ADVISORY COMMITTEE
ON
APPELLATE RULES

Washington, D.C.
October 18, 2016

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TABLE OF CONTENTS

MEETING AGENDA 5

TAB 1 **TABLE OF AGENDA ITEMS (OCTOBER 2016)** 15

TAB 2 **OPENING BUSINESS**

A. **ACTION ITEM: Approval of Minutes**

Draft Minutes of the April 5, 2016 Meeting of the Advisory Committee on Appellate Rules 21

B. **Information Item: Draft Minutes of the June 6, 2016 Meeting of the Committee on Rules of Practice and Procedure** 33

TAB 3 **ACTION ITEM: ITEM NO. 11-AP-C (AMENDMENTS TO RULES 3(C) AND (D))**

A. **Reporter's Memorandum (September 24, 2016)** 51

B. **Additional Materials: Proposed Revision for Public Comment** 59

TAB 4 **DISCUSSION ITEM: ITEM NO. 12-AP-D (CIVIL RULE 62 / APPEAL BONDS)**

A. **Reporter's Memorandum (September 19, 2016)** 73

B. **Additional Materials: Preliminary Draft of Proposed Amendments (August, 2016)** 79

TAB 5 **DISCUSSION ITEM: ITEM NO. 08-AP-R (DISCLOSURE REQUIREMENTS)**

A. **Reporter's Memorandum (September 20, 2016)** 87

Reporter's Memorandum (March 31, 2015) 99

B. **Additional Materials: Excerpt from May 14, 2016 Report of the Advisory Committee on Criminal Rules (revised July 6, 2016)** 125

TAB 6 **DISCUSSION ITEM: ITEM NO. 12-AP-F (CLASS ACTION SETTLEMENT OBJECTORS)**

A. **Reporter's Memorandum (September 11, 2016)** 133

B. **Additional Materials: Draft Minutes of Civil Rules Advisory Committee (April 14, 2016)** 139

TAB 7 **DISCUSSION ITEM: ITEM NOS. 15-AP-A, 15-AP-E, 15-AP-H (ELECTRONIC FILING BY PRO SE LITIGANT)**

A. Reporter's Memorandum (September 24, 2016) 145

B-D. Additional Materials:

Email from Robert Miller (March 9, 2016).....151

Email from Robert Miller (October 26, 2015).....155

Email from Sai (September 7, 2015) 159

TAB 8 **DISCUSSION ITEM: CIRCUIT SPLITS OVER THE MEANING OF APPELLATE RULES 4(C), 7, AND 39(A)(4)**

Reporter's Memorandum (September 25, 2016) 163

TAB 9 **DISCUSSION ITEM: INITIATIVES TO IMPROVE THE EFFICIENCY OF FEDERAL APPEALS**

A. Reporter's Memorandum (September 25, 2016) 177

B. Additional Materials: Clerk's Memorandum (September 23, 2016) 183

Agenda for Fall 2016 Meeting of
Advisory Committee on Appellate Rules
October 18, 2016
Washington, D.C.

I. Introductions

II. Public Comment on Proposed Amendments to Rule 29

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

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

V. Discussion Items

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

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

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

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

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

F. Initiatives to Improve the Efficiency of Federal Appeals

VI. New Business

VII. Adjournment

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
(Standing Committee)

Chair, Standing Committee	**Honorable David G. Campbell** United States District Court Sandra Day O'Connor United States Courthouse 401 West Washington Street, SPC 58 Phoenix, AZ 85003-2156
Reporter, Standing Committee	**Professor Daniel R. Coquillette** Boston College Law School 885 Centre Street Newton Centre, MA 02459
Members, Standing Committee	**Honorable Jesse Matthew Furman** United States District Court Thurgood Marshall United States Courthouse 40 Centre Street, Room 2202 New York, NY 10007-1501 **Gregory G. Garre, Esq.** Latham & Watkins LLP 555 Eleventh Street, N.W. Washington, DC 20004-1304 **Daniel C. Girard, Esq.** Girard Gibbs LLP 601 California Street, 14th Floor San Francisco, CA 94108 **Honorable Susan P. Graber** United States Court of Appeals Pioneer Courthouse 700 S.W. Sixth Avenue, Suite 211 Portland, OR 97204 **Honorable Frank Mays Hull** United States Court of Appeals Elbert P. Tuttle Court of Appeals Building 56 Forsyth Street, N.W., Room 300 Atlanta, GA 30303

Members, Standing Committee *(cont'd)*	**Peter D. Keisler, Esq.** Sidley Austin, LLP 1501 K Street, N.W. Washington DC 20005 **Professor William K. Kelley** Notre Dame Law School P. O. Box 780 Notre Dame, IN 46556 **Honorable Amy J. St. Eve** United States District Court Everett McKinley Dirksen United States Courthouse 219 South Dearborn Street, Room 1260 Chicago, IL 60604 **Professor Larry D. Thompson** University of Georgia School of Law 212 Hirsch Hall Athens, GA 30602 **Honorable Richard C. Wesley** United States Court of Appeals Livingston County Government Center Six Court Street Geneseo, NY 14454-1043 **Honorable Sally Yates** Deputy Attorney General (ex officio) United States Department of Justice 950 Pennsylvania Ave., N.W., Room 4111 Washington, DC 20530 **Honorable Robert P. Young, Jr.** Chief Justice Michigan Supreme Court Hall of Justice, 6th Floor 925 W. Ottawa Street Lansing, MI 48915 **Honorable Jack Zouhary** United States District Court James M. Ashley and Thomas W.L. Ashley United States Courthouse 1716 Spielbusch Avenue, Room 203 Toledo, OH 43604

Advisors and Consultants, Standing Committee	**Bryan A. Garner, Esq.** LawProse, Inc. 14180 Dallas Parkway, Suite 280 Dallas, TX 75254 **Professor Geoffrey C. Hazard, Jr.** Hastings College of the Law 200 McAllister Street San Francisco, CA 94102 **Professor R. Joseph Kimble** Thomas M. Cooley Law School 300 South Capitol Avenue Lansing, MI 48933 **Joseph F. Spaniol, Jr., Esq.** 5602 Ontario Circle Bethesda, MD 20816-2461
Secretary, Standing Committee and Rules Committee Officer	**Rebecca A. Womeldorf** Secretary, Committee on Rules of Practice & Procedure and Rules Committee Officer Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E., Room 7-240 Washington, DC 20544 Phone 202-502-1820 Fax 202-502-1755 Rebecca_Womeldorf@ao.uscourts.gov

ADVISORY COMMITTEE ON APPELLATE RULES

Chair, Advisory Committee on Appellate Rules	**Honorable Neil M. Gorsuch** United States Court of Appeals Byron White United States Courthouse 1823 Stout Street, 4th Floor Denver, CO 80257-1823
Reporter, Advisory Committee on Appellate Rules	**Professor Gregory E. Maggs** The George Washington University Law School 2000 H Street, N.W. Washington DC 20052
Members, Advisory Committee on Appellate Rules	**Honorable Michael A. Chagares** United States Court of Appeals United States Post Office and Courthouse Two Federal Square, Room 357 Newark, NJ 07102-3513 **Honorable Judith L. French** Ohio Supreme Court 65 South Front Street Columbus, OH 43215 **Honorable Ian Heath Gershengorn** Acting Solicitor General (ex officio) United States Department of Justice 950 Pennsylvania Avenue, N.W., Room 5143 Washington, DC 20530 **Gregory G. Katsas** Jones Day 51 Louisiana Avenue, N.W. Washington, D.C. 20001-2113 **Neal Katyal, Esq.** Hogan Lovells US LLP Columbia Square 555 Thirteenth Street, N.W. Washington, DC 20004 **Honorable Brett M. Kavanaugh** United States Court of Appeals William B. Bryant United States Courthouse Annex 333 Constitution Avenue, N.W., Room 3004 Washington, DC 20001

Members, Advisory Committee on Appellate Rules (*cont'd*)	**Honorable Stephen Joseph Murphy III** United States District Court Theodore Levin United States Courthouse 231 West Lafayette Boulevard, Room 235 Detroit, MI 48226 **Kevin C. Newsom, Esq.** Bradley Arant Boult Cummings LLP One Federal Place 1819 Fifth Avenue North Birmingham, AL 35203 **Professor Stephen E. Sachs** Duke Law School 210 Science Drive Box 90360 Durham, NC 27708-0360
Clerk of Court Representative, Advisory Committee on Appellate Rules	**Elisabeth A. Shumaker** Clerk United States Court of Appeals Byron White United States Courthouse 1823 Stout Street, 1st Floor Denver, CO 80257-1823
Liaison Members, Advisory Committee on Appellate Rules	**Gregory G. Garre, Esq.** *(Standing)* Latham & Watkins LLP 555 Eleventh Street, N.W. Washington, DC 20004-1304 **Honorable Pamela Pepper** *(Bankruptcy)* United States District Court United States Courthouse and Federal Building 517 East Wisconsin Avenue, Room 271 Milwaukee, WI 53202
Secretary, Standing Committee and Rules Committee Officer	**Rebecca A. Womeldorf** Secretary, Committee on Rules of Practice & Procedure and Rules Committee Officer Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E., Room 7-240 Washington, DC 20544 Phone 202-502-1820 Fax 202-502-1755 Rebecca_Womeldorf@ao.uscourts.gov

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TAB 1

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Advisory Committee on Appellate Rules
Table of Agenda Items —October 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

FRAP Item	Proposal	Source	Current Status
11-AP-D	Consider changes to FRAP in light of CM/ECF	Hon. Jeffrey S. Sutton	Discussed and retained on agenda 10/11 Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13 Discussed and retained on agenda 04/14 Discussed and retained on agenda 10/14 Discussed and retained on agenda 04/15 Discussed and retained on agenda 10/15 Draft approved 04/16 for submission to Standing Committee Approved for publication by Standing Committee 06/16
12-AP-B	Consider amending FRAP Form 4's directive concerning institutional-account statements for IFP applicants	Peter Goldberger, Esq., on behalf of the National Association of Criminal Defense Lawyers (NACDL)	Discussed and retained on agenda 09/12 Discussed and retained on agenda 10/15 Draft approved 04/16 for submission to Standing Committee Approved for publication by Standing Committee 06/16
12-AP-D	Consider the treatment of appeal bonds under Civil Rule 62 and Appellate Rule 8	Kevin C. Newsom, Esq.	Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/15 Discussed and retained on agenda 10/15 Draft approved 04/16 for submission to Standing Committee Approved for publication by Standing Committee 06/16
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

FRAP Item	Proposal	Source	Current Status
13-AP-B	Amend FRAP to address permissible length and timing of an amicus brief in support of a petition for rehearing and/or rehearing en banc	Roy T. Englert, Jr., Esq.	Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14 Draft approved 04/15 for submission to Standing Committee Approved by Standing Committee 06/15 Approved by Judicial Conference 09/15 Transmitted to the Supreme Court 10/15
13-AP-H	Consider possible amendments to FRAP 41 in light of Bell v. Thompson, 545 U.S. 794 (2005), and Ryan v. Schad, 133 S. Ct. 2548 (2013)	Hon. Steven M. Colloton	Discussed and retained on agenda 04/14 Discussed and retained on agenda 10/14 Discussed and retained on agenda 04/15 Draft approved 10/15 for submission to Standing Committee Approved by Standing Committee 01/16
14-AP-D	Consider possible changes to Rule 29's authorization of amicus filings based on party consent	Standing Committee	Awaiting initial discussion Draft approved 10/15 for submission to Standing Committee Discussed by Standing Committee 1/16 but not approved Draft approved 04/16 for submission to Standing Committee Approved for publication by Standing Committee 06/16
15-AP-A	Consider adopting rule presumptively permitting pro se litigants to use CM/ECF	Robert M. Miller, Ph.D.	Awaiting initial discussion Discussed and retained on agenda 10/15 Draft approved 04/16 for submission to Standing Committee Approved for publication by Standing Committee 06/16
15-AP-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

FRAP Item	Proposal	Source	Current Status
15-AP-E	Amend the FRAP (and other sets of rules) to address concerns relating to social security numbers; sealing of affidavits on motions under 28 U.S.C. § 1915 or 18 U.S.C. § 3006A; provision of authorities to pro se litigants; and electronic filing by pro se litigants	Sai	Awaiting initial discussion Discussed and retained on agenda 10/15 Partially removed from Agenda and draft approved for submission to Standing Committee 4/16 Approved for publication by Standing Committee 06/14
15-AP-H	Electronic filing by pro se litigants	Robert M. Miller, Ph.D.	Awaiting initial discussion Discussed and retained on agenda 10/15 Discussed and retained on agenda 4/16

TAB 2A

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 member 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.

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MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 6, 2016 | Washington, D.C.

TABLE OF CONTENTS

Attendance 1
Introductory Remarks 2
Approval of the Minutes of the Last Meeting 2
Visit of Chief Justice Roberts 3
Report of the Advisory Committee on Evidence Rules 3
Report of the Advisory Committee on Appellate Rules 5
Report of the Advisory Committee on Civil Rules 7
Report of the Advisory Committee on Criminal Rules 10
Report of the Advisory Committee on Bankruptcy Rules 11
Report of the Administrative Office 15
Concluding Remarks 15

ATTENDANCE

The Judicial Conference on Rules of Practice and Procedure held its fall meeting in Washington, D.C., on June 6, 2016. The following members participated in the meeting:

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

The following attended on behalf of the advisory committees:

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

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

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

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

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

The Honorable Sally Quillian Yates, Deputy Attorney General, represented the Department of Justice, along with Diana Erbsen, Joshua Gardner, Elizabeth J. Shapiro, and Natalia Sorgente.

Other meeting attendees included: Judge David G. Campbell; Judge Robert M. Dow; Judge Paul W. Grimm; Sean Marlaire, staff to the Court Administration and Case Management Committee (CACM); Professor Bryan A. Garner, Style Consultant; Professor R. Joseph Kimble, Style Consultant; and Professor Joseph F. Spaniol, Jr., Consultant.

Providing support to the Committee:

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

INTRODUCTORY REMARKS

Judge Sutton called the meeting to order. He first acknowledged a number of imminent departures from the Standing Committee effective October 1, 2016: Justice Brent Dickson, Roy Englert, Judge Neil Gorsuch, and Judge Patrick Schiltz are ending their terms as members of the Standing Committee and Judge Steve Colloton is ending his term as Chair of the Appellate Rules Advisory Committee, a position that will be assumed by Judge Gorsuch. Judge Sutton offered remarks on the contributions each has made to the Committee over the years and warmly thanked them for their service.

Judge Sutton recognized three individuals for reaching milestones of service to the Committee. Rick Marcus has served for twenty years as the Associate Reporter to the Advisory Committee on Civil Rules. Dan Capra has served for twenty years as the Reporter to the Advisory Committee on Evidence Rules. And Joe Spaniol has served twenty-five years as a style consultant to the Standing Committee.

Finally, Dan Coquillette took a moment to thank Judge Sutton, whose tenure as Chair of the Standing Committee comes to an end October 1, 2016.

APPROVAL OF THE MINUTES OF THE LAST MEETING

Upon a motion by a member, seconded by another, and by voice vote: **The Standing Committee approved the minutes of the January 7, 2016 meeting.**

VISIT OF CHIEF JUSTICE ROBERTS

Chief Justice Roberts and Jeffrey Minear, the Counselor to the Chief Justice, visited the Standing Committee. Chief Justice Roberts made some brief remarks. He thanked the members of the Committee for their service and acknowledged, as an alumnus of the Appellate Rules Committee himself, that such service could be a significant commitment of time. And he congratulated the Committee on the new discovery rules that went into effect on December 1, 2015, rule amendments he highlighted in his 2015 Year-End Report on the Federal Judiciary.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Sessions and Professor Capra provided the report on behalf of the Advisory Committee on Evidence Rules, which met on April 29, 2016, in Washington, D.C. Judge Sessions presented two action items and a number of information items.

Action Items

RULE 803(16) – The first matter for final approval was an amendment to Rule 803(16), the ancient documents exception to the hearsay rule, to limit its application to documents prepared before January 1, 1998. The version of Rule 803(16) published for comment would have eliminated the exception entirely. After hearing from many lawyers who continue to rely on the ancient documents exception, the Advisory Committee decided against eliminating the exception. Instead, the Advisory Committee revised its proposal to provide a cutoff date for the application of the exception. The Advisory Committee decided against leaving the exception in its current form because, unlike certain "ancient" hard copy documents, the retention of electronically-stored information beyond twenty years does not by itself suggest reliability. Judge Sessions acknowledged that any cutoff date will have a degree of arbitrariness, but also observed that electronically-stored information (known as "ESI") first started to explode around 1998 and that the ancient documents exception itself set an arbitrary time period of twenty years for its applicability.

Upon a motion by a member, seconded by another, and by voice vote: **The Standing Committee unanimously approved the proposed amendment to Rule 803(16), as amended after publication, for submission to the Judicial Conference for final approval.**

RULE 902 (13) & (14) – The second matter for final approval was an amendment to Rule 902 to add two new subdivisions ((13) and (14)) that would allow for the authentication of certain electronic evidence through certification by a qualified person without requiring that person to testify in person. The first provision would allow self-authentication of machine-generated information upon a submission of a certification prepared by a qualified person. The second provision would provide a similar certification procedure for a copy of data taken from an electronic device, medium, or file. The proposals for new Rules 902(13) and 902(14) would have the same effect as current Rules 902(11) and 902(12), which permit a foundation witness to establish the authenticity of business records by way of certification. One Committee member suggested providing instructions on the application of the rule with the inclusion of examples in the Committee Note. After discussion, Professor Capra agreed to do that.

Upon a motion by a member, seconded by another, and by voice vote: **The Standing Committee unanimously approved the proposed amendments to Rule 902 (13) and (14) for submission to the Judicial Conference for final approval.**

Information Items

Judge Sessions highlighted several information items on behalf of the Advisory Committee.

GUIDE FOR AUTHENTICATING ELECTRONIC EVIDENCE – The Standing Committee discussed the use and dissemination of the draft Guide for Authenticating Electronic Evidence. Written by Judge Grimm, Gregory Joseph, and Professor Capra, the manual would be for the use of the bench and bar and can be amended as necessary to keep pace with technological advances. The manual will be published by the Federal Judicial Center (FJC). The manual is not an official publication of the Advisory Committee itself. The members of the Standing Committee discussed the manual, noting its great value to judges and practitioners who regularly deal with the issue of authenticating electronic evidence, and expressed deep gratitude to its three authors for their work creating it and to the FJC for its assistance with publication.

POSSIBLE AMENDMENTS TO THE NOTICE PROVISIONS IN THE EVIDENCE RULES – The Advisory Committee has been considering ways to amend and make more uniform several notice provisions throughout the Federal Rules of Evidence. For the notice provision of Rule 807(b), the Residual Exception to the hearsay rule, the Advisory Committee is inclined to add a good cause exception to excuse lack of timely notice of the intent to offer statements covered under this exception. The Advisory Committee is also inclined to require that notice under 807(b) be written and not just oral. For the notice provision of Rule 404(b), the Advisory Committee is inclined to remove the requirement that the defendant in a criminal case must first specifically request that the government provide notice of their intent to offer evidence of previous crimes or other bad acts against the defendant. The Advisory Committee concluded that this requirement in Rule 404 was an unnecessary trap for the unwary lawyer and differs from most local rules. Finally, the Advisory Committee has concluded that the notice provisions in Rules 412, 413, 414, and 415 should not be changed through the Rules Enabling Act process as those rules were congressionally enacted and, in any event, are rarely used.

RESIDUAL EXCEPTION: RULE 807 – Judge Sessions reported on the symposium held in connection with the Advisory Committee's fall 2015 Chicago meeting regarding the potential elimination of the categorical hearsay exceptions (excited utterance, dying declaration, etc.) in favor of expanding the residual hearsay exception. The lawyers who testified before the Advisory Committee unanimously opposed the elimination of the hearsay exceptions. The Advisory Committee agrees that the exceptions should not be eliminated. But the Advisory Committee continues to consider expansion of the residual exception to allow the admission of reliable hearsay even absent "exceptional circumstances." The Advisory Committee included a working draft of amended Rule 807 in the agenda materials. It is planning a symposium in the fall to continue to discuss possible amendments to Rule 807, to be held at Pepperdine School of Law.

TESTIFYING WITNESS'S PRIOR INCONSISTENT STATEMENT: RULE 801(D)(1)(A) – The Advisory Committee is considering an expansion beyond what Rule 801(d)(1)(A) currently allows, which

are prior inconsistent statements made under oath during a formal proceeding. The Advisory Committee has rejected the idea of expanding the rule to cover all prior inconsistent statements, but continues to consider inclusion of prior inconsistent statements that have been video recorded.

EXCITED UTTERANCES: RULE 803(2) – The Advisory Committee considered four separate proposals to amend or eliminate Rule 803(2) on the grounds that "excited utterances" are not necessarily reliable. It determined not to take up any of the suggestions given the impact on other rules, as well as an FJC report regarding various social science studies on Rule 803(2) which provided some empirical support for the proposition that immediacy and excitedness tend to guarantee reliability.

CONVERTING CATEGORICAL HEARSAY EXCEPTIONS INTO GUIDELINES – At the suggestion of Judge Milton Shadur, the Advisory Committee considered reconstituting the categorical hearsay exceptions as standards or guidelines rather than binding rules. The Advisory Committee ultimately decided against doing so.

CONSIDERATION OF A POSSIBLE AMENDMENT TO RULE 803(22) – At the suggestion of Judge Graber, the Advisory Committee considered eliminating two exceptions to Rule 803(22): convictions from nolo contendere pleas and misdemeanor convictions. The Advisory Committee concluded that retaining each of these exceptions was warranted.

