MEMORANDUM

TO: **Hon. David G. Campbell, Chair**
Committee on Rules of Practice and Procedure

FROM: **Hon. Michael A. Chagares, Chair**
Advisory Committee on Appellate Rules

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

DATE: **May 22, 2017**

I. Introduction

The Advisory Committee on the Appellate Rules met on May 2, 2017, in Washington, D.C. At this meeting, the Advisory Committee considered six sets of proposed amendments that the Standing Committee published for public comment in August 2016, decided to propose two new sets of amendments for publication, and considered several additional items on its agenda.

Part II of this memorandum concerns the six sets of proposed amendments published for public comment. These proposed amendments would:

(A) extend the time for filing reply briefs to 21 days under Appellate Rules 28.1 and 31;

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

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

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

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

(F) address stays of the mandate under Appellate Rule 41.

As described below, in light of public comments, the Advisory Committee recommends no changes to the first two of these published proposals and recommends minor revisions of the other proposals.

Part III of this memorandum concerns the two new proposed sets of amendments that the Advisory Committee recommends publishing for public comment. These new amendments would:

(A) change the terms "mail" and "mailing" to "send" and "sending" in Appellate Rules 3(d) and 13(c); and

(B) require additional disclosures to aid judges in deciding whether to recuse themselves under Appellate Rule 26.1.

Part IV of this memorandum presents information about other matters the Advisory Committee is considering. The attached table of agenda items and draft minutes of the April meeting provide additional details of the Advisory Committee's activities. The Advisory Committee will hold its next meeting in October or November 2017.

II. Action Items: Amendments Previously Published for Public Comment

In August 2016, the Standing Committee published six sets of proposed amendments for public comment. Based on the comments received, the Advisory Committee now makes the following recommendations for amendments to the Appellate Rules.

A. Rules 31(a)(1) & 28.1(f)(4)—Extension of time to file reply briefs

In August 2016, the Standing Committee published proposed amendments to Appellate Rules 31(a)(1) and 28.1(f)(4). These rules currently provide only 14 days after service of the response to file a reply brief in appeals and cross-appeals. Previously, parties effectively had 17 days because Rule 26(c) formerly gave them three additional days in addition to the 14 days in Rules 31(a)(1) and 28.1(f)(4). The Advisory Committee concluded that effectively shortening the period for filing from 17 days to 14 days could adversely affect the preparation of useful reply briefs. Because time periods are best measured in increments of 7 days, the Committee concluded the period should be extended to 21 days.

The Advisory Committee received comments on the published proposal from the Pennsylvania Bar Association and the National Association of Criminal Defense Lawyers. These comments both supported the proposal. The Advisory Committee therefore recommends no changes to the proposed amendments. The proposed amendments (with changes shown in lines 9 and 25) are as follows:

Rule 28.1. Cross-Appeals

* * * * *

(f) Time to Serve and File a Brief. Briefs must be served and filed as follows:

(1) the appellant's principal brief, within 40 days after the record is filed;

(2) the appellee's principal and response brief, within 30 days after the appellant's principal brief is served;

(3) the appellant's response and reply brief, within 30 days after the appellee's principal and response brief is served; and

(4) the appellee's reply brief, within ~~14~~21 days after the appellant's response and reply brief is served, but at least 7 days before argument unless the court, for good cause, allows a later filing.

Committee Note

Subdivision (f)(4) is amended to extend the period for filing a reply brief from 14 days to 21 days. Before the elimination of the "three-day rule" in Rule 26(c), attorneys were accustomed to a period of 17 days within which to file a reply brief,

and the committee concluded that shortening the period from 17 days to 14 days could adversely affect the preparation of useful reply briefs. Because time periods are best measured in increments of 7 days, the period is extended to 21 days.

Rule 31. Serving and Filing Briefs

(a) Time to Serve and File a Brief.

(1) The appellant must serve and file a brief within 40 days after the record is filed. The appellee must serve and file a brief within 30 days after the appellant's brief is served. The appellant may serve and file a reply brief within ~~14~~21 days after service of the appellee's brief but a reply brief must be filed at least 7 days before argument, unless the court, for good cause, allows a later filing.

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Committee Note

Subdivision (a)(1) is revised to extend the period for filing a reply brief from 14 days to 21 days. Before the elimination of the "three-day rule" in Rule 26(c), attorneys were accustomed to a period of 17 days within which to file a reply brief, and the committee concluded that shortening the period from 17 days to 14 days could adversely affect the preparation of useful reply briefs. Because time periods are best measured in increments of 7 days, the period is extended to 21 days.

B. Form 4—Removal of request for Social Security number digits

In August 2016, the Standing Committee published for public comment a proposed amendment to Appellate Form 4. Litigants seeking permission to proceed in forma pauperis must complete this Form. Question 12 of the Form currently asks litigants to provide the last four digits of their social security numbers. The clerk representative to the Advisory Committee investigated the matter and reported that the general consensus of the clerks of court is that the last four digits of a social security number are not needed for any purpose and that the question can be eliminated. Given the potential security and privacy concerns associated with social security numbers, and the lack of need for obtaining the last four digits of social security numbers, the Advisory Committee recommended deleting this question.

Following publication of the proposal, the Advisory Committee received comments on the proposal from The World Privacy Forum and the National Association of Criminal Defense Lawyers. Both comments supported the proposal. The Advisory Committee therefore recommends no changes to the proposed amendment. The proposed amendment is as follows:

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

* * * * *

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

Your daytime phone number: (___) _____

Your age: _____ Your years of schooling: _____

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

C. Rules 8(a) & (b), 11(g), & 39(e)—References to Supersedeas Bonds

In August 2016, the Standing Committee published for public comment proposed amendments to Rules 8(a) & (b), 11(g), and 39(e). These amendments conform the Appellate Rules to a proposed change to Civil Rule 62(b). Civil Rule 62(b) currently provides: "If an appeal is taken, the appellant may obtain a stay by supersedeas bond . . . ." The proposed amendments will eliminate the antiquated term "supersedeas" and allow an appellant to provide "a bond or other security."

The Pennsylvania Bar Association submitted the only public comment on the proposal. It supported the proposed amendments without change "because they bring the [Appellate] rules into conformity with current practice."

The Advisory Committee recommends no changes to the proposals to amend Rules 8(a), 11(g), and 39(e), but recommends revising the proposed amendments to Rule 8(b) in two ways. First, to make Rule 8(b) conform to proposed amendments with Civil Rule 65.1, the Advisory Committee recommends rephrasing the heading and the first sentence to refer only to "security" and "security provider" (and not mention specific types of security, such as a bond, stipulation, or other undertaking). The Advisory Committee agrees with the Civil Rules Advisory Committee that this phrasing is simpler and less limiting. Second, the Advisory Committee recommends revising the third sentence of Rule 8(b) by changing the word "mail" to "send." This change will conform Rule 8(b) to the proposed amendments to Rule 25 that permit electronic filing and service. In addition, the Advisory Committee recommends modifying the Committee Note to explain these two revisions.

