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

Chicago, Illinois

I. Attendance and Introductions

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

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

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

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

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

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

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

II. Approval of the Minutes of the April 2015 Meeting

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

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

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

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

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

III. Action and Discussion Items

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

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

order if it wishes to stay the issuance of the mandate; (2) address the standard for stays of the mandate; and (3) restructure the Rule to eliminate redundancy.

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

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

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

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

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

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

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

> **Rule 41. Mandate: Contents; Issuance and Effective Date; Stay**
>
> (a) **Contents.** Unless the court directs that a formal mandate issue, the mandate consists of a certified copy of the judgment, a copy of the court's opinion, if any, and any direction about costs.
>
> (b) **When Issued.** The court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time by order. The court may extend the time only in extraordinary circumstances or under Rule 41(d).
>
> (c) **Effective Date.** The mandate is effective when issued.
>
> **(d) Staying the Mandate Pending a Petition for Certiorari.**
>
> ~~(1) **On Petition for Rehearing or Motion.** The timely filing of a~~

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

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

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

Judge Colloton introduced Item No. 08-AP-H and recounted its history. He explained that this item concerns efforts of a would-be appellant to "manufacture" appellate jurisdiction after the disposition of fewer than all the claims in an action by dismissing the remaining claims. The Committee first discussed this matter in November 2008 and then revisited it at seven subsequent meetings. At the April 2015 meeting, by consensus, the Committee decided to take no action on the topic of manufactured finality. A judge member moved to remove the item from the agenda, and another judge member seconded the motion. Without further discussion, the Committee approved the motion by voice vote.

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

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

~~petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, stays the mandate until disposition of the petition or motion, unless the court orders otherwise.~~

~~**(1) Pending Petition for Certiorari.**~~

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Committee was in recess for lunch.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The reporter introduced Item No. 15-AP-E, which concerns four proposals, namely: (1) that filings do not include any part of a social security number; (2) that courts seal financial affidavits filed in connection with motions to proceed in forma pauperis; (3) that opposing parties provide certain types of cited authorities to pro se litigants; and (4) that courts do not prevent pro se litigants from

filing or serving documents electronically. The reporter noted that the Committee had just discussed the fourth issue in connection with the previous item.

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

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

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

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

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

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

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

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

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

The reporter introduced Item No. 15-AP-G, explaining that its proponent requested a "general rule authorizing discretionary appeals of interlocutory orders, leaving it to the court of appeals to sort through those requests on a case by case basis." The reporter briefly summarized the proponent's argument as outlined in the memorandum on the item [Agenda Book at 491-494].

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

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

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

IV. Concluding matters

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

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

The Committee adjourned at 5:00 pm.