ADVISORY COMMITTEE
ON
APPELLATE RULES

Monterey, CA
April 10-11, 2008
Volume I

Agenda for Spring 2008 Meeting of
Advisory Committee on Appellate Rules
April 10-11, 2008
Monterey, CA

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III. Report on January 2008 Meeting of Standing Committee

IV. Report on Responses to Letter to Chief Judges Regarding Circuit Briefing Requirements

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3. Item No. 07-AP-B (Proposed new FRAP 12.1 concerning indicative rulings)

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B. Item No. 07-AP-E (issues relating to *Bowles v. Russell* (2007))

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E. Item No. 07-AP-F (amend FRAP 35(e) so that the procedure with respect to responses to requests for hearing or rehearing en banc will track the procedure set by FRAP 40(a)(3) with respect to responses to requests for panel rehearing)

F. Item No. 07-AP-G (amend FRAP Form 4 to conform to privacy requirements)**

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A. 07-AP-H (issues raised by *Warren v. American Bankers Insurance of Florida* (10th Cir. 2007)

B. 07-AP-I (FRAP 4(c)(1) and effect of failure to prepay first-class postage)

C. 08-AP-B (FRAP 28.1 – word limits in connection with cross-appeals)

VIII. Schedule Date and Location of Fall 2008 Meeting

IX. Adjournment

** N.B.: As explained in the enclosed materials, Committee action may be requested on Item No. 07-AP-G.

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March 18, 2008
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Carl E. Stewart Chair	C	Fifth Circuit	Member: 2001 Chair: 2005	---- 2008
James Forrest Bennett	ESQ	Missouri	2005	2008
Kermit Edward Bye	C	Eighth Circuit	2005	2008
Paul D. Clement *	DOJ	Washington, DC	----	Open
Thomas S. Ellis III	D	Virginia (Eastern)	2003	2009
Randy J. Holland	JUST	Delaware	2004	2010
Mark I. Levy	ESQ	Washington, DC	2003	2009
Maureen E. Mahoney	ESQ	Washington, DC	2005	2008
Stephen R. McAllister	ACAD	Kansas	2004	2010
Jeffrey S. Sutton	C	Sixth Circuit	2005	2008
Catherine T. Struve Reporter	ACAD	Pennsylvania	2006	Open

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Bankruptcy:

Judge James A. Teilborg (Standing Committee)

Civil:

Judge Eugene R. Wedoff (Bankruptcy Rules Committee)
Judge Diane P. Wood (Standing Committee)

Criminal:

Judge Reena Raggi (Standing Committee)

Evidence:

Judge Kenneth J. Meyers (Bankruptcy Rules Committee)
Judge Michael M. Baylson (Civil Rules Committee)
Judge John F. Keenan (Criminal Committee)

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Advisory Committee on Appellate Rules
Table of Agenda Items — March 2008

FRAP Item	Proposal	Source	Current Status
01-03	Amend FRAP 26(a)(2) to clarify interaction with "3-day rule" of FRAP 26(c).	Roy H. Wepner, Esq.	Discussed and retained on agenda 04/01 Referred to Civil Rules Committee 04/02 Draft approved 11/03 for submission to Standing Committee Approved for publication by Standing Committee 06/07 Published for comment 08/07
03-02	Amend FRAP 7 to clarify whether reference to "costs" includes only FRAP 39 costs.	Advisory Committee	Discussed and retained on agenda 05/03 Draft approved 11/03 for submission to Standing Committee Discussed and retained on agenda 04/07 Discussed and retained on agenda 11/07
03-09	Amend FRAP 4(a)(1)(B) & 40(a)(1) to clarify treatment of U.S. officer or employee sued in individual capacity.	Solicitor General	Discussed and retained on agenda 11/03; awaiting revised proposal from Department of Justice Tentative draft approved 04/04 Revised draft approved 11/04 for submission to Standing Committee Approved for publication by Standing Committee 06/07 Published for comment 08/07
05-01	Amend FRAP 21 & 27(c) to conform to Justice for All Act of 2004.	Advisory Committee	Discussed and retained on agenda 04/05; awaiting proposal from Department of Justice Discussed and retained on agenda 04/06; Department of Justice will monitor practice under the Act
05-05	Amend FRAP 29(e) to require filing of amicus brief 7 *calendar* days after *service* of principal brief of party supported.	Brian Wolfman Public Citizen Litigation Group	Discussed and retained on agenda 04/06; awaiting report from Department of Justice Further consideration deferred pending consideration of items 06-01 and 06-02, 11/06
05-06	Amend FRAP 4(a)(4)(B)(ii) to clarify whether appellant must file amended notice of appeal when court, on post-judgment motion, makes favorable or insignificant change to judgment.	Hon. Pierre N. Leval (CA2)	Discussed and retained on agenda 04/06 Draft approved 04/07 for submission to Standing Committee Approved for publication by Standing Committee 06/07 Published for comment 08/07

FRAP Item	Proposal	Source	Current Status
06-01	Amend FRAP 26(a) to adopt template proposed by Time-Computation Subcommittee.	Standing Committee	Discussed and retained on agenda 04/06 Draft approved 04/07 for submission to Standing Committee Approved for publication by Standing Committee 06/07 Published for comment 08/07
06-02	Amend various rules to adjust deadlines to compensate for new time-computation method.	Standing Committee	Discussed and retained on agenda 04/06; deadline subcommittee appointed Draft approved 04/07 for submission to Standing Committee Approved for publication by Standing Committee 06/07 Published for comment 08/07
06-04	Amend FRAP 29 to require that amicus briefs indicate whether counsel for a party authored brief and to identify persons who contributed monetarily to preparation or submission of brief.	Hon. Paul R. Michel (C.J., Fed. Cir.) and Hon. Timothy B. Dyk (Fed. Cir.)	Discussed and retained on agenda 11/06 Draft approved 04/07 for submission to Standing Committee Remanded by Standing Committee for consideration of new developments, 06/07 Draft approved 11/07 for submission to Standing Committee Approved for publication by Standing Committee 01/08
06-08	Amend FRAP to provide a rule governing amicus briefs with respect to rehearing en banc.	Mark Levy, Esq.	Discussed and retained on agenda 11/07
07-AP-B	Add new FRAP 12.1 concerning the procedure to be followed when a district court is asked for relief that it lacks authority to grant due to a pending appeal.	Civil Rules Committee 1/07	Draft approved 04/07 for submission to Standing Committee Approved for publication by Standing Committee 06/07 Published for comment 08/07
07-AP-C	Amend FRAP 4(a)(4)(A) and 22 in light of proposed amendments to Rules 11 of the rules governing 2254 and 2255 proceedings.	Criminal Rules Committee 1/07	Draft approved 04/07 for submission to Standing Committee FRAP 22 amendment approved for publication by Standing Committee 06/07 FRAP 22 amendment published for comment 08/07
07-AP-D	Amend FRAP to define the term "state."	Time-computation Subcommittee 3/07	Discussed and retained on agenda 04/07 Tentative draft approved 11/07
07-AP-E	Consider possible FRAP amendments in response to Bowles v. Russell (2007).	Mark Levy, Esq.	Discussed and retained on agenda 11/07

FRAP Item	Proposal	Source	Current Status
07-AP-F	Amend FRAP 35(e) so that the procedure with respect to responses to requests for hearing or rehearing en banc will track the procedure set by FRAP 40(a)(3) with respect to responses to requests for panel rehearing.	Hon. Jerry E. Smith	Discussed and retained on agenda 11/07
07-AP-G	Amend FRAP Form 4 to conform to privacy requirements.	Forms Working Group, chaired by Hon. Harvey E. Schlesinger	Discussed and retained on agenda 11/07
07-AP-H	Consider issues raised by Warren v. American Bankers Insurance of Florida, 2007 WL 3151884 (10th Cir. 2007), concerning the operation of the separate document rule.	Appellate Rules Committee	Awaiting initial discussion
07-AP-I	Consider amending FRAP 4(c)(1) to clarify the effect of failure to prepay first-class postage.	Hon. Diane Wood	Awaiting initial discussion
08-AP-A	Amend FRAP 3(d) concerning service of notices of appeal.	Hon. Mark R. Kravitz	Awaiting initial discussion
08-AP-B	Amend FRAP 28.1 concerning word limits in connection with cross-appeals.	Hon. Alan D. Lourie	Awaiting initial discussion

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Minutes of Fall 2007 Meeting of
Advisory Committee on Appellate Rules
November 1 and 2, 2007
Atlanta, Georgia

I. Introductions

Judge Carl E. Stewart called the meeting of the Advisory Committee on Appellate Rules to order on Thursday, November 1, at noon at the Four Seasons Hotel in Atlanta, Georgia. The following Advisory Committee members were present: Judge Kermit E. Bye, Judge Jeffrey S. Sutton,[1] Dean Stephen R. McAllister,[2] Mr. Mark I. Levy, and Ms. Maureen E. Mahoney. Mr. Douglas Letter, Appellate Litigation Counsel, Civil Division, U.S. Department of Justice ("DOJ"), was present representing the Solicitor General. Also present were Judge Lee S. Rosenthal, Chair of the Standing Committee; Judge Harris L. Hartz, liaison from the Standing Committee; Professor Daniel Coquillette, Reporter to the Standing Committee;[3] Mr. Peter G. McCabe, Secretary to the Standing Committee; Mr. Charles R. Fulbruge III, liaison from the appellate clerks; Mr. John K. Rabiej, Mr. James N. Ishida and Mr. Jeffrey N. Barr from the Administrative Office ("AO"); and Ms. Marie Leary from the Federal Judicial Center ("FJC"). Prof. Catherine T. Struve, the Reporter, took the minutes.

Judge Stewart welcomed the meeting participants. Judge Stewart and the Committee congratulated the Reporter on her recent wedding. Judge Stewart congratulated Judge Rosenthal on her new role as Chair of the Standing Committee, and expressed appreciation for her presence at the meeting. He noted also that the Committee appreciated the presence of Judge Hartz in his capacity as liaison from the Standing Committee. Judge Stewart noted with regret that Judge Ellis was unable to attend the meeting because he was presiding over a multi-week trial, and likewise that Mr. Bennett was on trial and unable to be present. Judge Stewart also noted with regret that Justice Holland was not present, but he mentioned that congratulations are due to Justice Holland for his recent receipt of the A. Sherman Christensen Award from the American Inns of Court. Judge Stewart noted Justice Holland's long involvement with, and many contributions to, the Inns of Court movement. Judge Stewart congratulated Mr. Letter on his

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[1] Due to scheduling conflicts, Judge Sutton attended part of the meeting on the afternoon of November 1 and was unable to be present on November 2.

[2] Dean McAllister attended the meeting on November 1 but was unable to be present on November 2.

[3] Professor Coquillette joined the meeting at 12:40 p.m. on November 1 and was present thereafter.

receipt of the Justice Tom C. Clark Award for Outstanding Government Lawyer, which was presented last month by the District of Columbia Chapter of the Federal Bar Association.

II. Approval of Minutes of April 2007 Meeting

The minutes of the April 2007 meeting were approved.

III. Report on June 2007 Meeting of Standing Committee

The Standing Committee approved for publication six sets of Appellate Rules amendments. Specifically, the Standing Committee gave permission to publish for comment the time-computation template and deadlines package; new Appellate Rule 12.1 concerning indicative rulings; an amendment to Appellate Rule 22(b) concerning certificates of appealability (which corresponds to the Criminal Rules Committee's proposed amendment to Rule 11(a) of the rules governing proceedings under 28 U.S.C. §§ 2254 and 2255); an amendment to Appellate Rule 4(a)(4)(B)(ii) that is designed to correct a technical difficulty that crept into Rule 4 as a result of the 1998 restyling; amendments to Appellate Rules 4(a)(1)(B) and 40(a)(1) pertaining to the treatment of suits in which a federal officer or employee is sued in his or her individual capacity; and an amendment to Appellate Rule 26(c) designed to parallel Civil Rule 6's treatment of the "three-day rule." Because the Standing Committee decided not to proceed at this time with the Criminal Rules Committee's proposed amendment to Rule 11(b) of the rules governing proceedings under 28 U.S.C. §§ 2254 and 2255, the corresponding proposal to amend Appellate Rule 4(a)(4)(A) was not approved for publication either. In addition, after discussing late-breaking developments that had occurred subsequent to the Advisory Committee's April meeting, the Standing Committee decided to await the Advisory Committee's further deliberations regarding the proposed amendment to Appellate Rule 29 (concerning amicus brief disclosures), rather than publishing that proposed amendment in August 2007.

At the Standing Committee meeting, Judge Levi appointed Judge Hartz as the chair of a subcommittee that will study issues relating to the sealing of entire cases. Judge Stewart reported that, subsequent to the Standing Committee meeting, he invited Judge Ellis to serve as the Appellate Rules Committee's member on that subcommittee, and Judge Ellis has agreed to serve. Judge Stewart noted that Judge Ellis has had experience with related issues in connection with cases in his district. Judge Hartz stated that the subcommittee's first meeting is scheduled for January, prior to the Standing Committee meeting; he observed that the longevity of the subcommittee will depend in part on how broadly its mandate is interpreted – i.e., whether it studies only the sealing of entire cases, or other issues relating to sealing. Judge Rosenthal noted that the FJC had done a very good study on sealed settlements (in response to congressional pressure to prohibit such practices), and that the Civil Rules Committee had concluded, in the light of the FJC's findings, that sealed settlements do not occur very often and that a rule prohibiting sealed settlements would simply lead litigants not to file their settlements at all.

Judge Rosenthal observed that new issues have arisen relating to sealing of items in the court record. For instance, the availability on the internet of information concerning plea agreements has led to issues relating to the website www.whosarat.com, which publicizes the identity of defendants who have entered into cooperation agreements. Judge Rosenthal reported that the latter topic is now under study by the Court Administration and Case Management Committee ("CACM") and the various Rules Committees.

As a final note, it was mentioned that new Rule 25(a)(5) (addressing privacy concerns relating to court filings) is on track to take effect December 1, 2007.

IV. Report on Responses to Letter to Chief Judges Regarding Circuit Briefing Requirements

Judge Stewart updated the Committee on the responses to his letter to the Chief Judges of each circuit concerning circuit-specific briefing requirements. Since the April 2007 meeting, Judge Stewart has received written responses from the Third, Sixth and Tenth Circuits. Judge Stewart noted that Chief Judge Tacha's letter on behalf of the Tenth Circuit raises a typical issue, which is that the Tenth Circuit is currently engaged in moving to the case management / electronic case filing system ("CM/ECF") and that the Circuit may take the opportunity to review the issues raised in Judge Stewart's letter in the course of a broader review designed to address the move to electronic filing. Judge Stewart predicted that it will take a while for the Circuits to transition to the electronic filing regime, but he stated that his letter has already served its purpose in making the circuits aware of the issues relating to circuit-specific briefing requirements.

Mr. Fulbruge noted that two circuits have already transitioned to electronic case management, and one circuit has already put in place electronic filing. He predicted that other circuits will likely make the transition to electronic case management during the next six months. Mr. McCabe reported that the bankruptcy courts – which were the first to implement CM/ECF – are at work on a new and improved version of it. A judge member observed that the Sixth Circuit will switch to electronic filing in April 2008, and he predicted that many briefing-related issues will percolate up once the electronic-filing regime takes effect. Another judge member reported that the Eighth Circuit's CM/ECF system has been fully operational since September 2007. He has been surprised to see how accepting the legal community is with respect to the new system; his assessment is that the transition has gone well in the Eighth Circuit. Judge Stewart noted that the Fifth Circuit has looked at the Eighth Circuit as a model for the transition to an electronic system. A member asked how the circuits that are switching to electronic filing are dealing with prisoner filings. Mr. Fulbruge explained that in the Fifth Circuit, prisoner filings will continue to be on paper. He noted, though, that some district courts in Texas scan all the prisoner filings in as electronic documents, which means that – with optical character recognition technology – if the original document was typed then the scanned electronic copy is largely word-searchable.

Mr. McCabe noted that a big issue concerns the logistics of getting the record to the Court of Appeals. For example, the AO has been working with the Social Security Administration to address the handling of the record in Social Security cases. Mr. Fulbruge agreed that paper records are a big issue – in particular, which courts will continue to use a paper record, and who will bear the costs of printing it. Mr. McCabe noted the possibility that a court might hire a contractor to do the printing. A member inquired whether the Eighth Circuit requires paper copies of filings now that it has switched to electronic filing. A judge member responded that paper copies need not be provided for documents filed electronically in the Eighth Circuit.

Judge Hartz reported that the Tenth Circuit is now receiving petitions and motions electronically, and that sometimes a motion or petition will be disposed of (based on the electronic filing) before the paper copy ever reaches chambers. Judge Stewart recalled that in the Fifth Circuit the courts' electronic-filing capabilities proved particularly useful in the wake of Hurricane Katrina. He noted the existence of debate over who should shoulder the task of printing paper copies: Reading all documents online instead of in print can be hard on the eyes, and judges may not want to tie up personnel in chambers with heavy printing requests.

V. Update on Public Comments Received to Date

Judge Stewart invited the Reporter to review the comments that the Committee has received so far on the proposed amendments that were published in August.

A comment on the time-computation proposals was received from Mr. Luchenitser of Americans United for Separation of Church and State, who suggests that Appellate Rule 26(c) should be amended so that its rendition of the three-day rule parallels that in Civil Rule 6. The Reporter noted that this comment can be taken as support for the proposed amendment to Appellate Rule 26(c) that has been published for comment.

The other comment that has been received so far is from the Committee on Civil Litigation of the Eastern District of New York ("EDNY Committee"), which writes in general opposition to the time-computation proposals, but supports certain of the Civil Rules Committee's proposals to lengthen specific Civil Rules deadlines. The EDNY Committee predicts that the proposed change in time-computation approach will cause much disruption, given the great number of affected deadlines that are contained in statutes, local rules, and standard forms. The EDNY Committee believes that the current time-counting system works well. To the extent that some litigants have difficulty computing time under the current approach, the EDNY Committee suggests that one could build into the electronic case filing software a program that could perform the necessary computations. The EDNY Committee notes that as to short time periods set by the Rules, the proposed amendments mitigate the effect of no longer skipping weekends, but do not offset the fact that under the new approach holidays will no longer be skipped either. The EDNY Committee argues strongly that if the new time-counting approach is adopted then Congress must be asked to lengthen all affected statutory time periods.

Likewise, the EDNY Committee notes that steps must be taken to lengthen all affected time periods set by local rules and standing orders. The EDNY Committee observes that some local rules contain periods counted in business days, and notes that any change in the time-counting rules should be tailored so as not to change such periods to calendar days. The EDNY Committee warns that the proposed amendments, by clarifying the way to compute backward-counted time periods, would effectively shorten the response time allowed under rules that count backwards. Moreover, the EDNY Committee notes that the proposed time-computation template (like the existing rules) does not provide for a longer response time when motion papers are served by mail. The EDNY Committee proposes that the best solution to the backward-counting problem is to eliminate backward-counted periods; as an example, the EDNY Committee points to the Local Civil Rule 6.1 which is in use in the Eastern and Southern Districts of New York. The Reporter observed that the EDNY Committee's comment, which was received very recently, will be carefully reviewed by the various participants in the time-counting project.

The Reporter noted that Mr. Letter had consulted with his counterpart on the Criminal Rules Committee concerning the proposed new Appellate Rule 12.1, and she invited Mr. Letter to report on the DOJ's view of the proposed new rule. Mr. Letter predicted that the DOJ will likely ask that Rule 12.1's Note be amended to say that Rule 12.1's indicative-ruling procedure would not generally apply in criminal cases. Prosecutors have indicated they have only seen two types of instances in the criminal context where the indicative-ruling procedure could be relevant. One has to do with motions under Criminal Rule 33(b) concerning newly discovered evidence. The other has to do with motions under Criminal Rule 35(b), concerning correcting or reducing a sentence for assistance to the government. The DOJ is concerned that, without the narrowing language in the Note, the advent of Rule 12.1 could prompt a flood of meritless filings by prisoners seeking to make inappropriate use of the new Rule. Mr. Letter observed that motions under Criminal Rule 35(a) (to correct a clear sentencing error) do not need an indicative-ruling mechanism because Appellate Rule 4(b)(5) makes clear that a trial court retains jurisdiction to rule on Rule 35(a) motions. Mr. Letter noted that one option might thus be to amend Appellate Rule 4(b)(5) to say that a district court retains jurisdiction to rule on all motions under Criminal Rule 35, rather than limiting Appellate Rule 4(b)(5) to motions under Criminal Rule 35(a). The Reporter responded that such an extension of Appellate Rule 4(b)(5) might increase the possibility of friction between the trial and appellate courts, given that the time limits on Rule 35(b) motions are much looser than those on Rule 35(a) motions. Mr. Letter suggested that if the Appellate Rule 4(b)(5) approach is not viable, then perhaps Rule 12.1 could cover Criminal Rule 35(b) motions as well as motions under Criminal Rule 33(b).

Judge Rosenthal noted that the Criminal Rules Committee has been asked to comment formally on proposed Rule 12.1. She observed that the Civil Rules Committee had faced a similar problem concerning the scope of proposed Civil Rule 62.1, and that the Civil Rules Committee had decided to give Rule 62.1 a potentially broad scope in civil cases. Judge Rosenthal noted that it is hard to assess the magnitude of the risk that the new Rule 12.1 will cause a flood of meritless filings; she predicted that, in any event, it was unlikely that prisoner litigants would read the Committee Note to the new Rule.

