MEMORANDUM

TO: **Hon. Jeffrey S. Sutton, Chair**
Committee on Rules of Practice and Procedure

FROM: **Hon. Steven M. Colloton, Chair**
Advisory Committee on Appellate Rules

RE: **Report of Advisory Committee on Appellate Rules**

DATE: **May 18, 2016**

I. Introduction

The Advisory Committee on Appellate Rules met on April 5, 2016 in Denver, Colorado. At this meeting and in subsequent email votes, the Committee decided to propose four sets of amendments for publication. As discussed in Part II below, these amendments would:

(1) conform Appellate Rules 8(a)(1)(B), 8(a)(2)(E), 8(b), 11(g), and 39(e)(3) to the proposed revision of Civil Rule 62 by altering clauses that use the term "supersedeas bond";

(2) allow a court to prohibit or strike the filing of an amicus brief based on party consent under Appellate Rule 29(a) when filing the brief might cause a judge's disqualification;

(3) delete a question in Appellate Form 4 that asks a movant seeking to proceed in forma pauperis to provide the last four digits of his or her social security number; and

(4) revise Appellate Rule 25 to address electronic filing, signatures, service, and proof of service in a manner conforming to the proposed revision of Civil Rule 5.

Part III of this memorandum presents several information items. One item concerns whether Appellate Rules 26.1 and 29(c) should require litigants to make additional disclosures to aid judges in deciding whether to recuse themselves.

Detailed information about the Committee's activities can be found in the attached draft of the minutes of the April meeting and in the attached agenda. The Committee has scheduled its next meeting for October 13-14, 2016, in Washington, D.C. Judge Neil Gorsuch will preside as the new chair of the Advisory Committee.

II. Action Items – for Publication

The Appellate Rules Committee presents the following four action items for publication.

A. Rules 8(a)(1)(B), 8(a)(2)(E), 8(b), 11(g), 39(e)(3): Revising clauses that use the term "supersedeas bond" to conform with the proposed revision of Civil Rule 62(b) [Item 12-AP-D]

The Advisory Committee on Civil Rules is proposing amendments to Civil Rule 62, which concerns stays of judgments and proceedings to enforce judgments. Rule 62(b) currently says: "If an appeal is taken, the appellant may obtain a stay by supersedeas bond . . . ." The proposed amendments will eliminate the antiquated term "supersedeas" and allow an appellant to provide "a bond or other security." A letter of credit is one possible example of security other than a bond.

The Appellate Rules use the term "supersedeas bond" in Rules 8(a)(1)(B), 8(a)(2)(E), 8(b), 11(g), and 39(e)(3). These rules must be amended to conform to the revision of Civil Rule 62(b). Most of the required amendments merely change the term "supersedeas bond" to "bond or other security," with slight variations depending on the context. The proposed amendments to Rule 8(b) are a little more complicated. Rule 8(b) provides jurisdiction to enforce a supersedeas bond against the "surety" who issued the supersedeas bond. Because Rule 62(b) now authorizes both bonds and other forms of security, the term "surety" is now too limiting. For example, the issuer of a letter of credit is not a surety. The Committee proposes amending Rule 8(b) so that the terms encompass sureties and other security providers.

The Committee intends to conform the Appellate Rules to proposed Civil Rule 62 and does not intend any other change in meaning. The Committee has spelled out this objective in the Advisory Committee Notes.

Rule 8. Stay or Injunction Pending Appeal

(a) Motion for Stay.

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

* * *

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

* * *

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

* * *

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

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

Committee Note

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

Rule 11. Forwarding the Record

* * *

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

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

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

Committee Note

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

Rule 39. Costs

* * *

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

(1) the preparation and transmission of the record;

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

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

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

Committee Note

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

B. Rule 29(a): Limitations on the Filing of Amicus Briefs by Party Consent [Item 14-AP-D]

Appellate 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 circuits have adopted local rules that forbid the filing of a brief by an amicus curiae when the filing could cause the recusal of one or more judges. For example, Second Circuit Local Rule 29.1(a) says: "The court ordinarily will deny leave to file an amicus brief when, by reason of a relationship between a judge assigned to hear the proceeding and the amicus curiae or its counsel, the filing of the brief might cause the recusal of the judge." The D.C., Fifth, and Ninth Circuits have similar local rules. These rules are inconsistent with Rule 29(a) because they do not allow the filing of amicus briefs based solely on consent of the parties.

The Advisory Committee presented a proposed amendment to Rule 29(a) in January 2016. Members of the Standing Committee made suggestions concerning the text and raised some policy questions that warranted further discussion. The Advisory Committee considered these matters at its April 2016 meeting and now submits a revised proposal for publication.

1. *Revised Proposal for Publication*

The Advisory Committee submits the following revised proposal for publication. The proposal differs from the January 2016 proposal in three ways. First, the proposed amendment no longer specifies that courts must act "by local rule." Courts may act by local rule, order, or any other means. Second, the revision modifies the text to clarify that local courts may both prohibit the filing of a brief that would cause recusal and also strike a brief after it has been filed if the potential for disqualification is discovered later in a screening process. Third, the rule contains two minor stylistic changes: deletion of a hyphen between "amicus curiae" and changing of the phrase "disqualification of a judge" to "a judge's disqualification."

Rule 29. Brief of an Amicus Curiae

(a) **When Permitted.** The United States or its officer or agency or a state may file an amicus curiae[1] brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing, except that a court of appeals may strike[2] or may prohibit[3] the filing of an amicus brief that would result in a judge's disqualification.[4]

* * *

Committee Note

The amendment authorizes orders or local rules, such as those previously adopted in some circuits, that prohibit the filing of an amicus brief by party consent if the brief would result in a judge's disqualification. The amendment does not alter or address the standards for when an amicus brief requires a judge's disqualification.[5]

2. *Four Additional Issues Raised at the January 2016 Standing Committee*

The Advisory Committee also considered four additional issues raised at the January 2016 Standing Committee meeting. First, a member of the Standing Committee asked whether Rule 29(a)

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[1] The Style Consultants proposed removing the hyphen between the words "amicus-curiae" in line 3. The words "amicus curiae" without a hyphen appear in the title of the Rule and in line 4. For consistency, they should all be the same.

