a) Petition for Permission to Appeal.**

3 (1) To request permission to appeal when an appeal is within the court of
4 appeals' discretion, a party must file a petition for permission to appeal. The
5 petition must be filed with the circuit clerk ~~with proof of service~~ and served on
6 all other parties to the district-court action.

7 * * * * *

8 Committee Note

9 The words "with proof of service" in subdivision (a)(1) are deleted because
10 Rule 25(d) specifies when proof of service is required for filed papers. Under
11 Rule 25(d), proof of service is not required when a party files papers using the
12 court's electronic filing system.

B. Rule 21(a) and (c)

Rule 21 concerns writs of mandamus and prohibition and other extraordinary writs. Subdivisions (a)(1) and (c) require the party petitioning for one of these writs to file the petition with "proof of service." These requirements are problematic for the same reason that the requirement in Rule 5(d)(1) is problematic. They make no exception for petitions filed using the court's electronic filing system, and they are unnecessary because Rule 25(d) specifies when proof of service is required. Again, a possible solution is simply to delete the reference to proof of service. A discussion draft with the proposed deletion is shown below:

1 **Rule 21. Writs of Mandamus and Prohibition, and Other Extraordinary**
2 **Writs**

3 **(a) Mandamus or Prohibition to a Court: Petition, Filing, Service, and**
4 **Docketing.**

5 (1) A party petitioning for a writ of mandamus or prohibition directed to a
6 court must file a petition with the circuit clerk ~~with proof of service on~~ and
7 serve all parties to the proceeding in the trial court.

8 * * * * *

9 **(c) Other Extraordinary Writs.** An application for an extraordinary writ
10 other than one provided for in Rule 21(a) must be made by filing a petition with
11 the circuit clerk ~~with proof of service on~~ and serving the respondents.

12 Proceedings on the application must conform, so far as is practicable, to the
13 procedures prescribed in Rule 21(a) and (b).

14 Committee Note

15 The words "with proof of service" in subdivision (a)(1) and (c) are deleted
16 because Rule 25(d) specifies when proof of service is required for filed papers.
17 Under Rule 25(d), proof of service is not required when a party files papers using
18 the court's electronic filing system.

C. Rule 26(c)

Rule 26 provides the rules for computing and extending time. Subdivision (c) contains two sentences, both of which refer to "proof of service." As amended on December 1, 2016, subdivision (c) provides:

1 **Rule 26. Computing and Extending Time**

2 * * * * *

3 **(c) Additional Time after Certain Kinds of Service.** When a party may or
4 must act within a specified time after being served, 3 days are added after the
5 period would otherwise expire under Rule 26(a), unless the paper is delivered on
6 the date of service stated in the proof of service. For purposes of this Rule 26(c), a
7 paper that is served electronically is treated as delivered on the date of service
8 stated in the proof of service.

The first clause of the first sentence of Rule 26(c) states a general rule giving a party three additional days to act after receiving notice. The 2005 Committee Note gives this illustration:

A paper is served by mail on Thursday, November 1, 2007. The prescribed time to respond is 30 days. The prescribed period ends on Monday, December 3 (because the 30th day falls on a Saturday, the prescribed period extends to the following Monday). Under Rule 26(c), three calendar days are added—Tuesday, Wednesday, and Thursday—and thus the response is due on Thursday, December 6.

9 court's electronic filing system is treated as delivered on the date of service stated
10 in the proof of service.

11 Committee Note

12 The amendment makes Rule 26(c) inapplicable when a paper is served using
13 the court's electronic filing system. Because electronic service using the court's
14 electronic filing system is generally instantaneous, a 3-day extension is not
15 necessary. In addition, Rule 26(c) can only apply when there is proof of service,
16 and the amendment to Rule 25(d) has eliminated the requirement of proof of
17 service in cases in which a party uses the court's electronic filing system. Rule
18 26(c) still applies when a party files a paper electronically not using the court's
19 electronic filing system.

D. Rule 32(f)

Rule 32 addresses the forms of briefs, appendices, and other papers. Rule 32(f) lists items that do not count toward the length limitation. In this list, the second to last bullet point states "the proof of service." Even though Rule 25(d) dispenses with the requirement of proof of service when a paper is filed using the court's electronic filing system, this provision does not appear to require any modification. There is no need to specify that some papers will not contain proof of service because the list already contains items that some papers will not include, like a disclosure statement.

1 **Rule 32. Form of Briefs, Appendices, and Other Papers**

2 **(f) Items Excluded from Length.** In computing any length limit, headings,
3 footnotes, and quotations count toward the limit but the following items do not:

- 4 • the cover page;
- 5 • a corporate disclosure statement;¹
- 6 • a table of contents;
- 7 • a table of citations;
- 8 • a statement regarding oral argument;

¹ The Standing Committee has published for public comment a proposal that will change "corporate disclosure statement" to "disclosure statement."

- 9 • an addendum containing statutes, rules, or regulations;
- 10 • certificates of counsel;
- 11 • the signature block;
- 12 • the proof of service; and
- 13 • any item specifically excluded by these rules or by local rule.

E. Rule 39(d)

Rule 39 addresses costs. Subdivision (d) requires a party who wants costs to be taxed to file a bill of costs "with proof of service." Addressing proof of service in this subdivision is unnecessary because Rule 25(d) specifies when proof of service is required and Rule 25(d) does not require proof of service when a party uses the court's electronic filing system. A proposed solution to this problem would be to delete the words "with proof of service." A discussion draft showing the proposed changes follows:

Rule 39. Costs

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

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

Committee Note

In subdivisions (d)(1) the words "with proof of service" are deleted because Rule 25(d) specifies when proof of service is required for filed papers.

III. Conclusion

At its Fall 2017 meeting, the Advisory Committee may wish to discuss and propose amendments to Appellate Rules 5(a)(1), 21(a)(1) and (c), 26(c), and 39(d)(1) to eliminate their references to "proof of service." Amending Rule 32(f) is unnecessary for the reasons given above.

TAB 6

TAB 6A

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MEMORANDUM

DATE: October 17, 2017

TO: Advisory Committee on Appellate Rules

FROM: Gregory E. Maggs, Reporter

RE: New discussion item regarding Appellate Rule 3(c)(1)(B) and the merger rule

Committee Member Neal Katyal has submitted the attached memorandum discussing a possible amendment to Rule 3(c). The Committee may wish to discuss this item at its November 2017 meeting and add the item to its agenda.

Attachment

Memorandum from Neal Kumar Katyal and Sean Marotta to Hon. Neil Gorsuch and Prof. Gregory E. Maggs, regarding Appellate Rule 3(c)(1)(B) and the Merger Rule (October 15, 2016)

TAB 6B



MEMORANDUM

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TO Hon. Neil Gorsuch, Chair
Prof. Gregory E. Maggs, Reporter

ORGANIZATION Advisory Committee on
Appellate Rules

FROM Neal Kumar Katyal
Sean Marotta

TELEPHONE (202) 637-5528

DATE October 15, 2016

By Electronic Mail

SUBJECT Appellate Rule 3(c)(1)(B) and the Merger Rule

We want to bring to your attention a possible issue for the Rules Committee to take up. In particular, we may wish to consider changing the Rules to eliminate a trap for the unwary under the Eighth Circuit’s interpretation of Appellate Rule 3(c)(1)(B), which requires a notice of appeal to “designate the judgment, order, or part thereof being appealed.”

In the Eighth Circuit, a notice of appeal that designates an order in addition to the final judgment excludes by implication any other order on which the final judgment rests. In our view, such forfeiture is not justified by the policies underlying Appellate Rule 3(c)(1)(B).

Below, we lay out the general rule and the Eighth Circuit’s exception, the problems with the Eighth Circuit’s exception, and one proposed fix, should you think it worthwhile for the Committee to investigate the matter.

1. Appellate Rule 3(c)(1)(B) requires that a notice of appeal “designate the judgment, order, or part thereof being appealed.” Under the “merger rule,” a “notice of appeal designating the final judgment necessarily confers jurisdiction over earlier interlocutory orders that merge into the final judgment.” *AdvantEdge Business Grp. v. Thomas E. Mestmaker & Assocs., Inc.*, 552 F.3d 1233, 1236-37 (10th Cir. 2009); *see also, e.g., John’s Insulation, Inc. v. L. Addison & Assocs., Inc.*, 156 F.3d 101, 105 (1st Cir. 1998) (“[I]t has been uniformly held that a notice of appeal that designates the final judgment encompasses not only that judgment, but also earlier interlocutory orders that merge into the judgment.”); *Federal Practice & Procedure* § 3949.4 (4th ed.) (“A notice of appeal that names the final judgment suffices to support review of all earlier orders that merge in the final judgment under the general rule that appeal from a final judgment supports review of all earlier interlocutory orders . . .”). Absent unusual circumstances, then, a notice of appeal satisfies Appellate Rule 3(c)(1)(B) if it designates the final judgment and any order listed in Appellate Rule 4(a)(4)(A). *See* Appellate Rule 4(a)(4)(B)(ii) (requiring the appellant to file a new or amended notice of appeal if an Appellate Rule 4(a)(4)(A) motion is decided after the initial notice of appeal is filed).

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The Eighth Circuit, however, has a rule that kicks in when a notice of appeal designates not just the final judgment, but also one or more interlocutory orders leading up to the final judgment. In those circumstances, “a notice which manifests an appeal from a specific district court order or decision precludes an appellant from challenging an order or decision that he or she failed to identify in the notice.” *Stephens v. Jessup*, 793 F.3d 941, 943 (8th Cir. 2015). So, for instance, if the notice of appeal designates the final judgment and an order dismissing Count I of the complaint, the appellant would forfeit any challenge to a separate order dismissing Count II of the complaint.

2. With respect to the Eighth Circuit, its *exclusio unius* approach to Appellate Rule 3(c)(1)(B) creates an unjustifiable trap for the unwary.

First, the Eighth Circuit’s exception appears to create a circuit split. The Federal Circuit, for instance, has held that the merger rule still applied where an appellant designated the district court’s final judgment as well as “specifically that portion of the Order & Judgment relating to the entry of an Order for Permanent Injunction.” *Cybersettle, Inc. v. National Arbitration Forum, Inc.*, 243 Fed. Appx. 603, 606 (Fed. Cir. 2007). The First Circuit, while not entirely clear, appears to have done the same. *See Markel Am. Ins. Co. v. Diaz-Santiago*, 674 F.3d 21, 26 (1st Cir. 2012) (appearing to reject the argument that designation of one order without another disclaims intention to appeal omitted order).