RULE 704(B) – Similarly, the Advisory Committee determined not to proceed with suggestions to eliminate Rule 704(b) or to create a specific rule regarding electronic communication and hearsay.

IMPLICATIONS OF *CRAWFORD* – The Advisory Committee continues to monitor case law developments after the Supreme Court's decision in *Crawford v. Washington*, in which the Court held that the admission of "testimonial" hearsay violates the accused's right to confrontation unless the accused has an opportunity to confront and cross-examine the declarant.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Colloton and Professor Maggs provided the report on behalf of the Advisory Committee on Appellate Rules, which met on April 5, 2016, in Denver, Colorado. Judge Colloton advised that Judge Gorsuch will be the new chair of the Advisory Committee as of October 2016.

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

Action Items

CONFORMING AMENDMENTS TO RULES 8, 11, AND 39(E)(3) – The first set of amendments recommended for publication were amendments to Rules 8(a)(1)(B), 8(a)(2)(E), 8(b), 11(g), and 39(e)(3) to conform to the amendment to Rule of Civil Procedure 62 by revising any clauses that use the antiquated term "supersedeas bond." The language would be changed to "bond or other

security" as appropriate in each of the rules. Judge Colloton noted that the Civil Rules Committee would discuss the amendment to Rule 62 later in the meeting. He added that the Style Consultants suggested a minor edit to proposed Rule 8(b) (adding the word "a" before "stipulation" on line 16) after the publication of the agenda book materials, and that the Advisory Committee accepted the edit. The Standing Committee discussed the phrase "surety or other security provider" and whether "security provider" contained within it the term "surety" and made minor edits to the proposed amendments.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed conforming amendments to Rules 8(a)(1)(B), 8(a)(2)(E), 8(b), 11(g), and 39(e)(3), contingent on the Standing Committee's approval of the proposed amendment to Civil Rule 62 later in the meeting.**

LIMITATIONS ON THE FILING OF AMICUS BRIEFS BY PARTY CONSENT: RULE 29(A) – The proposed amendment to Rule 29(a) would allow a court to prohibit or strike the filing of an amicus brief based on party consent where the filing of the brief might cause a judge's disqualification. This amendment would ensure that local rules that forbid the filing of an amicus brief when the filing could cause the recusal of one or more judges would be consistent with Rule 29(a). Professor Coquillette observed that, as important as preserving room for local rules may be, congressional committees in the past have responded to the proliferation of local rules by urging the Rules Committee to allow them only if they respond to distinctive geographic, demographic, or economic realities that prevail in the different circuits. Judge Colloton explained that this proposed amendment is particularly relevant to the rehearing en banc process which traditionally has been decentralized and subject to local variations. He further explained that the Advisory Committee discussed and rejected expanding the exception to other types of amicus filings. The Advisory Committee made minor stylistic edits to the proposed amended rule.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed amendment to Rule 29(a)**.

APPELLATE FORM 4 – Litigants seeking permission to proceed in forma pauperis are currently required by Appellate Form 4 to provide the last four digits of their Social Security number. Given the potential security and privacy concerns associated with Social Security numbers, and the consensus of the clerks of court that the last four digits of a Social Security number are not needed for any purpose, the Advisory Committee proposes to amend Form 4 by deleting this question.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed amendment to Appellate Form 4**.

REVISION OF APPELLATE RULE 25 TO ADDRESS ELECTRONIC FILING, SIGNATURES, SERVICE, AND PROOF OF SERVICE – In conjunction with the publication of the proposed amendment to Civil Rule 5, and in an effort to achieve an optimal degree of uniformity, the Advisory Committee

proposes to amend Appellate Rule 25 to address electronic filing, signatures, service, and proof of service. The proposed revision generally requires all parties represented by counsel to file electronically. The Standing Committee discussed the use of "person" versus "party" throughout the proposed amended rule, as well as the use of these phrases in the companion Criminal and Civil Rules. One minor stylistic amendment was proposed. The Standing Committee decided to hold over the vote to approve publication of the proposed amendment to Rule 25 until the discussion regarding Civil Rule 5.

Information Item

Judge Colloton discussed whether Appellate Rules 26.1 and 29(c) should be amended to require additional disclosures to provide further information for judges in determining whether to recuse themselves. It is an issue that the Advisory Committee will consider at its fall meeting.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Bates and Professors Cooper and Marcus provided the report on behalf of the Advisory Committee on Civil Rules, which met on April 14, 2016, in Palm Beach, Florida. The Advisory Committee had four action items in the form of three sets of proposed amendments to be published this upcoming summer and the pilot project proposal.

Action Items

RULE 5 – The Advisory Committees for Civil, Appellate, Bankruptcy, and Criminal Rules have recently worked together to create uniform provisions for electronic filing and service across the four sets of rules to achieve an optimal degree of uniformity. Professor Cooper explained that the Advisory Committee for Criminal Rules wisely decided to create their own stand-alone rule, proposed Criminal Rule 49.

With regard to filing, the proposed amendment to Rule 5 requires a party represented by an attorney to file electronically unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule. It allows unrepresented parties to file electronically if permitted by court order or local rule. And it provides that an unrepresented party may be required to file electronically only by court order or by a local rule that includes reasonable exceptions. Under the amended rule, a paper filed electronically would constitute a written paper for purposes of the rules.

With regard to service, the amended rule provides that a paper is served by sending it to a registered user by filing it with the court's electronic filing system or by sending it by other electronic means if that person consents in writing. In addition, service is complete upon filing via the court's electronic filing system. Rule 5(b)(3), which allows electronic service only if a local rule authorizes it, would be abrogated to avoid inconsistency with the amended rule.

The Standing Committee discussed the use of the terms "person" and "party" throughout Rule 5 and across other sets of rules and agreed to consider this issue further after the meeting.

Upon motion, seconded by a member, and on a voice vote: **The Committee unanimously approved the proposed amendments to Civil Rule 5 for publication for public comment**.

Upon motion, seconded by a member, and on a voice vote: **The Committee unanimously approved for publication for public comment the proposed amendment to Appellate Rule 25 that conforms to the amended Civil Rule 5**.

RULE 23 – Judge Bates detailed six proposed changes to Rule 23, many of which concern settlements in class action lawsuits. Rule 23(c)(2)(B) extends notice consideration to a class proposed to be certified for settlement. Rule 23(e) applies the settlement procedural requirements to a class proposed to be certified for purposes of settlement. Rule 23(e)(1) spells out what information parties should give the courts prior to notice and under what circumstances courts should give notice to the parties. Rule 23(e)(2) lays out general standards for approval of the proposed settlement. Rule 23(e)(5) concerns class action objections, requiring objectors to state to whom the objection applies, requiring court approval for any payment for withdrawing an objection or dismissing an appeal, and providing that the indicative ruling procedure be used if an objector seeks approval of a payment for dismissing an appeal after the appeal has already been docketed. Finally, Rule 23(f) specifies that an order to give notice based on a likelihood of certification under Rule 23(e)(1) is not appealable and extends to 45 days the amount of time for an appeal if the United States is a party. Judge Robert Dow, the chair of the Rule 23 Subcommittee, explained the outreach efforts by the subcommittee and stated that many of the proposed changes would provide more flexibility for judges and practitioners. The Rule 23 Subcommittee, under Judge Dow's leadership and with research support from Professor Marcus, has devoted years to generating these proposed amendments, organized multiple conferences around the country with class action practitioners, and considered many other possible amendments.

Upon motion, seconded by a member, and on a voice vote: **The Committee unanimously approved the proposed package of amendments to Civil Rule 23 for publication for public comment**.

RULE 62 – Judge Bates reported that a subcommittee composed of members of the Appellate and Civil Rules Committees and chaired by Judge Scott Matheson laid the groundwork for amendments to Rule 62. The proposed amendment includes three changes to the rule. First, Rule 62(a) extends the automatic stay from 14 days to 30 days in order to eliminate the "gap" between the 14-day automatic stay and the 28 days allowed for various post-judgment motions. Second, it recognizes the court's authority to dissolve the automatic stay or replace it with a court-ordered stay for a longer duration. Third, Rule 62(b) clarifies that security other than a bond may be posted. Another organizational change is a proposed new subsection (d) that would include language from current subsections (a) and (c). Judge Bates added that the word "automatic" would be removed from the heading of Rule 62(c) and that conforming edits will be made to the proposed rule to accommodate changes made to the companion Appellate Rules. Professor Cooper stated that Rule 65.1 would be conformed to Appellate Rules 8, 11, and 39 after the conclusion of the meeting.

Upon motion, seconded by a member, and on a voice vote: **The Committee unanimously approved the proposed amendments to Civil Rule 62 for publication for public comment**. **It also approved granting to the Civil Rules Advisory Committee the authority to make amendments to Rule 65.1 to conform it to Appellate Rules 8, 11, and 39 with the goal of seeking approval of the Standing Committee in time to publish them simultaneously in August 2016. Finally, with the amendment to Civil Rule 62 officially approved for publication, it also approved for publication the proposed amendments to Appellate Rules 8(a)(1)(B), 8(a)(2)(E), 8(b), 11(g), and 39(e)(3) which all conform to the amended Civil Rule 62**.

PILOT PROJECTS – Judge Campbell provided the report of the Pilot Projects Subcommittee, which included participants from the Standing Committee, CACM, and the FJC. The Subcommittee has collected and reviewed a lot of information, including working with focus groups of lawyers with experience with these types of discovery regimes. As a result of this work, the Advisory Committee seeks approval to forward the Mandatory Initial Discovery Pilot Project and Expedited Procedures Pilot Project to the Judicial Conference for approval. The first project would test a system of mandatory initial discovery requests to be adopted in each participating court. The second would test the effectiveness of court-wide adoption of practices that, under the current rules, have proved effective in reducing cost and delay.

Judge Campbell proceeded to detail each pilot project and asked for comments and suggestions on the proposals. For the first pilot project, Judge Campbell explained the proposed procedures. The Standing Committee then discussed whether or not all judges in a district would be required to participate in the pilot project, how to choose the districts that should participate, and how to measure the results of the pilot studies. Judge Bates noted the Advisory Committee's strong support of the project. Several Standing Committee members voiced their support as well.

For the second pilot project, many of the procedures are already available, and the purpose of the pilot project is to use education and training to achieve greater use of available procedures. Judge Campbell advised the Committee that CACM has created a case dashboard that will be available to judges via CM/ECF, and that judges will be able to use this tool to monitor the progress of their cases. The pilot would require a bench/bar meeting each year to monitor progress.

Upon motion, seconded by a member, and on a voice vote: **The Committee unanimously approved the recommendation to the Judicial Conference of the (i) Mandatory Initial Discovery Pilot Project and (ii) Expedited Procedures Pilot Project, with delegated authority for the Advisory Committee and the Pilot Projects Subcommittee to make refinements to the projects as discussed by the Committee.**

Information Items

EDUCATIONAL EFFORTS REGARDING 2015 CIVIL RULES PACKAGE – Judge Bates outlined some of the efforts undertaken by the Advisory Committee and the FJC to educate the bench and the bar about the 2015 discovery reforms of the Rules of Civil Procedure. Among other efforts, he mentioned the production of several short videos, a 90-minute webinar, plenary sessions at

workshops for district court judges and magistrate judges, segments on the discovery reforms at several circuit court conferences, and other programs sponsored by the American Bar Association.

Judge Bates advised that a subcommittee has been formed, chaired by Judge Ericksen, to consider possible amendments to Rule 30(b)(6). Professor Cooper stated that the Advisory Committee is considering amending Rule 81(c) in light of a concern that it may not adequately protect against forfeiture of the right to a jury trial after a case has been removed from state court.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Molloy and Professors Beale and King provided the report for the Advisory Committee on Criminal Rules, which met on April 18, 2016, in Washington, D.C. He reported that the Advisory Committee had three action items in the form of three proposed amendments to be published this upcoming summer for which it sought the approval of the Standing Committee.

Action Items

RULE 49 – Judge Molloy explained the proposed new stand-alone rule governing electronic service and filing in criminal cases. The Advisory Committee determined to have a stand-alone rule for criminal cases rather than to continue the past practice of incorporating Civil Rule 5 by reference. The proposed amendments to Rule 49 track the general order of Civil Rule 5 rule and much of its language. Unlike the civil rule, Rule 49's discussion of electronic filing and service comes before nonelectronic filing and service in the new criminal rule. Both rules provide that an unrepresented party must file nonelectronically unless allowed to file electronically by court order or local rule. But one substantive difference between the two rules is that, under Civil Rule 5, an unrepresented party may be required to file electronically by court order or local rule. A second substantive difference is that all nonparties must file and serve nonelectronically in the absence of a contrary court order or local rule. This conforms to the current architecture of CM/ECF which only allows the government and the defendant to file electronically in a criminal case. Third, proposed Rule 49 contains language borrowed from Civil Rule 11(a) regarding signatures.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved the proposed amendments to Rules 49 for publication for public comment.**

RULE 45(C) – The proposed amendment to Rule 45(c) is a conforming amendment. It replaces the reference to Civil Rule 5 with a reference to Rule 49(a)(4)(C),(D), and (E).

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved the proposed amendment to Rules 45(c) for publication for public comment.**

RULE 12.4 – The proposed amendment to Rule 12.4, changes the required disclosures for statements under Rule 12.4 regarding organizational victims. It permits a court, upon the showing of good cause, to relieve the government of the burden of filing a statement identifying any organizational victim. The proposed amendments reflect changes to the Code of Judicial Conduct and require a party to file the Rule 12.4(a) statement within 28 days after the defendant's initial appearance. The Standing Committee briefly discussed similar potential changes to the Appellate Rules regarding disclosure of organizational victims. And the Advisory Committee discussed removing the word "supplemental" from the title and body of Rule 12.4(b) in order to avoid potential confusion.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved the proposed amendments to Rule 12.4 for publication for public comment.**

Information Items

Judge Molloy reviewed several of the pending items under consideration by the Advisory Committee. The Cooperator Subcommittee continues to consider the problem of risk of harm to cooperating defendants and the kinds of procedural protections that might alleviate this problem. The Subcommittee includes representatives from the Advisory Committee, Standing Committee, CACM, and the Department of Justice. The Advisory Committee has formed subcommittees to consider suggested amendments to Criminal Rule 16 dealing with discovery in complex criminal cases and Rule 5 of the Rules Governing Section 2255 Proceedings regarding petitioner reply briefs. And in response to an op-ed by Judge Jon Newman, the Advisory Committee will consider the wisdom of reducing the number of peremptory challenges in federal trials.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Sandra Ikuta and Professors Gibson and Harner presented the report on behalf of the Advisory Committee on Bankruptcy Rules, which met on March 31, 2016, in Denver, Colorado. The Advisory Committee had nine action items, and sought final approval for three of the items: Rule 1001; Rule 1006, and technical changes to certain official forms.

Action Items

RULE 1001 – The first item was a request for final approval of Rule 1001, dubbed the "civility rule" by Judge Ikuta, which was published in August 2015 to track changes to Civil Rule 1. Judge Ikuta explained that the Advisory Committee considered the comments submitted, but made no changes to the published version of the amended rule.

Upon a motion by a member, seconded by another, and by voice vote: **The Committee unanimously approved the proposed amendments to Rule 1001 for submission to the Judicial Conference for final approval.**

RULE 1006 – The second item was a proposed change to Rule 1006(b), also published for comment in August 2015. The rule explains how a person filing a petition in bankruptcy can pay

the filing fee in installments, as allowed by statute. The proposed amendment clarified that courts may not refuse to accept petitions or summarily dismiss a case because the petitioner failed to make an initial installment payment at the time of filing (even if such a payment was required by local rule). Judge Ikuta said that the Advisory Committee considered the comments submitted, but made no changes to the published version of the amended rule.

Upon a motion by a member, seconded by another, and by voice vote: **The Committee unanimously approved the proposed amendments to Rule 1006 for submission to the Judicial Conference for final approval.**

TECHNICAL CHANGES TO OFFICIAL FORMS – Judge Ikuta next described the Advisory Committee's recommendation for retroactive approval of technical changes to nine official forms. She explained that the Judicial Conference at its March 2016 meeting approved a new process for making technical amendments to official bankruptcy forms. Under the new process, the Advisory Committee makes the technical changes, subject to retroactive approval by the Committee and report to the Judicial Conference. Judge Sutton thanked Judge Ikuta for developing the new streamlined approval process for technical changes to official bankruptcy forms.

Upon a motion by a member, seconded by another, and by voice vote: **The Committee unanimously approved the proposed technical changes to Official Forms 106E/F, 119, 201, 206, 206E/F, 309A, 309I, 423, and 424, for submission to the Judicial Conference for final approval.**

Judge Ikuta reported that the Advisory Committee had six additional action items in the form of six sets of proposed amendments to be published this upcoming summer for which it sought the approval of the Committee.

Before focusing on these specific recommendations, however, Judge Ikuta first suggested that the Committee adopt a procedure for more systematically coordinating publication and approval of amendments that affect multiple rules across different advisory committees. The chair recommended that the Rules Committee Support Office lead the coordination effort over the next year and that the Committee then evaluate whether further refinement of the process is needed. Judge Ikuta next explained and sought approval for a package of conforming amendments:

RULE 5005(A)(2) – Judge Ikuta said that the proposed amendments to Rule 5005(a)(2) would make the rule consistent with the proposed amendment to Civil Rule 5(d)(3).

RULES 8002(C), 8011(A)(2)(C), OFFICIAL FORM 417A, RULE 8002(B), RULES 8013, 8015, 8016, 8022, OFFICIAL FORM 417C, PART VIII APPENDIX, AND RULE 8017 – Judge Ikuta next discussed proposed changes to Rules 8002(c), 8011(a)(2)(C), and Official Form 417A; Rule 8002(b) (regarding timeliness of tolling motions); Rules 8013, 8015, 8016, 8022, Official Form 417C, and Part VIII Appendix (regarding length limits), and Rule 8017 (regarding amicus filings). The rule and form changes were proposed to conform to pending and proposed changes to the Federal Rules of Appellate Procedure.

RULE 8002(A)(5) – The new subdivision (a)(5) to Rule 8002 includes a provision similar to FRAP 4(a)(7) specifying when a judgment or order is "entered" for purposes of appeal.

Upon a motion by a member, seconded by another, and by voice vote: **The Committee unanimously approved the package of conforming amendments to Rules 5005(a)(2), 8002(C), 8011(a)(2)(C), Official Form 417C, Part VIII Appendix, Rule 8017, and Rule 8002(a)(5) for publication for public comment.**

RULES 3015 AND 3015.1 – Judge Ikuta explained that the Advisory Committee published the first version of the plan form and nine related rule amendments in August 2013. The Advisory Committee received a lot of comments, made significant changes, and republished in 2014. During the second publication, the Advisory Committee again received many comments, including one comment signed by 144 bankruptcy judges who opposed a national official form for chapter 13 plans. Late in the second comment period, the Advisory Committee received a comment proposing that districts be allowed to opt out of the national plan if their local plan form met certain requirements. Many of the bankruptcy judges who opposed a national plan form supported the "opt-out" proposal.

At its fall 2015 meeting, the Advisory Committee approved the national plan form and related rule amendments, but voted to defer submitting those items for final approval pending further consideration of the opt-out proposal. The Advisory Committee reached out to bankruptcy interest groups, made refinements to the opt-out proposal, and received support from most interested parties, including many of the 144 opposing judges.

The proposed amendment to Rule 3015 and new Rule 3015.1 would implement the opt-out provision. Rule 3015 would require that the national chapter 13 plan form be used unless a district adopts a local district-wide form plan that complies with requirements set forth in proposed new Rule 3015.1. The Advisory Committee determined that a third publication period would allow for full vetting of the opt-out proposal, but it recommended a shortened three-month public comment period because of the narrow focus of the proposed change. To avoid confusion, the Advisory Committee recommended that opt-out rules be published in July 2016, a month earlier than the rules and forms to be published in August 2016.

Upon a motion by a member, seconded by another, and by voice vote: **The Committee unanimously approved the proposed amendments to Rule 3015 and 3015.1 for publication for public comment.**

RULE 8006 – The Advisory Committee proposed to amend subdivision (c) of Rule 8006 to allow a bankruptcy court, bankruptcy appellate panel, or district court to file a statement in support of or against a direct appeal certification filed by the parties.

Upon a motion by a member, seconded by another, and by voice vote: **The Committee unanimously approved the proposed amendment to Rule 8006 for publication for public comment.**

RULE 8018.1 –This new rule would help guide district courts in light of the Supreme Court's *Stern v. Marshall* trilogy of cases (*Stern*, *Arkison* and *Wellness*). Proposed Rule 8018.1 would address a situation where the bankruptcy court has mistakenly decided a *Stern* claim by allowing the district court to treat the bankruptcy court's erroneous final judgment as proposed findings of fact and conclusions of law to be decided de novo without having to remand the case to the bankruptcy court.

Upon a motion by a member, seconded by another, and by voice vote: **The Committee unanimously approved the proposed Rule 8018.1 for publication for public comment.**

RULE 8023 – The proposed amendment to Rule 8023 would add a cross-reference to Rule 9019 to remind the parties that when they enter a settlement and move to dismiss an appeal, they may first need to obtain the bankruptcy court's approval of the settlement first.

