

**ADVISORY COMMITTEE
ON
APPELLATE RULES**

**Philadelphia, PA
April 6, 2018**

ADVISORY COMMITTEE ON APPELLATE RULES

Meeting of April 6, 2018

Philadelphia, PA

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12. Future meetings:

The fall 2018 meeting will be in Washington, DC, on October 26, 2018.

13. New business

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TAB 1

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ADVISORY COMMITTEE ON APPELLATE RULES

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

<p>Members, Advisory Committee on Appellate Rules (<i>cont'd</i>)</p>	<p>Professor Stephen E. Sachs Duke Law School 210 Science Drive Box 90360 Durham, NC 27708-0360</p> <p>Danielle Spinelli, Esq. Wilmer Cutler Pickering Hale and Dorr LLP 1875 Pennsylvania Avenue, N.W. Washington DC 20006</p>
<p>Clerk of Court Representative, Advisory Committee on Appellate Rules</p>	<p>Patricia Dodszuweit Clerk United States Court of Appeals James A. Byrne United States Courthouse 601 Market Street, Room 21400 Philadelphia, PA 19106-1729</p>
<p>Liaison Members, Advisory Committee on Appellate Rules</p>	<p>Honorable Frank Mays Hull (<i>Standing</i>) United States Court of Appeals Elbert P. Tuttle Court of Appeals Building 56 Forsyth Street, N.W., Room 300 Atlanta, GA 30303</p> <p>Honorable Pamela Pepper (<i>Bankruptcy</i>) United States District Court United States Courthouse and Federal Building 517 East Wisconsin Avenue, Room 271 Milwaukee, WI 53202</p>
<p>Secretary, Standing Committee and Rules Committee Chief Counsel</p>	<p>Rebecca A. Womeldorf Secretary, Committee on Rules of Practice & Procedure and Rules Committee Chief Counsel Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E., Room 7-240 Washington, DC 20544 Phone 202-502-1820 Fax 202-502-1755 Rebecca_Womeldorf@ao.uscourts.gov</p>

TAB 1A

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FRAP Item	Proposal	Source	Current Status
16-AP-D	Rule 3(c)(1)(B) and the Merger Rule	Neal Katyal	Discussed at 11/17 meeting and a study group formed to consider issue. Retained on agenda.
17-AP-F	Rule 29 – letters of blanket consent	Stephen E. Sachs	Awaiting initial discussion.
Costs on appeal suggestion	New business from 5/17 meeting	Committee	Discussed at 10/16 and 11/17 meetings. Referred to the Civil Rules Committee for feedback. Retained on agenda.
Rule 42(b) suggestion regarding dismissals	New business from 11/17 meeting	Committee	Discussed at 11/17 meeting and a subcommittee was formed to review. Topic for 4/18 meeting.
Review of rules regarding appendices	New business from 11/17 meeting	Committee	Discussed at 11/17 meeting and a subcommittee was formed to review. Retained on agenda.
08-AP-A	Amend FRAP 3(d) concerning service of notices of appeal	Hon. Mark R. Kravitz	Discussed and retained on agenda 11/08 Discussed and retained on agenda 10/15 Discussed and retained on agenda 04/16 Discussed and retained on agenda 10/16 Draft approved for submission to Standing Committee 05/17 Draft approved for publication by Standing Committee 06/17 Draft published for public comment 08/17
08-AP-R	Consider amending FRAP 26.1 (corporate disclosure) and the corresponding requirement in FRAP 29(c)	Hon. Frank H. Easterbrook	Discussed and retained on agenda 04/09 Discussed and retained on agenda 04/14 Discussed and retained on agenda 10/14 Discussed and retained on agenda 04/15 Discussed and retained on agenda 10/15 Discussed and retained on agenda 04/16 Discussed and retained on agenda 10/16 Discussed and retained on agenda 10/16 Draft approved for submission to Standing Committee 05/17 Draft approved for publication by Standing Committee 06/17

FRAP Item	Proposal	Source	Current Status
			Draft published for public comment 08/17
08- 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 Discussed and removed from agenda 11/17
11- AP-C	Amend FRAP 3(d)(1) to take account of electronic filing	Harvey D. Ellis, Jr., Esq.	Discussed and retained on agenda 04/13 Discussed and retained on agenda 10/15 Discussed and retained on agenda 04/16 Discussed and retained on agenda 10/16 Discussed and retained on agenda 10/16 Draft approved for submission to Standing Committee 05/17 Draft approved for publication by Standing Committee 06/17 Draft published for public comment 08/17
11-AP-D	Consider changes to FRAP in light of CM/ECF	Hon. Jeffrey S. Sutton	Discussed and retained on agenda 10/11 Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13 Discussed and retained on agenda 04/14 Discussed and retained on agenda 10/14 Discussed and retained on agenda 04/15 Discussed and retained on agenda 10/15 Draft approved 04/16 for submission to Standing Committee Approved for publication by Standing Committee 06/16 Revised draft approved 05/17 for resubmission to Standing Committee following public comments Revised draft approved by the Standing Committee 06/17 Draft approved by the Judicial Conference and submitted to the Supreme Court 09/17 Proposed amendment to Rule 25(d) removed from Supreme Court

FRAP Item	Proposal	Source	Current Status
			consideration 1/18 with approval of Committee and Standing Committee. Revised proposed amendments to Rule 25(d) presented at 4/18 meeting.
11-AP-B	Consider amending FRAP Form 4's directive concerning institutional-account statements for IFP applicants	Peter Goldberger, Esq., on behalf of the National Association of Criminal Defense Lawyers (NACDL)	Discussed and retained on agenda 09/12 Discussed and retained on agenda 10/15 Draft approved 04/16 for submission to Standing Committee Approved for publication by Standing Committee 06/16 Draft approved 05/17 for resubmission to Standing Committee following public comments Revised draft approved by the Standing Committee 06/17 Draft approved by the Judicial Conference and submitted to the Supreme Court 09/17
12-AP-D	Consider the treatment of appeal bonds under Civil Rule 62 and Appellate Rule 8	Kevin C. Newsom, Esq.	Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/15 Discussed and retained on agenda 10/15 Draft approved 04/16 for submission to Standing Committee Approved for publication by Standing Committee 06/16 Revised draft approved 05/17 for resubmission to Standing Committee following public comments Revised draft approved by the Standing Committee 06/17 Draft approved by the Judicial Conference and submitted to the Supreme Court 09/17
13-AP-H	Consider possible amendments to FRAP 41 in light of <i>Bell v. Thompson</i> , 545 U.S. 794 (2005), and <i>Ryan v. Schad</i> , 133 S. Ct. 2548 (2013)	Hon. Steven M. Colloton	Discussed and retained on agenda 04/14 Discussed and retained on agenda 10/14 Discussed and retained on agenda 04/15 Draft approved 10/15 for submission to Standing Committee Approved for publication by Standing Committee 01/16 Revised draft approved 05/17 for resubmission to Standing Committee following public comments Revised draft approved by the Standing Committee 06/17 Draft

FRAP Item	Proposal	Source	Current Status
			approved by the Judicial Conference and submitted to the Supreme Court 09/17
14-AP-D	Consider possible changes to Rule 29's authorization of amicus filings based on party consent	Standing Committee	Awaiting initial discussion Draft approved 10/15 for submission to Standing Committee Discussed by Standing Committee 1/16 but not approved Draft approved 04/16 for submission to Standing Committee Approved for publication by Standing Committee 06/16 Revised draft approved 05/17 for resubmission to Standing Committee following public comments Revised draft approved by the Standing Committee 06/17 Draft approved by the Judicial Conference and submitted to the Supreme Court 09/17
15-AP-A/H	Consider adopting rule presumptively permitting pro se litigants to use CM/ECF	Robert M. Miller, Ph.D.	Awaiting initial discussion Discussed and retained on agenda 10/15 Draft approved 04/16 for submission to Standing Committee Approved for publication by Standing Committee 06/16 Revised draft approved 05/17 for resubmission to Standing Committee following public comments Revised draft approved by the Standing Committee 06/17 Draft approved by the Judicial Conference and submitted to the Supreme Court 09/17
15-AP-C	Consider amendment to Rule 31(a)(1)'s deadline for reply briefs	Appellate Rules Committee	Awaiting initial discussion Draft approved 10/15 for submission to Standing Committee Approved for publication by Standing Committee 01/16 Draft approved 05/17 for resubmission to Standing Committee following public comments Revised draft approved by the Standing Committee 06/17 Draft approved by the Judicial Conference and submitted to the Supreme Court 09/17

FRAP Item	Proposal	Source	Current Status
15-AP-D	Amend FRAP 3(a)(1) (copies of notice of appeal) and 3(d)(1) (service of notice of appeal)	Paul Ramshaw, Esq.	Awaiting initial discussion Discussed and retained on agenda 10/15 Discussed and retained on agenda 04/16 Discussed and retained on agenda 10/16 Draft approved 05/17 for submission to Standing Committee Draft approved for submission to Standing Committee 05/17 Draft approved for publication by Standing Committee 06/17 Draft published for public comment 08/17
15-AP-E	Amend the FRAP (and other sets of rules) to address concerns relating to social security numbers; sealing of affidavits on motions under 28 U.S.C. § 1915 or 18 U.S.C. § 3006A; provision of authorities to pro se litigants; and electronic filing by pro se litigants	Sai	Awaiting initial discussion Discussed and retained on agenda 10/15 Partially removed from Agenda and draft approved for submission to Standing Committee 4/16 Approved for publication by Standing Committee 06/16 Revised draft approved 05/17 for resubmission to Standing Committee following public comments Revised draft approved by the Standing Committee 06/17 Draft approved by the Judicial Conference and submitted to the Supreme Court 09/17

FRAP Item	Proposal	Source	Current Status
15-AP-D	Amend FRAP 3(a)(1) (copies of notice of appeal) and 3(d)(1) (service of notice of appeal)	Paul Ramshaw, Esq.	Awaiting initial discussion Discussed and retained on agenda 10/15 Discussed and retained on agenda 04/16 Discussed and retained on agenda 10/16 Draft approved 05/17 for submission to Standing Committee Draft approved for submission to Standing Committee 05/17 Draft approved for publication by Standing Committee 06/17 Draft published for public comment 08/17
15-AP-E	Amend the FRAP (and other sets of rules) to address concerns relating to social security numbers; sealing of affidavits on motions under 28 U.S.C. § 1915 or 18 U.S.C. § 3006A; provision of authorities to pro se litigants; and electronic filing by pro se litigants	Sai	Awaiting initial discussion Discussed and retained on agenda 10/15 Partially removed from Agenda and draft approved for submission to Standing Committee 4/16 Approved for publication by Standing Committee 06/16 Revised draft approved 05/17 for resubmission to Standing Committee following public comments Revised draft approved by the Standing Committee 06/17 Draft approved by the Judicial Conference and submitted to the Supreme Court 09/17

TAB 1B

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Effective December 1, 2017

REA History: no contrary action by Congress; adopted by the Supreme Court and transmitted to Congress in April 2017;
approved by the JCUS and transmitted to the Supreme Court in September 2016

Rules	Summary of Proposal	Related or Coordinated Amendments
AP 4	Corrective amendment to Rule 4(a)(4)(B) restoring subsection (iii) to correct an inadvertent deletion of that subsection in 2009.	
BK 1001	Rule 1001 is the Bankruptcy Rules' counterpart to Civil Rule 1; the amendment incorporates changes made to Civil Rule 1 in 1993 and 2015.	CV 1
BK 1006	Amendment to Rule 1006(b)(1) clarifies that an individual debtor's petition must be accepted for filing so long as it is submitted with a signed application to pay the filing fee in installments, even absent contemporaneous payment of an initial installment required by local rule.	
BK 1015	Amendment substitutes the word "spouses" for "husband and wife."	
BK 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, 9009, new rule 3015.1	Implements a new official plan form, or a local plan form equivalent, for use in cases filed under chapter 13 of the bankruptcy code; changes the deadline for filing a proof of claim in chapter 7, 12 and 13; creates new restrictions on amendments or modifications to official bankruptcy forms.	
CV 4	Corrective amendment that restores Rule 71.1(d)(3)(A) to the list of exemptions in Rule 4(m), the rule that addresses the time limit for service of a summons.	
EV 803(16)	Makes the hearsay exception for "ancient documents" applicable only to documents prepared before January 1, 1998.	
EV 902	Adds two new subdivisions to the rule on self-authentication that would allow certain electronic evidence to be authenticated by a certification of a qualified person in lieu of that person's testimony at trial.	

Revised December 2017

Effective December 1, 2018

Current Step in REA Process: pending adoption by the Supreme Court

REA History: transmitted to the Supreme Court on October 4, 2017; approved by the Judicial Conference on September 12, 2017

Rules	Summary of Proposal	Related or Coordinated Amendments
AP 8, 11, 39	The proposed amendments to Rules 8(a) and (b), 11(g), and 39(e) conform the Appellate Rules to a proposed change to Civil Rule 62(b) that eliminates the antiquated term “supersedeas bond” and makes plain an appellant may provide either “a bond or other security.”	CV 62, 65.1
AP 25	The proposed amendments to Rule 25 are part of the inter-advisory committee project to develop coordinated rules for electronic filing and service. [NOTE: in March 2018, the Standing Committee withdrew the proposed amendment to Appellate Rule 25(d)(1) that would eliminate the requirement of proof of service when a party files a paper using the court's electronic filing system.]	BK 5005, CV 5, CR 45, 49
AP 26	"Computing and Extending Time." Technical, conforming changes.	AP 25
AP 28.1, 31	The proposed amendments to Rules 28.1(f)(4) and 31(a)(1) respond to the shortened time to file a reply brief effectuated by the elimination of the “three day rule.”	
AP 29	"Brief of an Amicus Curiae." The proposed amendment adds an exception to Rule 29(a) providing “that a court of appeals may strike or prohibit the filing of an amicus brief that would result in a judge’s disqualification.”	
AP 41	"Mandate: Contents; Issuance and Effective Date; Stay"	
AP Form 4	"Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis." Deletes the requirement in Question 12 for litigants to provide the last four digits of their social security numbers.	
AP Form 7	"Declaration of Inmate Filing." Technical, conforming change.	AP 25
BK 3002.1	The proposed amendments to Rule 3002.1 would do three things: (1) create flexibility regarding a notice of payment change for home equity lines of credit; (2) create a procedure for objecting to a notice of payment change; and (3) expand the category of parties who can seek a determination of fees, expenses, and charges that are owed at the end of the case.	
BK 5005 and 8011	The proposed amendments to Rule 5005 and 8011 are part of the inter-advisory committee project to develop coordinated rules for electronic filing and service.	AP 25, CV 5, CR 45, 49
BK 7004	"Process; Service of Summons, Complaint." Technical, conforming amendment to update cross-reference to CV 4.	CV 4
BK 7062, 8007, 8010, 8021, and 9025	The amendments to Rules 7062, 8007, 8010, 8021, and 9025 conform these rules with pending amendments to Civil Rules 62 and 65.1, which lengthen the period of the automatic stay of a judgment and modernize the terminology “supersedeas bond” and “surety” by using “bond or other security.”	CV 62, 65.1
BK 8002(a)(5)	The proposed amendment to 8002(a) would add a provision similar to FRAP 4(a)(7) defining entry of judgment.	FRAP 4
BK 8002(b)	The proposed amendment to 8002(b) conforms to a 2016 amendment to FRAP 4(a)(4) concerning the timeliness of tolling motions.	FRAP 4
BK 8002 (c), 8011	The proposed amendments to the inmate filing provisions of Rules 8002 and 8011 conform them to similar amendments made in 2016 to FRAP 4(c) and FRAP 25(a)(2)(C).	FRAP 4, 25

Revised December 2017

Effective December 1, 2018

Current Step in REA Process: pending adoption by the Supreme Court

REA History: transmitted to the Supreme Court on October 4, 2017; approved by the Judicial Conference on September 12, 2017

Rules	Summary of Proposal	Related or Coordinated Amendments
BK 8006	The amendment to Rule 8006 (Certifying a Direct Appeal to the Court of Appeals) adds a new subdivision (c)(2) that authorizes the bankruptcy judge or the court where the appeal is then pending to file a statement on the merits of a certification for direct review by the court of appeals when the certification is made jointly by all the parties to the appeal.	
BK 8013, 8015, 8016, 8022, Part VIII Appendix	The proposed amendments to Rules 8013, 8015, 8016, 8022, Part VIII Appendix conform to the new length limits, generally converting page limits to word limits, made in 2016 to FRAP 5, 21, 27, 35, and 40.	FRAP 5, 21, 27, 35, and 40
BK 8017	The proposed amendments to Rule 8017 would conform the rule to a 2016 amendment to FRAP 29 that provides guidelines for timing and length amicus briefs allowed by a court in connection with petitions for panel rehearing or rehearing in banc, and a 2018 amendment to FRAP 29 that authorizes the court of appeals to strike an amicus brief if the filing would result in the disqualification of a judge.	AP 29
BK 8018.1 (new)	The proposed rule would authorize a district court to treat a bankruptcy court's judgment as proposed findings of fact and conclusions of law if the district court determined that the bankruptcy court lacked constitutional authority to enter a final judgment.	
CV 5	The proposed amendments to Rule 5 are part of the inter-advisory committee project to develop coordinated rules for electronic filing and service.	
CV 23	"Class Actions." The proposed amendments to Rule 23: require that more information regarding a proposed class settlement be provided to the district court at the point when the court is asked to send notice of the proposed settlement to the class; clarify that a decision to send notice of a proposed settlement to the class under Rule 23(e)(1) is not appealable under Rule 23(f); clarify in Rule 23(c)(2)(B) that the Rule 23(e)(1) notice triggers the opt-out period in Rule 23(b)(3) class actions; updates Rule 23(c)(2) regarding individual notice in Rule 23(b)(3) class actions; establishes procedures for dealing with class action objectors; refines standards for approval of proposed class settlements; and incorporates a proposal by the Department of Justice to include in Rule 23(f) a 45-day period in which to seek permission for an interlocutory appeal when the United States is a party.	
CV 62	Proposed amendments extend the period of the automatic stay to 30 days; make clear that a party may obtain a stay by posting a bond or other security; eliminates the reference to "supersedeas bond"; rearranges subsections.	AP 8, 11, 39
CV 65.1	The proposed amendment to Rule 65.1 is intended to reflect the expansion of Rule 62 to include forms of security other than a bond and to conform the rule with the proposed amendments to Appellate Rule 8(b).	AP 8

Revised December 2017

Effective December 1, 2018

Current Step in REA Process: pending adoption by the Supreme Court

REA History: transmitted to the Supreme Court on October 4, 2017; approved by the Judicial Conference on September 12, 2017

Rules	Summary of Proposal	Related or Coordinated Amendments
CR 12.4	The proposed amendment to Rule 12.4(a)(2) – the subdivision that governs when the government is required to identify organizational victims – makes the scope of the required disclosures under Rule 12.4 consistent with the 2009 amendments to the Code of Conduct for United States Judges. Proposed amendments to Rule 12.4(b) – the subdivision that specifies the time for filing disclosure statements: provide that disclosures must be made within 28 days after the defendant’s initial appearance; revise the rule to refer to “later” rather than “supplemental” filings; and revise the text for clarity and to parallel Civil Rule 7.1(b)(2).	
CR 45, 49	Proposed amendments to Rules 45 and 49 are part of the inter-advisory committee project to develop coordinated rules for electronic filing and service. Currently, Criminal Rule 49 incorporates Civil Rule 5; the proposed amendments would make Criminal Rule 49 a stand-alone comprehensive criminal rule addressing service and filing by parties and nonparties, notice, and signatures.	AP 25, BK 5005, 8011, CV 5

Revised December 2017

Effective (no earlier than) December 1, 2019

Current Step in REA Process: published for public comment in August 2017; comment period closed February 2018

REA History: approved for publication by the Standing Committee in June 2017

Rules	Summary of Proposal	Related or Coordinated Amendments
AP 3, 13	Changes the word "mail" to "send" or "sends" in both rules, although not in the second sentence of Rule 13.	
AP 26.1, 28, 32	Rule 26.1 would be amended to change the disclosure requirements, and Rules 28 and 32 are amended to change the term "corporate disclosure statement" to "disclosure statement" to match the wording used in proposed amended Rule 26.1.	
BK 2002, 9036	The proposed amendments to Rules 2002(g) and 9036, along with an amendment to Official Form 410 (Proof of Claim), address noticing and service. The amendment to Rule 2002(g) would expand the references to mail to include other means of delivery allowing a creditor to receive notices by email. The amendment to Rule 9036 would allow the clerk or any other person to notice or serve registered users by use of the court's electronic filing system and to other persons by electronic means that the person consented to in writing.	
BK 4001	The proposed amendment would make subdivision (c) of the rule, which governs the process for obtaining post-petition credit in a bankruptcy case, inapplicable to chapter 13 cases.	
BK 6007	The proposed amendment to subsection (b) of Rule 6007 tracks the existing language of subsection (a) and clarifies the procedure for third-party motions brought under § 554(b) of the Bankruptcy Code.	
BK 9037	The proposed amendment would add a new subdivision (h) to the rule to provide a procedure for redacting personal identifiers in documents that were previously filed without complying with the rule's redaction requirements.	
CR 16.1 (new)	Proposed new rule regarding pretrial discovery and disclosure. Subsection (a) would require that, no more than 14 days after the arraignment, the attorneys are to confer and agree on the timing and procedures for disclosure in every case. Proposed subsection (b) emphasizes that the parties may seek a determination or modification from the court to facilitate preparation for trial.	
EV 807	Residual exception to the hearsay rule and clarifying the standard of trustworthiness.	
2254 R 5	Makes clear that petitioner has an absolute right to file a reply	
2255 R 5	Makes clear that movant has an absolute right to file a reply	

Revised December 2017

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Pending Legislation That Would Directly Amend the Federal Rules
115th Congress
Updated March 14, 2018