Second, the Eighth Circuit’s exception to the merger rule creates a perverse incentive to appeal with less, rather than more, specificity. A notice of appeal that names only the final judgment allows the appellant to present in his opening brief essentially any error in the record below. But a notice of appeal that names the final judgment and, say, a major summary-judgment order but not a subsidiary discovery order, narrows the errors assignable by the appellant

Third, the Eighth Circuit’s exception to the merger rule is inconsistent with the purpose behind Appellate Rule 3(c)(1)(B). The purpose of Appellate Rule 3(c)(1)(B) “is to provide sufficient notice to the appellees and the courts of the issues on appeal.” *R.P. ex rel. R.P. v. Alamo Heights Independent School Dist.*, 703 F.3d 801, 808 (5th Cir. 2012). In truth, it is not clear the ordinary notice of appeal carries out this function well; a notice that appeals the bare final judgment does not give much insight on the particular issues the appellant will raise. And appellees have ample way to know what issues are on appeal: Reading the opening brief. We are not aware of many circumstances where appellees have been prejudiced by having to wait until the opening brief to know the particular issues to be argued. But in any event, Appellate Rule 3(c) is to be construed “liberally.” *Smith v. Barry*, 502 U.S. 244, 248 (1992). The Eighth Circuit’s forfeiture rule appears to be contrary to that liberal rule of construction.

3. We propose that the Committee consider adding to Appellate Rule 3(c)(4) or adding a new Appellate Rule 3(c)(5) to overturn the Eighth Circuit’s exception. There is precedent for such an addition. Following *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988), which held that an appellant did not comply with Appellate Rule 3(c) by designating the first party appealing and adding “et al.,” the Court relaxed Rule 3(c)(1)(A) to limit satellite litigation. *See* 1993 Committee Notes to Appellate Rule 3. A similar fix may be order here.

So, for example, the Committee could add a new Appellate Rule 3(c)(4) and renumber existing Rule 3(c)(4) and 3(c)(5) accordingly. A new Rule 3(c)(4) would thus read:

“(4) An notice of appeal that designates the district court’s judgment and any order disposing of a motion listed in Rule 4(a)(4)(A) brings up for review any interlocutory order supporting the judgment or order listed in Rule 4(a)(4)(A). A party does not forfeit any argument on appeal by failing to designate an order other than—or designating orders in addition to—the district court’s judgment and any order disposing of a motion listed in Rule 4(a)(4)(A).”

The first sentence of the proposed new subsection merely restates and codifies the existing merger rule. The second sentence retains the core of existing Appellate Rule 3(c)(1)(B) and 4(a)(4)(B)(ii) by making clear that a notice of appeal should designate the district court’s final judgment and the district court’s order disposing of any motion listed in Rule 4(a)(4)(A). But the second sentence also overturns the Eighth Circuit’s exception to the merger rule—and clears up any uncertainty in the other circuits—by making clear that an appellant’s inartful attempt at greater specificity should not be held against him.

The new proposed Appellate Rule 3(c)(4) does not solve all issues surrounding Rule 3(c)(1)(B). There will be questions of whether a particular interlocutory order supports the judgment for merger-rule purposes and what to do when a notice of appeal fails to designate the final judgment or a Rule 4(a)(4)(A) order. Many of those circumstances are addressed by existing Rule 3(c)(4)’s admonition to not dismiss an appeal for informality of the notice. But the proposed addition makes clear that there should not be a “magic words” approach to the merger rule; a notice of appeal that designates the final judgment and any post-judgment motion should receive the benefits of the rule, regardless of the verbiage it uses in addition to that designation.

TAB 7

TAB 7A

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MEMORANDUM

DATE: October 14, 2017

TO: The Advisory Committee on Appellate Rules

FROM: Gregory E. Maggs, Reporter

RE: New discussion item regarding electronic records and Appellate Rules 10, 11, and 12

I. Introduction

Advisory Committee members Thomas Byron and Douglas Letter have forwarded a suggestion from within the Department of Justice that the Advisory Committee consider whether Appellate Rules 10, 11, and 12 require amendment in light of increased electronic filing. These three rules concern the content, the forwarding, and the filing of the record on appeals from a district court in non-bankruptcy cases.

If the Committee decides to add this item to its agenda, it would not have to begin with a clean slate. Instead, the Committee could rely heavily on amendments made to Rule 6 in 2014. The Committee Note accompanying the 2014 amendments to Rule 6 explained in relevant part: "Due to the shift to electronic filing, in some appeals the record will no longer be transmitted in paper form. Subdivisions (b)(2)(B)(i), (b)(2)(C), and (b)(2)(D) [of Rule 6] are amended to reflect the fact that the record sometimes will be made available electronically." The three cited subdivisions of Rule 6 correspond to provisions of Rules 10, 11, and 12 respectively. This memorandum provides discussion drafts of possible amendments to Rules 10, 11, and 12.

II. Suggested Amendments to Rules 10, 11, and 12

A. The Record on Appeal under Rule 10

Rule 10 concerns the content of records on appeal from the district court in non-bankruptcy cases. As shown in line 77 of attachment 1, the 2014 amendments to Rule 6(b)(2)(B)(i) changed the word "send" to "make available." And as shown in lines 95-135 of attachment 1, changes to Rule 6(b)(2)(C) similarly changed the word "forward" to "make available." The changes reflected the possibility that an electronic record might not be "sent" or

"forwarded" to the circuit clerk but instead simply made available on a computer system. The discussion draft below suggests similar possible amendments to Rule 10(d) and (e).

1 **Rule 10. The Record on Appeal**

2 **(a) Composition of the Record on Appeal.** The following items constitute
3 the record on appeal:

- 4 (1) the original¹ papers and exhibits filed in the district court;
5 (2) the transcript of proceedings, if any; and
6 (3) a certified copy of the docket entries prepared by the district clerk.

7 * * * * *

8 **(d) Agreed Statement as the Record on Appeal.** In place of the record on
9 appeal as defined in Rule 10(a), the parties may prepare, sign, and submit to the
10 district court a statement of the case showing how the issues presented by the
11 appeal arose and were decided in the district court. The statement must set forth
12 only those facts averred and proved or sought to be proved that are essential to the
13 court's resolution of the issues. If the statement is truthful, it—together with any
14 additions that the district court may consider necessary to a full presentation of the
15 issues on appeal—must be approved by the district court and must then be
16 certified to the court of appeals as the record on appeal. The district clerk must
17 then ~~send it~~ **make it available** to the circuit clerk within the time provided by
18 Rule 11. A copy of the agreed statement may be filed in place of the appendix
19 required by Rule 30.

20 **(e) Correction or Modification of the Record.**

- 21 (1) If any difference arises about whether the record truly discloses what
22 occurred in the district court, the difference must be submitted to and settled
23 by that court and the record conformed accordingly.

¹ The word "original" is discussed in part III of this memorandum.

- 24 (2) If anything material to either party is omitted from or misstated in the
25 record by error or accident, the omission or misstatement may be corrected
26 and a supplemental record may be certified and ~~forwarded~~ **made available**:
27 (A) on stipulation of the parties;
28 (B) by the district court before or after the record has been ~~forwarded~~
29 **made available**; or
30 (C) by the court of appeals.
31 (3) All other questions as to the form and content of the record must be
32 presented to the court of appeals.

33 Committee Note

34 Due to the shift to electronic filing, in some appeals the record will no longer
35 be transmitted in paper form. Subdivisions (d) and (e)(2) are amended to reflect
36 the fact that the record sometimes will be made available electronically. The
37 amendments conform with the 2014 amendments to Rules (6)(b)(2)(B)(i) and
38 (b)(2)(C).

b. Forwarding the Record under Rule 11

Rule 11 concerns forwarding the record from the district court to the court of appeals. The 2014 amendments to Rule 6, as shown in line 95-135 of attachment 1, changed the terms "forward" and "send" to "make available" in several places and limited some of the pre-existing rules so that they would apply only "when the record is made available in paper form." The discussion draft below suggests possible similar amendments to various parts of Rule 11.

1 **Rule 11. Forwarding Making the Record Available**

2 (a) **Appellant's Duty.** An appellant filing a notice of appeal must comply with
3 Rule 10(b) and must do whatever else is necessary to enable the clerk to assemble
4 and ~~forward~~ **make available** the record. If there are multiple appeals from a
5 judgment or order, the clerk must ~~forward~~ **make available** a single record.

6 (b) **Duties of Reporter and District Clerk.**

7 * * * * *

8 **(2) District Clerk's Duty to Forward Make Available.** When the record
9 is complete, the district clerk must number the documents constituting the
10 record and ~~send them~~ promptly **make them available** to the circuit clerk
11 together with a list of the documents correspondingly numbered and
12 reasonably identified.² ~~Unless directed to do so by a party or the circuit clerk,~~
13 ~~the district~~ **If the district clerk makes the record available in paper form,**
14 the clerk will not send to the court of appeals documents of unusual bulk or
15 weight, physical exhibits other than documents, or other parts of the record
16 designated for omission by local rule of the court of appeals, **unless directed**
17 **to do so by a party or the circuit clerk.** ~~If the exhibits are~~ unusually bulky or
18 heavy **exhibits are to be made available in paper form,** a party must arrange
19 with the clerks in advance for their transportation and receipt.

20 **(c) Retaining the Record Temporarily in the District Court for Use in**
21 **Preparing the Appeal.** The parties may stipulate, or the district court on motion
22 may order, that the district clerk retain the record temporarily for the parties to use
23 in preparing the papers on appeal. In that event the district clerk must certify to the
24 circuit clerk that the record on appeal is complete. Upon receipt of the appellee's
25 brief, or earlier if the court orders or the parties agree, the appellant must request
26 the district clerk to ~~forward~~ **make** the record **available.**

27 **(d) [Abrogated.]**

28 **(e) Retaining the Record by Court Order.**

29 (1) The court of appeals may, by order or local rule, provide that a certified
30 copy of the docket entries be ~~forwarded~~ **made available** instead of the entire
31 record. But a party may at any time during the appeal request that designated
32 parts of the record be ~~forwarded~~ **made available.**

² The 2014 Amendment to Rule 6(b)(2)(C)(i) deletes the phrase "together with a list of the documents correspondingly numbered and reasonably identified." I did not delete this phrase from this discussion draft of Rule 11 because I was unsure of the purpose of the deletion.

33 (2) The district court may order the record or some part of it retained if the
34 court needs it while the appeal is pending, subject, however, to call by the
35 court of appeals.

36 (3) If part or all of the record is ordered retained, the district clerk must
37 send to the court of appeals a copy of the order and the docket entries together
38 with the parts of the original record allowed by the district court and copies of
39 any parts of the record designated by the parties.

40 * * * * *

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

- 44 • for dismissal;
- 45 • for release;
- 46 • for a stay pending appeal;
- 47 • for additional security on the bond on appeal or on a supersedeas bond;³ or
- 48 • for any other intermediate order—

49 the district clerk must ~~send~~ **make available to** the court of appeals any parts of the
50 record designated by any party.