Upon a motion by a member, seconded by another, and by voice vote: **The Committee unanimously approved the proposed amendment to Rule 8023 for publication for public comment.**

OFFICIAL FORM 309F – Judge Ikuta said that the Advisory Committee recommended publication of amendments to five official bankruptcy forms. The first of the five forms was a proposed amendment to Official Form 309F. The form currently requires that a creditor who wants to assert that certain corporate and partnership debts are not dischargeable must file a complaint by a specific deadline. A recent district court decision evaluated the relevant statutory provisions and concluded that the form is incorrect and that no deadline should be imposed. The Advisory Committee agreed that the statute is ambiguous, and therefore proposed that Official Form 309F be amended to avoid taking a position.

Upon a motion by a member, seconded by another, and by voice vote: **The Committee unanimously approved the proposed amendment to Official Form 309F for publication for public comment.**

OFFICIAL FORMS 25A, 25B, 25C, AND 26 – Four forms, Official Forms 25A, 25B, 25C (the small business debtor forms), and 26 (Periodic Report Regarding Value, Operations, and Profitability) were renumbered as 425A, 425B, 425C and 426 to conform with the remainder of the Forms Modernization Project, and revised to be easier to understand and more consistent with the Bankruptcy Code.

Upon a motion by a member, seconded by another, and by voice vote: **The Committee unanimously approved the proposed amendment to Official Forms 25A, 25B, 25C, 26 for publication for public comment.**

Information Items

Judge Ikuta, Professor Elizabeth Gibson, and Professor Michelle Harner discussed the Advisory Committee's two information items. The first item was about the status of the Advisory Committee's proposal to add a new subdivision (h) to Rule 9037 in response to a suggestion

from CACM. Judge Ikuta and Professor Gibson explained that although the Advisory Committee approved an amendment, it decided to delay its recommendation for publication until the Advisory Committees for Appellate, Criminal and Civil Rules can decide whether to add a similar procedure to their privacy rules. Professor Harner summarized the second information item regarding the Advisory Committee's decision not to recommend any changes at this time to Rule 4003(c) in response to a suggestion.

REPORT OF THE ADMINISTRATIVE OFFICE

STRATEGIC PLAN FOR THE FEDERAL JUDICIARY – Rebecca Womeldorf discussed the Executive Committee's *Strategic Plan for the Federal Judiciary* which lays out various goals and priorities for the federal judiciary. She invited members to review this report and offer any input or feedback that they might have to her or Judge Sutton for inclusion in communications back to the Executive Committee.

LEGISLATIVE REPORT – There are bills currently pending in the House of Representatives and Senate intended to prevent proposed Criminal Rule 41 from becoming effective. Members of the Rules Committee have discussed this proposed rule with various members of Congress to respond to their concerns and explain the purpose and limited scope of the proposed rule.

CONCLUDING REMARKS

Judge Sutton thanked the Reporters for all their impressive work and Rebecca Womeldorf and the Rules Committee Support Office for helping to coordinate the meeting. Professor Coquillette thanked Judge Sutton again for all of his work as Chair of the Standing Committee over the past four years. Judge Sutton concluded the meeting. The Standing Committee will next meet in Phoenix, Arizona, on January 3–4, 2017.

Respectfully submitted,

Rebecca A. Womeldorf
Secretary, Standing Committee

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TAB 3A

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MEMORANDUM

To: Advisory Committee on Appellate Rules

From: Gregory E. Maggs, Reporter

Date: September 24, 2016

Subject: Items 08-AP-A, 11-AP-C, and 15-AP-D: Amending Rule 3(a) and 3(d) to Address the Electronic Filing and Service of a Notice of Appeal

These items concern Appellate Rules 3(a) and (d). Rule 3(a) requires an appellant to file a notice of appeal with the district clerk. Rule 3(d) requires the district clerk to serve the notice. The question for the Advisory Committee is whether these Rules require revision in light of the attached recently proposed amendments to Appellate Rule 25 concerning electronic filing and service. This memorandum examines each sentence of Rules 3(a) and 3(d) and then presents a discussion draft showing recommended changes.

Appellate Rule 3(a) currently contains two sentences. The first sentence of Rule 3(a) says: "An appeal permitted by law as of right from a district court to a court of appeals may be taken only by filing a notice of appeal with the district clerk within the time allowed by Rule 4." No amendment to this sentence is necessary because it does not specify how the appellant must file the notice. The proposed amendments to Appellate Rule 25(a)(2), as published for public comment, will determine when parties will file papers electronically or non-electronically.

The second sentence of Appellate Rule 3(a) says: "At the time of filing, the appellant must furnish the clerk with enough copies of the notice to enable the clerk to comply with Rule 3(d)." At first, it might seem that this rule should not apply if the appellant files the notice of appeal electronically. But sometimes it may apply. Under Appellate Rule 3(d), the district clerk must serve the notice of appeal. The clerk will follow the revised provisions in Appellate Rule 25 on whether to send the notice electronically or non-electronically. If the appellee is not represented by counsel (and local rules or a court order do not permit the appellee to use the electronic filing system), then clerk must mail the notice to the appellee. Accordingly, even if the appellant files the notice electronically, the appellant should provide the clerk with a paper copy to serve on the appellee. The second sentence of Appellate Rule 3(a) therefore does not require amendment. That said, the Committee might consider amending the second sentence of Rule 3(a) by adding the word "nonelectronic" before the word copies to prevent confusion about this point. In addition, the Committee could explain the point in a Committee Note.

Rule 3(d) requires several minor amendments in light of the new rules on electronic filing and service. The first sentence of Rule 3(d)(1) says: "The district clerk must serve notice of the filing of a notice of appeal by mailing a copy to each party's counsel of record—excluding the appellant's—or, if a party is proceeding pro se, to the party's last known address." The first clause of the sentence requires revision because it directs the district clerk to make service by mail. This requirement is inconsistent with Appellate Rule 25. Accordingly, I suggest revising Rule 3(d)(1) by substituting the word "sending" for "mailing." The sentence would require the clerk to serve the notice by "sending" it, but would not specify the means. The clerk would follow the revised provisions in Rule 25 in deciding whether to send the notice electronically or nonelectronically.

The second sentence of Rule 3(d)(1) says: "When a defendant in a criminal case appeals, the clerk must also serve a copy of the notice of appeal on the defendant, either by personal service or by mail addressed to the defendant." My suggested revision is to delete the second clause of this sentence. Again, the clerk would follow the revised provisions in Rule 25 in deciding whether to send the notice electronically or nonelectronically.

The third sentence of Rule 3(d)(1) says: "The clerk must promptly send a copy of the notice of appeal and of the docket entries—and any later docket entries—to the clerk of the court of appeals named in the notice." This sentence does not require revision. As written, the rule does not require the clerk to send the copy by mail, and nothing prohibits the clerk from sending the copy electronically.

The fourth sentence of Rule 3(d)(1) says: "The district clerk must note, on each copy, the date when the notice of appeal was filed." This sentence does not appear to require revision. A clerk could continue to note the date on a paper copy, and nothing would prevent the clerk from noting the date on an electronic copy.

Rule 3(d)(2) does not appear to require revision. It does not concern the method of filing or serving notice.

Rule 3(d)(3)'s first sentence also does not require revision because it also does not concern the method of filing or serving notice. Rule 3(d)(3)'s second sentence says: "The clerk must note on the docket the names of the parties to whom the clerk mails copies, with the date of mailing." Given that the clerk might serve parties either electronically or by mail, this sentence needs to be revised. I suggest rewriting the rule to say: "The clerk must note on the docket the names of the parties to whom the clerk ~~mails~~ sends copies, with the date of ~~mailing~~ sending." As revised, the rule would apply regardless of whether the clerk sends the copies electronically or nonelectronically.

Below is a discussion draft showing all of the proposed revisions suggested in the foregoing paragraphs:

Rule 3. Appeal as of Right—How Taken

(a) Filing the Notice of Appeal.

(1) An appeal permitted by law as of right from a district court to a court of appeals may be taken only by filing a notice of appeal with the district clerk within the time allowed by Rule 4. At the time of filing, the appellant must furnish the clerk with enough [nonelectronic][1] copies of the notice to enable the clerk to comply with Rule 3(d).

* * *

(d) Serving the Notice of Appeal.

(1) The district clerk must serve notice of the filing of a notice of appeal by ~~mailing~~ sending[2] a copy to each party's counsel of record—excluding the appellant's—or, if a party is proceeding pro se, to the party's last known address. When a defendant in a criminal case appeals, the clerk must also serve a copy of the notice of appeal on the defendant~~, either by personal service or by mail addressed to the defendant~~.[3] The clerk must promptly send a copy of the notice of appeal and of the docket entries—and any later docket entries—to the clerk of the court of appeals named in the notice. The district clerk must note, on each copy,

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[1] The word "nonelectronic" is not essential but it might make the rule clearer. Even if the appellant files the notice of appeal electronically, the appellant must provide the district clerk with enough paper copies of the notice to serve on any appellee whom the district court may not serve electronically.

[2] The word "mailing" is replaced with "sending." The clerk will follow the revised provisions in Rule 25 in deciding whether to send the notice electronically or nonelectronically.

[3] I recommended deleting this phrase because it would prohibit electronic service. Deleting the phrase would not prevent the clerk from serving the notice either by mail or by personal service.

the date when the notice of appeal was filed.[4]

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

(3) The district clerk's failure to serve notice does not affect the validity of the appeal. The clerk must note on the docket the names of the parties to whom the clerk ~~mails~~ sends copies, with the date of ~~mailing~~ sending.[5] Service is sufficient despite the death of a party or the party's counsel.

ADVISORY COMMITTEE NOTE

Amendments to Subdivisons (a) and (d) change the words "mail" and "mailing" to "send" and "sending" to make electronic filing and service possible. Other rules determine when a party or the clerk may or must send a notice electronically or non-electronically. [In Subdivision (a), the word "nonelectronic" is added to clarify that, even if the appellant files the notice of appeal electronically, the appellant must provide the district clerk with enough paper copies of the notice to serve on any appellee whom the district court may not serve electronically.] Subdivision (d)(1) no longer specifies the manner in which the clerk must serve the defendant in a criminal case. Other rules will determine whether the clerk serves the notice electronically or non-electronically.

Attachment

Proposed Revision of Appellate Rule 25 as published for public comment in Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of

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[4] When this rule was written, the clerk would note the date of filing on paper copies. But nothing in the text of the rule would prevent the clerk from adding the date of filing to electronic copies. A court's electronic filing system may do that automatically.

[5] Substituting the words "sends" and "sending" for "mails" and "mailing" will permit electronic service.

Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure 27-37 (Aug. 2016)

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TAB 3B

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Proposed Revision of Appellate Rule 25 as published for public comment in Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure 27-37 (Aug. 2016)

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—Generally Required; Exceptions.** A person represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.

(ii) **By an 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 a paper to a registered user by filing it with the court's electronic-filing system or by using other electronic means that the person consented to in writing.

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

cost, service on a ~~party~~person 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 or sending, unless the ~~party~~person making service is notified that the paper was not received by the ~~party~~person served.

(d) Proof of Service.

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

(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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TAB 4A

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MEMORANDUM

To: Advisory Committee on Appellate Rules

From: Gregory E. Maggs, Reporter

Date: September 19, 2016

Subject: Item 12-AP-D: Treatment of appeal bonds under Civil Rule 62 and Appellate Rule 8

I. Introduction

At its April 2016 meeting, the Advisory Committee proposed changes to Appellate Rule 8 and other rules to eliminate the term "supersedeas bond." In June 2016, the Standing Committee then made minor additional alterations to Appellate Rule 8 and published the proposed revised rule for public comment. This memorandum concerns two developments that occurred after the Standing Committee's meeting. First, Professor Ed Cooper, Reporter for the Civil Rules Advisory Committee, noticed a discrepancy between the proposed revision to Appellate Rule 8(d) and a corresponding provision in Civil Rule 65.1. Second, inquiry into ways of addressing this discrepancy revealed a separate internal discrepancy in Rule 8(d). This memorandum describes both problems and identifies possible ways of addressing them. The Committee, however, may wish to postpone any formal action on these matters until receiving public comments on the published version of Rule 8(d) in February 2017.

II. Background

As discussed in previous meetings, Civil Rule 62(b) currently requires appellants to post a "supersedeas bond" to stay a judgment pending an appeal. The Civil Rules Advisory Committee has proposed changing this rule to allow an appellant to post a "bond or other security." It also has proposed conforming amendments to several other Civil Rules, including Civil Rule 65.1. In April 2016, the Appellate Rules Advisory Committee proposed various changes to Rule 8 and other Appellate Rules to make them conform to the proposed amendments to the Civil Rules. The Standing Committee has now published all of the proposed changes for public comment.

III. Inconsistency Between Appellate Rule 8 and Civil Rule 65.1

Attached to this memorandum are copies of the published versions of revised Appellate Rule 8 and Civil Rule 65.1. Reporter Cooper has pointed out that lines 26-27 of Appellate Rule

8 use this phrase: "its liability on the bond or undertaking." In contrast, line 11 of Civil Rule 65.1 uses this phrase: "its liability on the bond, undertaking, or other security." Reporter Cooper suggests the Appellate Rules Advisory Committee should add the words "or other security" to Rule 8(b) to make it match Civil Rule 65.1. Including these words would not only make Appellate Rule 8(b) consistent with Civil Rule 65.1, but also would make the second clause of the first sentence of Rule 8(b) more consistent with the first clause of Rule 8(b) (lines 21-22). The following text shows the suggested correction to the version of Rule 26.1 published for public comment:

(b) Proceeding Against a Surety or Other Security Provider. If a party gives security in the form of a bond, other security, a stipulation, or other undertaking with one or more sureties or other security providers, each provider submits to the jurisdiction of the district court and irrevocably appoints the district clerk as its agent on whom any papers affecting its liability on the bond, ~~or~~ undertaking, or other security may be served. On motion, a 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 security provider provider whose address is known.

IV. Rule 8(b)'s Internal Discrepancy Concerning the Term "Stipulation"

In addressing the problem above another discrepancy became apparent: the first clause of the first sentence of Rule 8(d) [lines 20-23 above] mentions four forms of security: "a bond, other security, a stipulation, or other undertaking." But the second clause [lines 23-27 above], even with the proposed correction, would only mention "a bond, undertaking, or other security" and not a "stipulation." The Advisory Committee appears to have four options regarding this inconsistency:

Option (1): Delete the word "stipulation" in line 21. This option would make the two clauses of Rule 8(d)'s first sentence consistent with each other and would not create an inconsistency with Rule 65.1. The possibility of pursuing this option is not entirely new. At its April 2016 meeting, the Advisory Committee discussed the possibility of deleting the word "stipulation" but did not agree to take this action. The Committee appeared to be worried about the unknown consequences of deleting the word "stipulation." No reported cases under Rule 8(b) involve "stipulations," and the leading treatises do not explain how stipulations might serve as security.

Option (2): Add the word "stipulation" to line 27, so that the second clause of the first sentence would refer to "the bond, stipulation, undertaking, or other security." This action would make the first and second clauses of the first sentence of Rule 8(d) consistent. But it would make the second clause inconsistent with Civil Rule 65.1. The Committee may wish to consult with the Civil Rules Advisory Committee before taking this step.

Option (3): Rephrase the second clause of the first sentence of Rule 8(b) to refer simply to "the security" instead re-listing all the forms of security in the first clause of the sentence. Under this option for revision, Rule 8(b) would read as follows:

(b) Proceeding Against a Surety or Other Security Provider. If a party gives security in the form of a bond, other security, a stipulation, or other undertaking with one or more sureties or other security providers, each provider submits to the jurisdiction of the district court and irrevocably appoints the district clerk as its agent on whom any papers affecting its liability on the security ~~bond or undertaking~~ may be served. On motion, a 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 security provider provider whose address is known.

Under this option, the generic term "security" would cover all the forms of security in the first clause without eliminating any of them. This option arguably also cures the discrepancy between Rule 65.1 and Rule 8(b) noticed by Reporter Cooper because the second clause would be broad enough to cover everything in Rule 65.1.

Option (4): Make no revision to Rule 8(b). The argument for this option is that the inconsistency between the first and second clauses of the first sentence of Rule 8(b) exists in the current version of Rule 8(b) and has not caused any known problems.[1] The published version of Rule 8(b) perpetuates the issue but does not make it any worse.

V. Conclusion

The Committee may wish to express its sense now how it would like to address the two problems above. Alternatively, the Committee may wish to postpone any formal action on these matters until receiving public comments on the published version of Rule 8(d) in February 2017.

Attachment

Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure 21-23, 239-240 (August 2016)

[1] The first sentence of Rule 8(b) currently says: "If a party gives security in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits to the jurisdiction of the district court and irrevocably appoints the district clerk as the surety's agent on whom any papers affecting the surety's liability on the bond or undertaking may be served." The first clause mentions a "stipulation" but the second clause does not.

TAB 4B

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Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure 21-23, 239-240 (August 2016)

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.

* * * * *

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* 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~~ a 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

To conform to line 11 of Civil Rule 65.1, the highlighted phrase should say: "its liability on the bond, undertaking, or other security."

district clerk, who must promptly mail a copy to each ~~surety~~security provider 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 65.1. Proceedings Against a Surety or Other Security Provider

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

Committee Note

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

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MEMORANDUM

DATE: September 20, 2016

TO: Advisory Committee on Appellate Rules

FROM: Gregory E. Maggs, Reporter

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

I. Introduction

This item concerns proposed revisions to Appellate Rules 26.1 and 29(c), which require parties and amici curiae to make certain disclosures. Part II describes the current versions of these rules and reviews the impetus for possibly changing them. Part III presents updated discussion drafts for the Advisory Committee to consider at the October meeting. Part IV then identifies a number of specific questions that the Advisory Committee may wish to resolve.

II. Background

Appellate Rule 26.1 requires any "nongovernmental corporate party" to make certain disclosures when filing briefs and other documents so that the judges assigned to the case can determine whether to recuse themselves. The rule currently says:

Rule 26.1. Corporate Disclosure Statement

(a) Who Must File. Any nongovernmental corporate party to a proceeding in a court of appeals must file a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation.

(b) Time for Filing; Supplemental Filing. A party must file the Rule 26.1(a) statement with the principal brief or upon filing a motion, response, petition, or answer in the court of appeals, whichever occurs first, unless a local rule requires earlier filing. Even if the statement has already been filed, the party's principal brief must include the statement before the table of contents. A party must supplement its statement whenever the information that must be disclosed under

Rule 26.1(a) changes.

(c) Number of Copies. If the Rule 26.1(a) statement is filed before the principal brief, or if a supplemental statement is filed, the party must file an original and 3 copies unless the court requires a different number by local rule or by order in a particular case.

Appellate Rule 29(c)(1) and (5) also require certain disclosures in amicus briefs for the same purpose. These provisions currently provide:

Rule 29. Brief of an Amicus Curiae

* * *

(c) Contents and Form. An amicus brief must comply with Rule 32. In addition to the requirements of Rule 32, the cover must identify the party or parties supported and indicate whether the brief supports affirmance or reversal. An amicus brief need not comply with Rule 28, but must include the following:

(1) if the amicus curiae is a corporation, a disclosure statement like that required of parties by Rule 26.1;

* * *

(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; and

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

* * *

Local rules in some circuits currently impose disclosure requirements that go beyond those found in Appellate Rules 26.1 and 29(c). In addition, judges may need additional information in order to comply with their ethical duties to recuse themselves in certain situations. In March 2015, Professor Dan Capra prepared the attached memorandum on the subject, and

proposed a number of possible amendments for discussion.

The Advisory Committee has discussed Prof. Capra's proposed amendments to Rule 26.1 and 29(c) at its last several meetings. The Criminal Rules Advisory Committee also has been working on the subject of disclosure statements. At its Spring 2016 meeting, it proposed revisions to Criminal Rule 12.4, which is the analogue of Appellate Rule 26.1. The revisions to Criminal Rule 12.4 address the identification of organizational victims of crimes and the filing of supplemental disclosure statements. The Standing Committee discussed the Criminal Rules Advisory Committee's proposed revisions to Rule 12.4 at its June 2016 meeting and, in August 2016, published them for public comment. An excerpt from the report of the Criminal Rules Advisory Committee on to the Standing Committee is attached.

II. Revised Discussion Drafts of Appellate Rule 26.1 and Rule 29(c)

The discussion drafts below are modified versions of the discussion drafts that first appeared in Prof. Capra's memorandum. These modified drafts reflect (1) changes discussed at the Advisory Committee's October 2015 and April 2016 meetings; (2) proposed modifications to make Rule 26.1 conform to the proposed revisions of Criminal Rule 12.4; and (3) several suggested additional revisions. Footnotes indicate the locations of the changes in the discussion drafts since the April 2016 meeting.

Rule 26.1. ~~Corporate~~ Disclosure Statement

(a) Who Must File; <u>What Must Be Disclosed</u>. Any ~~nongovernmental corporate~~ party to a proceeding in a court of appeals must file a statement that lists:[1]

<u>(1)</u> any parent[2] corporation<u>,</u> and any publicly held ~~corporation~~ <u>entity,</u>[3] ~~that~~

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[1] The April 2016 discussion draft said: "~~Any nongovernmental corporate~~ <u>Except for an individual or a governmental unit, any</u> party to a proceeding in a court of appeals must file a statement that lists . . . ." As recounted in the draft minutes of the April 2016 meeting, the Advisory Committee decided to eliminate the "except" clause in Rule 26.1(a). The Committee believed that non-corporate parties should make the disclosures listed in Rule 26.1(a)(2)-(4). Non-corporate parties—like many corporate parties—simply will have nothing to disclose under Rule 26.1(a)(1).