A judge member asked why Rule 12.1's indicative-ruling procedure would not be useful in the criminal context when dealing with a change in the law, such as the Booker decision. Mr. Letter undertook to raise that question with his colleagues in the DOJ. Another appellate judge noted that he had seen a couple of cases in which the court had remanded, and in which the indicative-ruling procedure could have been employed; he noted, however, that courts had been getting by without a formal procedure for indicative rulings. An attorney member asked why the indicative-ruling procedure might not be useful with respect to any instance where there is a change in the law. Mr. Letter responded that such instances are less likely to come up in the criminal context because criminal appeals move so quickly. A judge member noted that because many judges are unfamiliar with the indicative-ruling procedure, they find other ways to handle situations when they arise. Judge Rosenthal observed that the need for a rule on indicative rulings may be greater on the civil than on the criminal side.

Mr. Rabiej noted that a consolidated Rules hearing has been scheduled for January 16, 2008 in Pasadena (after the Standing Committee meeting), and that an additional Appellate Rules hearing has been scheduled for February 1, 2008 in New Orleans. He observed that those wishing to testify at one of the hearings must make their interest in testifying known at least 30 days prior to the hearing.

VI. Action Item

A. Item No. 06-04 (FRAP 29 – amicus briefs – disclosure of authorship or monetary contribution)

Judge Stewart invited the Reporter to introduce the following proposed amendment and Committee Note:

Rule 29. Brief of an Amicus Curiae

* * * * *

(c) Contents and Form. An amicus brief must comply with Rule 32. In addition to the requirements of Rule 32, the cover must identify the party or parties supported and indicate whether the brief supports affirmance or reversal. ~~If an amicus curiae is a corporation, the brief must include a disclosure statement like that required of parties by Rule 26.1.~~ An amicus brief need not comply with Rule 28, but must

include the following:

(1) a table of contents, with page references;

(2) a table of authorities — cases (alphabetically arranged), statutes and other authorities — with references to the pages of the brief where they are cited;

(3) a concise statement of the identity of the amicus curiae, its interest in the case, and the source of its authority to file;

(4) an argument, which may be preceded by a summary and which need not include a statement of the applicable standard of review; ~~and~~

(5) a certificate of compliance, if required by Rule 32(a)(7)~~.~~; and

(6) if filed by an amicus curiae that is a corporation, a disclosure statement like that required of parties by Rule 26.1; and

(7) unless filed by an amicus curiae listed in the first sentence of Rule 29(a), a statement that, in the first footnote on the first page:

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

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

(C) identifies every other person — other than the amicus curiae, its members, or its counsel — who contributed money that was intended to fund preparing or submitting the brief.

* * * * *

Committee Note

Subdivision (c). Two items are added to the numbered list in subdivision (c). The items are added as subdivisions (c)(6) and (c)(7) so as not to alter the numbering of existing items. The disclosure required by subdivision (c)(6) should be placed before the table of contents, while the disclosure required by subdivision (c)(7) should appear in the first footnote on the first page of text.

Subdivision (c)(6). The requirement that corporate amici include a disclosure statement like that required of parties by Rule 26.1 was previously stated in the third sentence of subdivision (c). The requirement has been moved to new subdivision (c)(6) for ease of reference.

Subdivision (c)(7). New subdivision (c)(7) sets certain disclosure requirements for amicus briefs, but exempts from those disclosure requirements entities entitled under subdivision (a) to file an amicus brief without the consent of the parties or leave of court. Subdivision (c)(7) requires amicus briefs to disclose whether counsel for a party authored the brief in whole or in part and whether a party or a party's counsel contributed money with the intention of funding the preparation or submission of the brief. A party's or counsel's payment of general membership dues to an amicus need not be disclosed. Subdivision (c)(7) also requires amicus briefs to identify every other "person" (other than the amicus, its members, or its counsel) who contributed money with the intention of funding the brief's preparation or submission. "Person," as used in subdivision (c)(7), includes artificial persons as well as natural persons.

The disclosure requirement, which is modeled on Supreme Court Rule 37.6, serves to deter counsel from using an amicus brief to circumvent page limits on the parties' briefs. *See Glassroth v. Moore*, 347 F.3d 916, 919 (11th Cir. 2003) (noting the majority's suspicion "that amicus briefs are often used as a means of evading the page limitations on a party's briefs"). It also may help judges to assess whether the amicus itself considers the issue important enough to sustain the cost and effort of filing an amicus brief.

It should be noted that coordination between the amicus and the party whose position the amicus supports is desirable, to the extent that it helps to avoid duplicative arguments. This was particularly true prior to the 1998 amendments, when deadlines for amici were the same as those for the party whose position they supported. Now that the filing deadlines are staggered, coordination may not always be essential in order to avoid duplication. In any event, mere coordination – in the sense of sharing drafts of briefs – need not be disclosed under subdivision (c)(7). *Cf.* Robert L. Stern et al., Supreme Court Practice 662 (8th ed. 2002) (Supreme Court Rule 37.6 does not "require disclosure of any coordination and discussion between party counsel and *amici* counsel regarding their respective arguments . . . .").

The Reporter briefly reviewed the history of the proposal. In November 2006, the Committee voted to amend the Appellate Rules to require that amicus briefs indicate whether counsel for a party authored the brief and to identify persons (other than the amicus, its members, or its counsel) who contributed monetarily to the preparation or submission of the brief. The Committee's consensus was that the Rule should be modeled on Supreme Court Rule 37.6. In April 2007, the Committee approved a proposed amendment to Appellate Rule 29, modeled closely on Supreme Court Rule 37.6 as it then stood. Subsequently, the Supreme Court published for comment a proposed amendment to Supreme Court Rule 37.6 that would have required amicus briefs to disclose whether a party or its counsel was a member of the amicus or contributed money to the preparation or submission of the brief. By email circulation, the Committee considered alternative language that would conform the Appellate Rule 29 proposal to the amended language then proposed for Supreme Court Rule 37.6. By email, the Committee decided to present two alternative amendments to the Standing Committee – one for publication if the proposed amendment to Supreme Court Rule 37.6 were adopted, and the other for publication if the Rule 37.6 proposal were not adopted. After that decision, comments were submitted on the proposed Supreme Court Rule amendment that were highly critical; commenters asserted, among other things, that the proposed amendment, if adopted, would deter lawyers from joining groups that might be amici and would deter groups from seeking amicus status. Because the Appellate Rules Committee had not had a chance to consider those comments, and because it was not yet known what action the Supreme Court would take with respect to the Rule 37.6 amendment, the Standing Committee decided to hold off rather than publish the Rule 29 proposal in August 2007. In late July, the Supreme Court adopted a revised version of Rule 37.6, which took effect October 1, 2007. The revised version requires the amicus to disclose whether a party or its counsel contributed money intended to fund the preparation or submission of the brief. The revisions clearly respond to the criticisms voiced during the public comment period, and response to the Supreme Court's Rule amendment seems to be favorable. Accordingly, the Reporter redrafted the Rule 29 proposal to track the language adopted in the Supreme Court's October 2007 amendment to Rule 37.6. The wording of the Rule 29 proposal differs in some respects from that of Rule 37.6, due to style input from Professor Kimble.

An attorney member noted his impression that people who had been concerned about the proposed Supreme Court Rule 37.6 amendment as initially published were satisfied with the revised language. He stated that he supports the proposed amendment to Appellate Rule 29. There was some discussion of the differences between the language of the Rule 29 proposal and the wording of current Supreme Court Rule 37.6; one attorney member stated a preference for the wording of the Rule 29 proposal because it is clearer than the language used in the Supreme Court rule. It was observed that the Committee Note explains that the amendment is modeled on the Supreme Court rule.

A motion to approve the proposed amendment was moved and seconded. Without objection, the Committee by voice vote approved the proposed amendment.

VII. Discussion Items

A. Item No. 03-02 (proposed amendment concerning bond for costs on appeal)

Judge Stewart invited the Reporter to summarize the issues surrounding Item No. 03-02. In 2003, the Committee decided to amend Appellate Rule 7 to make clear that Rule 7 "costs" for which an appeal bond can be required do not include attorney fees. At the time of the Committee's 2003 decision, there was an evenly-divided circuit split on the question. The proposal was held (pursuant to the Committee's practice) to await submission to the Standing Committee along with other proposals. In spring 2007, the Committee decided not to send the Rule 7 proposal forward to the Standing Committee, having noted some issues with the drafting of the proposal. By fall 2007, the original evenly-divided circuit split has grown lopsided, with four circuits holding that Rule 7 "costs" can include at least some types of attorney fees, and two circuits taking the contrary view. This altered landscape makes it worthwhile for the Committee to revisit its earlier decision in order to assure itself that the proposed amendment is still warranted.

The Reporter briefly reviewed the relevant caselaw. First, though the Supreme Court's 1985 decision in *Marek v. Chesny* is not directly on point, it is worth summarizing because its reasoning is germane. In *Marek*, the Court held that Civil Rule 68's reference to "costs" includes attorney fees where there is statutory authority for the award of attorney fees and the relevant statute defines "costs" to include attorney fees. In so holding, the Court reasoned that neither Rule 68 nor its Note defined "costs," and that the drafters of the original Rule were aware of extant fee-shifting statutes and presumably drafted against the backdrop of those statutes.

The Reporter next summarized the caselaw on the Rule 7 issue itself. Two circuits – the D.C. Circuit and the Third Circuit – have held that Rule 7 costs cannot include attorney fees. These courts reasoned that Rule 7 costs include only those costs that may be taxed under Rule 39, and that Rule 39 costs do not include attorney fees. By contrast, the Second, Sixth, Ninth and Eleventh Circuits have held that at least some attorney fees can be included among Rule 7 costs. These circuits' views vary in some respects. For example, the Eleventh Circuit will include statutory attorney fees among Rule 7 costs, but only if the statutory language defines attorney fees as part of "costs"; the Sixth Circuit, by contrast, has rejected the view that the statutory language must define the attorney fee as part of the costs. Though the Ninth Circuit has held that Rule 7 costs can include statutory attorney fees, it has also held that Rule 7 costs cannot include attorney fees that might be assessed for a frivolous appeal under Appellate Rule 38; the latter type of attorney fee is hard to gauge prospectively (especially for a district court) and its inclusion could chill valid appeals.

Judge Stewart noted a decision handed down by the Fifth Circuit the day before the meeting, in which the panel reduced a $150,000 Rule 7 bond to $1,000. The case concerned an appeal bond required as a condition of the appeal of an objector to a class action settlement; it did not present the question of a statutorily-authorized attorney's fee. Judge Rosenthal noted that it

is interesting that the issue came up in the context of a class action. She observed that there are few tools available to a district judge to prevent a proposed class settlement from being hijacked by objectors. The use of an appeal bond is almost the only way to counter opportunistic objectors. But there is a question what label one puts on the bond. Here, the district judge evidently couched the bond as justified by the judge's view that the appeal was frivolous; perhaps the bond could have been justified instead on another ground, such as the possibility of statutory interest. Judge Rosenthal noted that unlike the possibility of an eventual award of attorney fees for a frivolous appeal under Rule 38, a Rule 7 appeal bond requirement can provide an up-front deterrent to frivolous appeals. She noted that there are "opt out farmers" who have been known to mount campaigns to blow up proposed class settlements.

An attorney member suggested that the Committee should not limit its focus to class actions, and asked whether data are available on whether courts are actually awarding attorney fees under Appellate Rule 38. Another attorney member asked how Rule 7 bonds differ from supersedeas bonds. The Reporter stated that whereas a supersedeas bond is required as a condition of staying the judgment pending appeal, a Rule 7 bond is designed to protect the appellee against the possibility that the appellant will inflict costs on the appellee as a result of the appeal itself. Another member queried whether large Rule 7 bonds would ever be required of defendants of limited means. The Reporter responded that in some fee-shifting contexts – such as the Copyright Act – the inclusion of attorney fees in a Rule 7 bond could affect the appeal of a litigant of limited means. Also, though the availability of in forma pauperis status could address the difficulties of some poor litigants, there might be some litigants not poor enough for i.f.p. status but impecunious enough to suffer hardship from a large Rule 7 bond requirement. Also, i.f.p. status is unavailable to corporate litigants.

A member stated that the proposal seems to raise policy issues concerning access to courts. Decisions whether or not to discourage a particular type of appeal are not, he suggested, the types of choices that the rulemakers are supposed to make. He argued that he would want to know what impact the proposed amendment would have.

Another member responded that the general topic of cost bonds is already covered by Rule 7 – showing that it is appropriate for rulemaking – and that it was unlikely that a better solution to the problem could be obtained from Congress or the Supreme Court than from the rulemaking process. This member suggested that Rule 38 attorney fees should not be taken into account in setting Rule 7 bonds (because determining an appeal's frivolity in advance is unmanageable), but that it may be appropriate to take into account the availability of attorney fees that Congress has defined as "costs."

Professor Coquillette noted that commentators have suggested that sometimes the Supreme Court would prefer to abstain from addressing an issue and let the rulemaking process address it instead. He observed that the rulemakers' statutory mandate includes maintaining consistency in the nationwide application of the Rules.

An attorney member agreed that the rulemaking process has comparative advantages over other avenues of change, but – observing that the rulemakers do not yet know enough to assess the relevant issues – he asked whether it might be possible to have hearings on the topic. Judge Rosenthal stated that it has proven very useful in the past to hold a miniconference on the topic of proposed rulemaking, before publishing a proposal for comment. Participants in the miniconference can be selected to represent various practice areas and sectors that could be affected by the rulemaking change under discussion. The Civil Rules Committee, for example, is using this technique to examine issues relating to Civil Rule 56. A member agreed that such a miniconference would not be unprecedented. Another member asked whether the topic is significant enough to warrant a miniconference; Judge Rosenthal responded that a miniconference need not be an involved proceeding – it can take just half a day in Washington, D.C., for example. Professor Coquillette agreed that mini-conferences have frequently been used.

Judge Stewart asked whether the FJC might be able to assist the Committee. For example, if the Committee has a sense of the frequency with which attorney fees are included in Rule 7 bonds, and the types of cases in which this occurs, and the frequency with which parties decide not to appeal when a large Rule 7 bond is required, that might help the Committee to shape the miniconference. Judge Rosenthal volunteered the assistance of her rules clerk to help the Reporter look through the district court decisions that are available online. She also noted that the rules clerk could assist in assessing how Rule 7 bond rulings are docketed in her district, which would then enable the Committee to focus the inquiries that might be pursued by the FJC. Mr. Fulbruge noted that as a prospective matter, the CM/ECF system can assist the Committee: If district clerks can be asked to use certain language when docketing motions and rulings concerning Rule 7 bonds, then those docket entries will be much more readily searchable. The Reporter stated that she would be very grateful for the assistance of Judge Rosenthal's rules clerk, and that she also looked forward to working with Ms. Leary to shape the necessary inquiries.

In summary, the following inquiries will be pursued concerning the inclusion of attorney fees (including both statutory attorney fees and Rule 38 attorney fees) in Rule 7 bonds. The Reporter will work with Judge Rosenthal's rules clerk, Andrea Thomson, and in tandem with guidance from Ms. Leary and the FJC, to assess what information is currently available from docketing statements, focusing first (as a sample) on docket information from Judge Rosenthal's district. The Reporter and Ms. Thomson will also look at electronically available district court rulings. Armed with that information, the group can consider designing a possible study that the FJC might undertake. Then, based on the information gained through these inquiries, the group can confer on the possible design of a mini-conference (which might, if all goes quickly, be held in tandem with the spring meeting).

A member asked whether it would be appropriate to reach out to some congressional committees for their views on the policy issues. It was observed that it would be preferable to

get a good deal more information and to engage in a good deal more study before taking such a step.

By consensus, Item No. 03-02 was retained on the study agenda.

B. Item No. 06-06 (proposals to amend FRAP 4 and 40 with respect to cases involving state government litigants)

Judge Stewart invited Dean McAllister to report on behalf of the subcommittee tasked with researching the proposal by William Thro, the Virginia State Solicitor General, to amend Rules 4(a)(1)(B) and 40(a)(1) so as to treat state-government litigants the same as federal-government litigants for purposes of the time to take an appeal or to seek rehearing.

Dean McAllister reported that, subsequent to the Committee's April 2007 meeting, he wrote on the subcommittee's behalf to make Mr. Thro aware of the concerns and questions that had been discussed at the April meeting. Dean McAllister raised the matter in June at the the State Solicitors and Appellate Chiefs Conference sponsored by the National Association of Attorneys General; at the NAAG meeting, Dean McAllister discerned little active support for the proposal among other state attorneys general. Dean McAllister noted that Barbara Underwood, the New York Solicitor General, questioned the usefulness of Virginia's proposal.

A member expressed puzzlement why the momentum behind Virginia's proposal had dissipated. He noted that because many other states had initially signed on to the letter in support of Virginia's proposal, it would be useful to inquire where those states currently stand. Dean McAllister noted that another member (not then in attendance at the meeting) had suggested that the states initially supporting the Virginia proposal had not realized the proposal's full implications.

Dean McAllister suggested that Judge Stewart might write a letter (to be distributed through NAAG) noting that the Committee does not perceive a consensus among state attorneys general in favor of the Virginia proposal, and asking state attorneys general to let the Committee know if they continue to support the proposal.

Judge Stewart agreed to write on the Committee's behalf. He suggested that the letter should note that the Committee has had the proposal on its agenda for three meetings; that the Committee appreciates the states' input on the proposal and has studied it carefully; but that based on the information that the Committee has at this time, the Committee is inclined not to take additional action. Based on this understanding, by consensus, Item No. 06-06 was removed from the study agenda.

C. Item No. 07-AP-C (proposal to amend FRAP 4 in the light of proposed amendments to Rules 11 of the rules governing proceedings under 28 U.S.C. §§ 2254 and 2255)

The Reporter noted that the proposed amendment to Rule 11(b) of the rules governing proceedings under 28 U.S.C. §§ 2254 and 2255 has been remanded to the Criminal Rules Committee for further study. Pending the Criminal Rules Committee's review of the Rule 11(b) proposal, there is no action that needs to be taken by the Appellate Rules Committee on the corresponding proposal to amend Appellate Rule 4(a)(4)(A).

D. Item No. 07-AP-D (FRAP 1 – definition of "state")

Judge Stewart invited Mr. Letter to report on the results of his inquiries concerning the views of entities that would be affected by the proposed definition of the term "state" in the Appellate Rules. The proposal would define "state" as follows:

Rule 1. Scope of Rules; Definition; Title

(a) Scope of Rules.

(1) These rules govern procedure in the United States courts of appeals.

(2) When these rules provide for filing a motion or other document in the district court, the procedure must comply with the practice of the district court.

(b) ~~[Abrogated]~~ **Definition.** In these rules, "state" includes the District of Columbia and any commonwealth, territory, or possession of the United States.

(c) Title. These rules are to be known as the Federal Rules of Appellate Procedure.

Committee Note

Subdivision (b). New subdivision (b) defines the term "state" to include the District of Columbia and any commonwealth, territory or possession of the United States. Thus, as used in these Rules, "state" includes the District of Columbia, Guam, American Samoa, the U.S. Virgin Islands, the Commonwealth of Puerto Rico, and the Commonwealth of the Northern Mariana Islands.

Mr. Letter pursued inquiries through the U.S. Attorney's offices in various places that would be affected by the proposed definition. Those offices themselves have expressed no objections to the proposal. Mr. Letter asked the U.S. Attorney's offices in Puerto Rico, the Virgin Islands, Washington D.C., and Guam to contact their local counterparts to see if there are any objections to the proposal. (He was unable to find a U.S. Attorney's office that covered either American Samoa or the Northern Mariana Islands.) Local justice officials in Puerto Rico and D.C. see no problem with the proposed definition. He does not yet have an answer from officials in the Virgin Islands, but his contacts in the U.S. Attorney's office have been pressing further for an answer. He was unable to obtain a response from officials in Guam.

It was noted that American Samoa had previously expressed reservations about a proposed rule amendment that would affect it. Professor Coquillette recalled that the issue in that instance had to do with extraterritorial warrants. Mr. Letter explained that the Pacific Islands Committee of the Judicial Council of the Ninth Circuit had expressed objections to the inclusion of American Samoa in a proposed amendment to Criminal Rule 41 that would authorize certain overseas search warrants. Ultimately, despite those objections, the Standing Committee voted to include American Samoa in the extraterritorial warrant provision.

A motion to approve the proposed new Rule 1(b) was moved and seconded, and passed by voice vote without opposition.

E. Items awaiting initial discussion

1. Item No. 07-AP-E (consider possible FRAP amendments in response to *Bowles v. Russell* (2007))

Judge Stewart invited the Reporter to present an overview of the issues raised by the Supreme Court's recent decision in *Bowles v. Russell*, 127 S. Ct. 2360 (2007). In *Bowles*, the Court held that Rule 4(a)(6)'s 14-day time limit on reopening the time to take a civil appeal is mandatory and jurisdictional, and barred the application of the "unique circumstances" doctrine to excuse violations of jurisdictional deadlines.

After the district court denied Bowles' habeas petition, Bowles failed to file a notice of appeal within the 30-day limit set by rule and statute. Bowles' counsel subsequently moved for an order reopening the time to file an appeal under Rule 4(a)(6), and the district court granted the motion. Both rule and statute limited the allowable extension to 14 days after the date of entry of the order reopening the time, but the district court erroneously set a date (February 27) which extended the time by 17 days. Bowles' counsel filed the notice of appeal on February 26 – within the time set by the order but outside the limits set by rule and statute. A closely divided Supreme Court held that the 14-day period was mandatory and jurisdictional, and thus that Bowles' appeal must be dismissed. The majority relied heavily on the notion that the time period was jurisdictional because it was set by statute. As the Court reasoned, because Congress decides whether the courts can hear cases at all, it can also determine under what circumstances the courts can hear them. Though Bowles had argued that his reliance on the date set by the judge should have excused his untimely filing under the "unique circumstances" doctrine, the Court overruled that doctrine with respect to deadlines – like Rule 4(a)(6)'s 14-day deadline – that are jurisdictional. The dissenters vigorously contested the majority's view that the deadline was jurisdictional, and would have applied the unique circumstances doctrine to excuse Bowles' late filing.