51 Committee Note

52 Due to the shift to electronic filing, in some appeals the record will no longer
53 be transmitted in paper form. The Rule is amended to reflect the fact that the
54 record sometimes will be made available electronically. The amendments
55 conform with the 2014 amendments to Rule 6(b)(2)(C).

C. Filing the Record under Rule 12

Rule 12(c) concerns filing the record in appeals from district courts in non-bankruptcy cases. As shown in line 136-47 of attachment 1, the 2014 amendment to Rule 6(b)(2)(D)

³ A proposed change of the term "supersedeas bond" is now before the Supreme Court.

substantially changed the corresponding provision for appeals in bankruptcy cases. The discussion draft below suggests a similar amendment to Rule 12(c).

1 **Rule 12. Docketing the Appeal; Filing a Representation Statement; Filing the**
2 **Record**

3 * * * * *

4 (c) **Filing the Record, Partial Record, or Certificate.** ~~Upon receiving the~~
5 ~~record, partial record, or district clerk's certificate as provided in Rule 11, the~~
6 ~~circuit clerk must file it and immediately notify all parties of the filing date.~~

7 **When the district clerk has made the record available, the circuit clerk must**
8 **note that fact on the docket. The date noted on the docket serves as the filing**
9 **date of the record. The circuit clerk must immediately notify all parties of the**
10 **filing date.**

11 Committee Note

12 Due to the shift to electronic filing, in some appeals the record will no
13 longer be transmitted in paper form. Subdivision (c) is amended to reflect the fact
14 that the record sometimes will be made available electronically. The amendment
15 conforms with the 2014 amendment to Rule 6(b)(2)(D).

III. Additional Issues

The discussion drafts above suggest possible amendments to Rules 10, 11, and 12 that correspond to the 2014 amendments to Rules 6(b)(2)(B)(i), 6(b)(2)(C), and 6(b)(2)(D). In addition to these proposed amendments, the Advisory Committee may wish to consider three additional issues.

First, under Rule 10(a)(1), the record consists of "the original papers and exhibits" plus the transcript and docket. The word "original" arguably could pose an obstacle to transmitting the record electronically because it would prevent scanning paper documents and because it is unclear what the term "original papers and exhibits" means when papers and exhibits are filed electronically. One possible solution to this issue would be simply to add a clause authorizing copies of the papers and exhibits if the record is not made available in paper form. The following discussion draft suggests a possible amendment:

1 **Rule 10. The Record on Appeal**

2 **(a) Composition of the Record on Appeal.** The following items constitute
3 the record on appeal:

- 4 (1) the original papers and exhibits filed in the district court or **copies of**
5 **the papers and exhibits if the record is not made available in paper form;**
6 (2) the transcript of proceedings, if any; and
7 (3) a certified copy of the docket entries prepared by the district clerk.

Second, the proposed amendments discussed above do not address the basic question of when the district court may or must forward the record electronically. The Advisory Committee may wish to address this question or may wish, at least for the time being, to have clerks of court work out the answer on the basis of practical considerations.

Third, the Advisory Committee may wish to postpone action on Rules 10, 11, and 12 until the courts of appeals have more experience with electronic filing. Although these rules use arguably outdated or imprecise words such as "send" and "forward," no actual disputes have arisen about their meaning in the context of electronic records. Changing the terms now might create unforeseen issues that are worse than any current ambiguities.

Attachment

Redline version Rule 6 showing the 2014 amendments

TAB 7B

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

1 **Rule 6. Appeal in a Bankruptcy Case ~~From a Final~~**
2 **~~Judgment, Order, or Decree of a District~~**
3 **~~Court or Bankruptcy Appellate Panel~~**

4 **(a) Appeal From a Judgment, Order, or Decree of a**
5 **District Court Exercising Original Jurisdiction in a**
6 **Bankruptcy Case.** An appeal to a court of appeals
7 from a final judgment, order, or decree of a district
8 court exercising jurisdiction under 28 U.S.C. § 1334 is
9 taken as any other civil appeal under these rules.

10 **(b) Appeal From a Judgment, Order, or Decree of a**
11 **District Court or Bankruptcy Appellate Panel**
12 **Exercising Appellate Jurisdiction in a Bankruptcy**
13 **Case.**

14 **(1) Applicability of Other Rules.** These rules
15 apply to an appeal to a court of appeals under

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

2 FEDERAL RULES OF APPELLATE PROCEDURE

16 28 U.S.C. § 158(d)(1) from a final judgment,
17 order, or decree of a district court or bankruptcy
18 appellate panel exercising appellate jurisdiction
19 under 28 U.S.C. § 158(a) or (b). ~~But there are 3~~
20 ~~exceptions,~~ but with these qualifications:
21 (A) Rules 4(a)(4), 4(b), 9, 10, 11, ~~12(b)~~12(c),
22 13-20, 22-23, and 24(b) do not apply;
23 (B) the reference in Rule 3(c) to “Form 1 in the
24 Appendix of Forms” must be read as a
25 reference to Form 5; ~~and~~
26 (C) when the appeal is from a bankruptcy
27 appellate panel, ~~the term~~ “district court,” as
28 used in any applicable rule, means
29 “appellate panel-”; and

30 (D) in Rule 12.1, “district court” includes a
31 bankruptcy court or bankruptcy appellate
32 panel.

33 (2) **Additional Rules.** In addition to the rules made
34 applicable by Rule 6(b)(1), the following rules
35 apply:

36 (A) **Motion for ~~r~~Rehearing.**

37 (i) If a timely motion for rehearing under
38 Bankruptcy Rule ~~8015~~ 8022 is filed,
39 the time to appeal for all parties runs
40 from the entry of the order disposing
41 of the motion. A notice of appeal filed
42 after the district court or bankruptcy
43 appellate panel announces or enters a
44 judgment, order, or decree – but
45 before disposition of the motion for

4 FEDERAL RULES OF APPELLATE PROCEDURE

46 rehearing – becomes effective when
47 the order disposing of the motion for
48 rehearing is entered.

49 (ii) ~~Appellate review of~~ If a party intends
50 to challenge the order disposing of the
51 motion – or the alteration or
52 amendment of a judgment, order, or
53 decree upon the motion – then
54 ~~requires~~ the party, in compliance with
55 Rules 3(c) and 6(b)(1)(B), ~~to amend a~~
56 ~~previously filed notice of appeal. A~~
57 ~~party intending to challenge an altered~~
58 ~~or amended judgment, order, or decree~~
59 must file a notice of appeal or
60 amended notice of appeal. The notice
61 or amended notice must be filed

62 within the time prescribed by Rule 4 –
63 excluding Rules 4(a)(4) and 4(b) –
64 measured from the entry of the order
65 disposing of the motion.

66 (iii) No additional fee is required to file an
67 amended notice.

68 (B) **The ~~r~~Record on aAppeal.**

69 (i) Within 14 days after filing the notice
70 of appeal, the appellant must file with
71 the clerk possessing the record
72 assembled in accordance with
73 Bankruptcy Rule ~~8006~~ 8009 – and
74 serve on the appellee – a statement of
75 the issues to be presented on appeal
76 and a designation of the record to be

6 FEDERAL RULES OF APPELLATE PROCEDURE

77 certified and ~~sent~~ made available to
78 the circuit clerk.

79 (ii) An appellee who believes that other
80 parts of the record are necessary must,
81 within 14 days after being served with
82 the appellant's designation, file with
83 the clerk and serve on the appellant a
84 designation of additional parts to be
85 included.

86 (iii) The record on appeal consists of:
87 • the redesignated record as
88 provided above;
89 • the proceedings in the district
90 court or bankruptcy appellate
91 panel; and

- 92 • a certified copy of the docket
93 entries prepared by the clerk
94 under Rule 3(d).

95 (C) **Forwarding** Making the ~~r~~Record
96 Available.

- 97 (i) When the record is complete, the
98 district clerk or bankruptcy-appellate-
99 panel clerk must number the
100 documents constituting the record and
101 ~~send promptly~~ make it available ~~them~~
102 ~~promptly to the circuit clerk together~~
103 ~~with a list of the documents~~
104 ~~correspondingly numbered and~~
105 ~~reasonably identified~~ to the circuit
106 ~~clerk.~~ clerk. ~~Unless directed to do so by a~~
107 ~~party or the circuit clerk~~ If the clerk

8 FEDERAL RULES OF APPELLATE PROCEDURE

108 makes the record available in paper
109 form, the clerk will not send ~~to the~~
110 ~~court of appeals~~ documents of unusual
111 bulk or weight, physical exhibits other
112 than documents, or other parts of the
113 record designated for omission by
114 local rule of the court of appeals,
115 unless directed to do so by a party or
116 the circuit clerk. If ~~the exhibits are~~
117 unusually bulky or heavy exhibits are
118 to be made available in paper form, a
119 party must arrange with the clerks in
120 advance for their transportation and
121 receipt.
122 (ii) All parties must do whatever else is
123 necessary to enable the clerk to

124 assemble the record and ~~forward the~~
 125 ~~record~~ make it available. When the
 126 record is made available in paper
 127 form, ~~t~~The court of appeals may
 128 provide by rule or order that a certified
 129 copy of the docket entries be ~~sent~~
 130 made available in place of the
 131 redesignated record, ~~b.~~ But any party
 132 may request at any time during the
 133 pendency of the appeal that the
 134 redesignated record be ~~sent~~ made
 135 available.

136 (D) **Filing the rRecord.** ~~Upon receiving the~~
 137 ~~record~~ ~~or a certified copy of the docket~~
 138 ~~entries sent in place of the redesignated~~
 139 ~~record~~ ~~the circuit clerk must file it and~~

10 FEDERAL RULES OF APPELLATE PROCEDURE

140 ~~immediately notify all parties of the filing~~
141 ~~date~~ When the district clerk or bankruptcy-
142 appellate-panel clerk has made the record
143 available, the circuit clerk must note that
144 fact on the docket. The date noted on the
145 docket serves as the filing date of the
146 record. The circuit clerk must immediately
147 notify all parties of the filing date.

148 **(c) Direct Review by Permission Under 28 U.S.C.**
149 **§ 158(d)(2).**

150 **(1) Applicability of Other Rules.** These rules
151 apply to a direct appeal by permission under 28
152 U.S.C. § 158(d)(2), but with these qualifications:
153 (A) Rules 3-4, 5(a)(3), 6(a), 6(b), 8(a), 8(c), 9-
154 12, 13-20, 22-23, and 24(b) do not apply;

155 (B) as used in any applicable rule, “district
156 court” or “district clerk” includes – to the
157 extent appropriate – a bankruptcy court or
158 bankruptcy appellate panel or its clerk; and
159 (C) the reference to “Rules 11 and 12(c)” in
160 Rule 5(d)(3) must be read as a reference to
161 Rules 6(c)(2)(B) and (C).

162 (2) **Additional Rules.** In addition, the following
163 rules apply:

164 (A) **The Record on Appeal.** Bankruptcy
165 Rule 8009 governs the record on appeal.