[2] Earlier discussion drafts would have required parties to list any "affiliated" corporation in addition to any parent corporation, adopting a requirement of a Fourth Circuit local rule. But at the April 2016 meeting, the Advisory Committee decided to eliminate the requirement of

~~owns 10% or more of its stock~~ that has a 10% or greater ownership interest in the party or states that there is no such corporation or entity;

(2) the names of all judges in the matter[4] and in any related [state][5] matter;

(3) the names of all lawyers and legal organizations that have appeared or are expected to appear for the party in the matter [and any related matter][6]; and

(4) the names of all witnesses who have testified on behalf of the party in the matter [and any related matter].[7]

(b) Time ~~for~~ to File~~ing~~; ~~Supplemental~~ Later Filing.[8] A party must file the

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disclosing affiliated corporations because of the difficulty of defining the term "affiliated."

[3] The Appellate Rules do not define the term "publicly held entity." Professor Capra's memorandum suggests that the term might apply to certain trade associations and limited partnerships. One of the questions in Part IV below is whether the lack of a definition should preclude this proposed change.

[4] At the April 2016 meeting, the Advisory Committee decided to use the term "matter" instead of "case" or "proceeding" in Rule 26.1(a)(2)-(4) because some appeals come directly from federal agencies. The term "matter" is broad enough to cover any kind of previous proceeding.

[5] The previous discussion draft did not include brackets around the word "state" in this discussion draft. I have added the brackets because the Advisory Committee may wish to delete the word "state." The deletion would change the proposed revision to require disclosure of the names of the judges in any related matter, whether it was a federal or state matter.

[6] I have added the bracketed words "and any related matter." Including this phrase would make the disclosure requirement in Rule 26.1(a)(3) similar to the disclosure requirement in Rule 26.1(a)(2).

[7] As recounted in the draft minutes of the April 2016 meeting, the Advisory Committee discussed deleting the proposed requirement of disclosing the names of witnesses because of its potential burden. The Committee, however, did not reach a conclusion on the issue. In addition, I have added the bracketed words "and any related matter" to make the disclosure requirement in Rule 26.1(a)(4) similar to the disclosure requirement in Rule 26.1(a)(2).

[8] The previous discussion drafts of Rule 26.1 did not propose any changes to Rule 26.1 (b). The proposed changes in this discussion draft would partially conform Rule 26.1(b) to the

Rule 26.1(a) statement with the principal brief or upon filing a motion, response, petition, or answer in the court of appeals, whichever occurs first, unless a local rule requires earlier filing. Even if the statement has already been filed, the party's principal brief must include the statement before the table of contents. A party must ~~supplement~~ file a statement promptly if the party learns of any additional required information or any changes in required information ~~upon its statement whenever the information that must be disclosed under Rule 26.1(a) changes~~.

* * *

(d) Organizational Victim in a Criminal Case.[9] [In a criminal case,] unless the government shows good cause, it must file a statement identifying any organizational victim of the alleged criminal activity. If the organizational victim is a corporation,[10] the statement must also disclose the information required by Rule Rule 26.1(a)(1) to the extent it can be obtained through due diligence.

(e) Bankruptcy Proceedings.[11] In a bankruptcy proceeding, the debtor or the

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recently published proposed revision of Criminal Rule 12.4(b). Further discussion of this matter appears in Part IV of this memorandum.

[9] The language of the current discussion draft is copied from the recently published proposed revision of Criminal Rule 12.4(a)(2). Further discussion of this matter appears in Part IV of this memorandum. The April 2016 discussion draft of Appellate Rule 26.1(d) said: "In a criminal case if an organization is a victim of [the alleged] criminal activity, the government must file a statement identifying the victim, unless the government shows good cause for not complying with this requirement. If the organizational victim is a corporation or publicly held entity, the statement must also disclose the information required by Rule 26.1(a)(1) to the extent it can be obtained through due diligence."

[10] This proposal (following Criminal Rule 12.4) refers only to corporations. In contrast, the proposed revision of Rule 26.1(a)(1) refers to both corporations and "publicly held entities." The Committee may wish to reconcile this discrepancy. Further discussion of this matter appears in Part IV of this memorandum.

[11] The Bankruptcy Rules do not currently require these disclosures and the Bankruptcy Rules Advisory Committee is not currently contemplating any changes to disclosure requirements. Further discussion of this matter appears in Part IV of this memorandum.

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[12] must file a statement that discloses the information required by Rule 26.1.

[**(g) Local Rules.** A local rule may not impose greater or lesser disclosure requirements on a party.][13]

COMMITTEE NOTE

Under federal law and ethical standards, judges must decide whether to recuse themselves from participating in cases for various reasons. Prior to 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 disclosures. The change to subdivison (b) establishes that a supplemental filing is required not only when information that has been disclosed changes, but also when a party learns of additional information that is subject to

[12] At its April 2016 meeting, the Advisory Committee approved the phrase "a person who wants to intervene," which comes from Rule 15.1(d). The October 2015 draft had used the word "intervenors."

[13] This suggested provision is new. One of the reasons for amending Rule 26.1 is to bring it in line with local rules. Barring local rules from increasing or decreasing the required disclosures could further this goal. Further discussion of this matter appears in Part IV of this memorandum.

the disclosure requirements.[14] 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 26.1(f) imposes disclosure requirements on persons who want to intervene because their intervention, if allowed, might require a judge's recusal. The amendments to this rule change only the disclosure requirements and do not change the standards for recusal.[15] [In order to make federal appellate practice more uniform, Subdivision 26.1(g) prohibits local rules from increasing or decreasing disclosure requirements.][16]

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 curiae is an individual or governmental unit;

* * *

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[14] This sentence is new. It explains the purpose of the proposed amendment to Rule 26.1(b) on supplemental filings. As explained above, this proposed amendment follows the proposed revision of Criminal Rule 12.4(b).

[15] The last sentence of this note is new. At the April 2016 meeting, the Advisory Committee concluded that the Advisory Committee Note should indicate that the Committee is not trying to change existing recusal requirements by mandating additional disclosures.

[16] This sentence would explain the purpose of the proposed new Rule 26.1(g).

(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.[17]

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.

IV. Issues for Discussion at the October 2016 Meeting

At the October 2016 meeting, the Advisory Committee may wish to consider the following issues about the discussion drafts above.

A. Questions about the Proposed Revision to Rule 26.1(a)

1. Should efforts to amend Rule 26.1(a) continue?

Although the Committee has discussed the text of proposed revisions of Rule 26.1(a), it has not formally decided the fundamental question of whether to recommend any revision. Even at this late date, the Committee still might decide that the benefit of requiring additional disclosures does not justify the effort required to amend Rule 26.1(a) and to coordinate the

[17] At the April 2016 meeting, the Advisory Committee had no objection to the phrasing of Rule 29(c)(5)(D).

changes with the other Advisory Committees. The current language of Rule 26.1(a) is almost identical to the current version of Civil Rule 7.1(a), Criminal Rule 12.4(a)(1), and Bankruptcy Rules 7007.1(a) and 8012(a) . The other Advisory Committees are not currently considering revisions to these provisions. (The Criminal Rules Advisory Committee did not propose amendments to Criminal Rule 12.4(a)(1) when it recommended the recently published proposed revisions of other parts of Criminal Rule 12.4.)

2. Should the term "publicly held corporation" be changed to "publicly held entity" in Rule 26.1(a)(1)?

The discussion draft of Rule 26.1(a)(1) proposes changing the term "publicly held corporation" to "publicly held entity." Making this change may cause some uncertainty because the Appellate Rules do not define the term "publicly held entity." Professor Capra's memorandum suggests that the term might apply to certain trade associations and limited partnerships.

If the Committee approves the proposal to change the word "corporation" to "entity" in Rule 26.1(a) then it also may wish to add a definition. Although I could find no specific definition of "publicly held entity" in federal law, various legal treatises use the term. A typical definition is: "A publicly held entity is an entity whose interests are traded in a public exchange." John M. Cunningham & Vernon R. Proctor, Drafting Limited Liability Company Operating Agreements § 3.02 (2016). In addition, the Committee also may wish to change the term "corporation" to "entity" in Rule 26.1(d).

3. Should the phrase "any related state matter" be changed to "any related matter" in Rule 26.1(a)(2)?

The discussion draft of Rule 26.1(a)(2) proposes requiring a party to disclose the names of the judges in "any related state matter." The Advisory Committee may wish to delete the word "state" so that the provision would require disclosure of the names of the judges in any related matter, whether it is a federal or state matter.

4. Should the proposed provision of disclosure of witnesses be included in Rule 26.1(a)(4)?

At the April 2016 meeting, several members of the Advisory Committee suggested that the additional disclosure requirements in Rule 26.1(a) might be overly burdensome to litigants. These members questioned whether the benefits of additional disclosures were actually worth the cost. As recounted in the draft minutes of the April 2016 meeting, the Advisory Committee discussed deleting the proposed requirement of disclosing the names of witnesses in Rule

26.1(a)(4) because of its potential burden. The Advisory Committee did not reach a conclusion on the issue. Disclosure might be easy when a case contains a record of a complete trial because such a record usually contains a list of the witnesses who testified. But it might be more difficult in other cases.

5. How should the Advisory Committee coordinate revisions of Rule 26.1(a) with the other Advisory Committees?

As noted above, Civil Rule 7.1(a), Criminal Rule 12.4(a)(1), and Bankruptcy Rules 7007.1(a) and 8012(a) are very similar to Appellate Rule 26.1(a). If the Advisory Committee decides to propose changes Rule 26.1(a), it presumably should have a plan to coordinate changes with the other Advisory Committees. Anticipating this possibility, the Criminal Rules Advisory Committee's report to the Standing Committee says: "Efforts to coordinate the changes will continue if the Appellate Rules Committee decides to move forward with an amendment on this subject [i.e., disclosures under Rule 26.1(a)]." One possibility would be to create a joint subcommittee.

B. Questions about the Proposed Revision to Rule 26.1(b)

The Criminal Rules Advisory Committee has proposed changes to Criminal Rule 12.4(b), which the Standing Committee has now published for public comment (see the second attachment to this memorandum). The changes concern supplemental disclosure statements. The changes are as follows:

Criminal Rule 12.4

* * *

(b) Time ~~for~~ to File~~ing~~; ~~Supplemental~~ Later Filing. A party must:

(1) file the Rule 12.4(a) statement within 28 days after~~upon~~ the defendant's initial appearance; and

(2) ~~promptly~~ file a ~~supplemental~~ statement at a later time promptly if the party learns of any additional required information or any changes in required information~~upon any change in the information that the statement requires~~.

The Criminal Rules Advisory Committee has explained the proposed amendments as follows:

> The proposed amendment to Rule 12.4(b) makes two changes. It specifies that the time for making the disclosures is within 28 days after the initial appearance, and

it makes clear that a supplemental filing is required not only when information that has been disclosed changes, but also when a party learns of additional information that is subject to the disclosure requirements.

The discussion drafts of Rule 26.1 that the Advisory Committee considered at previous meetings did not address supplemental disclosure statements. Assuming that the Advisory Committee would want to follow the Criminal Rules Advisory Committee on this matter, I have now addressed supplemental filing statements in the discussion draft of Rule 26.1(b) above.

The discussion draft of Rule 26.1(b) copies the language in the proposed revision of Criminal Rule 12.4(b)(2) regarding the requirement of filing supplemental statements. But the proposed revision does not attempt to conform Appellate Rule 26.1 to the first change in Criminal Rule 12.4(b)(1), which now requires the initial disclosure statement to be filed within 28 days after the initial appearance. Instead, the time for filing under Rule 26.1(b) remains the time when the first brief or other listed document is filed. I see no reason that the Appellate Rules and Criminal Rules must be uniform on this matter given the differences between trial and appellate procedure.

The Advisory Committee may wish to decide whether this is the correct approach. In addition, the Committee may wish to decide whether to propose this change to the Standing Committee even if the Committee does not recommend revisions to other parts of Rule 26.1.

C. Questions about the Proposed Revision to Rule 26.1 (d)

In the discussion draft above, Rule 26.1(d) now follows the language of the recently published revised version of Criminal Rule 12.4(a)(2) (see the second attachment to this memorandum). The text of the previous discussion draft of Rule 26.1(d) is shown in footnote 9. The substance is not much different, but Criminal Rule 12.4(a)(2) is slightly less detailed.

As with the proposed revision to Rule 26.1(b), the Advisory Committee may wish to decide whether this is the correct approach. In addition, the Committee may wish to decide whether to propose this change to the Standing Committee even if it does not recommend revisions to other parts of Rule 26.1.

D. Questions about the Proposed Revision to Rule 26.1(d)

Bankruptcy Rules 7007.1(a) and 8012(a) require corporate disclosure statements in bankruptcy cases. These Bankruptcy Rules are very similar to the current version of Appellate Rule 26.1. A possible argument against the proposed revisions in the discussion draft of Rule 26.1(d) above is that the Bankruptcy Rules Advisory Committee is not currently considering

changes to Rules 7007.1 and 8012. Although Prof. Capra included a proposed version of Rule 26.1(d) in his memorandum, he advised the Committee: "The lack of movement in the Bankruptcy Rules Committee probably counsels some caution in proceeding at the appellate level, as one would think that the Bankruptcy Rules would be the primary source for defining who is a party in a bankruptcy proceeding for purposes of the disclosure rules." Based on this concern, the Advisory Committee may wish to consider whether it would be more appropriate to allow the Bankruptcy Rules Advisory Committee to take the lead on this matter.

E. Questions about the Proposed Revision to Rule 26.1(g)

As described in Professor Capra's memorandum, various local rules require disclosures that are not currently required by Rule 26.1. One of the purposes of revising Rule 26.1 is to incorporate those local rules to make federal practice uniform. To prevent future disunity, the newly suggested Rule 26.1(g) in the discussion draft would prohibit local rules from imposing greater or lesser disclosure requirements on a party. The Committee has not previously consider this question but may wish to do so at it October 2016 meeting.

Attachments:

1. Memorandum from Prof. Daniel J. Capra to the Advisory Committee on Appellate Rules, Subject: Item No. 08-AP-R (March 31, 2015)

2. Excerpt from the May 14, 2016 Report of the Advisory Committee on Criminal Rules (Revised July 6, 2016), as reprinted in Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure 248, 249, 251-253 (Aug. 2016)

MEMORANDUM

To: Advisory Committee on Appellate Rules

From: Daniel J. Capra

Re: Item No. 08-AP-R (disclosure requirements)

Date: March 31, 2015

This item focuses on local circuit provisions that impose disclosure requirements broader than those requirements found in the Appellate Rules. The Committee has been discussing whether any of the additional requirements in these local rules should be considered for inclusion in the Appellate rules. At its last meeting, the Committee considered several areas in which certain circuits had imposed additional disclosure requirements. These included:

- Judge's connection with a prior or current participant in the litigation (including lawyers);
- Disclosures in criminal appeals;
- Disclosures in bankruptcy appeals;
- Disclosure by intervenors;
- Disclosure of an ownership interest other than stock;
- Disclosure of ownership interests held other than by publicly traded corporations;
- Disclosure by public entities not in the corporate form;
- Disclosure of affiliates; and
- Greater disclosure by amici.

In addition, at the Standing Committee meeting, one of the members asked the Committee to consider whether the parties should be required to disclose the witnesses in any proceeding in the lower court.

This memo provides, for discussion purposes only, some drafting language for adding disclosure requirements in the areas that the Committee has discussed. Part One of this memo sets forth background and a brief discussion of the cost/benefit analysis attendant to disclosure requirements. Part Two sets forth the drafting possibilities, and discusses some considerations

that the Committee might take into account in determining whether to pursue an amendment to the existing disclosure requirements in the Appellate Rules.[1] Part Three sets forth a draft, for discussion purposes only, on how the Appellate Rules would have to be amended to accommodate all the colorable additional disclosure requirements that have been discussed by the Committee.

I. Rules on Disclosure, and the Cost-Benefit Analysis:

A. Appellate Rules

Two Appellate Rules deal with disclosure. **Rule 26.1(a) provides:**

> **(a) Who Must File.** Any nongovernmental corporate party to a proceeding in a court of appeals must file a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation.

Appellate Rule 29(c)(1) provides disclosure requirements for amici. It is essentially an absorptive provision: it imposes the same disclosure requirements as are imposed on a party:

> **(c) Contents and Form.** * * * An amicus brief need not comply with Rule 28, but must include the following:
>
> > (1) If the amicus curiae is a corporation, a disclosure statement like that required of parties by Rule 26.1; [2]

[1] The memo does not treat all the options for greater disclosure provided by the local rules. The options treated are those that received at least preliminarily positive comments in memos prepared by Subcommittee members, or as reflected in the minutes from the last meeting. It also treats the one suggestion made by a Standing Committee member when the topic of disclosure rules was raised at the June Standing Committee meeting.

[2] The Appellate Rules Committee has previously considered a suggestion that Rule 29(c)(1) should be clarified because the language "like that required" might be thought to mean that the disclosure requirements for amici might be somehow different from the disclosure requirements for parties. But the Committee decided not to proceed with any such amendment, on the ground that the language was intended to and does mean that the disclosure requirements for parties and amici are coextensive.

B. Statute

These disclosure rules --- and any consideration of whether to expand upon them --- must be evaluated in light of the statute that predominantly regulates recusal and disqualification decisions. That provision is **28 U.S.C.§ 455**, which provides in pertinent part as follows:

§ 455. Disqualification of justice, judge, or magistrate judge

(a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

> **(c)** A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.[3]

In addition, **28 U.S.C. § 47** provides that ""[n]o judge shall hear or determine an appeal from the decision of a case or issue tried by him."

C. Cost-Benefit Analysis for Disclosure Rules

The general requirement of section 455 --- recusal should occur where impartiality might reasonably be questioned --- is broad and fuzzy enough that almost any scenario of a judge's relationship to a matter is at least potentially one that would call for disclosure. For example, if a corporate party has an affiliate, and the judge has an ownership interest in the affiliate, one can probably spin a factual situation in which the relationship is so close, or the effect on the affiliate is so profound, that impartiality might reasonably be questioned. A review of the local rules that require greater disclosure, conducted by Cathie Struve's research assistant in 2013, in fact concluded that every single one of the additional requirements could facilitate a judge's recusal decision. That is not an irrational conclusion given the breadth of the "impartiality might reasonably be questioned" standard.

So disclosure rules provide a benefit in informing the judge's recusal decisions. But of course these rules impose costs on the parties; investigation and disclosure of all the required details (affiliates, participating law firms, trade associations, etc.) adds to the expense of litigation. Thus, it would seem that a disclosure requirement should not be added simply because it might in some attenuated circumstance give a judge relevant information for recusal. It is hard to know where to draw the line, but if you have to spin an unlikely scenario to conclude that the information could be relevant to a recusal decision, then perhaps the disclosure should not be required. Another factor is the type of information demanded --- the more it is readily at hand, the more acceptable the disclosure requirement.

[3] Canon 3(C) of the Code of Conduct for United States Judges also governs disqualifications, but it is substantively identical to section 455.

II. Areas for Additional Disclosure

A. Judge's Connection With a Prior or Current Participant in the Litigation

The local rules in some circuits focus on two types of connections between a judge and a participant in the litigation: 1) a judge's prior participation in the case; and 2) lawyers who have previously appeared in the case. Both these connections are certainly in some cases relevant to disqualification/recusal considerations. They will be discussed in turn.

1. Prior Participation

Section 47 requires recusal if the judge tried the case or issue. Section 455(b)(2) provides that a judge must recuse himself where he served as lawyer in the matter. Section 455(b)(3) provides that if the judge was previously employed by the government, he must recuse if he participated as "counsel, advisor, or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case or controversy." Finally, section 455(b)(1) requires recusal when the judge has "personal knowledge of disputed evidentiary facts concerning the proceeding" and section 455(b)(2) requires recusal where the judge has been a material witness.

But while the statute does specifically regulate a judge's prior participation, the factors listed cannot easily be made the subject of disclosure requirements. Some of these connections would be probably be beyond a party's ability to know. For example, how is a party to know that the judge in his former life as a government lawyer "expressed an opinion concerning the merits of a particular case or controversy"? And how is a party to know whether the judge has personal knowledge of disputed evidentiary facts? It is probably for this reason that the local rules providing additional disclosure provisions on this subject are focused on the judge's actual participation in the proceeding or in related state proceedings.

The Eleventh Circuit provision might be a good model for discussion. As incorporated into Rule 26.1, and amended slightly to cover related state court proceedings, it would read like this:

> **(a) Who Must File.** Any nongovernmental corporate party to a proceeding in a court of appeals must file a statement that:
>
> > **(1)** identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation;
> >
> > **(2)** provides a list of the trial judges in the proceeding and in any related state proceeding.

2. Lawyer Participation

Under section 455(b)(2), a judge must recuse if "a lawyer with whom he previously practiced law" was involved with the case during their association. A judge must also recuse if he or his spouse, or anyone within three degrees of relationship of either of them, or a spouse of such a person, is an attorney in a proceeding. Given the connection between participating lawyers and grounds for recusal --- and the possibility that a judge has family members who are lawyers within the specified degree of relationship --- it is probably not surprising that five circuits seek information about lawyers' participation in the case. The cost of such a disclosure would not seem high as it should be information that the party has fairly easily at its disposal.