The Reporter noted that the Court's reliance on the statutory nature of the 14-day deadline is not necessarily persuasive, given that 28 U.S.C. § 2107 has historically been modeled on the relevant Rules rather than vice versa. It remains to be seen how courts will treat other Rule 4 deadlines after *Bowles*. Presumably, the Rule 4 deadlines that have a statutory backing will, like the 14-day limit in *Bowles* itself, be held jurisdictional. But non-statutory Rule 4 deadlines could be viewed as claim-processing rules rather than jurisdictional limits, under the Court's prior decisions in *Eberhart* and *Kontrick*. Prudent litigants, however, would be well advised to comply carefully with all Rule 4 deadlines.

The question before the Committee is whether it might take any action in response to *Bowles*. One option might be to re-define which of the Rule 4 deadlines are jurisdictional. Another option might be to reinstate the unique circumstances doctrine. But as to either of these options, there is a question of rulemaking power. The *Bowles* majority closed by stating, "[i]f rigorous rules like the one applied today are thought to be inequitable, Congress may authorize courts to promulgate rules that excuse compliance with the statutory time limits." This language might be read to suggest that the rulemakers do not currently possess that power. Such a conclusion would surprise the rulemakers who adopted the 1966, 1979 and 1991 amendments to Rule 4, each of which forgave untimeliness that would otherwise (under the then-current statute) have doomed an affected appeal. But the conclusion does fit logically with the Court's current view that the statutory appeal deadlines are jurisdictional. The traditional view has been that rules adopted via the rulemaking process are not to affect the courts' subject matter jurisdiction; and though there are limited statutory authorizations for rulemaking that does affect appellate subject matter jurisdiction, those authorizations would not encompass the possible responses to *Bowles*. The Reporter noted that she has had very helpful discussions with Professor Cooper, who has suggested the possibility of exploring ways to respond to *Bowles* through matters that

are recognized to be within the scope of the rulemaking power, such as by altering the way in which the Rules define the entry of judgment or the motions that suspend the running of the time to appeal. But, as Professor Cooper has noted, such approaches may seem circuitous and somewhat artificial when compared with more direct responses such as reinstating the unique circumstances doctrine for all deadlines or redefining which deadlines are jurisdictional.

A member noted that she has always assumed that all the deadlines set by Appellate Rule 4 are jurisdictional. A judge observed that the *Bowles* approach is consistent with the Supreme Court's treatment of the deadlines for seeking Supreme Court review. An attorney member stated that he did not find the Supreme Court's reliance on the statutory nature of the deadline very persuasive. He noted that if one were writing on a clean slate, one could choose among a variety of options – for example, that no appeal deadlines are jurisdictional; or that all are jurisdictional; or that there should be a unique circumstances doctrine. He observed that a key question is who should make those decisions; if the rulemakers were to go forward, he suggested, it would be prudent to obtain ratification from Congress. One would not, he stated, want uncertainty concerning an issue of jurisdiction.

Another attorney member observed that – given the notoriety of the *Bowles* decision – one might assume that if Congress were upset with the approach taken in *Bowles*, Congress would address the matter. A member suggested that only Congress can act to change the approach taken in *Bowles*. Professor Coquillette stressed that the *Bowles* decision has ramifications that will extend throughout all the Rules systems, not just the Appellate Rules; he cautioned that the rulemakers should not be hasty to conclude that there is a lack of rulemaking authority in the area.

Judge Rosenthal noted that the effect of the approach taken in *Bowles* was relatively unlikely to be felt by the attorneys on the Rules Committees, since those attorneys are less likely to miss deadlines. She observed that the effect would likely be felt more acutely in cases litigated by less able lawyers, or by pro se litigants. She pointed out the difficulties that the district courts will face when confronted by uncertainty as to whether a particular deadline is jurisdictional. She predicted that the Bankruptcy Rules Committee and the Civil Rules Committee will also be interested in *Bowles*'s implications. She noted the Rules Committees' historic involvement in questions relating to deadlines.

A member asked whether other Rules Committees should also be looking into the implications of the *Bowles* decision. Judge Rosenthal stated that it is important to get a sense of what the Supreme Court does next in this area, as well as what the lower courts do. An attorney member stated that it is important to avoid suggesting either that the Advisory Committee lacks authority to respond to issues raised by *Bowles* or that the Advisory Committee does not care about those issues. A judge asked whether it is clear that the jurisdictional-deadlines issue will come back up to the Supreme Court. A member noted that the *John R. Sand & Gravel* case, which is before the Court this Term, presents the question of whether the Tucker Act's statute of limitations limits the subject matter jurisdiction of the Court of Federal Claims.

Judge Stewart noted the difficulty of predicting, after *Bowles*, which deadlines are jurisdictional and which are not. If a deadline is jurisdictional, then the court must investigate the question of compliance with the deadline whether or not counsel raises an objection; this adds another layer to the court's workload. There have been a range of reactions to *Bowles*, from those that are approving to those that are highly critical. The *Bowles* decision will have a range of systemic consequences.

By consensus, Item No. 07-AP-E was retained on the study agenda. Judge Rosenthal predicted that the other Rules Committees would also consider *Bowles*'s implications, and she observed that there would also be discussion of *Bowles* at the January Standing Committee meeting.

2. Item No. 06-08 (proposed FRAP rule concerning amicus briefs with respect to rehearing)

Judge Stewart invited the Reporter to discuss the proposal concerning amicus briefs with respect to panel rehearing and rehearing en banc. The Reporter thanked Mr. Levy for raising a number of good questions which the Appellate Rules do not currently address: Can such amicus briefs be filed at all? Can they be filed with the consent of the parties, or is permission of the court by motion required? What is the maximum length for such briefs? And when are they due -- at the same time as the petition or 7 days later?

The Reporter noted that Rule 29's text does not explicitly answer any of these questions. The 1998 Committee Note, which dates from the amendment that introduced the 7-day stagger in briefing deadlines, observes that the court may grant permission to file an amicus brief in a context where a party does not file a principal brief – for example, in support of a petition for rehearing. The Note states that in such a situation, the court will set a filing deadline.

The Reporter's research indicates that five circuits – the First, Second, Fourth, Sixth, and Eighth – currently have no local rule or other provision addressing the matter. The Fourth Circuit, however, has indicated in a 2006 decision that it disfavors requests to file an amicus brief in the first instance at the stage of a request for rehearing. The other eight circuits have local rules or provisions that address various aspects of the matter; the local rule recently adopted by the Ninth Circuit provides the most detailed and comprehensive treatment.

On the question of whether amicus briefs can be filed at all, it is interesting as a point of comparison to note that the Supreme Court does not permit amicus briefs with respect to rehearing. The D.C. Circuit permits amicus briefs on rehearing only by invitation of the court. The Fourth Circuit, as noted, disfavors amicus filings on rehearing if the amicus did not seek to participate in earlier briefing. Some circuits may limit amicus filings at the rehearing stage if the filing would result in a judge's disqualification. A number of circuits, though, do have local

rules or provisions that – by regulating the submission of amicus briefs on rehearing – display an assumption that such briefs will sometimes be filed.

On the issue of whether a motion is required, or whether party consent suffices, circuits take varying approaches. The Ninth Circuit's rule tracks Appellate Rule 29(a)'s approach. In the Eleventh Circuit, government amici need neither party consent nor court permission, but other amici must obtain court permission. In the Federal Circuit, court permission is always required.

At least three circuits have provisions regulating the length of the briefs. Two circuits specifically address the question of timing for amicus briefs on the question of whether rehearing should be granted, while three circuits have addressed the timing of amicus briefs during briefing that ensues after a grant of rehearing en banc. A variety of other circuit-specific provisions address other aspects of amicus filings with respect to rehearing.

A national rule on the subject could provide practitioners with guidance and reduce circuit-to-circuit variations. But a national rule would alter local practices in some circuits in a way that might conflict with some judges' preferences. The Reporter noted that if the Committee decides to consider a adopting a national rule, it should consider whether the national rule should address all or only some of the questions just mentioned, and should also consider whether the practice concerning rehearing should differ in some respects from Appellate Rule 29's approach to amicus briefs more generally.

Mr. Levy explained that he suggested that this item be placed on the Committee's agenda because he is often asked about the practice for amicus filings with respect to rehearing. Moreover, at the time that he raised the question, two circuits were looking at the possibility of making local rules on the subject, and he wondered whether the Committee might wish to consider a national rule. Mr. Levy noted that he disagrees with the Fourth Circuit's view, in that he believes that an amicus's lack of prior involvement should not disqualify the amicus from participating at the rehearing stage.

Professor Coquillette asked whether it is felt that the current diversity in circuit practice is justified by variations in local conditions. Mr. Levy noted that circuits differ with respect to their willingness to grant rehearing en banc. A judge noted that even if there are no inherent local variations, differences among circuits with respect to amicus filings may grow out of different histories, in particular circuits, with respect to en bancs. The judge asked Mr. Levy whether his concerns would be assuaged if each circuit made clear its approach to amicus filings in relation to rehearing. Mr. Levy responded that such clarity would go a long way toward meeting his concerns; later in the discussion, however, he noted that he would not favor an outcome in which additional circuits decided to bar the amicus filings. On that basis, he stated, he would prefer a national rule permitting such filings to a more gradual circuit-by-circuit approach.

Mr. Fulbruge recounted that the frequency of en bancs varies by circuit. Judge Stewart observed that the Fifth Circuit actually blocks out time in the yearly schedule for en banc arguments. Mr. Fulbruge reported that in the Fifth Circuit, both requests for and grants of rehearing (either panel or en banc) have declined over time. He noted that there have been some issues in the Fifth Circuit relating to the possibility that some entities seek to file amicus briefs with the object of causing a recusal. Mr. Letter observed that the Fifth Circuit's rule addresses the disqualification issue but does not answer the other questions posed by Mr. Levy. Mr. Letter noted the argument that amicus filings (concerning rehearing) by the DOJ may be authorized by 28 U.S.C. § 516; but he observed that certainty on the question would be useful. A judge member stated that his impression is that younger judges are more likely to vote for en bancs. Seven years ago, he recalled, en bancs were a relatively rare occurrence in his circuit, but that has changed after the recent appointments to the circuit.

Judge Rosenthal suggested that if the main problem is that there are gaps in the circuits' local rules, the Committee might work with CACM to coordinate a request to the circuits to clarify their requirements. A member asked whether the Committee might wish to consider adopting a default rule that would govern in the absence of a circuit-specific requirement. Professor Coquillette noted that one option is to develop a model for a uniform local rule on the subject. Another member stated that, in considering the matter, it would be useful to know whether judges think that amicus briefs concerning rehearing are actually useful. Judge Stewart observed that it would be hard to discern judges' views on that question, and that cultures vary from circuit to circuit; for example, the Seventh Circuit seems less likely than other circuits to welcome amicus filings. He noted that in some instances, amicus briefs have been filed that were more helpful than the parties' briefs; thus, he would not favor a rule that barred amicus filings. An attorney member suggested that the D.C. Circuit might feel that their situation differs from that of other circuits, because the D.C. Circuit does not grant rehearing en banc all that often, and if it permitted amicus filings with respect to rehearing it might receive many more than some other circuits do. (On the other hand, the member noted that if one is drawing a comparison to Supreme Court practice, one should not only look at the practice with respect to rehearing, since a more apt analogy might be the practice with respect to certiorari petitions.) An attorney member agreed that judges' preferences vary with respect to amicus briefs; he also noted, though, that there is a virtue in allowing amici to air their views.

Judge Rosenthal cautioned that the Committee should think carefully about whether the question is one that is appropriate for a national rule. There can be a danger to trying to have it both ways – i.e., to adopt a default rule but to allow local rulemakers to opt out. That approach was tried with respect to Civil Rule 26(a), and what happened was that the district courts opted out in droves – which was particularly problematic in that instance given Civil Rule 26(a)'s potential impact. Professor Coquillette recalled that the local opt-out in Rule 26(a) was forced on the rulemakers by others; he observed that the Civil Rules Committee currently faces similar pressures with respect to local practices on summary judgment.

A member suggested that the question is whether the Committee feels that this matter is more like briefing rules (as to which the Committee has allowed, but discouraged, local requirements) or more like citation of unpublished opinions (as to which the Committee adopted a national rule); he stated that he believes persuasion is the better approach to take in this instance. Professor Coquillette noted, as a precedent, that CACM has in the past developed model local rules, for example, with respect to electronic filing.

An attorney member observed that a national rule permitting amicus filings concerning rehearing would not be as intrusive on circuit preferences as a national rule preempting all circuit-specific briefing requirements: If judges don't want to read the resulting amicus filings, he suggested, they need not do so. Mr. Letter stated that this issue does not seem comparable to the variation in circuit briefing rules; here, it would be better for there to be a rule that governs, even if it is not a national rule. He noted that the government almost never opposes amicus filings in the court of appeals. A judge responded that if judges know that they will not read amicus filings on a particular topic, it would seem wrong to have a local rule that allows those filings. He noted that the circuits' response to Judge Stewart's letter concerning circuit-specific briefing requirements shows that it would be difficult to induce the circuits to address the amicus-brief issue without a nudge; working with CACM, he suggested, could be an effective way to provide such a nudge. Mr. Rabiej noted that a model local rule could be developed either by CACM or by the Advisory Committee; he observed that the track record for adoption of CACM's proposed local rules has not been all that good. Professor Coquillette noted that he had offered CACM's experience by way of example, and not to indicate that he thought CACM should necessarily be the entity to perform the drafting. Mr. McCabe noted that CACM's best outcome, in terms of adoption, was the model local rule on electronic filing; but he observed that that result has been the exception. A judge suggested that the key is to present the circuits with a list of the questions that local circuit rules should answer – rather than to tell the circuits how they should answer each of those questions.

Judge Rosenthal commented that even if the circuits take no action on the suggestion, one would be no worse off than before. She suggested that a request to the circuits would be most effective if the Committee makes a persuasive case concerning the need for local rules; thus, for example, if the ABA Section on Litigation voiced support for the proposal, that would be helpful.

Mr. Levy moved that the Committee decide to adopt a national rule on amicus filings with respect to rehearing, with the rule's content to be determined subsequently. Mr. Letter seconded the motion. An attorney member stated that the Committee should consult the D.C. Circuit for its views before publishing a proposed rule. Mr. Letter volunteered to contact the D.C. Circuit's Clerk. A member questioned whether the Committee should vote on Mr. Levy's motion without first deciding the content of the proposed rule. Mr. Letter suggested that the motion should be amended to state that the Committee would retain the matter on its study agenda and consider it further at the next meeting. The member who had raised the question stated that he would be amenable to that approach, but that if the proposal turns out to be one for a national rule he would vote against it. After this discussion, Mr. Levy withdrew the motion.

By consensus, the Committee retained Item 06-08 on its study agenda. The Reporter will work with Mr. Letter and Mr. Levy to develop a proposal for the Committee's consideration at the spring meeting.

3. Item No. 07-AP-F (amend FRAP 35(e) so that the procedure with respect to responses to requests for hearing or rehearing en banc will track the procedure set by FRAP 40(a)(3) with respect to responses to requests for panel rehearing)

Judge Stewart invited the Reporter to describe the issues raised by Item No. 07-AP-F. This Item arises from a suggestion made by Judge Jerry Smith. Judge Smith points out that while Rule 40 assures litigants that ordinarily the court will request a response to a petition for panel rehearing before granting such a petition, Rule 35 provides no such assurance with respect to requests for rehearing en banc. Judge Smith suggests that Rule 35(e) should be amended to state that ordinarily the court will not grant rehearing en banc without first allowing a response to the request.

The Reporter noted that during the Committee's deliberations over the restyling of the Appellate Rules, the Committee discussed but rejected the option of eliminating this difference between Rules 35 and 40. From the minutes, it appears that one or more members relied on the notion that if en banc rehearing is granted, there will be a later opportunity for the party opposing the petition to respond – namely, during the en banc briefing.

The Reporter briefly reviewed the circuit-specific provisions on this question. Currently, seven circuits have no rule or other local provision that would assure the opponent of a petition for rehearing en banc that it will be asked to respond before rehearing en banc is granted. Five circuits have provisions stating that the court will not, or ordinarily will not, grant rehearing en banc without first ordering a response. Another circuit has an internal operating procedure that, in practice, likely assures that in most instances a response will be requested prior to a grant of rehearing en banc. As a point of comparison, the Supreme Court Rules state that the Court ordinarily will not grant rehearing without first requesting a response.

Mr. Fulbruge noted that although the Fifth Circuit does not have a local rule on point, in practice the court requests a response before granting rehearing en banc. Judge Stewart agreed that, in practice, the court would not grant rehearing en banc without requesting a response. He noted, as well, that a response to the request for rehearing en banc can assist the court in reaching a resolution that stops short of rehearing en banc; for example, the panel might change some aspects of the language in the panel opinion.

Judge Hartz noted that though the Tenth Circuit does not have a local rule on point, in practice the court calls for a response prior to granting a request for rehearing en banc. On the other hand, Judge Hartz noted, the court does order en bancs *sua sponte* without first requesting a

response. Judge Stewart noted that a fair number of rehearings en banc are initiated by a circuit judge rather than by the parties.

Mr. Letter cautioned that it is not always the case that the party opposing rehearing en banc will get an opportunity to submit new briefing during the en banc procedure itself. For example, in the Ninth Circuit, the court does not always call for new briefs when it grants rehearing en banc. He suggested that it is good to call for a response before granting rehearing en banc, because giving the party a chance to submit its views in opposition to rehearing contributes to the perception that the process is fair. This is true, Mr. Letter suggested, not just when a party requests rehearing en banc but also when the court grants rehearing en banc sua sponte.

An attorney member stated that he believes the proposal makes sense, although he has not considered the question of whether the court should provide an opportunity for a response before it grants rehearing en banc sua sponte. He noted a general trend in the Appellate Rules toward treating panel rehearing and rehearing en banc the same way. Another attorney member stated that seemed to be no grounds for objection to the proposed rule change, but, on the other hand, that it is not clear whether there is a need for it: As a practical matter, the courts seem to ask for a response before granting rehearing en banc. A judge noted that if Rule 35 is amended, there is the question of whether to cover sua sponte grants of rehearing en banc. It was noted that one could draft the response provision so it does not apply to sua sponte en bancs; and it was also observed that the Rule 40 provision contains the qualifier "ordinarily."

By consensus, Item No. 07-AP-F was retained on the study agenda.

4. Item No. 07-AP-G (amend FRAP Form 4 to conform to privacy requirements)

Judge Stewart invited Mr. McCabe to present Item No. 07-AP-G, which concerns the implications of the new privacy requirements for Appellate Form 4.

Mr. McCabe explained that the Administrative Office produces a number of forms, and has a working group that provides advice on them and on other forms. Among the forms appended to the Appellate Rules is Form 4, which concerns the information that must accompany a motion for permission to appeal in forma pauperis. Form 4 is referred to in Rule 24, which states that motions for leave to proceed in forma pauperis status must attach an affidavit that shows in the detail prescribed by Form 4 the party's inability to pay.

In the wake of the E-Government Act, the courts have adopted new privacy rules that require redaction of certain personal identifiers. An effort has been made to review the AO's many forms for consistency with the new privacy requirements. The AO's committee has identified a number of forms for court filings that ask the litigant to include a social security number.

There is thus a need to consider amending Form 4. There is also the question of what form should be used in the district courts. Perhaps Form 4 can be adapted for use in the district courts. But some district judges argue that they do not need all the detail required by Form 4, especially in prisoner cases. One option might be to use something like Form 4 for use in non-prisoner cases, and to have a shorter, simpler form for use in prisoner cases. In the meantime, it is necessary to bring the current forms into compliance with the new privacy requirements. Mr. McCabe also noted that an effort is underway to restyle all of the forms. Mr. Rabiej noted that the district courts' shorter form is used in habeas cases, where the fee is $ 5.00; questions concerning a $ 5.00 fee would not seem to justify a lengthy affidavit form.

Mr. Coquillette pointed out that, while the Committee is considering revisions to Form 4, it may wish to consider Question 10, which requests the name of any attorney whom the litigant has paid for services in connection with the case, as well as the amount the litigant has paid. Mr. Coquillette stated that the National Association of Criminal Defense Lawyers has argued that these questions seek information that is protected by the attorney-client privilege; he noted that some other commentators dispute that view.

Mr. Fulbruge noted that it is important to require some sort of personal identifying information, especially since many litigants may have common surnames. Mr. Rabiej asked whether including the last four digits of the person's social security number would suffice. Judge Rosenthal stated that in addition, it is important to require the person's full name. She stated support for the notion of having one form that can be used in both the district courts and the courts of appeals. She observed that current Form 4 includes what seems like excessive detail for in forma pauperis requests; why does the judge need to know about the person's laundry and dry cleaning? Mr. Rabiej recounted that the Supreme Court Clerk had specifically requested that detailed questions be included in Form 4.