166 (B) **Making the Record Available.**
167 Bankruptcy Rule 8010 governs completing
168 the record and making it available.

169 (C) **Stays Pending Appeal.** Bankruptcy
170 Rule 8007 applies to stays pending appeal.

171 (D) Duties of the Circuit Clerk. When the
172 bankruptcy clerk has made the record
173 available, the circuit clerk must note that
174 fact on the docket. The date noted on the
175 docket serves as the filing date of the
176 record. The circuit clerk must immediately
177 notify all parties of the filing date.

178 (E) Filing a Representation Statement.
179 Unless the court of appeals designates
180 another time, within 14 days after entry of
181 the order granting permission to appeal, the
182 attorney who sought permission must file a
183 statement with the circuit clerk naming the
184 parties that the attorney represents on
185 appeal.

Committee Note

Subdivision (b)(1). Subdivision (b)(1) is updated to reflect the renumbering of 28 U.S.C. § 158(d) as 28 U.S.C. § 158(d)(1). Subdivision (b)(1)(A) is updated to reflect the renumbering of Rule 12(b) as Rule 12(c). New subdivision (b)(1)(D) provides that references in Rule 12.1 to the “district court” include – as appropriate – a bankruptcy court or bankruptcy appellate panel.

Subdivision (b)(2). Subdivision (b)(2)(A)(i) is amended to refer to Bankruptcy Rule 8022 (in accordance with the renumbering of Part VIII of the Bankruptcy Rules).

Subdivision (b)(2)(A)(ii) is amended to address problems that stemmed from the adoption — during the 1998 restyling project — of language referring to challenges to “an altered or amended judgment, order, or decree.” Current Rule 6(b)(2)(A)(ii) states that “[a] party intending to challenge an altered or amended judgment, order, or decree must file a notice of appeal or amended notice of appeal” Before the 1998 restyling, the comparable subdivision of Rule 6 instead read “[a] party intending to challenge an alteration or amendment of the judgment, order, or decree shall file an amended notice of appeal” The 1998 restyling made a similar change in Rule 4(a)(4). One court has explained that the 1998 amendment introduced ambiguity into that Rule: “The new formulation could be read to expand the obligation to file an amended notice to circumstances where the ruling on the post-trial motion alters the prior judgment in an

insignificant manner or in a manner favorable to the appellant, even though the appeal is not directed against the alteration of the judgment.” *Sorensen v. City of New York*, 413 F.3d 292, 296 n.2 (2d Cir. 2005). Though the *Sorensen* court was writing of Rule 4(a)(4), a similar concern arises with respect to Rule 6(b)(2)(A)(ii). Rule 4(a)(4) was amended in 2009 to remove the ambiguity identified by the *Sorensen* court. The current amendment follows suit by removing Rule 6(b)(2)(A)(ii)’s reference to challenging “an altered or amended judgment, order, or decree,” and referring instead to challenging “the alteration or amendment of a judgment, order, or decree.”

Subdivision (b)(2)(B)(i) is amended to refer to Rule 8009 (in accordance with the renumbering of Part VIII of the Bankruptcy Rules).

Due to the shift to electronic filing, in some appeals the record will no longer be transmitted in paper form. Subdivisions (b)(2)(B)(i), (b)(2)(C), and (b)(2)(D) are amended to reflect the fact that the record sometimes will be made available electronically.

Subdivision (b)(2)(D) sets the duties of the circuit clerk when the record has been made available. Because the record may be made available in electronic form, subdivision (b)(2)(D) does not direct the clerk to “file” the record. Rather, it directs the clerk to note on the docket the date when the record was made available and to notify the parties of that date, which shall serve as the date of filing the record for purposes of provisions in these Rules that calculate time from that filing date.

Subdivision (c). New subdivision (c) is added to govern permissive direct appeals from the bankruptcy court to the court of appeals under 28 U.S.C. § 158(d)(2). For further provisions governing such direct appeals, see Bankruptcy Rule 8006.

Subdivision (c)(1). Subdivision (c)(1) provides for the general applicability of the Federal Rules of Appellate Procedure, with specified exceptions, to appeals covered by subdivision (c) and makes necessary word adjustments.

Subdivision (c)(2). Subdivision (c)(2)(A) provides that the record on appeal is governed by Bankruptcy Rule 8009. Subdivision (c)(2)(B) provides that the record shall be made available as stated in Bankruptcy Rule 8010. Subdivision (c)(2)(C) provides that Bankruptcy Rule 8007 applies to stays pending appeal; in addition, Appellate Rule 8(b) applies to sureties on bonds provided in connection with stays pending appeal.

Subdivision (c)(2)(D), like subdivision (b)(2)(D), directs the clerk to note on the docket the date when the record was made available and to notify the parties of that date, which shall serve as the date of filing the record for purposes of provisions in these Rules that calculate time from that filing date.

Subdivision (c)(2)(E) is modeled on Rule 12(b), with appropriate adjustments.

Changes Made After Publication and Comment

No changes were made after publication and comment.

TAB 8

TAB 8A

MEMORANDUM

DATE: October 15, 2017

TO: The Advisory Committee on Appellate Rules

FROM: Gregory E. Maggs, Reporter

RE: New discussion item regarding a circuit split on whether attorney's fees are "costs on appeal" under Rule 7

At the Advisory Committee's May 2017 meeting, Rules Law Clerk Lauren Gailey volunteered to research an apparent circuit split on whether attorney's fees are "costs on appeal" under Appellate Rule 7. Ms. Gailey subsequently prepared the attached thorough memorandum on the subject. Rule 7 provides:

1 **Rule 7. Bond for Costs on Appeal in a Civil Case**

2 In a civil case, the district court may require an appellant to file a bond or provide
3 other security in any form and amount necessary to ensure payment of costs on
4 appeal. Rule 8(b) applies to a surety on a bond given under this rule.

On the question "May attorney's fees be included in the amount of a bond under Appellate Rule 7," Ms. Gailey reaches the following conclusions:

- Yes in the First, Second, Sixth, Ninth, and Eleventh Circuits, if a fee-shifting statute entitles the successful appellee to attorney's fees as "costs"
- Likely yes in the Eighth and Tenth Circuits, which have followed the majority position's logic in different contexts
- Likely yes in the D.C. Circuit, where precedent to the contrary has been implicitly overruled . . . ; and
- Likely no in the Third Circuit, where district courts continue to follow an unpublished decision reaching the opposite conclusion

At its November 2017 meeting, the Advisory Committee may wish to discuss possible responses to this research. One response might be to propose an amendment to Rule 7 to specify expressly whether or under which circumstances attorney's fees may be included. Another

response might be to write a letter to the chief judges of the courts of appeals for each circuit calling their attention to the apparent circuit split.

Attachment

Memorandum from Ms. Lauren Gailey, Rules Law Clerk to Appellate Rules Advisory Committee (July 28, 2017)

TAB 8B

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MEMORANDUM

TO: Appellate Rules Advisory Committee

FROM: Lauren Gailey, Rules Law Clerk

DATE: July 28, 2017

RE: Circuit split: Whether attorney’s fees are “costs on appeal” under Appellate Rule 7

Appellate Rule 7 provides that “[i]n a civil case, the district court may require an appellant to file a bond or provide other security in any form and amount necessary to ensure payment of costs on appeal.” In 2016, the Rules Law Clerk compiled a list of splits in authority as to the interpretation of the federal rules, one of which involved whether the term “costs on appeal” for the purposes of Rule 7 includes attorney’s fees. See Memorandum from Derek A. Webb to Advisory Committee on Appellate Rules 3–4 (Mar. 17, 2016) (on file with Rules Committee Support Office).

Five federal courts of appeals have held that “costs on appeal” that may be included in the amount of a Rule 7 bond can include attorney’s fees, if they are authorized by a substantive statute at issue in the case. See *Int’l Floor Crafts v. Dziemit*, 420 F. App’x 6, 17 (1st Cir. 2011); *Azizian v. Federated Dep’t Stores, Inc.*, 499 F.3d 950, 958 (9th Cir. 2007); *In re Cardizem CD Antitrust Litig.*, 391 F.3d 812, 815, 818 (6th Cir. 2004); *Pedraza v. United Guar. Corp.*, 313 F.3d 1323, 1329–30 (11th Cir. 2002); *Adsani v. Miller*, 139 F.3d 67, 71 (2d Cir. 1998). An earlier decision permitted a bond that included attorney’s fees where the appeal was likely frivolous under Appellate Rule 38. *Skolnick v. Harlow*, 820 F.2d 13, 15 (1st Cir. 1987) (per curiam). Two other courts of appeals have held that attorney’s fees are not “costs.” See *Hirschensohn v. Lawyers Title Ins. Corp.*, No. 96-7312, 1997 WL 307777, at *3 (3d Cir. 1997); *In re Am. President Lines, Inc.*, 779 F.2d 714, 716 (D.C. Cir. 1985) (per curiam).

The advisory committee first discussed this split, among others, at its spring 2016 meeting. See Draft Minutes of the Spring 2016 Meeting of the Advisory Committee on Appellate Rules (April 5, 2016), in *Agenda Book for Advisory Committee on Appellate Rules*, Washington, D.C., October 18, 2016, at 29 (2016). When the split was discussed in greater depth at the fall 2016 meeting, then-Judge Neil M. Gorsuch, who was chair of the advisory committee at the time, and other members wondered how often the Rule 7 issue arises. See Draft Minutes of the Fall 2016 Meeting of the Advisory Committee on Appellate Rules (October 18, 2016), in *Agenda Book for Advisory Committee on Appellate Rules*, San Diego, CA, May 2, 2017, at 27 (2017).¹ This memorandum is intended to answer that question and explore the circuit split in greater detail.

I. The Circuit Split

The issue of whether attorney’s fees are “costs on appeal” under Appellate Rule 7 typically arises when the district court, having determined that a bond is appropriate, must calculate its

¹ The spring 2017 meeting was moved to Washington, D.C. after the agenda book was published.

amount: Should it include attorney’s fees? *See, e.g., In re Porsche Cars N. Am., Inc. Plastic Coolant Tubes Prod. Liab. Litig.*, No. 11-2233, 2014 WL 2931465, at *3 (S.D. Ohio June 30, 2014); *Valentini v. Citigroup, Inc.*, No. 11-1355, 2014 WL 502066, at *3 (S.D.N.Y. Feb. 7, 2014).

A. Minority Position: “Costs” Do Not Include Attorney’s Fees

The Third and D.C. Circuits are usually described as taking the minority position that “costs on appeal” for Rule 7 purposes do not include attorney’s fees. The leading treatises initially took this view as well. *See* 20 JAMES W. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 307.10[2] (3d ed. 2002) (“Attorney’s fees . . . are not considered to be costs under Appellate Rule 7.”); CHARLES A. WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 3953 (3d ed. 1999) (“The costs secured by a Rule 7 bond are limited to costs taxable under Appellate Rule 39. They do not include attorney fees that may be assessed on appeal.”). Upon closer inspection, however, the minority position is not monolithic.