[2] The word "strike" is new. At the January 2016 meeting, a member of the Standing Committee raised a question whether the power to "prohibit" a filing was sufficient if a court does not realize that a brief creates a recusal problem until after the brief has already been filed. The revised language would allow the court to "strike" the brief.

[3] The January 2016 version of this rule said ". . . may by local rule prohibit . . . ." A member of the Standing Committee proposed deleting the words "by local rule" in line 6 so that judges could act either by order in an individual case or by creating a local rule.

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

[5] The Advisory Committee revised this note at its April 2016 meeting.

should announce a national rule instead of leaving the matter to local rules or court orders. The Committee decided that this is a matter appropriately left to the discretion of local circuits.

Second, a member of the Standing Committee also asked whether Rule 29(a) should be simplified so that it allows filing of an amicus brief only by leave of court. The Committee believes that the United States or a State should be permitted to file without leave of court and thus does not favor adding a universal requirement to obtain leave of court.

Third, a consultant to the Standing Committee raised a policy objection to allowing a court to prohibit the filing of an amicus brief that would cause a judge's disqualification. The objection was that a court might block an amicus brief that raises an awkward but important issue about disqualification that the parties themselves do not wish to raise. In such situations, the parties may consent to having an amicus curiae raise the issue. The Advisory Committee considered this potential objection but concluded that local circuits should be permitted to conclude that the benefits of avoiding recusals in a three-judge panel or an en banc court outweigh the potential benefits of an amicus brief.

Fourth, the Style Consultants suggested a revision to the clause beginning with the word "except" in line 5. They proposed ending the second sentence with the word "filing" and creating a new sentence beginning with the word "But." At its April 2016 meeting, the Committee discussed the matter at length and rejected the proposed revision. The Committee believed that the proposed third sentence (beginning with "But") contradicted the categorical grant of permission in the proposed second sentence. *See Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 398-99 (2010) ("The Federal Rules regularly use 'may' to confer categorical permission, as do federal statutes that establish procedural entitlements.") (citations omitted). Another proposed alternative of breaking the section into subdivisions would add unnecessary complexity. The Committee thus decided to approve the original a version with the "except" clause. This formulation is consistent with existing Appellate Rules, e.g., Fed. R. App. P. 25(a)(5), 28(b), 28.1(a), (c)(2), (c)(3), (d), and other respected texts, e.g., U.S. Const. Art. I, § 6, cl.1, Art. III, § 3, cl. 2.

C. Form 4: Removal of Question Asking Petitioners Seeking to Proceed in forma Pauperis to Provide the Last Four Digits of their Social Security Numbers [Item 15-AP-E]

Litigants seeking permission to proceed in forma pauperis must complete Appellate Form 4. Question 12 of Appellate Form 4 currently asks litigants to provide the last four digits of their social security numbers. The clerk representative to the Advisory Committee has investigated the matter and reports that the general consensus of the clerks of court is that the last four digits of a social security number are not needed for any purpose and that the question could be eliminated. Given the potential security and privacy concerns associated with social security numbers, and the

lack of need for obtaining the last four-digits of social security numbers, the Committee proposes to amend Form 4 by deleting this question. The proposed deletion is as follows:

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

* * *

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

Your daytime phone number: (___) _____

Your age: _____ Your years of schooling: _____

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

D. Revision of Appellate Rule 25 to address Electronic Filing, Signatures, Service, and Proof of Service [Items 08-AP-A, 11-AP-C, 11-AP-D, 15-AP-A, 15-AP-D, 15-AP-H]

At its April 2016 meeting, the Appellate Rules Committee reviewed the Civil Rules Committee's progress on revising Civil Rule 5 to address electronic filing, signatures, service, and proof of service. The Committee then decided to propose revisions of Appellate Rule 25 that would follow the proposed revisions of Civil Rule 5 as closely as possible while maintaining the current structure of Appellate Rule 25.

The proposed revision of Appellate Rule 25 has four key features. First, proposed Rule 25(a)(2)(B)(i) addresses electronic filing by generally requiring a person represented by counsel to file papers electronically. This provision, however, allows everyone else to file papers nonelectronically and also provides for exceptions for good cause and by local rule. Second, proposed Rule 25(a)(2)(B)(iii) addresses electronic signatures by specifying that when a paper is filed electronically, the "user name and password of an attorney of record, together with the attorney's name on a signature block, serves as the attorney's signature." Third, proposed Rule 25(c)(2) addresses electronic service by saying that such service "may be made by sending it to a registered user by filing it with the court's electronic-filing system or by using other electronic means that the person consented to in writing." Fourth, proposed Rule 25(d)(1) is revised to make proof of service of process required only for papers that are not served electronically.

Appellate Rule 25. Filing and Service

(a) Filing.

(1) **Filing with the Clerk.** A paper[6] required or permitted to be filed in a court of appeals must be filed with the clerk.

(2) **Filing: Method and Timeliness**.[7]

(A) **Nonelectronic Filing**

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

~~(B)~~(ii) **A brief or appendix.** A brief or appendix not filed electronically is timely filed, however, if on or before the last day for filing, it is:

~~(i)~~• mailed to the clerk by First-Class Mail, or other class of mail that is at least as expeditious, postage prepaid; or

~~(ii)~~• dispatched to a third-party commercial carrier for delivery to the clerk within 3 days.

~~(C)~~(iii) **Inmate filing.** A paper not filed electronically ~~filed~~ by an inmate confined in an institution is timely if deposited in the institution's internal mailing system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the

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[6] The term "paper" includes electronically filed documents under Appellate Rule 25(a)(2)(B)(iv).

[7] Appellate Rules 25(a)(2)(A) & (B) follow the approach of proposed Civil Rule 5(d)(2) and (3), addressing nonelectronic filing and electronic filing in separate sections.

[8] This rule follows the approach of proposed Civil Rule 5(d)(2), which uses the term "paper not filed electronically."

benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

~~(D) **Electronic filing.** A court of appeals may by local rule permit or require papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes. A local rule may require filing by electronic means only if reasonable exceptions are allowed. A paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules.~~[9]

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

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

(ii) **Unrepresented Person — When Allowed or Required.** A person not represented by an attorney:

• may file electronically only if allowed by court order or by local rule; and

[9] The subject of Appellate Rule 25(a)(2)(D) will be addressed in Appellate Rule 25(a)(2)(B).