The proposed amendments (with revisions indicated by footnotes) are as follows:

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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(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~~ Security Provider. If a party gives security ~~in the form of a bond, a stipulation, or other undertaking~~ with one or more ~~sureties~~ 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 security ~~bond or undertaking~~ may be served.[1] On motion, a ~~surety's~~ security provider's liability may be enforced in the

[1] In the proposed amendments published for public comment, the first sentence of Rule 8(b) said: "If a party gives security in the form of a bond, a stipulation, an undertaking, or other security, ~~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 security ~~bond or undertaking~~ may be served."

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~~ send[2] a copy to each ~~surety~~ security provider whose address is known.

Committee Note[3]

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." The term "security" in the amended subdivision (b) includes but is not limited to the examples of security (i.e., "a bond, a stipulation, or other undertaking") formerly listed in subdivision (b). The word "mail" is changed to "send" to avoid restricting the method of serving security providers. Other Rules specify the permissible manners of service.

Rule 11. Forwarding the Record

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

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

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[2] The proposed amendment published for public comment did not change the word "mail."

[3] The Committee Note published for public comment included only the first two sentences. The last two sentences are new.

• for any other intermediate order—

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

Committee Note

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

Rule 39. Costs

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

(1) the preparation and transmission of the record;

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

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

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

Committee Note

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

D. Rule 29(a)—Limitations on Amicus Briefs filed by Party Consent

In August 2016, the Standing Committee published for public comment proposed amendments to Appellate Rule 29(a). Rule 29(a) specifies that an amicus curiae may file a brief with leave of the court or without leave of the court "if the brief states that all parties have consented to its filing." Several courts of appeals, however, have adopted local rules that forbid the filing of a brief by an amicus curiae when the filing could cause the recusal of one or more judges. These local rules conflict with Rule 29(a) because Rule 29(a) imposes no limit on the filing of a brief with party consent. The Advisory Committee decided that Rule 29(a) should be amended to allow courts to prohibit or strike the filing of an amicus brief. The proposed amendment accomplishes this result by adding an exception providing "that a court of appeals may strike or prohibit the filing of an amicus brief that would result in a judge's disqualification."

At its May 2017 meeting, the Advisory Committee decided to revise its proposed amendment to Rule 29 for two reasons. First, other amendments to Rule 29 took effect in December 2016. These other amendments renumbered Rule 29's subdivisions and provided new rules for amicus briefs during consideration of whether to grant rehearing. As a result, the Advisory Committee now recommends moving the exception from the former subdivision (a) to the new subdivision (a)(2) and copying this exception into the new subdivision (b)(2). These changes do not alter the meaning or function of the exception. Second, the Advisory Committee recommends rephrasing the exception to improve its clarity. As revised, the exception would authorize a court of appeals to "prohibit the filing of or strike" an amicus brief (rather than "strike or prohibit the filing of" the brief). The new word order makes the exception more chronological without changing the meaning or function of the proposed amendment. The revised proposal is as follows:

Rule 29. Brief of an Amicus Curiae

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

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

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

the filing of or strike an amicus brief that would result in a judge's disqualification.[4]

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(b) During Consideration of Whether to Grant Rehearing.

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

(2) When Permitted. The United States or its officer or agency or a state may file an amicus ~~curiae~~ brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court, except that a court of appeals may prohibit the filing of or strike an amicus brief that would result in a judge's disqualification.[5]

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Committee Note

The amendment authorizes orders or local rules, such as those previously adopted in some circuits, that prohibit the filing of an amicus brief 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 Advisory Committee received six comments on the proposed amendment. Five of these comments oppose creating an exception that would allow a court of appeals to prohibit the filing of or strike an amicus brief filed by party consent. Associate Dean Alan B. Morrison of the George Washington University Law School, the Pennsylvania Bar Association, the Federal Bar Council, and Heather Dixon, Esq., assert in their comments that the proposed amendment is unnecessary because amicus briefs that require the recusal of a judge are rare. They further assert that the exception could

[4] The proposed amendment published for public comment said "strike or prohibit the filing of" instead of "prohibit the filing of or strike."

[5] The proposal published for public comment did not include the amendments to this subdivision because the subdivision did not go into effect until December 2016.

be wasteful. An amicus curiae may pay an attorney to write a brief and a court then might strike the brief. The amicus curiae likely would not know the identity of the judges on the appellate panel when filing the brief and would have no options once the court strikes the brief. The Advisory Committee understands these considerations but has concluded that the exception is necessary given the existence of local rules that currently contradict Rule 29. The Committee has no information suggesting the local rules actually have caused any problems.

Second, Judge Jon O. Newman of the U.S. Court of Appeals for the Second Circuit comments that the proposed amendment should not change "amicus-curiae brief" to "amicus brief." He explains: "It's a 'friend of the court brief,' not a 'friend brief.'" The Committee understands the criticism but recommends the change for consistency. Rule 29, as revised in December 2016, now uses the term "amicus-curiae brief" in two instances and the term "amicus brief" in six instances. The Committee believes that changing the two instances of "amicus-curiae brief" to "amicus brief" is the most straightforward solution to this problem.

E. Rule 25—Electronic Filing, Signatures, Service, and Proof of Service

In August 2016, the Standing Committee published proposed amendments to Appellate Rule 25. The proposed amendment to subdivision (a)(2)(B)(i) addresses electronic filing by generally requiring a person represented by counsel to file papers electronically. This provision, however, allows everyone else to file papers non-electronically and also provides for exceptions for good cause and by local rule. The proposed amendment to subdivision (a)(2)(B)(iii) addresses electronic signatures. The proposed amendment to subdivision (c)(2) addresses electronic service through the court's electronic-filing system or by using other electronic means that the person to be served consented to in writing. The proposed amendment to subdivision (d)(1) requires proof of service of process only for papers that are not served electronically.

After receiving public comments and conferring with the other Advisory Committees, the Appellate Rules Advisory Committee recommends minor revisions of the proposed amendments for three reasons. First, amendments that became effective in December 2016 altered the text of subdivision (a)(2)(C), which addresses inmate filings. This change requires a slight relocation of the proposed amendment as shown below.

Second, public comments criticized the signature provision in the proposed new subdivision (a)(2)(B)(iii). Reporter Ed Cooper of the Civil Rules Advisory Committee has summarized the three primary concerns as follows:

> First, [the provision] might be misread to require that the user name and password appear on the signature block. . . . Second, the ever-changing world of security for electronic communications may mean that courts will move toward means of authentication more advanced than user names and logins. . . . Third, concerns were

expressed about the means of becoming an attorney of record before, or with, filing the initial complaint.

The Advisory Committee recommends replacing the language published for public comment with a new provision drafted jointly with the other Advisory Committees. This new provision would provide: "An authorized filing made through a person's electronic-filing account, together with the person's name on a signature block, constitutes the person's signature."

Third, a comment regarding punctuation revealed an ambiguity in the clause-structure of the proposed Appellate Rule 25(c)(2). The intent was to indicate two methods of serving a paper, not three or four. But the language is ambiguous because the proposals use the word "by" four times. The Advisory Committee recommends addressing this ambiguity by separating the two methods of service using "(A)" and "(B)." The revised provision would provide: "Electronic service of a paper may be made (A) by sending it to a registered user by filing it with the court's electronic-filing system or (B) by sending it by other electronic means that the person to be served consented to in writing.