Name	Sponsor(s)/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
<p>Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017</p>	<p>H.R. 985 <i>Sponsor:</i> Goodlatte (R-VA)</p> <p><i>Co-Sponsors:</i> Sessions (R-TX) Grothman (R-WI)</p>	<p>CV 23</p>	<p>Bill Text (as amended and passed by the House, 3/9/17): https://www.congress.gov/115/bills/hr985/BILLS-115hr985eh.pdf</p> <p>Summary (authored by CRS): (Sec. [103]) This bill amends the federal judicial code to prohibit federal courts from certifying class actions unless:</p> <ul style="list-style-type: none"> • in a class action seeking monetary relief for personal injury or economic loss, each proposed class member suffered the same type and scope of injury as the named class representatives; • no class representatives or named plaintiffs are relatives of, present or former employees or clients of, or contractually related to class counsel; and • in a class action seeking monetary relief, the party seeking to maintain the class action demonstrates a reliable and administratively feasible mechanism for the court to determine whether putative class members fall within the class definition and for the distribution of any monetary relief directly to a substantial majority of class members. <p>The bill limits attorney's fees to a reasonable percentage of: (1) any payments received by class members, and (2) the value of any equitable relief.</p> <p>No attorney's fees based on monetary relief may: (1) be paid until distribution of the monetary recovery to class members has been completed, or (2) exceed the total amount distributed to and received by all class members.</p> <p>Class counsel must submit to the Federal Judicial Center and the Administrative Office of the U.S. Courts an accounting of the disbursement of funds paid by defendants in class action settlements. The Judicial Conference of the United States must use the accountings to prepare an annual summary for Congress and the public on how funds paid by defendants in class actions have been distributed to class members, class counsel, and other persons.</p> <p>A court's order that certifies a class with respect to particular issues must include a determination that the entirety of the cause of action from which the particular issues arise satisfies all the class certification prerequisites.</p>	<ul style="list-style-type: none"> • 3/13/17: Received in the Senate and referred to Judiciary Committee • 3/9/17: Passed House (220–201) • 3/7/17: Letter submitted by AO Director (sent to House Leadership) • 2/24/17: Letter submitted by AO Director (sent to leaders of both House and Senate Judiciary Committees; Rules Committees letter attached) • 2/15/17: Mark-up Session held (reported out of Committee 19–12) • 2/14/17: Letter submitted by Rules Committees (sent to leaders of both House and Senate Judiciary Committees) • 2/9/17: Introduced in the House

Pending Legislation That Would Directly Amend the Federal Rules
115th Congress
Updated March 14, 2018

Name	Sponsor(s)/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
			<p>A stay of discovery is required during the pendency of preliminary motions in class action proceedings (motions to transfer, dismiss, strike, or dispose of class allegations) unless the court finds upon the motion of a party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice.</p> <p>Class counsel must disclose any person or entity who has a contingent right to receive compensation from any settlement, judgment, or relief obtained in the action.</p> <p>Appeals courts must permit appeals from an order granting or denying class certification.</p> <p>(Sec. [104]) Federal courts must apply diversity of citizenship jurisdictional requirements to the claims of each plaintiff individually (as though each plaintiff were the sole plaintiff in the action) when deciding a motion to remand back to a state court a civil action in which: (1) two or more plaintiffs assert personal injury or wrongful death claims, (2) the action was removed from state court to federal court on the basis of a diversity of citizenship among the parties, and (3) a motion to remand is made on the ground that one or more defendants are citizens of the same state as one or more plaintiffs.</p> <p>A court must: (1) sever, and remand to state court, claims that do not satisfy the jurisdictional requirements; and (2) retain jurisdiction over claims that satisfy the diversity requirements.</p> <p>(Sec. [105]) In coordinated or consolidated pretrial proceedings for personal injury claims conducted by judges assigned by the judicial panel on multidistrict litigation, plaintiffs must: (1) submit medical records and other evidence for factual contentions regarding the alleged injury, the exposure to the risk that allegedly caused the injury, and the alleged cause of the injury; and (2) receive not less than 80% of any monetary recovery. Trials may not be conducted in multidistrict litigation proceedings unless all parties consent to the specific case sought to be tried.</p> <p>Report: https://www.congress.gov/115/crpt/hrpt25/CRPT-115hrpt25.pdf</p>	

Pending Legislation That Would Directly Amend the Federal Rules
115th Congress
Updated March 14, 2018

Name	Sponsor(s)/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
Lawsuit Abuse Reduction Act of 2017	H.R. 720 <i>Sponsor:</i> Smith (R-TX) <i>Co-Sponsors:</i> Goodlatte (R-VA) Buck (R-CO) Franks (R-AZ) Farenthold (R-TX) Chabot (R-OH) Chaffetz (R-UT) Sessions (R-TX)	CV 11	<p>Bill Text (as passed by the House without amendment, 3/10/17): https://www.congress.gov/115/bills/hr720/BILLS-115hr720rfs.pdf</p> <p>Summary (authored by CRS): (Sec. 2) This bill amends the sanctions provisions in Rule 11 of the Federal Rules of Civil Procedure to require the court to impose an appropriate sanction on any attorney, law firm, or party that has violated, or is responsible for the violation of, the rule with regard to representations to the court. Any sanction must compensate parties injured by the conduct in question.</p> <p>The bill removes a provision that prohibits filing a motion for sanctions if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets.</p> <p>Courts may impose additional sanctions, including striking the pleadings, dismissing the suit, nonmonetary directives, or penalty payments if warranted for effective deterrence.</p> <p>Report: https://www.congress.gov/115/crpt/hrpt16/CRPT-115hrpt16.pdf</p>	<ul style="list-style-type: none"> • 3/13/17: Received in the Senate and referred to Judiciary Committee • 3/10/17: Passed House (230–188) • 2/1/17: Letter submitted by Rules Committees (sent to leaders of both House and Senate Judiciary Committees) • 1/30/17: Introduced in the House
	S. 237 <i>Sponsor:</i> Grassley (R-IA) <i>Co-Sponsor:</i> Rubio (R-FL)	CV 11	<p>Bill Text: https://www.congress.gov/115/bills/s237/BILLS-115s237is.pdf</p> <p>Summary (authored by CRS): This bill amends the sanctions provisions in Rule 11 of the Federal Rules of Civil Procedure to require the court to impose an appropriate sanction on any attorney, law firm, or party that has violated, or is responsible for the violation of, the rule with regard to representations to the court. Any sanction must compensate parties injured by the conduct in question.</p> <p>The bill removes a provision that prohibits filing a motion for sanctions if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets.</p>	<ul style="list-style-type: none"> • 11/8/17: Senate Judiciary Committee Hearing held – “The Impact of Lawsuit Abuse on American Small Businesses and Job Creators” • 2/1/17: Letter submitted by Rules Committees (sent to leaders of both House and Senate Judiciary Committees) • 1/30/17: Introduced in the Senate; referred to Judiciary Committee

Pending Legislation That Would Directly Amend the Federal Rules
115th Congress
Updated March 14, 2018

Name	Sponsor(s)/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
			<p>Courts may impose additional sanctions, including striking the pleadings, dismissing the suit, nonmonetary directives, or penalty payments if warranted for effective deterrence.</p> <p>Report: None.</p>	
Stopping Mass Hacking Act	<p>S. 406 <i>Sponsor:</i> Wyden (D-OR)</p> <p><i>Co-Sponsors:</i> Baldwin (D-WI) Daines (R-MT) Lee (R-UT) Rand (R-KY) Tester (D-MT)</p>	CR 41	<p>Bill Text: https://www.congress.gov/115/bills/s406/BILLS-115s406is.pdf</p> <p>Summary: (Sec. 2) “Effective on the date of enactment of this Act, rule 41 of the Federal Rules of Criminal Procedure is amended to read as it read on November 30, 2016.”</p> <p>Report: None.</p>	<ul style="list-style-type: none"> • 2/16/17: Introduced in the Senate; referred to Judiciary Committee
	<p>H.R. 1110 <i>Sponsor:</i> Poe (R-TX)</p> <p><i>Co-Sponsors:</i> Amash (R-MI) Conyers (D-MI) DeFazio (D-OR) DelBene (D-WA) Lofgren (D-CA) Sensenbrenner (R-WI)</p>	CR 41	<p>Bill Text: https://www.congress.gov/115/bills/hr1110/BILLS-115hr1110ih.pdf</p> <p>(Sec. 2) “(a) In General.—Effective on the date of enactment of this Act, rule 41 of the Federal Rules of Criminal Procedure is amended to read as it read on November 30, 2016.</p> <p>(b) Applicability.—Notwithstanding the amendment made by subsection (a), for any warrant issued under rule 41 of the Federal Rules of Criminal Procedure during the period beginning on December 1, 2016, and ending on the date of enactment of this Act, such rule 41, as it was in effect on the date on which the warrant was issued, shall apply with respect to the warrant.”</p> <p>Summary (authored by CRS): This bill repeals an amendment to rule 41 (Search and Seizure) of the Federal Rules of Criminal Procedure that took effect on December 1, 2016. The amendment allows a federal magistrate judge to issue a warrant to use remote access to search computers and seize electronically stored information located inside or outside that judge's district in specific circumstances.</p> <p>Report: None.</p>	<ul style="list-style-type: none"> • 3/6/17: Referred to Subcommittee on Crime, Terrorism, Homeland Security, and Investigations • 2/16/17: Introduced in the House; referred to Judiciary Committee

Pending Legislation That Would Directly Amend the Federal Rules
115th Congress
Updated March 14, 2018

Name	Sponsor(s)/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
Back the Blue Act of 2017	<p>S. 1134 <i>Sponsor:</i> Cornyn (R-TX)</p> <p><i>Co-Sponsors:</i> Cruz (R-TX) Tillis (R-NC) Blunt (R-MO) Boozman (R-AR) Capito (R-WV) Daines (R-MT) Fischer (R-NE) Heller (R-NV) Perdue (R-GA) Portman (R-OH) Rubio (R-FL) Sullivan (R-AK) Strange (R-AL) Cassidy (R-LA) Barrasso (R-WY)</p>	§ 2254 Rule 11	<p>Bill Text: https://www.congress.gov/115/bills/s1134/BILLS-115s1134is.pdf</p> <p>Summary: Section 4 of the bill is titled “Limitation on Federal Habeas Relief for Murders of Law Enforcement Officers.” It adds to § 2254 a new subdivision (j) that would apply to habeas petitions filed by a person in custody for a crime that involved the killing of a public safety officer or judge.</p> <p>Section 4 also amends Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts—the rule governing certificates of appealability and time to appeal—by adding the following language to the end of that Rule: “Rule 60(b)(6) of the Federal Rules of Civil Procedure shall not apply to a proceeding under these rules in a case that is described in section 2254(j) of title 28, United States Code.”</p> <p>Report: None.</p>	<ul style="list-style-type: none"> • 5/16/17: Introduced in the Senate; referred to Judiciary Committee
	<p>H.R. 2437 <i>Sponsor:</i> Poe (R-TX)</p> <p><i>Co-Sponsors:</i> Barletta (R-PA) Johnson (R-OH) Graves (R-LA) McCaul (R-TX) Olson (R-TX) Smith (R-TX) Stivers (R-OH) Williams (R-TX)</p>	§ 2254 Rule 11	<p>Bill Text: https://www.congress.gov/115/bills/hr2437/BILLS-115hr2437ih.pdf</p> <p>Summary: Section 4 of the bill is titled “Limitation on Federal Habeas Relief for Murders of Law Enforcement Officers.” It adds to § 2254 a new subdivision (j) that would apply to habeas petitions filed by a person in custody for a crime that involved the killing of a public safety officer or judge.</p> <p>Section 4 also amends Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts—the rule governing certificates of appealability and time to appeal—by adding the following language to the end of that Rule: “Rule 60(b)(6) of the Federal Rules of Civil Procedure shall not apply to a proceeding under these rules in a case that is described in section 2254(j) of title 28, United States Code.”</p>	<ul style="list-style-type: none"> • 6/7/17: referred to Subcommittee on the Constitution and Civil Justice and Subcommittee on Crime, Terrorism, Homeland Security, and Investigations • 5/16/17: Introduced in the House; referred to Judiciary Committee

Pending Legislation That Would Directly Amend the Federal Rules
115th Congress
Updated March 14, 2018

Name	Sponsor(s)/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
			Report: None.	

TAB 1D

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SUMMARY OF THE
REPORT OF THE JUDICIAL CONFERENCE
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

This report is submitted for the record and includes information on the following for the Judicial Conference:

- Federal Rules of Appellate Procedurepp. 2–4
- Federal Rules of Bankruptcy Procedurepp. 4–6
- Federal Rules of Civil Procedurepp. 6–11
- Federal Rules of Criminal Procedure.....pp. 11–14
- Federal Rules of Evidencepp. 14–16
- Judiciary Strategic Planningp. 17

NOTICE
NO RECOMMENDATIONS PRESENTED HEREIN REPRESENT THE POLICY OF THE JUDICIAL CONFERENCE
UNLESS APPROVED BY THE CONFERENCE ITSELF.

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

**TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES:**

The Committee on Rules of Practice and Procedure (Standing Committee) met on January 4, 2018. All members were present.

Representing the advisory rules committees were: Judge Michael A. Chagares, Chair, and Professor Gregory E. Maggs, Reporter, of the Advisory Committee on Appellate Rules; Judge Sandra Segal Ikuta, Chair, and Professor S. Elizabeth Gibson, Reporter, of the Advisory Committee on Bankruptcy Rules; Judge John D. Bates, Chair, Professor Edward H. Cooper, Reporter, and Professor Richard L. Marcus, Associate Reporter, of the Advisory Committee on Civil Rules; Judge Donald W. Molloy, Chair, Professor Sara Sun Beale, Reporter, and Professor Nancy J. King, Associate Reporter, of the Advisory Committee on Criminal Rules; and Judge Debra Ann Livingston, Chair, and Professor Daniel J. Capra, Reporter, of the Advisory Committee on Evidence Rules.

Also participating in the meeting were: Professor Daniel R. Coquillette, the Standing Committee's Reporter; Professor Catherine T. Struve, the Standing Committee's Associate Reporter (by telephone); Professor R. Joseph Kimble and Professor Bryan A. Garner, consultants to the Standing Committee; Rebecca A. Womeldorf, the Standing Committee's Secretary; Bridget Healy, Scott Myers, and Julie Wilson, Attorneys on the Rules Committee Staff (by telephone); Patrick Tighe, Law Clerk to the Standing Committee; and Dr. Tim Reagan and

NOTICE

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UNLESS APPROVED BY THE CONFERENCE ITSELF.**

Dr. Emery G. Lee III, of the Federal Judicial Center (FJC). Elizabeth J. Shapiro attended on behalf of the Department of Justice.

FEDERAL RULES OF APPELLATE PROCEDURE

Information Items

The Advisory Committee on Appellate Rules met on November 9, 2017, and discussed the following items.

Proposal to Amend Rules to Address References to “Proof of Service”

A proposed amendment to Appellate Rule 25(d) that eliminates the requirement of proof of service when a party files a paper using the court’s electronic filing system was approved by the Conference at its September 2017 session. (JCUS-SEP 17, p. 3) The advisory committee subsequently identified references to “proof of service” in Appellate Rules 5(a)(1), 21(a)(1) and (c), 26(c), 32(f), and 39(d)(1), that require corresponding amendments. The advisory committee determined after discussion that the proposed corresponding changes to remove or revise references to “proof of service” in each of these rules are properly seen as technical corrections for which publication for additional comments is unnecessary.

Upon further review of the proposed amendment to Appellate Rule 25(d) discussed above, and subsequent to its meeting on November 9, 2017, the advisory committee identified a wording change to the pending amendment that will clarify the intent of the rule change. This is a technical change for which publication for additional comments is unnecessary. To permit this change to be made prior to Supreme Court approval of the pending amendment to Rule 25(d), and to allow all Appellate Rule amendments addressing proof of service to proceed together, the advisory committee determined by e-mail vote to recommend withdrawing the proposed amendment to Rule 25(d) now pending before the Supreme Court and the Standing Committee agreed. The advisory committee intends to submit proposed amendments to Rules 5(a)(1),

21(a)(1) and (c), 25(d), 26(c), 32(f), and 39(d)(1), for approval at the Standing Committee's June 12, 2018 meeting, and ask the Judicial Conference to approve the withdrawal and new proposed amendments at its September 2018 session. The Committee agreed with all of the advisory committee's recommendations.

Revisiting Proposals to Amend Rule 29 to Allow Indian Tribes and Cities to File Amicus Briefs Without Leave of Court or Consent of the Parties

Rule 29(a) allows federal and state governments to file amicus briefs without leave of court or consent of the parties. At its April 2012 meeting, the advisory committee considered a suggestion to permit Indian Tribes and cities to file amicus briefs without leave of court or consent of the parties. The advisory committee determined to take no action on the suggestion, with an explanation that the advisory committee would revisit the item in five years. The advisory committee did so at its fall 2017 meeting, and determined that there remained no evidence that Indian Tribes or cities had been denied opportunity to file amicus briefs under the existing rule. Absent such evidence, and given the potential complications and ramifications of a rule change, the advisory committee decided to take no further action on the suggestion.

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

Appellate Rule 3(c)(1)(B) requires a notice of appeal to “designate the judgment, order, or part thereof being appealed.” In the Eighth Circuit, a notice of appeal that designates an order in addition to the final judgment excludes by implication any other order on which the final judgment rests. The advisory committee received a suggestion to revise the rule to eliminate the possible “trap for the unwary” reflected in the Eighth Circuit's interpretation of Rule 3(c)(1)(B). Following discussion at its fall 2017 meeting, the advisory committee formed a subcommittee to study this issue to determine if any action should be taken on the suggestion.

Circuit Split on Whether Attorney’s Fees Are “Costs on Appeal” Under Rule 7

A circuit split has arisen on the question of whether attorney’s fees are “costs on appeal” for purposes of calculating the amount of a bond under Appellate Rule 7. After discussion at its fall 2017 meeting, the advisory committee formed a subcommittee to investigate this issue, and will consult with the Civil Rules Advisory Committee on any resulting rule proposal.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Information Items

The Advisory Committee on Bankruptcy Rules met on September 26, 2017, and discussed the following items.

Rules 2002(h) and 8012

The advisory committee considered amendments to two rules: Rule 2002(h) (Notices to Creditors Whose Claims are Filed) and Rule 8012 (Corporate Disclosure Statement). Both proposals relate to other proposed amendments currently published for public comment. Because the related rules have not yet been finalized, the advisory committee plans to present the proposed amendments to Rules 2002(h) and 8012 at the Standing Committee’s June 2018 meeting.

Withdrawal of Proposed Amendment to Rule 8023 (Voluntary Dismissal)

In August 2016, the advisory committee published for public comment a proposed amendment to Rule 8023, which governs voluntary dismissal of an appeal. The proposed amendment added a cross-reference to Rule 9019, which requires a bankruptcy trustee to get bankruptcy court approval of a compromise or settlement. The advisory committee recommended the amendment in response to a suggestion that appellate courts might be unaware that a bankruptcy trustee’s ability to seek the dismissal of an appeal may be subject to bankruptcy court approval.

Although no comments addressing the proposed amendment were filed, the Department of Justice expressed concern at the advisory committee’s spring 2017 meeting that the proposed amendment might create administration difficulties because it seemed to require the clerk or the appellate court to determine the applicability of Rule 9019 with respect to every voluntary dismissal of a bankruptcy appeal. The advisory committee considered the Department of Justice’s concerns over the summer. After surveying the case law and finding no decision addressing the circumstance of a trustee voluntarily dismissing an appeal without complying with Rule 9019, the advisory committee decided an amendment to Rule 8023 was not needed and could cause confusion.

Approval of National Instructions Authorizing Alterations

The 2017 amendments to Rule 9009 restrict authority to make alterations to Official Bankruptcy Forms and provide as a general matter that “[t]he Official Forms prescribed by the Judicial Conference of the United States shall be used without alteration.” The rule was amended to ensure that a form, such as the Chapter 13 Plan Form, which is intended to provide information in a particular order and format, is not altered.

Rule 9009 includes exceptions to the general prohibition against altering Official Forms. One of those exceptions allows for alterations as provided in the “national instructions for a particular Official Form.” In response to suggestions from several bankruptcy courts, the advisory committee approved national instructions for certain forms that would allow for limited modifications such as the cost-saving practice of adding local court information to the official form notice of a bankruptcy case.

Suggestion to Amend Rule 2013 (Public Record of Compensation Awarded to Trustees, Examiners, and Professionals)

The advisory committee received a suggestion from a bankruptcy clerk questioning the need for Rule 2013. The rule requires the bankruptcy clerk’s office to compile and maintain a

public record of all fees awarded by the court to trustees, attorneys, and other professionals, and transmit the record to the U.S. trustee's office. The clerk asserts that CM/ECF has eliminated the need for the type of records Rule 2013 was designed to produce because reports about fee awards can now be generated on demand. The advisory committee is working with the FJC and will seek information from the U.S trustee's office to evaluate the current compliance with and the need for Rule 2013.

Exploration of Whether the Bankruptcy Rules Should be Restyled

Over the past two decades, each set of federal rules other than the Federal Rules of Bankruptcy Procedure have been comprehensively restyled. In the past, concerns have been raised that restyling of the Bankruptcy Rules should not be undertaken because of their close association with statutory text. For example, the Bankruptcy Rules continue to use the now disfavored word "shall" in order to be consistent with the Bankruptcy Code's use of that term. Nevertheless, incremental restyling has occurred, and in the process of revising Part VIII of the bankruptcy rules, which address bankruptcy appeals, and other individual rules, the new style conventions from other rule sets generally have been incorporated.

In response to suggestions from the style consultants that the time has come to comprehensively restyle the Bankruptcy Rules, the advisory committee has established a subcommittee to explore the advisability of such a project. The subcommittee anticipates that it will make at least a preliminary report to the advisory committee at its spring 2018 meeting.

FEDERAL RULES OF CIVIL PROCEDURE

Information Items

The advisory committee met on November 7, 2017. Discussion focused primarily on its ongoing consideration of possible amendments to Rule 30(b)(6), a suggestion from the Administrative Conference of the United States regarding social security review cases,

suggestions urging rules for multidistrict litigation (MDL) proceedings, and a suggestion that Rule 26 be amended to require disclosure of third party litigation financing agreements.