Judge Rosenthal stressed the need to act quickly to eliminate the request for the full social security number. Judge Rosenthal observed that the issue of home addresses should also be looked at, and that Form 4's Question 7 – relating to dependents – raises privacy issues concerning minor children. The Committee will work with CACM and other Committees and with Mr. Rabiej and Mr. McCabe to get the word out to the district courts and courts of appeals. Mr. Fulbruge suggested that it will also be important to get word to prison libraries. Mr. Fulbruge volunteered to reach out to his colleagues among the circuit clerks to alert them to these issues.

VII. Additional Old Business and New Business

A. Information item relating to Item No. 06-05 (statement of issues to be raised on appeal)

The Reporter drew the Committee's attention to the correspondence from Judge Jan

DuBois, who wrote to the Reporter to express support for Judge Baylson's proposal for a FRAP rule modeled on Pennsylvania Rule of Appellate Procedure 1925(b). The Reporter noted that she had had a very helpful telephone discussion with Judge DuBois concerning his support for the proposal, and that she had assured Judge DuBois that she would make the Committee aware of his thoughts on the matter.

B. New Business

Judge Stewart noted that, pursuant to the Chief Justice's new policy, the Chairs of the Rules Committees will be attending the Judicial Conference's discussions concerning long-range planning. Thus, if members have suggestions concerning long-range planning issues, Judge Stewart would be happy to discuss them.

A judge member noted that the Tenth Circuit's recent opinion in *Warren v. American Bankers Insurance of Florida*, 2007 WL 3151884, raises significant issues concerning the operation of the separate document rule. Mr. Letter agreed that the questions raised in *Warren* are important. The Reporter suggested that she should investigate the matter and report on it at the Committee's spring meeting.

VIII. Date and Location of Spring 2008 Meeting

The Committee tentatively discussed April 10 and 11 as possible dates for the Committee's Spring 2008 meeting. The date and location will be announced.

IX. Adjournment

The Committee adjourned at 9:45 a.m. on November 2, 2007.

Respectfully submitted,

Catherine T. Struve
Reporter

ORAL REPORT ON

JANUARY 2008 STANDING COMMITTEE MEETING

Oral Report on

Responses re Circuit Briefing Requirements

MEMORANDUM

DATE: March 13, 2008

TO: Judge Lee H. Rosenthal
Standing Committee on Rules of Practice and Procedure
Reporters and Advisory Committee Chairs

CC: John K. Rabiej

FROM: Judge Marilyn L. Huff
Catherine T. Struve

RE: Time-Computation Project

We write on behalf of the Time-Computation Subcommittee to summarize the Subcommittee's reactions to the comments submitted concerning the proposed time-computation amendments.

Part I of this memo summarizes the Time-Computation Subcommittee's recommendations and requests. Part II summarizes developments in the Project since the Standing Committee's June 2007 meeting. Part III provides more detail concerning the Subcommittee's views on each outstanding issue.[1] Part IV lists and summarizes the comments submitted on the time-computation project.[2] Part IV includes not only the issues highlighted in Part III, but also a number of comments that seem more properly directed to a particular Advisory Committee than to this Subcommittee.

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[1] Part III omits discussion of comments that seem more appropriate for consideration by one or more of the Advisory Committees outside the context of the time-computation project than for consideration at this time by the Subcommittee. (Such comments concern, inter alia, proposals to change the "three-day rule"; proposals to eliminate backward-counted deadlines; and criticisms of particular deadlines or proposed changes to deadlines within a given set of Rules.) Part III is organized thematically.

[2] In the interest of brevity, Part IV does not list comments directed solely to the bankruptcy appeal deadlines contained in Bankruptcy Rule 8002, because such comments are numerous and are more properly addressed by the Bankruptcy Rules Committee than by the Time-Computation Subcommittee.

I. Summary of recommendations

The Subcommittee makes the following recommendations, the reasons for which are discussed in Part III of this memo. As explained in Part III, the Subcommittee also discussed at length two possible changes to the proposed text and note of the time-computation rules.[3] Because each of those possible changes ultimately failed to gain the support of a majority of Subcommittee members, the Subcommittee recommends no change in the language of the proposals as published.

Approval and timing of project. The Subcommittee recommends that the Advisory Committees move forward to finalize the proposed time-computation rules. As discussed in Part III.B, questions have been raised about the timing of the project, and it may be the case that in the future the Standing Committee should consider the possibility of delaying the project's progress or the effective date of the proposed amendments. But for the moment, the Subcommittee recommends proceeding on the assumption that the project will continue on track to take effect December 1, 2009.

Compilation of list of statutory deadlines for amendment. The Subcommittee asks each Advisory Committee to compile – and approve at its spring meeting – a list of the statutory time periods that fall within its area of expertise and that should be lengthened in order to offset the shift in time-computation approach.[4] The project's timing will depend in part on how soon

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[3] Those two possible changes can be summed up as follows:

Note to subdivision (a). The Subcommittee discussed whether to recommend adding the following sentences to the first paragraph of the Note to subdivision (a) of the time-computation rules:

> Thus, for example, a local rule should not set a time period in "business days," because subdivision (a) directs that one "count every day, including intermediate Saturdays, Sundays, and legal holidays." A local rule providing that "[r]eply papers shall be filed and served at least three business days before the return date" should be amended. Until then, it should be applied, under subdivision (a), as though it refers to "three days" instead of "three business days."

New language for subdivision (a)(6). The Subcommittee discussed whether to recommend splitting subdivision (a)(6)(B) into two provisions as follows:

> (B) any other day declared a holiday by the President or Congress; and
>
> (C) for periods that are measured after an event, any other day declared a holiday by the state [etc.]

[4] Some participants in the Subcommittee's conference calls are of the view that the goal should be to make a short list of those statutory time periods which are most in need of such

the Advisory Committees are able to compile those lists. In particular, there is a pressing need to obtain the list of provisions affecting criminal practice, in order to seek input from affected groups.

II. Recent developments in the time-computation project

As you know, the Time-Computation Subcommittee is tasked with examining the time-computation provisions found in the Appellate, Bankruptcy, Civil, and Criminal Rules, with a view to simplifying those provisions and eliminating inconsistencies among them. The Subcommittee, in consultation with the Advisory Committees and the Standing Committee, drafted a proposed template for an amended time-computation rule. The template's principal simplifying innovation is its adoption of a "days-are-days" approach to computing all periods of time, including short time periods.

Versions of the template rule were published for comment as proposed amendments to Appellate Rule 26(a), Bankruptcy Rule 9006(a), Civil Rule 6(a), and Criminal Rule 45(a). Also published for comment were proposed amendments to numerous deadlines set by the Appellate, Bankruptcy, Civil and Criminal Rules; the goal of those amendments is to offset the effect of the change in time-counting approach by lengthening most short rule-based deadlines.

In publishing the time-computation proposals for comment, we drew the attention of the bench and bar to three issues in particular. First, we solicited input on the proposed time-computation rules. Second, we noted that the shift to a days-are-days approach will be almost entirely offset – as to rule-based periods – by amendments that lengthen most short rule-based deadlines. Third, we pointed out that the new time-computation rules will govern a number of statutory deadlines that do not themselves provide a method for computing time, and we solicited input concerning key statutory deadlines that the Standing Committee should recommend that Congress lengthen in order to offset the change in time-computation approach.

We received a total of some 22 comments that are relevant to the time-computation project as a whole. Those comments are summarized in Part IV of this memo. The public comment period closed February 15, 2008. The Time-Computation Subcommittee held two conference calls in February 2008 to discuss the comments. As to a few issues (such as those discussed in Part III.C.1) the Subcommittee continued its deliberations by email.

III. Discussion of Subcommittee recommendations

This Part discusses issues raised by the comments on the time-computation project, and summarizes the Subcommittee's reactions to those issues.

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amendment. But one Subcommittee member has suggested that the goal should be to amend *all* affected statutory deadlines (unless they are controversial and therefore might derail or delay the entire project).

A. Overall advisability of project

The following commentators commented favorably on the time-computation project overall:

- Chief Judge Frank H. Easterbrook.
- Walter W. Bussart.
- Jack E. Horsley.
- Public Citizen Litigation Group.
- The State Bar of California's Committee on Appellate Courts.

The following commentators commented unfavorably.

- The Committee on Civil Litigation of the U.S. District Court for the Eastern District of New York ("EDNY Committee").
- The Committee on Bankruptcy and Corporate Reorganization of the Association of the Bar of the City of New York ("ABCNY Bankruptcy Committee").
    - The Committee focuses its opposition on the time-computation proposal for Bankruptcy Rule 9006. With respect to the time-computation proposals for the other sets of Rules, the Committee cites with approval the comments of the EDNY Committee.
- Professor Alan N. Resnick opposes adoption of a days-are-days time-computation approach in Bankruptcy Rule 9006.
- Richard Levin writes on behalf of the National Bankruptcy Conference ("NBC"), which "strongly endorses and supports" the comments submitted by Professor Alan Resnick.[5]

Commentators who oppose the project predict that the proposed change in time-computation approach will cause disruption, given the great number of affected deadlines that are contained in statutes, local rules, and standard forms. They believe that the current time-counting

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[5] The NBC also warns that the proposed changes to various bankruptcy-relevant time periods could result in unintended consequences; it thus suggests "that the Advisory Committee delay incorporation of the 7, 14, 21, and 28 day time period changes into the Bankruptcy Rules until the impact of those changes [is] studied further ...."

system works well.[6] They note that as to short time periods set by the Rules, the proposed amendments mitigate the effect of no longer skipping weekends, but do not offset the fact that under the new approach holidays will no longer be skipped either.

Subcommittee members reviewed with care the arguments leveled against the time-computation proposals. Members observed, however, that these were the same objections that had been made – and rejected – during the Advisory Committees' earlier consideration of the proposed template. The Subcommittee's consensus was that it makes sense to proceed with the project, subject to the considerations discussed in Part III.B. below.

B. Statutory deadlines, local rules deadlines, and the timing of project's implementation

Several commentators (1) urge strongly that statutory and local rules deadlines must be adjusted in order to offset the shift to a days-are-days approach, and (2) also urge that the new time-computation rules' effective date must be delayed until those tasks are accomplished.[7]

1. Statutory and local rules deadlines

Craig S. Morford, Acting Deputy Attorney General, writes on behalf of the Department of Justice to express support for the goals of the time-computation project, but also to express strong concerns "about the interplay of the proposed amendment with both existing statutory periods and local rules." The DOJ argues that "changes should be addressed in relevant statutory and local rule provisions before a new time-computation rule is made applicable." Otherwise, the DOJ fears that the purposes of some statutes "may be frustrated." The DOJ argues that exempting statutory time periods from the new time-counting approach would be an undesirable solution since it would create "confusion and uncertainty" to have two different time-counting regimes (one for rules and one for statutes). Mr. Morford does not specifically state the DOJ's position on which of the statutory time periods should be lengthened to offset the change in time-computation approach. His letter does refer to the Committee's identification of "some 168 statutes ... that contain deadlines that would require lengthening."

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[6] To the extent that some litigants have difficulty computing time under the current approach, the EDNY Committee suggests that one could build into the electronic case filing software a program that could perform the necessary computations.

[7] Alexander J. Manners proffers several suggestions for guiding the local rules amendment process. He suggests that the district courts be given "an implementation guide and timeline for district courts to follow in order to ensure their local and judges' rules are amended correctly and in time to coincide with the adoption of the new Federal Rules." That guide should, he argues, encourage local rulemakers to lengthen affected short time periods (taking account, inter alia, of any relevant state holidays) and to use multiples of 7 days (where possible) when doing so.

The EDNY Committee argues strongly that if the new time-counting approach is to be adopted then Congress must be asked to lengthen all affected statutory time periods. Likewise, the EDNY Committee notes that steps must be taken to lengthen all affected time periods set by local rules, standing orders, and standard-form orders.

The Subcommittee takes seriously the comments that stress the necessity for changes in periods set by statute or by local rule. The Subcommittee asks each Advisory Committee to compile and approve a list of the statutory time periods that will require amendment. Subcommittee members did not reach complete consensus on the approach that should be taken in compiling the list. At least one Subcommittee member stressed the importance of including all affected statutory time periods (except for any that might be deemed controversial). Other participants in the conference call, however, took the view that the goal should be to compile a relatively short list of the provisions that are most likely to cause problems if not lengthened to offset the shift in time-computation approach.

2. Timing of project's implementation

As noted above, the DOJ urges that the time-computation amendments not be allowed to take effect unless and until (1) Congress enacts legislation to lengthen all relevant statutory periods, (2) the local rulemaking bodies have had the opportunity to amend relevant local-rule deadlines, and (3) the bench and bar have had time to learn about the new time-counting rules. Likewise, Robert M. Steptoe, Jr., a partner at Steptoe & Johnson, urges that the time-computation proposals "not be implemented unless and until the Standing Committee is sure that it will receive the necessary cooperation from Congress and the local rules committees to meet the desired objective of simplification." Similarly, Alex Luchenitser of Americans United for Separation of Church and State urges that "local district and appellate courts should be given a specific time frame to adopt revisions to their rules after the new federal rules are approved. And the new federal rules should not go into effect until after the deadline for local courts to adopt changes to their rules passes."

The Subcommittee agrees that the effective date of the Rules should be chosen so as to allow time for the necessary statutory and local rules changes.

3. Timing possibilities

The Subcommittee discussed possible ways to adjust the time-computation project's timing to address these concerns. The further progress of the package of time-computation amendments depends upon the understanding that Congress will pass legislation lengthening a number of statutory deadlines. If the time-computation project were to go forward as planned, the Rules amendments would be on track to take effect December 1, 2009. Because the ability to stay on the December 1, 2009 track depends in part on events that have not yet occurred (including the need to compile and obtain input on the list of short statutory time periods that require amendment), the Subcommittee discussed two alternate possibilities. One would be to ask the Standing Committee to hold the package of time-computation amendments until June

2009. Another would be to include effective date provisions that make the time-computation rule amendments not effective until some time after Congress passes appropriate legislation or until December 1, 2010 (so as to afford more time for conforming legislation and local rule changes).

The Supreme Court's orders customarily provide that amendments "shall take effect on December 1, [year], and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending." See, e.g., Order of April 12, 2006, 234 F.R.D. 221. But that pattern is not required by statute. As to the Civil, Criminal, and Appellate Rules, 28 U.S.C. § 2074 provides:

> The Supreme Court shall transmit to the Congress not later than May 1 of the year in which a rule prescribed under section 2072 is to become effective a copy of the proposed rule. Such rule shall take effect no earlier than December 1 of the year in which such rule is so transmitted unless otherwise provided by law. The Supreme Court may fix the extent such rule shall apply to proceedings then pending, except that the Supreme Court shall not require the application of such rule to further proceedings then pending to the extent that, in the opinion of the court in which such proceedings are pending, the application of such rule in such proceedings would not be feasible or would work injustice, in which event the former rule applies.

Section 2075, concerning the Bankruptcy Rules, provides simply that "[t]he Supreme Court shall transmit to Congress not later than May 1 of the year in which a rule prescribed under this section is to become effective a copy of the proposed rule. The rule shall take effect no earlier than December 1 of the year in which it is transmitted to Congress unless otherwise provided by law." 28 U.S.C. § 2075.

The Subcommittee did not discuss the alternative timing options in detail. (For example, the Subcommittee did not discuss the extent to which the Enabling Act provisions would permit the use of an effective date in a later year than the year when the proposed amendments are transmitted to Congress.[8]) Instead, the Subcommittee concluded that the best approach, for the

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[8] One interpretation of Section 2074 might be that the effective date must be within the year in which the rules were transmitted to Congress (though of course no earlier than December 1 of that year). That interpretation takes account of the first sentence of Section 2074, which prescribes that the rules must be transmitted to Congress "not later than May 1 of the year in which" the rules will become effective. One reason for such a reading can be illustrated with a hypothetical: If the Court transmitted a rule to Congress on November 1, 2009, and set the rule's effective date at January 1, 2010, this would run counter to the statute's seven-month waiting period requirement – yet as a technical matter it might be claimed that there had been compliance because the transmittal occurred before May 1, 2010 (complying with the first sentence of 2074(a)) and the effective date was no earlier than December 1, 2009 (complying with the second sentence). To prevent such a misreading of the statute, one might conclude that the transmittal and effective date must take place within the same calendar year.

moment, is to move ahead on the assumption that the project will stay on track to take effect December 1, 2009.

C. Substantive issues relating to the project's implementation

As noted above, the Subcommittee recommends no changes to the language of the proposals as published. Before reaching that conclusion, the Subcommittee discussed two possible changes which some members of the Subcommittee would have supported; those possible changes are discussed in Part III.C.1. Other suggestions made by commentators, and rejected by clear consensus of the Subcommittee, are discussed in Part III.C.2.

1. Possible changes discussed, but ultimately not adopted, by the Subcommittee

Alternate time-counting methods set by local rules. The EDNY Committee observes that some local rules contain periods counted in business days, and argues that any change in the time-counting rules should be tailored so as not to change such periods to calendar days. The Subcommittee disagrees with the EDNY Committee's recommendation, and believes that the national time-computation rules should trump contrary time-computation approaches in the local rules.

The ABCNY Bankruptcy Committee suggests, among other problems, that "some local courts might decide to retain the present computational approach through the promulgation of local rules," which would compound the resulting confusion. The Subcommittee's discussion of this comment underscored participants' view that it is important that the Committee Note make clear the national rules' effect on local time-counting provisions.

One possible response, however, might be that the statute should be construed in the light of its purpose, which was to have "the proposed rules 'lay over' for a period of at least seven months," H.R. Rep. 99-422, at 26 – a purpose which is not thwarted in instances where transmittal occurs by May 1, 2009 and the effective date is set for 2010 or later (but which would foreclose the misinterpretation described in the preceding paragraph – transmittal 11/1/09, effective date 1/1/10).

Admittedly, research has disclosed no precedent for the rulemakers' setting a delayed effective date (though there are instances in which Congress delayed the effective date). But it does not seem clear that the statute bars such a delayed effective date. Indeed, to the extent that one of the aspects of post-1988 rulemaking is caution (on the part of the rulemakers) concerning the use of the supersession authority, and to the extent that the time-computation rules package might affect some aspects of statutory deadlines through that supersession authority, it might be thought salutary to tie the effective date of the rules package to the effective date of the legislation.

The Note already states that local rules "may not direct that a deadline be computed in a manner inconsistent with" the national time-computation rules. The Subcommittee discussed whether it would be useful to provide further clarification. At least one Subcommittee member feels that such clarification would be useful. However, the Subcommittee was not able to formulate clarifying language that would not itself raise additional problems. The language first considered by the Subcommittee is shown below (new material is underlined; Appellate Rule 26(a) is used here for illustrative purposes):

> **Subdivision (a).** Subdivision (a) has been amended to simplify and clarify the provisions that describe how deadlines are computed. Subdivision (a) governs the computation of any time period found in a statute that does not specify a method of computing time, a Federal Rule of Appellate Procedure, a local rule, or a court order. In accordance with Rule 47(a)(1), a local rule may not direct that a deadline be computed in a manner inconsistent with subdivision (a). Thus, for example, a local rule should not set a time period in "business days," because subdivision (a) directs that one "count every day, including intermediate Saturdays, Sundays, and legal holidays." A local rule providing that "[r]eply papers shall be filed and served at least three business days before the return date" should be amended. Until then, it should be applied, under subdivision (a), as though it refers to "three days" instead of "three business days."

During the Subcommittee's discussion of this possible addition, a participant voiced unease with the proposed change. He noted that "[t]he new sentences target a transitional problem that should be eliminated soon," and that "Committee Notes are permanent and do not ordinarily refer to transitional problems, whose permanent status might only confuse a future reader when all the local rules have been amended." He cautioned:

> [M]y major concern with the three additional sentences is the implication that the rules committees have the authority to construe a local rule in a certain way, e.g., until the local rules are changed they should be read to mean "three days." The rules committees have no authority to interpret local rules. The circuit judicial councils determine whether a local rule is consistent with the federal rules (28 U.S.C. section 331(d)(4).) When we renumbered the rules, we faced a similar issue with requiring parallel local rules. But in that case, we amended the rule directly to provide that local rules must conform with the renumbering system. We could do that here, but I believe that is unnecessary as the courts will amend their local rules to comply with the law.
>
> The last sentence of the original Committee Note seems clear and sufficient to me. "In accordance with Rule 47(a)(1), a local rule may not direct that a deadline be computed in a manner inconsistent with subdivision (a)." I do not believe that the next three sentences are necessary, particularly because we will send a notice to every court advising them of the new rule and their responsibility to amend the local rules consistent with the law. We will monitor their actions and send follow-up notices, if necessary. The added three sentences carry no more weight than these notices and may be viewed by some in the wrong light. If

we believe that the "business day" issue must be addressed, I would suggest adding something like the following in lieu of the three sentences: "The rule is intended to make clear that time periods cannot be counted using "business days," because subdivision (a) directs that "one count every day, including intermediate Saturdays, Sundays, and legal holidays." Even this revised sentence may not be necessary, because our notices to the courts will make the point clear.

In the light of this input, and because a majority of Subcommittee members failed to voice support for the proposed change to the note to subdivision (a)(1), the Subcommittee is not recommending such a change.

State holidays. Alexander Manners, a vice president of CompuLaw LLC, proposes that Civil Rule 6(a)(6)'s definition of the term "legal holiday" be changed so that (a)(6)(B) reads "any other day declared a holiday by the President, Congress, or the state where the district court is located and officially noticed as a legal holiday by the district court." He makes this suggestion out of concern that, otherwise, litigants will be confused as to whether a state holiday counts as a "legal holiday" for time-computation purposes in instances when the federal district court fails to close on that day, or when it closes only for some purposes, or when it closes but fails to give timely notice of the closure.