1. American President Lines: D.C. Circuit Rejects “Frivolous Appeal” Rationale

The first court of appeals to decide the attorney’s fees issue was the U.S. Court of Appeals for the D.C. Circuit in *In re American President Lines, Inc.*, 779 F.2d 714 (D.C. Cir. 1985). In a per curiam opinion, the court reduced the amount of an appeal bond from \$10,000—a figure that included attorney’s fees—to \$450. *Id.* at 716, 719. Although the court “sympathize[d] fully with the District Court’s desire to protect [the appellee] from further expense” at the hands of an “unremitting[.]” litigant, it rejected each of the district court’s justifications for the \$10,000 figure, including its concern that the “appeal might turn out to be frivolous.” *Id.* at 717, 719. The court of appeals reasoned that an award of attorney’s fees as a remedy for a frivolous appeal is governed not by Rule 7 but by Appellate Rule 38, which assigns the determination of frivolousness to the appellate court rather than the district court.² *Id.* at 717.

In a brief analysis, the court cited *Moore’s* and *Wright & Miller*—but no case law, *Adsani*, 139 F.3d at 73—for the proposition that “costs” under Rule 7 “are simply those that may be taxed against an unsuccessful litigant under Federal Appellate Rule 39, and do not include attorneys’ fees that may be assessed on appeal.” *Am. President Lines*, 779 F.2d at 716. It relied on several pre-Appellate Rules decisions in concluding that a Rule 7 bond “may cover only taxable costs, not attorneys’ fees or other expenses.” *Id.* at 717 (citing *Levine v. Bradlee*, 378 F.2d 620, 622 (3d Cir. 1967) (describing in procedural history district court’s order that appellant seeking attorney’s fees in shareholder derivative suit file “a cost bond, as distinguished from a bond for expenses,” under a local rule), *Smoot v. Fox*, 353 F.2d 830, 832 (6th Cir. 1965) (district court’s imposition of a bond covering attorney’s fees as a precondition for granting a pretrial conference was improper in the absence of a fee-shifting statute), and *McClure v. Borne Chem. Co.*, 292 F.2d 824, 835 (3d Cir. 1961) (under rule of “general federal equity law” that “litigation expenses, including reasonable attorney’s fees,” are awarded to the prevailing party at final judgment only in “exceptional” cases, district court lacked discretion to require security that included attorney’s fees)).

² Under Appellate Rule 38, “[i]f a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.”

2. *Hirschensohn*: Third Circuit Assumes Rule 39 Defines “Costs”

Twelve years later, the U.S. Court of Appeals for the Third Circuit followed a different path to the same result in *Hirschensohn v. Lawyers Title Insurance Corp.*, No. 96-7312, 1997 WL 307777, at *3 (3d Cir. June 10, 1997). In essence, *Hirschensohn*'s rationale is a syllogism: Appellate Rule 39 defines “costs” for the purposes of Appellate Rule 7, and “[a]ttorneys’ fees are not among the expenses that are described as costs for purposes of Rule 39”; therefore, attorney’s fees are not “costs” under Rule 7.³ See *id.* at *1, *3. For the major premise that “[c]osts’ referred to in Rule 7 are those that may be taxed against an unsuccessful litigant under Federal Rule of Appellate Procedure 39,” the court cited *American President Lines* and the then-current editions of the leading treatises. *Id.* at *1–2.

The court analogized to cases examining “the relationship between attorneys’ fees and costs in a variety of statutory contexts,” which consistently “held that attorneys’ fees are distinct from the ‘costs’ defined by Rule 39.” *Id.* at *1–2. It also implicitly relied on the relationship between Rule 7 and Rule 39 to distinguish *Marek v. Chesny*, 473 U.S. 1 (1985), which was decided six months before *American President Lines* but not addressed there. See *Hirschensohn*, 1997 WL 307777, at *2. The U.S. Supreme Court had held in *Marek* that “costs” for the purposes of Civil Rule 68 *did* include attorney’s fees, but the court of appeals reasoned that while “Rule 68 . . . does not define costs, Rule 39 does so in some detail.” *Id.* Instead, it followed a 1992 Third Circuit case rejecting the argument that “‘costs’ under Rule 39 included attorneys’ fees authorized by 42 U.S.C. § 1988” and held that “Rule 7 does not authorize a bond to cover estimated costs of attorneys’ fees.” *Id.* at *2–3.

In closing, the court of appeals announced an “additional ground” for its holding: the provision of the Virgin Islands Code authorizing awards of attorney’s fees does not apply to federal appeals. *Id.* at *3. The court had noted earlier in the opinion the statement in the committee note to Rule 39 that some “statutes contain specific provisions in derogation of these general provisions,” *id.* at *1 n.1, such as “28 U.S.C. § 1928, which forbids the award of costs to a successful plaintiff in a patent infringement action under the circumstances described by the statute,” FED. R. APP. P. 39(a) advisory committee’s note to 1967 adoption. The court read the note’s directive that “[t]hese statutes are controlling in cases to which they apply” as applicable only to subdivision (a), “which describes the circumstances under which costs should be awarded—not which items are included within the term ‘costs.’”⁴ See *Hirschensohn*, 1997 WL 307777, at *1 n.1.

³ Under Appellate Rule 39(e), “[t]he following costs on appeal are taxable in the district court for the benefit of the party entitled to costs under this rule:

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

⁴ Appellate Rule 39(a) provides:

- (a) Against Whom Assessed. The following rules apply unless the law provides or the court orders otherwise:
 - (1) if an appeal is dismissed, costs are taxed against the appellant, unless the parties agree otherwise;

3. Are American President Lines and Hirschensohn Good Law?

The precedential value of *American President Lines* and *Hirschensohn* has been questioned. See, e.g., *Sky Cable, LLC v. Coley*, No. 11-48, 2017 WL 437426, at *5 (W.D. Va. Jan. 31, 2017) (“To the extent *In re Am. President Lines, Inc.* and *Hirschensohn* restrict Rule 7 appeal bonds to those costs contemplated in Rule 39, they do so in mere *dicta*; that rule is not essential to those cases’ result.”); *In re Certaineed Fiber Cement Siding Litig.*, MDL No. 2270, 2014 WL 2194513, at *3 (E.D. Pa. May 27, 2014) (“With respect to whether attorneys’ fees can be included when determining the appropriate amount of a Rule 7 appeal bond, there is no binding authority for the Court to follow.” (alterations and quotation marks omitted)); *Star Pac. Corp. v. Star Atl. Corp.*, No. 08-4957, 2013 WL 637686, at *1 n.3 (D.N.J. Feb. 20, 2013) (“Recognizing that *Hirschensohn* is an unpublished case, this Court finds it appropriate to review cases from sister circuits addressing this issue.”).

One court reasoned that *Hirschensohn* was “narrow,” “address[ing] whether attorneys’ fees could be included as a cost under Rule 7” rather than “provid[ing] an exhaustive definition of a Rule 7 cost,” and declined to extend it to the related issue of whether settlement-fund administrative expenses are “costs on appeal” under Rule 7. *Rougvie v. Ascena Retail Grp., Inc.*, No. 15-724, 2016 WL 6069968, at *5–6 (E.D. Pa. Oct. 14, 2016). *But see Schwartz v. Avis Rent a Car Sys., LLC*, No. 11-4052, 2016 WL 4149975, at *3 (D.N.J. Aug. 3, 2016) (describing *Hirschensohn* as “often-cited” and “thorough” and relying on *Hirschensohn*, which “more pointedly addresses the issue of costs appropriately included under Rules 7 and 39,” to conclude that “administrative costs are not included in a Rule 7 bond”). Nevertheless, district courts in the Third Circuit generally continue to follow *Hirschensohn*. See, e.g., *Rossi v. Proctor & Gamble Co.*, No. 11-7238, 2014 WL 1050658, at *2 (D.N.J. Mar. 17, 2014) (“Although *Hirschensohn* is an unreported decision, its reasoning remains sound. Thus, the Court sees no reason to deviate from the Third Circuit’s practice of excluding attorneys’ fees from Rule 7 appeal bonds.”), *aff’d*, 597 F. App’x 69 (2015) (per curiam) (stating that “[w]e agree with the disposition of this case” but not addressing the Rule 7 issue).

The years have been less kind to *American President Lines*, which was either modified or implicitly overruled by *Montgomery & Associates v. Commodity Futures Trading Comm’n*, 816 F.2d 783 (D.C. Cir. 1987). *Sky Cable*, 2017 WL 437426, at *5. In *Montgomery*, the court denied a motion for costs as time-barred, but acknowledged that attorney’s fees were expressly required “to be taxed and collected as a part of [appellee’s] costs” under the statute at issue. 816 F.2d at 784 (alteration in original). The court explained that “no language . . . in Rule 39[] enumerates what items are included in ‘costs’ or suggests an exception for attorneys’ fees deemed to be costs by statute,” and “the Supreme Court has indicated [in *Marek*] that it takes seriously a statutory definition of attorneys’ fees as ‘costs.’” *Id.* After *Montgomery*, courts have recognized that *American President Lines* “provides an ambiguous precedent of little authority.” *Adsani*, 139 F.3d at 73 n.6; see also, e.g., *Sky Cable*, 2017 WL 437426, at *5 (recognizing overruling); *Cobell v.*

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- (2) if a judgment is affirmed, costs are taxed against the appellant;
 - (3) if a judgment is reversed, costs are taxed against the appellee;
 - (4) if a judgment is affirmed in part, reversed in part, modified, or vacated, costs are taxed only as the court orders.

Salazar, 816 F. Supp. 2d 10, 15 (D.D.C. 2011) (following *Montgomery* in concluding that “attorneys’ fees are permitted only if the applicable statute deems attorneys’ fees to be ‘costs’”).

B. Majority Position: “Costs” May Include Attorney’s Fees, if a Fee-shifting Statute So Provides

The prevailing trend favors permitting attorney’s fees to be included in the Rule 7 bond amount—at least where the underlying substantive statute allows. *Wright & Miller* and *Moore’s* no longer take the position that attorney’s fees are not “costs” under Rule 7; they now acknowledge that authority on the subject is divided. 20 JAMES W. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* § 307.21 (2017); 16A CHARLES A. WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & CATHERINE T. STRUVE, *FEDERAL PRACTICE & PROCEDURE* § 3953 (4th ed. 2008).