Rule 30(b)(6) (Depositions of an Organization)

The advisory committee continued its consideration of Rule 30(b)(6), the rule addressing deposition notices or subpoenas directed to an organization. As previously reported, in May 2016, the Rule 30(b)(6) subcommittee solicited comment about practitioners' general experience under the rule as well as the following six potential amendment ideas:

1. Including a specific reference to Rule 30(b)(6) among the topics for discussion by the parties at the Rule 26(f) conference and between the parties and the court at the Rule 16 conference;
2. Clarifying that statements of the Rule 30(b)(6) deponent are not judicial admissions;
3. Requiring and permitting supplementation of Rule 30(b)(6) testimony;
4. Forbidding contention questions in Rule 30(b)(6) depositions;
5. Adding a provision for objections to Rule 30(b)(6) deposition notices; and
6. Addressing the application of limits on the duration and number of depositions as applied to Rule 30(b)(6) depositions.

The advisory committee posted an invitation for comment on the federal judiciary's rulemaking website and asked for submission of any comments by August 1, 2017. In addition, members of the subcommittee participated in two conferences focused on the rule in an effort to receive additional input from the bar.

The input received revealed significant disagreements as to what are the most serious problems with the rule. One set of concerns focused on perceived over-reaching in use of the rule, sometimes leading to overbroad or overly numerous topics for interrogation, or strategic use of the judicial admission possibility. A competing set of concerns focused on organizations'

preparation of their witnesses; some say organizations too often evade their responsibilities and that enforcement of the duty to prepare is too lax.

Positive comments were also received. It was reported that very often, after notice of a Rule 30(b)(6) deposition is given, the parties engage in constructive exchanges that produce improvements from the perspective of both the noticing party and the organization and that facilitate an orderly inquiry. Based on input from the bar on the six amendment ideas, the subcommittee determined that proceeding with any of them would likely produce controversy rather than improve practice. At the same time, it seemed that a rule amendment that prompts, or even requires, parties to communicate about recurrent problem areas might be the best approach for improving practice. Initially, the subcommittee focused on possible amendments to Rule 16(c) (to require the court to consider including provision for Rule 30(b)(6) depositions in a case management order) or Rule 26(f) (to direct the parties to discuss the matter during their discovery planning conference). Ultimately, however, the subcommittee returned to Rule 30(b)(6) itself, drafting language that adds the requirement that the parties communicate about Rule 30(b)(6) depositions when a party proposes to take such a deposition.

At the fall 2017 meeting, the advisory committee discussed the draft language. Members provided helpful feedback, including the following: (1) any amendment should make clear that there is a bilateral obligation to confer; (2) the organization should be expected to discuss the identity of the person to be offered as its designee as well as the matters for examination; and (3) the inclusion in the draft that the parties “attempt” to confer might be problematic. There was also discussion about whether an amendment to Rule 26(f) would in fact be helpful.

Since the meeting, the subcommittee has continued to work on a draft proposed amendment. It plans to present a proposed amendment for publication to the advisory committee at its meeting in April 2018.

Social Security Disability Review Cases

As previously reported, the advisory committee has added to its agenda the consideration of a suggestion by the Administrative Conference of the United States (ACUS) that the Judicial Conference “develop for the Supreme Court’s consideration a uniform set of procedural rules for cases under the Social Security Act in which an individual seeks district court review of a final administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g).” The suggestion was referred to the advisory committee, as it is the appropriate committee to study and to advise about rules for civil actions in the district courts.

A subcommittee was formed to consider the ACUS suggestion and to gather additional data and information from the various stakeholders. As a first step, government and claimant representatives were invited to a meeting on November 6, 2017. Participants included the Vice Chair/Executive Director of the ACUS; the General Counsel of the Social Security Administration; the Counsel to the Associate Attorney General, Department of Justice; the Deputy Director of Government Affairs of the National Organization of Social Security Claimants’ Representatives; and a representative of the American Association for Justice. The meeting began with formal statements and developed through open give-and-take discussion that substantially focused, and seemed to narrow, the issues.

At its meeting the next day, the advisory committee engaged in a lengthy discussion of the ACUS suggestion. A similarly robust discussion occurred at the January 2018 meeting of the Standing Committee. No final decision has been made regarding the ACUS suggestion; questions and concerns remain regarding the advisability of promulgating rules for specific types of cases and whether any such rules would be effective. However, the advisory committee through its subcommittee is committed to thoroughly considering the suggestion and anticipates several additional months of information gathering before deciding whether to pursue draft rules.

MDL Proceedings

At its fall 2017 meeting, the advisory committee formed a subcommittee to consider three proposals for specific rules for MDL proceedings – actions transferred for “coordinated or consolidated pretrial proceedings” under 28 U.S.C. § 1407. Two of the proposals suggested amendments to the Civil Rules to add provisions applicable to all MDL proceedings. Several of these proposed amendments are born of a common concern: large MDL proceedings often attract claimants whose purported claims have no foundation in fact, and there is no effective means for screening them out early. Other proposed amendments address bellwether trial practice and an expansion of the opportunities for interlocutory appellate review.

A third proposal would only apply to those MDL proceedings (about 20) involving more than 900 individual cases. It proposes that after discovery has been completed and the bellwether cases selected, the remaining work would be divided among five judges “to decide whether to dispose of a case on motion, settle, or remand.” Judges from other districts could have intercircuit assignments to sit with the MDL court for these purposes.

The advisory committee engaged in a preliminary discussion of these suggestions at its fall 2017 meeting. It was the consensus of the advisory committee that more information is needed, especially input from the plaintiffs’ bar and experienced MDL judges, as all of the proposals submitted thus far are from representatives of the defense bar. The subcommittee has begun information gathering. In considering whether there is an opportunity to improve MDL practice by amending current rules or adopting new rules, the subcommittee will coordinate closely with the Judicial Panel on Multidistrict Litigation.

Third Party Litigation Financing Agreements

The advisory committee has received a suggestion to add a new Rule 26(a)(1)(A)(v) that would require automatic disclosure of

any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on, and sourced from, any proceeds of the civil action, by settlement, judgment or otherwise.

The advisory committee considered and declined to act upon similar proposals in 2014 and again in 2016. At its fall 2017 meeting, the advisory committee recognized that the issue is complicated and that any consideration must include input from both proponents and opponents of disclosure. The committee referred the issue to the MDL subcommittee, since one of the MDL proposals discussed above explicitly calls for disclosure of third party financing agreements. Additionally, such funding agreements are often used in MDL proceedings. The subcommittee will study the issue in an effort to determine whether it is something that should be pursued.

FEDERAL RULES OF CRIMINAL PROCEDURE

Information Items

The advisory committee met on October 24, 2017. Among the topics for discussion were the consideration of the final report of the cooperator's subcommittee, a suggestion to amend Rule 32, and the development of a manual on complex criminal litigation.

Cooperator's Subcommittee

The main topic of discussion at the fall 2017 meeting was a report from the cooperator's subcommittee which was tasked with developing amendments to the Criminal Rules to address concerns regarding dangers to cooperating witnesses posed by access to information about cooperation in case files. The rules committees were asked to develop possible rule amendments

to implement the recommendations of the Judicial Conference Committee on Court Administration and Case Management (CACM) in its guidance issued in June 2016.

The subcommittee presented its final report detailing its comprehensive study of the issue, its development of several packages of rules proposals, and its recommendations to the full advisory committee. The report included the development of rules amendments to implement the CACM guidance, as well as four alternative approaches and related rules amendments: (1) amendments omitting the requirement in the guidance for bench conferences in every case during the plea and sentencing hearings; (2) amendments omitting the bench conferences and sealing the entirety of various documents that may refer to cooperation, rather than requiring bifurcation and the filing of sealed supplements to each document; (3) amendments omitting the bench conferences and directing that cooperation-related documents be submitted directly to the court and not filed, rather than filed under seal; and (4) amendments designed to implement the CACM guidance and to supplement it with additional rules amendments that might be deemed necessary or desirable to carry out the CACM Committee's approach and objectives. The subcommittee also reported that it had begun, but not completed, consideration of a new draft Criminal Rule 49.2 that would limit remote access to categories of documents that frequently refer to cooperation, but would allow full access to those documents at the courthouse.

The subcommittee reported that in its view the package of rules amendments developed to implement the CACM guidance would fully do so. However, the subcommittee reported that it did not recommend adoption of that rules package or any of the other alternative sets of rules amendments it developed.

After robust discussion, the advisory committee agreed with the subcommittee's recommendation that no rules amendments on this issue be pursued at this time. All members agreed that the threat of harm to cooperators is a serious problem that should be addressed, but

the advisory committee determined that rules amendments were not the best way to address the problem at this time. Various concerns were expressed, including the notion that the proposed amendments would make judicial proceedings less transparent, and that the amendments would result in sweeping changes that may not be necessary. Members were also of the view that other changes (*e.g.*, possible recommendations by the Task Force on Protecting Cooperators that changes be made by the Bureau of Prisons and to the CM/ECF system) should be implemented before embarking on rules amendments.

The advisory committee also decided to hold in abeyance any final recommendation on the subcommittee's alternative approach of limiting remote public access, reflected in its working draft of new Rule 49.2, but provided feedback to the subcommittee on its working draft.

Rule 32(e)(2) (Sentencing and Judgment—Disclosing the Report and Recommendation)

Also at the fall 2017 meeting, the advisory committee decided to add to its agenda a suggestion to amend Rule 32(e)(2) which states: “The probation officer must give the presentence report to the defendant, the defendant’s attorney, and an attorney for the government at least 35 days before sentencing unless the defendant waives this minimum period.” Probation officers often receive requests from defendants for copies of their presentence reports (PSRs). There is concern that this provision might contribute to the problem of threats and harm to cooperators. These requests may be the result of pressure from other inmates to provide materials that could reveal whether there was cooperation. Rule 32(e)(2) deliberately grants the right to receive the PSR to the defendant in order to increase the chances that incorrect information would be identified and corrected. At present, however, PSRs are often served only on counsel, not on the defendant. Given this reality and the concern that providing PSRs directly to defendants might contribute to the problem of threats and harm to cooperators, the question of whether to amend Rule 32(e)(2) was referred to the cooperator’s subcommittee for consideration.

Manual on Complex Criminal Litigation

The Rule 16.1 subcommittee has been charged with exploring the possibility of developing a manual on complex criminal litigation that would parallel the Manual on Complex Civil Litigation. With input from the subcommittee, the FJC has agreed to develop a special topics page on its website focused exclusively on complex criminal litigation. The page will initially include existing relevant materials. No decision has been made yet whether all of the materials originally prepared for judicial use will be available to the public. Going forward, the FJC will spearhead the development of a manual, including obtaining input on topics from a broader group.

FEDERAL RULES OF EVIDENCE

Information Items

The Advisory Committee on Evidence Rules met on October 26, 2017. In conjunction with this meeting, the advisory committee convened a group of experts to discuss topics related to forensic expert testimony, Rule 702, and *Daubert*.

Conference on Forensic Expert Testimony, Rule 702, and *Daubert*

The conference consisted of two separate panels. The first panel included scientists, judges, academics, and practitioners, exploring whether Evidence Rules amendments could and should have a role in assuring that forensic expert testimony is valid, reliable, and not overstated in court. The second panel consisted of judges and practitioners, and discussed the problems that courts and litigants have encountered in applying *Daubert* in both civil and criminal cases. The conference provided much material for the advisory committee to evaluate.

Possible Amendment to Rule 801(d)(1)(A)

Rule 801(d)(1)(A) currently provides that prior inconsistent statements of a testifying witness, made under oath at a formal proceeding, may be admitted for substantive purposes. The

advisory committee continued its consideration of an amendment that would expand the rule to allow for substantive admissibility of prior inconsistent statements that are audiovisually recorded. At the advisory committee's request, the FJC prepared and issued surveys to collect feedback from judges and practicing lawyers concerning the potential amendment. In addition, at the invitation of the advisory committee, several comments were submitted. At its next meeting, the advisory committee will consider this input, and decide whether or not to proceed with an amendment to Rule 801(d)(1)(A).

Possible Amendments to Rule 404(b)

The advisory committee's examination of Rule 404(b) was prompted by recent case law in some circuits demanding more rigor in the Rule 404(b) analysis in criminal cases. The advisory committee has resolved not to propose an amendment that would add an "active contest" requirement to Rule 404(b), concluding that such a requirement would be too rigid and should be left to the court's assessment of probative value and prejudicial effect. The advisory committee will continue to consider other possible amendments to Rule 404(b).

Possible Amendment to Rule 106

The advisory committee is considering whether Rule 106, the rule of completeness, should be amended to provide that a completing statement is admissible over a hearsay objection, and to provide that the rule – which currently is limited to written or recorded statements – should be expanded to cover oral statements as well.

Possible Amendment to Rule 609(a)(1)

The advisory committee is considering a suggestion to abrogate Rule 609(a)(1), which provides for admissibility (subject to a balancing test) of a witness's prior criminal convictions that did not involve dishonesty or a false statement. The reason for the suggestion is a reliance on principles of "restorative justice," i.e., that a person who has been convicted and released into

society should not be saddled with the opprobrium of a prior conviction, and that non-falsity convictions as a class are of very limited probative value and are highly prejudicial. The suggestion was considered with the knowledge that Rule 609(a)(1) and its applicable balancing tests are the result of a compromise following extensive congressional involvement in the drafting of Rule 609 as part of the original rulemaking process. The advisory committee will continue its consideration of Rule 609 at its spring meeting.

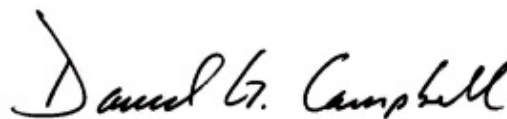
Rule 606(b) and the Supreme Court's Decision in *Pena-Rodriguez v. Colorado*

The advisory committee considered the possibility of amending Rule 606(b) to reflect the Supreme Court's 2017 holding in *Pena-Rodriguez v. Colorado*. In that case, the Court held that application of Rule 606(b), which bars testimony of jurors regarding deliberations, violated the defendant's Sixth Amendment right where the testimony concerned racist statements made about the defendant and one of the defendant's witnesses during deliberations. The advisory committee previously declined to pursue an amendment due to concern that any amendment to Rule 606(b) to allow for juror testimony to protect constitutional rights could be read to expand the *Pena-Rodriguez* holding. At its spring 2018 meeting, the advisory committee will revisit the issue of a possible amendment, but notes that continued review of the case law indicates that the lower courts are adhering to (and not expanding) the *Pena-Rodriguez* holding. The goal of any amendment would be to assure that Rule 606(b) would not be subject to unconstitutional application.

JUDICIARY STRATEGIC PLANNING

The Standing Committee considered the request to comment on two questions related to the *Strategic Plan for the Federal Judiciary*, and has provided a response to Chief Judge Carl Stewart, the judiciary's planning coordinator.

Respectfully submitted,



David G. Campbell, Chair

Jesse M. Furman	William K. Kelley
Daniel C. Girard	Carolyn B. Kuhl
Robert J. Giuffra Jr.	Rod J. Rosenstein
Susan P. Graber	Amy J. St. Eve
Frank M. Hull	Srikanth Srinivasan
Peter D. Keisler	Jack Zouhary

TAB 2

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

November 8, 2017
Washington, D.C.

Judge Michael A. Chagares, Chair, Advisory Committee on the Appellate Rules, called the meeting of the Advisory Committee on the Appellate Rules to order on Thursday, November 8, 2017, at 9:00 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 Jay S. Bybee, Justice Judith L. French, Judge Brett M. Kavanaugh, Christopher Landau, Esq., Judge Stephen Joseph Murphy III, Professor Stephen E. Sachs, and Danielle Spinelli, Esq. Solicitor General Noel Francisco was represented by Douglas Letter, Esq. and H. Thomas Byron III, Esq.

Also present were: Judge David G. Campbell, Chair, Standing Committee on the Rules of Practice and Procedure; Professor Daniel R. Coquillette, Reporter, Standing Committee on the Rules of Practice and Procedure; Ms. Shelly Cox, Administrative Specialist, Rules Committee Support Office of the Administrative Office of the U.S. Courts (RCSO); Ms. Lauren Gailey, former Rules Law Clerk, RCSO; Judge Frank Mays Hull, 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; Marie Leary, Esq., Research Associate, Advisory Committee on the Appellate Rules; Professor Gregory E. Maggs, Reporter, Advisory Committee on the Appellate Rules; Judge Pamela Pepper, Member, Advisory Committee on the Bankruptcy Rules and Liaison Member, Advisory Committee on the Appellate Rules; Patrick Tighe, Rules Law Clerk, RCSO; Marcia M. Waldron, Clerk of Court Representative, 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.

Professor Catherine T. Struve, Associate Reporter, Standing Committee on the Rules of Practice and Procedure, participated by telephone.

I. Introduction

Judge Chagares opened the meeting and greeted everyone. Judge Chagares welcomed Judge Jay Bybee, Chris Landau, Esq., and Danielle Spinelli, Esq., as new members of the Committee, and Judge Frank Hull, as a new liaison member from the Standing Committee. He noted that Clerk of Court Marcy Waldron will be completing her service for the Advisory Committee, and thanked her for her contributions.

Judge Chagares noted that the President had appointed or nominated several members of the Committee to judicial offices. Former Advisory Committee Chair Neil Gorsuch was elevated to the Supreme Court, former Committee member Kevin Newsom was appointed to the U.S. Court of Appeals for the Eighth Circuit, former Committee member Amy Coney Barrett is a nominee for a judgeship on the U.S. Court of Appeals for the Seventh Circuit, former Committee member Alison Eid is a nominee for a judgeship on the U.S. Court of Appeals for the Tenth Circuit, former Committee member Gregory Katsas is a nominee for a judgeship on the U.S. Court of Appeals for the D.C. Circuit, and Committee reporter Gregory Maggs is a nominee for a judgeship on the U.S. Court of Appeals for the Armed Forces.

II. Approval of the Minutes

An error in the spelling of Acting Solicitor General Jeffrey B. Wall's name in the draft minutes of the May 2017 meeting of the Advisory Committee was noted and corrected. A motion to approve the draft minutes was then made, seconded, and approved.

III. Report on June 2017 Meeting of the Standing Committee

The reporter presented a report of the action taken by the Standing Committee at its June 2017 meeting. As described in the Advisory Committee Agenda Book at 31, the Advisory Committee recommended that the Standing Committee (1) send proposed amendments to Appellate Rules 8, 11, 25, 26, 28.1, 29, 31, 39, and 41, and Forms 4 and 7 to the Judicial Conference of the United States and (2) publish proposed amendments to Appellate Rules 3, 13, 26.1, 28, and 32 for public comment. The Standing Committee approved these recommendations at its June 2017 meeting with the minor changes noted in the Agenda Book.

IV. Discussion Items

A. Item 09-AP-B: Proposal to Amend Rule 29 to Allow Indian Tribes and Cities to File Amicus Briefs without Leave of Court or Consent of Parties

Judge Chagares presented discussion Item 09-AP-B, which concerns a proposal to allow Indian tribes and cities to file amicus briefs under Rule 29 without leave of the court or the consent of the parties. *See* Agenda Book at 131. Judge Chagares noted that the Committee had last considered the issue in 2012. At that time, the Committee took no action and recommended revisiting the issue in 2017. Judge Chagares suggested that the question for the Committee now was whether the matter should be pursued or removed from the Committee's agenda.

Mr. Letter recounted some of the history of the matter. He said that some judges thought that Indian tribes should be accorded the same dignity as other sovereigns under Rule 29. He

informed the Committee that the Solicitor General saw no need for amending Rule 29 but would not oppose the amendment if the judges supported it.

An attorney member said that she wondered why Indian tribes were not treated the same as states and the United States. If the policy is to allow sovereigns to file, then it would be consistent to add Indian Tribes. Cities, however, would not need to be included because they are subdivisions of states.

Mr. Coquillette recounted that Judge Sutton had spent a lot of time checking with judges and Indian tribes about the matter and had concluded that this was more of an academic issue than a practical one. Mr. Coquillette recalled that research could not locate any instance in which an Indian tribe was denied leave to file an amicus brief. But Mr. Coquillette said that allowing cities to file amicus briefs without leave of the court or party consent might cause problems.

A judge member observed that Indian tribes, unlike most states and the United States, typically hire law firms to represent them. Accordingly, there may be more recusal issues arising out of amicus briefs filed by Indian tribes than amicus briefs filed by states or the United States.

Mr. Letter noted that foreign nations are sovereign and are not permitted to file amicus briefs without leave of the court or consent of the parties. He also noted that the United States generally does not oppose amicus briefs.

An attorney member asked for clarification on the rules on when counsel for an amicus would require recusal. Judge Chagares and Judge Hall said that their Courts of Appeals generally treat amicus briefs the same as other briefs. The attorney member also asked what percentage of motions to file an amicus brief are denied. The clerk representative said that they were seldom denied unless they caused a recusal or were not in conformity with the rules. The attorney member also asked how the word "state" in Rule 29 is defined. Mr. Letter said that Rule 1(b) defines the term "state" to include territories, Puerto Rico, and D.C.

Judge Campbell discussed the recently proposed amendments to Rule 29. The amendments would allow a court to strike or deny leave to file an amicus brief if the brief would cause a recusal. But these amendments do not apply to amicus briefs filed by states or the United States. They therefore would also not apply to Indian tribes if the rule were amended to treat Indian tribes like the states and the United States.

A judge member moved that the Committee not act on the proposal given the general tenor of the comments. The motion was seconded and then passed. Judge Chagares said that the matter could be brought up again in the future if the Committee desired.

B. Potential Amendments to Rules 5(a)(1), 21(a)(1) and (c), 26(c), 32(f), and 39(d)(1) Regarding Proof of Service

The reporter introduced a new matter concerning potential amendments to Rules 5(a)(1), 21(a)(1) and (c), 26(c), 32(f), and 39(d)(1) regarding proof of service. *See* Agenda Book at 131. He explained that proposed changes to Rule 25(d) will eliminate the requirement of a proof of service when a paper is presented for filing through the court's electronic filing system. Accordingly, slight changes to other rules that address proof of service might be necessary.

The Committee first discussed the proposed amendments to Rule 25(d). The clerk representative was concerned that the proposed amendment might not address situations in which some parties were served electronically and some parties were served non-electronically. The Committee noted the potential issue. But the sense of the Committee was to take no action at this time because the proposed amendment to Rule 25(d) matches the proposed amendment to Civil Rule 5(d)(1)(B), and both proposals are currently before the Supreme Court. The Committee may wish to revisit the issue if actual problems arise in the future.