The fact that the federal courts do not always close on state holidays has been discussed in the Advisory Committees' consideration of the time-computation proposals; despite the fact that federal courts do not always close, it was deemed important to count state holidays as legal holidays, given that – among other things – state and local government offices (including those of state and local government lawyers) are likely to be closed on state holidays. Under the clear text of the proposed Rule (and also under the text of the current Rule), state holidays count as legal holidays.

The Subcommittee discussed the fact that with respect to forward-counted deadlines, including state holidays within the definition of "legal holiday" serves as a safe harbor: A party who assumes the state holiday *is* a legal holiday will be protected from missing a deadline, while the worst that happens to a party who doesn't know the state holiday counts as a legal holiday is that the party thinks their deadline is a day earlier than it really is.

However, the Subcommittee noted that with respect to backward-counted deadlines, the state-holiday provision as currently drafted could pose a trap for the unwary. Imagine a case in which the backward-counted period (e.g., a requirement that a litigant file or serve reply papers five days before a hearing) ends on a state holiday on which the federal courts do not close. In such an instance the unwary practitioner may file or serve on the state holiday, not realizing that because that day counts as a legal holiday for time-counting purposes, the backward-counted deadline actually fell the day *before* the state holiday. In the light of the arcane nature of some state holidays, the Subcommittee thought it might be worthwhile to eliminate this potential trap. The Subcommittee therefore discussed the possibility of amending subdivision (a)(6)'s definition of "legal holiday." The blacklined excerpt below shows the possible alteration compared to the published version (using Appellate Rule 26(a)(6) for illustrative purposes):

(6) ***"Legal Holiday" Defined.*** "Legal holiday" means:

(A) the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day; ~~and~~

(B) any other day declared a holiday by the President; or Congress; ~~or~~ and

(C) for periods that are measured after an event, any other day declared a holiday by the state in which is located either the district court that rendered the challenged judgment or order, or the circuit clerk's principal office. (In this rule, 'state' includes the District of Columbia and any United States commonwealth, territory, or possession.)

The Note to subdivision (a)(6) would then be expanded to explain the significance of subdivision (a)(6)(C). The first attempt at drafting such an expanded Note is shown below:

Subdivision (a)(6). New subdivision (a)(6) defines "legal holiday" for purposes of the Federal Rules of Appellate Procedure, including the time-computation provisions of subdivision (a). Subdivision (a)(6) continues to include within the definition of "legal holiday" days that are "declared a holiday by the President." For two cases that applied this provision to find a legal holiday on days when the President ordered the government closed for purposes of celebration or commemoration, *see Hart v. Sheahan*, 396 F.3d 887, 891 (7th Cir. 2005) (President included December 26, 2003 within scope of executive order specifying pay for executive department and independent agency employees on legal holidays), and *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1098 (D.C. Cir. 2003) (executive order provided that "[a]ll executive branch departments and agencies of the Federal Government shall be closed and their employees excused from duty on Monday, December 24, 2001").

For forward-counted periods – i.e., periods that are measured after an event – subdivision (a)(6)(C) includes certain state holidays within the definition of legal holidays. However, state legal holidays are not recognized in computing backward-counted periods. Take, for example, Monday, April 21, 2008 (Patriots' Day in the relevant state). If a filing is due 10 days after an event, and the tenth day is April 21, then the filing is due on Tuesday, April 22 because Monday, April 21 counts as a legal holiday. But if a filing is due 10 days before an event, and the tenth day is April 21, the filing is due on Monday, April 21; the fact that April 21 is a state holiday does not make April 21 a legal holiday for purposes of computing this backward-counted deadline. But note that if the clerk's office is inaccessible on Monday, April 21, then subdivision (a)(3) extends the April 21 filing deadline forward to the next accessible day that is not a Saturday, Sunday or legal holiday -- no earlier than Tuesday, April 22.

Subdivision (a)(6)(C) defines the term "state" – for purposes of subdivision (a)(6) – to include the District of Columbia and any commonwealth, territory or possession of the United States. Thus, for purposes of subdivision (a)(6)'s definition of "legal holiday," "state" includes the District of Columbia, Guam, American Samoa, the U.S. Virgin Islands, the Commonwealth of Puerto Rico, and the Commonwealth of the Northern Mariana Islands.

Two attorney members of the Subcommittee voiced unease with this approach. As one of them commented:

> I appreciate the risk that, instead of being a safe harbor as it is for forward-counting rules, [the treatment of state holidays with respect to backward-counted deadlines] could be a trap for the unwary. But I wonder how often that will come up, especially because out-of-state lawyers probably will have local counsel who will be aware of the situation. And if it does, I wonder whether judges can take care of it on a case-by-case basis where a party seeks an extension nunc pro tunc .... On the other hand, I worry that the difference between state holidays for forward- and backward-counting rules will simply be, and appear to be, too complicated, particularly in the context where the whole concept of backward-counting time computations is new and has proven to be less than completely intuitive.
>
> I'm reinforced in that concern by the proposed committee note .... [T]he example is that Patriot's Day "counts as a legal holiday" [for forward-looking rules], but "the fact that [Patriot's Day] is a state holiday does not make [it] a legal holiday for purposes of computing this backward-counting deadline." Huh? I think most people, and even most lawyers, would scratch their heads -- the same day either is or is not a legal holiday under the Rules. This complexity ... gives the appearance of a Rube Goldberg contraption.

Likewise, during a discussion of the time-computation project by the Appellate Rules Committee's Deadlines Subcommittee, at least one member of that Subcommittee voiced strong agreement with these concerns about the complexity of this proposed change.

Notwithstanding these concerns, one Time-Computation Subcommittee member continues to feel that the change is worth attempting. As he explains:

> [T]here is a good reason for distinguishing between forward-counting and backward counting in the treatment of non-federal holidays: avoiding traps for the unwary. By excluding the holiday if it falls on the last day of a forward-counted deadline, we give an extra day to the practitioner who may have thought that the federal courts were closed that day. By including the holiday in a backward-counted deadline, we allow a practitioner--knowing that the federal courts are in fact open on a state holiday--to file timely on the holiday itself rather than the day before. This rationale, which I find compelling, makes the counting rule as now proposed both consistent and intelligible.

This member suggested changing the proposed additional Note language to make this rationale more explicit, as follows:

> For forward-counted periods--i.e., periods that are measured after an event--subdivision (a)(6)(C) includes certain state holidays within the definition of legal holidays. However, state legal holidays are not recognized in computing backward-counted periods. In each situation, the rule protects those who may be unsure of the effect of state holidays. For forward-counted deadlines, treating state holidays the same as federal holidays extends the deadline. Thus, someone who thought that the federal courts might be closed on a state holiday, would be safeguarded against an inadvertent late filing. In contrast, for backward-counted deadlines, not giving state holidays the treatment of federal holidays allows filing on the state holiday itself rather than the day before. Since the federal courts will indeed likely be open on state holidays, there is no reason to require the earlier filing.

In short, thoughtful considerations were voiced on both sides. But the net result of the discussion is that a majority of Subcommittee members failed to voice support for the proposed change to subdivision (a)(6). Accordingly, the Subcommittee is not recommending such a change.

2. Other comments as to which the Subcommittee recommends no change

End of "last day": 11:59 p.m. versus 12:00 midnight. Stephen P. Stoltz argues that the time-counting rules should define the "last day" as ending "at 11:59:59 p.m." rather than "at midnight." He suggests this because "[m]ost people today would agree that a day begins at midnight and ends at 11:59:59 p.m. local time." He warns that if the time-counting rules provide that the "last day" of a period ends "at midnight," there will be confusion and courts may conclude that a "deadline is actually the day (or evening) before the particular day."

Similarly, the ABCNY Bankruptcy Committee suggests that "'[m]idnight' is often defined as 12:00 a.m., or the beginning of a given day." Thus, the Committee "believes that the intent of the proposal was to permit filings up to and including 11:59 p.m., or the end of a given day."

It is unclear whether these commentators are correct in assuming that most people believe that days begin at midnight and end at 11:59 p.m.[9] – as opposed to believing that days begin at 12:01 a.m. and end at midnight. The Oxford Reference Dictionary of Weights, Measures, and Units does provide some support for the "11:59 p.m." view; it defines "p.m." as follows:

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[9] Mr. Stoltz advocates the use of the term "11:59:59 p.m.," evidently to make the counting unit seconds rather than minutes. For purposes of simplicity, this memo will refer to "11:59 p.m."

> PM, p.m. [post meridian, i.e. after meridian] time Indicative of a time after noon, i.e. after the Sun has nominally crossed the meridian, so the time is after the meridian. Thus 12:30 p.m. identifies the moment 30 minutes after noon. Similarly 12:30 a.m. identifies the moment 30 minutes after midnight. Technically 12:00 can be neither a.m. nor p.m.; it should be qualified as midnight else as noon, when the number can be just 12. (The 24-hour clock avoids all qualification, whether by a.m. else p.m., or by noon else midnight. Its ambivalence is whether to have midnight as 24:00 in the day it ends, else 00:00 in the day it initiates; the latter is preferable.) ....[10]

On the other hand, a number of districts' local rules concerning electronic filing provide evidence for the contrary view, in the sense that they refer to requirements that filings be made "prior to [or before] midnight" *on the due date* – evincing a view that midnight on the due date means the middle-of-the-night hour that *concludes* (rather than *commences*) the day of the due date.

Subcommittee members considered the argument for changing "midnight" to "11:59:59 p.m.," and concluded that such a change is not worthwhile. To find subdivision (a)(4)'s references to "midnight" confusing, a reader would have to read subdivision (a)(4) as stating that (for electronic filers) the "last day" of a period ends at the very moment it begins – which would seem to be a facially absurd reading.

End of "last day": non-electronic filings. Judge Philip H. Brandt, a U.S. Bankruptcy Judge in the Western District of Washington, argues that proposed Bankruptcy Rule 9006(a)(4)'s definition of the end of the "last day" "would eliminate 'drop-box' filings, and would advantage electronic filers over debtors and other parties representing themselves, and over attorneys who practice infrequently in bankruptcy court and are not electronic filers." The root of his concern is that (a)(4) sets a default rule that the end of the day is midnight for e-filers, but sets a default rule that the end of the day falls at the scheduled closing of the clerk's office for non-e-filers. He urges that 9006(a)(4) be amended to state "simply ... that the time period 'ends at midnight in the court's time zone'" for all filers.

Both the text and Note of the proposed rule permit the adoption of local rules that permit the use of a drop-box up to midnight. Subcommittee members believe this adequately addresses the concern identified by Judge Brandt.

Exclusion of date-certain deadlines. Carol D. Bonifaci correctly observes that the proposed Committee Note makes clear that a deadline stated as a date certain (e.g., "no later than November 1, 2008") is not covered by the proposed time-computation rules. She suggests that this should also be stated in the text of the proposed Rules.

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[10] A Dictionary of Weights, Measures, and Units (Donald Fenna ed., Oxford University Press 2002) (emphasis added), available at <http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t135.e1103>.

The Subcommittee's view is that no change in the Rule text is needed. The proposed time-counting rules, like the existing time-counting rules, refer to "computing" periods of time, and no computation is needed if the court has set a date certain. Admittedly there is (as the proposed Committee Note observes) a circuit split on this question, but the circuit split is addressed (and laid to rest) in the Note.

Backward-counted deadlines. Ms. Bonifaci expresses confusion concerning the proposed time-computation rules' treatment of backward-counted and forward-counted deadlines. Ms. Bonifaci believes that if a backward-counted deadline falls on a weekend, the time-computation proposals would direct one to reverse direction and count *forward to Monday*; in actuality, the proposals direct that one continue counting in the same direction – i.e., *back to Friday*.

The Subcommittee's view is that Ms. Bonifaci's comment on backward-counted time periods does not require a change in the proposal.

Time periods counted in hours. Thomas J. Wiegand writes on behalf of the Seventh Circuit Bar Association's Rules and Practice Committee. He reports that the Bar Association sponsored a lunchtime discussion of the proposed Rules amendments this past December. One topic of discussion was whether the proposed time-computation rules' directive to "count every hour" when computing hour-based time periods will alter the application of Civil Rule 30(d)(2)'s presumptive seven-hour limit on the length of a deposition. He suggests that "the Committee might desire to make clear whether any change is intended for calculating the 7-hour period in Rule 30(d)(2)." The lunchtime participants evidently wondered whether the new time-counting provision might be read to change either the practice of not counting breaks as part of the seven hours or the practice under which the deposition takes place during a single day. He notes: "On the assumption that changing how to calculate the 7-hour period is outside of this year's proposed changes to the Civil Rules, some members believe that changing either the 7-hour duration in Rule 30(d)(2), or how to calculate it, should be considered by the Committee in the future."

The Subcommittee feels that these comments are best considered by the Civil Rules Committee rather than by the Time-Computation Subcommittee.[11]

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[11] It is not clear that the proposal for calculating hour-based periods would change the practice of presumptively limiting a deposition to a single day. Nor is it evident that the time-counting proposals would affect the practice of not counting breaks as part of the seven hours. As Mr. Wiegand notes, the 2000 Committee Note to Civil Rule 30 explains that the seven-hour limit "contemplates that there will be reasonable breaks during the day for lunch and other reasons, and that the only time to be counted is the time occupied by the actual deposition." Based on that Committee Note, one might reason that the time-counting rules apply only when counting the time that Rule 30's Note says is "to be counted" – i.e., only when counting non-break time.

IV. Listing and summary of time-computation comments

This section summarizes the comments we have received relating to the time-computation project.[12] This listing focuses on comments relevant to over-arching issues concerning the time-computation project; comments directed solely to a particular issue concerning a particular set of Rules, such as Bankruptcy Rule 8002, are generally not included.[13]

07-AP-001; 07-CV-001: Americans United for Separation of Church and State. Alex Luchenitser of Americans United for Separation of Church and State writes that Appellate Rule 26(c) should be amended so that its three-day rule tracks the three-day rule in Civil Rule 6(e). In fact, the package of Appellate Rules proposals currently out for comment includes a proposed amendment to Appellate Rule 26(c) intended to do what Mr. Luchenitser suggests.

In a follow-up comment, Mr. Luchenitser urges that "local district and appellate courts should be given a specific time frame to adopt revisions to their rules after the new federal rules are approved. And the new federal rules should not go into effect until after the deadline for local courts to adopt changes to their rules passes."

07-AP-002; 07-BK-004; 07-CR-002; 07-CV-002: Committee on Civil Litigation of the U.S. District Court for the Eastern District of New York ("EDNY Committee"). The EDNY Committee writes in general opposition to the time-computation proposals, but supports certain of the Civil Rules Committee's proposals to lengthen specific Civil Rules deadlines.[14] The EDNY Committee also makes some suggestions for improving the project if it goes forward.

- Overall cost/benefit analysis. The EDNY Committee predicts that the proposed change in time-computation approach will cause much disruption, given the great number of affected deadlines that are contained in statutes, local rules, and standard forms. The EDNY Committee believes that the current time-counting

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[12] This section is organized by docket number: It first lists all the consecutively-numbered comments in the Appellate Rules comment docket; then all the comments in the Bankruptcy Rules comment docket not already listed above; and then all comments in the Civil Rules docket not already listed above. (All time-computation comments in the Criminal Rules docket are encompassed in those first three categories.)

[13] The Bankruptcy Rules Committee specifically requested comment on whether the ten-day deadline for taking an appeal from a bankruptcy court to a district court or a BAP should be extended, either to 14 days or to 30 days. Many respondents opposed a 30-day period, and some also opposed any extension at all (even to 14 days). Some respondents, however, favor a 14-day period, while a handful favor a 30-day period. These comments seem directed toward matters within the particular expertise of the Bankruptcy Rules Committee rather than this Subcommittee.

[14] This memo does not treat in detail the EDNY Committee's views concerning the lengthening of specific Civil Rules deadlines, since that is a matter primarily for the Civil Rules Committee rather than the Time-Computation Subcommittee.

system works well. To the extent that some litigants have difficulty computing time under the current approach, the EDNY Committee suggests that one could build into the electronic case filing software a program that could perform the necessary computations.

- Incompleteness of offsetting changes. The EDNY Committee notes that as to short time periods set by the Rules, the proposed amendments mitigate the effect of no longer skipping weekends, but do not offset the fact that under the new approach holidays will no longer be skipped either. The EDNY Committee argues strongly that if the new time-counting approach is to be adopted then Congress must be asked to lengthen all affected statutory time periods. Likewise, the EDNY Committee notes that steps must be taken to lengthen all affected time periods set by local rules, standing orders, and standard-form orders.

- Business-day provisions in local rules. The EDNY Committee observes that some local rules contain periods counted in business days, and argues that any change in the time-counting rules should be tailored so as not to change such periods to calendar days.

- Backward-counted time periods. The EDNY Committee warns that the proposed amendments, by clarifying the way to compute backward-counted time periods, would effectively shorten the response time allowed under rules that count backwards. Moreover, the EDNY Committee notes that the proposed time-computation template (like the existing rules) does not provide for a longer response time when motion papers are served by mail. The EDNY Committee proposes that the best solution to the backward-counting problem is to eliminate backward-counted periods; as an example, the EDNY Committee points to the Local Civil Rule 6.1 which is in use in the Eastern and Southern Districts of New York.

07-AP-003; 07-BR-015; 07-CR-003; 07-CV-003: Chief Judge Frank H. Easterbrook. Chief Judge Easterbrook writes in support of the time-computation proposals. He suggests that in addition to the proposed changes, the three-day rule contained in Appellate Rule 26(c) should be abolished. He argues that the three-day rule is particularly incongruous for electronic service, and that adding three days to a period thwarts the goal served by our preference for setting periods in multiples of seven days.

07-AP-004; 07-BK-007; 07-BR-023; 07-CR-004; 07-CV-004: Walter W. Bussart. Mr. Bussart states generally that the proposed amendments are helpful and that he supports their adoption.

07-AP-005; 07-BK-008; 07-CR-006; 07-CV-006: Jack E. Horsley. Overall, Mr. Horsley views the proposed amendments with favor.

With respect to one or more of the time periods in Appellate Rule 4 which the proposed amendments would lengthen from 10 to 14 days, Mr. Horsley proposes a further lengthening so

that the period in question would be 21 days. This suggestion seems more appropriate for consideration in the first instance by the Appellate Rules Committee rather than the Time-Computation Subcommittee.

Mr. Horsley also suggests amending Appellate Rule 26(c) to clarify how the three-day rule works when the last day of a period falls on a weekend or holiday. This suggestion is already accounted for by another proposed amendment to FRAP 26(c) that is currently out for comment. Mr. Horsley's suggestion in this regard can thus be taken as providing general support for the latter proposal.

07-AP-006; 07-BK-010; 07-CR-007; 07-CV-007: Stephen P. Stoltz. Mr. Stoltz generally supports the time-computation proposals. He argues, however, that the time-counting rules should define the "last day" as ending "at 11:59:59 p.m." rather than "at midnight." He suggests this because "[m]ost people today would agree that a day begins at midnight and ends at 11:59:59 p.m. local time." He warns that if the time-counting rules provide that the "last day" of a period ends "at midnight," there will be confusion and courts may conclude that a "deadline is actually the day (or evening) before the particular day."

07-AP-007; 07-BK-011; 07-CR-008; 07-CV-008: Robert J. Newmeyer. Mr. Newmeyer is an administrative law clerk to Judge Roger T. Benitez of the U.S. District Court for the Southern District of California. Mr. Newmeyer stresses that the 10-day period set by 28 U.S.C. § 636(b)(1) must be lengthened to 14 days. This statute will presumably be on the list of statutory periods that Congress should be asked to lengthen, so this suggestion is in line with the Project's current scheme.

Mr. Newmeyer further suggests that it would be worthwhile to consider setting an even longer period for filing objections to case-dispositive rulings by magistrate judges. This suggestion seems to fall within the Civil Rules Committee's jurisdiction rather than that of the Time-Computation Project.

Mr. Newmeyer also expresses confusion as to whether the Civil Rule 6(a) time-computation proposals affect the "three-day rule." As you know, the time-computation project does not propose to change the three-day rule, and it seems unlikely that there will be confusion on this score in the event that the time-computation proposals are adopted (Mr. Newmeyer's confusion probably springs from the fact that the time-computation rules as published include only provisions in which a change is proposed, and thus omit Civil Rule 6(d)). In any event, Mr. Newmeyer suggests that the three-day rule should be deleted. This suggestion, like Chief Judge Easterbrook's suggestion, is one that the Advisory Committees may well wish to add to their agendas, but is not one that seems appropriate for resolution in connection with the time-computation project itself.

07-AP-008; 07-BK-012; 07-CR-009; 07-CV-009: Carol D. Bonifaci. Ms. Bonifaci, a paralegal at a Seattle law firm, expresses confusion concerning the proposed time-computation rules' treatment of backward-counted and forward-counted deadlines. Ms. Bonifaci believes that if a backward-counted deadline falls on a weekend, the time-computation proposals would direct one to reverse direction and count forward to Monday.

Ms. Bonifaci observes that the proposed Committee Note makes clear that a deadline stated as a date certain (e.g., "no later than November 1, 2008") is not covered by the proposed time-computation rules, and she suggests that this should also be stated in the text of the proposed Rules.