1. Skolnick: First Circuit Affirms Bond That Included Fees Under Rule 38

In 1987, the U.S. Court of Appeals for the First Circuit became the first federal court of appeals to permit attorney’s fees to be included in a Rule 7 bond. In *Skolnick v. Harlow*, 820 F.2d 13 (1st Cir. 1987), the court in a per curiam opinion affirmed a Rule 7 order imposing a \$5,000 bond—an amount “by no means unprecedented”—where the “plaintiff [wa]s a litigious *pro se* who has filed numerous lawsuits in state court.” *Id.* at 15. Given the circumstances, the court of appeals could not conclude that the district court, which had “implied . . . that the appeal might be frivolous and that an award of sanctions against plaintiff on appeal [under Appellate Rule 38] was a real possibility,” had abused its discretion. *Id.* *But see Adsani*, 139 F.3d at 71 (reviewing legal question of “the extent and type of costs allowable under Rule 7” *de novo*). The brief analysis cited no case law and did not discuss *American President Lines*, which had been decided two years earlier. *See Azizian*, 499 F.3d at 956.

Skolnick remains the only federal appellate decision permitting attorney’s fees to be included in the Rule 7 bond amount based on whether the appeal was likely to be deemed frivolous. *See Khoday v. Symantec Corp.*, No. 11-180, 2016 WL 4098557, at *2 (D. Minn. July 28, 2016). In 2007, the Ninth Circuit, without expressly acknowledging *Skolnick*, rejected its position that the district court may include in the Rule 7 bond attorney’s fees that could be awarded for a frivolous appeal under Rule 38. *Azizian*, 499 F.3d at 960–61. Instead, the Ninth Circuit followed the D.C. Circuit in *American President Lines* in leaving the determination of the appeal’s merit to the court of appeals. *Id.* at 961. District courts have also criticized or declined to follow *Skolnick*. *See, e.g., Khoday*, 2016 WL 4098557, at *2 (court of appeals should decide whether appeal is frivolous); *In re Navistar Diesel Engine Prod. Liab. Litig.*, No. 11-2496, 2013 WL 4052673, at *2 (N.D. Ill. Aug. 12, 2013) (“Rule 7 does not permit a district court to include in a bond damages that the court of appeals might later award under Rule 38.”); *Dewey v. Volkswagen of Am.*, No. 07-2249, 2013 WL 3285015, at *2 (D.N.J. Mar. 18, 2013) (acknowledging that “it is tempting to also consider whether the appeal is frivolous when deciding whether to require a bond” but declining to do so).

2. *Adsani and Pedraza*: Whether “Costs” Include Attorney’s Fees Depends on the Wording of the Statute

The first court to adopt the current majority rule, which looks to the underlying substantive statute to determine whether attorney’s fees are “costs,” was the U.S. Court of Appeals for the Second Circuit in *Adsani v. Miller*, 139 F.3d 67 (2d Cir. 1998). There, a plaintiff with no assets in the United States whose copyright action had been dismissed as “objectively unreasonable” appealed an order imposing a \$35,000 Rule 7 bond that included attorney’s fees the defendants might have been entitled to under the Copyright Act’s fee-shifting provision. *Id.* at 69–71.

For the *Adsani* court, the “principal dispute” was “over Rule 39’s relevance to the question of what the term ‘costs’ in Rule 7 means.” *Id.* at 74. The court rejected the plaintiff’s argument that Rule 39 defines “costs” for the purposes of the Appellate Rules, and that by “list[ing] certain costs but mak[ing] no mention of attorney’s fees,” Rule 39 forecloses the possibility that “costs on appeal” under Rule 7 include attorney’s fees. *Id.* at 71, 74. Instead, the court found that “Rule 39 has no definition of the term ‘costs’ but rather defines the circumstances under which costs should be awarded” and sets forth “procedures for taxing them.” *Id.* at 74–75. “Specific costs are mentioned only in the context of *how* that cost should be taxed, procedurally speaking.” *Id.* at 74 (emphasis added). Rule 39 therefore “provides only that . . . costs on appeal go to the winner, and that certain procedures be followed in the taxing of these costs.” *Id.* at 74–75.

The court read *Marek* “to support the view that Rule 39 does not exhaustively define ‘costs.’” *Id.* at 74. *Marek* dealt with Civil Rule 68, which, like Appellate Rule 7, “does not have a pre-existing definition of costs.” *See id.* at 72, 74. “Given the importance of ‘costs’ to the Rule,” the Supreme Court in *Marek* reasoned that the omission of a definition was not “mere oversight”; a more reasonable explanation was that the rulemakers intended “to refer to all costs properly awardable under the relevant substantive statute or other authority,” such as those provided for in the fee-shifting provisions of many statutes, including the Copyright Act. *Id.* at 72. Because “the drafters of Rule 7 . . . were equally aware of the Copyright Act’s provision for the statutory award of attorney’s fees ‘as part of the costs,’ . . . *Marek* provides very persuasive authority for the proposition that the statutorily authorized costs may be included in the appeal bond authorized by Rule 7.” *Id.* at 73. “[W]here, as here, a federal statute includes attorney’s fees ‘as part of the costs’ which may be taxed upon appeal, the district court may factor these fees into its imposition of the bond for costs.” *Id.* at 79. Accordingly, the court affirmed the Rule 7 order and distinguished *American President Lines*, *Skolnick*, and *Hirschensohn*, which “[d]id not address the case where, as here, an independent federal statute explicitly authorizes attorney’s fees ‘as part of the costs.’”⁵ *Id.* at 73–74, 79. To the extent that those decisions looked to Rule 39 to define “costs,” the *Adsani* court simply disagreed. *See* WRIGHT, MILLER, COOPER & STRUVE, *supra*, § 3953.

The U.S. Court of Appeals for the Eleventh Circuit adopted the Second Circuit’s reasoning in *Pedraza v. United Guaranty Corp.*, 313 F.3d 1323 (11th Cir. 2002). The court agreed that *Marek* provided the correct interpretive approach because of the “several substantive and linguistic parallels between [Civil] Rule 68 and [Appellate] Rule 7.” *Id.* at 1332. Like the Second Circuit

⁵ *Skolnick* was brought under, inter alia, 42 U.S.C. § 3612, which does have a fee-shifting provision. *See* 820 F.2d at 14; *see also* § 3612(p) (“In . . . any civil action under this section, the . . . court . . . may allow the prevailing party . . . a reasonable attorney’s fee and costs.”). However, that issue does not appear to have been raised.

in *Adsani*, the *Pedraza* court took the position that “the exclusion of attorneys’ fees from Rule 39 ‘costs’ in no way informs . . . the definition of the term ‘costs’ in Rule 7.” *Id.* at 1330 n.12. The Eleventh Circuit concluded that its meaning “should be derived from the definition of costs contained in the statutory fee shifting provision that attends the plaintiff’s underlying cause of action.” *Id.* at 1333.

Unlike in *Adsani*, however, the provision of the Real Estate Settlement Procedures Act at issue in *Pedraza*, 12 U.S.C. § 2607(d)(5), did not support including attorney’s fees in the bond. *Pedraza*, 313 F.3d at 1334–35. The text of § 2607(d)(5) permitted the court to “award to the prevailing party the court costs of the action *together with* reasonable attorney[’]s fees,” as opposed to “as part of the costs’ or similar indicia that attorneys’ fees are encompassed within costs.” *Id.* at 1333–35 (quoting 42 U.S.C. § 1988(b), which was at issue in *Marek*).⁶

The Eleventh Circuit held in a subsequent § 1988 case that costs for Rule 7 purposes may include attorney’s fees under that statute. *See Young v. New Process Steel, LP*, 419 F.3d 1201, 1204, 1207–08 (11th Cir. 2005) (but reading *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), to prevent district courts from requiring unsuccessful civil rights plaintiffs to post bonds including attorney’s fees “unless the court determines that the appeal is likely to be frivolous, unreasonable, or without foundation”). *Young* stands for the proposition that “courts must look beyond the mere fact that a fee-shifting provision defines attorney’s fees as part of costs, to whether the statute could actually support an award of fees to the appellees.” *Azizian*, 499 F.3d at 958.

3. *Cardizem, Azizian, and Dziemit*: Whether Fees Are “Costs” Depends on the Statute’s Operation

The U.S. Court of Appeals for the Sixth Circuit adopted the same general reasoning as *Adsani* and *Pedraza* in *In re Cardizem CD Antitrust Litigation*, 391 F.3d 812 (6th Cir. 2004), where the court affirmed an order imposing a \$174,429 appeal bond upon a class-action settlement objector. *Id.* at 815, 818. The court agreed that *Marek* supplied the proper interpretive framework and that Rule 39 “does not define ‘costs’” but “merely lists which costs of appeal can be ‘taxed’ by the district court if it chooses to order one party to pay costs to the other.” *Id.* at 817.

But whereas the Eleventh Circuit in *Pedraza* defined “costs” for Rule 7 purposes according to “the definition of costs contained in the statutory fee shifting provision” and distinguished between the statutory terms “costs” and “fees,” 313 F.3d at 1333–34, the Sixth Circuit read *Marek* not to “require that the underlying statute provide a *definition* for ‘costs,’” but to include “sums [that] are ‘properly awardable’ under the underlying statute,” *Cardizem*, 391 F.3d at 817 n.4 (emphasis added).⁷ Accordingly, the court affirmed the inclusion of attorney’s fees in the bond

⁶ The U.S. District Court for the District of Columbia has also taken this language-centric approach. *See Cobell*, 816 F. Supp. 2d at 15 (attorney’s fees are not “costs” under Rule 7 because provision of the Equal Access to Justice Act awarding “expenses of attorneys, *in addition to the costs which may be awarded pursuant to subsection (a)*, to the prevailing party,” 28 U.S.C. § 2412(a)(1), “could not be clearer that attorneys’ fees are not considered to be the same thing as costs” (emphasis in original)).

⁷ Identifying the “underlying statute” is not always easy where the appellant contesting the Rule 7 bond is a class action settlement objector. *See In re Porsche*, 2014 WL 2931465, at *3. In *Cardizem*, for example, the class action raised various federal and state substantive laws, but the court looked only to the Tennessee statute at issue in

because the statute’s fee-shifting provision expressly permitted an award of “reasonable attorney’s fees and costs.” *Id.* at 817–18; *see also In re Porsche*, 2014 WL 2931465, at *3 (“The movants suggest that the analysis ends whenever an underlying statute contains a fee-shifting provision; however, that is not accurate. The Court must analyze the fee-shifting provision at issue to determine whether attorney’s fees are ‘properly awardable’ under that provision in each case.”); WRIGHT, MILLER, COOPER & STRUVE, *supra*, § 3953 (explaining that the *Cardizem* court rejected the argument that “the linguistic distinction between fees and costs barred the inclusion of the fees in the Rule 7 bond”).