The Committee considered and approved the proposed changes to Rule 5(a)(1). *See* Agenda Book at 180-81.

The Committee considered the proposed changes to Rule 21, *see* Agenda Book at 181-82, and approved the changes as slightly modified by the style consultants. The approved version of the proposal reads as follows:

Rule 21. Writs of Mandamus and Prohibition, and Other Extraordinary

Writs

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

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

* * * * *

The Committee then took a brief recess. During the recess, an alternative was drafted, printed, and circulated to the Committee. The Committee approved this alternative proposal subject to minor adjustments. As approved, the proposal reads as follows:

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

2 * * * * *

3 **(c) Additional Time after Certain Kinds of Service.** When a party may or
4 must act within a specified time after being served with a paper, and the paper is
5 not served electronically on the party or delivered to the party on the date stated
6 in the proof of service, 3 days are added after the period would otherwise expire
7 under Rule 26(a) ~~unless the paper is delivered on the date of service stated in the~~
8 ~~proof of service. For purposes of this Rule 26(c), a paper that is served~~
9 ~~electronically is treated as delivered on the date of service stated in the proof of~~
10 ~~service.~~

The Committee did not approve a revised Committee Note during the meeting.

The Committee considered an amendment to Rule 32(f). *See* Agenda Book at 184-85. The Committee first determined that the phrase "the proof of service" should be changed to "a proof of service" because there will not always be a proof of service. Further consideration led the Committee to conclude that two other uses of the word "the" should also be changed to "a" for the same reason. As approved by the Committee, the proposed change to Rule 32 reads as follows:

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

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

- 4 • ~~the~~ a cover page;
5 • a corporate disclosure statement;²
6 • a table of contents;
7 • a table of citations;

² The Standing Committee has published for public comment a proposal that will change "corporate disclosure statement" to "disclosure statement."

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

The Committee discussed and approved the proposed change to Rule 39. *See* Agenda Book at 185.

After the Committee considered and proposed all of the changes above, Judge Campbell observed that they might be properly seen as technical correction to the Rules to conform to the amendments to Rule 25(d). As a result, he did not see the need to publish them for additional comments. The sense of the Committee was to recommend this approach to the Standing Committee.

C. Item No. 16-AP-D: Appellate Rule 3(c)(1)(B) and the Merger Rule

Judge Chagares next presented a new proposal, prepared by former Committee member Neal Katyal, regarding Rule 3(c)(1)(B) and the Merger Rule. *See* Agenda Book at 189.

Mr. Byron expressed caution in taking action to address the interpretation of Rule 3(c)(1)(B). He was concerned that the case law in the Eighth Circuit, upon closer examination, might not be so clearly divergent from the decisions of other Courts of Appeals. He explained that there is often some uncertainty as to whether a particular order is a final order. He also said that there were other cases where it would be appropriate to inquire into the party's intent. Judge Chagares agreed, and said that revising the rule would be a really complex matter.

An attorney member said that the issue is often very fact-specific. He explained: "If you say I am appealing order A and order B, then it is clear that you are not appealing order C." An academic member said that it should be clearer what is a final order. Mr. Letter said that lawyers often take a belt-and-suspenders approach, and say that they are appealing the final judgment and specific orders.

Following the discussion, Judge Chagares asked for the views of the Committee. An academic member proposed further study. Mr. Letter suggested that the main point should be to make the rules clearer. The Chair formed a subcommittee to consider the matter further. The members of the subcommittee are Mr. Letter, Mr. Byron, Mr. Landau, and Prof. Sachs.

D. New Discussion Item Regarding Possible Amendments to Rules 10, 11, and 12

Mr. Byron led the discussion of a new suggestion for amending Rules 10, 11, and 12 to address electronic records. *See* Agenda Book at 197. He explained that these Rules were mostly directed to clerks of court. Accordingly, the initial question is whether electronic records currently present a problem for the clerks.

The clerk representative informed the Committee that she had spoken to clerks of court from other Courts of Appeals. The other clerks did not have any objection to changing the word “send” to “make available” in Rules 10, 11, and 12 as proposed. But she further noted that various Courts of Appeals follow different approaches on whether the District Courts or the Courts of Appeals do relevant tasks with respect to records. She suggested that, in the future, records might be kept in a central repository and might not be transmitted from District Courts to Courts of Appeals. Accordingly, by the time the proposed amendment works its way through the system, it might be obsolete. She also noted that there are still many paper records, especially in state habeas corpus cases.

Judge Chagares asked whether there was a risk of upsetting what is now a stable system. A liaison member was concerned that if the District Court did not send the record, but merely made it available, the record might be incomplete. Judge Chagares said that it was not clear that a problem needs to be fixed and that any amendment might soon be obsolete.

The sense of the committee was to take the matter off the agenda.

E. New Discussion Item Regarding a Circuit Split on Whether Attorney’s Fees Are “Costs on Appeal” Under Rule 7

Judge Chagares presented a matter concerning a circuit split on whether attorney’s fees are “costs on appeal” under Rule 7. *See* Agenda Book at 223. He thanked Ms. Gailey, the former Rules clerk, for her research into the matter. He noted that the Committee previously had considered the issue, and thanked Ms. Struve for finding memoranda on the subject that the Committee previously considered. Summarizing the research, he explained that the U.S. Court of Appeals for the Third Circuit appears to be an outlier, but has taken a position only in a non-precedential opinion.

Ms. Struve said that the question was a perennial issue. An attorney member asked why the question was addressed in the Appellate Rules instead of the Civil Rules. He suggested that Civil Rule 62 should address the question. A judge member agreed with this point. The clerk representative said that few cases involve bonds.

An academic member said that it was unclear to him how the issue comes up. The Rule refers to costs, not fees, and usually the law distinguishes between costs and fees. He said that maybe the solution would be to remove the word "costs" and specify more clearly what should and what should not be covered.

Judge Campbell said that the rule formerly provided for an automatic \$250 bond. He said that there now may be strategic use of the rule to require a large bond to prevent the other party from appealing. He also said that many of the cases citing the rules deal with class action objectors. He suggested asking Mr. Edward Cooper, the reporter for the Civil Rules Advisory Committee, for his opinion.

The sense of the Committee was to keep this matter on the Agenda and ask the Civil Rules Committee for its opinion.

V. New Matters

Judge Chagares led a discussion of possible new matters that the Committee might want to take up. He said that he recently had spoken to the American Academy of Appellate Lawyers (AAAL) and that they were concerned with three matters. First, the AAAL wants to clarify when a cross-appeal is necessary. The AAAL believes that cross-appeals often are filed just to avoid the risk that one might be needed. Second, the AAAL was concerned about judges considering facts that are not in the record. The AAAL thought that the court should provide some sort of notice to the parties before doing this. A judge member pointed out that there was the possibility of seeking rehearing. Third, the AAAL was concerned about courts' sua sponte consideration of legal issues. The AAAL thinks parties should receive notice and opportunity to be heard. Judge Chagares said that the AAAL had not yet submitted any proposals to the Committee.

Judge Chagares next suggested that the Committee might review the rules regarding the appendix. In his experience, much of what is in the appendix is unnecessary. He suggested that it might be best to require the appendix to be filed seven days after the last brief. An attorney member said that the rule as written is often not followed. He believed that it is better to have a deferred appendix that only contains what is cited in the brief (including some context). But Mr. Letter said that a potential problem with a deferred appendix is that the parties then have to file a revised brief that cites the appendix. The clerk representative agreed that this is a problem, especially when trying to docket briefs. She said that in the future, briefs will contain hyperlinks to the actual record, and appendices therefore might be unnecessary.

An attorney member said that every Court of Appeals now has its own rules on appendices. Mr. Byron predicted that most Courts of Appeals would be unlikely to want to

change their local rules. The attorney member responded that it might still be better to have an improved default rule. The Chair formed a subcommittee to study the issue. The members of the subcommittee are Mr. Letter, Mr. Byron, Ms. Spinelli, and Judge Bybee.

Judge Chagares asked whether members of the Committee had ideas for improving the efficiency of appellate litigation. An attorney member raised the issue of how much discretion clerks have under Rule 42(b) in not allowing parties to dismiss a case after they have settled. A liaison member said that a request to dismiss is often “subject to settlement agreements being executed.” Ms. Struve said that there are very few cases that deny leave to dismiss. Mr. Letter said that sometimes judges say something like “the government should not be settling on these terms.” An academic member said that there are some situations in which settlements must be reviewed and others when they should not be reviewed. Mr. Byron asked whether it is necessary to have both parties sign the request for dismissal. A judge member asked whether the matter should be addressed in the Civil Rules. The chair formed a subcommittee to study the issue. The members of the subcommittee are Mr. Landau, Judge Kavanaugh, and Mr. Letter.

VI. Information About the Activities of the Other Committees

Judge Campbell reported that the Civil Rules Advisory Committee is looking at multi-district litigation, interlocutory appeals, third-party funding of litigation, and pilot programs aimed at improving discovery and making litigation quicker.

Judge Campbell reported that the Evidence Rules Advisory Committee is looking at issues under Rules 404(b), 702, and 609. He noted that one recommendation is to refine the analysis with respect to specific kinds of evidence like fingerprints, bite marks, etc.

Judge Campbell reported that the Criminal Rules Advisory Committee is looking for better ways to protect cooperators in criminal cases. He said that there were hundreds of instances in which cooperators were threatened or killed based on information included in court records.

Judge Campbell also observed that the House has passed bills that could affect appeals. HR 985 could make every class certification appealable as of right and would limit the kinds of classes that could be certified. The other legislation would address current rules requiring complete diversity, which are often manipulated. Another bill would alter Rule 11 standards.

VII. Adjournment

Judge Chagares thanked Ms. Womeldorf and her staff for organizing the dinner and meeting. He also thanked Ms. Waldron for all of her contributions to the Committee. He announced that the next meeting will be held on April 6, 2018 in Philadelphia.

The Committee adjourned at 12:15 pm.

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MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Meeting of January 4, 2018 | Phoenix, Arizona

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ATTENDANCE

The Judicial Conference Committee on Rules of Practice and Procedure held its spring meeting at the JW Marriott Camelback Inn in Scottsdale, Arizona, on January 4, 2018. The following members participated in the meeting:

Judge David G. Campbell, Chair	Professor William K. Kelley
Judge Jesse M. Furman	Judge Carolyn B. Kuhl
Robert J. Giuffra, Jr., Esq.	Judge Amy St. Eve
Daniel C. Girard, Esq.	Elizabeth J. Shapiro, Esq.*
Judge Susan P. Graber	Judge Srikanth Srinivasan
Judge Frank Mays Hull	Judge Jack Zouhary
Peter D. Keisler, Esq.	

The following attended on behalf of the Advisory Committees:

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

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

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

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

Advisory Committee on Evidence Rules –
Judge Debra Ann Livingston, Chair
Professor Daniel J. Capra, Reporter

* Elizabeth J. Shapiro, Deputy Director of the Department of Justice’s Civil Division, represented the Department on behalf of the Honorable Rod J. Rosenstein, Deputy Attorney General.

Providing support to the Committee were:

Professor Daniel R. Coquillette	Reporter, Standing Committee
Professor Catherine T. Struve (by telephone)	Associate Reporter, Standing Committee
Rebecca A. Womeldorf	Secretary, Standing Committee
Professor Bryan A. Garner	Style Consultant, Standing Committee
Professor R. Joseph Kimble	Style Consultant, Standing Committee
Julie Wilson (by telephone)	Attorney Advisor, RCS
Scott Myers (by telephone)	Attorney Advisor, RCS
Bridget Healy (by telephone)	Attorney Advisor, RCS
Shelly Cox	Administrative Specialist, RCS
Dr. Tim Reagan	Senior Research Associate, FJC
Patrick Tighe	Law Clerk, Standing Committee

OPENING BUSINESS

Judge Campbell called the meeting to order. He introduced the Committee's new members, Judge Srinivasan of the U.S. Court of Appeals for the District of Columbia, Judge Kuhl of the Los Angeles Superior Court, and attorney Bob Giuffra of Sullivan & Cromwell's New York Office, as well as other first-time attendees supporting the meeting.

He announced that Chief Justice Roberts appointed Cathie Struve Associate Reporter to the Standing Committee and that Dan Coquillette will retire as Reporter to the Standing Committee at the end of 2018. Dan Coquillette will continue to serve as a consultant to the Standing Committee. Judge Campbell thanked Professor Coquillette for his tremendous support and guidance throughout the years.

Judge Campbell also welcomed Judge Livingston as the new Chair of the Advisory Committee on Evidence Rules. He also informed the Standing Committee that Professor Greg Maggs was nominated to the U.S. Court of Appeals for the Armed Forces, and once confirmed, Professor Maggs will be ineligible to continue as Reporter to the Advisory Committee on Appellate Rules. He thanked Professor Maggs for his service.

For the new members, Judge Campbell explained the division of agenda items at the Standing Committee's January and June meetings. The January meeting tends to be an informational meeting with few action items, which is true for today's meeting. The January meeting typically serves to get the Standing Committee up to speed on what is happening in the advisory committees so that the Standing Committee is better prepared to make decisions at its June meeting, where proposals are approved for publication or transmission to the Supreme Court. The Committee's January meeting also serves to provide feedback to the advisory committees on pending proposals. Judge Campbell encouraged all Committee members to speak up on issues and topics raised by the advisory committees.

Rebecca Womeldorf directed the Committee to the chart, included in the Agenda Book, that summarizes the status of current rules amendments in a three-year cycle. This chart shows

the breadth of work underway in the rules process, whether technical or substantive rules changes. The chart also details proposed rules pending before the U.S. Supreme Court that, if approved, would become effective December 1, 2018. Between now and May 1, 2018, the Committee will receive word if the Supreme Court has approved the rules. If so, the Court and the Committee will prepare a package of materials for Congress. Around the end of April, there will be an order on the U.S. Supreme Court's website noting that the proposed rules have been transmitted to Congress. If Congress takes no action, this set of rules becomes effective December 1, 2018.

The chart also notes which proposed rules are published for comment and public hearings, whether in D.C. or elsewhere in the country. If there is insufficient interest, the public hearings are cancelled. So far, we have not had requests to testify about these published rules, but have received some written comments. These rules will most likely come before the Committee for final approval in June 2018.

APPROVAL OF THE MINUTES OF THE PREVIOUS MEETING

Upon a motion by a member, seconded by another, and by voice vote: **The Standing Committee approved the minutes of the June 12-13, 2017 meeting.**

TASK FORCE ON PROTECTING COOPERATORS

Judge Campbell and Judge St. Eve updated the Committee on the Task Force on Protecting Cooperators. Judge Campbell began by reviewing the origins of the Cooperators Task Force, from a letter by the Committee on Court Administration and Case Management ("CACM") detailing various recommendations to address harm to cooperators to Judge Sutton's referral of CACM's recommendation for various rules-related amendments to the Criminal Rules Committee. Director Duff also formed a Task Force on Protecting Cooperators to address various practices within the judiciary, the Bureau of Prisons ("BOP"), and the Department of Justice ("DOJ") that might address the problem in a comprehensive way.

Judge St. Eve provided an overview of the Task Force, noting that Judge Kaplan serves as Chair. She explained that the Task Force has explored what is driving harm to cooperators and what the Task Force can do to address the problem. There are four separate working groups within the Task Force – namely, a BOP Working Group, a CM/ECF Working Group, a DOJ Working Group, and a State Practices Working Group. Judge St. Eve reviewed the work completed or underway by each working group. The State Practices Working Group explored and did not identify any state practices that could be adopted by the federal courts to address harm to cooperators.

One challenge the Task Force faces is the variety of policies and procedures used by federal district courts across the country to reduce harm to cooperators, from the District of Maryland to the Southern District of New York. The DOJ Working Group is trying to synthesize and identify commonalities among disparate local policies and procedures.

The BOP Working Group found consistent themes and issues, and Judge St. Eve noted that BOP has been incredibly cooperative throughout this process. The BOP does not collect statistics documenting the extent of the harm to cooperators. Harm is occurring, primarily at high and medium security prisons, not low security facilities. Within these high and medium security prisons, prisoners are often forced by other inmates to “show their papers,” such as sentencing transcripts and plea agreements, to demonstrate that they are not cooperators. These papers can be electronically accessed through PACER and CM/ECF.

As a result of these findings, the BOP Working Group will recommend that the BOP make these sentencing-related documents contraband within the prisons. Because some prisoners need access to these documents, BOP will work with wardens to establish facilities within the prisons where prisoners can securely access these documents. The Group is also recommending that BOP punish individuals for pressuring and threatening cooperators. Some recommended changes will require approval from BOP’s union prior to implementation.

Another major issue is developing other types of limitations to place on PACER and CM/ECF to reduce the identification of cooperators, consistent with First Amendment and other concerns. On January 17, the CM/ECF Working Group will meet in Washington D.C. to hear from federal public defenders on this issue. The full Task Force meets on January 18.

Judge Campbell noted that the Committee does not have jurisdiction over BOP Policy or CM/ECF remote access. However, the question for the Committee is whether and what rules-based changes can be made to further help address this problem.

Judge Bates asked whether the Task Force has received any feedback from the defense bar about limiting incarcerated individuals’ access. Judge St. Eve noted that a federal defender is on the Task Force and that federal defenders support limiting access within BOP so long as prisoners can still access their documents when necessary for appeals and other court proceedings.

Professor Coquillette asked why the BOP cannot collect empirical data, and Judge St. Eve responded that the Task Force considered proposing such a recommendation. The Task Force decided against this recommendation after the BOP voiced concerns that collecting the data will create more harm than good. Judge Campbell noted the FJC survey, which provides anecdotal evidence in which judges reported over 500 instances of harm to cooperators, including 31 murders, and that much of this harm stemmed from the ability to identify cooperators from court documents. This FJC survey was a major impetus for the CACM letter. One committee member noted that he believes that the problem of harm to cooperators is better addressed by the BOP, instead of through rules changes. Judge St. Eve emphasized that BOP officials – especially BOP staff working at high and medium security facilities – know that harm to cooperators is a problem and are committed to better addressing it.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Molloy provided the report of the Advisory Committee on Criminal Rules, focusing largely on the Advisory Committee's decision to oppose adopting CACM-recommended rules to reduce harm to cooperators. As noted earlier, CACM recommended that the Standing Committee amend various criminal rules to reduce harm to cooperators. The Committee referred the CACM recommendation to the Criminal Rules Committee, which created the Cooperator Subcommittee, also chaired by Judge Kaplan.

At the Advisory Committee meeting in October 2017, the Cooperator Subcommittee presented its research and recommendations about CACM-based rules amendments. In drafting rule amendments consistent with CACM's proposal, the Subcommittee balanced competing interests – namely, transparency and First Amendment concerns with harm reduction concerns. After many meetings, the Subcommittee concluded that amendments to Criminal Rules 11, 32, 35, 47, and 49 would be required to implement CACM's recommendations, and the Subcommittee drafted these amendments for further discussion.

The Subcommittee's draft amendments engendered a lively discussion at the Advisory Committee meeting. Judge Kaplan and the DOJ abstained from voting. The Advisory Committee as a whole voted on two questions. First, the Advisory Committee unanimously agreed that the draft rules amendments would implement CACM's proposals. Second, the Advisory Committee agreed, albeit with two dissenting votes, not to recommend these amendments.

With this overview, Judge Molloy sought discussion about whether the Committee agreed with Advisory Committee's decision. To assist the Committee, Professors Beale and King provided an overview of the various proposed amendments to Criminal Rules 11, 32, 35, 47, and 49, that had been considered.

One Committee member questioned how defense bar advocacy is impaired when plea agreements are sealed on a case-by-case basis because defense attorneys are not losing any information that they otherwise would have. Professor King noted that sealing practices vary district-by-district, and so, a rule about sealing on a case-by-case basis would not reduce access to that information in districts that rarely or never seal. Professor King also noted that the defense bar indicated that the terms of plea agreements are important, that they need this information in order to assess their client's proposed plea agreement, and that sealing plea agreements in every case would impair their ability to do this. Another member asked about whether sealing the plea agreements in every case would prevent others from identifying cooperators. Professor Beale responded that it would prevent others from identifying cooperators through plea agreements, but that there are other ways to learn about cooperators – through lighter sentences, Brady disclosures, etc. She articulated that the Advisory Committee did not think that Rule 11 was an effective response to the problem, especially given that this rule change would be a transition to secrecy.

One member asked whether constitutional challenges have been raised in districts that have implemented aggressive sealing tactics in order to protect cooperators. Judge St. Eve noted that she is not aware of any constitutional challenges. This may reflect that these districts have received

buy-in as to sealing practices from prosecutors, defenders, and judges prior to implementation. Professor Beale noted that some instances of constitutional challenges by an individual do exist.

Judge Campbell interjected to respond to a few comments raised by committee members. First, he stated that there is no way to absolutely prevent cooperator identity from becoming known but that this does not mean steps cannot be taken that will reduce the dissemination of such information. Moreover, there seem to be ways to reduce the identification of cooperators without increased sealing, whether by changing the appearance of the docket on CM/ECF or adopting the “master sealed event” approach implemented in the District of Arizona. Judge Campbell emphasized that the Advisory Committee should not give up on amendments that would not result in more secrecy.

More generally, many Committee members asked questions about the overall implications of CACM-based rules changes. One member inquired whether these rules changes would (negatively) affect non-cooperators who would no longer be able to demonstrate their non-cooperation status. Professor King noted that this is a tricky issue and that the effect of rule-based changes on non-cooperators is one reason why the defense bar has no unanimous position on this topic. Another member asked whether the CACM-based rules changes would encourage more cooperation. From the Task Force perspective, Judge St. Eve said it is not part of the Task Force’s mission to consider whether rules or policy changes would encourage more cooperation. The Task Force’s charter focuses on ways to reduce harm to cooperators. One member voiced support for more judicial education on how to reduce harm to cooperators.