07-AP-010; 07-CV-010: Public Citizen Litigation Group. Brian Wolfman writes on behalf of Public Citizen Litigation Group to express general support for the proposed days-are-days time-counting approach. Public Citizen suggests, however, that the deadlines for certain post-trial motions (and for the tolling effect – under Appellate Rule 4(a) – of Civil Rule 60 motions) be lengthened only to 21 rather than 30 days. Public Citizen argues that a 30-day period is unnecessarily long and will cause unwarranted delays. Public Citizen (like Howard Bashman) argues that it is awkward for the post-trial motion deadline to fall on the same day as the deadline for filing the notice of appeal. As noted below with respect to Mr. Bashman's suggestion, this seems a matter better suited to consideration by the Civil Rules and Appellate Rules Committees than by the Time-Computation Subcommittee.

07-AP-012; 07-BK-014; 07-CR-011; 07-CV-011: Robert M. Steptoe, Jr. Mr. Steptoe, a partner at Steptoe & Johnson, expresses concern "that the proposed time-computation rules would govern a number of statutory deadlines that do not themselves provide a method for computing time," and that the proposed rules "may cause hardship if short time periods set in local rules are not adjusted." Therefore, he urges that the time-computation proposals "not be implemented unless and until the Standing Committee is sure that it will receive the necessary cooperation from Congress and the local rules committees to meet the desired objective of simplification."

07-AP-015; 07-BK-018; 07-CR-014; 07-CV-016: FDIC. Richard J. Osterman, Jr., Acting Deputy General Counsel of the Litigation Branch of the Federal Deposit Insurance Corporation, writes to urge that Congress *not* be asked to amend the time periods set in certain provisions of the Federal Deposit Insurance Act. He explains that banking agencies such as the FDIC already "employ calendar days in their computations of time to respond to regulatory and enforcement decisions" – thus indicating that no adjustment is necessary or appropriate in connection with the time-computation project. Since no participant in the time-computation project has suggested that the FDIA provisions should be included on the list of statutory periods that Congress should be asked to change in light of the time-computation project, it seems fair to say that Mr. Osterman's suggestion accords with the approach that the project is already taking.

Mr. Osterman also suggests that Civil Form 3 be amended to "include a paragraph that references federal defendants, who have a full 60 days to respond as opposed to the standard 21 days you are proposing. This language is absent from the current summons form." This suggestion concerns the Civil Rules Committee rather than the Time-Computation Subcommittee. (The version of Form 3 that is currently in effect does include an italicized parenthetical that states: "(Use 60 days if the defendant is the United States or a United States agency, or is an officer or employee of the United States allowed 60 days by Rule 12(a)(3).)")

07-AP-016; 07-BK-019; 07-CR-015; 07-CV-017: DOJ. Craig S. Morford, Acting Deputy Attorney General, writes on behalf of the Department of Justice to express support for the

goals of the time-computation project, but also to express strong concerns "about the interplay of the proposed amendment with both existing statutory periods and local rules." The DOJ argues that "changes should be addressed in relevant statutory and local rule provisions before a new time-computation rule is made applicable." Otherwise, the DOJ fears that the purposes of some statutes "may be frustrated." The DOJ argues that exempting statutory time periods from the new time-counting approach would be an undesirable solution since it would create "confusion and uncertainty" to have two different time-counting regimes (one for rules and one for statutes).

Mr. Morford does not specifically state the DOJ's position on which of the statutory time periods should be lengthened to offset the change in time-computation approach. His letter does refer to the Committee's identification of "some 168 statutes ... that contain deadlines that would require lengthening."

The DOJ urges that the time-computation amendments not be allowed to take effect unless and until (1) Congress enacts legislation to lengthen all relevant statutory periods, (2) the local rulemaking bodies have had the opportunity to amend relevant local-rule deadlines, and (3) the bench and bar have had time to learn about the new time-counting rules.

07-AP-017: The State Bar of California – Committee on Appellate Courts. Blair W. Hoffman writes on behalf of the State Bar of California's Committee on Appellate Courts to express support for the time-computation project. He states that the simplification of the time-counting rules is desirable.

07-AP-018; 07-BR-036; 07-CV-018: Rules and Practice Committee of the Seventh Circuit Bar Association. Thomas J. Wiegand writes on behalf of the Seventh Circuit Bar Association's Rules and Practice Committee. He reports that the Bar Association sponsored a lunchtime discussion of the proposed Rules amendments this past December. One topic of discussion was whether the proposed time-computation rules' directive to "count every hour" when computing hour-based time periods will alter the application of Civil Rule 30(d)(2)'s presumptive seven-hour limit on the length of a deposition. He suggests that "the Committee might desire to make clear whether any change is intended for calculating the 7-hour period in Rule 30(d)(2)." He also notes: "On the assumption that changing how to calculate the 7-hour period is outside of this year's proposed changes to the Civil Rules, some members believe that changing either the 7-hour duration in Rule 30(d)(2), or how to calculate it, should be considered by the Committee in the future."

07-BR-026; 07-BK-009: Alan N. Resnick. Professor Resnick previously served as first the Reporter to and then a member of the Bankruptcy Rules Committee. Of particular relevance to the overall Time-Computation Project, Professor Resnick opposes adoption of a days-are-days time-computation approach in Bankruptcy Rule 9006. He points out that a days-are-days approach would result in "the shortening of some state and federal statutory time periods."

Professor Resnick raises additional points that are less closely tied to the overall Time-Computation Project and are thus more appropriate for initial consideration by the Bankruptcy Rules Committee. Professor Resnick stresses that if time periods set by the Bankruptcy Rules and the Civil Rules are altered, care must be taken to adjust the Bankruptcy Rules so that newly-

lengthened Civil Rules time periods are not inappropriately incorporated into the Bankruptcy Rules. In particular, Professor Resnick notes that the Bankruptcy Rules Committee should consider altering Bankruptcy Rule 9023's incorporation of Civil Rule 59's provisions if Civil Rule 59 is amended to change current 10-day time limits to 30 days. Professor Resnick also adds his voice to those that oppose the lengthening of Bankruptcy Rule 8002's ten-day appeal period. But if Rule 8002's ten-day period is lengthened, then Professor Resnick points out other time periods in the Bankruptcy Rules that he argues should be corresponding lengthened.

07-BK-013; 07-BR-029: Judge Philip H. Brandt. Judge Brandt, a U.S. Bankruptcy Judge in the Western District of Washington, argues that proposed Bankruptcy Rule 9006(a)(4)'s definition of the end of the "last day" "would eliminate 'drop-box' filings, and would advantage electronic filers over debtors and other parties representing themselves, and over attorneys who practice infrequently in bankruptcy court and are not electronic filers." The root of his concern is that (a)(4) sets a default rule that the end of the day is midnight for e-filers, but sets a default rule that the end of the day falls at the scheduled closing of the clerk's office for non-e-filers. He urges that 9006(a)(4) be amended to state "simply ... that the time period 'ends at midnight in the court's time zone'" for all filers.

Judge Brandt also raises points about Bankruptcy Rules 8002 and 9023; but those points are directed more toward the Bankruptcy Rules Committee than toward the Time-Computation Subcommittee.

07-BK-015; 07-CV-014; 07-BR-033: Committee on Bankruptcy and Corporate Reorganization of the Association of the Bar of the City of New York. The Committee on Bankruptcy and Corporate Reorganization of the Association of the Bar of the City of New York ("ABCNY Bankruptcy Committee") writes in opposition to the time-computation proposals. The Committee focuses its opposition on the time-computation proposal for Bankruptcy Rule 9006. With respect to the time-computation proposals for the other sets of Rules, the Committee cites with approval the comments of the Committee on Civil Litigation of the U.S. District Court for the Eastern District of New York ("EDNY Committee").

The ABCNY Bankruptcy Committee's objections to the time-computation proposals are very similar to those stated by the EDNY Committee; in sum, the ABCNY Bankruptcy Committee believes that the costs of the time-computation proposals strongly outweigh their benefits. This summary highlights those aspects of the ABCNY Bankruptcy Committee's comments that differ from those of the EDNY Committee. The ABCNY Bankruptcy Committee suggests, among other problems, that "some local courts might decide to retain the present computational approach through the promulgation of local rules," which would compound the resulting confusion. The ABCNY Bankruptcy Committee also suggests that "'[m]idnight' is often defined as 12:00 a.m., or the beginning of a given day." Thus, the Committee "believes that the intent of the proposal was to permit filings up to and including 11:59 p.m., or the end of a given day."

07-BK-022; 07-CV-019: National Bankruptcy Conference. Richard Levin writes on behalf of the National Bankruptcy Conference ("NBC"), which "strongly endorses and supports" the comments previously submitted by Professor Alan Resnick. The NBC also warns that the

proposed changes to various bankruptcy-relevant time periods could result in unintended consequences; it thus suggests "that the Advisory Committee delay incorporation of the 7, 14, 21, and 28 day time period changes into the Bankruptcy Rules until the impact of those changes [is] studied further ...."

07-CV-005: Patrick Allen. Mr. Allen writes in opposition to the proposed extension of certain ten-day periods in Civil Rules 50, 52 and 59. Among other things, he notes that under current Civil Rule 6, 10-day time periods are computed by skipping intermediate weekends and holidays. He does not discuss the time-computation proposal to change to a days-are-days approach. This comment seems directed toward matters within the particular expertise of the Civil Rules Committee rather than this Subcommittee.

07-CV-013: Alexander J. Manners. Mr. Manners, a vice president of CompuLaw LLC, supports proposed Civil Rule 6(a)(5)'s treatment of backward-counted deadlines.

With respect to Civil Rule 6(a)(6)'s definition of the term "legal holiday," Mr. Manners proposes that proposed Rule 6(a)(6)(B) be changed to so as to read "any other day declared a holiday by the President, Congress, or the state where the district court is located and officially noticed as a legal holiday by the district court." He makes this suggestion out of concern that, otherwise, litigants will be confused as to whether a state holiday counts as a "legal holiday" for time-computation purposes in instances when the federal district court fails to close on that day, or when it closes only for some purposes, or when it closes but fails to give timely notice of the closure.

Mr. Manners observes that under a "plain reading" of the three-day rule as it is stated in current Civil Rule 6, the three-day rule does not apply to backward-counted deadlines since in those instances "the party is not required to act within a specified time after service." Mr. Manners argues that this can lead to unfairness. He suggests that Civil Rule 6's three-day rule should be amended to apply the three-day rule to backward-counted deadlines (or else that each backward-counted deadline be modified to take account of this problem). Mr. Manners is not the only commentator to observe this problem with respect to the interaction of the three-day rule and backward-counted deadlines; the EDNY Committee suggests eliminating backward-counted deadlines for that reason among others. This suggestion, like other commentators' suggestions concerning the three-day rule, seems best addressed as a new agenda item for the relevant Advisory Committees rather than as part of the time-computation project.

Mr. Manners proffers several suggestions for guiding the local rules amendment process. He suggests that the district courts be given "an implementation guide and timeline for district courts to follow in order to ensure their local and judges' rules are amended correctly and in time to coincide with the adoption of the new Federal Rules." That guide should, he argues, encourage local rulemakers to lengthen affected short time periods (taking account, inter alia, of any relevant state holidays) and to use multiples of 7 days (where possible) when doing so.

Mr. Manners also proposes an alteration to Civil Rule 6(c)'s treatment of motion paper deadlines, a matter that seems more appropriate for consideration by the Civil Rules Committee.

07-CV-015: U.S. Department of Justice. Jeffrey S. Buchholtz, Acting Assistant Attorney General, Civil Division, writes on behalf of the Department of Justice to comment on the proposed amendment to Civil Rule 81 that would define the term "state," for purposes of the Civil Rules, to "include[], where appropriate, the District of Columbia and any United States commonwealth, territory [, or possession]." The Department supports the definition's inclusion of commonwealths and territories, but opposes the inclusion of "possession." The Department is "concern[ed] that the term 'possession' might be interpreted – incorrectly – to include United States military bases overseas."

Howard Bashman's Law.com article. Mr. Bashman wrote a column on the time-computation proposals which can be accessed at http://www.law.com/jsp/article.jsp?id=1201918759261 . Mr. Bashman's main comment in his column concerns the Civil Rules proposal to extend certain post-trial motion deadlines. As has been noted, extending those deadlines from 10 to 30 days will mean that those deadlines fall on the same day as the Rule 4(a) deadline for taking an appeal in cases that do not involve U.S. government parties. Mr. Bashman's concern is that this will (1) prevent a potential appellant from knowing whether any post-trial motions will be filed prior to the deadline for taking an appeal and thus (2) increase the number of appeals that are filed only to be suspended pending the resolution of a timely post-trial motion.

Like Public Citizen's comment to the same effect, this comment falls more within the jurisdiction of the Civil Rules Committee and the Appellate Rules Committee than of the Time-Computation Subcommittee.

MEMORANDUM

DATE: March 12, 2008

TO: Appellate Rules Committee

FROM: Catherine T. Struve

RE: Deadlines Subcommittee report

I write to summarize the Deadlines Subcommittee's discussion of issues relating to the Time-Computation Project. Enclosed with this memo are published versions of Rule 26(a), Rule 26(c), and the various Rule deadlines that are part of the time-computation package. As of this writing, the Standing Committee's Time-Computation Subcommittee is in the process of finalizing its recommendations concerning the time-computation template; those recommendations will be summarized under separate cover. If the Time-Computation Subcommittee recommends changes to the template in response to the public comments, the Deadlines Subcommittee will discuss those recommendations prior to the Advisory Committee's spring meeting. In the meantime, this memo sets forth the Deadlines Subcommittee's views on other FRAP-related time-computation issues.

Part I of this memo discusses the public comments submitted on the proposed changes to deadlines set by the Appellate Rules. Part II considers the public comments concerning the "three-day rule." Part III raises a few matters pertaining to statutory deadlines.

I. Appellate Rules deadlines

As you know, the Committee proposed amendments that lengthen deadlines set by the Appellate Rules so as to offset the proposed change in time-computation approach. The changes can be summarized as follows. References to "calendar days" in Rules 25, 26 and 41 become simply references to "days." Three-day periods in Rules 28.1(f) and 31(a) become seven-day periods. The five-day period in Rule 27(a)(4) becomes a seven-day period. The seven-day period in Rule 4(a)(6) lengthens to 14 days. The seven-day periods in Rules 5(b)(2) and 19 become ten days. The eight-day period in Rule 27(a)(3)(A) becomes ten days. The ten-day period in Rule 4(a)(4)(A)(vi) becomes 30 days to correspond with proposed changes in the Civil

Rules. The ten-day periods in Rules 4(a)(5)(C), 4(b), 5, 6, 10, 12, 30 and 39 become 14 days. The 20-day period in Rule 15(b) becomes 21 days.

Part I.A. summarizes the public comments on appeal-related deadlines issues. Part I.B. discusses the interaction between the Civil Rules' deadlines for tolling motions and the Appellate Rules' deadlines for civil appeals, and notes that the Deadlines Subcommittee has recommended to the Civil Rules Committee that the tolling motion deadlines be set at less than 30 days. The time limit set in Appellate Rule 4(a)(4)(A)(vi) concerning Rule 60 motions should mirror the deadline chosen by the Civil Rules Committee for tolling motions under Rules 50, 52 and 59. As discussed in Part I.C., the Subcommittee does not recommend any other changes to the FRAP deadlines as published for comment.

A. Summary of Public Comments

07-AP-001; 07-CV-001: Americans United for Separation of Church and State. Alex Luchenitser of Americans United for Separation of Church and State writes that the 8-day response deadline in Rule 27(a)(3)(A) should be enlarged not to 10 days (the Committee's proposal) but "to a higher number, such as 12 or 14 calendar days." He argues that under the new time-computation method an 8-day deadline will result in less total response time than currently exists. He notes that "[w]hile some appellate motions are quite simple and easy to respond to, other[] motions are major substantive motions that require a long time to properly respond [to]." As an alternative to lengthening the deadline for all responses, he suggests that the Committee consider "provid[ing] different response times for substantive and procedural motions, such as 7 calendar days for procedural ones and 21 for substantive ones...."

07-AP-002; 07-BK-004; 07-CR-002; 07-CV-002: Committee on Civil Litigation of the U.S. District Court for the Eastern District of New York ("EDNY Committee"). As noted in the Time-Computation memo, the EDNY Committee warns that the proposed amendments, by clarifying the way to compute backward-counted time periods, would effectively shorten the response time allowed under rules that count backwards. Moreover, the EDNY Committee notes that when a period is counted backward from a future event, one will be unable to get the benefit of the three-day rule's extension (which of course is triggered only for periods that are counted forward from the service of papers). The EDNY Committee proposes that the best solution to the backward-counting problem is to eliminate backward-counted periods such as Civil Rule 6(c)'s provision concerning motion papers; the EDNY Committee suggests substituting a provision modeled on the Local Civil Rule 6.1 which is in use in the Eastern and Southern Districts of New York (which counts forward rather than backward).

07-AP-005; 07-BK-008; 07-CR-006; 07-CV-006: Jack E. Horsley. Overall, Mr. Horsley views the proposed amendments with favor. He supports the deletion of "calendar" from Rule 26(c).

With respect to one or more of the time periods in Appellate Rule 4 that the proposed amendments would lengthen from 10 to 14 days,[1] Mr. Horsley proposes a further lengthening so that the period in question would be 21 days, "to assure even a more liberal time frame."

07-AP-010; 07-CV-010: Public Citizen Litigation Group. Brian Wolfman writes on behalf of Public Citizen Litigation Group to express general support for the proposed days-are-days time-counting approach. Public Citizen suggests, however, that the deadlines for certain post-trial motions (and for the tolling effect – under Appellate Rule 4(a) – of Civil Rule 60 motions) be lengthened only to 21 rather than 30 days. Public Citizen argues that a 30-day period is unnecessarily long and will cause unwarranted delays. Public Citizen (like Howard Bashman) argues that it is awkward for the post-trial motion deadline to fall on the same day as the deadline for filing the notice of appeal.

07-AP-019; 07-CV-020; 07-CR-016: Jordan Center for Criminal Justice and Penal Reform. Mark Jordan writes on behalf of the Jordan Center for Criminal Justice and Penal Reform to urge that Rule 29(e)'s seven-day deadlines for amicus briefs be lengthened to 14 days.

Howard Bashman's Law.com article. Mr. Bashman wrote a column on the time-computation proposals which can be accessed at http://www.law.com/jsp/article.jsp?id=1201918759261 . Mr. Bashman's main comment in his column concerns the Civil Rules proposal to extend certain post-trial motion deadlines. As has been noted, extending those deadlines from 10 to 30 days will mean that those deadlines fall on the same day as the Rule 4(a) deadline for taking an appeal in cases that do not involve U.S. government parties. Mr. Bashman's concern is that this will (1) prevent a potential appellant from knowing whether any post-trial motions will be filed prior to the deadline for taking an appeal and thus (2) increase the number of appeals that are filed only to be suspended pending the resolution of a timely post-trial motion.

B. Deadlines for tolling motions (Civil Rules 50, 52, and 59; Appellate Rule 4(a)(4)(A)(vi))

The Civil Rules Committee requested the Appellate Rules Committee's input concerning the Public Citizen and Bashman comments on the Civil Rules Committee's proposal to extend to 30 days the deadlines for renewed motions for judgment as a matter of law under Rule 50(b), motions for a new trial under Rules 50(d) and 59(b), motions for amended or additional findings under Rule 52(b), and motions to amend or alter a judgment under Rule 59(e). Because the Civil

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[1] Mr. Horsley does not specify which period or periods are the focus of this comment; he gives a line number ("line 14") but that line number does not appear to correspond with any particular FRAP 4 period in the drafts that were published for comment. He could be referring to FRAP 4(a)(5)(C)'s limit on extensions of time, FRAP 4(b)(1)(A)'s time limit for a defendant's notice of appeal, or FRAP 4(b)(3)'s time limits for filing a notice of appeal after the disposition of certain timely motions. Since Mr. Horsley appears to be referring only to one particular deadline, I would guess that he has in mind the Rule 4(a)(5)(C) limit on extensions of time.

Rules Committee will meet a few days prior to the Appellate Rules Committee this spring, it will not be possible for the full Appellate Rules Committee to provide input on this question in time for the Civil Rules Committee's meeting. But the Deadlines Subcommittee discussed the question and provided its views to the Civil Rules Committee (while stressing that these views are only those of the Deadlines Subcommittee, not the full Advisory Committee).

Deadlines Subcommittee members are very sympathetic to the concern that setting the deadline for the tolling motions at 30 days will prevent a potential appellant from knowing (at the time the notice of appeal is to be filed) whether another party will make a motion that will toll the time for appeal and suspend the effectiveness of a previously-filed notice of appeal. Though the group did not arrive at a concrete suggestion for an alternative period, the Deadlines Subcommittee conveyed the following thoughts to the Civil Rules Committee:

- The Subcommittee would be uncomfortable with a regime in which the tolling motion deadlines are set at 30 days. It seems problematic for a potential appellant to have to file the notice of appeal without knowing whether a tolling motion will be filed.

- Even though the issue will only arise when more than one party is dissatisfied with a judgment, that situation is not all that rare, given the many cases in which there are more than just two parties. (The issue will not arise, though, in cases where FRAP 4(a)(1)(B) and Section 2107 provide a 60-day appeal deadline because the United States or its officer or agency is a party.)

- It was felt that in a number of cases 21 days would suffice to prepare post-judgment motions. On the other hand, members noted that often 21 days will not be enough. The federal government, for example, almost always would want more time than 21 days to prepare such a motion.[2]

- Members discussed the fact that the Civil Rules Committee has concluded that the current Civil Rules do not permit extensions of the tolling motion deadlines, and that the proposed amendment to Civil Rule 6(b) underscores the fact that no extensions to those deadlines are permitted. Members recounted their experience that lawyers often feel that they need more time than the current Rules provide to prepare post-judgment motions, and recalled that one way in which district judges finesse the issue is to permit a barebones motion within the required time period, followed by a more detailed brief at a later point. (It was noted that some district courts also might delay the entry of judgment as a way of finessing the point.)