• may be required to file electronically only by court order, or by a local rule that includes reasonable exceptions.

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

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

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

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

(5) **Privacy Protection.** An appeal in a case whose privacy protection was governed by Federal Rule of Bankruptcy Procedure 9037, Federal Rule of Civil Procedure 5.2, or Federal Rule of Criminal Procedure 49.1 is governed by the same rule on appeal. In all other proceedings, privacy protection is governed by Federal Rule of Civil Procedure 5.2, except that Federal Rule of Criminal Procedure 49.1 governs when an extraordinary writ is sought in a criminal case.

(b) Service of All Papers Required. Unless a rule requires service by the clerk, a party must, at or before the time of filing a paper, serve a copy

on the other parties to the appeal or review. Service on a party represented by counsel must be made on the party's counsel.

(c) Manner of Service.

(1) ~~Service~~ Nonelectronic service[10] may be any of the following:

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

(B) by mail; or

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

~~(D) by electronic means, if the party being served consents in writing.~~[11]

(2) ~~If authorized by local rule, a party may use the court's transmission equipment to make electronic service under Rule 25(c)(1)(D)~~[12] Electronic service may be made by sending it to a registered user by filing it with the court's electronic-filing system or by using other electronic means that the person consented to in writing.[13]

(3) When reasonable considering such factors as the immediacy of the relief sought, distance, and cost, service on a party

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[10] Proposed Civil Rule 5(b)(2) addresses both electronic and non-electronic service. To retain the structure of the current Appellate Rule 25(c), the proposed revision addresses nonelectronic service in Rule 25(c)(1) and electronic service in Rule 25(c)(2).

[11] The proposed Appellate Rule 25(c)(2) makes the current Appellate Rule 25(c)(1)(D) unnecessary.

[12] The deleted clause is similar to the deleted clause in Civil Rule 5(b)(3).

[13] This sentence comes from proposed Civil Rule 5(b)(2)(E).

must be by a manner at least as expeditious as the manner used to file the paper with the court.

(4) Service by mail or by commercial carrier is complete on mailing or delivery to the carrier. Service by electronic means is complete on ~~transmission~~ filing, unless the party making service is notified that the paper was not received by the party served.[14]

(d) Proof of Service.

(1) A paper presented for filing other than through the court's electronic filing system[15] 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:

(i) the date and manner of service;

(ii) the names of the persons served; and

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

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

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

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[14] This provision is similar to the last clause of Civil Rule 5(b)(2)(E).

[15] A paper filed through the court's electronic filing system does not need to include this information because the electronic filing system will automatically provide it.

(e) Number of Copies. When these rules require the filing or furnishing of a number of copies, a court may require a different number by local rule or by order in a particular case.

Committee Note

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

III. Information Items

A. Disclosure Requirements under Rules 26.1 & 29(c) [Item 08-AP-R]

Since 2008, the Advisory Committee has carried on its agenda a matter concerning disclosure requirements under Appellate Rules 26.1 and 29(c). These rules currently require corporate parties and amici curiae to file corporate disclosure statements. The purpose of these disclosure requirements, as explained in a 1998 Advisory Committee note, is to assist judges in making a determination of whether they have any interests in any of a party's related corporate entities that would disqualify them from hearing an appeal.

In recent meetings, the Committee has considered whether to amend Rules 26.1 and 29(c) to require additional disclosures. The primary impetus for the discussion is a collection of local rules that require litigants to make disclosures that go beyond what Appellate Rules 26.1 and 29(c) require. If some circuits have concluded that more disclosure is necessary to allow an informed decision on recusal or disqualification, then should the national rules require disclosure of this information in every circuit? In each instance, the Committee has sought to assess both the benefits of additional requirements and the burden on litigants.

The Committee has not developed a firm view on whether amendments are warranted. What follows are the Committee's most recent discussion drafts of Rules 26.1 and 29(c). The Committee welcomes any feedback from the Standing Committee on the merit of requiring additional disclosures in the federal rules.

Rule 26.1. ~~Corporate~~ Disclosure Statement

(a) Who Must File; What Must Be Disclosed. Any ~~nongovernmental corporate~~[16] party to a proceeding in a court of appeals must file a statement that lists:

(1) any parent[17] corporation, and any publicly held ~~corporation~~ entity,[18] ~~that owns 10% or more of its stock~~ that has a 10% or greater ownership interest in the party or states that there is no such corporation or entity;

(2) the names of all judges[19] in the matter[20] and in any related state matter;

(3) the names of all lawyers and legal organizations that have appeared or are expected to appear for the party in the matter; and

* * *

[16] At the April 2016 meeting, it was the sense of the Committee that this rule no longer should apply only to corporations because the proposed new disclosure requirements now extend to facts beyond corporate ownership.

[17] The Committee considered but rejected a suggestion that litigants must disclose not only parent corporations but also "affiliates." The Committee was unsure how to define affiliates and worried about the burden of such a disclosure requirement.

[18] The Committee is unsure whether Rule 26.1 should require litigants to identify publicly held entities other than corporations (e.g., limited liability partnerships, etc.). The Fourth Circuit requires litigants to disclose whether "10% or more of the stock of a party/amicus [is] owned by a publicly held corporation or *other publicly held entity*." U.S. Court of Appeals for the Fourth Circuit, Disclosure of Corporate Affiliations Form, http://www.ca4.uscourts.gov/docs/pdfs/discl.pdf?sfvrsn=10 (emphasis added).

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

[20] The Committee considered other possible words, such as "case" or "proceeding," but concluded that "matter" was best because it would cover appeals from matters before agencies.

(d) Organizational Victim in a Criminal Case. In a criminal case if an organization is a victim of [the alleged] criminal activity, the government must file a statement identifying the victim, unless the government shows good cause for not complying with this requirement.[21] If the organizational victim is a corporation or publicly held entity, the statement must also disclose the information required by Rule 26.1(a)(1) to the extent it can be obtained through due diligence.

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

(1) any debtor not named in the caption;

(2) the members of each committee of creditors;

(3) the parties to any adversary proceeding; and

(4) any active participants in a contested matter.