Another member noted that harm to cooperators has been occurring long before CM/ECF and that cooperator information can be learned from many sources other than CM/ECF. This member asked whether the Task Force believed that there would be some benefit from a national policy instead of the disparate local policy approach. Judge St. Eve stated that the Task Force thinks a national policy is the best option, and the DOJ is considering a national approach as well. However, due to local variation, the Task Force is facing the challenging question of what that national policy should be. Professor Capra noted that in 2011 a Joint CACM/Rules Committee considered this issue and determined that a national policy or approach is not feasible. Judge St. Eve stated that the Task Force is aware of this 2011 conclusion. Professor Beale noted one advantage to a rules-based change is that proposed rules would be published for public comment. In addition, rules promulgated through the Rules Enabling Act process would also obviously have national enforcement effect.

In light of this discussion, Judge Campbell asked whether the Committee agreed with the Advisory Committee’s decision not to adopt the CACM rules-based changes. Before soliciting feedback, Judge Campbell noted that the DOJ did not take a position on these CACM rules-based amendments because DOJ wants to wait until the Task Force concludes its work. He also stated that some Advisory Committee members questioned whether the Advisory Committee could revisit rules changes depending on the outcome of the Task Force’s work. Unless the Committee disagrees with the decision not to adopt the CACM rules-based changes at this time, the Advisory Committee opted, if necessary, to revisit these rules after the Task Force concludes its work.

Many members voiced agreement with the Advisory Committee's decision to reject the CACM rules-based amendments. One member supported the District of Arizona's approach, and another noted that, without empirical data about the causes of the problem, the Advisory Committee's position seemed wise. This member also stated that CM/ECF seems to be a problem and that CM/ECF should be changed. Another member thought consideration of any rules changes should wait until the CM/ECF Working Group makes its recommendations. One member suggested that achieving a national policy is difficult and the source of the problem stems from the BOP. This member believed that the harms from rules-based changes exceed the benefits.

Judge Molloy concluded his report by providing updates about the Advisory Committee's other work. After the mini-conference on complex criminal litigation, the Advisory Committee recommended that the FJC prepare a Manual on Complex Criminal Litigation, which would parallel the Manual on Complex Civil Litigation. The Advisory Committee is also considering a few new rules amendments. First, the Cooperator Subcommittee is considering amending Rule 32(e)(2) to remove the requirement to give the PSR to the defendant. This change could help address one aspect of the cooperator identification problem. Second, the Advisory Committee rejected a proposal to amend Rule 43 to permit sentencing by videoconference. Third, the Advisory Committee is considering re-examining potential changes to Rule 16 regarding expert disclosure in light of an article by Judge Paul Grimm. Lastly, the Advisory Committee is considering changes to Rule 49.2, which would limit remote access in criminal cases akin to the remote access limitations imposed by Civil Rule 5.2. However, the Advisory Committee is holding in abeyance its final recommendation on this rule change until after the Task Force concludes its work.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Bates presented the report of the Advisory Committee on Civil Rules, which included only informational items and no action items.

Rule 30(b)(6): The Subcommittee on Rule 30(b)(6) began with a broad focus, but it has narrowed the issues under consideration, primarily through examination and input from the bar. There is little case law on this topic in part because these problems are often resolved before judicial involvement or with little judicial involvement. The Subcommittee received more than 100 written comments on its proposed amendment ideas, and the feedback revealed strong competing views, often dependent upon whether the commenter typically represents plaintiffs or defendants.

Based on this input, the Subcommittee on Rule 30(b)(6) is focusing on amending Rule 30(b)(6) to require that the parties confer about the number and description of matters for examination. The Subcommittee is, however, still tinkering with the language. The Subcommittee is also receiving additional input on some select topics, including whether to add language to Rule 26(f) listing Rule 30(b)(6) depositions as a topic of consideration.

In terms of timeline, the Subcommittee will make a recommendation to the Advisory Committee at its April 2018 meeting. Its recommendation, if any, will be presented to the Standing Committee in June 2018.

One member asked why the judicial admissions issue was eliminated as an issue to be addressed. The Subcommittee concluded that there is little utility to a rules-based approach to this problem. Although tension in the case law exists, the cases are typically sanction-based cases related to bad behavior. The Subcommittee is concerned that a rule change directed to the judicial admissions issue could create more problems than it would solve.

Some members voiced support for adding a “meet and confer” element to Rule 30(b)(6), noting that it would help encourage parties to agree on the topics of depositions before the deposition and thereby reduce litigation costs. Others were skeptical that the parties would actually meet and confer to flesh out topics for the depositions. One member suggested that the benefit of this rule change would not exceed the work necessary to change the rule. Judge Campbell noted that this is a unique problem for a frequently used discovery tool. The Advisory Committee investigated this problem ten years ago and concluded that it was too difficult to devise a rule change to reduce the problem. Based on the comments raised, Judge Campbell wondered whether education of the bar, through a best practices or guidance document for Rule 30(b)(6), may be a better solution than a rule change.

Social Security Disability Review: The Administrative Conference of the United States (“ACUS”) proposed creating uniform procedural rules governing judicial review of social security disability benefit determinations by the Social Security Administration. The Social Security Administration supports ACUS’s proposal. The Advisory Committee is in the early stages of considering this proposal, and in November 2017, it met with representatives from ACUS, the Social Security Administration, the DOJ, and claimants’ representatives. At this meeting, it became clear that a rules-based approach would not address the major issues with respect to social security review, including the high remand rate, lengthy administrative delays, and variations within the substantive case law governing social security appeals.

The Advisory Committee created a Social Security Subcommittee to consider the ACUS proposal. The Subcommittee will focus on potential rules governing the initiation of the case (e.g., filing of a complaint and an answer) and electronic service options. The Subcommittee will not consider discovery-based rules because this does not appear to be a major issue.

Some broad issues remain for the Subcommittee’s determination, including the kind of rules it would devise, the placement of the rules (e.g., within the Civil Rules), concerns relating to substance-specific rulemaking, and whether to devise procedural rules for all administrative law cases. The Subcommittee thus far is not inclined to draft procedural rules for all types of administrative law cases, which can vary greatly. Although the Social Security Administration would like rules regarding page limits and filing deadlines, the Civil Rules do not typically include such specifications. The Subcommittee will provide an update to the Advisory Committee at its April meeting and to the Standing Committee in June.

One member asked about trans-substantivity, noting that the admiralty rules do not fit well within the Civil Rules and that rules governing judicial review of one administrative agency seem to raise even greater trans-substantivity concerns because such rules would be less general. This member asked whether the Subcommittee has considered that procedural rules for all administrative law cases would seem to raise fewer trans-substantive concerns than social security rules alone. Judge Bates said that the Subcommittee has not considered this issue yet but will be considering trans-substantivity concerns. Professor Cooper raised an empirical question about the extent to which all administrative law review cases focus primarily or solely on the administrative record.

One member encouraged the Subcommittee to consider Appellate Rules 15 and 20 when devising particular rules governing review of social security benefits decisions. Professor Struve seconded this suggestion. Another member asked about how the specialized rules for habeas corpus and admiralty came about under the Rules Enabling Act. Professors Cooper and Marcus provided an overview of the formation of these rules and noted that the habeas corpus rules are a good analogy for creating specialized rules for social security decisions.

Another member asked whether the Subcommittee is considering the patchwork of local district court rules governing social security review. The Subcommittee is looking at the panoply of local rules and how these rules impact the time for review at the district court level. Professor Cooper noted that there is not a wide divergence in the amount of time it takes courts to review social security decisions. Judge Campbell noted that 52 out of 94 district courts have their own procedural rules and that, according to the Social Security Administration's estimates, uniform rules would save the agency around 2-3 hours per case. Because the Social Security Administration handles around 18,000 cases per year, uniform rules would result in significant cost savings for the agency.

Multidistrict Litigation ("MDL") Proceedings: The Advisory Committee has received some proposals to draft specialized rules governing MDL proceedings, some of which parallel legislation pending in Congress such as HR 985. The business and defense interests have submitted these proposals, and none is from the plaintiff side. Judge Bates provided an overview of these various proposals, noting the focus on mass tort litigation.

The Advisory Committee has created a MDL Subcommittee, headed by Judge Bob Dow (who also headed the Class Action Subcommittee). The Subcommittee has a significant amount to learn. The Subcommittee has received written comments from the defense bar but it has yet to hear from the plaintiffs' bar, the Judicial Panel on Multidistrict Litigation, judges who have handled significant numbers of MDLs, and the academic community. The Subcommittee is currently creating a reading list as well as identifying research projects. The Subcommittee also has to explore how it wants to proceed, and given these factors adoption of rules, if any, will be a long and careful process. The Subcommittee will take six to twelve months of information gathering. Judge Campbell clarified that the Rules Enabling Act process guarantees that it would take at least three years before any rules are adopted (assuming any are proposed), but that these proposals are receiving careful attention.

Some members noted that this an important and valuable area to investigate given that MDLs comprise a significant portion of the federal docket. Because these cases often require considerable flexibility, innovation, and discretion, others expressed skepticism about the necessity or ability to devise a specialized set of rules for MDL proceedings. Another member noted that devising such rules may be difficult given that mass tort MDLs raise different issues and problems than antitrust MDLs, for example.

One member suggested that the Subcommittee consider the process for appointing lead counsel in light of Civil Rule 23(g)'s objective standard and how lead counsels are appointed under the Private Securities Litigation Reform Act. Another member recommended speaking with experienced MDL litigators. Other members recommended attending a variety of MDL conferences occurring around the country in 2018 as well as considering the best practices materials compiled by the MDL Panel.

Third-Party Litigation Finance: The Advisory Committee has received a proposal which would require automatic disclosure of third-party litigation financing agreements under Rule 26(a)(1)(A)(v). Although this proposal does not pertain only to MDLs, the MDL Subcommittee is charged with exploring it. The Advisory Committee considered similar proposals in 2014 and 2016 but did not recommend any changes to the Civil Rules. Like the previous proposals, this proposal presents a definitional problem regarding what constitutes third-party litigation financing. It is also controversial, with a clear division between the plaintiff and defense bars, and it presents significant ethical questions. It is not clear that the Advisory Committee would have reconsidered this proposal again so soon, but because third-party litigation financing issues were raised within the MDL proposals, the Advisory Committee decided to examine the issue further as part of the rulemaking proposals for MDLs.

Other Proposals: The Advisory Committee received a proposal to amend Rule 71.1(d)(3)(B)(i) to discard the preference for publishing notice of a condemnation action in a newspaper published in the county where the property is located. The Advisory Committee will further explore this proposal, and the Department of Justice has indicated that it does not have a problem with eliminating the preference. The Advisory Committee wants to further explore the implications of eliminating the preference.

Another proposal received by the Advisory Committee was to amend Rule 16 so that a judge assigned to manage and adjudicate a case could not also serve as a "settlement neutral." The Advisory Committee removed this matter from its agenda because it is not clear that there is a problem that a rule amendment could or should solve.

The Advisory Committee was also asked to explore the initial discovery protocols for the Fair Labor Standards Act – a request which parallels earlier efforts regarding initial discovery protocols for employment cases alleging adverse action. The Advisory Committee hopes judges consider these protocols favorably, but it did not think the Advisory Committee should endorse these protocols. The Advisory Committee concerns itself with rules adopted through the Rules Enabling Act process and does not endorse work developed by other entities outside the rulemaking process.

Pilot Project Updates: Two courts, the District of Arizona and the Northern District of Illinois, have enlisted in the Mandatory Initial Discovery project. It is too early to report feedback on its results. Judge Campbell noted that the project has been going well in the District of Arizona, stating that initial feedback has been positive and that the district has experienced fewer issues than expected. He suspects, however, that problems may arise during summary judgment and trial phases for cases filed after May 1 when parties request that district judges exclude evidence not disclosed during the mandatory initial discovery periods. The district judges in Arizona are anticipating this and are prepared to handle the problems as they arise. Judge Campbell also applauded the FJC's efforts with developing and implementing this project. Judge St. Eve reported that the Mandatory Initial Discovery project rolled out very smoothly in the Northern District of Illinois and that the district has received positive feedback thus far.

The Expedited Procedures project has been stalled for want of participating district courts. The Advisory Committee has enlisted Judge Jack Zouhary to spearhead its efforts to drum up participation. The Advisory Committee has found courts often indicate initial support for the pilot, but ultimately decline to participate. Their support typically wanes due to vacancies, caseloads, or lack of unanimous participation by judges within a district. The project's requirements have been modified to permit more flexibility and to allow for less than unanimous participation by district judges within a given district.

Judge Zouhary noted his district agreed to participate in the Expedited Procedures project because his district already had similar rules in place, albeit using different terminology. A letter of endorsement for the project has been drafted, and some organizations, including the American College of Trial Lawyers, the Federal Bar Association, the FJC, the NYU Civil Jury Project, and the American Board of Trial Advocates, have expressed excitement for the project and are considering joining the letter.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Ikuta gave the report of the Advisory Committee on Bankruptcy Rules. At its September 2017 meeting, the Advisory Committee recommended publishing changes to two rules: Rule 2002(h) (Notices to Creditors Whose Claims are Filed) and Rule 8012 (Corporate Disclosure Statement). Because the proposed amendments relate to a bankruptcy rule and an appellate rule that were published in August 2017, however, the Advisory Committee is waiting to review any comments before finalizing proposed language. The Advisory Committee plans to present the proposed changes at the Committee's June meeting.

Judge Ikuta discussed four additional information items: (1) withdrawal of a prior proposal to amend Rule 8023 (Voluntary Dismissals), (2) updates to national instructions for bankruptcy forms, (3) a suggestion to eliminate Rule 2013 (Public Record of Compensation Awarded to Trustees, Examiners, and Professionals), and (4) preliminary consideration of a proposal to restyle the bankruptcy rules.

The Advisory Committee decided to withdraw its prior recommendation to amend Rule 8023. Judge Ikuta said the proposed amendment was intended to be a reminder that a bankruptcy trustee who is party to an appeal may need bankruptcy court approval before seeking to dismiss the appeal. The Advisory Committee's Department of Justice representative raised a concern, however, that the change would be difficult for appellate clerks to administer. The Advisory Committee agreed that the proposed amendment could cause confusion, which outweighed the benefit of the proposed change. It therefore voted to withdraw the proposal from consideration.

The Advisory Committee updated national instructions for certain forms. Judge Ikuta explained that the December 1, 2017 amendments to Rule 9009 (Form) restricted the ability of bankruptcy courts to modify official forms, with certain exceptions. One exception allows for modifications that are authorized by national instructions. After learning the courts routinely modify certain notice-related forms to provide additional local court information, and that model court orders included as part of some official forms are often modified by courts to provide relevant details, the Advisory Committee approved national instructions that would permit these practices to continue.

The Advisory Committee is also looking into a suggestion from a bankruptcy clerk that it should eliminate or amend Rule 2013. The intent of the rule is to avoid cronyism between the bankruptcy bar and the courts. It requires the bankruptcy clerk to maintain a public record of fees awarded to trustees, attorneys, and other professionals employed by trustees and to provide an annual report of such fees to the United States trustee. The suggestion stated that compliance with this rule is spotty, and because a report regarding fees can be generated and provided on request, there is no need to keep systematic records. Judge Ikuta said that the Advisory Committee, with help from the FJC, will gather more information about current compliance with the rule before taking any steps. It expects to consider the issue at its spring 2018 meeting.

Finally, the Advisory Committee is considering whether it should commence the process of restyling the Bankruptcy Rules. The Advisory Committee is taking a phased approach before making this big decision. First, it is studying whether any restyling is warranted, given the close connection of the Bankruptcy Rules to the Bankruptcy Code and the use of many statutory terms throughout the rules. The Advisory Committee will also consider the views of its stakeholders, and it has asked the FJC to help it obtain input from users of the Bankruptcy Rules regarding the pros and cons of restyling. Because any input would be more meaningful and valuable if bankruptcy judges and practitioners could consider some exemplars of restyled rules, the Advisory Committee has asked the Committee's style consultants to assist in developing such exemplars from the eight rules in Part IV of the Bankruptcy Rules.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Livingston provided the report for the Advisory Committee on Evidence Rules. The Advisory Committee met on October 26 and 27, 2017, at the Boston College Law School, where the law school and Dean Vincent Rougeau were gracious hosts. She advised that she had no action items to report, but that there were several information items.

The Advisory Committee held a symposium in connection with its meeting. The symposium focused on forensic expert testimony, Rule 702, and Daubert. The topics discussed included the 2016 President’s Council of Advisors on Science and Technology’s (“PCAST”) report on forensic science in criminal courts and a potential “best practices” manual. The conference participants shared an interest in ensuring that expert testimony comported with Rule 702, but the focus was not on potential amendments to Rule 702, but instead, the applications of the rule. Some conference attendees suggested that a best practice manual might be more helpful than potential rule amendments. Judge Livingston stated that the Advisory Committee will discuss the findings from the conference at its spring 2018 meeting.

Judge Campbell noted that a panel of judges and lawyers at the Boston College event also raised concerns about possible abuses of Daubert motions in civil cases, and he suggested that the Civil Rules Advisory Committee be apprised of these concerns. Dan Capra noted a potential circuit split related to the admissibility of forensic evidence.

Next, Judge Livingston advised that the Advisory Committee published a proposed amendment to Rule 807, and that the public comment period is open until mid-February. The Advisory Committee will discuss all comments at its meeting in the spring.

The Advisory Committee is also considering a possible amendment to Rule 801(d)(1)(A). It sought informal input on a possible amendment in the fall of 2017, and it also obtained results from a survey conducted by the FJC. The Advisory Committee will consider the input at its spring meeting. A committee member noted that one possible area of consideration for the Advisory Committee is jury instructions regarding prior consistent statements.

The Advisory Committee is considering a possible amendment to Rule 404(b); however, disagreement exists within the Advisory Committee regarding a circuit split between the Third and Seventh Circuits. There is further disagreement about how the rule is being employed, and the Advisory Committee has discussed the three principal purposes of the rule, including the chain of reasoning, the balancing test, and additions to the notice provision. Judge Campbell noted the similarities to the discussion surrounding Rule 30(b)(6), where there is a disagreement regarding whether an amendment is needed. Another member added that while much of the discussion is about criminal cases, any changes would impact civil cases as well.

Other items that will be considered by the Advisory Committee at its spring meeting include possible amendments to Rule 606(b) (in light of the Supreme Court’s decision in *Pena-Rodriguez v. Colorado*) and to Rules 106 and 609(a)(1).

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Chagares provided the report for the Advisory Committee on Appellate Rules, which included several informational items and one discussion item. First, as to the discussion item, Judge Chagares reviewed the proposed amended rules pending before the Supreme Court for consideration, including the proposed amendments to Rule 25(d). The proposed amendment to Rule 25(d) would eliminate the requirement of proof of service when a document is filed through a court’s electronic-filing system, replacing “proof of service” with “filed and served.” Given the

pending amendment to Rule 25(d), the Advisory Committee decided that references to “proof of service” in Rules 5(a)(1), 21(a)(1) and (c), 26(c), and 39(d)(1) should be removed. Judge Chagares explained that these proposed amendments are technical and that the Advisory Committee did not believe publication of the technical changes was necessary.

During this discussion, several committee members raised concerns about the use of “filed and served” in Rule 25(d), suggesting elimination of the term “and served.” Judge Campbell noted that while a document filed electronically is served automatically, those not filed electronically need the instruction in the rule. Committee members made suggestions for various stylistic edits to the proposed rule amendments, and the Committee’s style consultants offered their views on the proposed language and edits, including present versus past tense. One committee member raised concerns about eliminating the proof of service language in Rule 39, given the subject-matter of the rule. Judge Campbell suggested adding to the committee notes an instruction regarding service and a reference to Rule 25. The group discussed possible language for the committee notes, and Judge Campbell recommended that the Advisory Committee consider these comments and present the revised package of rules and committee notes to the Committee in June, after consideration of the discussion at the meeting.

Following this meeting, the Advisory Committee, in consultation with the Standing Committee, determined to withdraw the proposed amendments to Rule 25(d) from the Supreme Court’s consideration. The Advisory Committee will consider the comments made at the Standing Committee meeting regarding Rule 25(d), as well as those regarding Rules 5(a)(1), 21(a)(1) and (c), 26(c), and 39(d)(1), and it will present an amended set of proposed rule amendments for the Committee’s consideration at its June 2018 meeting.

Judge Chagares reviewed several information items. The Advisory Committee considered at its November 2017 meeting a suggestion to amend Rule 29 to permit cities and Indian tribes to file amicus briefs without leave of court. The Advisory Committee considered but deferred action on the proposal five years ago, and after discussion at its November 2017 meeting, the Advisory Committee decided to take no further action. It is a problem that rarely, if ever, arises in litigation. Judge Campbell noted that most Indian tribes appear before federal court via private firms, not through government lawyers, and this could cause more recusal issues.

Judge Chagares advised that the Advisory Committee considered several other issues at its November 2017 meeting. These included a proposal to amend Rule 3(c)(1)(B), which as currently drafted may present a potential trap for the unwary. After discussion, a subcommittee was formed to study the issue. The Advisory Committee also considered a suggestion to amend Rules 10, 11, and 12 in light of advances made with electronic filing and the impact on the record on appeal. After discussion, the Advisory Committee determined that most clerks’ offices have procedures to manage these issues, and that with upcoming upgrades to CM/ECF, some issues raised may be resolved. The Advisory Committee thus determined to remove the suggestion from its agenda. The Advisory Committee discussed a potential issue related to Rule 7 and whether attorney fees are “costs on appeal” under the rule. The Advisory Committee determined to refer the issue to the Civil Rules Committee and to form a subcommittee to monitor any developments.

Finally, Judge Chagares noted several items that the Advisory Committee may consider at upcoming meetings, including concerns about judges deciding issues outside of those addressed in briefing, the use of appendices, and the dismissal of appeals after settlement agreements. A Committee member raised a concern that the dismissal issue could be substantive rather than procedural, and Judge Chagares stated that this concern would be considered by the Advisory Committee when the issue is discussed.

REPORT OF THE ADMINISTRATIVE OFFICE

Rebecca Womeldorf provided the report from the Rules Committee Staff (“RCS”). The Standing Committee reviewed Scott Myers’ report regarding instances where committees need to coordinate regarding proposed rule changes which implicate other rules. Ms. Womeldorf added that treatment of bonds for costs on appeal under Appellate Rule 7 and treatment of the proof of service references across the Appellate and Civil Rules will continue to require coordination between these various committees.