The most direct and comprehensive language on the subject is found in Federal Circuit Rule 47.4. As added to Rule 26.1, it would look like this:

> **(a) Who Must File.** Any nongovernmental corporate party to a proceeding in a court of appeals must file a statement that:
>
> > **(1)** identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation;
> >
> > **(2)** lists the trial judges in the proceeding and in any related state proceeding;
> >
> > **(3)** lists the names of all law firms and the partners and associates that have appeared or are expected to appear for the party in the proceeding;

B. Disclosures in Criminal Appeals

The disclosure provisions in the Criminal Rules are found in Rule 12.4. Rule 12.4(a)(1) is identical to Appellate Rule 26.1. Rule 12.4(a)(2) is an additional provision that requires the government to file a statement identifying an organizational victim, and also requires the government to disclose the ownership information required by Rule 12.4(a)(1) "to the extent it can be obtained through due diligence."[4]

[4] That language is a recognition that the government might not have ready access about whether the victim has a parent or 10% or more ownership by a public company. In contrast, parties would clearly have that information, so a due diligence standard is unnecessary in Rule 26.1(a). It should be noted, however, that adding

The minutes of the last Committee meeting describe a discussion led by Judge Chagares, who stated that some attorneys were under the impression that the Rule 26.1 disclosure requirements do not apply to criminal appeals. Judge Chagares concluded that an amendment to Rule 26.1 that would specify that it applies to criminal appeals would be unnecessary, because the rule plainly does apply, and because the Committee's work on the question had sensitized Circuit Clerks as to its applicability.

Therefore, the only question remaining for criminal cases is whether to add a provision regarding disclosure of organizational victims. It would seem that the need for disclosure is not dramatic. There are not many appeals involving corporate victims, and recoveries by organizational victims in criminal cases would seldom be so substantial as to raise an inference of impartiality.

On the other hand, there is no apparent explanation for having disclosure requirements as to victims in criminal trials, but not in criminal appeals. So if the Committee were to proceed with an amendment, it would have the positive effect of providing uniformity across the two sets of rules.

There is a drafting problem, however. A provision about an organizational victim does not fit well within the structure of the existing rule. It can't be efficiently incorporated into subdivision (a), and it is probably not worth it to make it subdivision (b) and move everything else down, as renumbering (or relettering) imposes transaction costs. The best solution is to add a subdivision at the end of the rule.

If Criminal Rule 12.4(a)(2) were added to the Appellate Rules, it might look like this (in a rule that adds, in building block fashion, to what has been added above).

> **(a) Who Must File.** Any nongovernmental corporate party to a proceeding in a court of appeals must file a statement that:
>
> > **(1)** identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation;
> >
> > **(2)** lists the trial judges in the proceeding and in any related state proceeding;
> >
> > **(3)** lists the names of all law firms and the partners and associates that have appeared or are expected to appear for the party in the proceeding;
>
> **(b) Time for Filing; Supplemental Filing.**

---

certain disclosure requirements may raise a question of what kind of effort a party must undertake to find the information – in which case the addition of a due diligence standard might be warranted.

* * *

(c) Number of Copies.

* * *

(d) Organizational Victim in a Criminal Case. In a criminal case, if an organization is a victim of [the alleged][5] criminal activity, the government must file a statement identifying the victim. If the organizational victim is a corporation, the statement must also disclose the information required by Rule 26.1(a)(1) to the extent it can be obtained through due diligence.

C. Disclosures in Bankruptcy Appeals

As Judge Chagares noted at the last meeting, not every person or entity involved in a bankruptcy proceeding is treated as a party for purposes of disclosure issues. The Code of Conduct Committee's Advisory Opinion No. 100 states that the following participants in a bankruptcy proceeding have a sufficient relationship to that proceeding to be considered parties for purposes of the disclosure rules: 1) the debtor; 2) members of the creditors' committee; 3) the trustee; 4) parties to an adversary proceeding; and 5) participants in a contested matter.

The clarification provided by Advisory Opinion No. 100 is not currently set forth in either the Appellate Rules or the Bankruptcy Rules on disclosure. In 2008, the Codes of Conduct Committee suggested that the Bankruptcy Rules Committee "may wish to consider the special conflict screening issues related to bankruptcy proceedings, especially the potential need for corporate parent information in adversary proceedings and contested matters."[6] But the Bankruptcy Rules Committee has never adopted, and is not currently considering, any change to its disclosure rule. The lack of movement in the Bankruptcy Rules Committee probably counsels some caution in proceeding at the appellate level, as one would think that the Bankruptcy Rules would be the primary source for defining who is a party in a bankruptcy proceeding for purposes of the disclosure rules.

That said, if the Committee were interested in clarifying who the "parties" are in a bankruptcy, then it may wish to consider language along the lines of the Third Circuit Rule. As applied to the working draft as it has been set forth thus far, the language might be added as follows (it only works as a separate subdivision):

[5] "Alleged" is used in the Criminal Rules. There is an argument that "alleged" is not the right term at the appellate level.

[6] Letter from Chair of Codes of Conduct Committee to Chair of Rules Committee, May 8, 2008, at 2.

(a) Who Must File. Any nongovernmental corporate party to a proceeding in a court of appeals must file a statement that:

> **(1)** identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation;
>
> **(2)** lists the trial judges in the proceeding and in any related state proceeding;
>
> **(3)** lists the names of all law firms and the partners and associates that have appeared or are expected to appear for the party in the proceeding;

(b) Time for Filing; Supplemental Filing.

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(c) Number of Copies.

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(d) Organizational Victim in a Criminal Case. In a criminal case, if an organization is a victim of [the alleged] criminal activity, the government must file a statement identifying the victim. If the organizational victim is a corporation, the statement must also disclose the information required by Rule 26.1(a)(1) to the extent it can be obtained through due diligence.

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

- the debtor, if not named in the caption;
- the members of the creditors' committees;
- the parties to an adversary proceeding; and
- the active participants in a contested matter.

The Eleventh Circuit adds a requirement that "other entities whose stock or equity value may be substantially affected by the outcome of the proceedings" must be disclosed. But this language seems pretty fuzzy. There could be a lot of collateral damage in a bankruptcy proceeding and it would often be difficult to determine at the time disclosure is required what

kind of effect there will be. And it will certainly be difficult to determine if the effect may be "substantial" --- whatever that means. So it is probably better to avoid such fuzzy language.

D. Disclosure of an Ownership Interest Other Than Stock

Currently the only financial interest in a party or amici that must be disclosed is the parent corporation and "any public corporation that owns 10% or more of its stock." There are local rules that require disclosure of ownership interests other than stock. For example, the D.C. Circuit requires disclosure of any publicly held company "that has a 10% or greater ownership interest (such as stock or partnership shares)." Because recusal rules focuses on financial interest, it should make no difference whether the ownership interest is in stock or in some other unit.

An amendment that would expand the disclosure requirement beyond stock ownership would be straightforward. As applied to our already-altered Rule 26.1(a), it might look like this:

> **(a) Who Must File.** Any nongovernmental corporate party to a proceeding in a court of appeals must file a statement that:
>
> > **(1)** identifies any parent corporation and any publicly held corporation that ~~owns 10% or more of its stock~~ **has a 10% or greater ownership interest in the party,** or states that there is no such corporation;
> >
> > **(2)** lists the trial judges in the proceeding and in any related state proceeding; and
> >
> > **(3)** lists the names of all law firms and the partners and associates that have appeared or are expected to appear for the party in the proceeding.

E. Disclosure of Ownership Interests Held Other Than By Publicly Traded Corporations

Currently the 10% ownership disclosure requirement applies only if that interest is held by a publicly traded corporation. The Fourth Circuit recognizes that the financial interest that might be relevant to recusal is not limited to ownership by a publicly traded corporation. That is, nothing in 28 U.S.C. § 455 distinguishes between businesses organized as corporations and those organized in another way, such as a real estate investment trust.

Neal Katyal suggested, in his memo to the Committee prepared for the Subcommittee, that it is unlikely that parties are using the term "corporation" to avoid disclosure where the ownership interest is held by an entity in another form. That is a plausible conclusion, but it would seem hard to answer that question empirically with any certainty. In any event, if the Committee were to decide to amend the rule to expand disclosure requirements beyond corporate ownership, that amendment might look like this:

> **(a) Who Must File.** Any nongovernmental corporate party to a proceeding in a court of appeals must file a statement that:
>
> > **(1)** identifies any parent corporation and any publicly held ~~corporation~~ **entity** that ~~owns 10% or more of its stock~~ has a 10% or greater ownership interest in the party, or states that there is no such ~~corporation~~ **entity**;
> >
> > **(2)** lists the trial judges in the proceeding and in any related state proceeding; and
> >
> > **(3)** lists the names of all law firms and the partners and associates that have appeared or are expected to appear for the party in the proceeding.

F. Disclosure By Public Entities Not in the Corporate Form

As discussed at the previous meeting, the rule limiting the disclosure requirements to corporations is hard to square with the fact that a judge's ownership interest in an entity doing business other than in the corporate form --- such as an LLC or a trade association --- could in some cases be grounds for recusal. That is to say, for recusal purposes there is no substantive distinction between corporations and other non-governmental entities. The financial-interest prohibition in 28 U.S.C. § 455(b)(4) applies to all "parties" to a proceeding, and is not dependent on corporate form.

Neal Katyal stated in his previous memo on the subject that it is unlikely that parties believe they are exempt from disclosure requirements when the entity is not in corporate form. Again, this conclusion is very difficult to address empirically. If the Committee does decide to expand the parties' (and, by absorption, amici's) disclosure requirements to include entities other than in corporate form, the rule could be amended as follows:

> **(a) Who Must File.** ~~Any nongovernmental corporate~~ **Except for governmental units and individuals, any** party to a proceeding in a court of appeals must file a statement that:
>
> > **(1)** identifies any parent corporation and any publicly held ~~corporation~~ entity that ~~owns 10% or more of its stock~~ has a 10% or greater ownership interest in the party, or states that there is no such ~~corporation~~ entity;
> >
> > **(2)** lists the trial judges in the proceeding and in any related state proceeding; and
> >
> > **(3)** lists the names of all law firms and the partners and associates that have appeared or are expected to appear for the party in the proceeding.

It should be noted that if a change is made to require entities other than corporations to disclose, there will have to be conforming changes to Rule 29 (as discussed below) and to Rule 28(a)(1), which states that the brief must include "a corporate disclosure statement if required by Rule 26.1." The conforming change would be easy: just delete the word "corporate."

G. Disclosure of Affiliates

When Rule 26.1 was amended in 1998, the Advisory Committee specifically declined to require disclosure of a party's affiliates. The Committee Note explains that "disclosure of a party's subsidiaries or affiliated corporations is ordinarily unnecessary" because "the possibility is quite remote that the judge might be biased by the fact that the judge and the litigant are co-owners of the same corporation." Nothing has been presented to indicate that the interests supporting disclosure have somehow become more compelling since 1998. Moreover, the Committee on Codes of Conduct has advised that a judge need not automatically recuse simply because the judge owns stock in a subsidiary and the parent corporation is a party.[7] If that is so, then it follows that recusal is not required when the judge has an ownership interest in a party's corporate affiliate.

When it comes to affiliates, the question is whether the judge's interest in the affiliate "will be substantially affected by the outcome of the proceeding" under section 455(b)(4). The affiliate connection in general is more attenuated than when the judge has an ownership interest in a parent of the party, and so it is questionable whether affiliate status should be elevated to the same status as parent-sub, i.e., automatic reporting of the relationship. As stated above, many relationships that the judge might have --- financial, familial, etc. --- might in extreme cases be substantially affected by the outcome of the proceeding. But at some point the burdens of disclosure outweigh the benefits to judges, because the information disclosed will so rarely lead to recusal.

Nonetheless, if the Committee did wish to include corporate affiliation in the disclosure requirements, the rule amendment might look like this:

> **(a) Who Must File.** ~~Any nongovernmental corporate~~ **Except for governmental units and individuals, any** party to a proceeding in a court of appeals proceeding must file a statement that:
>
> > **(1)** identifies any parent **or affiliated** corporation and any publicly held ~~corporation~~ entity that ~~owns 10% or more of its stock~~ that has a 10% or greater ownership interest in the party, or states that there is no such ~~corporation~~ entity;
> >
> > **(2)** lists the trial judges in the proceeding and in any related state proceeding; and

[77] Advisory Opinion No. 57, *Disqualification Based on Stock Ownership in Parent Corporation of a Party or Controlled Subsidiary of a Party* (June 2009).

(3) lists the names of all law firms and the partners and associates that have appeared or are expected to appear for the party in the proceeding.

H. Intervenors

Intervenors obviously have an interest in the proceeding, and so theoretically intervenors should be subject to the same disclosure requirements as are imposed on a party. Three circuits have a local rule imposing disclosure requirements on intervenors that are the same as if they had been a party initially.

There are some strong arguments, though, for not amending the rule to deal specifically with intervenors. Probably the strongest argument is that intervention at the appellate level is so rare that it is not worth treating with a disclosure rule. It is true that the *government* intervenes at the appellate level with some frequency, but intervention on appeal by non-governmental corporate parties appears very rare. It is notable that in 2010, the Committee was asked by the DOJ representative to consider a rule on intervention, because the Appellate Rules have no general provision governing intervention along the lines of Civil Rule 24. The minutes of the meeting indicate that the Committee's discussion "did not produce any suggestions for moving forward with a rulemaking proposal on this item"; in 2011 the proposal on intervenors was taken off the Committee's agenda. Given the fact that the Committee has decided not to establish standards for intervention generally, it seems a bit odd to amend the disclosure rules to cover it. It seems odder still that Rule 26.1 should be amended to cover intervenors given the absence of movement on the subject by the Civil Rules Committee. It can be argued that a more systematic solution would be to consider a general rule on intervenors with a disclosure provision in that rule, or to consider a disclosure rule that tracked an amendment in the Civil Rules to that effect.

Another reason for questioning the need for an amendment treating intervenors is that when they do intervene, they have the same rights as a party to the proceeding. *See, e.g., City of Cleveland v. Nuclear Regulatory Commission,* 17 F.3d 1515, 1517 (D.C. Cir. 1994). If that is the case, then it is probable that a corporate intervenor is *already subject* to the disclosure requirements that apply to parties under Rule 26.1. Thus, imposing a disclosure requirement on intervenors specifically may be superfluous and even confusing, because the amendment would raise an inference that the Committee had determined that intervenors are *not* parties to the appeal. At a minimum, more thought should probably be given to the status of intervenors and

whether they are properly considered as parties before a disclosure amendment on the subject is proposed.

If the Committee were to decide to specify that the disclosure requirements apply to intervenors, it should be done by adding another subdivision to Rule 26.1. Lumping intervenors with parties results in balky drafting, especially if new disclosure requirements are to be added. For example, instead of having a provision requiring disclosure of an ownership interest "in the party" the rule would have to say "ownership interest in the party or intervenor." And so forth. Also, it needs to be specified in the amendment that intervenors are only subject to disclosure requirements if they would have those obligations as parties --- so, for example, an individual intervenor should not be subject to any disclosure obligations.

Here is what a separate subdivision covering intervenors might look like (as added to all the additions that have been discussed previously in this memo):

(a) Who Must File. ~~Any nongovernmental corporate~~ **Except for governmental units and individuals, any** party to a proceeding in a court of appeals proceeding must file a statement that:

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

(2) lists the trial judges in the proceeding and in any related state proceeding; and

(3) lists the names of all law firms and the partners and associates that have appeared or are expected to appear for the party in the proceeding.

(b) Time for Filing; Supplemental Filing.

* * *

(c) Number of Copies.

* * *

(d) Organizational Victim in a Criminal Case. In a criminal case, if an organization is a victim of [the alleged] criminal activity, the government must file a statement identifying the victim. If the organizational victim is a corporation, the statement must also disclose the information required by Rule 26.1(a)(1) to the extent it can be obtained through due diligence.

(e) Bankruptcy Proceedings. In bankruptcy proceedings, the debtor or the trustee of the bankruptcy estate --- or the appellant if the debtor or trustee is not a party --- must file a statement identifying:

- the debtor, if not named in the caption;
- the members of the creditors' committees;
- the parties to an adversary proceeding; and
- the active participants in a contested matter.

(f) Intervenors. Intervenors have the same disclosure requirements as parties under Rule 26.1(a) and (a)(1).[8]

I. More Disclosure by Amici

At the last meeting, Committee members noted that the interest of a judge in an amicus could warrant recusal. It was also noted that there have been instances in which parties engineered the participation of an amicus in order to generate a recusal. These concerns about amici are currently addressed in Rule 29(c)(1), which provides that a "corporation" must file "a disclosure statement like that required of parties by Rule 26.1."

The same issues of greater disclosure that have previously been discussed as to parties --- e.g., extension to non-corporate entities, different ownership interests, affiliates, etc. ---would appear to apply equally to amici. There does not seem to be any reason to try to impose a disclosure obligation on an amicus that would not be imposed on a party. For example, there would be no reason to conclude that an amicus must disclose affiliates, while a party is not required to do so. Indeed that is the very point of the absorptive Rule 29(c)(1) --- whatever parties must disclose, amici must disclose. That absorption would seem to be efficient and elegant rulemaking.

But that absorption works currently because the only disclosure requirement is that of a corporation, which must disclose its parent and any publicly held corporation that holds more than 10% of stock. The relevance of that interest is obvious for both parties and amici, and both parties and amici will be disclosing individualized and not cumulative information. Absorption is

[8] It would be unnecessary, and burdensome, to require intervenors to disclose judge and lawyer participation, because that information will already have been disclosed by the parties and an intervenor may not have easy access to that information.

more problematic if some of the extra disclosure requirements considered above are added to Rule 26.1. For example, the provisions discussed above, if enacted, would require parties to disclose the trial judges in the proceeding or in any related state proceeding, and the names of law firms and lawyers that have appeared or will appear in the proceeding. There would be no reason to impose those obligations on an amicus, because the parties will already have made those disclosures and the information demanded is not logically related to the amicus role and may be difficult for the amicus to access. The point here is not that a judge's interest in a party should be treated differently from an interest in an amicus, but rather that parties have access to information and will have disclosed that information independently of the amicus and so there is no reason to impose the requirement on the amicus.

In sum, if additional disclosure requirements on amici are to be imposed, Rule 29(c)(1) will have to be changed so that there is a proper fit between it and an amended Rule 26.1. There would be three problematic additions to Rule 26.1 considered so far as applied to current Rule 29(c)(1): 1) covering all non-governmental public entities (because Rule 29(c)(1) currently applies only to corporations); 2) requiring disclosure of trial judges in the proceeding; and 3) requiring disclosure of all participating lawyers. (All of the other possible extensions could be absorbed without changing the language of Rule 29(c)(1)). Assuming these three extensions were to be added, Rule 29(c)(1) could be changed as follows:

> **(c) Contents and Form.** * * * An amicus brief need not comply with Rule 28, but must include the following:
>
> (1) ~~If the amicus curiae is a corporation, a~~ A disclosure statement like that required of parties by Rule 26.1, with the following exceptions:
>
> (A) a disclosure statement is not required if the amicus curiae is a governmental unit or an individual; and
>
> (B) an amicus curiae is not required to disclose the information set forth in Rule 26.1(a)(2) and (3). [9]

Finally, in one respect it might be argued that amici should have an independent disclosure obligation: would it not be useful to disclose whether entities or lawyers not on the brief have actually contributed in some way (financially or otherwise) to the amicus's cause? The

[9] It could be argued that the rule's language requiring a statement "like that" made by parties, could be flexible enough to allow some differences and so it would be unnecessary to say anything about differences in disclosure. But failing to specify the different disclosure provisions is confusing, and moreover the Appellate Rules Committee has already determined that the term "like that" does not indicate any differences in disclosure requirements between parties and amici.

answer is, probably yes, as the judge's relationship to those with such interests could be pertinent to the recusal decision. It should be noted, though, that Rule 29 currently *does* require at least some disclosure of participation in the amicus brief. Rule 29(c)(4) already requires amici to provide "a concise statement of the identity of the amicus curiae and its interest in the case" --- and more importantly, Rule 29(c)(5)(C) requires all non-governmental amici to file a statement that indicates whether

> "a person --- other than the amicus curiae, its members, or its counsel --- contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person."

It could be argued that the language of Rule 29(c)(5) could be usefully amended to require disclosure of all the lawyers who worked on the brief, in order to determine whether the judge needs to exclude due to a family relationship. If such a changes were made, it would be best to add it as a new subpart might look like this:

> (C) a person --- other than the amicus curiae, its members, or its counsel --- contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person ; and
>
> (D) a lawyer or law firm contributed to the preparation of the brief, and, if so, identifies each such lawyer or firm.

J. Witness Lists

When the Committee's consideration of disclosure rules was discussed at the January Standing Committee meeting, a Committee member from the Ninth Circuit suggested that it would be useful to amend Rule 26.1 to require disclosure of the names of witnesses who testified in the proceeding. Certainly a scenario could be crafted in which the judge's relationship with one of the witnesses at trial is a strong enough connection as that his impartiality "might reasonably be questioned." 28 U.S.C. §455(b). Also, 28 U.S.C.§455(b)(5)(iv) requires a judge to recuse himself where a person who is within the necessary degree of relationship is "likely to be a material witness in the proceeding." That statutory provision is not addressed to appellate judges but rather to trial judges --- the provision looks forward and not backward. It seems to be grounded in the concern that a witness could receive preferential treatment by the trial judge. The relationship of an appellate judge to a witness in the case appears to be more attenuated. But it might be concluded that section 455(b)(v) has some relevance because it generally shows a concern about certain relationships between judges and witnesses.

That said, it is certainly the rare case in which an appellate judge's relationship to a trial witness raises cause for concern. On the other hand, the disclosure requirement would simply be producing a witness list, and that seems a minimal burden. It is of course for the Committee to determine whether the costs of disclosure with regard to witness lists outweighs the benefit of providing information to judges that could in some few cases be relevant to a recusal decision.