As revised in these three ways, the proposal to amend Rule 25 is now as follows:

Appellate 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 such filing is not timely unless the clerk receives the papers within the time fixed for filing.

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

~~(i)~~• mailed to the clerk by ~~First-Class Mail~~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.**[6] If an institution has a system designed for legal mail, an inmate confined there must use that system to receive the benefit of this Rule 25(a)(2)~~(C)~~(A)(iii). A paper ~~filed~~not filed electronically by an inmate is timely if it is deposited in the institution's internal mail system on or before the last day for filing and:

~~(i)~~• it is accompanied by: ~~•~~ a declaration in compliance with 28 U.S.C. § 1746—or a notarized statement—setting out the date of deposit and stating that first-class postage is being prepaid; or ~~•~~ evidence (such as a postmark or date stamp) showing that the paper was so deposited and that postage was prepaid; or

~~(ii)~~• the court of appeals exercises its discretion to permit the later filing of a declaration or notarized statement that satisfies Rule 25(a)(2)~~(C)(i)~~(A)(iii).

~~(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~~

[6] The amendment to subdivision (a)(2)(C) as proposed for public comment said: "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." The revision reflects the amendment to subdivision (a)(2)(C) that became effective in December 2016.

~~means in compliance with a local rule constitutes a written paper for the purpose of applying these rules.~~

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

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

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

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

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

(iii) **Signing.** An authorized filing made through a person's electronic-filing account, together with the person's name on a signature block, constitutes the person's signature.[7]

(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.

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[7] The proposed amendment published for public comment said: "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."

(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 of a paper may be made (A) by sending it to a registered user by filing it with the court's electronic-filing system or (B) by sending it by other electronic means that the person to be served consented to in writing.[8]

[8] The proposed amendment published for public comment said: "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).

The Advisory Committee received public comments that criticized the published version of Rule 25(a)(2)(B)(ii), which concerns filing by unrepresented parties. These comments argued that unrepresented parties generally should have the right to file electronically, which is much less expensive than filing non-electronically. The Advisory Committee considered these arguments at its October 2016 and Spring 2017 meetings but decided not to change the proposed amendment. The Advisory Committee remains concerned about possible difficulties that unrepresented parties might have in using electronic filing and about the difficulty of holding them accountable for abusing the filing system.

One public comment recommended adding a provision to Rule 25 that is similar to Criminal Rule 49(d), which addresses filings by non-parties. The Advisory Committee decided that this proposal went beyond the scope of the amendments to Rule 25 published for public comment. The Committee will study the proposal as a new matter.

F. Rule 41—Stays of the mandate

In August 2016, the Standing Committee published proposed amendments to Appellate Rule 41, which concerns the content, issuance, effective date, and stays of the mandate. The Standing Committee received five public comments about the proposed amendments to Rule 41. In light of these comments, the Advisory Committee recommends two revisions.

First, the Advisory Committee recommends revising subdivision (b) by deleting the previously proposed sentence: "The court may extend the time only in extraordinary circumstances or under Rule 41(d)." Comments submitted by Judge Jon O. Newman and Chief Judge Robert A. Katzmann of the U.S. Court of Appeals for the Second Circuit argue that the sentence is problematic because courts might wish to extend the time for good cause

even if exceptional circumstances do not exist. For example, a court might wish to poll members about rehearing a case en banc. The Advisory Committee agrees with these comments. The Advisory Committee believes that the new requirement that a court can extend a stay only "by order" provides sufficient protection against improper extensions.

Second, the Advisory Committee recommends revising subdivision (d)(2)(B), which will become subdivision (d)(2) under the proposed amendment. The National Association of Criminal Defense Lawyers (NACDL) has argued that the proposed amendments do not address a gap in the current rules. The comment explains: "Where a Justice [of the Supreme Court] has deemed an extension of the certiorari period to be appropriate, it should not be necessary also to move the Court of Appeals for an extension of the stay of mandate. Rather, the stay should automatically continue for the same period for which the time to file a timely cert. petition has been extended." The Advisory Committee agrees with this suggestion and has added new clause in subdivision (d)(2) that will extend a stay automatically if a Justice of the Supreme Court extends the time for filing a petition for certiorari.

As revised in these two ways, the proposal to amend Rule 41 is now as follows:

Rule 41. Mandate: Contents; Issuance and Effective Date; Stay

(a) **Contents.** Unless the court directs that a formal mandate issue, the mandate consists of a certified copy of the judgment, a copy of the court's opinion, if any, and any direction about costs.

(b) **When Issued.** The court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time by order.[9]

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

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

~~(1) **On Petition for Rehearing or Motion.** The timely filing of a petition for panel rehearing, petition for rehearing en banc, or motion for stay of~~

[9] The amendment published for public comment contained this additional sentence: "The court may extend the time only in extraordinary circumstances or under Rule 41(d)."

~~mandate, stays the mandate until disposition of the petition or motion, unless the court orders otherwise.~~

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

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

~~(B)~~ (2) The stay must not exceed 90 days, unless

(i) the period is extended for good cause;

(ii) the period for filing a timely petition is extended, in which case the stay will continue for the extended period;[10] or

(iii) ~~unless~~ the party who obtained the stay files a petition for the writ and so notifies the circuit clerk in writing within the period of the stay~~. In that case~~, in which case the stay continues until the Supreme Court's final disposition.

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

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

[10] This clause is new. It was not part of the proposed amendments published for public comment.

Committee Note

Subdivision (b).[11] Subdivision (b) is revised to clarify that an order is required for a stay of the mandate and to specify the standard for such stays.

Before 1998, the Rule referred to a court's ability to shorten or enlarge the time for the mandate's issuance "by order." The phrase "by order" was deleted as part of the 1998 restyling of the Rule. Though the change appears to have been intended as merely stylistic, it has caused uncertainty concerning whether a court of appeals can stay its mandate through mere inaction or whether such a stay requires an order. There are good reasons to require an affirmative act by the court. Litigants—particularly those not well versed in appellate procedure—may overlook the need to check that the court of appeals has issued its mandate in due course after handing down a decision. And, in *Bell v. Thompson*, 545 U.S. 794, 804 (2005), the lack of notice of a stay was one of the factors that contributed to the Court's holding that staying the mandate was an abuse of discretion. Requiring stays of the mandate to be accomplished by court order will provide notice to litigants and can also facilitate review of the stay.

Subdivision (d). Two changes are made in subdivision (d).

Subdivision (d)(1)—which formerly addressed stays of the mandate upon the timely filing of a motion to stay the mandate or a petition for panel or en banc rehearing—has been deleted and the rest of subdivision (d) has been renumbered accordingly. In instances where such a petition or motion is timely filed, subdivision (b) sets the presumptive date for issuance of the mandate at 7 days after entry of an order denying the petition or motion. Thus, it seems redundant to state (as

[11] This portion of the Committee Note has been revised to remove discussion of the formerly proposed sentence allowing a court to delay issuance of the mandate only in exceptional circumstances.

subdivision (d)(1) did) that timely filing of such a petition or motion stays the mandate until disposition of the petition or motion. The deletion of subdivision (d)(1) is intended to streamline the Rule; no substantive change is intended.