Julie Wilson provided an overview of congressional activity implicating the Federal Rules. In general, Ms. Wilson noted that, although the RCS is monitoring many pending bills, not much movement has occurred in the past few months. Ms. Wilson first briefly reviewed pending congressional legislation which would directly amend the Federal Rules. The Senate Judiciary Committee held in November 2017 a hearing on “The Impact of Lawsuit Abuse on American Small Businesses and Job Creators,” which focused on a variety of bills which would directly amend the Federal Rules, including the Lawsuit Abuse Reduction Act (“LARA”). No action, however, has occurred regarding these pieces of legislation, including LARA, since that hearing. The RCS continues to monitor these bills for further development.

The RCS has also offered mostly informal feedback and comments to Congress on other bills which would not directly amend but rather require review of the Federal Rules by the Standing Committee. This includes the Safeguarding Addresses from Emerging (SAFE) at Home Act, which was introduced in September 2017 by Senator Roy Blunt and would require federal courts and several agencies to comply with state address confidentiality programs. This proposed legislation raises concerns about service under the Federal Rules, and RCS communicated this feedback to Senator Blunt’s staffer but has not heard anything in response. Representative Bob Goodlatte also introduced in October 2017 the Article I Amicus and Intervention Act, which would limit federal courts’ authority to deny Congress’s ability to appear as an amicus curiae. The RCS communicated its concern to congressional staffers that this legislation would lengthen the time of appeals.

A few developments occurred in the past month as well. On November 30, 2017, the House Subcommittee on Courts, Intellectual Property, and the Internet, held a hearing on “The Role and Impact of Nationwide Injunctions by District Courts.” Although the hearing did not concern a specific piece of legislation, Rep. Goodlatte reiterated his interest in this issue, and Professor Samuel Bray, who submitted a proposal to the Civil Rules Committee earlier this year regarding nationwide injunctions, spoke at this hearing. The RCS will continue to monitor for the introduction of any specific pieces of legislation regarding nationwide injunctions.

The Committee lastly considered what advice it could provide to the Executive Committee regarding which goals and strategies outlined in the *Strategic Plan for the Federal Judiciary* should receive priority attention over the next two years. After discussion, the Committee authorized Judge Campbell to report the sense of the Committee on these issues to the Judiciary's Planning Coordinator.

CONCLUDING REMARKS

Judge Campbell concluded the meeting by thanking the Committee members and other attendees for their participation. The Committee will next meet on June 12, 2018, in Washington, D.C.

Respectfully submitted,

Rebecca A. Womeldorf
Secretary, Standing Committee

TAB 4

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MEMORANDUM

TO: The Advisory Committee on the Appellate Rules

SUBJECT: Summary of Comments on Published Rules and Suggested Revisions

DATE: March 20, 2018

Five proposed amended rules were published for comment in August 2017. These rules are Rules 3, 13, 26.1, 28, and 32. The comment period closed in February 2018. The rules as published are included as Attachment A to this memo.

Four comments were filed in response to the published rules. All the comments related to Rule 26.1, and there were no comments filed with respect to Rules 3, 13, 28, and 32. In addition, Professor Elizabeth Gibson, reporter to the Advisory Committee on Bankruptcy Rules, advised of several revisions to Bankruptcy Rule 8012, and provided suggested language to close a potential gap in the published version of Rule 26.1(c). Each of the comments is discussed separately below. Copies of the comments are included as Attachment B, the revised version of Bankruptcy Rule 8012 is included as Attachment C, and a revised version of Rule 26.1 is included at Attachment D.

Comment Regarding Rule 26.1(b)

The National Association of Criminal Defense Lawyers (NACDL) filed a comment related to Rule 26.1(b). In general, the NACDL supports the proposed amendment, but suggests that language be added to the Committee Note to help deter overuse of the government exception in the proposed subsection. The NACDL suggests that the Committee Note be strengthened to emphasize that excusing the government from making a disclosure should be the rare exception.

The following revised Committee Note language regarding the amendments to subsection (b) would more closely track the Committee Note for Criminal Rule 12.4, and account for the comment filed by the NACDL:

New subdivision (b) corresponds to the disclosure requirement set by Criminal Rule 12.4(a)(2). Like Criminal Rule 12.4(a)(2), subdivision (b) requires the government to identify organizational victims to assist judges in complying with their obligations under the Code of Conduct for United States Judges. In some cases, there are numerous organizational victims, but the impact of the crime on each is relatively small. In such cases, the amendment allows the government to show good cause to be relieved of making the disclosure statements because the organizations' interests could not be "affected substantially by the outcome of the proceedings."

Comments Regarding Rule 26.1(c)

The comment from Charles Ivey concerns the proposed amendments to Rule 26.1(c). He suggests that language be added to Rule 26.1(c) to reference involuntary bankruptcy proceedings under 11 U.S.C. § 303 and the addition of a requirement that petitioning creditors be identified in disclosure statements. Professor Gibson and Scott Myers, the reporter and staff support to the Bankruptcy Rules Committee, reviewed the comment and suggested that no change be made to the published rule. Generally, petitioning creditors will come within the rule if they are corporations and either an appellant or appellee. If after the rule is effective this becomes an issue, Mr. Ivey could submit a suggestion for a rule amendment.

Professor Gibson suggested revised language for Rule 26.1(c) to address a potential gap in the proposed amendment to the subsection, and provided the following revisions:

(c) **Bankruptcy Proceedings.** In a bankruptcy proceeding, the debtor, the trustee, or, if neither is a party, the appellant must file a statement that (1) identifies each debtor not named in the caption; and (2) for each debtor in the bankruptcy case that ~~If the debtor is a corporation, the statement must also~~ identify any parent corporation and any publicly held corporation that owns 10% or more of its stock, or must state that there is no such corporation.

Comment Regarding Rule 26.1(d)

A comment regarding Rule 26.1(d) was filed by John Hawkinson, a journalist who submits his comments from the perspective of an intervenor and non-party movant. His objection is as follows:

The proposed Rule 26.1(d) is intended to “require[] persons who want to intervene to make the same disclosures as parties” (proposed Committee note at lines 38, 39), but its language says something different:

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

I read the language as suggesting (1) all putative intervenors must file a Rule 26.1 statement, while simultaneously suggesting (2) it may only apply to individual PERSONS rather than corporate entities, and (3) being silent about what information an intervenor must provide.

He further states that the proposed rule is clear only upon reading the Committee Note, and that this should not be the case. He has several suggested edits, but the main edit is to Rule 26.1(d) regarding the use of the word “person,” with a suggestion that the word be changed to either “non-party” or “putative intervenor.” He makes several suggestions for re-numbering the

proposed amended rule to make it more consistent with the current rule, and for restoring the subheading for Rule 26.1(a) to the wording of the current rule, “Who Must File.”

Finally, Mr. Hawkinson notes that, in general, there is a lack of clarity in the Appellate Rules regarding intervenors, and makes several suggestions for possible changes in the last paragraph of his comment.

To resolve some of the issues raised, it is possible to move proposed Rule 26.1(d) to the end of subsection (a) of the rule. If subsection (d) is moved to the end of subsection (a), the revised subsection (a) would read as follows:

- (a) Nongovernmental Corporate Parties and Intervenors. 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. Any nongovernmental corporation that wants to intervene must file such a statement.

If subsection (d) is moved to subsection (a), the numbering of the rule’s subsection would need to be revised, along with the Committee Note.

Comment Regarding Rule 26.1(e)

Aderant CompuLaw filed a comment related to Rule 26.1(e). Specifically, Aderant suggests that the language be changed to eliminate any ambiguity about who must file a disclosure statement under Rule 26.1.

To address this concern, Rule 26.1(e) could be revised as follows:

- (e) Time for Filing; Supplemental Filing. One required to file a Rule 26.1 ~~The statement must be:~~
 - (1) ~~file it filed~~ 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;
 - (2) ~~Even if the statement has already been filed,~~ include the statement before the table of contents in the principal brief;
and
 - (3) ~~must include the statement before the table of contents.~~ The statement must be supplemented supplement the statement whenever the information required under Rule 26.1 changes.

Revised Committee Note

Language could be added to the Committee Note to provide further background regarding the expanded disclosure requirements of the rule. Other edits could be made to resolve issues raised in the comments and the re-ordering of the subsections to accommodate the change to Rule 26.1(d). The revised Committee Note could read as follows:

These amendments are mainly designed to assist judges in determining whether they must recuse themselves because of an “interest that could be affected substantially by the outcome of the proceeding.” Code of Judicial Conduct, Canon 3(C)(1)(c) (2009).

Subdivision (a) is amended to encompass nongovernmental corporations that want to intervene on appeal.

New subdivision (b) corresponds to the disclosure requirement set by Criminal Rule 12.4(a)(2). Like Criminal Rule 12.4(a)(2), subdivision (b) requires the government to identify organizational victims to assist judges in complying with their obligations under the Code of Conduct for United States Judges. In some cases, there are numerous organizational victims, but the impact of the crime on each is relatively small. In such cases, the amendment allows the government to show good cause to be relieved of making the disclosure statements because the organizations’ interests could not be “affected substantially by the outcome of the proceedings.”

New subdivision (c) requires disclosure of the names of all the debtors in bankruptcy cases, because the names of the debtors are not always included in the caption in appeals of adversary proceedings. Subdivision (c) also imposes disclosure requirements as to the ownership of corporate debtors.

Subdivisions (d) and (e) (formerly subdivisions (b) and (c)) apply to all the disclosure requirements set by Rule 26.1.

A revised version of proposed amended Rule 26.1 and the Committee Note are included as Attachment D. The comments from the Style Consultants are noted in italics in the revised rule.

TAB 4A

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

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

2 * * * * *

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

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

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

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

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

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

30 * * * * *

Committee Note

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

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

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

3 * * * * *

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

12 * * * * *

Committee Note

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

1 **Rule 26.1 Corporate-Disclosure Statement**

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

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

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

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

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

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

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

35 supplement its ~~The~~ statement must be supplemented
36 whenever the information ~~that must be disclosed~~
37 required under Rule 26.1(a) changes.
38 ~~(e)~~**(f) Number of Copies.** If the Rule 26.1(a) statement is
39 filed before the principal brief, or if a supplemental
40 statement is filed, ~~the party must file~~ an original and 3
41 copies must be filed unless the court requires a
42 different number by local rule or by order in a
43 particular case.

Committee Note

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

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

1 **Rule 28. Briefs**

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

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

7 * * * * *

Committee Note

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

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

2 * * * * *

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

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

Committee Note

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

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TAB 4B

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PUBLIC SUBMISSION

As of: February 16, 2018
Tracking No. 1k1-90fx-mnko
Comments Due: February 15, 2018

Docket: [USC-RULES-AP-2017-0002](#)

Proposed Amendments to the Federal Rules of Appellate Procedure

Comment On: [USC-RULES-AP-2017-0002-0001](#)

Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: [USC-RULES-AP-2017-0002-0005](#)

Comment from Charles (Chuck) Ivey, NA

Submitter Information

Name: Charles (Chuck) Ivey

Organization: NA

General Comment

I would like to comment on the proposed amendment to FRAP 26.1, which applies to disclosure statements involving Bankruptcy Proceedings. The current draft of Proposed Rule 26.1(c) does not distinguish between involuntary proceedings and most other bankruptcy proceedings which are commenced by the filing of a voluntary petition. Proposed Rule 26.1(c) should be amended to add an additional requirement that a disclosure statement MUST IDENTIFY EACH PETITIONING CREDITOR in cases commenced pursuant to 11 U.S.C. 303. This is particularly important when the order being appealed is an order for relief under 11 U.S.C. 303(h), or an order of dismissal under 11 U.S.C. 303(i).

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PUBLIC SUBMISSION

As of: February 16, 2018 Tracking No. 1k2-91hc-xt4 Comments Due: February 15, 2018

Docket: [USC-RULES-AP-2017-0002](#)

Proposed Amendments to the Federal Rules of Appellate Procedure

Comment On: [USC-RULES-AP-2017-0002-0001](#)

Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: [USC-RULES-AP-2017-0002-0006](#)

Comment from Ellie Bertwell, Aderant CompuLaw

Submitter Information

Name: Ellie Bertwell

Organization: Aderant CompuLaw

General Comment

Aderant CompuLaw submits the attached comment to the Proposed Amendments to the Federal Rules of Appellate Procedure.

Attachments

FRAP Comment 2-15-18 Eff. 12-1-19

February 13, 2018

Via Electronic Submission

Re: Comment on Proposed Amendments to Federal Rules of Appellate Procedure

Comments Due by February 15, 2018
Amendments Effective December 1, 2019

To the Committee on Rules of Practice and Procedure:

Aderant CompuLaw respectfully submits the following comment to the proposed amendment to Federal Rule of Appellate Procedure 26.1(e).

As currently written and as proposed, Appellate Rule 26.1(e) is somewhat ambiguous as to when a party must file the Rule 26.1(a) statement because it does not expressly relate the “principal” brief” to the party filing the brief. To clarify the rule, we suggest the following change to the first sentence of proposed Rule 26.1(e):

Time for Filing; Supplemental Filing. The Rule 26.1 statement must be filed when a party, person or entity files its ~~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.”

Thank you for considering our comments.

Submitted by:

Ellie Bertwell
Aderant CompuLaw
200 Corporate Pointe, Suite 400
Culver City, CA 90230

February 13, 2018

PUBLIC SUBMISSION

As of: February 16, 2018 Tracking No. 1k2-91ik-tbdx Comments Due: February 15, 2018
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Docket: [USC-RULES-AP-2017-0002](#)

Proposed Amendments to the Federal Rules of Appellate Procedure

Comment On: [USC-RULES-AP-2017-0002-0001](#)

Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure

Document: [USC-RULES-AP-2017-0002-0007](#)

Comment from Peter Goldberger, National Ass'n of Criminal Defense Lawyers

Submitter Information

Name: Peter Goldberger

Organization: National Ass'n of Criminal Defense Lawyers

General Comment

Comments of National Association of Criminal Defense Lawyers on proposed amended Rule 26.1 attached.
- Peter Goldberger, Chair, NACDL Committee on Rules of Procedure

Attachments

NACDL comments FRAP 021518

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Rick Jones
President

National Association of Criminal Defense Lawyers

12th Floor, 1660 L Street, NW

Washington, DC 20036

February 15, 2018

Rebecca A. Womeldorf, Esq.
Secretary, Committee on Practice & Procedure
Judicial Conference of the United States

AMENDMENTS TO APPELLATE RULES PROPOSED FOR
COMMENT, Aug. 2017

Dear Ms. Womeldorf:

The National Association of Criminal Defense Lawyers is pleased to submit our comments on the proposed changes to Rules 26.1 of the Federal Rules of Appellate Procedure.

Our organization has nearly 10,000 direct members; in addition, NACDL's 94 state and local affiliates, in all 50 states, comprise a combined membership of some 40,000 private and public defenders. NACDL, founded in 1958, is the preeminent organization in the United States representing the views, rights and interests of the defense bar and its clients.

**APPELLATE RULE 26.1(b) – DISCLOSURE STATEMENT
REGARDING ORGANIZATIONAL VICTIMS IN CRIMINAL
APPEALS**

The proposed new Appellate Rule 26.1(b) would for the first time require a disclosure statement to be filed by the government in criminal appeals, to identify organizational victims. On behalf of the criminal defense bar, NACDL is pleased to see in this proposal a clear recognition that victims and alleged victims are not parties to the criminal case or to a criminal appeal. We have some concern, however, that the government may seek to overuse the suggested "good cause" exception in Rule 26.1(b). This could encourage judges to refrain from appropriate recusal in cases with numerous victims that may have sustained relatively minor losses. The appearance of judicial impartiality is especially important to criminal

defendants facing loss of liberty, and a defendant’s confidence in the fairness of the court – which in turn is important to the integrity and success of our criminal justice system – may be affected by a failure to recuse even when the matter seems minor in financial terms. With those considerations in mind, we encourage the Committee to consider strengthening the wording of the now very brief Advisory Committee Note to emphasize that excusing the government from making a disclosure should be the rare exception. However, with confidence that federal judges will not misapply the newly created “good cause” exception when sought to be invoked, NACDL agrees that the flexibility that this amendment would afford the government in making the required notification seems ultimately unobjectionable.

We thank the Committee for its excellent work and for this opportunity to contribute our thoughts. NACDL looks forward to continuing our longstanding relationship with the advisory committee as a regular submitter of written comments.

Respectfully submitted,
THE NATIONAL ASSOCIATION
OF CRIMINAL DEFENSE LAWYERS

By: Peter Goldberger
Ardmore, PA

*Chair, Committee on
Rules of Procedure*

Cheryl D. Stein
Washington, DC

Alexander Bunin
Houston, TX

In Memoriam:
William J. Genego
Santa Monica, CA
Late Co-Chair

Please respond to:
Peter Goldberger, Esq.
50 Rittenhouse Place
Ardmore, PA 19003
E: peter.goldberger@verizon.net

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Drafting concern with proposed FRAP 26.1(d)

John A Hawkinson to: rules_support

02/21/2018 02:51 PM

To the Committee on Rules of Practice and Procedure:

Good afternoon, I apologize for sending these comments out-of-time; I became aware of the proposed language yesterday evening, and in a phone call this morning to the Rules Committee Support Office, I was advised by Shelly of that office that it was appropriate to send in late comments to this address.

My concern is with the drafting of the proposed FRAP Rule 26.1(d), which I think does not sufficiently clearly convey its intent.

I have recently been an intervenor at the district court level and a non-party movant at the appellate level, and view the proposed rule change through that lens. The proposed Rule 26.1(d) is intended to "require[] persons who want to intervene to make the same disclosures as parties" (proposed Committee note at lines 38, 39), but its language says something different:

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

I read the language as suggesting (1) all putative intervenors must file a Rule 26.1 statement, while simultaneously suggesting (2) it may only apply to individual PERSONS rather than corporate entities, and (3) being silent about what information an intervenor must provide.

To expand on my (3): 26.1(a), 26.1(b), and 26.1(c) list categories of parties who must file a Rule 26.1 statement and why they must file such a statement -- so it is natural to read 26.1(d) in the same way, that all intervenors must file such a statement (by nature of wishing to intervene), but then without explanation of what should be included. Although this result is clearly nonsensical, it remains the natural reading for me and thus engenders confusion which is only clarified upon reading the committee notes, which are unfortunately not always presented along with the text of the rule in many contexts. And a rule should be unambiguous and understandable without requiring referral to the Notes.

I am not sure what the minimal fix to correct these issues is at this stage of the rulemaking process.

I would suggest changing "person" to "non-party" or perhaps simply stating "putative intervenor," to avoid the confusion about corporate entities.

If it is not too much upheaval, I would suggest restoring 26.1(a) as "Who must file" and pushing the proposed 26.1(a), (b), and (c) down one level of hierarchy to 26.1(a)(1), 26.1(a)(2), and 26.1(a)(3) to make clear that intervenors are not a mandatory category of filer comparable to the three enumerated categories.

Such a change also allows relocating the proposed 26.1(d) to the end of the Rule, which would avoid the necessity of renumbering 26.1(c) and (d) to 26.1(e) and (f) as is now proposed. Renumbering of rule sections produces confusion when someone might not be referring to the most up-to-date copy of the rules, so it would be nice to avoid it.

If the above changes can be made, then the proposed Rule 26.1(d) intervenor rule can be rewritten as:

(d) Intervenors. Any putative intervenor is subject to the disclosure requirements of Rule 26.1.

Although it could as easily reference Rule 26.1(a) instead.

As a longer term comment, there is a general lack of clarity in the FRAP regarding intervention -- there is no analogue to FRCP Rule 24, so no single place to collect all the direction for intervention. So it is a bit scattered, primarily in Rule 15 for intervention in agency proceedings (only), in Rules 28.1 and 32 on the color of briefs, and now in Rule 26.1. There may not be much to say about intervention right now, but there are areas that could use future clarification, such as whether intervenors at the district court below are treated as parties at the appellate level, and similar. If there were some FRAP analogue to FRCP 24, then the proposed FRAP 26.1(d) might be better placed in it.

Thank you for your time and attention. I apologize for my lack of prior awareness of your proposed rules and their attendant comment deadline.

--jhawk@mit.edu
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Freelance Journalist
twitter: @johnhawkinson

TAB 4C

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ATTACHMENT C

Rule 8012. Corporate Disclosure Statement

(a) ~~WHO MUST FILE~~ ~~NON~~GOVERNMENTAL CORPORATE PARTY. Any nongovernmental corporate party appearing in the district court or BAP 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) DISCLOSURE AS TO DEBTOR. The debtor, the trustee, or, if neither is a party, the appellant must file a statement that (1) identifies each debtor not named in the caption and (2) for each debtor in the bankruptcy case that is a corporation, 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.

(c) INTERVENOR. A person who wants to intervene must file a statement that discloses the information required by Rule 8012.

~~(b)~~(d) TIME TO FILE; SUPPLEMENTAL FILING. ~~A party must file the~~The Rule 8012 statement must be filed with ~~its~~the principal brief or upon filing a motion, response, petition, or answer in the district court or BAP, 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~~The statement must be supplemented whenever the required information changes.

Committee Note

The rule is amended to conform to recent amendments to Fed. R. App. P. 26.1(c). New subdivision (b) requires disclosure of the name of all the debtors in the underlying bankruptcy case. The names of the debtors are not always included in the caption in appeals of adversary proceedings. It also requires, for corporate debtors, disclosure of the same information required to be disclosed under subdivision (a). New subdivision (c) requires persons who want to intervene to make the same disclosures as parties. Subdivision (d), previously subdivision (b), now applies to all of the disclosure requirements.

TAB 4D

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

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

3 **Corporations and Intervenors.** Any nongovernmental
4 corporation ~~corporate party~~ to a proceeding in a court
5 of appeals must file a statement that identifies any
6 parent corporation and any publicly held corporation
7 that owns 10% or more of its stock or states that there
8 is no such corporation. *The same requirement applies*
9 *to a nongovernmental corporation that wants to*
10 *intervene.*

11 **(b) Organizational Victim in a Criminal Case.** In a

12 criminal case, unless the government shows good
13 cause, it must file a statement ~~identifying~~ that identifies
14 any organizational victim of the alleged criminal
15 activity. If the organizational victim is a corporation,
16 the statement must also disclose the information
17 required by Rule 26.1(a) to the extent it can be obtained
18 through due diligence.