In *Azizian v. Federated Department Stores, Inc.*, 499 F.3d 950 (2007), the U.S. Court of Appeals for the Ninth Circuit “agree[d] with the Second, Sixth, and Eleventh Circuits and h[e]ld that the term ‘costs on appeal’ in Rule 7 includes all expenses defined as ‘costs’ by an applicable fee-shifting statute, including attorney’s fees.” *Id.* at 958. The court listed four reasons for adopting the majority rule: (1) “Rule 7 does not define ‘costs on appeal,’” and the rulemakers were aware of the many federal statutes that “departed from the American rule by defining ‘costs’ to include attorney’s fees”; (2) Rule 39 contains “no indication that [its] drafters intended [it] to define costs for purposes of Rule 7 or for any other appellate rule”; (3) “*Marek* counsels that we must take feeshifting statutes at their word,” despite criticism that “minor and quite possibly unintentional” wording differences in could have unintended consequences; and (4) permitting district courts to include attorney’s fees in the bond amount “comports with their role in taxing the full range of costs of appeal.” *Id.* at 958–59.

Although the court of appeals generally permitted “district courts to include appellate attorney’s fees in estimating and ordering security for statutorily authorized costs under Rule 7,” it held that the district court had erred in doing so in that particular case. *Id.* at 959. *Azizian* was brought under an “asymmetrical” provision of the Clayton Act permitting recovery of “the cost of suit, including a reasonable attorney’s fee” only by prevailing plaintiffs, and it was the defendants who had appealed. *Id.* Because the court held that fees were not properly included in the bond under those circumstances, *id.* at 960, even though that statutory language provided “indicia that attorneys’ fees are encompassed within costs” under *Pedraza*, 313 F.3d at 1334, the Ninth Circuit seems to have taken the position of *Young* and *Cardizem* that the statute’s practical operation—not its words alone—determines whether attorney’s fees are “costs on appeal.” *See also In re Porsche*, 2014 WL 2931465, at *3 (when applying *Cardizem* to an asymmetrical fee-shifting provision, the court must ask whether the party seeking the fee award would *actually* be entitled to an award of attorney’s fees).

In 2011, the U.S. Court of Appeals for the First Circuit had occasion to revisit the Rule 7 issue in *International Floor Crafts, Inc. v. Dziemit*, 420 F. App’x 6 (1st Cir. 2011). Instead of confronting its earlier decision in *Skolnick*, which was based on a much-criticized rationale involving whether the appeal was frivolous under Rule 38, *see supra* Part I-B-1, the panel instead affirmed the bond order containing attorney’s fees “on an alternative ground”: “the majority view

the objector’s own suit, which was not certified as a class action. *See* 391 F.3d at 817. Another example is *In re Porsche*, where the district court rejected the contention that it could look to the fee provisions of “any statute in the underlying class action.” 2014 WL 2931465, at *3. Because the objector was “neither an Ohio plaintiff nor a member of the Ohio subclass,” an Ohio consumer statute was not an appropriate basis for “properly awardable” costs; the court instead looked to the federal statute under which the nationwide class’s claims arose. *Id.* at *3–4.

that a Rule 7 bond may include appellate attorneys' fees if the applicable statute underlying the litigation contains a fee-shifting provision that accounts for such fees in its definition of recoverable costs and the appellee is eligible to recover them." *Dziemit*, 420 F. App'x at *17 (assuming "appellate fees are part of the fees calculable as costs under RICO" because appellant had forfeited the argument).

Although these five courts of appeals differ slightly in their methodologies, they nonetheless all adopt the position that attorney's fees *may* be included in the amount of the Rule 7 bond—whether they actually *are* properly included under the circumstances of a given case is a separate question. *See, e.g., Azizian*, 499 F.3d at 959–60 (losing plaintiff could not be ordered to pay fees under Section 4 of the Clayton Act, so they were not properly included in bond); *In re Magsafe Apple Power Adapter Litig.*, 571 F. App'x 560, 563 (9th Cir. 2014) (attorney's fees could not be included in Rule 7 bond in absence of fee-shifting statute); *In re Porsche*, 2014 WL 2931465, at *5 (same).

C. Courts That Have Yet To Decide the Issue

The U.S. Court of Appeals for the Fifth Circuit expressly declined to address the attorney's fees issue in a case involving an objector's appeal of a proposed class settlement. In *Vaughn v. American Honda Motor Co.*, 507 F.3d 295 (5th Cir. 2007), the court acknowledged the split over whether attorney's fees can be included in a Rule 7 bond but did not decide the issue because the district court had not awarded attorney's fees against the appellant.⁸ *Id.* at 299. The court again declined to decide the issue in 2013, *Noatex Corp. v. King Const. of Houston, L.L.C.*, 732 F.3d 479, 489 n.8 (5th Cir. 2013), although a district court read its willingness to "assume without deciding that attorney's fees may constitute costs for Rule 7 purposes" as an implicit endorsement of the majority view, *Ernest v. CitiMortgage, Inc.*, No. 13-802, 2014 WL 294544, at *9 (W.D. Tex. Jan. 22, 2014); *see also Jones v. Singing River Health Sys.*, No. 14-447, 2016 WL 6104342, at *1 (S.D. Miss. Aug. 23, 2016) (citing *Cardizem* and *Pedraza*).

In early 2017, a district court in the Fourth Circuit speculated that the court of appeals would "follow the majority view in allowing attorneys' fees under a Rule 7 bond" based on a 2016 decision in which it had adopted a rationale similar to that of *Adsani*, *Pedraza*, and the other majority-view cases in concluding that attorney's fees were "costs" under Civil Rule 41(d). *Sky Cable*, 2017 WL 437426, at *6 (citing *Andrews v. Am.'s Living Ctrs., LLC*, 827 F.3d 306 (4th Cir. 2016)). Other district courts in the Fourth Circuit also seem inclined to follow the majority approach. *See, e.g., In re Meabon*, No. 15-398, 2017 WL 374921, at *2 n.1 (W.D.N.C. Jan. 25, 2017); *Madison Oslin, Inc. v. Interstate Res., Inc.*, No. 12-3041, 2016 WL 1274094, at *1 (D. Md. Apr. 1, 2016) (implicitly applying majority approach), *appeal dismissed*, Nos. 16-1027, 16-1057 (Apr. 12, 2016).

The U.S. Court of Appeals for the Tenth Circuit held in 2013 that a contractual provision requiring an appeal bond that included attorney's fees was enforceable, but cautioned that "[i]f

⁸ The Fifth Circuit in *Vaughn*, concerned that "imposing too great a burden on an objector's right to appeal may discourage meritorious appeals or tend to insulate a district court's judgment in approving a class settlement from appellate review," reduced the amount of the bond from \$150,000 to \$1,000 on other grounds. 507 F.3d at 300.

Rule 7 set forth the district court’s *exclusive* authority to order a bond to cover appellate costs, [appellants] would be right to complain” because the appellee class representative “ha[d] not pointed to any rule or statute explicitly authorizing the court to impose a bond to cover attorney fees and interest.”⁹ *Hershey v. ExxonMobil Oil Corp.*, 550 F. App’x 566, 569 (10th Cir. 2013) (per curiam). The following year, the court of appeals stated that “other circuit courts addressing the meaning of ‘costs on appeal’ have consistently linked that phrase to costs that a successful appellate litigant can recover pursuant to a specific rule or statute.” *Cf. Tennille v. W. Union Co.*, 774 F.3d 1249, 1255–56 (10th Cir. 2014) (“delay damages” against class-action objectors are not “costs” under Rule 7).

In a case earlier this year involving “costs associated with delays in administering a class action settlement for the length of a class member’s appeal,” the U.S. Court of Appeals for the Eighth Circuit held that “only those costs that the prevailing appellate litigant can recover under a specific rule or statute applicable to the case at hand” may be included in a Rule 7 bond. *In re Target Corp. Customer Data Sec. Breach Litig.*, 847 F.3d 608, 614–15 (8th Cir. 2017), *amended*, 855 F.3d 913 (8th Cir. 2017). Citing *Tennille*, *Cardizem*, *Azizian*, *Adsani*, *Pedraza*, and even *American President Lines*, the court called their approach “sensible and fair” in that, “[b]y linking the amount of the bond to the amount the appellee stands to have reimbursed, the rule secures the compensation due to successful appellees while avoiding creating ‘an impermissible barrier to appeal’ through overly burdensome bonds.” *Id.* at 615 (quoting *Adsani*, 139 F.3d at 76).

II. How Frequently Does the Rule 7 Issue Arise?

Appellate Rule 7 has remained substantively unchanged since it was amended in 1979. *See* WRIGHT, MILLER, COOPER & STRUVE, *supra*, § 3953; *see also* FED. R. APP. P. 7 advisory committee’s note to 1979 amendments (explaining that the bond amount was to be left to the court’s discretion). A Lexis Shepard’s search last updated on July 28, 2017 returned 315 federal cases that have cited Appellate Rule 7 since the amended version became effective on August 1, 1979. In 190 of those, a variation on the term “attorney’s fees” appeared in the same paragraph as the rule citation and the term “costs.”

The incidence of such cases has increased in recent years. Of the 190 Lexis cases, 115 were decided on or after January 1, 2009. Westlaw’s search algorithms, which returned slightly fewer results, yielded approximately 90 relevant decisions since 2009 (after duplicates were removed). Two thirds were decided after January 1, 2013.

But sheer numbers alone do not answer the question of interest to the advisory committee: how frequently the issue of whether attorney’s fees may be included in a Rule 7 bond arises. A closer look at each of the 60 Westlaw cases decided since January 1, 2013 reveals that more than half dealt with the issue in some way—whether analyzing and deciding (or declining to decide)

⁹ The majority rule might extend to private contracts awarding attorney’s fees to the prevailing party; courts have applied logic similar to that of the majority position in such situations. *See, e.g., Valentini* 2014 WL 502066, at *3–4 (“[W]here, as here, a private contractual agreement would require an appealing party to pay attorney’s fees for the appeal, a bond covering likely attorney’s fees is appropriate.”); *Swenson v. Bushman Inv. Props., Ltd.*, No. 10-175, 2013 WL 6491105, at * 1 (D. Idaho Dec. 9, 2013) (imposing bond that included attorney’s fees in accordance with contract).

the legal question, applying settled precedent, or discussing the split in dicta (see case list, attached as Appendix).¹⁰ Perhaps because many of these cases arose in circuits where there is settled law—especially the Ninth, Second, and Third Circuits—a lengthy analysis of the legal question was conducted in a relatively small percentage. *See, e.g., Sky Cable*, 2017 WL 437426, at *3–6 (analyzing circuit split and following majority position in absence of Fourth Circuit precedent). More often, the law is settled, and the issue is whether attorney’s fees should be included in the bond under the circumstances of a particular case. *See, e.g., DeCurtis v. Upward Bound Int’l, Inc.*, No. 09-5378, 2013 WL 3270357, at *6–7 (S.D.N.Y. June 3, 2013) (applying *Adsani*).

III. Conclusion

May attorney’s fees may be included in the amount of a bond under Appellate Rule 7?