Subdivision (d)(4)—i.e., former subdivision (d)(2)(D)—is amended to specify that a mandate stayed pending a petition for certiorari must issue immediately once the court of appeals receives a copy of the Supreme Court's order denying certiorari, unless the court of appeals finds that extraordinary circumstances justify a further stay. Without deciding whether the prior version of Rule 41 provided authority for a further stay of the mandate after denial of certiorari, the Supreme Court ruled that any such authority could be exercised only in "extraordinary circumstances." *Ryan v. Schad*, 133 S. Ct. 2548, 2551 (2013) (per curiam). The amendment to subdivision (d)(4) makes explicit that the court may stay the mandate after the denial of certiorari, and also makes explicit that such a stay is permissible only in extraordinary circumstances. Such a stay cannot occur through mere inaction but rather requires an order.

The reference in prior subdivision (d)(2)(D) to the *filing* of a copy of the Supreme Court's order is replaced by a reference to the court of appeals' *receipt* of a copy of the Supreme Court's order. The filing of the copy and its receipt by the court of appeals amount to the same thing (*cf.* Rule 25(a)(2), setting a general rule that "filing is not timely unless the clerk receives the papers within the time fixed for filing"), but "upon receiving a copy" is more specific and, hence, clearer.

Under subdivision (d)(2)(ii), if the court of appeals issues a stay of the mandate for a party to file a petition for certiorari, and a Justice of the Supreme Court subsequently extends the time for filing the petition, the stay automatically continues for the extended period.[12]

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[12] This sentence is new. It was not included Committee Note published for public comments in August 2016.

III. Action Items: New Amendments Proposed for Publication

The Advisory Committee recommends that the Standing Committee publish two new sets of proposed amendments for public comment. The amendments concern the use of the word "mail" in Rules 3(d) and 13(c) and corporate disclosures under Rule 26.1.

A. Rules 3(d) & 13(c)—Changing "Mail" to "Send"

In August 2016, the Standing Committee published proposed changes to Appellate Rule 25 to address the electronic filing and service of documents.[13] In light of the proposed changes to Rule 25, the Advisory Committee subsequently considered whether other Rules that require parties to "mail" documents also should be amended. Following its study of all the rules that use the word "mail," the Advisory Committee recommends changes to Rules 3(d) and 13(c).

Rule 3(d) concerns the clerk's service of the notice of appeal. The Advisory Committee concluded that subdivisions (d)(1) and (3) need two changes. The proposed changes are shown below. First, in lines 5 and 18, the words "mailing" and "mails" should be replaced with "sending" and "sends" to make electronic filing and service possible. Second, as indicated in lines 8-9, the portion of subdivision (d)(1) providing that the clerk must serve the defendant in a criminal case "either by personal service or by mail addressed to the defendant" should be deleted. These changes will eliminate any requirement of mailing. The clerk will determine whether to serve a notice of appeal electronically or non-electronically based on the principles in revised Rule 25.

Rule 3. Appeal as of Right—How Taken

* * * * *

(d) Serving the Notice of Appeal.

(1) The district clerk must serve notice of the filing of a notice of appeal by ~~mailing~~ sending 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~~

[13] *See* Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure 27 (August 2016) (proposed revision of Appellate Rule 25), http://www.uscourts.gov/file/20163/download.

~~the defendant~~. 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, the date when the notice of appeal was filed.

(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. Service is sufficient despite the death of a party or the party's counsel.

Committee Note

Amendments to Subdivision (d) change the words "mailing" and "mails" to "sending" and "sends" to make electronic service possible. Other rules determine when a party or the clerk may or must send a notice electronically or non-electronically.

Rule 13 concerns appeals from the Tax Court. This rule uses the word "mail" in both its first and second sentences. Changing the reference in the first sentence as shown in the discussion draft below would allow an appellant to send a notice of appeal to the Tax Court clerk by means other than mail. The second sentence expresses a rule that applies when a notice is sent by mail, which is still a possibility. Accordingly, the Advisory Committee does not recommend a change to the second sentence.

Rule 13. Appeals From the Tax Court

(a) Appeal as of Right.

* * * * *

(2) Notice of Appeal; How Filed. The notice of appeal may be filed either at the Tax Court clerk's office in the District of Columbia or by ~~mail addressed~~

sending it to the clerk. If sent by mail the notice is considered filed on the postmark date, subject to § 7502 of the Internal Revenue Code, as amended, and the applicable regulations.

* * * * *

ADVISORY COMMITTEE NOTE

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

Four other Rules also use the term "mail." Rules 8 and 25 are addressed in Part II.C. and II.D. of this memorandum above. Rule 4(c) concerns appeals by inmates confined in an institution. As amended in December 2016, Rule 4(c) provides in part: "If an institution has a system designed for legal mail, an inmate confined there must use that system to receive the benefit of this Rule 4(c)(1)." Rule 4(c)(1) specifies the rules for when mail deposited by inmates is timely. Rule 4(c) does not appear to require any changes. The Rule does not require filing by mail but instead establishes principles that apply when inmates use an institution's system for legal mail (which they may continue to do notwithstanding the changes to Rule 25). Rule 26, as amended in 2016, specifies rules for computing and extending time. Subdivision (a)(4)(C) defines the term "last day" as follows:

> Unless a different time is set by a statute, local rule, or court order, the last day ends: . . . (C) for filing under Rules 4(c)(1), 25(a)(2)(B), and 25(a)(2)(C)—and filing by mail under Rule 13(a)(2)—at the latest time for the method chosen for delivery to the post office, third-party commercial carrier, or prison mailing system . . . .

Although this provision uses the words "mail" and "mailing," it does not require revision. The Rule specifies the method for calculating time when mail is used. It does not specify when mail may or may not be used.

B. Disclosure Requirements under Rule 26.1

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

In recent meetings, the Committee has considered whether to amend Rules 26.1 and 29(c) to require additional disclosures. The primary impetus for the discussion is a collection of local rules that require litigants to make disclosures that go beyond what Appellate Rules 26.1 and 29(c) require.

At its October 2016 meeting, the Advisory Committee tabled consideration of proposed amendments to Rule 26.1(a) and 29(c), which would have required disclosures concerning publicly held entities other than corporations and concerning judges and witnesses in prior proceedings. The Committee determined that the burdens imposed by those additional disclosure requirements outweighed the benefits.

The Advisory Committee, however, proposes adding a new subdivision (b) requiring disclosure of organizational victims in criminal cases. This new subdivision (b) conforms Rule 26.1 to the amended version of Criminal Rule 12.4(a)(2) that was published for public comment in August 2016. The only differences are the introductory words "In a criminal case" and the reference to "Rule 26.1(a)" instead of Criminal Rule 12.4(a)(1).