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

Committee Note

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

ALTERNATIVE B: Under federal law and ethical standards, judges must decide whether to recuse themselves from participating in cases for various reasons. Before this amendment, Rule 26(a) required corporations to disclose only "any parent corporation and any publicly held corporation that owns 10% or more of its stock." Local rules of court have attempted to help judges determine whether recusal is necessary by requiring the parties to make additional disclosures. The amendment to subdivision (a) follows the lead of these local rules by requiring the listed additional

[21] The bracketed phrase is based on a recent discussion draft of a proposed amendment to Criminal Rule 12.4. In the Appellate Rules version, the "good cause" exception appears at the end of the sentence rather than the start because of other words at the start of the sentence. No difference in meaning is intended.

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

Rule 29. Brief of an Amicus Curiae

* * *

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

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

* * *

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

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

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

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

(D) a lawyer or legal organization authored the brief in whole or in part, and, if so, identifies each such lawyer or legal organization.

Committee Note

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

B. Miscellaneous Items

The Committee discussed five other agenda items at its April 2016 meeting. Item No.12-AP-F concerned proposed amendments to Civil Rule 23 to address class action settlement objectors. The Civil Committee's latest proposal would require a district court to approve any payment offered to a class action objector for withdrawing an objection. The proposal would not require amendment of the Appellate Rules. After considering the matter, the sense of the Committee was that an Appellate Rule is not warranted, and that the matter ultimately is a policy question for the Civil Rules Committee.

Item No. 16-AP-A was a proposal to extend the period of filing a notice of appeal in a criminal case from 14 days to 30 days. The Committee previously considered and rejected essentially the same proposal. Item No. 11-AP-E concerned a suggestion that Appellate Rule 4(b) be amended to accord criminal defendants the same 30-day appeal period that applies to government appeals in criminal cases. The Committee discussed Item No.11-AP-E at its Spring 2012 and Fall 2012 meetings and then voted to remove the item from the Agenda without taking action. After reviewing considerations on both sides, and the history of Item No. 11-AP-E, the Committee decided to take no action and to remove Item No. 16-AP-A from its agenda.

Item No. 12-AP-B concerned a proposal to add a parenthetical phrase to the instructions that accompany Question 4 on Appellate Form 4. The amended instruction would read as follows:

If you are a prisoner seeking to appeal a judgment in a civil action or proceeding (not including a decision in a habeas corpus proceeding or a proceeding under 28 U.S.C. § 2255), you must attach a statement certified by the appropriate institutional officer showing all receipts, expenditures, and balances during the last six months in your institutional accounts. If you have

multiple accounts, perhaps because you have been in multiple institutions,

attach one certified statement of each account.

The proposed parenthetical phrase is consistent with case law and may prevent some confusion. But after discussing the matter, the Committee decided not to amend the form because the current language already tracks the applicable statute on disclosure, 28 U.S.C. § 1915(a)(2),[22] and the burden imposed by mistaken filing of unnecessary account statements is not great. The Committee agreed to remove this item from its agenda.

Item No. 15-AP-F concerned recovery of the $500 docketing fee as a cost. Most circuits have interpreted Rule 39(e)(4) as implicitly making the docketing fee a cost that is taxable in the court of appeals. At least three circuits, however, require appellants to recover this fee in the district court. The sense of the Committee was that no amendment to Appellate Rule 39(e)(4) is necessary because the majority of courts are correctly interpreting the Rule. The Committee decided to remove this item from the agenda and asked the Chair to bring the matter to the attention of the chief judges of the circuits.

The Committee also considered a memorandum prepared by Mr. Derek Webb, who is a law clerk to Judge Sutton. The memorandum listed a number of possible circuit splits on issues arising under the Appellate Rules. Mr. Webb suggested three issues that might warrant inclusion on the Committee's agenda in the future: (1) whether delay by prison authorities in delivering the order from which a prisoner wishes to appeal should be counted in computing time for appeal under Rule 4; (2) whether the costs for which a bond may be required under Rule 7 include attorney's fees; and (3) whether "the court" in Rule 39(a)(4) refers to the appellate court or the district court. The Committee thought the incoming Chair and the Reporter could decide whether to include any of these matters on the discussion agenda for the October 2016 meeting.

Enclosures:

1. Draft Minutes from the April 5, 2016 Meeting of Appellate Rules Committee
2. Agenda Table for the Appellate Rules Committee
3. Text of Proposed Revisions for Publication

[22] Section 1915(a)(2) says: "A prisoner seeking to . . . appeal a judgment in a civil action or proceeding without prepayment of fees or security therefor . . . shall submit a certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the 6-month period immediately preceding the filing of the complaint or notice."

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TAB 3B

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

Rule 8. Stay or Injunction Pending Appeal

(a) Motion for Stay.

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

* * * * *

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

* * * * *

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

* * * * *

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

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

(b) Proceeding Against a Surety or Other Security Provider. If a party gives security in the form of a bond, other security, ~~or~~stipulation, or other undertaking with one or more sureties or other security providers, each ~~surety~~provider submits to the jurisdiction of the district court and irrevocably appoints the district clerk as ~~the surety's~~its agent on whom any papers affecting ~~the surety's~~its liability on the bond or undertaking may be served. On motion, a ~~surety's~~security provider's liability may be enforced in the district court without the necessity of an independent action. The motion and any notice that the district court prescribes may be served on the

district clerk, who must promptly mail a copy to each surety whose address is known.

* * * * *

Committee Note

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

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Rule 11. Forwarding the Record

* * * * *

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

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

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

Committee Note

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

Rule 25. Filing and Service

(a) Filing.

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

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

(A) **Nonelectronic Filing**

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

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

is timely filed, however, if on or before the last day for filing, it is:

~~(i)~~• mailed to the clerk by ~~First-Class Mail~~first-class mail, or other class of mail that is at least as expeditious, postage prepaid; or

~~(ii)~~• dispatched to a third-party commercial carrier for delivery to the clerk within 3 days.

~~(C)~~(iii) **Inmate filing.** A paper ~~filed~~not filed electronically by an inmate confined in an institution is timely if deposited in the institution's internal mailing system on or before the last day

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

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

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

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

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

(ii) **Unrepresented Person—When Allowed or Required.** A person not represented by an attorney:

- may file electronically only if allowed by court order or by local rule; and
- may be required to file electronically only by court order, or by a local rule that includes reasonable exceptions.

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

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

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

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

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

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

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

(c) Manner of Service.