19 **(c) Bankruptcy Proceedings Cases.** In a bankruptcy
20 ~~proceeding case~~, the debtor, the trustee, or, if neither is
21 a party, the appellant must file a statement that (1)
22 identifies each debtor not named in the caption and (2)
23 for each debtor in the bankruptcy case that is a
24 corporation, identifies any parent corporation and any
25 publicly held corporation that owns 10% or more of its
26 stock, or must state that there is no such corporation.
27 *discloses the information required by Rule 26.1(a).*

28 ~~**(d) Intervenor.**~~ A person who wants to intervene must
29 ~~file a statement that discloses the information required~~
30 ~~by Rule 26.1.~~

31 ~~**(b)(e)(d)**~~ **Time for Filing; Supplemental Filing.** The Rule

32 26.1 ~~The statement must be:~~

33 (1) be filed with the principal brief or upon filing a
34 motion, response, petition, or answer in the
35 court of appeals, whichever occurs first, unless
36 a local rule requires earlier filing;

37 ~~(2)~~ Even if the statement has already been filed,
38 include the statement before the table of
39 contents in the principal brief; and
40 ~~(3)~~ must include the statement before the table of
41 ~~contents. The statement must be supplemented~~
42 supplement the statement whenever the
43 information required under Rule 26.1 changes.
44 ~~(e)(f)(e)~~ **Number of Copies.** If the Rule 26.1~~(a)~~ statement
45 is filed before the principal brief, or if a supplemental
46 statement is filed, ~~the party must file an original and 3~~
47 copies must be filed unless the court requires a different
48 number by local rule or by order in a particular case.

Committee Note

These amendments are mainly designed to assist judges in determining whether they must recuse themselves because of an “interest that could be affected substantially by the outcome of the proceeding.” Code of Judicial Conduct, Canon 3(C)(1)(c) (2009).

Subdivision (a) is amended to encompass nongovernmental corporations that want to intervene on appeal.

New subdivision (b) corresponds to the disclosure requirement set by Criminal Rule 12.4(a)(2). Like Criminal Rule 12.4(a)(2), subdivision (b) requires the government to identify organizational victims to assist judges in complying with their obligations under the Code of Conduct for United States Judges. In some cases, there are numerous organizational victims, but the impact of the crime on each is relatively small. In such cases, the amendment allows the government to show good cause to be relieved of making the disclosure statements because the organizations' interests could not be "affected substantially by the outcome of the proceedings."

New subdivision (c) requires disclosure of the names of all the debtors in bankruptcy cases, because the names of the debtors are not always included in the caption in appeals of adversary proceedings. Subdivision (c) also imposes disclosure requirements as to the ownership of corporate debtors.

Subdivisions (d) and (e) (formerly subdivisions (b) and (c)) apply to all the disclosure requirements set by Rule 26.1.

TAB 5

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MEMORANDUM

TO: The Advisory Committee on the Appellate Rules
FROM: Bridget Healy
SUBJECT: Proposed Amendments to Rule 25(d)(1)
DATE: March 14, 2018

As part of an effort to modernize the federal rules to reflect the increased use of electronic filing, the rules committees approved several rules changes related to filing and service, including changes to the appellate rules. The proposed amendments to Appellate Rule 25, Bankruptcy Rule 5005, Civil Rule 5, and Criminal Rule 49 were developed with the goal of achieving symmetry among the rules to the extent practicable. The rule amendments are with the Supreme Court for approval with intended effective dates of December 1, 2018, except for the proposed amendments to Rule 25(d)(1).

Following the January 2018 Standing Committee meeting, the Advisory Committee, in consultation with the Standing Committee, determined to withdraw the proposed amendments to Rule 25(d)(1) from the Supreme Court's consideration. The Advisory Committee agreed to consider comments regarding Rule 25(d)(1), as well as those regarding Rules 5(a)(1), 21(a)(1) and (c), 26(c), and 39(d)(1), and present an amended set of proposed rule amendments for the Standing Committee's consideration at its June 2018 meeting.

The proposed amendments to Rule 25(d)(1) were withdrawn from approval because of a concern with the following language: "A paper presented for filing other than through the court's electronic-filing system...." The Advisory Committee determined that the best course forward was to reconsider the proposed language to eliminate any potential confusion and to conform the language to that used in other federal rules. The revised language adds a reference to service, and tracks the language used in Bankruptcy Rule 8011(d)(1).

The revised proposed text for Rule 25(d)(1) reads as follows, with the new language underlined:

Rule 25. Filing and Service

* * * * *

(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)(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.

* * * * *

Committee Note

The amendment conforms Rule 25 to other federal rules regarding proof of service. As amended, subdivision (d) eliminates the requirement of proof of service or acknowledgment of service when filing and service is made through a court's electronic-filing system. The notice of electronic filing generated by the court's system serves that purpose.

If the Advisory Committee approves the revised proposed amendments to Rule 25(d)(1), the amendments will go to the Standing Committee for final approval at its June 2018 meeting, along with proposed conforming rule amendments to Rules 5(a)(1), 21(a)(1) and (c), 26(c), and 39(d)(1). Materials regarding these proposed rule amendments are included at Tab 6 of the agenda materials. Given the conforming nature of the amendments, the Advisory Committee may recommend that the amendments to Rules 5(a)(1), 21(a)(1) and (c), 26(c), and 39(d)(1) be considered for final approval without publication.

If the Standing Committee gives final approval, the proposed amendments would be considered by the Judicial Conference in September 2018, with an intended effective date of December 1, 2019. To document the revisions to the Rule 25(d)(1), a note could be added regarding the edits in the “Changes since Publication” section of the proposed rule when it is presented to the Judicial Conference.

Recommendation

To conform to the language used regarding proofs of service with the language used in other federal rules, it is recommended that the Advisory Committee approve the revised proposed amended language in Rule 25(d)(1) and the accompanying Committee Note, for transmission to the Standing Committee for final approval at its June 2018 meeting.

The revised proposed amended Rule 25(d)(1) and Committee Note are included as Attachment A to this memo. The original (withdrawn) version of Rule 25(d) is included at Attachment B for reference purposes, with the withdrawn language highlighted.

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TAB 5A

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1 **Rule 25. Filing and Service**

2 * * * * *

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

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

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

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

11 (i) the date and manner of service;

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

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

17 (2) When a brief or appendix is filed by mailing or
18 dispatch in accordance with Rule 25(a)(2)(A)(ii),

TAB 5B

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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.**

(i) **In general.** 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.

(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:

- mailed to the clerk by first-class mail, or other class of mail that is at least as expeditious, postage prepaid; or
 - dispatched to a third-party commercial carrier for delivery to the clerk within 3 days.
- (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)(A)(iii). A paper 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:

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

(B) Electronic Filing and Signing.**(i) By a Represented Person—****Generally Required; Exceptions.**

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

(ii) By an Unrepresented Person—**When Allowed or Required.**

A person not represented by an attorney:

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

order, or by a local rule that includes reasonable exceptions.

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

(iv) **Same as a 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

12 FEDERAL RULES OF APPELLATE PROCEDURE

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) 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.

(2) 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 filing or sending, 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)(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 (c)(2). The amendments dispense with the requirement of proof of service for electronic filings in Rule 25(d)(1).

TAB 6

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MEMORANDUM

TO: The Advisory Committee on the Appellate Rules

FROM: Bridget Healy

SUBJECT: Proposed Technical Amendments to Conform to Rule 25(d) Amendments

DATE: March 16, 2018

As part of an effort to modernize the federal rules to reflect the increased use of electronic filing, the rules committees approved several rule changes related to filing and service, including changes to the appellate rules. The proposed rule amendments are with the Supreme Court for approval, with intended effective dates of December 1, 2018, except Rule 25(d)(1). The proposed amendment to Rule 25(d)(1) will be reconsidered at the Advisory Committee's April 2018 meeting, and if approved, will go to the Standing Committee in June 2018 for final approval. The intended effective date of the amendments to Rule 25(d)(1), assuming approval at the various levels, would be December 1, 2019.

If the proposed amended language in Rule 25(d)(1) goes forward, several appellate rules will require amendments to conform the rules to the amendment. The rules that will require amendments are Rules 5, 21, 26, 32, and 39. Each rule currently includes a reference to a required proof of service. The proposed amendment to Rule 25(d)(1) would eliminate this requirement in cases in which a document is filed and served through a court's electronic filing system.

The proposed amendments to Rules 5, 21, 26, 32, and 39 were considered at the Advisory Committee's November 2017 meeting. The Advisory Committee determined that given the nature of the proposed amendments, they could be considered technical amendments, and not require publication. The proposed amendments were presented for discussion at the Standing Committee's January 2018 meeting, and language revisions were suggested. In addition, the Standing Committee's style consultants offered several style amendments. No decision was made whether the proposed amendments are technical amendments that do not require publication.

Recommendation

Based on the discussion at the Standing Committee meeting, the proposed amendments to Rule 25(d)(1), and the discussion at the Advisory Committee's November 2017 meeting, it is recommended that the Advisory Committee propose for approval the conforming amendments to Rules 5, 21, 26, 32, and 39. It is further recommended that the Advisory Committee propose that the rules not be published for public comment, but instead, given final approval and included with the amendment to Rule 25(d) that will be presented to the Judicial Conference in September 2018. If approved, the rules would have an intended effective date of December 1, 2019. If, instead, the rules are published for public comment, they would have an intended effective date of December 1, 2020. The proposed amended rules are discussed below, and are included at

Attachment A to this memo. For reference, the style consultants' comments are included at Attachment B.

Rule 5

Rule 5(a) sets out the rules for petitions for permission to appeal, and would be amended to remove the reference to “proof of service” and to make stylistic edits.

Rule 5. Appeal by Permission

(a) Petition for Permission to Appeal.

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

* * * * *

Committee Note

Subdivision (a)(1) is amended to delete the reference to “proof of service” to reflect amendments to Rule 25(d) that eliminate the requirement of a proof of service when filing and service are completed using a court's electronic filing system.

Rule 21

Rule 21(a) addresses extraordinary writs and would be amended to remove references to “proof of service” from subsections (a)(1) and (c) and make minor style edits.

Rule 21. Writs of Mandamus and Prohibition, and Other Extraordinary Writs

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

(1) A party petitioning for a writ of mandamus or prohibition directed to a court must file a the petition with the circuit clerk ~~with proof of service on and serve it on~~ all parties to the proceeding in the trial court. The party must also provide a copy to the trial-court judge. All parties to the proceeding in the trial court other than the petitioner are respondents for all purposes.

* * * * *

(c) Other Extraordinary Writ. An application for an extraordinary writ other than one provided for in Rule 21(a) must be made by filing a petition with the circuit clerk ~~with proof of service on~~ and serving it on the respondents. Proceedings on the application must conform, so far as is practicable, to the procedures prescribed in Rule 21(a) and (b).

* * * * *

Committee Note

The term “proof of service” in subdivisions (a)(1) and (c) is deleted to reflect amendments to Rule 25(d) that eliminate the requirement of a proof of service when filing and service are completed using a court’s electronic filing system.

Rule 26

Rule 26(c) addresses additional time, and would be amended to reflect the proposed amended language of Rule 25(d), and to clarify the language used to state when three days are added to the time within which a party must act after being served. Most of these amendments are suggestions from the style consultants. These proposed amendments include a suggestion to capitalize “After” in the subheading.

Rule 26. Computing and Extending Time

* * * * *

(c) Additional Time After Certain Kinds of Service.
When a party may or must act within a specified time after being served with a paper, and the paper is not served electronically on the party or delivered to the party on the date stated in the proof of service, 3 days are added after the period would otherwise expire under Rule 26(a) ~~unless the paper is delivered on the date of service stated in the proof of service. For purposes of this Rule 26(e), a paper that is served electronically is treated as delivered on the date of service stated in the proof of service.~~

* * * * *

Committee Note

The amendment in subdivision (c) simplifies the expression of the current rules for when three days are added. In addition, the amendment revises the subdivision to conform to the amendments to Rule 25(d) which eliminate the requirement of a proof of service when filing and service are completed using a court's electronic filing system.

Rule 32

Rule 32 addresses the forms of briefs, appendices, and other papers. Rule 32(f) lists items that do not count toward the length limits, and includes a reference to “the proof of service.” Amended Rule 25(d)(1) would dispense with the requirement of proof of service when a paper is filed and served using the court's electronic filing system. While this provision does not require modification to comply with the proposed amendment, the rule would be updated to recognize that not all documents include each of the items listed in the rule, including a proof of service. The current set of amendments include suggestions from the style consultants.

In addition, an amendment to Rule 32(f) was published for comment in August 2017, and will be considered for final approval at the April 2018 meeting. If it goes forward for final approval, its intended effective date will be December 1, 2019. The amendment would remove the term “corporate” before “disclosure statement” to comply with a similar amendment to 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~~ 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 amendments to subdivision (f) conform the rule to amendments to Rule 25(d) that eliminate the requirement of a proof of service when filing and service are completed through a court's electronic filing system. The amendment to subdivision (f) does not change the substance of the current rule, but removes the articles before each item because a document will not always include these items.

Rule 39

Rule 39(d) addresses bills of costs and would be amended to remove the reference to a "proof of service." Also, the term "and serve" is added based on comments from the Standing Committee meeting.

Rule 39. Costs

* * * * *

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

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

* * * * *

Committee Note

In subdivision (d)(1) the words "with proof of service" are deleted and replaced with "and serve" to conform with amendments to Rule 25(d) regarding when proof of service or acknowledgement of service is required for filed papers.

For reference, the proposed text of Rule 25(d) reads as follows, with the new language underlined:

Rule 25. Filing and Service

* * * * *

(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)(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.

TAB 6A

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1 **Rule 5. Appeal by Permission**

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

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

9 * * * * *

Committee Note

Subdivision (a)(1) is amended to delete the reference to “proof of service” to reflect amendments to Rule 25(d) that eliminate the requirement of a proof of service when filing and service are completed using a court’s electronic filing system.

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

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

5 (1) A party petitioning for a writ of mandamus or
6 prohibition directed to a court must file ~~a~~ the
7 petition with the circuit clerk ~~with proof of service~~
8 ~~on~~ and serve it on all parties to the proceeding in
9 the trial court. The party must also provide a copy
10 to the trial-court judge. All parties to the
11 proceeding in the trial court other than the
12 petitioner are respondents for all purposes.

13 * * * * *

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

19 conform, so far as is practicable, to the procedures
20 prescribed in Rule 21(a) and (b).

21 * * * * *

Committee Note

The term “proof of service” in subdivisions (a)(1) and (c) is deleted to reflect amendments to Rule 25(d) that eliminate the requirement of a proof of service when filing and service are completed using a court’s electronic filing system.

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

2 * * * * *

3 **(c) Additional Time aAfter Certain Kinds of Service.**

4 When a party may or must act within a specified time
5 after being served, and the paper is not served
6 electronically on the party or delivered to the party on
7 the date stated in the proof of service, 3 days are added
8 after the period would otherwise expire under
9 Rule 26(a), ~~unless the paper is delivered on the date of~~
10 ~~service stated in the proof of service. For purposes of~~
11 ~~this Rule 26(e), a paper that is served electronically is~~
12 ~~treated as delivered on the date of service stated in the~~
13 ~~proof of service.~~

* * * * *

Committee Note

The amendment in subdivision (c) simplifies the expression of the current rules for when three days are added. In addition, the amendment revises the subdivision to conform to the amendments to Rule 25(d) which eliminate the requirement of a proof of service when filing and service are completed using a court's electronic filing system.

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

2 * * * * *

3 (f) **Items Excluded from Length.** In computing any

4 length limit, headings, footnotes, and quotations count

5 toward the limit but the following items do not:

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

* * * * *

Committee Note

The amendments to subdivision (f) conform the rule to amendments to Rule 25(d) that eliminate the requirement of a proof of service when filing and service are completed using a court's electronic filing system. The amendment to subdivision (f) does not change the substance of the current rule, but removes the articles before each item because a document will not always include these items.

1 **Rule 39. Costs**

2

* * * * *

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

4

(1) A party who wants costs taxed must—within 14

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days after entry of judgment—file with the circuit

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clerk, ~~with proof of service,~~ and serve an itemized

7

and verified bill of costs.

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* * * * *

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Committee Note

In subdivision (d)(1) the words “with proof of service” are deleted and replaced with “and serve” to conform with amendments to Rule 25(d) regarding when proof of service or acknowledgement of service is required for filed papers.

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TAB 6B

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to proof of service in Rule 5(a)(1), leaving the requirement of proof of service to Rule 25(d).
The Advisory Committee proposes the following amendment:

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Rule 5. Appeal by Permission

(a) Petition for Permission to Appeal.

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

Committee Note

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

(cf. 21(a) & (c)
below)

B. Rule 21(a)(1) and (c)

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

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Rule 21. Writs of Mandamus and Prohibition, and Other Extraordinary Writs

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

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

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(c) Other Extraordinary Writs. An application for an extraordinary writ other than one provided for in Rule 21(a) must be made by filing a petition with the circuit clerk ~~with proof of service on~~ and serving it on the respondents. Proceedings on the application must conform, so far as is practicable, to the procedures prescribed in Rule 21(a) and (b).

Committee Note

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

C. Rule 26(c)

Rule 26(c) affords a person who has been served with a paper three additional days to act beyond the otherwise applicable time limit, unless the paper "was delivered on the date of service stated in the proof of service." The rule further provides that a paper served electronically is to be treated as being delivered on the date of service stated in the proof of service. The references to proof of service are problematic because, under the proposed revision to Rule 25(d), proof of service is not required when a party files papers using the court's electronic filing system. As described in the attached minutes, the Advisory Committee considered several approaches for amending Rule 26(c) to address this issue. The Advisory Committee decided that the best approach was to rewrite the rule to say expressly that three days are added unless the paper is served electronically or unless the paper is delivered on the date stated in the proof of service. The Advisory Committee proposes the following amendment:

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Rule 26. Computing and Extending Time

* * * * *

(c) Additional Time after Certain Kinds of Service. When a party may or must act within a specified time after being served with a paper, and the paper is not served electronically on the party or delivered to the party on the date stated in the proof of service, 3 days are added after the period would otherwise expire under Rule 26(a) ~~unless the paper is delivered on the date of service stated in the~~

8 ~~proof of service. For purposes of this Rule 26(c), a paper that is served~~
9 ~~electronically is treated as delivered on the date of service stated in the proof of~~
10 ~~service.~~

The Advisory Committee did not approve a Committee Note for the amendment proposed above. An appropriate note, however, might explain the purpose and function of the proposed amendment as follows: "The amendment in subdivision (c) simplifies the expression of the current rules for when three days are added. In addition, the amendment revises the subdivision so that it can apply even when there is no proof of service."

D. Rule 32(f)

Rule 32 addresses the forms of briefs, appendices, and other papers. The Advisory Committee first determined that the phrase "the proof of service" in Rule 32(f) should be changed to "a proof of service" because there will not always be a proof of service. Further consideration led the Committee to conclude that two other uses of the word "the" should also be changed to "a" for the same reason. The Advisory Committee proposes the following amendments:

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

2 * * * * *

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

- 5 • ~~the~~ cover page;
- 6 • ~~a~~ corporate disclosure statement;²
- 7 • ~~a~~ table of contents;
- 8 • ~~a~~ table of citations;
- 9 • ~~a~~ statement regarding oral argument;
- 10 • ~~an~~ addendum containing statutes, rules, or regulations;
- 11 • certificates of counsel;
- 12 • ~~the~~ signature block;

AS RECOMMENDED
AT THE JAN. 2018
STANDING COMMITTEE
MEETING

² The Standing Committee has published for public comment a proposal that will change "corporate disclosure statement" to "disclosure statement."

- 13 • ~~the~~ proof of service; and
- 14 • any item specifically excluded by these rules or by local rule.

The Advisory Committee did not approve a Committee Note for the amendment proposed above. An appropriate Committee Note might explain: "The amendment to subdivision (f) does not change the substance of the current rule. It changes the references to 'the cover page,' 'the signature block,' and 'the proof of service' to 'a cover page,' 'a signature block,' and 'a proof of service' because a paper will not always include these three items."

E. Rule 39(d)

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

1 **Rule 39. Costs**

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

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

6 Committee Note

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

III. Information Items: Other Matters Discussed at the November 8, 2017 Meeting

The Advisory Committee discussed four additional items at its November 8, 2017 meeting. The Advisory Committee describes these items here for the information of the Standing Committee but does not propose any amendments at this time. The enclosed minutes summarize other matters considered at the Advisory Committee's meeting.

TAB 7

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MEMORANDUM

TO: Appellate Rules Advisory Committee
FROM: H. Thomas Byron, III
Judge Michael A. Chagares
Christopher Landau
Stephen E. Sachs
DATE: March 9, 2018
RE: **Rule 3, Notice of Appeal (16-AP-D)**

Neal K. Katyal and Sean Marotta suggested that this committee consider amending Rule 3(c)'s requirements for the content of a notice of appeal (16-AP-D). Rule 3(c)(1)(B) requires a notice of appeal to “designate the judgment, order, or part thereof being appealed.”

Katyal and Marotta pointed out that the Eighth Circuit in some cases had held that a notice of appeal designating the final judgment and one or more interlocutory orders should be read to limit the scope of the appeal—excluding review of any other orders, notwithstanding the merger rule.

In our discussion and review of cases, our subcommittee identified a related concern: When the district court disposes of all claims, but does not separately enter final judgment, some courts have held that a notice of appeal designating only the last dispositive order closing the case should be read to exclude review of other orders entered earlier.

For that reason, we are currently exploring a range of possible proposals to address the situation where a notice of appeal identifies some but not all orders, in addition to or instead of referring to a final judgment. At Judge Chagares's suggestion, we are seeking additional information from the Administrative Office and the Federal Judicial Center on current practice in the circuits concerning those issues.