The Advisory Committee proposes adding a new subdivision (c) requiring disclosure of the name of the debtor or debtors in bankruptcy cases when they are not included in the caption. The caption might not include the name of the debtor in appeals from adversary proceedings, such as a dispute between two of the debtor's creditors. *See, e.g.*, *Meyers Law Grp., P.C. v. Diversified Realty Servs., Inc.*, 647 F. App'x 736, 738 (9th Cir. 2016) (adversary proceeding in bankruptcy of Greg James Ventures LLC).

The Advisory Committee considered requiring additional disclosures in bankruptcy cases, including disclosure of (a) each committee of creditors, (b) the parties to any adversary proceeding, and (c) any active participants in a contested matter. But in consultation with representatives of the Bankruptcy Rules Advisory Committee, the Advisory Committee decided not to require these disclosures. Requiring disclosure of each committee of creditors would be over-inclusive because the members of a committee of creditors would not necessarily have any interest in a particular appeal. Disclosure of parties to any adversary proceeding and active participants in a contested matter is unnecessary because appellate judges do not need the names of other adversaries and other participants in contested matters if those matters are not before the court.

Current subdivision (b) addresses supplemental filings. The Advisory Committee considered amending this subdivision to make it conform to proposed amendments to Criminal Rule 12.4(b) published for public comment in August 2016. The Criminal Rules Advisory Committee, however, has informed the Advisory Committee that it intends to scale back its proposed revision of Criminal Rule 12.4(b) and recommends no changes to the Appellate Rules.

The Advisory Committee recommends moving current subdivisions (b) and (c) to the end of Rule 26.1 by designated them as subdivisions (e) and (f). These provisions address supplemental filings and the number of copies that must be filed. Moving the subdivisions will make it clear that they apply to all of the disclosure requirements.

The proposed amendments to Rule 26.1 are as follows:

Rule 26.1 ~~Corporate~~ Disclosure Statement

(a) ~~Who Must File~~Nongovernmental Corporate Party. 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) Organizational Victim in a Criminal Case. 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, the statement must also disclose the information required by Rule 26.1(a) to the extent it can be obtained through due diligence.

(c) Bankruptcy Proceedings. In a bankruptcy proceeding, the debtor, the trustee, or, if neither is a party, the appellant must file a statement that identifies each debtor not named in the caption. If the debtor is a corporation, the statement must also identify any parent corporation and any publicly held corporation that holds 10 percent or more of its stock, or must state that there is no such corporation.

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

~~(b)~~**(e) 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)~~**(f) 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.

COMMITTEE NOTE

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

Changing Rule 26.1's heading from "Corporate Disclosure Statement" to "Disclosure Statement" will require conforming amendments to Rules 28(a)(1) and 32(f). References to "corporate disclosure statement" must be changed to "disclosure statement." The following proposed drafts show the required changes in lines 4 and 16.

Rule 28. Briefs

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

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

* * * * *

Committee Note

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

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

* * * * *

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

- the cover page;
- a ~~corporate~~ disclosure statement;
- a table of contents;
- a table of citations;
- a statement regarding oral argument;
- an addendum containing statutes, rules, or regulations;
- certificates of counsel;
- the signature block;
- the proof of service; and
- any item specifically excluded by these rules or by local rule.

* * * * *

Committee Note

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

For the reasons explained above, the Advisory Committee recommends that the Standing Committee publish for public comment the proposed amendments to Rules 26.1 and the conforming changes to Rules 27, 28, and 32.

IV. Information Items

At its May 2017 meeting, the Advisory Committee considered four additional items. Item 16-AP-C concerned a proposal to amend Rules 32.1 and 35 to require courts to designate orders granting or denying rehearing as "published" decisions. The Advisory Committee determined that the proposed revisions were unnecessary because these orders are already available on Pacer and in commercial databases. Item 16-AP-D concerned a new proposal to amend the Civil Rules to include a provision similar to Appellate Rule 28(j). The Advisory Committee removed this item from its agenda because the Civil Rules Advisory Committee had decided not to pursue the proposal. Item 17-AP-A concerned a proposal to amend Rules 4 and 27 to address certain types of subpoenas. The Advisory Committee removed this item from its agenda because the proposed amendments appeared to rest on a misunderstanding of the cited Rules. Item 17-AP-B concerned a new proposal for amending Rule 28 to specify the manner of stating the question presented in appellate briefs. The Advisory Committee discussed the matter at length but decided against pursuing it. Members of the Advisory Committee expressed concern about adding more technical rules that attorneys might have difficulty following and about directing counsel on matters of advocacy.

The Advisory Committee continues to study possible ways to reduce the cost and increase the speed of federal appellate litigation. At the spring 2017 meeting, the Advisory Committee discussed the collateral order doctrine, a list of suggestions submitted by the American Academy of Appellate Lawyers (AAAL), and a proposal to provide properly formatted word-processing templates of briefs and other documents. Although the Advisory Committee did not develop any specific proposals at the May 2017 meeting, the Advisory Committee's work on the subject of increasing the speed and efficiency of appellate litigation will continue.

Enclosures:

1. Draft Minutes from the May 2, 2017 Meeting of Appellate Rules Committee
2. Agenda Table for the Appellate Rules Committee
3. Revised Text of Proposed Amendments Published in August 2016
4. Text of New Items Proposed for Publication

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TAB 2B

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

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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[1] New material is underlined; 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~~Security Provider. If a party gives security ~~in the form of a bond, a stipulation, or other undertaking~~ with one or more ~~sureties~~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 security~~bond or undertaking~~ may be served. On motion, a ~~surety's~~security provider's liability may be enforced in the district court without the necessity of an independent action. The motion and any notice that the district court prescribes may be served on the district clerk, who must promptly ~~mail~~

send 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." The word "mail" is changed to "send" to avoid restricting the method of serving security providers. Other Rules specify the permissible manners of service.

Changes Made After Publication and Comment

- The heading and first sentence of subdivision (b) are changed to refer only to "security" and "security provider" and do not mention specific types of security (such as a bond, stipulation, or other undertaking) or specific types of security providers (such as a surety).
- In the third sentence of subdivision (b), the word "mail" is changed to "send."

Summary of Public Comments

The Pennsylvania Bar Association (AP-2016-0002-0012)—The proposed amendments bring Rule 8 into conformity with current practice.

Rule 11. Forwarding the Record

* * * * *

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

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

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

Committee Note

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

Changes Made After Publication and Comment

None.

Summary of Public Comments

The Pennsylvania Bar Association (AP-2016-0002-0012)—The proposed amendments bring Rule 11 into conformity with current practice.

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

paper ~~filed~~not filed electronically by an inmate is timely if it is deposited in the institution's internal mail system on or before the last day for filing and:

~~(i)~~• it is accompanied by: ~~•~~ a declaration in compliance with 28 U.S.C. § 1746—or a notarized statement—setting out the date of deposit and stating that first-class postage is being prepaid; or ~~•~~ evidence (such as a postmark or date stamp) showing that the paper was so deposited and that postage was prepaid; or

~~(ii)~~• the court of appeals exercises its discretion to permit the later filing of a declaration or notarized statement that satisfies Rule 25(a)(2)~~(C)~~(i)(A)(iii).