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

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

(B) by mail; or

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

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

(2) ~~If authorized by local rule, a party may use the court's transmission equipment to make electronic service under Rule 25(c)(1)(D)~~ Electronic service may be made by sending it to a registered user by filing it with the court's electronic-filing system or by using other electronic means that the person consented to in writing.

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

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

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

(d) Proof of Service.

(1) A paper presented for filing 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:

(i) the date and manner of service;

(ii) the names of the persons served; and

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

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

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

(e) Number of Copies. When these rules require the filing or furnishing of a number of copies, a court may require a different number by local rule or by order in a particular case.

Committee Note

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

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Rule 29. Brief of an Amicus Curiae

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

* * * * *

Committee Note

The amendment authorizes orders or local rules, such as those previously adopted in some circuits, that prohibit the filing of an amicus brief by party consent if the brief would result in a judge's disqualification. The amendment does not alter or address the standards for when an amicus brief requires a judge's disqualification.

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Rule 39. Costs

* * * * *

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

(1) the preparation and transmission of the record;

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

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

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

Committee Note

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

Rule 62(b)(2) allows a party to obtain a stay by providing a "bond or other security."

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

* * * * *

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

Your daytime phone number: (___) _____

Your age: _____ Your years of schooling: _____

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

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TAB 3C

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

FRAP Item	Proposal	Source	Current Status
07-AP-E	Consider possible FRAP amendments in response to Bowles v. Russell (2007).	Mark Levy, Esq.	Discussed and retained on agenda 11/07 Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 04/11 Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14 Draft approved 04/15 for submission to Standing Committee Approved by Standing Committee 06/15 Approved by Judicial Conference 09/15 Transmitted to the Supreme Court 10/15
07-AP-I	Consider amending FRAP 4(c)(1) to clarify the effect of failure to prepay first-class postage.	Hon. Diane Wood	Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14 Draft approved 04/15 for submission to Standing Committee Approved by Standing Committee 06/15 Approved by Judicial Conference 09/15 Transmitted to the Supreme Court 10/15
08-AP-A	Amend FRAP 3(d) concerning service of notices of appeal.	Hon. Mark R. Kravitz	Discussed and retained on agenda 11/08 Discussed and retained on agenda 10/15 Discussed and retained on agenda 04/16

FRAP Item	Proposal	Source	Current Status
08-AP-C	Abolish FRAP 26(c)'s three-day rule.	Hon. Frank H. Easterbrook	Discussed and retained on agenda 11/08 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14 Draft approved 04/15 for submission to Standing Committee Approved by Standing Committee 06/15 Approved by Judicial Conference 09/15 Transmitted to the Supreme Court 10/15
08-AP-R	Consider amending FRAP 26.1 (corporate disclosure) and the corresponding requirement in FRAP 29(c)	Hon. Frank H. Easterbrook	Discussed and retained on agenda 04/09 Discussed and retained on agenda 04/14 Discussed and retained on agenda 10/14 Discussed and retained on agenda 04/15 Discussed and retained on agenda 10/15 Discussed and retained on agenda 04/16
09-AP-B	Amend FRAP 1(b) to include federally recognized Indian tribes within the definition of "state"	Daniel I.S.J. Rey-Bear, Esq.	Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10 Discussed and retained on agenda 10/11 Discussed and retained on agenda 04/12; Committee will revisit in 2017
11-AP-C	Amend FRAP 3(d)(1) to take account of electronic filing	Harvey D. Ellis, Jr., Esq.	Discussed and retained on agenda 04/13 Discussed and retained on agenda 10/15 Discussed and retained on agenda 04/16
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

FRAP Item	Proposal	Source	Current Status
12-AP-B	Consider amending FRAP Form 4's directive concerning institutional-account statements for IFP applicants	Peter Goldberger, Esq., on behalf of the National Association of Criminal Defense Lawyers (NACDL)	Discussed and retained on agenda 09/12 Discussed and retained on agenda 10/15 Draft approved 04/16 for submission to Standing Committee
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
12-AP-E	Consider treatment of length limits, including matters now governed by page limits	Professor Neal K. Katyal	Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14 Draft approved 04/15 for submission to Standing Committee Approved by Standing Committee 06/15 Approved by Judicial Conference 09/15 Transmitted to the Supreme Court 10/15
12-AP-F	Consider amending FRAP 42 to address class action appeals	Professors Brian T. Fitzpatrick and Brian Wolfman and Dean Alan B. Morrison	Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13 Discussed and retained on agenda 04/14 Discussed and retained on agenda 10/15 Discussed and retained on agenda 04/16
13-AP-B	Amend FRAP to address permissible length and timing of an amicus brief in support of a petition for rehearing and/or rehearing en banc	Roy T. Englert, Jr., Esq.	Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14 Draft approved 04/15 for submission to Standing Committee Approved by Standing Committee 06/15 Approved by Judicial Conference 09/15 Transmitted to the Supreme Court 10/15

FRAP Item	Proposal	Source	Current Status
13-AP-H	Consider possible amendments to FRAP 41 in light of Bell v. Thompson, 545 U.S. 794 (2005), and Ryan v. Schad, 133 S. Ct. 2548 (2013)	Hon. Steven M. Colloton	Discussed and retained on agenda 04/14 Discussed and retained on agenda 10/14 Discussed and retained on agenda 04/15 Draft approved 10/15 for submission to Standing Committee Approved by Standing Committee 01/16
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
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
15-AP-B	Technical amendment – update cross-reference to Rule 13 in Rule 26(a)(4)(C)	Reporter	Draft approved 04/15 for submission to Standing Committee Approved by Standing Committee 06/15 Approved by Judicial Conference 09/15 Transmitted to the Supreme Court 10/15
15-AP-C	Consider amendment to Rule 31(a)(1)'s deadline for reply briefs	Appellate Rules Committee	Awaiting initial discussion Draft approved 10/15 for submission to Standing Committee Approved by Standing Committee 01/16
15-AP-D	Amend FRAP 3(a)(1) (copies of notice of appeal) and 3(d)(1) (service of notice of appeal)	Paul Ramshaw, Esq.	Awaiting initial discussion Discussed and retained on agenda 10/15 Discussed and retained on agenda 04/16
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 10/16 for submission to Standing Committee
15-AP-H	Electronic filing by pro se litigants	Robert M. Miller, Ph.D.	Awaiting initial discussion Discussed and retained on agenda 10/15

TAB 3D

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

April 5, 2016
Denver, Colorado

Attendance and Introductions

The Chair, Judge Steven M. Colloton, called the meeting of the Advisory Committee on Appellate Rules to order on Tuesday, at 9:00 a.m., at the Colorado Supreme Court in Denver, Colorado.