If witness lists are added to the disclosure requirement, the addition might look like this:

> **(a) Who Must File.** ~~Any nongovernmental corporate~~ **Except for governmental units and individuals, any** party ~~to a proceeding~~ or intervenor in a court of appeals proceeding must file a statement that:
>
> > **(1)** identifies any parent **or affiliated** corporation and any publicly held ~~corporation~~ entity that ~~owns 10% or more of its stock~~ that has a 10% or greater ownership interest in the party, or states that there is no such ~~corporation~~ entity;
> >
> > **(2)** lists the trial judges in the proceeding and in any related state proceeding;
> >
> > **(3)** lists the names of all law firms and the partners and associates that have appeared or are expected to appear for the party in the proceeding; and
> >
> > **(4)** lists the names of all witnesses who have testified on behalf of the party in the proceeding.

Under the drafts as set forth above, the witness list requirement would not apply to amici --- requiring amici to disclose this information would be burdensome on the amici and duplicative to the court. Nor would intervenors be subject to this requirement.

K. Reporting by Individuals?

There remains a concern about adding new disclosure requirements beyond corporate ownership that has not yet been discussed. The additional requirements – list of judges, list of lawyers, list of witnesses --- are not tied to the nature or identity of the *party.* And yet the disclosure requirement at the threshold is definitely dependent on the nature of the party. Only corporate parties (and, if added, other entities) are required to make disclosures. And yet the risk

of recusal because of trial judge participation, lawyer participation, and witness participation are the same regardless of whether the parties are business entities or individuals. So logically, individual parties should have disclosure requirements when it comes to these additional, non-business grounded recusal factors.

To date, however, none of the local rules require individuals to report, even though the information that needs to be reported goes well beyond corporate ownership in many of these rules. So the rules are logically inconsistent but at least avoid the concern that individual parties --- at least certain of them --- might be especially burdened by disclosure obligations.

If the Committee were to determine that individual parties should disclose non-business related factors, then Rule 26.1 would need substantial amendment. There would be a conflict with the opening clause ("Except for governmental units and individuals"). The draft incorporating all the other changes, set forth immediately below, would probably have to be subdivided: business entities would disclose ownership information in one subdivision and then individuals would be added to the requirement for disclosing the other information. Relettering would probably be required. Joe Kimble would surely be required.

Because this memo has ended up to be complicated enough, I chose not to give the Committee two separate drafts, one for exempting individuals and one for including them. The version below does not cover individuals.

III. Discussion Draft of All Possible Changes Discussed in This Memorandum

Rule 26.1. ~~Corporate~~ Disclosure Statement[10]

(a) Who Must File; <u>What Must Be Disclosed</u>.[11] ~~Any nongovernmental corporate~~ **<u>Except for governmental units and individuals, any</u>** party to a proceeding in a court of appeals must file a statement that<u>:</u>

> **<u>(1)</u>** identifies any parent **<u>or affiliated</u>** corporation and any publicly held ~~corporation~~ <u>entity</u> that ~~owns 10% or more of its stock~~ <u>that has a 10% or greater ownership interest in the party,</u> or states that there is no such ~~corporation~~ <u>entity;</u>
>
> **<u>(2)</u>** <u>lists the trial judges in the proceeding and in any related state proceeding; and</u>
>
> **<u>(3)</u>** <u>lists the names of all law firms and the partners and associates that have appeared or are expected to appear for the party in the proceeding; and</u>
>
> **<u>(4)</u>** <u>lists the names of all witnesses who have testified on behalf of the party in the proceeding.</u>

(b) Time for Filing; Supplemental Filing.

* * *

(c) Number of Copies.

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<u>(d) Organizational Victim in a Criminal Case.</u> <u>In a criminal case, if an organization is a victim of [the alleged] criminal activity, the government must file a statement identifying the victim. If the organizational victim is a corporation, the statement must also disclose the information required by Rule 26.1(a)(1) to the extent it can be obtained through due diligence.</u>

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[10] "Corporate" is no longer descriptive if the rule governs other business entities.

[11] The caption of this subdivision is insufficiently descriptive --- even today --- because the subdivision covers not only the "who" but the "what."

(e) Bankruptcy Proceedings. In bankruptcy proceedings, the debtor or the trustee of the bankruptcy estate --- or the appellant if the debtor or trustee is not a party --- must file a statement identifying:

● the debtor, if not named in the caption;

● the members of the creditors' committees;

● the parties to an adversary proceeding; and

● the active participants in a contested matter.

(f) Intervenors. Intervenors have the same disclosure requirements as parties under Rule 26.1(a) and (a)(1).[12]

Rule 29. Brief of an Amicus Curiae

* * *

(c) Contents and Form. An amicus brief must comply with Rule 32. * * * . An amicus brief need not comply with Rule 28, but must include the following:

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

(1) ~~If the amicus curiae is a corporation, a~~ A disclosure statement like that required of parties by Rule 26.1, with the following exceptions:

(A) a disclosure statement is not required if the amicus curiae is a governmental unit or an individual; and

(B) an amicus curiae is not required to disclose the information set forth in Rule 26.1(a)(2)-(4).]

* * *

[12] It would be unnecessary, and burdensome, to require intervenors to disclose judge and lawyer participation, witness lists, etc., because that information will already have been disclosed by the parties.

(5) unless the amicus curiae is one listed in the first sentence of Rule 29(a),[13] a statement that indicates whether:

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

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

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

(D) a lawyer or law firm contributed to the preparation of the brief, and, if so, identifies each such lawyer or firm.

[13] This is odd phrasing. Why not just say who is excepted? "Unless the amicus curiae is the United States or its officer or its agency or a state . . ." If the rule ever does get amended, that would seem to be a stylistic and user-friendly improvement.

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TAB 5B

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Excerpt from the May 14, 2016 Report of the
Advisory Committee on Criminal Rules (Revised July 6, 2016)

IV. Action Item: Rule 12.4

The Criminal Rules Committee recommends publication of an amendment to Rule 12.4, which governs the parties' disclosure statements. Rule 12.4(a)(2) requires the government to identify organizational victims to assist judges in complying with their obligations under the Judicial Code of Conduct. Rule 12.4 was a new rule added in 2002. The Committee Note states that "[t]he purpose of the rule is to assist judges in determining whether they must recuse themselves because of a 'financial interest in the subject matter in controversy.' Code of Judicial Conduct, Canon 3C(1)(c) (1972)." Prior to 2009, the Code of Judicial Conduct treated any victim entitled to restitution as a party, and the committee note stated that the purpose of the disclosures required by Rule 12.4 was to assist judges in determining whether to recuse. In 2009, however, the Code of Judicial Conduct was amended. It no longer treats any victim who may be entitled to restitution as a party, and it requires disclosure only when the judge has an interest "that could be substantially affected by the outcome of the proceedings."

The proposed amendment to Rule 12.4(a) brings the scope of the required disclosures in line with the 2009 amendments, allowing the court to relieve the government of the burden of

making the required disclosures upon a showing of "good cause." The amendment will avoid the need for burdensome disclosures when there are numerous organizational victims, but the impact of the crime on each is relatively small. For example, nearly every organization in the United States could be affected by price fixing concerning a widely-used product, such as a computer program. But each victim would suffer only a very minor harm from a price increase that might be pennies for each product purchased. In such cases, it seems unnecessarily burdensome (even if possible) for the government even to name every corporation, partnership, union, or other organizational victim. The amendment allows the government to show good cause to be relieved of making the disclosure statements because the organizations' interests could not be "substantially affected by the outcome of the proceedings."

The requirement that the government show "good cause" is a flexible standard that allows the court to weigh all of the relevant factors and determine on a case-by-case basis whether to relieve the government of the obligation to make disclosures under Rule 12.4. Although the style consultants expressed concern that the phrase "good cause" was vague, that phrase is used throughout the Criminal Rules where exceptions to general requirements are permitted, and it is well understood by judges and litigants. Moreover, "good cause" allows a holistic approach to the question whether to relieve the government of its disclosure responsibility, taking into account all of the relevant factors. It also allows the court to take a broad view of the scope of recusal and the information required in particular cases.

The proposed amendment to Rule 12.4(b) makes two changes.[5] It specifies that the time for making the disclosures is within 28 days after the initial appearance, and it makes clear that a supplemental filing is required not only when information that has been disclosed changes, but also when a party learns of additional information that is subject to the disclosure requirements. The Committee concluded that adding these details while amending Rule 12.4(a) would be beneficial, although they might not, by themselves, warrant an amendment.

The Appellate Rules Committee has a parallel amendment under consideration, and its reporter participated in the development of the Committee's proposed amendment. However, because the Appellate Rules proposal is part of a more comprehensive revision, it is on a slower timeline. Efforts to coordinate the changes will continue if the Appellate Rules Committee decides to move forward with an amendment on this subject.[6]

* * * * *

[5] An additional change was made to accommodate a point raised at the Standing Committee meeting. If the government was unaware there were any organizational victims until after the 28-day period had expired, it would make no initial filing and its disclosure of information subsequently learned about organizational victims would not be "supplemental." Accordingly, by post-meeting votes, the Criminal Rules Committee proposed and Standing Committee approved revising the caption and text of 12.4(b) to refer to a "later"—rather than a "supplemental"—filing.

[6] If that occurs, one of the issues will be the proposal that the Appellate Rule include disclosures not only for corporations, but also other "publicly held entities."

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE[1]

Rule 12.4. Disclosure Statement

(a) Who Must File.

(1) ***Nongovernmental Corporate Party.*** Any nongovernmental corporate party to a proceeding in a district court must file a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation.

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

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

~~government must file a statement identifying the victim~~. If the organizational victim is a corporation, the statement must also disclose the information required by Rule 12.4(a)(1) to the extent it can be obtained through due diligence.

(b) Time ~~for~~to File~~ing~~; ~~Supplemental~~Later Filing. A party must:

(1) file the Rule 12.4(a) statement within 28 days after~~upon~~ the defendant's initial appearance; and

(2) ~~promptly~~ file a ~~supplemental~~ statement at a later time promptly if the party learns of any additional required information or any changes in required information~~upon any change in the information that the statement requires~~.

Committee Note

Subdivision (a). Rule 12.4 requires the government to identify organizational victims to assist judges in complying with their obligations under the Judicial Code of

Conduct. The 2009 amendments to Canon 3(C)(1)(c) of the Judicial Code require recusal only when a judge has "an interest that could be substantially affected by the outcome of the proceeding." In some cases, there are numerous organizational victims, but the impact of the crime on each is relatively small. In such cases, the amendment allows the government to show good cause to be relieved of making the disclosure statements because the organizations' interests could not be "substantially affected by the outcome of the proceedings."

Subdivision (b). The amendment specifies that the time for making the disclosures is within 28 days after the initial appearance, and it makes clear that a supplemental filing is required not only when information that has been disclosed changes, but also when a party learns of additional information that is subject to the disclosure requirements.

Because a filing made after the 28 day period may disclose organizational victims in cases in which none were previously known or disclosed, the caption and text have also been revised to refer to a later, rather than a supplemental, filing.

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TAB 6A

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MEMORANDUM

DATE: September 11, 2016

TO: Advisory Committee on Appellate Rules

FROM: Gregory E. Maggs, Reporter

SUBJECT: Item No.12-AP-F: Proposed Amendments to Appellate Rule 42 to address Class Action Settlement Objectors

Item No.12-AP-F concerns a possible problem with some objections to class action settlements. 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.

Discussion of Item 12-AP-F at the October 2015 and April 2016 Committee Meetings

In October 2015, the Appellate Rules Advisory Committee discussed possible amendments to Appellate Rule 42 and Civil Rule 23 to address this potential problem. The amendment to Rule 42 would have addressed situations in which a district court denied a class member's objection and the class member appealed the denial. In such situations, if the class member entered into a settlement and then sought to dismiss the appeal, the amendment would have required the court of appeals to refer the request to the district court.[1]

At the April 2016 meeting, however, the Appellate Rules Advisory Committee learned that the Civil Rules Advisory Committee had decided to address this matter of class action objections through what it called "the simple approach." This approach would require amending

[1] The Advisory Committee considered this "sketch" of a new section to be added to Appellate Rule 42: "A motion to dismiss an appeal from an order denying an objection made to approval of a class-action settlement under Rule 23(e)(5) of the Federal Rules of Civil Procedure [must][may] be referred to the district court for its determination whether to permit withdrawal of the objection and appeal under Rule 23(e)(5)(B) if the objector or the objector's counsel is to receive any payment or consideration in [exchange for] {connection with} dismissal of the appeal." This sketch appeared in the Rule 23 Subcommittee Report (Oct. 2015), which was included in the Appellate Rules Advisory Committee's October 2015 Agenda Book.

Civil Rule 23 but would not require amending Appellate Rule 42.

The proposed amendment to Rule 23 under the simple approach would require a district court to approve any consideration paid to an objector for withdrawing an objection or seeking to dismiss an appeal of an order denying an objection. The theory behind the amendment is that a class member will not object to a settlement in bad faith with the hope of extracting money for withdrawing the objection or dismissing an appeal if the class member does not think a court will approve the consideration for doing so. If a class member does make an objection, and then agrees to withdraw the objection or dismiss an appeal, the district court might approve or disapprove the consideration. If the district court approves the consideration, there is no reason to restrict withdrawal of an appeal. If the district court does not approve the consideration, then the class member presumably would not want to withdraw the objection. In any event, the appellate court retains its power to decide whether to allow or not allow the withdrawal of an appeal. Accordingly, no amendment to Appellate Rule 42 is necessary.

The Appellate Rules Advisory Committee discussed this "simple approach" at length at its April 2016 meeting. As described in the draft minutes, although some members of the Appellate Rules Advisory Committee expressed concern about various aspects of the proposal, the sense of the Committee was to leave the issue to the Civil Rules Advisory Committee. Judge Colloton summarized the apparent views of the Advisory 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."

Subsequent Action at the June 2016 Standing Committee Meeting

At it June 2016 Meeting, the Standing Committee agreed with Civil Rules Advisory Committee's approach and decided to publish the proposed amendments to Civil Rule 23 for public comment. The published version of the key provision, proposed Civil Rule 23(e)(5)(B), reads as follows:

Rule 23. Class Actions

*** * ***

(e) Settlement, Voluntary Dismissal, or Compromise.

* * *

(5) Class-Member Objections.

* * *

(B) Court Approval Required For Payment to an Objector or Objector's Counsel. Unless approved by the court after a hearing, no payment or other consideration may be provided to an objector or objector's counsel in connection with:

(i) forgoing or withdrawing an objection, or

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

The published Committee Note for this amendment to Civil Rule 23 explains in relevant part:

> Rule 23(e)(5)(B)(ii) applies to consideration in connection with forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal. Because an appeal by a class-action objector may produce much longer delay than an objection before the district court, it is important to extend the court-approval requirement to apply in the appellate context. The district court is best positioned to determine whether to approve such arrangements; hence, the rule requires that the motion seeking approval be made to the district court. Until the appeal is docketed by the circuit clerk, the district court may dismiss the appeal on stipulation of the parties. See Fed. R. App. P. 42(a). Thereafter, the court of appeals has authority to decide whether to dismiss the appeal. This rule's requirement of district court approval of any consideration in connection with such dismissal by the court of appeals has no effect on the authority of the court of appeals over the appeal. It is, instead, a requirement that applies only to providing consideration in connection with forgoing, dismissing, or abandoning an appeal. A party dissatisfied with the district court's order under Rule 23(e)(5)(B) may appeal the order.

More details about the proposed amendment to Civil Rule 23 and its relation to the former proposal to amend Appellate Rule 42 appear in the attached excerpt from the Draft Minutes of the Civil Rules Advisory Committee (April 14, 2016).

Issue for the October 2016 Meeting

If the Appellate Rules Advisory Committee continues to believe this amendment to Civil Rule 23 adequately addresses the problem of class action objectors, and that no change to Appellate Rule 42 is necessary, the Advisory Committee might decide to remove Item

No.12-AP-F from its agenda. Alternatively, the Committee might leave the item on its agenda at least until after the period for public comment on the proposed amendments to Civil Rule 23 ends in February 2017.

Attachment

Excerpt from Draft Minutes of the Civil Rules Advisory Committee 12-15 (April 14, 2016).

TAB 6B

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Objectors. In all the many encounters with bar groups and at the miniconference last fall, there was virtually unanimous agreement that something should be done to address the problem of "bad" objectors. The problem is posed by the objector who files an open-ended objection, often copied verbatim from routine objections filed in other cases, then "lies low," saying almost nothing, and — after the objection is denied — files a notice of appeal. The business model is to create, at low cost, an opportunity to seek advantage, commonly payment, by exploiting the cost and delay generated by an appeal.

Part of the Rule 23(e)(5) proposal addresses the problem of routine objections by requiring that the objection state whether it applies only to the objector, to a specific subset of the class, or to the entire class. It also directs that the objection state with specificity the grounds for the objection. The Committee Note says

that failure to meet these requirements supports denial of the objection.

Another part of the proposal deletes the requirement in present Rule 23(e)(5) that the court approve withdrawal of an objection. There are many good-faith withdrawals. Objections often are made without a full understanding of the terms of the settlement, much less the conflicting pressures that drove the parties to their proposed agreement. Requiring court approval in such common circumstances is unnecessary.

At the same time, proposed Rule 23(e)(5)(B) deals with payment "in connection with" forgoing or withdrawing an objection, or forgoing, dismissing, or abandoning an appeal from a judgment approving the proposed settlement. No payment or other consideration may be provided unless the court approves. The expectation is that this approach will destroy the "business model" of making unsupported objections, followed by a threat to appeal the inevitable denial. A court is not likely to approve payment simply for forgoing or withdrawing an appeal. Imagine a request to be paid to withdraw an appeal because it is frivolous and risks sanctions for a frivolous appeal. Or a contrasting request to approve payment to the objector, not to the class, for withdrawing a forceful objection that has a strong prospect of winning reversal for the class or a subclass. Approval will be warranted only for other reasons that connect to withdrawal of the objection. An agreement with the proponents of the settlement and judgment to modify the settlement for the benefit of the class, for example, will require court approval of the new settlement and judgment and may well justify payment to the now successful objector. Or an objector or objector's counsel may, as the Committee Note observes, deserve payment for even an unsuccessful objection that illuminates the competing concerns that bear on the settlement and makes the court confident in its judgment that the settlement can be approved.

The requirement that the district court approve any payment or compensation for forgoing, dismissing, or abandoning an appeal raises obvious questions about the allocation of authority between district court and court of appeals if an appeal is actually taken. Before a notice of appeal is filed, the district court has clear jurisdiction to consider and rule on a motion for approval. If it rules before an appeal is taken, its ruling can be reviewed as part of a single appeal. The Subcommittee has decided not to attempt to resolve the question whether a pre-appeal motion suspends the time to appeal. Something may well turn on the nature of the motion. If it is framed as a motion for attorney fees, it fits into a well-established model. If it is for payment to the objector, matters may be more uncertain — it may be something as simple as an argument that the objector should be fit into one subclass rather than another, or that the objector's proofs of injury have been

dealt with improperly.

After the agenda materials were prepared, the Subcommittee continued to work on the relationship between the district court and the court of appeals. It continued to put aside the question of appeal time. But it did develop a new proposed Rule 23(e)(5)(C) to address the potential for overlapping jurisdiction when a motion to approve payment is not made, or is made but not resolved, before an appeal is docketed. The proposal is designed to be self-contained, operating without any need to amend the dismissal provisions in Appellate Rule 42. "The question is who has the case." The proposal, as it evolved in the Subcommittee, reads:

> (C) *Procedure for Approval After Appeal*. If approval under Rule 23(e)(5)(B) has not been obtained before an appeal is docketed in the court of appeals, the procedure of Rule 62.1 applies while the appeal remains pending.

Invoking the indicative ruling procedure of Rule 62.1 facilitates communication between the courts. The district court retains authority to deny the motion without seeking a remand. It is expected that very few motions will be made simply "for" approval of payment, and that denial will be the almost inevitable fate of any motion actually made. But if the motion raises grounds that would lead the district court either to grant the motion or to want more time to consider the motion if that fits with the progress of the case on appeal, the court of appeals has authority to remand for that purpose.

Representatives of the Appellate Rules Committee have endorsed this approach in preference to the more elaborate earlier drafts that would amend Appellate Rule 42.

The first comment was that it is extraordinary that it took so long to reach such a sensible resolution.

The next reaction asked how this proposal relates to waiver. If an objector fails to make an objection with the specificity required by proposed Rule 23(e)(5)(A), for example, can the appeal request permission to amend the objection? Isn’t this governed by the usual rule that you must stand by the record made in the district court? And to be characterized as procedural forfeiture, not intentional waiver? The purpose of (e)(5)(A) is to get a useful objection; an objection without explanation does not help the court’s evaluation of the proposed settlement. Pro se objectors often fail to make helpful objections. So a simple objection that the settlement "is not fair" is little help if it does not explain the unfairness. At the same time, the proposed Committee Note recognizes the need to understand that an objector proceeding without counsel cannot be expected to adhere to technical legal

standards. The Note also states something that was considered for rule text, but withdrawn as not necessary: failure to state an objection with specificity can be a basis for denying the objection. That, and forfeiture of the opportunity to supply specificity on appeal, is a standard consequence of failure to comply with a "must" procedural requirement. The courts of appeals can work through these questions as they routinely do with procedural forfeiture. Forfeiture, after all, can be forgiven, most likely for clear error. It is not the same as intentional waiver.