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

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

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

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

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

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

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

(iii) **Signing.** An authorized filing made through a person's electronic-filing account, together with the person's name on a signature block, constitutes the person's signature.

(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 of a paper may be made (A) by sending it to a registered user by filing it with the court's electronic-filing system or (B) by sending it by other electronic means that the person to be served consented to in writing.

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

(4) Service by mail or by commercial carrier is complete on mailing or delivery to the carrier.

Service by electronic means is complete on ~~transmission~~filing, unless the party making service is notified that the paper was not received by the party served.

(d) Proof of Service.

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

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

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

(i) the date and manner of service;

(ii) the names of the persons served; and

(iii) their mail or electronic addresses, facsimile numbers, or the addresses of

the places of delivery, as appropriate for the manner of service.

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

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

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

Committee Note

The amendments conform Rule 25 to the amendments to Federal Rule of Civil Procedure 5 on electronic filing, signature, service, and proof of service. They establish, in Rule 25(a)(2)(B), a new national rule that generally makes electronic filing mandatory. The rule recognizes

exceptions for persons proceeding without an attorney, exceptions for good cause, and variations established by local rule. The amendments establish national rules regarding the methods of signing and serving electronic documents in Rule 25(a)(2)(B)(iii) and 25(c)(2). The amendments dispense with the requirement of proof of service for electronic filings in Rule 25(d)(1).

Changes Made After Publication and Comment

- In subdivision (a)(2)(C), the location of the proposed additional words "not filed electronically" are moved because of amendments to this subdivision that became effective in December 2016.
- Subdivision (a)(2)(B)(iii) is rewritten to change the standard for what constitutes a signature.
- Subdivision 25(c)(2) is rephrased for clarity.

Summary of Public Comments

Judge Jon O. Newman, U.S. Court of Appeals for the Second Circuit (AP-2016-0002-0006)—In proposed rule 25(c)(2), a comma is needed after "user"; a comma is needed after "system"; and the word "served" should be inserted after "person."

Ms. Cheryl L. Siler, Aderant CompuLaw (AP-2016-0002-0009)—Subdivision 25(c)(2) should be revised to be uniform with proposed Civil Rule (5)(b)(2).

Mr. Michael Rosman (AP-2016-0002-0010)—Subdivision 25(a)(2)(B)(iii) does not define "user name" or "password." A person filing a paper might not yet be an attorney of record. The subdivision does not address in a clear manner the requirements for documents (like agreements) that should be signed by both parties.

Heather Dixon, Esq. (AP-2016-0002-0014)—The signature provision should be revised to make it clear that the attorney's user name and password are not to be included in the signature block.

New York City Bar Association (AP-2016-0002-0017)—Rule 25(a)(2)(B)(iii) could be read to mean that the attorney's user name and password should be included on any paper that is electronically filed.

Sai (AP-2016-0002-0018)—The amendments should (1) remove the presumptive prohibition on pro se use of electronic filing and instead grant presumptive access; (2) treat pro se status as a rebuttably presumed good cause for nonelectronic filing; (3) require courts to allow pro se access on par with attorney filers; (4) permit individualized prohibitions for good cause, e.g,. for vexatious litigants; (5) change and conform the "signature" paragraph with Federal Rule of Civil Procedure 5.

National Association of Criminal Defense Counsel (AP-2016-0002-0019)—The elimination of the requirement of a certificate of service for electronically served documents should be made. The proposed rule on filing by unrepresented parties is satisfactory. The proposed amendment overlooks an important change applicable to

filings by non-parties. Rule 25(b) has not been, but should be, amended in the same manner as the concurrently proposed amendment to Criminal Rule 45, so as to require service on all parties of papers filed not only by parties but also by non-parties.

Rule 29. Brief of an Amicus Curiae

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

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

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

* * * * *

(b) During Consideration of Whether to Grant Rehearing.

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

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

* * * * *

Committee Note

The amendment authorizes orders or local rules, such as those previously adopted in some circuits, that prohibit the filing of an amicus brief 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.

Changes Made After Publication and Comment

- The word order of the proposed exception allowing a court to "prohibit the filing of or strike" an amicus brief was changed for stylistic purposes.
- The placement of the proposed exception was moved from subdivision (a) to subdivision (a)(2) because of amendments that took effect in December 2016.
- The proposed exception in subdivision (a)(2) was also added to the new subdivision (b)(2) created by amendments that took effect in December 2016.
- The phrase "amicus-curiae brief" is shortened to "amicus brief" in subdivision (b)(2) for consistency with other subdivisions.

Summary of Public Comments

Judge Jon O. Newman, U.S. Court of Appeals for the Second Circuit (AP-2016-0002-0006)—The word "curiae" should not be deleted. It's a "friend of the court brief," not a "friend brief."

Associate Dean Alan B. Morrison (AP-2016-0002-0003)—The likelihood of a strategic attempt to file an amicus brief that would cause the recusal of a judge is very small. The parties typically do not know the identity of the judges on the panel until shortly before the deadline for filing, and they also typically do not know the judge's recusal policies. The possible benefits of the rule do not outweigh its costs. Preventing the recusal of a judge might require all the money and effort put into an amicus brief to be wasted.

The Pennsylvania Bar Association (AP-2016-0002-0012)—Neither the amicus nor its counsel have any idea whether the filing of the brief would trigger recusal of a judge who ultimately would be assigned to the case. It seems unreasonable under such circumstances to prohibit or strike the amicus brief, instead of simply allowing the judge to recuse.

Federal Bar Council (AP-2016-0002-0013)—The changes may be unnecessary. Several of the local rules only address amicus briefs filed at the stage of rehearing or rehearing en banc. The new subdivision (b) of Rule 29 now addresses such filings. The Advisory Committee should wait until the courts of appeals have had sufficient experience with the new Appellate Rule 29(b) to assess whether it adequately addresses the problem of amicus briefs that might cause recusals.

Heather Dixon, Esq. (AP-2016-0002-0014)—The subdivision should be rewritten to say that once a panel of judges has been assigned to a case, amicus curiae briefing

that would result in recusal of an assigned judge will only be permitted where the amicus curiae brief would (a) provide the court with substantial assistance in understanding the issues presented by the parties, or (b) would shed light on a matter of broad public concern that (i) is reasonably expected to be directly impacted by the court's decision and (ii) has not been made known to the court by the parties' briefing.

National Association of Criminal Defense Counsel (AP-2016-0002-0019)—The amendment should be rewritten to emphasize that the only reasons for striking brief are interests in case-processing or a substantiated concern about judge-shopping.

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Rule 39. Costs

* * * * *

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

(1) the preparation and transmission of the record;

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

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

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

Committee Note

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

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

Changes Made After Publication and Comment

None.

Summary of Public Comments

The Pennsylvania Bar Association (AP-2016-0002-0012)—The proposed amendments to Rule 39 bring the rules into conformity with current practice.

Rule 41. Mandate: Contents; Issuance and Effective Date; Stay

(a) Contents. Unless the court directs that a formal mandate issue, the mandate consists of a certified copy of the judgment, a copy of the court's opinion, if any, and any direction about costs.

(b) When Issued. The court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time by order.