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

Reporter Gregory E. Maggs was present and kept these minutes. 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; Marie Leary, Esq., Research Associate, Appellate Rules Committee, Federal Judicial Center; Mr. Michael Ellis Gans, Clerk of Court Representative to the Advisory Committee on Appellate Rules; and Ms. Shelly Cox, Administrative Specialist in the Rules Committee Support Office of the Administrative Office. Mr. Derek Webb, law clerk to Judge Sutton, participated by telephone.

Judge Colloton began the meeting by introducing Chief Justice Nancy E. Rice of the Colorado Supreme Court. Chief Justice Rice welcomed the Committee to the courthouse and spoke of the history of the building. Judge Colloton also welcomed Judge Kavanaugh to his first meeting.

Approval of the Minutes of the October 2015 Meeting

A spelling error on page 11 of the draft minutes of the October 2015 Meeting was identified and corrected. The draft minutes were then approved.

Report on the January 2016 Meeting of the Standing Committee

Judge Colloton reported that the Standing Committee had approved two proposals from the Appellate Rules Committee for publication and public comment. One was Item 13-AP-H, which concerned proposed amendments to Rule 41(b) and (d) regarding the stays of a mandate. The other was Item 15-AP-C, which concerned proposed amendments to Rule 31(a)(1) and Rule 28.1(f)(4) to lengthen the time for filing a reply brief from 14 days to 21 days.

Judge Colloton said that a third proposal, Item No. 14-AP-D, which concerns amicus briefs filed by party consent under Appellate Rule 29(a), prompted suggestions from the Style Consultants and substantive comments from the Committee Members. Judge Colloton therefore decided to bring the item back for further discussion at today's Committee meeting.

Item No. 12-AP-D (Civil Rule 62: Bonds)

Mr. Newsom led the discussion of this item. He began by reporting the status of proposed revisions to Civil Rule 62 and addressed the discussion draft of this rule on page 70 of the Agenda Book. He explained that the revision to Rule 62 aims to accomplish three things: (1) to extend the automatic stay to 30 days; (2) to allow a party to provide security other than a bond; and (3) to require only one security for all stayed periods. He also explained that the Advisory Committee Note was edited to make it more concise.

Mr. Newsom then turned to the proposed conforming amendments to Appellate Rules 8, 11, and 39, addressing the discussion drafts of these rules on pages 61-64 of the Agenda Book. The Committee agreed with the general approach of the drafts and the policy decision to make Rule 8(b) apply to providers of security other than sureties. The Committee decided to amend the discussion draft in the following three ways:

(1) Rule 8(a)(1)(B) [lines 6-7]: The bracketed phrase "[provided to obtain the stay of a judgment or order of a district court pending appeal]" should be included but edited to say "provided to obtain the stay."

(2) Rule 8(a)(2)(E) [line 15]: The word "appropriate" should be deleted.

(3) Rule 8(b) [lines 16-20]: The wording of this section should be rephrased to say: "If a party gives security in any form, including a bond, other security, stipulation, or other undertaking, with one or more sureties or other security providers, each security provider submits . . . ." The subsequent references to "surety" in the provision should then be replaced with "security provider."

The Committee addressed the discussion draft of Rule 11(g) at length. It considered various possible amendments but ultimately did not alter the discussion draft. The Committee did not make any amendments to the discussion draft of Rule 39(e).

Mr. Newsom moved to approve the discussion draft as amended and to send it to the Standing Committee for publication. The motion was seconded and approved.

Item No.12-AP-F (Civil Rule 23: Class Action Settlement Objectors)

Judge Colloton introduced this item, which concerns class action settlement objections. Class members sometimes object to settlements not because they have good faith objections but instead because they want to receive payments to withdraw their objections so that the settlements can go forward. Judge Colloton explained that the Civil Rules Committee decided to address this matter through what it calls "the simple approach." Under this approach, Civil Rule 23(e)(5)(B) would be amended to provide that "no payment or other consideration" can be given to an objector in exchange for withdrawing an objection without the district court's approval. The simple approach would not require amending the Appellate Rules.

Judge Colloton asked the Committee to consider whether the proposed "simple approach" was a good solution to the problem of class action objections. He also asked the Committee to consider whether requiring a district court to approve consideration paid to an objector impermissibly interferes with an appellate court's jurisdiction.

Mr. Derek Webb spoke regarding his memorandum included in the Agenda Book at page 109. He informed the Committee that the Civil and Appellate rules allow a district court to continue to act in a variety of situations even though a notice of appeal has been filed.

Two judge members expressed agreement with the "simple approach" of the Civil Rules Committee. An attorney member expressed some concern about the policy behind the approach. He was not sure that the district court would always know the case better than the court of appeals. He offered the example of a case in which there was a proposed payment to withdraw an objection after oral argument in the court of appeals. He asked, "Should the district court really decide whether the payment should be made?" The attorney member, however, thought that such situations might be rare.

Judge Sutton saw some potential for conflict between the district court and court of appeals. He noted that nothing in the proposed revision of Civil Rule 23 would require or prevent the dismissal of an objection by a court of appeals. He suggested that another, possibly better, approach might have been to require a court of appeals to ask the district court for an indicative ruling under Appellate Rule 12.1 before deciding whether to dismiss an objection. He said that this option

remains open to the courts of appeals and suggested that the Advisory Committee Note could address this point.

Following further discussion, Judge Colloton summarized the apparent views of the Committee as follows: The Appellate Rules Committee prefers not to address the issue of class action objectors with an appellate rule, and whether the proposed revision of Civil Rule 23 is desirable is ultimately a policy question for the Civil Rules Committee.