The Committee approved a recommendation that the Standing Committee approve publication of proposed Rule 23(e)(5) this summer.

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MEMORANDUM

DATE: September 24, 2016

TO: Advisory Committee on Appellate Rules

FROM: Gregory E. Maggs, Reporter

SUBJECT: Items 15-AP-A, 15-AP-E, 15-AP-H: Electronic Filing by Pro Se Litigants

These three items concern proposals to modify the Appellate Rules so that they generally would allow pro se litigants to file documents electronically. The Committee considered but did not approve these proposals when it recently recommended changes to Appellate Rule 25. This memorandum reviews the previous consideration of these items and suggests questions that the Advisory Committee may wish to consider at the October 2016 meeting.

Previous Consideration of these Items

The Appellate Rules currently leave most questions about who can and who cannot file documents electronically to local rules. Rule 25(a)(2)(D) says:

> (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.

Some local rules currently treat pro se parties differently from represented parties. For example, Second Circuit Local Rule 25.1(b)(3) says: "A pro se party who wishes to file electronically must seek permission from the court . . . ."

As discussed in previous memoranda, the proponents of Items 15-AP-A, 15-AP-E, and 15-AP-H have asked the Advisory Committee to amend Rule 25 to authorize pro se parties to file electronically or at least to treat pro se and represented parties equally in setting rules regarding electronic filing. Robert H. Miller, Ph.D., the proponent of Items 15-AP-A and 15-AP-H, wrote:

> Pro se litigants are already disadvantaged relative to the Federal agencies they are arguing against. Aside from the burden of proof as an appellant, the costs, rules,

> and research capabilities are onerous. It cost me hundreds of dollars to print, copy, and mail my briefs and appendices. I risked untimely filing merely because of unforseeable problems at the copy store or delivery service. Filing electronically eliminates several last minute hangups that can dispose of a worthy case.
>
> I believe that pro se litigants should be permitted to use ECF unless and until they demonstrate an inability to use the system above and beyond mistakes commonly made by seasoned attorneys admitted to the bar. This request is for the consideration of fairness as well as cost. The Ninth Circuit routinely approves this motion, and I don't believe its experience leaves them worse for wear.

Sai, the proponent of Item 15-AP-E, similarly wrote:

> [C]ourts should not prohibit pro se litigants from having CM/ECF access where represented parties would have it. Doing so imposes a disparate burden of time, expense, effort, processing delays, reduction in the visual quality of papers due to printing and scanning, removal of hyperlinks in papers, and reduction in ADA / Rehab Act accessibility.

The Advisory Committee considered these arguments at its October 2015 and April 2016 meetings and during its consideration of amendments to Appellate Rule 25 following the April 2016 meeting. The Committee, however, ultimately did not support them. On the contrary, the proposed revised version of Appellate Rule 25(a)(2)(B)(ii), as published for public comment (and reprinted in this Agenda Book), provides:

> **(ii) By an 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.

This provision does not give pro se litigants the same rights to file electronically as represented parties.

Questions for Possible Decision at the October 2016 Meeting

Despite its approval of the proposed Appellate Rule 25(a)(2)(B)(ii), the Advisory Committee did not remove Items 15-AP-A, 15-AP-E, and 15-AP-H from its table of agenda items. Accordingly, at the October 2016 meeting, the Advisory Committee may wish to decide

whether to (a) study these items further, (b) remove them from the Committee's agenda, or (c) postpone any additional action until it receives public comments on the recently proposed and published revision of Rule 25.

Attachments

1. Submission from Dr. Miller (Mar. 9, 2015)
2. Submission from Dr. Miller (Oct. 26, 2015)
3. Submission from Sai (Sept. 7, 2015)

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TAB 7B

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Proposed change to Federal Circuit ECF rules
Rob Miller
to:
Rules_Support
03/09/2015 10:09 PM
Hide Details
From: Rob Miller <robmiller44@hotmail.com>

To: Rules_Support@ao.uscourts.gov

15-AP-A

History: This message has been forwarded.

I, Robert M. Miller, am a petitioner for three cases before the US Court of Appeals for the Federal Circuit. I also have an appeal being heard by the Ninth Circuit.

The Ninth Circuit permitted me, a pro se appellant, to file briefs electronically. However, Federal Circuit rules currently prohibit pro se petitioners from doing so. I filed an unopposed motion to use Electronic Case Filing (ECF) for two of my cases at the Federal Circuit, and the Court denied both motions.

Pro se litigants are already disadvantaged relative to the Federal agencies they are arguing against. Aside from the burden of proof as an appellant, the costs, rules, and research capabilities are onerous. It cost me hundreds of dollars to print, copy, and mail my briefs and appendices. I risked untimely filing merely because of unforseeable problems at the copy store or delivery service. Filing electronically eliminates several last minute hangups that can dispose of a worthy case.

I believe that pro se litigants should be permitted to use ECF unless and until they demonstrate an inability to use the system above and beyond mistakes commonly made by seasoned attorneys admitted to the bar. This request is for the consideration of fairness as well as cost. The Ninth Circuit routinely approves this motion, and I don't believe its experience leaves them worse for wear.

Respectfully submitted,

Robert M. Miller, Ph.D.

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TAB 7C

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Suggested Rule Change - ECF for Pro Se Litigants
Rob Miller
to:
Rules_Support
10/26/2015 02:26 PM
Hide Details
From: "Rob Miller" <robmiller44@hotmail.com>
To: <Rules_Support@ao.uscourts.gov>

To whom it may concern:

I have been a pro se litigant in one district court and two US Courts of Appeals. In the U.S. District Court for Northern California and the U.S. Court of Appeals for the Ninth Circuit, I was permitted to use Electronic Case Filing for my lawsuit and appeal.

In a recent appeal to the U.S. Court of Appeals for the Federal Circuit, I discovered that pro se litigants are not permitted to e-file. Since I discovered this rule the day before my Notice of Appeal was due in Washington, DC, I forfeited my right to appeal.

I discovered today that I am not entitled to file using ECF in an appeal to the U.S. District Court for the Eastern District of Virginia. The rule was not prominent in the local rules or the pro se handbook, and I only learned about it by calling the Clerk's office. Later, I found one line in the rules regarding this restriction that was difficult to see. Oddly, this court allows pro se litigants to receive service of documents through PACER.

Whether or not the courts have reasons from experience to believe pro se litigants have difficulty with electronic filing, litigants such as myself have been unjustly burdened relative to our legal adversaries based not on our own failures, but with failures by other pro se litigants. The US Courts could look to the Ninth Circuit's experiment in permitting all litigants to e-file to see what the results are. In any case, clerks in the Ninth Circuit have informed me that even experienced attorneys and paralegals make errors in ECF. Pro se litigants should not be held to a higher standard than professional litigants, but have their errors excused or unexcused consistent with the courts' approach to professional litigants.

These rules have an adverse impact on pro se litigants relative to their adversaries. While the defendants, government officials, can use ECF from the convenience of their home or office right up until a midnight deadline, I must submit documents through the mail at great expense or drop the documents at the court house in person, taking time off work and dealing with heavy traffic and scarce parking.

The rules of the courts must ensure that no party is disadvantaged relative to another. Pro se litigants already suffer from a lack of experience and resources. These rules only further compound the disadvantage.

Sincerely,

Robert M. Miller, Ph.D.
4094 Majestic Lane
#278
Fairfax, VA 22033

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TAB 7D

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

Sai to: Rules_Support 09/07/2015 10:36 AM

History: This message has been forwarded.

Dear Committee on Rules of Practice and Procedure -

I further request parallel changes to the non-civil rules, and defer to the Committee on how to mirror them appropriately, as I am only familiar with the civil rules.

In particular, I note an error in my draft below for proposal #2: 18 U.S.C. 3006A (the Criminal Justice Act) would of course come under the FRCrP, not the FRCvP, so the FRCvP rule should refer only to 28 U.S.C. 1915 (the IFP statute).

Sincerely,
Sai

On Mon, Sep 7, 2015 at 10:02 AM, Sai <dccc@s.ai> wrote:
> Dear Committee on Rules of Practice and Procedure -
>
> I hereby propose the following four changes to the Federal Rules of
> Civil Procedure.
>
>
> 1. FRCP 5.2: amend (a)(1) to read as follows:
> (1) any part of the social-security number and taxpayer-identification
number
>
> The last four digits of an SSN, prior to a recent change by the SSA,
> is the only part that is random. The first digits can be strongly
> derived from knowing the person's place and date of birth.
>
> Disclosure of the last four digits of an SSN effectively gives away
> all of the private information, serves no public purpose in
> understanding the litigation, and should therefore be sealed by
> default (absent a court order to the contrary, as already provided for
> by FRCP 5.2).
>
> See, e.g.:
> Alessandro Acquisti and Ralph Gross, Predicting Social Security
> numbers from public data, DOI 10.1073/pnas.0904891106, PNAS July 7,
> 2009 vol. 106 no. 27 10975-10980 and supplement
> https://www.pnas.org/content/106/27/10975.full.pdf
> http://www.heinz.cmu.edu/~acquisti/ssnstudy/
>
> EPIC: Social Security Numbers (Nov. 13, 2014)
> https://epic.org/privacy/ssn/
>
> Latanya Sweeney, SSNwatch, Harvard Data Privacy Lab; see also demo
> http://latanyasweeney.org/work/ssnwatch.html
> http://dataprivacylab.org/dataprivacy/projects/ssnwatch/index.html
>
>
> 2. FRCP 5.2: add a new paragraph, to read as follows:
>
> (i) Any affidavit made in support of a motion under 28 U.S.C. 1915 or

> 18 U.S.C. 3006A shall be filed under seal and reviewed ex parte. Upon
> a motion showing good cause, notice to the affiant and all others
> whose information is to be disclosed, and opportunity for the same to
> contest the motion, the court may order that such affidavits be
> (1) disclosed to other parties under an appropriate protective order; or
> (2) unsealed in appropriately redacted form.
>
> For extensive argument, please see the petition and amicus briefs in
> my petition for certiorari regarding this issue: http://s.ai/ifp
>
>
> 3. Add new rule 7.2, matching that of S.D. & E.D. NY:
>
> Rule 7.2. Authorities to Be Provided to Pro Se Litigants
> In cases involving a pro se litigant, counsel shall, when serving a
> memorandum of law (or other submissions to the Court), provide the pro
> se litigant (but not other counsel or the Court) with copies of cases
> and other authorities cited therein that are unpublished or reported
> exclusively on computerized databases. Upon request, counsel shall
> provide the pro se litigant with copies of such unpublished cases and
> other authorities as are cited in a decision of the Court and were not
> previously cited by any party.
>
> See:
> Local Civil Rule of the Southern and Eastern Districts of New York 7.2
> Lebron v. Sanders, 557 F.3d 76 (2d Cir. 2009)
>
>
> 4. Add new subparagraph to rule 5(d)(3):
> (1) A court may not require a pro se litigant to file any paper by
> non-electronic means solely because of the litigant's pro se status.
>
> Pro se litigants should still be permitted (not required) to file by
> paper, to ensure that those without access to CM/ECF or familiarity
> with adequate technology have access to the courts.
>
> Pro se litigants may of course be required to register with CM/ECF in
> the same manner as an attorney, including signing appropriate
> declarations or passing the same CM/ECF training or testing required
> of attorneys.
>
> However, courts should not prohibit pro se litigants from having
> CM/ECF access where represented parties would have it. Doing so
> imposes a disparate burden of time, expense, effort, processing
> delays, reduction in the visual quality of papers due to printing and
> scanning, removal of hyperlinks in papers, and reduction in ADA /
> Rehab Act accessibility.
>
>
>
> I request to be notified by email of any progress related to the four
> changes I have proposed above.
>
> Respectfully submitted,
> /s/ Sai

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MEMORANDUM

To: Advisory Committee on Appellate Rules

From: Gregory E. Maggs, Reporter

Date: September 25, 2016

Subject: Circuits Splits over the Meaning of Appellate Rules 4(c), 7, and 39(a)(4)

I. Introduction

At the April 2016 meeting, the Appellate Rules Advisory Committee considered a memorandum by Mr. Derek Webb, law clerk to the Standing Committee, which identified numerous circuit splits on issues arising under the Appellate Rules. As noted in the draft minutes, the Committee decided to study three of these issues "for possible inclusion on its agenda in the future." These three issues were: (1) whether delay by prison authorities in delivering the order from which an inmate wishes to appeal can be used in computing the 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 an appellate court in awarding costs under Rule 39(a)(4) must specify the specific costs to be taxed. This memorandum describes the circuit splits over these three issues in greater depth so that the Advisory Committee can decide whether to place these matters on the agenda for resolution at future meetings.

II. Summary of the Circuit Conflicts Under Consideration

The following sections of this memorandum briefly summarize the circuit conflicts under consideration. In deciding whether to place any of these matters on the agenda for future resolution, the Advisory Committee may wish to consider that conflicts among the circuits over the meaning of Appellate Rules can have different causes and in turn may merit different responses. In some cases, a conflict may result from what the Committee recognizes as a gap or ambiguity in the text of a rule. In such cases, the Advisory Committee may wish to recommend amendments to the rule to correct the problem. In other instances, the Advisory Committee may believe that the text of the rule is correctly stated and that the conflict exists because one or more courts have misinterpreted the rule. In some such cases, the Advisory Committee may decide that no amendment is necessary and may leave the matter to be sorted out through litigation. But in other instances, the Committee may decide to amend the rule, not for the purpose of changing its meaning, but instead to clarify what the Committee believes is the correct practice. *See, e.g.,* Fed. R. Civ. P. 4 Committee Note (1993) ("In most circuits [the amended] language simply

restates the current practice . . . . Two circuits, however, have questioned that practice . . ., and the Committee wishes to clarify the rule.").

A. Computation of Time for Inmate Appeals under Rule 4

The first conflict concerns the computation of the time that an inmate has to file a notice of Appeal under Rule 4. Rule 4 provides in relevant part:

Rule 4. Appeal as of Right—When Taken

(a) Appeal in a Civil Case.

(1) Time for Filing a Notice of Appeal.

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after entry of the judgment or order appealed from.

(B) The notice of appeal may be filed by any party within 60 days after entry of the judgment or order appealed from if one of the parties is:

(i) the United States;

* * *

(b) Appeal in a Criminal Case.

(1) Time for Filing a Notice of Appeal.

(A) In a criminal case, a defendant's notice of appeal must be filed in the district court within 14 days after the later of:

(i) the entry of either the judgment or the order being appealed; or

(ii) the filing of the government's notice of appeal.

* * *

(c) Appeal by an Inmate Confined in an Institution.

(1) If an inmate confined in an institution files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail 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..

* * *

A circuit split currently exists on the issue of whether the period for filing a notice of appeal may be extended if prison officials delay in notifying an inmate of the entry of a judgment or appealable decision. For example, a court may enter a judgment on October 1 but the inmate may not learn of the entry of the judgment until October 10. The question is whether the pro se inmate should have 10 additional days to file a notice of appeal. My research assistant, Mr. Frank Chang, has prepared the following summary of the circuit split on this issue:

> Unlike an ordinary appellant, the *pro se* prison inmate does not need to file the notice of appeal with the district court clerk. *Compare* Fed. R. App. P. 4(c)(1) *with* Fed. R. App. P. 4(a)(1)(A), (b)(1)(A). Under Rule 4(c)(1), the inmate may simply deliver the notice of appeal to the prison's internal mail system or legal mail system, if one exists, before the last day for filing permitted by the Rules.
>
> Rule 4(c) was added as a part of the 1993 Amendment to the Federal Rules of Appellate Procedure and was a codification of the Supreme Court's decision in *Houston v. Lack*, 487 U.S. 266 (1988). *See* Rule 4, Notes of Advisory Committee on Rules – 1993 Amendment. The Court had created the colloquially-called "mailbox rule," or "*Houston* rule, to "address[] the effect of delay in transmission of court papers by prison authorities on the timeliness of a notice of appeal." *United States v. Grana*, 864 F.2d 312, 315 (3d Cir. 1989). The Supreme Court declined to interpret Rule 4 as barring an inmate's notice of appeal that was received in the district court one day late, because "*pro se* prisoners have no control over delays between the prison authorities' receipt of the notice and its filing." *Houston*, 487 U.S. at 273-74. So the Court in *Houston* interpreted "filed" as "delivered to prison officials for forwarding to the clerk of the district court." *Id.* 272. The dissent in *Houston* asserted that the decision lacked textual support. *See id.* at 277, 284 (Scalia, J., dissenting). But this possible objection to the majority's decision is now moot because the principle in *Houston* was subsequently adopted by amending Rule 4(c).
>
> The current circuit split under Rule 4 is about when the clock starts for computing the amount of time available to an inmate for filing a notice of appeal. Relying on the Supreme Court's observation that inmates do not have control over transmission of court papers, the Third Circuit and others have held that delay by

prison authorities in delivering the notice of entry of the judgment should be excluded from computing the time for appeal. In contrast, the Tenth Circuit has relied on the text of Rule 4 and 28 U.S.C. § 2109 and has declined to exclude delay by prison authorities from the time for appeal.

A timely filing of a notice of appeal is required in both civil and criminal appeals, and the failure to make a timely filing is fatal to an appeal. In civil cases, an appellant's compliance with Rule 4(a)(1)(A)'s thirty-day filing deadline is jurisdictional and mandatory because Congress prescribed a thirty-day filing deadline through a jurisdictional statute. 28 U.S.C. § 2107(a); *Bowles v. Russell*, 551 U.S. 205, 214 (2007). Without the appellant's compliance with Rule 4(a)(1)(A)'s thirty-day filing deadline, the court of appeals is without jurisdiction to hear the appeal. Similarly, in criminal appeals, the appellant must comply with Rule 4(b)(1)(A)'s fourteen-day filing deadline. But several circuits have recognized that compliance with Rule 4(b)(1)(A) is not a jurisdictional requirement because Congress has not created a jurisdictional filing deadline. *E.g.*, *United States v. Lopez*, 562 F.3d 1309, 1312-13 (11th Cir. 2009) (citing *Bowles*, 551 U.S. at 205 and cases from five other circuits). Nevertheless, Rule 4(b)(1)(A)'s filing deadline, like other court-adopted rules, "assure[s] relief to a party properly raising them." *Eberhart v. United States*, 546 U.S. 12, 19 (2005).

In a civil appeal, the thirty-day period begins to run "after entry of the judgment or order appealed from." Fed. R. App. P. 4(a)(1)(A); *see also* 28 U.S.C. § 2107 ("[N]o appeal shall bring any judgment . . . for review unless notice of appeal is filed, within thirty days after the entry of such judgment . . . ."). In a criminal appeal, the fourteen-day period begins to run "after the later of: (i) the entry of either the judgment or the order being appealed; or (ii) the filing of the government's notice of appeal." Fed. R. App. P. 4(b)(1)(A). Entry of judgment is defined in civil cases as "when the judgment or order is entered in the civil docket under Federal Rules of Civil Procedure 79 (a)." Fed. R. App. P. 4(a)(7)(A). A judgment is entered in a criminal case "when it is entered on the criminal docket." Fed. R. App. P. 4(b)(6).

A potential problem for *pro se* prisoners seeking to file an appeal is that they may not discover immediately that an appealable judgment has been entered. The district court may mail the notice of the entry of judgment to the prisoners, but a delay by prison authorities in delivering the notice to prisoners – negligent or otherwise – could cause the prisoners to exceed the filing deadline for the notice of appeal.

The Third Circuit excludes any delay by prison authorities in transmitting the notice of entry of the judgment from determining the timeliness of a *pro se* prisoner's appeal. *Long v. Atl. City Police Dep't*, 670 F.3d 436, 441 (3d Cir. 2012) (citing *United States v. Grana*, 864 F.2d 312, 316 (3d Cir. 1989)). The Third Circuit "perceive[s] no difference between delay in transmitting the prisoner's papers to the court [as in *Houston*] and transmitting the court's final judgment to him so that he may prepare his appeal." *Grana*, 864 F.2d at 316. If the prison receives from the district court the notice of entry of judgment, but does not deliver the notice of entry of judgment to the prisoner for four days, then those four days do not count against the prisoner in determining the timeliness of his appeal. The Third Circuit holds that the prison inmates lose control over the timeliness of their appeal and must "depend upon the prison authorities to deliver to him the notice of the entry of a final order." *Id.* The inmate may not have the means to contact the district court to inquire about the status of his case. *Id.* at 315. In a criminal case, "the appeal period . . . is shorter than that in civil cases" so even a slight delay could compromise the right to appeal. *Id.*

At least two circuits have issued unreported opinions relying on the Third Circuit's decision in *Grana* in remanding the case or dismissing the appeal. *See Bingham v. Dist. of Columbia*, 1996 WL 103739, at *1 (D.C. Cir. Jan. 18, 1996) (per curiam) (remanding the case to "ascertain the actual date appellant received a copy of that memorandum order and whether a delay, if any, in appellant's receipt was attributable to prison authorities."); *Brown v. Riverside Corr. Facility*, 1992 WL 102504, at *2-*3 (6th Cir. Apr. 29, 1992) (per curiam) (dismissing the appeal because even after "[e]xcluding all delay attributable to the prison authorities, the notice of appeal was not filed within the requisite thirty-day period").