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

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

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

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

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

~~(B)~~ (2) The stay must not exceed 90 days, unless

(i) the period is extended for good cause;

(ii) the period for filing a timely petition is extended, in which case the stay will continue for the extended period; or

(iii) unless the party who obtained the stay files a petition for the writ and so notifies the circuit clerk in writing within the period of the stay. In that case, the stay continues until the Supreme Court's final disposition.

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

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

Committee Note

Subdivision (b). Subdivision (b) is revised to clarify that an order is required for a stay of the mandate and to specify the standard for such stays.

Before 1998, the Rule referred to a court's ability to shorten or enlarge the time for the mandate's issuance "by order." The phrase "by order" was deleted as part of the 1998 restyling of the Rule. Though the change appears to have been intended as merely stylistic, it has caused uncertainty concerning whether a court of appeals can stay its mandate through mere inaction or whether such a stay requires an order. There are good reasons to require an affirmative act by the court. Litigants—particularly those not well versed in appellate procedure—may overlook the need to check that the court of appeals has issued its mandate in due course after handing down a decision. And, in *Bell v. Thompson*, 545 U.S. 794, 804 (2005), the lack of notice of a stay was one of the factors that contributed to the Court's holding that staying the mandate was an abuse of discretion. Requiring stays of the mandate to be accomplished by court order will provide notice to litigants and can also facilitate review of the stay.

Subdivision (d). Two changes are made in subdivision (d).

Subdivision (d)(1)—which formerly addressed stays of the mandate upon the timely filing of a motion to stay the mandate or a petition for panel or en banc rehearing—has been deleted and the rest of subdivision (d) has been renumbered accordingly. In instances where such a

petition or motion is timely filed, subdivision (b) sets the presumptive date for issuance of the mandate at 7 days after entry of an order denying the petition or motion. Thus, it seems redundant to state (as subdivision (d)(1) did) that timely filing of such a petition or motion stays the mandate until disposition of the petition or motion. The deletion of subdivision (d)(1) is intended to streamline the Rule; no substantive change is intended.

Subdivision (d)(4)—i.e., former subdivision (d)(2)(D)—is amended to specify that a mandate stayed pending a petition for certiorari must issue immediately once the court of appeals receives a copy of the Supreme Court's order denying certiorari, unless the court of appeals finds that extraordinary circumstances justify a further stay. Without deciding whether the prior version of Rule 41 provided authority for a further stay of the mandate after denial of certiorari, the Supreme Court ruled that any such authority could be exercised only in "extraordinary circumstances." *Ryan v. Schad*, 133 S. Ct. 2548, 2551 (2013) (per curiam). The amendment to subdivision (d)(4) makes explicit that the court may stay the mandate after the denial of certiorari, and also makes explicit that such a stay is permissible only in extraordinary circumstances. Such a stay cannot occur through mere inaction but rather requires an order.

The reference in prior subdivision (d)(2)(D) to the *filing* of a copy of the Supreme Court's order is replaced by a reference to the court of appeals' *receipt* of a copy of the Supreme Court's order. The filing of the copy and its receipt by the court of appeals amount to the same thing (*cf.* Rule 25(a)(2), setting a general rule that "filing is not timely unless the clerk receives the papers within the time

fixed for filing"), but "upon receiving a copy" is more specific and, hence, clearer.

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

Changes Made After Publication and Comment

- In subdivision (b), the proposed additional sentence is deleted. The proposed sentence would have provided that a court may extend the time when the mandate must issue only in extraordinary circumstances.
- A new clause is added to subdivision (d)(2) that extends a stay automatically if the time for filing a certiorari petition is extended. None.

Summary of Public Comments

Judge Jon O. Newman, U.S. Court of Appeals for the Second Circuit (AP-2016-0002-0006)—A court of appeals might wish to extend the mandate even if extraordinary circumstances do not exist. For example, when a party has not filed a petition for panel rehearing or a petition for rehearing en banc, a court of appeals sometimes delays issuance of the mandate because one or more members of the court of appeals are considering whether to request a poll of active judges to consider a rehearing in banc or

because the court has ordered a rehearing en banc on its own motion and is considering the disposition of such a rehearing. Neither of these circumstances would qualify as "extraordinary circumstances."

Catherine O'Hagan Wolfe, United States Court of Appeals for the Second Circuit (AP-2016-0002-0006)— All the active judges of the U.S. Court of Appeals for the Second Circuit and all the senior judges who have had the opportunity to review Judge Newman's comment endorse his call for reconsideration of Rule 41(b).

Zachary Shemtob, New York City Bar Association (AP-2016-0002-0006)—We agree with the comments submitted by Judge Newman and recommend that the Committee delete the proposed last sentence to Rule 41(b).

National Association of Criminal Defense Counsel (AP-2016-0002-0019)—The "extraordinary circumstances" standard for withholding issuance of a mandate is too restrictive and too strong in its wording to cover all the unanticipated circumstances that might arise, particularly in capital cases.

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

* * * * *

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

Your daytime phone number: (___) _____

Your age: _____ Your years of schooling: _____

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

Changes Made After Publication and Comment

None.

Summary of Public Comments

Pam Dixon, World Privacy Forum (AP-2016-0002-0008)—The proposed amendment should be made. Collection and maintenance of any personally identifiable information (such as a SSN, whether whole or partial) creates a concern about personal privacy. A social security number does a poor job of identification and authentication. The consensus of clerks of court is that the last four digits of a SSN serve no purpose and could be eliminated.

National Association of Criminal Defense Counsel (AP-2016-0002-0019)—The amendment should be made.

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TAB 2C

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

Rule 3. Appeal as of Right—How Taken

* * * * *

(d) Serving the Notice of Appeal.

(1) The district clerk must serve notice of the filing of a notice of appeal by ~~mailing~~sending 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. 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

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

named in the notice. The district clerk must note, on each copy, the date when the notice of appeal was filed.

(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. Service is sufficient despite the death of a party or the party's counsel.

* * * * *

Committee Note

Amendments to Subdivision (d) change the words "mailing" and "mails" to "sending" and "sends" to make electronic service possible. Other rules determine when a party or the clerk may or must send a notice electronically or non-electronically.

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Rule 13. Appeals From the Tax Court

(a) Appeal as of Right.

* * * * *

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

* * * * *

Committee Note

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

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Rule 26.1 ~~Corporate~~ Disclosure Statement

(a) ~~Who Must File~~Nongovernmental Corporate Party. 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) Organizational Victim in a Criminal Case. 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, the statement must also disclose the information required by Rule 26.1(a) to the extent it can be obtained through due diligence.

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

party, the appellant must file a statement that identifies each debtor not named in the caption. If the debtor is a corporation, the statement must also identify any parent corporation and any publicly held corporation that holds 10 percent or more of its stock, or must state that there is no such corporation.

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

~~(b)~~**(e)** **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)~~**(f)** **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.

Committee Note

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

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Rule 28. Briefs

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

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

* * * * *

Committee Note

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

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

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

- the cover page;
- a ~~corporate~~ disclosure statement;
- a table of contents;
- a table of citations;
- a statement regarding oral argument;
- an addendum containing statutes, rules, or regulations;
- certificates of counsel;
- the signature block;
- the proof of service; and
- any item specifically excluded by these rules or by local rule.