Item No. 16-AP-A (Appellate Rule 4(b)(1) and Criminal Case Notice of Appeals)

The Reporter introduced this item, which concerns a proposal to amend Appellate Rule 4(b)(1)(A) to increase the period for filing a notice of appeal in a criminal case from 14 days to 30 days. The reporter explained that the Committee previously had considered and rejected essentially the same proposal when it addressed Item 11-AP-E. The Committee discussed Item 11-AP-E at its Spring 2012 and Fall 2012 meetings and then voted to remove the item from the Agenda without taking action.

A judge member said that limiting the period for filing a notice of appeal to 14 days was necessary for having prompt appeals. He also noted that the interests of lawyers may differ from clients; lawyers may want more time but clients may want speedier action. Expressing the view of the Department of Justice, Mr. Byron said no real need has been shown for the amendment. Other speakers emphasized that the Committee had previously considered and decided the matter.

Judge Colloton asked whether there should be further study. No member believed that further study was required. A motion to remove the item from the Committee's agenda was seconded and approved.

Item No. 14-AP-D (Appellate Rule 29(a) on Amicus Briefs Filed with Party Consent)

Judge Colloton introduced this item, which concerns amicus briefs filed by party consent. He reminded the Committee that it had proposed a modification of Appellate Rule 29(a) at its October 2016 meeting. He then explained that the Standing Committee was generally favorable to the proposal but identified issues that may require further consideration.

Judge Colloton began by discussing the policy issue of whether a court should be able to reject not only amicus briefs filed by party consent but also amicus briefs filed by the government. An attorney member said that the rules should continue to provide the government a right to file an amicus brief. Mr. Byron said that the Department of Justice's position was that the government should have a right to file an amicus brief.

Judge Colloton then addressed the discussion draft line-by-line. The sense of the Committee was to make the following revisions:

(1) line 3: strike the hyphen in "amicus-curiae"

(2) line 5: adopt the "except" clause rather than the separate "but" sentence proposed by the Style Consultants

(3) line 6: strike "by local rule"

(4) line 6: replace "prohibit" with "prohibit or strike"

At the suggestion of a judge member, the Committee also decided to replace the Advisory Committee Note for the proposed amendment to Appellate Rule 29(a) on page 140 of the Agenda Book with the following: "The amendment authorizes orders or local rules, such as those previously adopted in some circuits, that prohibit the filing of an amicus brief by party consent if the brief would result in a judge's disqualification. The amendment does not alter or address the standards for when an amicus brief requires a judge's disqualification."

The Committee approved a motion to submit the revised version of the Rule to the Standing Committee.

Item No. 08-AP-R (Appellate Rules 26.1 and 29(c) on Disclosures)

Judge Colloton introduced this item, which concerns Appellate Rules 26.1 and 29(c). These rules currently require corporate parties and amici curiae to file corporate disclosure statements. The purpose of these disclosure requirements is to assist judges in deciding whether they need to recuse themselves. Judge Colloton explained that some local rules go further. He explained that, in the memorandum included at page 159 of the Agenda Book, Professor Daniel Capra had tried to pull together suggestions for additional disclosure requirements without necessarily advocating for them. Judge Colloton said that the initial decisions for the Committee were (1) whether to include some or all of the proposed disclosures; (2) whether to conduct more study; or (3) whether to drop the matter.

A judge member asked the attorney members how burdensome they considered such disclosure requirements. An attorney members said that some disclosure requirements are very burdensome. The committee discussed the requirement of disclosing witnesses. Several members suggested that the cost was not worth the benefit. An attorney member also said that disclosing affiliates of corporations would be burdensome. He said that such disclosures are sometimes required in state courts.

Judge Sutton asked whether the list of required disclosures would carry with it a presumption that recusal was necessary when the listed information was disclosed. An attorney member asked whether the Advisory Committee Note could address this potential concern by saying that the additional disclosure requirements do not change the recusal standards.

Another attorney member asked how strong the need was for changing the current rules. Mr. Byron, speaking for the Justice Department, agreed that additional disclosure requirements would be burdensome and that it was not clear how beneficial they would be.

Judge Sutton said that the current rule requires disclosure of things that by statute automatically require disclosure. The proposed rule would go further. He also said that the proposal should not go to the Standing Committee for publication at this time because the Bankruptcy Rules Committee was still working on its own disclosure requirements.

Judge Colloton questioned the need for requiring parties to disclose the identity of judges, asking whether there were many judges who have to recuse themselves because of the identity of a judge during earlier proceedings in a case.

Several committee members expressed concern that disclosing the identity of all lawyers who had worked on a matter could be very burdensome, especially if there had been an administrative proceeding below. But a countervailing consideration was that judges still may have to recuse themselves based on the participation of a lawyer.

The Committee discussed the question whether clauses (a)(2), (a)(3), and (a)(4) should use the term "proceeding" or "case" or some other term. A judge member pointed out that some appeals come directly from agencies. Another judge member suggested that the word "matter" might be better. Another judge member suggested that perhaps local rules should address matters coming directly to the court of appeals from administrative proceedings.

Judge Colloton asked whether the draft of Rule 26.1(e) corresponded to any similar provision in the draft revision to the Bankruptcy Rules. The Committee decided that the reporter should coordinate with the Criminal Rules and Bankruptcy Rules Committees.

It was the sense of the committee that the following action should be taken with respect to the discussion drafts of Rule 26.1 and Rule 29(c) beginning on page 150 of the Agenda Book.

(1) The "except clause" in line 3 should be deleted so that Rule 26.1 applies to all parties.

(2) The term "affiliated" in line 5 should be deleted. A Fourth Circuit local rule requires disclosure of affiliates. But the term is complicated to define.

(3) The term “matter” rather than “case” or “proceeding” should be in lines 10, 12, and 14

(4) The “good cause”exception in lines 17 and 18 should be included. The formulation differs from the formulation in the criminal law rules. The exception has to be included at the end of the sentence because of everything else at the start of the sentence. The substance is the same.

(5) There was no objection to the proposed language in lines 31-32 regarding persons who want to intervene.

(6) The Advisory Committee note should make clear that the Committee is not trying to change the recusal requirements.

(7) The Committee had no objection to the proposed change to Rule 29(c)(5)(D).

The Committee determined that no amendment should be proposed at this time, and that the matter should be carried over for further consideration. The Chair may receive input from the Standing Committee at its June 2016 meeting.