The Tenth Circuit, on the other hand, expressly declined to follow the Third Circuit's *Grana* approach and does not exclude the delay by prison authorities in transmitting the notice of entry of judgment. *Jenkins v. Burtzloff*, 69 F.3d 460, 461 (10th Cir. 1995). The Tenth Circuit found the Third Circuit's application of *Houston* irreconcilable with the word "entry" found in Rule 4 and 28 U.S.C. § 2107. Rule 4 states that in a civil case the notice of appeal must be filed "within 30 days of the date of *entry of the judgment* or order appealed from." Fed. R. App. P. 4(a)(1)(A) (emphasis added). In addition, 28 U.S.C. § 2107 says that the notice of appeal must be filed "within thirty days after the *entry of such judgment*, order or decree" (emphasis added). Rule 4(a)(7) then defines when a judgment or order is "entered." Given these texts and definitions, the Tenth Circuit held that "[t]he date of entry is the beginning point for when the time period begins to run," and that "the word 'entry' can[not] be construed differently."

Id. at 461. The Tenth Circuit also observed a practical, administrative difficulty with a contrary decision in that "[t]he date of entry for a single order could be different for each of the incarcerated parties." *Id.* at 462.

B. Bond Costs under Appellate Rule 7

The second circuit split under consideration is about whether a district court, acting under Appellate Rule 7, may include attorney's fees as "costs" of the appeal for which the appellant must file a bond. Rule 7 provides:

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

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

My research assistant, Mr. Chang, has prepared the following summary of the disagreement over the meaning of "costs on appeal" under Appellate Rule 7:

> The purpose of Rule 7, as shown in its text, is "to ensure payment of costs on appeal," and "to protect the rights of appellees brought into appeals court by such appellants" who "pose a payment risk." *Adsani v. Miller*, 139 F.3d 67, 75 (2d Cir. 1998). Where the district court orders filing of a bond or security, an appellant's failure to file a bond can result in a dismissal of the appeal. *See Sckolnick v. Harlow*, 820 F.2d 13, 15 (1st Cir. 1987) (per curiam).
>
> A circuit split exists over whether the district court, acting under Rule 7, may include attorney's fees as "costs" of the appeal for which the appellant must file a bond. *See* 16A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3953 (4th ed. 2016). Under the majority approach, the district court may include attorney's fees as costs as long as there is a fee-shifting statute that permits recovery of attorney's fees as costs. Under the minority approach, the district court, acting under Rule 7, cannot include attorney's fees as costs.
>
> The majority approach is followed by the Second, Sixth, Ninth, and Eleventh Circuits. *See Adsani*, 139 F.3d at 75; *In re Cardizem CD Antitrust Litig.*, 391 F.3d 812, 817 (6th Cir. 2004); *Azizian v. Federated Dep't Stores, Inc.*, 499 F.3d 950, 953 (9th Cir. 2007); *Pedraza v. United Guar. Corp.*, 313 F.3d

1323, 1333 (11th Cir. 2002). This approach was heavily influenced by the Supreme Court's decision in *Marek v. Chesny*, 473 U.S. 1 (1985), which interpreted the term "costs" found in Federal Rule of Civil Procedure 68 to include attorney's fees awardable under 42 U.S.C. § 1988. Although Rule 68 did not itself define the term "costs," the Rule was written when a number of federal statutes allowed recovery of attorney's fees as part of costs. *Id.* at 7-8. So the Court concluded that the term "costs" in Rule 68 "incorporates the definition of costs that otherwise applies to the case" through underlying statutes. *Id.* at 9 n.2. The majority of circuits have held that the term "costs" in Federal Rules of Appellate Procedure 7 operates like "costs" in Rule 68, because Rule 7 also does not define "costs." *See* Fed. R. App. P. 7. Moreover, Rule 7 was drafted and amended with the awareness "that numerous federal statutes encompass attorneys' fees within the definition of 'costs.' " *Pedraza*, 313 F.3d at 1332. Therefore, these courts have found the meaning of "costs" in Rule 7 "should be derived from the statutory fee shifting provision that attends the plaintiff's underlying cause of action." *Id.* at 1333.

The minority approach, followed by the Third and D.C. Circuits, holds that the district court, acting under Rule 7, cannot include attorney's fees as costs because Rule 39 defines "costs" in Rule 7 but does not include attorney's fees. *See Hurschensohn v. Lawyers Title Ins. Corp.*, No. 96-7312, 1997 WL 307777, *1 (3d Cir. June 10, 1997); *In re Am. President Lines, Inc.*, 779 F.2d 714, 716 (D.C. Cir. 1985) (per curiam); *see also* Fed. R. App. P. 39. The D.C. Circuit also rejected a district court's holding that the purpose in requiring a bond was to screen out frivolous appeals. *In re Am. President Lines, Inc.*, 779 F.2d at 716. The D.C. Circuit noted that Rule 7's primary purpose or function is not to deter frivolous appeals. Rule 38, "Frivolous Appeal," fulfills that purpose. The D.C. Circuit further held that such efforts burden "those [appeals] possessing merit." *Id.* at 718. Lastly, the court reasoned that the appellate court, not the district court, should decide whether an appeal is frivolous or not. *Id.* at 717. The Third Circuit largely relied on the D.C. Circuit's decision. *See Hurschensohn*, 1997 WL 307777, at *1. The Third Circuit found the Supreme Court's interpretation of 28 U.S.C. § 1920 to be instructive in interpreting the term "costs" in Rule 39, and, thus, Rule 7. *Id.* at *1-*2 (citing *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980)). The Third Circuit noted that "various items" listed in Rule 39 "have their source in 28 U.S.C. § 1920," which "does not provide for attorneys' fees." *Id.* at *1. The court found this to mean that Rule 39, and necessarily Rule 7, does not provide for attorney's fees.

C. Recovery of Costs Ordered under Rule 39(a)(4)

The third circuit split under consideration is about whether an appellate court, in awarding costs pursuant to Rule 39(a)(4), must specify the costs to be taxed under Rule 39(e) before a district court may entertain an application for those costs. Rule 39 provides in pertinent part:

> **Rule 39. Costs**
>
> **(a) Against Whom Assessed.** The following rules apply unless the law provides or the court orders otherwise:
>
> (1) if an appeal is dismissed, costs are taxed against the appellant, unless the parties agree otherwise;
>
> (2) if a judgment is affirmed, costs are taxed against the appellant;
>
> (3) if a judgment is reversed, costs are taxed against the appellee;
>
> (4) if a judgment is affirmed in part, reversed in part, modified, or vacated, costs are taxed only as the court orders.
>
> * * *
>
> **(e) Costs on Appeal Taxable in the District Court.** The following costs on appeal are taxable in the district court for the benefit of the party entitled to costs under this rule:
>
> (1) the preparation and transmission of the record;
>
> (2) the reporter's transcript, if needed to determine the appeal;
>
> (3) premiums paid for a supersedeas bond or other bond to preserve rights pending appeal; and
>
> (4) the fee for filing the notice of appeal.

My research assistant, Mr. Chang, prepared the following summary of the conflicting interpretations of Rule 39(a)(4):

> Subsections (a)(1), (2), and (3) specify when costs are to be taxed against either the appellant or the appellee. Subsection (a)(4), however, leaves discretion to the appellate court on how costs are to be taxed when a judgment is affirmed in part, reversed in part, modified, or vacated. *E.g.*, *Stewart Park & Reserve Coal.,*

Inc. v. Slater, 352 F.3d 545, 561 (2d Cir. 2003) (asserting "we may tax the costs of this appeal as we see fit" (quotation marks and alterations omitted)); *Golden Door Jewelry Creations, Inc. v. Lloyds Underwriters Non-Marine Ass'n*, 117 F.3d 1328, 1340 (11th Cir. 1997) ("Rule 39(a) leaves the imposition of costs to the discretion of the appellate court where the lower court judgment is affirmed in part, reversed in part or vacated."). Subsection (a)(4) acknowledges that "there are circumstances in which the disposition on appeal will not lend itself to a ready determination of which party, if any, should bear costs on appeal" and grants the appellate court with discretion to award costs as it is necessary. *L-3 Commc'n Corp. v. OSI Sys., Inc.*, 607 F.3d 24, 29 (2d Cir. 2010).

Rule 39(a)(4) works in tandem with other subsections in Rule 39 that list taxable costs of appeal. In particular, Rule 39(e), "Costs on Appeal Taxable in the District Court," provides that some "costs on appeal are taxable in the district court for the benefit of the party entitled to costs under this rule." Fed. R. App. P. 39(e). Rule 39(e) lists the following costs taxable in the district court: "the preparation and transmission of the record"; "the reporter's transcript, if needed to determine the appeal"; "premiums paid for a supersedeas bond or other bond to preserve rights pending appeal"; and "the fee for filing the notice of appeal." *Id.*

There is a circuit split over whether the appellate court, in awarding costs pursuant to Rule 39(a)(4), must "specify which particular Rule 39(e) costs are to be taxed before a district court may entertain an application for those costs . . . ." *L-3 Commc'n, Corps.*, 607 F.3d at 29-30. The Eleventh Circuit and the Eight Circuit have held that the appellate court must do so, but the Second Circuit has held it is not required to do so.

In *Golden Door*, the Eleventh Circuit held that an appellate court "must provide a specific directive" as to what costs the parties are entitled. *Golden Door*, 117 F.3d at 1340. The Eleventh Circuit interpreted the phrase "only as ordered by the court" in Rule 39(a)(4) as providing the parties only the relief the court grants, but not as "provid[ing] parties with [an] unfettered right to all costs incurred on appeal." *Id.* Where an appellate court's order does not explicitly grant a class of costs, the Eleventh Circuit treats that "silence as a rejection of those costs." *Id.* In *Golden Door*, the appellant secured and posted supersedeas bonds for the appeal. The subsequent appeal resulted in the judgment being vacated. The appellate court's order awarded to the appellant "costs on appeal to be taxed by the Clerk of *this court*." *Id.* (emphasis added). When the appellant sought to recover the premiums paid for the supersedeas bond pursuant to Rule 39(e), the district court interpreted the appellate court's order to exclude the Rule 39(e)

costs, because the order only granted costs "to be taxed by the Clerk of *this court* [appellate court]." *Id.* (emphasis added). Because the appellate court's order did not include costs to be taxed by the clerk of the *district court*, the district court held it did not have the authority to tax Rule 39(e) costs. The Eleventh Circuit affirmed and held that "in cases where this court's determination does not produce closure, we must determine the relief to which the parties are entitled." *Id.* at 1340.

The Eighth Circuit relied on the Eleventh Circuit's decision in *Golden Door* in holding that the district court was without authority to award costs, unless the appellate court indicates which Rule 39(e) costs are recoverable in the district court. *Reeder-Simco GMC, Inc. v. Volvo GM Heavy Truck Corps.*, 497 F.3d 805, 808-09 (8th Cir. 2007). The Eighth Circuit held "the appellate court must specify whether one party or the other, or both, are entitled to costs, and if so, what costs." *Id.* at 808. It found that Rule 39(e) "limits the costs taxable in the district court to those a party is 'entitled to . . . under this rule.'" *Id.* In *Reeder-Simco*, the appellate court never entered an order indicating which party was entitled to costs of appeal, because neither party brought a motion for costs. *Id.* at 808. Therefore, the Eighth Circuit held that, in the absence of an appellate court order, Volvo was not entitled to recover any Rule 39(e) costs in the district court. *Id.* at 808-09.

To the contrary, under the Second Circuit's interpretation, the appellate court only needs to determine which party is entitled to cost, but does not need to specify what costs. In *L-3 Communications Corporation*, the Second Circuit interpreted Rule 39(a)(4) as "requiring the appellate court to make a determination about which party, if any, should bear costs." The Second Circuit held this was consistent with the structure of Rule 39. Rule 39(a)(4), after all, is listed under Subsection (a), entitled "Against Whom Assessed." *Id.* at 28. However, as with Subsections (a)(1), (2), and (3), the court did not interpret (a)(4) "as requiring the appellate court to delineate precisely what costs under Rule 39 that party will bear." *Id.* at 29. The Second Circuit treated "party entitled to costs" under Subsection (a)(4) as if it was the prevailing party under Subsections (a)(1), (2), and (3). The party designated by the appellate court as the party entitled to cost "is entitled to seek costs in the same manner as is a prevailing party under subsections (a)(1), (2), and (3)." *Id.* at 29.

The Second Circuit distinguished *Golden Door* and *Reeder-Simco*. The Second Circuit distinguished *Golden Door* by finding that the Eleventh Circuit's order limited costs of appeal by awarding only the cost "to be taxed by the Clerk of this court" and excluded costs taxable in the district court. The Second Circuit

holds that the appellate court retains the ability to "tax the costs of the appeal as it sees fit." *Id.* at 29 (quotation marks and alterations omitted). But the Second Circuit disagreed with the Eleventh Circuit to the extent *Golden Door* implied that the appellate court must "specify which particular Rule 39(e) costs are to be taxed before a district court may entertain an application of cost." *Id.* at 29-30. The Second Circuit then found the language from *Reeder-Simco* ("the appellate court must specify whether one party or the other, or both, are entitled to costs, and if so what costs") as a dictum that is neither binding nor persuasive on the court, because "there was no order regarding costs that had ever been entered" in *Reeder-Simco*. *Id.* at 30.

III. Questions for the Advisory Committee at the October 2016 Meeting

At the October 2016 Meeting, the Advisory Committee may wish to decide whether to include any or all of these three circuit conflicts on its agenda for future action. If the Committee decides to include an issue on its agenda, it may also wish to give the Reporter guidance for preparing materials for the spring meeting. For example, it might requests discussion drafts of amendments that would revise or clarify the Rules 5, 7, and 39 so that they would clearly require the current approach of the majority and/or minority of the circuits that have considered the issue.

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MEMORANDUM

DATE: September 28, 2016

TO: Advisory Committee on Appellate Rules

FROM: Gregory E. Maggs, Reporter

SUBJECT: Discussion Item: Initiatives to Improve the Efficiency of Federal Appeals

In his 2015 Year-End Report on the Federal Judiciary, Chief Justice John Roberts praised the Standing Committee and Advisory Committees for their efforts to reduce "serious impediments to just, speedy, and efficient resolution" of federal litigation. Chief Justice Roberts also spoke at the June 2016 meeting of the Standing Committee, and in his remarks he challenged those attending the meeting to work to improve the efficiency of the federal procedural rules. The Advisory Committee, accordingly, may wish to discuss the possibility of initiating efforts to amend the Appellate Rules for the specific purpose of making federal appellate litigation faster and less expensive, without sacrificing the rights of litigants.

The Advisory Committee members all have extensive experience with appellate litigation, and may have ideas for changes to the Appellate Rules that might improve the efficiency of the U.S. Courts of Appeals. Other suggestions for how to improve efficiency may come from published sources. For example, the following recent articles suggest various reforms that could make federal appeals faster and less expensive:

- Martin H. Siegel, *Let's Revamp the Appellate Rules Too*, 42 Litigation 30 (2016): The author suggests a number of cost saving reforms for appellate practice, including: providing simple forms for run-of-the mill motions (e.g., requests for extensions of time, requests concerning oral arguments, etc.); eliminating redundant portions of briefs (e.g., the summary of the argument, issue statements, etc.); having judges email questions to the parties in advance of (or instead of) holding oral argument; and using more video conferencing for oral argument. This article is available at: http://www.americanbar.org/content/dam/aba/publications/litigation_journal/spring2016/revamp-appellate-rules.authcheckdam.pdf

- Robert K. Christensen & John Szmer, *Examining the Efficiency of the U.S. Courts of Appeals: Pathologies and Prescriptions*, 32 Int'l Rev. L. & Econ. 30 (2012): The authors use empirical data to make twelve claims about policies that affect the efficiency of appellate courts. Some of their claims could lead to amendments to the Appellate Rules

(e.g., "Orally argued cases contribute to longer disposition times"), while other claims concern matters that only Congress could address (e.g., "Circuit size in terms of active judges decreases efficiency"). This article is available at: http://polis.unipmn.it/pubbl/RePEc/uca/ucaiel/iel004.pdf

- Nicole L. Waters & Michael Sweikar, *Efficient and Successful ADR in Appellate Courts: What Matters Most?*, 62 Disp. Resol. J. 42 (2007): The authors use empirical data to make two claims about how to improve the efficiency of appellate alternative dispute resolution (ADR) policies. These claims are: (1) there is "no correlation between successful outcomes and cases referred to ADR based on case-level facts"; and (2) "successful outcomes were best achieved where there was greater court supervision of and involvement in the ADR programs." This article is available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=913320

- Hannah M. Smith, Note, *Using the Scientific Method in the Law: Examining State Interlocutory Appeals Procedures that would Improve Uniformity, Efficiency, and Fairness in the Federal System*, 61 Clev. St. L. Rev. 259 (2013): The author uses empirical evidence in comparing the federal approach to interlocutory appeals to different and arguably more efficient approaches in certain state courts. This article is available at: http://engagedscholarship.csuohio.edu/cgi/viewcontent.cgi?article=1403&context=clevstlrev

- Joseph Delehanty, *Enhancing Efficiencies in the Appellate Process Through Technology*, 15 J. App. Prac. & Process 77 (2014): The author makes several suggestions for using technology to reduce costs, such as doing more oral arguments by video teleconference. This article is available at: http://lawrepository.ualr.edu/cgi/viewcontent.cgi?article=1357&context=appellatepracticeprocess

In addition to these published recommendations, the Advisory Committee also might solicit suggestions. Many knowledgeable groups or individuals may have useful ideas. For example, Betsy Shumaker, the Clerk of Court of the U.S. Court of Appeals for the Tenth Circuit and Clerk Liaison to the Advisory Committee, has prepared the attached memorandum suggesting that the Advisory Committee may wish to update Appellate Rules 10, 11, 27, and 30 to address electronic records, motions, and appendices.

At the October 2016 meeting, the Advisory Committee may wish to discuss whether it should undertake initiatives aimed at improving the efficiency of federal appellate litigation and, if so, how it would like to begin such initiatives (e.g., by creating a subcommittee, asking for outside opinions, etc.).

Attachment

Memorandum from Clerk of Court Betsy Shumaker to Judge Neil Gorsuch, Subject: Potential Fed. R. App. P. Updates (Sept. 23, 2016)

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TAB 9B

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MEMO

To: Judge Neil Gorsuch

From: Betsy Shumaker

Date: September 23, 2016

Re: Potential Fed. R. App. P. Updates

When we talked about the Rules, you asked me if there were other rules or sections of the rules that I had identified as needing updating. While I don't know how realistic it might be to review some or all of the provisions noted below, these stand out to me as being particularly outdated given our commitment to and dependence on electronic filing. I have also included the date of the last update as a reference point. Please don't hesitate to let me know if you have any questions.

Fed. R. App. P. 10—The Record on Appeal (last updated 2009)

This rule has not been modified since the advent of the electronic appendix. While every circuit does things differently, and not all courts have electronic records and appendices (or "record excerpts" as many courts call them) the rule clearly contemplates only paper records. For instance, Rule 10(a)(1) states the record on appeal must include "the original papers and exhibits filed in the district court." It also states the record must include "a certified copy of the docket entries prepared by the district clerk." While "papers" could certainly be read to include electronic papers, the rule doesn't even reference electronic alternatives. I would also note Rule 10(e)(2) references corrections to the record and directs that it "may be corrected and a supplemental record may be certified and forwarded." Again—while some of the language could certainly be construed to include electronic transmission, language updates would make that more clear.

Fed. R. App. P. 11—Forwarding the Record (last updated 1998)

This is the rule I referenced when we were talking on the phone. It has not been updated since 1998—a time when no circuit court transmitted anything electronically. In particular, Rule 11(a) states the appellant must "do whatever . . . is necessary to enable the clerk to assemble and forward the record." Rule 11(b)(2) describes forwarding record

materials "of unusual bulk or weight." Rule 11(c) discusses "retaining the record temporarily in the district court for use in preparing the appeal." Again, there may be circuits which receipt some materials in hard copy, but the majority does not, and the rule doesn't even reference the possibility of electronic transmission.

Fed. R. App. P. 27—Motions (last updated 2009)

The majority of this rule still works well. In part 27(d)(1), however, the Rule references formatting requirements and speaks to "reproduction" and "binding." Again, there may be courts requiring the submission of paper copies of motions (we do not) but it seems the rule should also acknowledge and speak to electronic submission of motions. At a minimum I think it should include language noting that courts may alter the requirements of this section via local rule or practice.

Fed. R. App. P. 30—Appendix to the Briefs (last updated 2009)

As with Rule 27, much of this rule can still be applied easily in the electronic world. I believe, however, that updates to the language of the Rule to acknowledge electronic filing and the impact of local rules on electronic filing would eliminate confusion. For instance, Rule 30(d) states that when transcripts are included in an appendix "the transcript page numbers must be shown in brackets immediately before the included pages." In the electronic world pagination is consecutive and automatic (using either the district court's CM program or pagination features in Adobe Acrobat). Likewise, Rule 30(e) is titled "Reproduction of Exhibits" and states exhibits "may be reproduced in a separate volume . . . [and must be] suitably indexed." Again, I'm not aware of any circuit which receipts exhibit materials in this manner. Like some of the other rules identified here, I think adding language to reference local alternatives, at a minimum, would be helpful.

Conclusion

I do not think any of these rules require a total overhaul. In particular given how different the circuits are in terms of their practices it is desirable to have rules of general application. The issue is, however, that none of these rules have been updated since all of the courts became electronic. They do not even acknowledge the electronic filing world, and that can be confusing to lawyers and litigants. All of the courts have local rules to address our reality (that is, the electronic filing of most everything) but that seems to me to be one of the concerns—right now in most circuits there is a significant disconnect between the Fed. R. App. P. and the local rules. For instance, our local rule 30.1, which addresses the submission of electronic appendices, is longer than all of Fed. R. App. P. 30. I think with some language tweaks the Fed. R. App. P. could be updated to lessen the confusion.