* * * * *

Committee Note

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

TAB 2D

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

FRAP Item	Proposal	Source	Current Status
08-AP-A	Amend FRAP 3(d) concerning service of notices of appeal.	Hon. Mark R. Kravitz	Discussed and retained on agenda 11/08 Discussed and retained on agenda 10/15 Discussed and retained on agenda 04/16 Discussed and retained on agenda 10/16 Draft approved 06/17 for submission to Standing Committee
08-AP-R	Consider amending FRAP 26.1 (corporate disclosure) and the corresponding requirement in FRAP 29(c)	Hon. Frank H. Easterbrook	Discussed and retained on agenda 04/09 Discussed and retained on agenda 04/14 Discussed and retained on agenda 10/14 Discussed and retained on agenda 04/15 Discussed and retained on agenda 10/15 Discussed and retained on agenda 04/16 Discussed and retained on agenda 10/16 Discussed and retained on agenda 10/16 Draft approved 05/17 for submission to Standing Committee
09-AP-B	Amend FRAP 1(b) to include federally recognized Indian tribes within the definition of "state"	Daniel I.S.J. Rey-Bear, Esq.	Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10 Discussed and retained on agenda 10/11 Discussed and retained on agenda 04/12; Committee will revisit in 2017
11-AP-C	Amend FRAP 3(d)(1) to take account of electronic filing	Harvey D. Ellis, Jr., Esq.	Discussed and retained on agenda 04/13 Discussed and retained on agenda 10/15 Discussed and retained on agenda 04/16 Discussed and retained on agenda 10/16 Discussed and retained on agenda 10/16 Draft approved 05/17 for submission to Standing Committee

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 Revised draft approved 05/17 for resubmission to Standing Committee following public comments
12-AP-B	Consider amending FRAP Form 4's directive concerning institutional-account statements for IFP applicants	Peter Goldberger, Esq., on behalf of the National Association of Criminal Defense Lawyers (NACDL)	Discussed and retained on agenda 09/12 Discussed and retained on agenda 10/15 Draft approved 04/16 for submission to Standing Committee Approved for publication by Standing Committee 06/16 Draft approved 05/17 for resubmission to Standing Committee following public comments
12-AP-D	Consider the treatment of appeal bonds under Civil Rule 62 and Appellate Rule 8	Kevin C. Newsom, Esq.	Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/15 Discussed and retained on agenda 10/15 Draft approved 04/16 for submission to Standing Committee Approved for publication by Standing Committee 06/16 Revised draft approved 05/17 for resubmission to Standing Committee following public comments
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 for publication by Standing Committee 01/16 Revised draft approved 05/17 for resubmission to Standing Committee following public comments

FRAP Item	Proposal	Source	Current Status
14-AP-D	Consider possible changes to Rule 29's authorization of amicus filings based on party consent	Standing Committee	Awaiting initial discussion Draft approved 10/15 for submission to Standing Committee Discussed by Standing Committee 1/16 but not approved Draft approved 04/16 for submission to Standing Committee Approved for publication by Standing Committee 06/16 Revised draft approved 05/17 for resubmission to Standing Committee following public comments
15-AP-A	Consider adopting rule presumptively permitting pro se litigants to use CM/ECF	Robert M. Miller, Ph.D.	Awaiting initial discussion Discussed and retained on agenda 10/15 Draft approved 04/16 for submission to Standing Committee Approved for publication by Standing Committee 06/16 Revised draft approved 05/17 for resubmission to Standing Committee following public comments
15-AP-C	Consider amendment to Rule 31(a)(1)'s deadline for reply briefs	Appellate Rules Committee	Awaiting initial discussion Draft approved 10/15 for submission to Standing Committee Approved for publication by Standing Committee 01/16 Draft approved 05/17 for resubmission to Standing Committee following public comments
15-AP-D	Amend FRAP 3(a)(1) (copies of notice of appeal) and 3(d)(1) (service of notice of appeal)	Paul Ramshaw, Esq.	Awaiting initial discussion Discussed and retained on agenda 10/15 Discussed and retained on agenda 04/16 Discussed and retained on agenda 10/16 Draft approved 05/17 for submission to Standing Committee
15-AP-E	Amend the FRAP (and other sets of rules) to address concerns relating to social security numbers; sealing of affidavits on motions under 28 U.S.C. § 1915 or 18 U.S.C. § 3006A; provision of authorities to pro se litigants; and electronic filing by pro se litigants	Sai	Awaiting initial discussion Discussed and retained on agenda 10/15 Partially removed from Agenda and draft approved for submission to Standing Committee 4/16 Approved for publication by Standing Committee 06/16 Revised draft approved 05/17 for resubmission to Standing Committee following public comments

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TAB 2E

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

May 2, 2017
Washington, D.C.

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

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

Also present were: Ms. Shelly Cox, Administrative Specialist, Rules Committee Support Office of the Administrative Office of the U.S. Courts (RCSO); Ms. Lauren Gailey, Rules Law Clerk, RCSO; Gregory G. Garre, Esq., Member, Standing Committee on the Rules of Practice and Procedure and Liaison Member, Advisory Committee on the Appellate Rules; Bridget M. Healy, Esq., Attorney Advisor, RCSO; Professor Gregory E. Maggs, Reporter, Advisory Committee on the Appellate Rules; and Rebecca A. Womeldorf, Esq., Secretary, Standing Committee on the Rules of Practice and Procedure and Rules Committee Officer.

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

I. Introduction

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

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

II. Approval of Minutes

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

III. Action Items

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Judge Kavanaugh then discussed the National Association of Criminal Defense Lawyers (NACDL)'s proposal for modifying Rule 41(d). The proposal, as shown on page 271 of the Agenda Book, would not allow a stay to exceed 90 days when a Justice of the U.S. Supreme Court extends the time for filing a petition for writ of certiorari.

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

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

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

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

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

The reporter presented Items 08-AP-A, 11-AP-C, and 15-AP-D, which concern new proposals for amending Rules 3(d), 8(b), and 13(c) to change the words "mail" and "mailing" to "send" and "sending." Materials concerning these items begin at page 352 of the Agenda Book. The reporter reminded the Advisory Committee that it had approved changes to Rule 3(d) at its Fall 2016 meeting, but decided to search the rules for other instances of the word "mail" and "mailing" before making a recommendation to the Standing Committee. Following brief discussion, the Advisory Committee agreed to recommend that the Standing Committee publish for public comment the proposed changes to Rule 3(d) and Rule 13(c) as shown on 353-356 of the Agenda Book. The amendment to Rule 8(b) should be made in connection with Item 12-AP-D (discussed above).

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

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

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

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

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

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

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

III. Discussion Items

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. Improving Efficiency in Federal Appellate Litigation

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

A. Collateral Order Doctrine

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

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

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

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

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

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

B. Suggestions of the American Academy of Appellate Lawyers

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

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

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

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

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

C. Suggestion Regarding Appellate Rule 47

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

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

VI. Concluding Remarks

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

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

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