We have identified the following questions as appropriate for our initial focus:

1. Does the position described by Katyal and Marotta accurately reflect the position of the Eighth Circuit? If so, do any other courts of appeals follow a similar rule?
2. When a notice of appeal designates an order in a civil case disposing of the last set of remaining claims, whether or not any final judgment is then set out in a separate document (as the Civil Rules might require), which courts of appeals have permitted review of the final judgment as a whole, and which have restricted appellate review to that order only? (Possible examples might include *Elliott v. City of Hartford*, 823 F.3d 170, 173–74 (CA2 2016), or *Moton v. Cowart*, 631 F.3d 1337, 1340 n.2 (CA11 2011).)

In addition, our discussions have identified some related issues that might also be worthy of the committee’s attention in the course of considering any proposed amendment to Rule 3(c). Once our inquiry into the two questions above has been completed, we may consider some issues related to review of post-judgment orders, as well as how strictly courts should construe the designation in a notice of appeal. To that end, we are interested in the following questions:

3. As to post-judgment orders:
 - a. When a notice of appeal is timely filed for appealing the judgment but designates only certain postjudgment orders, which courts of appeals have permitted review of the underlying judgment as well, and which have forbidden such review? (Possible examples might include *Manning v. Jones*, 875 F.3d 408, 411 (CA8 2017), or *Town of Norwood v. New Eng. Power Co.*, 202 F.3d 408, 415 (CA1 2000).)
 - b. When a notice of appeal designates only the final judgment but is timely filed for appealing a

postjudgment order, which courts of appeals have permitted review of the postjudgment order as well, and which have forbidden such review? (Possible examples might include *Caudill v. Hollan*, 431 F.3d 900, 906 (CA6 2005), or *Bogart v. Chapell*, 396 F.3d 548, 555 (CA4 2005).)

4. More generally:

- a. When a litigant drafting a notice of appeal makes the wrong choice among various kinds of related orders—designating, for example, the underlying order and not the order denying leave to amend or denying reconsideration—which courts of appeals have overlooked the error, and which have declined to do so? (Possible examples might include *Williams v. Akers*, 837 F.3d 1075 (CA10 2016), *Huls v. Llabona*, 437 F. App'x 830, 833 (CA11 2011), or *Lockman Found. v. Evangelical Alliance Mission*, 930 F.2d 764, 772 (CA9 1991).)
- b. Which courts of appeals have overlooked an appellant's error in drafting the notice of appeal on the ground that the error does not prejudice the appellee, and which have declined to do so? (Possible examples might include the cases cited in the cert petition in *Rosillo v. Holten*, 137 S.Ct. 295 (2016).)
- c. How often are questions like these litigated? Do courts often confront issues involving Rule 3(c) or the contents of a notice of appeal? Or do these issues arise only rarely?

We welcome any reactions or suggestions concerning these issues from other members of the committee.

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MEMORANDUM

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TO Hon. Neil Gorsuch, Chair
Prof. Gregory E. Maggs, Reporter **ORGANIZATION** Advisory Committee on
Appellate Rules

FROM Neal Kumar Katyal
Sean Marotta **TELEPHONE** (202) 637-5528

DATE October 15, 2016

By Electronic Mail

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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BY ELECTRONIC MAIL

November 14, 2017

The Hon. Michael A. Chagares, Chair
 Prof. Gregory E. Maggs, Reporter
 Advisory Committee on Appellate Rules

RE: Rule 29(a)(2), Letters of Blanket Consent

Dear Judge Chagares and Prof. Maggs:

Under Rule 29(a)(2), a private person needs the parties' consent or leave of court before filing an amicus brief in a court of appeals. I propose that the Rule be amended to allow the parties to file letters of blanket consent. This procedure is already used in the Supreme Court, where it saves parties the time and trouble of approving many separate requests by amici. It could do the same in the courts of appeals.

Supreme Court Rule 37.3(a) states in part as follows:

3. (a) An *amicus curiae* brief in a case before the Court for oral argument may be filed if it reflects that written consent of all parties has been provided, or if the Court grants leave to file under subparagraph 3(b) of this Rule. * * * A petitioner or respondent may submit to the Clerk a letter granting blanket consent to amicus curiae briefs, stating that the party consents to the filing of amicus curiae briefs in support of either or of neither party. The Clerk will note all notices of blanket consent on the docket.

The courts of appeals see fewer amici per case than does the Supreme Court, and I am not aware of any that has adopted a blanket-consent procedure by local rule. But making the option available would still save the parties some time—especially the United States, which often consents to amicus briefs no matter who is filing them. A party preferring to review the amici one-by-one simply need not submit any letter.

The Hon. Michael A. Chagares
RE: Rule 29(a)(2), Letters of Blanket Consent
November 14, 2017
Page 2 of 2

I propose that Rule 29 be amended to follow Supreme Court Rule 37.3(a). (The language below includes other amendments recently transmitted to the Supreme Court; new material is in **bold**.)

Rule 29. Brief of an Amicus Curiae

(a) During 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, but a court of appeals may prohibit the filing of or may strike an amicus brief that would result in a judge's disqualification. **A party may submit to the circuit clerk a letter granting blanket consent to amicus briefs, stating that the party consents to the filing of amicus briefs in support of either or of neither party. The clerk will note all notices of blanket consent on the docket.**

There is no need to amend Rule 29(b)(2)'s provisions on amicus briefs as to rehearing; at that stage, all private amici must obtain leave of court.

I hope this is helpful. Please don't hesitate to contact me if there's more information I can provide, and thank you for your time and attention.

Respectfully,



STEPHEN E. SACHS

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TAB 11

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MEMORANDUM

TO: The Advisory Committee on the Appellate Rules
FROM: Bridget Healy
SUBJECT: Costs on Appeal and Appellate Rule 7
DATE: March 16, 2018

Rule 7 provides that the district court may require an appellant to file a bond in any amount necessary to ensure payment of costs on appeal. At the November 2017 meeting, the Advisory Committee discussed whether attorneys' fees are "costs on appeal" under the rule. After discussion, the Advisory Committee determined to refer the issue to the Civil Rules Committee for its thoughts on the issue and on whether that committee should consider any amendments prior to the consideration of any appellate rule amendments.

The Civil Rules Committee reporters reviewed the suggestion, and advised that their view was that it was an issue for the Appellate Rules Committee to consider initially. They noted that Rule 7 often comes up in cases involving class action objectors, and that the Civil Rules Committee's Rule 23 subcommittee considered issues related to costs on appeal, but did not recommend any specific rule amendments. They also noted that the specific Civil Rule referenced, Rule 62, addresses security for obtaining a stay of execution, like Appellate Rule 8. Appellate Rule 7 addresses only a bond for costs on appeal. Specifically, they stated that: "[n]either Rule 62 nor Rule 8 expressly address costs or attorney fees. Nor does it seem likely that they should. Rule 62 simply calls on the court to approve the bond or other security. Appellate Rule 8(a) is similar." The reporters concluded that if, after consideration of the issue, something appears to impact the Civil Rules, the Civil Rules Committee can review the matter at that time.

The current discussion of the issue first arose at the spring 2016 meeting. The rule provides:

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

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

Research by the former rules law clerk found that most circuits generally permit attorneys' fees to be considered costs on appeal under Rule 7 when the underlying substantive statute allows. The exceptions are the Third Circuit and the D.C. Circuit, although the decision denying attorneys' fees as costs has effectively been overruled in the D.C. Circuit. Memoranda prepared by Gregory Maggs and Lauren Gailey providing greater detail on the research are included as Attachments A and B to this memo, respectively.

The Advisory Committee previously considered this issue in 2003, and discussed an amendment to explicitly state that Rule 7 “costs on appeal” did not include appellate attorney fees. The minutes from the May 2003 meeting reflect that the Advisory Committee discussed *Pedraza v. United Guaranty Corp.*, 313 F.3d 1323 (11th Cir. 2002), in which the Eleventh Circuit described a circuit split over the meaning of Rule 7 and noted that the circuits disagree about whether the reference to “costs on appeal” in Rule 7 is limited to those costs identified in Rule 39(e). The Advisory Committee discussed the issue and reached two conclusions, reflected in the minutes from the meeting:

First, Rule 7 should be amended to resolve the circuit split. This issue is important, and appellants in the Second and Eleventh Circuits — who might be required to post a bond to secure costs and attorneys’ fees amounting to hundreds of thousands of dollars — are treated much differently than similarly situated appellants in the D.C. and Third Circuits — who cannot be required to post a bond to secure anything more than a few hundred dollars in costs.

Second, the amendment to Rule 7 should make it clear that district courts can require appellants to post bonds to secure only what are typically thought of as “costs” (such as the costs identified in Rule 39(e)) and not attorneys’ fees — whether or not those attorneys’ fees are defined as “costs” in the relevant fee-shifting statute. Adopting the position of the Second and Eleventh Circuits would expand Rule 7 beyond its intended scope and vastly increase the cost of Rule 7 bonds. It would also attach significant consequences to whether a particular fee-shifting statute defines attorneys’ fees as “costs,” a matter that likely reflects little conscious thought on the part of Congress. In addition, district courts would confront practical problems in trying to determine the size of bond necessary to secure attorneys’ fees that will be incurred for an appeal in its infancy. Finally, requiring appellants to post a bond to secure attorneys’ fees is almost always unnecessary. In most cases in which an appellant might be held liable under a feeshifting statute for the attorneys’ fees incurred by an appellee, the appellant will be a public entity or other organization with ample resources to pay the fees.

The Advisory Committee discussed how Rule 7 might be amended to reflect this decision, but recognized that nowhere in the Appellate Rules or in the U.S. Code was there a comprehensive list of costs that are recoverable on appeal. The Advisory Committee determined to research this matter further and present a draft amendment and Committee Note at a future meeting.

At the November 2003 meeting, the Advisory Committee considered the following proposed amended Rule 7 and Committee Note:

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

In a civil case, the district court may require an appellant to file a bond or provide other security in any form and amount necessary

to ensure payment of costs on appeal. As used in this rule, “costs on appeal” means the costs that may be taxed under 28 U.S.C. § 1920 and the cost of premiums paid for a supersedeas bond or other bond to preserve rights pending appeal. Rule 8(b) applies to a surety on a bond given under this rule.

Committee Note

Rule 7 has been amended to resolve a circuit split over whether attorney’s fees are included among the “costs on appeal” that may be secured by a Rule 7 bond when those fees are defined as “costs” under a fee-shifting statute. The Second and Eleventh Circuits hold that a Rule 7 bond can secure such attorney’s fees; the D.C. and Third Circuits hold that it cannot. *Compare Pedraza v. United Guar. Corp.*, 313 F.3d 1323, 1328-33 (11th Cir. 2002), and *Adsani v. Miller*, 139 F.3d 67, 71-76 (2d Cir. 1998), with *Hirschensohn v. Lawyers Title Ins. Corp.*, No.96-7312, 1997 WL 307777, at *1 (3d Cir. Apr. 7, 1997), and *In re American President Lines, Inc.*, 779 F.2d 714, 716 (D.C. Cir. 1985). The amendment adopts the views of the D.C. and Third Circuits. To require parties to secure attorney’s fees with a Rule 7 bond would “expand[] Rule 7 beyond its traditional scope, create[] administrative difficulties for district court judges, burden[] the right to appeal for litigants of limited means, and attach[] significant consequences to minor and quite possibly unintentional differences in the wording of fee-shifting statutes.” 16A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & PATRICK J. SCHILTZ, FEDERAL PRACTICE AND PROCEDURE § 3953 (3d ed. Supp. 2004). Moreover, it seems likely that in many, if not most, of the cases in which a fee-shifting statute requires an appellant to pay the attorney’s fees incurred on appeal by its opponent, the appellant is a governmental or corporate entity whose ability to pay is not seriously in question. Under amended Rule 7, an appellant may be required to post a bond to secure only two types of costs. First, a Rule 7 bond may ensure payment of the costs that may be taxed under 28 U.S.C. § 1920; attorney’s fees are not among those costs. *See Roadway Express, Inc. v. Piper*, 447 U.S. 752, 757-58 (1980). Second, a Rule 7 bond may ensure payment of the cost of premiums paid for a supersedeas bond or other bond to preserve rights pending appeal. Although this cost is not mentioned by § 1920, it has long been recoverable under the common law and the local rules of district courts, and it is explicitly mentioned in Rule 39(e).

The proposed amendment was approved by the Advisory Committee at the fall 2003 meeting. The proposed amendment was not submitted to the Standing Committee for approval, but was re-introduced at the April 2007 meeting. It was determined that the matter required

additional study to develop a revised proposed amendment. The matter was discussed in more depth at the November 2007 meeting. The reporter advised that the original motivation for a possible amendment - the circuit split regarding including attorneys' fees as costs under Rule 7 - was no longer as evident, and that it was unclear whether an amendment was needed. The Advisory Committee determined to retain it on its study agenda, and considered completing a study in conjunction with the Federal Judicial Center. Following the additional research, the Advisory Committee determined to complete an in-depth study by the FJC. Finally, at the November 2008 meeting, the Advisory Committee determined to remove the matter from its study agenda, following the FJC research and input from the reporters to the Civil Rules Committee regarding Civil Rules 23 and 68. Professor Catherine Struve's memorandum for the November 2008 meeting is included as Attachment C.

Recommendation

A subcommittee could be formed to consider whether there are any necessary changes to Appellate Rule 7. One possible option would be to amend the rule to include a specific reference to attorneys' fees. This would eliminate any potential circuit split regarding to attorneys' fees as costs on appeal, but may introduce confusion over other included costs. A solution may be to include explanatory language in the accompanying Committee Note, if the rule were to be amended.

Another option is to permit the actions of the Advisory Committee, including the meeting minutes and memoranda, to act as guidance to the circuit courts regarding Rule 7, rather than a rule amendment. This could include any conclusions of the subcommittee.

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MEMORANDUM

DATE: October 15, 2017

TO: The Advisory Committee on Appellate Rules

FROM: Gregory E. Maggs, Reporter

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

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

1 **Rule 7. Bond for Costs on Appeal in a Civil Case**
2 In a civil case, the district court may require an appellant to file a bond or provide
3 other security in any form and amount necessary to ensure payment of costs on
4 appeal. Rule 8(b) applies to a surety on a bond given under this rule.

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

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

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

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

Attachment

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

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MEMORANDUM

TO: Appellate Rules Advisory Committee

FROM: Lauren Gailey, Rules Law Clerk

DATE: July 28, 2017

RE: Circuit split: Whether attorney's fees are "costs on appeal" under Appellate Rule 7

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

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

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

I. The Circuit Split

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁴ Appellate Rule 39(a) provides:

(a) Against Whom Assessed. The following rules apply unless the law provides or the court orders otherwise:

- (1) if an appeal is dismissed, costs are taxed against the appellant, unless the parties agree otherwise;

3. Are American President Lines and Hirschensohn Good Law?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Courts That Have Yet To Decide the Issue

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

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

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

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

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

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

II. How Frequently Does the Rule 7 Issue Arise?

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

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

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

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

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

III. Conclusion

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

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

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

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

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

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

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

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

APPENDIX

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

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

TAB 11C

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MEMORANDUM

DATE: October 20, 2008
TO: Advisory Committee on Appellate Rules
FROM: Catherine T. Struve, Reporter
RE: Item No. 03-02

At the Appellate Rules Committee's April 2008 meeting, members discussed the proposal to amend Appellate Rule 7 to address the inclusion of attorney fees among the costs for which a Rule 7 bond can be required. Among other information, the members discussed the Federal Judicial Center's initial exploratory study of appeal bonds. Members expressed varying views about the best way to proceed with the study of this topic (and, indeed, about whether to proceed with a proposed amendment at all). But there was general consensus that the use of appeal bonds in class litigation seems to pose issues distinct from those raised by the use of such bonds in other settings. Thus, members concluded that before asking the FJC to invest further resources in a larger study, the Committee should seek the views of the Civil Rules Committee concerning the role of appeal bonds in class litigation. Members also expressed interest in seeking the views of knowledgeable practitioners concerning this question.

As a preliminary means of pursuing these questions, I conveyed the following questions to Judge Kravitz and Professor Cooper:

- What role do sizeable appeal bonds play in class litigation? Do such bonds constitute an undue deterrent to appeals by objectors, or are they a useful tool for courts tasked with managing class litigation? (Or does the answer to this question depend on the specifics?) In this context is the inclusion of attorney fees in the bond the only issue, or might sizeable bonds also result from the inclusion of such anticipated costs as "administrative costs" relating to the delay in implementing a proposed class settlement?

- If appeal bonds play a significant role in class litigation, and if their use is problematic, does it make sense for the Appellate Rules Committee to consider a rulemaking response to those issues in isolation, or should such a response be coordinated with your Committee's consideration of other issues relating to the management of class suits?

- We would also be grateful for your suggestions concerning knowledgeable practitioners whom we might consult for their views concerning these issues (obviously, we would want to seek a range of views from plaintiffs' and defendants' viewpoints, and from both those who have served as class counsel and those who have served as counsel

for objectors).

The Civil Rules Committee’s fall meeting, which will occur shortly after the Appellate Rules Committee’s meeting, may provide an opportunity to obtain the Committee’s views on such questions. In the meantime, Professor Cooper shared some very helpful preliminary thoughts.

Professor Cooper’s observations underscore the challenges of moving forward with a provision to address class-action appeals. As a general matter, he notes that to the extent that a commentator takes the view that appeal bonds may be used to respond to perceived problems with the behavior of certain class action objectors, one might question whether the best way to address such behavior is through *appellate* procedure (and specifically through an appeal bond requirement).¹ Moreover, he points out that procedural reforms directed at class-action objectors present challenges: “As to class actions, objectors present many problems. Beginning with the fact that there are, after all, good objectors. And good objections. Back in the earlier phases of the Rule 23 revisions there were provisions that sought both to encourage the good objectors (including an award of fees even if their objections failed) and to discourage bad objectors. Discouraging extortionate appeals was one of the real concerns. At the time we gave up on the idea. That is not to say we should not take it up again, only that it is difficult. So a provision in Appellate Rule 7 looking at class actions only with respect to objector-appellants would be difficult in its own right.”

In addition to these big-picture concerns, a project attempting to address class-action appeals would confront challenging technical issues. Professor Cooper notes that the conceptual challenges of addressing the inclusion of attorney fees in appeal bonds extend beyond situations where a *statute* authorizes the award of attorney fees; for example, appeal-bond issues might arise “[i]f class counsel is entitled to a fee out of the common fund, and it seems reasonable to augment the fee out of the common fund that has been preserved for the class by attorney services rendered for the class as appellee.” In addition, Professor Cooper notes that class-action appeals include interlocutory appeals by permission under Rule 23(f), and he suggests that consideration of such interlocutory appeals might entail assessment of the present uses (and perhaps misuses) of Rule 23(f). Professor Cooper further questions whether (if one is reassessing the contours of Appellate Rule 7) it might be worthwhile to reexamine why only the *appellant* may be required to file a Rule 7 bond: “As for statutory fee appeals, what if the appellant is the one who will be entitled to fees if successful on appeal? Why not require the appellee to post a bond--because we presume the judgment is correct? Should it depend on whether the statute is a one-way shift, a two-way shift, or a [two-way shift under which]defendant can recover, but only on showing worse behavior than the plaintiff need show to

¹ Professor Cooper notes that a focus on appeal bonds might be explained by the likelihood that “any part [of an action] that remains certified for class treatment is far more likely to be resolved by settlement than trial, so appeals will be taken by objectors or no one. But trial, with a winner and a loser, is possible: can we ignore it in the rule?”

recover[[]]?”

Professor Cooper agrees with the Appellate Rules Committee’s intuition that if the Committee were to move in the direction of considering an amendment dealing specifically with appeals in class action litigation, it would be desirable for the Civil Rules Committee to be involved in the discussions of such a proposal. He notes, however, that the Civil Rules Committee’s consideration of issues relating to the treatment of attorney fees under Appellate Rule 7 carries the possibility of additional complications for the Civil Rules Committee. As the Appellate Rules Committee has noted, the reasoning of *Marek v. Chesny*, 473 U.S. 1 (1985), has played a key role in the lower courts’ discussions of the Appellate Rule 7 issue. In *Marek*, the Supreme Court held that Civil Rule 68’s reference to “costs”² includes attorney fees where there is statutory authority for the award of attorney fees and the relevant statute “defines ‘costs’ to include attorney’s fees.” *Marek*, 473 U.S. at 9. The Court explained that because neither Rule 68 nor its note defined “costs,” and because the drafters of the original Rules were aware of the existence of fee-shifting statutes, “the most reasonable inference is that the term ‘costs’ in Rule 68 was intended to refer to all costs properly awardable under the relevant substantive statute or other authority.” *Id.* As Professor Cooper notes, commentators have questioned both the plausibility of the *Marek* Court’s inference and the policy implications of *Marek*’s holding. To the extent that the Committees contemplate revising Appellate Rule 7 to address the treatment of attorney fees as part of Rule 7 “costs,” and to the extent that such a revision to Appellate Rule 7 entails the consideration of possible amendments to the Civil Rules, the question may arise whether (and how) to address *Marek*’s treatment of attorney fees as “costs” under Civil Rule 68. And the latter issue would undoubtedly prove a thorny one. Admittedly, a change to Appellate Rule 7 which did not entail parallel changes to any Civil Rule might not require the Civil Rules Committee to open the question of Civil Rule 68; but this set of potential complications is worth weighing as the Committees discuss whether, and how, to proceed with possible changes to Appellate Rule 7.

If the Appellate Rules Committee is inclined to continue with research concerning appeal bonds and class action litigation, it would be very helpful to obtain the perspective of litigators with experience in various roles in class litigation. (Daniel Girard’s memo, which the Committee considered in connection with its spring 2008 meeting, illustrates how helpful such perspectives can be.) Among those who have assisted the Civil Rules Committee with questions on class action litigation are Allen Black of Fine, Kaplan & Black; Sheila Birnbaum of Skadden, Arps; Robert Heim of Dechert; Jocelyn Larkin of the Impact Fund; and the Public Citizen Litigation Group’s co-founder Alan Morrison.³ I expect that Committee members may have

² If a Rule 68 offer of settlement is not accepted, and “[i]f the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made.” Fed. R. Civ. P. 68(d).

³ Though Alan Morrison is no longer with Public Citizen, he and/or some of the current litigators at Public Citizen could comment from the perspective of class-action objectors.

additional suggestions concerning whom to consult; this would be a useful topic to discuss at the November meeting.