- Members wondered whether, if the motion deadline were set at 21 days, it would be possible for the Rules to authorize the court to extend that deadline in a particular case. We discussed the fact that this question would be particularly fraught given the motions'

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[2] Though extra appeal time is provided for cases involving federal-government litigants, see FRAP 4(a)(1)(B) and 28 U.S.C. § 2107, the rules do not give extra time for post-judgment motions in such cases.

function as tolling motions under Appellate Rule 4(a)(4). We noted the Ninth Circuit's recent conclusion that to the extent post-judgment motions function as tolling motions for purposes of civil appeal time, the deadlines for those motions are jurisdictional.[3] Would a court in the Ninth Circuit find that a barebones motion within the deadline, later followed by more detailed briefing, qualifies as "timely" for purposes of tolling under Rule 4(a)(4)?

- In the light of the concerns that might arise (post-*Bowles*) when rules authorize a court to extend a deadline that is considered jurisdictional, it would seem optimal for the Civil Rules to set a livable deadline for post-judgment motions so that extensions would not ordinarily be necessary. Perhaps this justifies departing from the 7-day-increment presumption and setting the deadline at something a bit longer than 21 days. Members noted that setting the deadline at 28 days might allow a would-be appellant to know whether a motion has been made before filing the notice of appeal (at least when CM/ECF is used) but members did not advocate 28 days since that would in effect encourage appellants to wait to the next-to-last day to file their notice of appeal -- an undesirable practice. Perhaps 25 days might strike a middle point? No consensus was reached on this issue.

It is unclear, as of this writing, what choice the Civil Rules Committee will make with respect to the deadlines for tolling motions. At any rate, it seems clear that the period set in Appellate Rule 4(a)(4)(A)(vi) should be the same as the period selected for the post-judgment motion deadlines under Civil Rules 50, 52 and 59.

C. Other FRAP deadline-related comments

The Subcommittee recommends no change to other FRAP deadlines.

Rule 4 – deadlines from 10 to 14 days. The Subcommittee adheres to its proposal to lengthen certain of Rule 4's ten-day periods to 14 days, rather than to Mr. Horsley's suggested 21 days. The extension to 14 days will in fact give litigators a longer period than they had under the time-counting regime that applied prior to the 2002 amendments: Prior to the 2002 amendments, the relevant deadlines in Rules 4(a)(5)(C), 4(b)(1)(A), and 4(b)(3) were 10-day deadlines that were computed using a days-are-days approach. Thus, litigators will be better off under the Committee's proposals than they were under the pre-2002 regime. Mr. Horsley does not offer a specific reason for lengthening the periods still further.

Rule 27(a)(3)(A). The Subcommittee adheres to its proposal that the motion response time in Rule 27(a)(3)(A) be enlarged from 8 to 10 days. Mr. Luchenitser's argument for a longer response time is premised on a misunderstanding of how counting will work under the new computation rule. He correctly observes that under the current time-counting system, when one factors in the effect of the three-day rule, the response time for a motion that is not served by

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[3] See U.S. v. Comprehensive Drug Testing, Inc., 513 F.3d 1085, 1100-01 (9th Cir. 2008). These issues are discussed at more length in a separate memo.

hand will range from 13 to 17 days (depending on which day of the week the motion is served on, and assuming that no holidays intervene).

The flaw in his reasoning comes when he asserts that under the proposed new time-counting approach, "when the 3 days for electronic or mail service are added, there will be 13 calendar days to respond." As will be made clear by the proposed amendment to Rule 26(c), the three days are to be added *after the period would otherwise expire* – which means that whenever the proposed 10-day period ends on a weekend or holiday, one first counts forward to the next non-holiday weekday, and then one adds the three days – yielding a number higher than 13. Likewise, if the 10-day period ends on a weekday, and then one adds the three days, and the day thus reached is a weekend or holiday, then once again one counts forward to the next non-holiday weekday.

Applying these principles, one can see that the response time under the published proposals would be 14 days if the motion is served on a Monday, 13 days if served on a Tuesday, 15 days if served on a Wednesday, 14 days if served on a Thursday, and 13 days if served on a Friday (assuming in all these instances that there are no relevant legal holidays). That yields a mean response time of 13.8 days – admittedly a day shorter than the mean response time of 14.8 days under the current system, but hardly as short as Mr. Luchenitser assumes. Moreover, as the Note explains, the proposed 10-day period corresponds exactly to the 10-day period that applied prior to the 2002 amendments; i.e., prior to the 2002 amendments, the response time was 10 days and the 10 days was counted using a days-are-days approach. The proposed 10-day response time, thus, merely reinstates the same deadline, computed in the same way, as obtained prior to the 2002 amendments. Mr. Luchenitser's alternative suggestion – that the Committee adopt differing response times "for substantive and procedural motions" – would, as he recognizes, create a line-drawing problem: Which types of motions should be included in each category? It is not evident that there is a need that would justify the added complexity of such a dichotomy.

Rule 29. The Subcommittee adheres to its view that no change is needed in Rule 29's seven-day deadlines.

Prior to 1998, amici were required to file at the same time as the party whom they supported (absent consent of all parties). In 1998 the seven-day stagger was adopted, but – prior to 2002 – the stagger was seven *calendar* days. With the 2002 amendment to Rule 26(a), the stagger period was effectively lengthened because intermediate weekends and holidays are now skipped. In response, Public Citizen proposed (among other things) that the Committee amend Rule 29(e) to set the stagger period at seven *calendar* days. The Advisory Committee decided to place Public Citizen's proposal on hold pending the outcome of the time-computation project. Moreover, the Advisory Committee determined that no lengthening of Rule 29(e)'s seven-day periods is necessary in connection with the time-computation project. The seven-calendar-day period that will obtain under the new days-are-days time-counting approach is precisely the same one that obtained from the effective date of the 1998 amendments to the effective date of the 2002 amendments. If the Committee wishes to pursue Mr. Jordan's suggestion that the Rule 29(e) periods be lengthened, the Committee could add this suggestion to its study agenda as a separate item.

Rules 28.1 and 31. In response to the EDNY Committee's points about backward-counted deadlines, I suggested that the Subcommittee might wish to consider whether the Appellate Rules' timing for reply briefs[4] should be transmuted into a forward-counted period. The Subcommittee concluded that such a change is unnecessary. The EDNY Committee focuses its concern on the Civil Rules' deadlines for motion papers, and does not mention the Appellate Rules' deadlines for reply briefs. This is not surprising, since it may be questioned how frequently appellate briefing and argument schedules are compressed enough to trigger the backward-counted deadlines for reply briefs. Currently, the presumptive deadline for reply briefs is the earlier of (1) 14 days after the prior brief is served, or (2) 3 days before argument. Under the proposals published for comment, the presumptive deadline for reply briefs will be the earlier of (1) 14 days after the prior brief is served, or (2) 7 days before argument. Deadline (1) will ordinarily be the salient deadline, because deadline (2) will only become relevant when argument follows very close on the heels of briefing. Given the infrequency with which deadline (2) is likely to apply, there seems to be no reason to consider eliminating the backward-counted deadlines in Rules 28.1(f) and 31(a). This is especially true given that those deadlines can be extended by the court "for good cause."

III. The "three-day rule"

During the time-computation project the question arose whether the three-day rule should be altered. The decision was taken not to change the three-day rule for the time being. The Appellate Rules Committee did, however, publish for comment a technical amendment designed to clarify the three-day rule's application and to make Rule 26(c)'s three-day rule parallel the three-day rule in Civil Rule 6.

Public comments on the time-computation project have raised once again the possibility of altering or eliminating the three-day rule. Subcommittee members agree that it is worthwhile to study this proposal, and recommend that it be added to the Committee's study agenda.

A. Summary of public comments on the three-day rule

07-AP-001; 07-CV-001: Americans United for Separation of Church and State. In a comment concerning the time-computation proposals, Alex Luchenitser of Americans United for Separation of Church and State suggests that "the amended rules [should] clarify the working of the 3-day rule so that it is clear and is consistent among the district and appellate rules."

07-AP-003; 07-BR-015; 07-CR-003; 07-CV-003: Chief Judge Frank H. Easterbrook. Chief Judge Easterbrook asserts that the three-day rule contained in Appellate Rule 26(c) should be abolished. He argues that the three-day rule is particularly incongruous for electronic service,

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[4] Under Appellate Rules 28.1(f) and 31(a), a reply brief must be filed "at least 3 days before argument, unless the court, for good cause, allows a later filing." The time-computation proposals would change the three-day period to seven days.

and that adding three days to a period thwarts the goal served by the time-computation project's preference for setting periods in multiples of seven days.

07-AP-005; 07-BK-008; 07-CR-006; 07-CV-006: Jack E. Horsley. In connection with his comments on the time-computation proposals, Mr. Horsley suggests amending Appellate Rule 26(c) to clarify how the three-day rule works when the last day of a period falls on a weekend or holiday. Specifically, Mr. Horsley suggests that Rule 26(c)[5] be amended to read:

> When a party is required or permitted to act within a prescribed period after a paper is served on that party, 3 ~~calendar~~ days are added to the prescribed period extended to the next business day if the 3rd day falls on a holiday or non-business day or unless the paper is delivered on the date of service stated in the proof of service. For purposes of this Rule 26(c), a paper that is served electronically is not treated as delivered on the date of service stated in the proof of service.

Style suggestions. Professor Kimble suggests capitalizing "after" in the subdivision heading; deleting "prescribed" from "prescribed period"; and placing a comma after "under Rule 26(a)". As modified by Professor Kimble's suggestions, the proposed amendment would read:

Rule 26. Computing and Extending Time

* * * * *

(c) Additional Time After Service. When a party ~~is required or permitted to act within a prescribed period after a paper is served on that party~~ may or must act within a specified time after service, 3 calendar days are added ~~to~~ after the ~~prescribed~~ 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(c), a paper that is served electronically is not treated as delivered on the date of service stated in the proof of service.

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[5] Mr. Horsley's suggested language is shown inserted into the text of current Rule 26(c), because it appears that Mr. Horsley makes this comment with respect to Rule 26(c) as it is shown in the package of time-computation deadline amendments – i.e., Rule 26(c) as it currently stands but with the word "calendar" deleted.

B. Recommendations

The Deadlines Subcommittee recommends that the proposed amendment to Rule 26(c) be adopted as modified by Professor Kimble's style suggestions. The Subcommittee also recommends that Chief Judge Easterbrook's suggestion concerning the elimination of the three-day rule be added to the Committee's study agenda, for consideration in coordination with the other advisory committees.

Though Mr. Luchenitser's comment does not mention the proposed amendment to Rule 26(c), it can be taken as supporting that proposed amendment (given that the proposal will ensure that the Appellate Rules' three-day rule works the same way as the three-day rules contained in the Civil and Criminal Rules). Likewise, Mr. Horsley's comment appears to provide general support for the approach taken in the proposed amendment to Rule 26(c)'s three-day rule. Though the proposed amendment employs language different from that which he suggests, his specific concern is addressed by the final sentence of the second paragraph of the Committee Note.

The suggestion that the three-day rule be eliminated is well worth considering.[6] Though Chief Judge Easterbrook's suggestion relates only to the Appellate Rules, the criticism of the three-day rule is relevant, as well, to Civil Rule 6(e), Criminal Rule 45(c), and Bankruptcy Rule 9006(f). Over the past nine years, there have been lengthy discussions of whether electronic service ought to be included within the three-day rule. The Appellate, Bankruptcy, and Civil Rules Advisory Committees, and the Standing Committee, have discussed the question periodically since at least the spring of 1999. More recently, the time-computation project also discussed the matter. Though there has been some support, in those discussions, for excluding electronic service from the three-day rule, ultimately the decision was taken to include electronic service within the three-day rule for the moment.

Some of the reasons given for including electronic service may be somewhat less weighty now than they were a decade ago: Concerns that e-service may be delayed by technical glitches or that electronically served attachments may arrive in garbled form are perhaps less urgent in districts (or circuits) where electronic service occurs as part of smoothly-running CM/ECF programs. It may also be the case that as districts or circuits move to make CM/ECF mandatory for counsel, counsel might no longer (as a practical matter) have the inclination or, perhaps, ability to decline consent to electronic service; in those districts or circuits, there would be no need to give counsel an incentive to consent to electronic service (or to avoid giving counsel a disincentive to consent to electronic service). However, the concern remains that counsel might strategically e-serve on a Friday night in order to inconvenience an opponent. Thus, though some of the rationales for including e-service in the three-day rule may have become less persuasive over time, the concern over possible strategic misuse of e-filing persists, and the shift to

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[6] Another commentator, Robert J. Newmeyer, makes a similar suggestion with respect to Civil Rule 6(d)'s three-day rule. See Comment No. 07-AP-007; 07-BK-011; 07-CR-008; 07-CV-008.

mandatory electronic filing is still in the process of occurring (especially in the courts of appeals, which have been slower to adopt CM/ECF).

In sum, the possibility of eliminating the three-day rule may well be ripe for reconsideration, and the Deadlines Subcommittee suggests that it be added to the Committee's study agenda. In considering the possibility of eliminating the three-day rule, the Committee will presumably wish to coordinate its deliberations with those of the Bankruptcy, Civil and Criminal Rules Committees.

IV. Statutory deadlines

As you know, the Advisory Committee has voted to recommend that the following statutes be considered for amendment in the light of the proposed shift in time-computation approach: 28 U.S.C. § 2107(c); 18 U.S.C. § 3771(d); Classified Information Procedures Act § 7(b); and 28 U.S.C. § 1453(c).

In reviewing the comprehensive list of statutory deadlines and comparing that list to the one considered by the Deadlines Subcommittee in March 2007, I noticed a few additional provisions that I should bring to the Subcommittee's attention.

Two of these deadlines – 18 U.S.C. § 2339B(f)(5)(B),[7] and 28 U.S.C. § 158 note[8] – merit close attention. Those two provisions are currently among those that are under consideration by the Criminal and Bankruptcy Rules Committees (respectively), and the Deadlines Subcommittee is awaiting input from those Committees on whether the provisions warrant change.

The other three statutory provisions[9] are 10-day deadlines that were in effect prior to 2002, and thus, to the extent that FRAP 26(a) governed their computation,[10] they would have

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[7] 4-day time limits for hearing argument on interlocutory appeal concerning classified information and for deciding appeal after argument.

[8] Interim provision setting 10-day time limit for seeking leave to appeal in bankruptcy proceeding.

[9] 18 U.S.C. § 2339B(f)(5)(B) (10-day period for taking interlocutory appeals concerning classified information); 19 U.S.C. § 1516(f) (10-day deadline for agency to publish in the Federal Register notice of Court of International Trade or Federal Circuit decision concerning certain customs issues); 19 U.S.C. § 1516a(c)(1) & (e) (10-day deadlines for agency to publish in the Federal Register notice of Court of International Trade or Federal Circuit decision concerning customs issues).

[10] As noted above, 19 U.S.C. § 1516(f), 19 U.S.C. § 1516a(c)(1), and 19 U.S.C. § 1516a(e) set deadlines when the Commerce Department is supposed to publish certain Federal Circuit or Court of International Trade decisions in the Federal Register. The relevant agencies have been operating under the assumption all along that the ten-day provision in these statutes

been subject to a days-are-days approach prior to 2002. Accordingly, keeping these periods at 10 days under the days-are-days approach will simply restore them to the way they worked pre-2002.

Encls.

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has meant ten calendar days. Indeed, because FRAP 1 makes clear that the FRAP apply to procedures in the courts, it seems implausible that Rule 26(a) would govern the computation of these deadlines.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE*

Rule 26. Computing and Extending Time

(a) Computing Time. ~~The following rules apply in computing any period of time specified in these rules or in any local rule, court order, or applicable statute:~~

~~(1) Exclude the day of the act, event, or default that begins the period.~~

~~(2) Exclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days, unless stated in calendar days.~~

~~(3) Include the last day of the period unless it is a Saturday, Sunday, legal holiday, or--if the act to be done is filing a paper in court--a day on which the weather or other conditions make the clerk's office inaccessible.~~

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*New material is underlined; matter to be omitted is lined through.

~~(4) As used in this rule, "legal holiday" means New Year's Day, Martin Luther King, Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, Christmas Day, and any other day declared a holiday by the President, Congress, or the state in which is located either the district court that rendered the challenged judgment or order, or the circuit clerk's principal office.~~ The following rules apply in computing any time period specified in these rules, in any local rule or court order, or in any statute that does not specify a method of computing time.

(1) ***Period Stated in Days or a Longer Unit.*** When the period is stated in days or a longer unit of time:

(A) exclude the day of the event that triggers the period;

(B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and

(C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

(2) ***Period Stated in Hours.*** When the period is stated in hours:

(A) begin counting immediately on the occurrence of the event that triggers the period;

(B) count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays; and

(C) if the period would end on a Saturday, Sunday, or legal holiday, the period continues

to run until the same time on the next day that is not a Saturday, Sunday, or legal holiday.

(3) ***Inaccessibility of the Clerk's Office.*** Unless the court orders otherwise, if the clerk's office is inaccessible:

(A) on the last day for filing under Rule 26(a)(1), then the time for filing is extended to the first accessible day that is not a Saturday, Sunday, or legal holiday; or

(B) during the last hour for filing under Rule 26(a)(2), then the time for filing is extended to the same time on the first accessible day that is not a Saturday, Sunday, or legal holiday.

(4) ***"Last Day" Defined.*** Unless a different time is set by a statute, local rule, or court order, the last day ends:

(A) for electronic filing in the district court, at midnight in the court's time zone;

(B) for electronic filing in the court of appeals, at midnight in the time zone of the circuit clerk's principal office;

(C) for filing under Rules 4(c)(1), 25(a)(2)(B), and 25(a)(2)(C) – and filing by mail under Rule 13(b) – at the latest time for the method chosen for delivery to the post office, third-party commercial carrier, or prison mailing system; and

(D) for filing by other means, when the clerk's office is scheduled to close.

(5) ***"Next Day" Defined.*** The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

(6) ***"Legal Holiday" Defined.*** "Legal holiday" means:

(A) the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day; and

(B) any other day declared a holiday by the President, Congress, or the state in which is located either the district court that rendered the challenged judgment or order, or the circuit clerk's principal office. (In this rule, 'state' includes the District of Columbia and any United States commonwealth, territory, or possession.)

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Committee Note

Subdivision (a). Subdivision (a) has been amended to simplify and clarify the provisions that describe how deadlines are computed. Subdivision (a) governs the computation of any time period found in a statute that does not specify a method of computing time, a Federal Rule of Appellate Procedure, a local rule, or a court order. In accordance with Rule 47(a)(1), a local rule may not direct that a deadline be computed in a manner inconsistent with subdivision (a).

The time-computation provisions of subdivision (a) apply only when a time period must be computed. They do not apply when a fixed time to act is set. The amendments thus carry forward the approach taken in *Violette v. P.A. Days, Inc.*, 427 F.3d 1015, 1016 (6th Cir. 2005) (holding that Civil Rule 6(a) "does not apply to situations where the court has established a specific calendar day as a deadline"), and reject the contrary holding of *In re American Healthcare Management, Inc.*, 900 F.2d 827, 832 (5th Cir. 1990) (holding that Bankruptcy Rule 9006(a) governs treatment of date-certain deadline set by court order). If, for example, the date for filing is "no later than November 1, 2007," subdivision (a) does not govern. But if a filing is required to be made "within 10 days" or "within 72 hours," subdivision (a) describes how that deadline is computed.

Subdivision (a) does not apply when computing a time period set by a statute if the statute specifies a method of computing time. *See, e.g.*, 20 U.S.C. § 7711(b)(1) (requiring certain petitions for review by a local educational agency or a state to be filed "within 30 working days (as determined by the local educational agency or State) after receiving notice of" federal agency decision).

Subdivision (a)(1). New subdivision (a)(1) addresses the computation of time periods that are stated in days. It also applies to time periods that are stated in weeks, months, or years; though no such time period currently appears in the Federal Rules of Appellate Procedure, such periods may be set by other covered provisions such as a local rule. *See, e.g.*, Third Circuit Local Appellate Rule 46.3(c)(1). Subdivision (a)(1)(B)'s directive to "count every day" is relevant only if the period is stated in days (not weeks, months or years).

Under former Rule 26(a), a period of 11 days or more was computed differently than a period of less than 11 days. Intermediate Saturdays, Sundays, and legal holidays were included in computing the longer periods, but excluded in computing the shorter periods. Former Rule 26(a) thus made computing deadlines unnecessarily complicated and led to counterintuitive results. For example, a 10-day period and a 14-day period that started on the same day usually ended on the same day — and the 10-day period not infrequently ended later than the 14-day period. *See Miltimore Sales, Inc. v. Int'l Rectifier, Inc.*, 412 F.3d 685, 686 (6th Cir. 2005).

Under new subdivision (a)(1), all deadlines stated in days (no matter the length) are computed in the same way. The day of the event that triggers the deadline is not counted. All other days — including intermediate Saturdays, Sundays, and legal holidays — are counted, with only one exception: If the period ends on a Saturday, Sunday, or legal holiday, then the deadline falls on the next day that is not a Saturday, Sunday, or legal holiday. An illustration is provided below in the discussion of subdivision (a)(5). Subdivision (a)(3) addresses filing deadlines that expire on a day when the clerk's office is inaccessible.