- Yes in the First, Second, Sixth, Ninth, and Eleventh Circuits, if a fee-shifting statute entitles the successful appellee to attorney’s fees as “costs,” *see supra* Part I-B-2 & 3;
- Likely yes in the Eighth and Tenth Circuits, which have followed the majority position’s logic in different contexts, *see supra* Part I-C;
- Likely yes in the D.C. Circuit, where precedent to the contrary has been implicitly overruled, *see supra* Part I-A-1 & 3; and
- Likely no in the Third Circuit, where district courts continue to follow an unpublished decision reaching the opposite conclusion, *see supra* Part I-A-2–3.

The issue has arisen with increasing frequency over the past decade to a current average of 0.65 federal cases per month since the beginning of 2013. *See* App’x (listing 36 cases in 55 months from January 2013 through July 2017).

Beyond attorney’s fees, a consensus has emerged in the courts of appeals that “costs on appeal” for the purposes of Rule 7 refers to a broader range of costs and expenses than the “Costs on Appeal Taxable in the District Court” listed in Rule 39. *See, e.g., Golloher v. Todd Christopher Int’l, Inc.*, No. 11-1726, 2014 WL 12625124, at *2 (N.D. Cal. July 7, 2014) (*Azizian* “reject[ed] the position . . . that the term is synonymous with the ‘costs’ listed in Rule 39”); *In re Toyota*

¹⁰ This list includes only cases discussing attorney’s fees under Appellate Rule 7. Cases involving whether attorney’s fees are “costs” for the purposes of other rules, *see, e.g., Hines v. City of Albany*, No. 16-1056, 2017 WL 2871362, at *3 (2d Cir. July 6, 2017) (Rule 39); *Family PAC v. Ferguson*, 745 F.3d 1261, 1265–66 (9th Cir. 2014) (same); *Stockmar v. Colo. Sch. of Traditional Chinese Med., Inc.*, No. 13-2906, 2015 WL 4456207, at *2 (D. Colo. July 21, 2015) (Civil Rule 62), or whether expenses other than attorney’s fees are “costs” under Rule 7, *see, e.g., Tennille*, 774 F.3d at 1255–56 (“delay damages”); *In re Fletcher Int’l Ltd.*, No. 14-2836, 2014 WL 3897565, at *3 (S.D.N.Y. Aug. 6, 2014) (Rule 38 sanctions), are outside the scope of this memorandum.

The omission of cases examining whether other expenses are Rule 7 “costs” is especially significant, as splits of authority also exist as to some of these issues. *Compare Dewey v. Volkswagen of Am.*, Nos. 07-2249, 07-2361, 2013 WL 3285105, at *4 (D.N.J. Mar. 18, 2013) (“[C]ourts have not included administrative costs incurred while the [class action] appeal is pending.”), *with Heekin v. Anthem, Inc.*, No. 05-1908, 2013 WL 752637, at *1 (S.D. Ind. Feb. 27, 2013) (“In class action cases . . . bonds are used to cover excess administrative costs that otherwise would not have been incurred.”); *compare In re Nutella Mktg. and Sales Practices Litig.*, 589 F. App’x 53, 61 (3d Cir. 2014) (appeal bond that included settlement-administration costs was not an abuse of discretion), *with Keller v. Nat’l Collegiate Athletic Ass’n*, No. 09-1967, 2015 WL 6178829, at *2 (N.D. Cal. Oct. 21, 2015) (following *Azizian* and concluding that no statute authorized the inclusion of administrative costs in Rule 7 bond).

Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prod. Liab. Litig., No. 10-2151, 2013 WL 5775118, at *1 (C.D. Cal. Oct. 21, 2013) (“[T]he term ‘costs on appeal’ in Rule 7 includes all expenses defined as ‘costs’ by an applicable fee-shifting statute.”). Even the U.S. Court of Appeals for the Third Circuit, which does not permit attorney’s fees to be included in the Rule 7 bond amount, has affirmed a bond order that included the cost of administering a class-action settlement. *In re Nutella Mktg. and Sales Practices Litig.*, 589 F. App’x 53, 61 (3d Cir. 2014).

The scope of the majority rule continues to expand. Two courts of appeals that have not decided the issue of attorney’s fees under Rule 7 recently followed majority position’s reasoning to conclude that the Rule 7 bond could include “costs” *other* than attorney’s fees if an underlying statute allowed. *See In re Target*, 847 F.3d at 614–15; *Tennille*, 774 F.3d at 1255–56; *see also*, *e.g.*, *Low v. Trump Univ., LLC*, No. 10-940, 2017 WL 2655300, at *4 (S.D. Cal. June 19, 2017) (characterizing *Azizian* as holding that “the term ‘costs on appeal’ in Rule 7 includes all expenses defined as ‘costs’ by an applicable fee-shifting statute, including attorney’s fees”).

APPENDIX

1. *Hershey v. ExxonMobil Oil Corp.*, 550 F. App'x 566, 568–69 & n.3 (10th Cir. 2013)
2. *Noatex Corp. v. King Const. of Houston, L.L.C.*, 732 F.3d 479, 489 (5th Cir. 2013)
3. *RRW Legacy Mgmt. Grp., Inc. v. Walker*, No. 14-326, 2017 WL 1283480, at *2–3 (W.D. Wash. Apr. 6, 2017)
4. *Sky Cable, LLC v. Coley*, No. 11-48, 2017 WL 437426, at *5 (W.D. Va. Jan. 31, 2017)
5. *In re Meabon*, No. 15-398, 2017 WL 374921, at *2 n.1 (W.D.N.C. Jan. 25, 2017)
6. *Ingenuity 13, LLC v. Doe*, No. 12-8333, 2016 WL 4472931, at *3 (C.D. Cal. Aug. 23, 2016)
7. *Jones v. Singing River Health Sys.*, No. 14-447, 2016 WL 6104342, at *1 (S.D. Miss. Aug. 23, 2016)
8. *Schwartz v. Avis Rent a Car Sys., LLC*, No. 11-4052, 2016 WL 4149975, at *3 (D.N.J. Aug. 3, 2016)
9. *Khoday v. Symantec Corp.*, No. 11-180, 2016 WL 4098557, at *2 (D. Minn. July 28, 2016)
10. *Noel v. Terrace of St. Cloud, LLC*, No. 14-597, 2016 WL 3447388, at *2 (M.D. Fla. June 23, 2016)
11. *In re Credit Default Swaps Antitrust Litig.*, No. 13-2476, 2016 WL 2731524, at *19 (S.D.N.Y. Apr. 26, 2016)
12. *In re Polyurethane Foam Antitrust Litig.*, 178 F. Supp. 3d 635, 643–45 (N.D. Ohio 2016)
13. *In re Sandridge Energy, Inc.*, No. 13-102, 2016 WL 4491738, at *3–4 (W.D. Okla. Feb. 18, 2016)
14. *Glaberson v. Comcast Corp.*, No. 03-6604, 2015 WL 7887788, at *3 (E.D. Pa. Dec. 3, 2015)
15. *Chizmar v. ACCO Brands Corp.*, No. 14-2181, 2015 WL 4388326, at *3 (S.D.N.Y. July 17, 2015)
16. *Padgett v. Loventhal*, No. 04-3946, 2015 WL 4240804, at *2 (N.D. Cal. July 13, 2015)
17. *MPC Franchise, LLC v. Tarantino*, No. 11-6310, 2015 WL 1608877, at *2 (W.D.N.Y. Apr. 10, 2015)
18. *Eagle Fuels, LLC v. Perrin*, No. 10-811, 2014 WL 12617433, at *1 (W.D. Mo. Dec. 2, 2014)
19. *U.S. ex rel. Ryan v. Endo Pharm., Inc.*, No. 05-3450, 2014 WL 4209219, at *3 (E.D. Pa. Aug. 25, 2014)
20. *City of Providence v. Aerospostable, Inc.*, No. 11-7132, 2014 WL 6487393, at *1 (S.D.N.Y. Nov. 17, 2014)
21. *U.S. ex rel. Schell v. Bluebird Media, LLC*, No. 12-4019, 2014 WL 3098624, at *1 (W.D. Mo. July 7, 2014)
22. *In re Porsche Cars N. Am., Inc. Plastic Coolant Tubes Prod. Liab. Litig.*, No. 11-2233, 2014 WL 2931465, at *5 (S.D. Ohio June 30, 2014)

23. *In re Certaineed Fiber Cement Siding Litig.*, MDL No. 2270, 2014 WL 2194513, at *3 (E.D. Pa. May 27, 2014)
24. *Rossi v. Proctor & Gamble Co.*, No. 11-7238, 2014 WL 1050658, at *2 (D.N.J. Mar. 17, 2014), *aff'd*, 597 F. App'x 69 (3d Cir. 2015)
25. *Valentini v. Citigroup, Inc.*, No. 11-1355, 2014 WL 502066, at *3–4 (S.D.N.Y. Feb. 7, 2014)
26. *Ernest v. CitiMortgage, Inc.*, No. 13-802, 2014 WL 294544, at *8–9 (W.D. Tex. Jan. 22, 2014)
27. *Swenson v. Bushman Inv. Props., Ltd.*, No. 10-175, 2013 WL 6491105, at *1 (D. Idaho Dec. 9, 2013)
28. *In re Netflix Privacy Litig.*, No. 11-379, 2013 WL 6173772, at *4 (N.D. Cal. Nov. 25, 2013)
29. *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prod. Liab. Litig.*, No. 10-2151, 2013 WL 5775118, at *1 (C.D. Cal. Oct. 21, 2013)
30. *In re Navistar Diesel Engine Prods. Liab. Litig.*, No. 11-2496, 2013 WL 4052673, at *1–3 (N.D. Ill. Aug. 12, 2013)
31. *Trustees of Utah Carpenters' & Cement Masons' Pension Tr. v. Loveridge*, No. 10-809, 2013 WL 4045658, at *1–2 (D. Utah Aug. 8, 2013), *aff'd*, 567 F. App'x 659 (10th Cir. 2014)
32. *Dennings v. Clearwire Corp.*, No. 10-1859, 2013 WL 3553625, at *2 (W.D. Wash. July 11, 2013)
33. *DeCurtis v. Upward Bound Int'l, Inc.*, No. 09-5378, 2013 WL 3270357, at *6–7 (S.D.N.Y. June 3, 2013)
34. *Trout Point Lodge Ltd. v. Handshoe*, No. 12-90, 2013 WL 685978, at *1–2 (S.D. Miss. Feb. 25, 2013)
35. *Star Pac. Corp. v. Star Atl. Corp.*, No. 08-4957, 2013 WL 637686, at *1 n.3 (D.N.J. Feb. 20, 2013)
36. *Hamstein Cumberland Music Grp. v. Estate of Williams*, No. 06-63, 2013 WL 12069013, at *3 (N.D. Okla. Jan. 25, 2013), *report and recommendation adopted*, No. 06-63, 2013 WL 12069014 (N.D. Okla. Feb. 19, 2013)