Item 12-AP-B (Appellate Rules Form 4 and Institutional Account Statement)

This Item concerns a proposal to add the parenthetical phrase "(not including a decision in a habeas corpus proceeding or a proceeding under 28 U.S.C. § 2255)" to one of the questions in Appellate Form 4. The reporter introduced the time and summarized the arguments in Reporter Struve's memorandum for and against the adding the parenthetical phrase.

After a brief discussion, the Committee decided to take no action for two reasons. First, the language of the Form already tracks the applicable statute. Second, although the parenthetical phrase might prevent the filing of institutional account statements unnecessarily, the consequence was not very burdensome to either confinement institutions or prisoners. A motion to remove this item from the agenda was made, seconded, and approved.

Item No. 15-AP-E (Appellate Rules Form 4 and Social Security Numbers)

The reporter introduced this item, which included five proposals. The first proposal was to amend Appellate Form 4 to remove the question asking litigants seeking leave to proceed in forma pauperis to provide the last four digits of their social security numbers. The reporter presented this item. As discussed in the memorandum on page 215 of the Agenda Book, the clerks of the courts of appeals report that this information is no longer needed for any purpose. The Committee

discussed the matter briefly and decided that the question should be deleted. The Committee will send a proposal for publication to the Standing Committee.

The second proposal was to amend Appellate Rule 25(a)(5) to prohibit filings from containing any part of a social security number. The Committee decided to take no action on this matter because Appellate Rule 25(a)(5) incorporates the privacy standards from the Civil Rules. Any change should come from the Civil Rules.

The third proposal was to amend Appellate Rule 24(a)(1) to add a presumption that an affidavit filed in support of a motion for leave to proceed in forma pauperis would be sealed. The Committee previously had discussed this matter at its October 2015 meeting. Following a brief discussion, the sense of the Committee was that the proposal should be rejected.

The fourth proposal was that Appellate Rule 32.1(b) should be amended to require litigants to provide pro se applicants with unpublished opinions that are not available without cost from a publicly accessible database. An attorney member suggested that this proposal raised a substantive policy question about how much financial assistance should be given to pro se litigants and that this question was better addressed by Congress than by a Rules Committee. Another attorney member pointed out that the proposal concerned all pro se litigants, not just those seeking leave to proceed in forma pauperis. Some pro se litigants might be able to afford access to commercial databases. Another member of the Committee asked whether a court might order a party to provide unpublished opinions on an individual basis. The sense of the Committee was that the proposal should be rejected.

The fifth proposal was to amend Appellate Rule 25(d)(2)(D) to allow pro se litigants to file or serve documents electronically. A member suggested that the Committee should consider this proposal as part of its general consideration of electronic filing issues.

A motion was made to present the first matter (concerning social security numbers) to the Standing Committee for publication, to remove the second, third, and fourth matters from the agenda, and to fold the fifth matter into the rest of the other agenda items concerning electronic filing. The motion was seconded and approved.

Item No. 15-AP-F (Appellate Rule 39(e) and Recovery of Appellate Fees)

The reporter introduced this item, which the Committee discussed for the first time at the October 2015 Meeting. The item concerns the procedure by which an appellant who prevails on appeal may recover the $5 fee for filing a notice of appeal and the $500 fee for docketing an appeal. Rule 39(e)(4) says that the fee for filing a notice of appeal is taxable as a cost in the district court.

In most circuits, the $500 docketing fee is seen as a cost taxable in the court of appeals, but at least three circuits require appellants to recover this fee in the district court.

The Committee considered the question whether Rule 39 should be amended. The clerk representative said that the clerks in most circuits want to tax the whole thing in the court of appeals. Mr. Byron suggested the possibility of deleting (e)(4). A judge member said that he thought that the rule was correct as written.

Following further discussion the sense of the Committee was that the Chair should communicate with the chief judges of the various circuits about the problem, with the goal of finding a resolution without amending the rules. The motion to remove the item from the agenda was made, seconded, and approved.

Item Nos. 08-AP-A, 11-AP-C, 11-AP-D, 15-AP-A, 15-AP-D, 15-AP-H (Electronic Filing and Service)

These items concern electronic filing, signature, service, and proof of service. The reporter described the progress that the Civil Rules Committee had made on revising the Civil Rules to address these subjects. Several members of the Committee expressed agreement with the four major characteristics of the reform: First, parties represented by counsel must file electronically absent an exception, such as an exception for good cause. Second, use of the court's electronic filing system constitutes a signature. Third, parties will serve papers through the court's electronic filing system. Fourth, no proof of service is required for papers served through the electronic filing system.

The Committee concluded that the reporter should prepare a discussion draft of Appellate Rule 25 that would follow the most recent draft of Civil Rule 5. The reporter would then circulate the draft to the committee members by email. The goal is to present a proposed revision of Appellate Rule 25 to the Standing Committee in June.

The Committee also directed the reporter to determine whether other Appellate Rules would also require amendment to address electronic filing.

Memo on Circuit Splits

The Committee also considered a memorandum prepared by Mr. Webb. The memorandum listed a number of circuit splits on issues under the Appellate Rules. The Committee decided to study three of these issues for possible inclusion on its agenda in the future: (1) whether delay by prison authorities in delivering the order from which the prisoner wishes to appeal can be used in computing time for appeal under Rule 4(c); (2) whether the costs for which a bond may be required under Rule 7 can include attorney's fees; and (3) whether "the court" in Rule 39(a)(4) refers to the

appellate court or the district court. The Committee also agreed to study the other issues in the memorandum further.

Adjournment

Judge Colloton thanked Justice Eid for her 6 years of service on the Committee and for providing her input from the perspective of a state court. Judge Colloton also thanked Prof. Barrett for her service on the Committee and for hosting the meeting in Chicago. Judge Colloton noted that this was the last meeting for Judge Sutton at the Appellate Rules Committee. He also noted that this was the last meeting for Mr. Gans and himself. He noted that Mr. Gans has served for in clerk's office of the Eighth Circuit for 33 years. Judge Colloton thanked him for his insight and polling of his colleagues.

Judge Sutton announced that Judge Neil Gorsuch will be the new chair of this committee. Judge Sutton thanked Judge Colloton for his four years of service, care, and fair-mindedness. Judge Sutton also read comments from former reporter Cathie Struve who complimented and thanked Judge Colloton for his service as chair of the Committee.

The meeting adjourned.