Where subdivision (a) formerly referred to the "act, event, or default" that triggers the deadline, new subdivision (a) refers simply to the "event" that triggers the deadline; this change in terminology is adopted for brevity and simplicity, and is not intended to change meaning.

Periods previously expressed as less than 11 days will be shortened as a practical matter by the decision to count intermediate Saturdays, Sundays, and legal holidays in computing all periods. Many of those periods have been lengthened to compensate for the change. *See, e.g.*, Rules 5(b)(2), 5(d)(1), 28.1(f), & 31(a).

Most of the 10-day periods were adjusted to meet the change in computation method by setting 14 days as the new period. A 14-day period corresponds to the most frequent result of a 10-day period under the former computation method — two Saturdays and two Sundays were excluded, giving 14 days in all. A 14-day period has an additional advantage. The final day falls on the same day of the week as the event that triggered the period — the 14th day after a Monday, for example, is a Monday. This advantage of using week-long periods led to adopting 7-day periods to replace some of the periods set at less than 10 days, and 21-day periods to replace 20-day periods. Thirty-day and longer periods, however, were retained without change.

Subdivision (a)(2). New subdivision (a)(2) addresses the computation of time periods that are stated in hours. No such deadline currently appears in the Federal Rules of Appellate Procedure. But some statutes contain deadlines stated in hours, as do some court orders issued in expedited proceedings.

Under subdivision (a)(2), a deadline stated in hours starts to run immediately on the occurrence of the event that triggers the deadline.

The deadline generally ends when the time expires. If, however, the time period expires at a specific time (say, 2:17 p.m.) on a Saturday, Sunday, or legal holiday, then the deadline is extended to the same time (2:17 p.m.) on the next day that is not a Saturday, Sunday, or legal holiday. Periods stated in hours are not to be "rounded up" to the next whole hour. Subdivision (a)(3) addresses situations when the clerk's office is inaccessible during the last hour before a filing deadline expires.

Subdivision (a)(2)(B) directs that every hour be counted. Thus, for example, a 72-hour period that commences at 10:00 a.m. on Friday, November 2, 2007, will run until 9:00 a.m. on Monday, November 5; the discrepancy in start and end times in this example results from the intervening shift from daylight saving time to standard time.

Subdivision (a)(3). When determining the last day of a filing period stated in days or a longer unit of time, a day on which the clerk's office is not accessible because of the weather or another reason is treated like a Saturday, Sunday, or legal holiday. When determining the end of a filing period stated in hours, if the clerk's office is inaccessible during the last hour of the filing period computed under subdivision (a)(2) then the period is extended to the same time on the next day that is not a weekend, holiday or day when the clerk's office is inaccessible.

Subdivision (a)(3)'s extensions apply "[u]nless the court orders otherwise." In some circumstances, the court might not wish a period of inaccessibility to trigger a full 24-hour extension; in those instances, the court can specify a briefer extension.

The text of the rule no longer refers to "weather or other conditions" as the reason for the inaccessibility of the clerk's office.

The reference to "weather" was deleted from the text to underscore that inaccessibility can occur for reasons unrelated to weather, such as an outage of the electronic filing system. Weather can still be a reason for inaccessibility of the clerk's office. The rule does not attempt to define inaccessibility. Rather, the concept will continue to develop through caselaw, *see, e.g.*, *Tchakmakjian v. Department of Defense*, 57 Fed. Appx. 438, 441 (Fed. Cir. 2003) (unpublished per curiam opinion) (inaccessibility "due to anthrax concerns"); *cf.* William G. Phelps, *When Is Office of Clerk of Court Inaccessible Due to Weather or Other Conditions for Purpose of Computing Time Period for Filing Papers under Rule 6(a) of Federal Rules of Civil Procedure*, 135 A.L.R. Fed. 259 (1996) (collecting cases). In addition, local provisions may address inaccessibility for purposes of electronic filing.

Subdivision (a)(4). New subdivision (a)(4) defines the end of the last day of a period for purposes of subdivision (a)(1). Subdivision (a)(4) does not apply in computing periods stated in hours under subdivision (a)(2), and does not apply if a different time is set by a statute, local rule, or order in the case. A local rule may, for example, address the problems that might arise under subdivision (a)(4)(A) if a single district has clerk's offices in different time zones, or provide that papers filed in a drop box after the normal hours of the clerk's office are filed as of the day that is date-stamped on the papers by a device in the drop box.

28 U.S.C. § 452 provides that "[a]ll courts of the United States shall be deemed always open for the purpose of filing proper papers, issuing and returning process, and making motions and orders." A corresponding provision exists in Rule 45(a)(2). Some courts have held that these provisions permit an after-hours filing by handing the papers to an appropriate official. *See, e.g.*, *Casalduc v. Diaz*, 117 F.2d 915, 917 (1st Cir. 1941). Subdivision (a)(4) does not address the

effect of the statute on the question of after-hours filing; instead, the rule is designed to deal with filings in the ordinary course without regard to Section 452.

Subdivision (a)(4)(A) addresses electronic filings in the district court. For example, subdivision (a)(4)(A) would apply to an electronically-filed notice of appeal. Subdivision (a)(4)(B) addresses electronic filings in the court of appeals.

Subdivision (a)(4)(C) addresses filings by mail under Rules 25(a)(2)(B)(i) and 13(b), filings by third-party commercial carrier under Rule 25(a)(2)(B)(ii), and inmate filings under Rules 4(c)(1) and 25(a)(2)(C). For such filings, subdivision (a)(4)(C) provides that the "last day" ends at the latest time (prior to midnight in the filer's time zone) that the filer can properly submit the filing to the post office, third-party commercial carrier, or prison mail system (as applicable) using the filer's chosen method of submission. For example, if a correctional institution's legal mail system's rules of operation provide that items may only be placed in the mail system between 9:00 a.m. and 5:00 p.m., then the "last day" for filings under Rules 4(c)(1) and 25(a)(2)(C) by inmates in that institution ends at 5:00 p.m. As another example, if a filer uses a drop box maintained by a third-party commercial carrier, the "last day" ends at the time of that drop box's last scheduled pickup. Filings by mail under Rule 13(b) continue to be subject to § 7502 of the Internal Revenue Code, as amended, and the applicable regulations.

Subdivision (a)(4)(D) addresses all other non-electronic filings; for such filings, the last day ends under (a)(4)(D) when the clerk's office in which the filing is made is scheduled to close.

Subdivision (a)(5). New subdivision (a)(5) defines the "next" day for purposes of subdivisions (a)(1)(C) and (a)(2)(C). The Federal

Rules of Appellate Procedure contain both forward-looking time periods and backward-looking time periods. A forward-looking time period requires something to be done within a period of time *after* an event. *See, e.g.*, Rule 4(a)(1)(A) (subject to certain exceptions, notice of appeal in a civil case must be filed "within 30 days after the judgment or order appealed from is entered"). A backward-looking time period requires something to be done within a period of time *before* an event. *See, e.g.*, Rule 31(a)(1) ("[A] reply brief must be filed at least 7 days before argument, unless the court, for good cause, allows a later filing."). In determining what is the "next" day for purposes of subdivisions (a)(1)(C) and (a)(2)(C), one should continue counting in the same direction — that is, forward when computing a forward-looking period and backward when computing a backward-looking period. If, for example, a filing is due within 10 days *after* an event, and the tenth day falls on Saturday, September 1, 2007, then the filing is due on Tuesday, September 4, 2007 (Monday, September 3, is Labor Day). But if a filing is due 10 days *before* an event, and the tenth day falls on Saturday, September 1, then the filing is due on Friday, August 31. If the clerk's office is inaccessible on August 31, then subdivision (a)(3) extends the filing deadline forward to the next accessible day that is not a Saturday, Sunday or legal holiday—no earlier than Tuesday, September 4.

Subdivision (a)(6). New subdivision (a)(6) defines "legal holiday" for purposes of the Federal Rules of Appellate Procedure, including the time-computation provisions of subdivision (a). Subdivision (a)(6) continues to include within the definition of "legal holiday" days that are "declared a holiday by the President." For two cases that applied this provision to find a legal holiday on days when the President ordered the government closed for purposes of celebration or commemoration, *see Hart v. Sheahan*, 396 F.3d 887, 891 (7th Cir. 2005) (President included December 26, 2003 within scope of executive order specifying pay for executive department and

independent agency employees on legal holidays), and *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1098 (D.C. Cir. 2003) (executive order provided that "[a]ll executive branch departments and agencies of the Federal Government shall be closed and their employees excused from duty on Monday, December 24, 2001"). Subdivision (a)(6)(B) includes certain state holidays within the definition of legal holidays, and defines the term "state" – for purposes of subdivision (a)(6) – to include the District of Columbia and any commonwealth, territory or possession of the United States. Thus, for purposes of subdivision (a)(6)'s definition of "legal holiday," "state" includes the District of Columbia, Guam, American Samoa, the U.S. Virgin Islands, the Commonwealth of Puerto Rico, and the Commonwealth of the Northern Mariana Islands.

PROPOSED AMENDMENT TO THE FEDERAL RULES OF APPELLATE PROCEDURE*

Rule 26. Computing and Extending Time

* * * * *

(c) Additional Time after Service. When a party ~~is required or permitted to act within a prescribed period after a paper is served on that party~~ may or must act within a specified time after service, 3 calendar days are added ~~to~~ after the prescribed 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(c), a paper that is served electronically is not treated as delivered on the date of service stated in the proof of service.

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*New material is underlined; matter to be omitted is lined through.

Committee Note

Subdivision (c). Rule 26(c) has been amended to eliminate uncertainty about application of the 3-day rule. Civil Rule 6(e) was amended in 2004 to eliminate similar uncertainty in the Civil Rules.

Under the amendment, a party that is required or permitted to act within a prescribed period should first calculate that period, without reference to the 3-day rule provided by Rule 26(c), but with reference to the other time computation provisions of the Appellate Rules. After the party has identified the date on which the prescribed period would expire but for the operation of Rule 26(c), the party should add 3 calendar days. The party must act by the third day of the extension, unless that day is a Saturday, Sunday, or legal holiday, in which case the party must act by the next day that is not a Saturday, Sunday, or legal holiday.

To illustrate: A paper is served by mail on Thursday, November 1, 2007. The prescribed time to respond is 30 days. The prescribed period ends on Monday, December 3 (because the 30th day falls on a Saturday, the prescribed period extends to the following Monday). Under Rule 26(c), three calendar days are added — Tuesday, Wednesday, and Thursday — and thus the response is due on Thursday, December 6.

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PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE*

Rule 4. Appeal as of Right–When Taken

(a) Appeal in a Civil Case.

* * * * *

(4) Effect of a Motion on a Notice of Appeal.

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or

*New material is underlined; matter to be omitted is lined through.

not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed no later than ~~10~~ 30 days after the judgment is entered.

* * * * *

(5) **Motion for Extension of Time.**

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(C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or ~~10~~ 14 days after the date when

the order granting the motion is entered, whichever is later.

(6) **Reopening the Time to File an Appeal.** The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

* * * * *

(B) the motion is filed within 180 days after the judgment or order is entered or within ~~7~~ 14 days after the moving party receives notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier; and

* * * * *

(b) Appeal in a Criminal Case.

(1) **Time for Filing a Notice of Appeal.**

(A) In a criminal case, a defendant's notice of appeal must be filed in the district court within ~~10~~ 14 days after the later of:

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

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

* * * * *

(3) **Effect of a Motion on a Notice of Appeal.**

(A) If a defendant timely makes any of the following motions under the Federal Rules of Criminal Procedure, the notice of appeal from a judgment of conviction must be filed within ~~10~~ 14 days after the entry of the order disposing of the last such remaining motion, or within ~~10~~ 14 days after the entry of the

judgment of conviction, whichever period ends later. This provision applies to a timely motion:

(i) for judgment of acquittal under Rule 29;

(ii) for a new trial under Rule 33, but if based on newly discovered evidence, only if the motion is made no later than ~~10~~ 14 days after the entry of the judgment; or

(iii) for arrest of judgment under Rule 34.

* * * * *

Committee Note

Subdivision (a)(4)(A)(vi). Subdivision (a)(4) provides that certain timely post-trial motions extend the time for filing an appeal. Lawyers sometimes move under Civil Rule 60 for relief that is still available under another rule such as Civil Rule 59. Subdivision (a)(4)(A)(vi) provides for such eventualities by extending the time for filing an appeal so long as the Rule 60 motion is filed within a limited

time. Formerly, the time limit under subdivision (a)(4)(A)(vi) was 10 days, reflecting the 10-day limits for making motions under Civil Rules 50(b), 52(b), and 59. Subdivision (a)(4)(A)(vi) now contains a 30-day limit to match the revisions to the time limits in the Civil Rules.

Subdivision (a)(5)(C). The time set in the former rule at 10 days has been revised to 14 days. See the Note to Rule 26.

Subdivision (a)(6)(B). The time set in the former rule at 7 days has been revised to 14 days. Under the time-computation approach set by former Rule 26(a), "7 days" always meant at least 9 days and could mean as many as 11 or even 13 days. Under current Rule 26(a), intermediate weekends and holidays are counted. Changing the period from 7 to 14 days offsets the change in computation approach. See the Note to Rule 26.

Subdivisions (b)(1)(A) and (b)(3)(A). The times set in the former rule at 10 days have been revised to 14 days. See the Note to Rule 26.

Rule 5. Appeal by Permission

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(b) Contents of the Petition; Answer or Cross-Petition; Oral Argument.

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(2) A party may file an answer in opposition or a cross-petition within ~~7~~ 10 days after the petition is served.

* * * * *

(d) Grant of Permission; Fees; Cost Bond; Filing the Record.

(1) Within ~~10~~ 14 days after the entry of the order granting permission to appeal, the appellant must:

(A) pay the district clerk all required fees; and

(B) file a cost bond if required under Rule 7.

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Committee Note

Subdivision (b)(2). Subdivision (b)(2) is amended in the light of the change in Rule 26(a)'s time computation rules. Subdivision (b)(2) formerly required that an answer in opposition to a petition for permission to appeal, or a cross-petition for permission to appeal, be filed "within 7 days after the petition is served." Under former Rule 26(a), "7 days" always meant at least 9 days and could mean as many as 11 or even 13 days. Under current Rule 26(a), intermediate weekends and holidays are counted. Changing the period from 7 to

10 days offsets the change in computation approach. See the Note to Rule 26.

Subdivision (d)(1). The time set in the former rule at 10 days has been revised to 14 days. See the Note to Rule 26.

Rule 6. Appeal in a Bankruptcy Case From a Final Judgment, Order, or Decree of a District Court or Bankruptcy Appellate Panel

* * * * *

(b) Appeal From a Judgment, Order, or Decree of a District Court or Bankruptcy Appellate Panel Exercising Appellate Jurisdiction in a Bankruptcy Case.

* * * * *

(2) **Additional Rules.** In addition to the rules made applicable by Rule 6(b)(1), the following rules apply:

* * * * *

(B) **The record on appeal.**

(i) Within ~~10~~ 14 days after filing the notice of appeal, the appellant must file with the clerk possessing the record assembled in accordance with Bankruptcy Rule 8006 — and serve on the appellee — a statement of the issues to be presented on appeal and a designation of the record to be certified and sent to the circuit clerk.

(ii) An appellee who believes that other parts of the record are necessary must, within ~~10~~ 14 days after being served with the appellant's designation, file with the clerk and serve on the appellant a designation of additional parts to be included.

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Committee Note

Subdivision (b)(2)(B). The times set in the former rule at 10 days have been revised to 14 days. See the Note to Rule 26.

Rule 10. The Record on Appeal

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(b) The Transcript of Proceedings.

(1) **Appellant's Duty to Order.** Within ~~10~~ 14 days after filing the notice of appeal or entry of an order disposing of the last timely remaining motion of a type specified in Rule 4(a)(4)(A), whichever is later, the appellant must do either of the following:

* * * * *

(3) **Partial Transcript.** Unless the entire transcript is ordered:

(A) the appellant must — within the ~~10~~ 14 days provided in Rule 10(b)(1) — file a statement of the issues that the appellant intends to

present on the appeal and must serve on the appellee a copy of both the order or certificate and the statement;

(B) if the appellee considers it necessary to have a transcript of other parts of the proceedings, the appellee must, within ~~10~~ 14 days after the service of the order or certificate and the statement of the issues, file and serve on the appellant a designation of additional parts to be ordered; and

(C) unless within ~~10~~ 14 days after service of that designation the appellant has ordered all such parts, and has so notified the appellee, the appellee may within the following ~~10~~ 14 days either order the parts or move in the district court for an order requiring the appellant to do so.

* * * * *

(c) Statement of the Evidence When the Proceedings Were Not Recorded or When a Transcript Is Unavailable. If the transcript of a hearing or trial is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement must be served on the appellee, who may serve objections or proposed amendments within ~~10~~ 14 days after being served. The statement and any objections or proposed amendments must then be submitted to the district court for settlement and approval. As settled and approved, the statement must be included by the district clerk in the record on appeal.

* * * * *

Committee Note

Subdivisions (b)(1), (b)(3) and (c). The times set in the former rule at 10 days have been revised to 14 days. See the Note to Rule 26.

Rule 12. Docketing the Appeal; Filing a Representation Statement; Filing the Record

* * * * *

(b) Filing a Representation Statement. Unless the court of appeals designates another time, the attorney who filed the notice of appeal must, within ~~10~~ 14 days after filing the notice, file a statement with the circuit clerk naming the parties that the attorney represents on appeal.

* * * * *

Committee Note

Subdivision (b). The time set in the former rule at 10 days has been revised to 14 days. See the Note to Rule 26.

Rule 15. Review or Enforcement of an Agency Order—How Obtained; Intervention

* * * * *

(b) Application or Cross-Application to Enforce an Order; Answer; Default.

* * * * *

(2) Within ~~20~~ 21 days after the application for enforcement is filed, the respondent must serve on the applicant an answer to the application and file it with the clerk. If the respondent fails to answer in time, the court will enter judgment for the relief requested.

* * * * *

Committee Note

Subdivision (b)(2). The time set in the former rule at 20 days has been revised to 21 days. See the Note to Rule 26.

Rule 19. Settlement of a Judgment Enforcing an Agency Order in Part

When the court files an opinion directing entry of judgment enforcing the agency's order in part, the agency

must within 14 days file with the clerk and serve on each other party a proposed judgment conforming to the opinion. A party who disagrees with the agency's proposed judgment must within ~~7~~ 10 days file with the clerk and serve the agency with a proposed judgment that the party believes conforms to the opinion. The court will settle the judgment and direct entry without further hearing or argument.

Committee Note

Rule 19 formerly required a party who disagreed with the agency's proposed judgment to file a proposed judgment "within 7 days." Under former Rule 26(a), "7 days" always meant at least 9 days and could mean as many as 11 or even 13 days. Under current Rule 26(a), intermediate weekends and holidays are counted. Changing the period from 7 to 10 days offsets the change in computation approach. See the Note to Rule 26.

Rule 25. Filing and Service

(a) Filing.

* * * * *

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

* * * * *

(B) **A brief or appendix.** A brief or appendix is timely filed, however, if on or before the last day for filing, it is:

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

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

* * * * *

(c) Manner of Service.

(1) Service may be any of the following:

* * * * *

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

* * * * *

Committee Note

Under former Rule 26(a), short periods that span weekends or holidays were computed without counting those weekends or holidays. To specify that a period should be calculated by counting all intermediate days, including weekends or holidays, the Rules used the term "calendar days." Rule 26(a) now takes a "days-are-days" approach under which all intermediate days are counted, no matter how short the period. Accordingly, "3 calendar days" in subdivisions (a)(2)(B)(ii) and (c)(1)(C) is amended to read simply "3 days."

Rule 26. Computing and Extending Time

* * * * *

(c) Additional Time after Service. When a party is required or permitted to act within a prescribed period after a paper is served on that party, 3 ~~calendar~~ days are added to the prescribed period unless the paper is delivered on the date of service stated in the proof of service. For purposes of this Rule 26(c), a paper that is served electronically is not treated as delivered on the date of service stated in the proof of service.

Committee Note

Subdivision (c). To specify that a period should be calculated by counting all intermediate days, including weekends or holidays, the Rules formerly used the term "calendar days." Because new subdivision (a) takes a "days-are-days" approach under which all intermediate days are counted, no matter how short the period, "3 calendar days" in subdivision (c) is amended to read simply "3 days."

Rule 27. Motions

(a) In General.

* * * * *

(3) **Response.**

(A) **Time to file.** Any party may file a response to a motion; Rule 27(a)(2) governs its contents. The response must be filed within ~~8~~ 10 days after service of the motion unless the court shortens or extends the time. A motion authorized by Rules 8, 9, 18, or 41 may be granted before the ~~8-day~~ 10-day period runs only if the court gives reasonable notice to the parties that it intends to act sooner.

* * * * *

(4) **Reply to Response.** Any reply to a response must be filed within ~~5~~ 7 days after service of the response. A reply must not present matters that do not relate to the response.

* * * * *

Committee Note

Subdivision (a)(3)(A). Subdivision (a)(3)(A) formerly required that a response to a motion be filed "within 8 days after service of the motion unless the court shortens or extends the time." Prior to the 2002 amendments to Rule 27, subdivision (a)(3)(A) set this period at 10 days rather than 8 days. The period was changed in 2002 to reflect the change from a time-computation approach that counted intermediate weekends and holidays to an approach that did not. (Prior to the 2002 amendments, intermediate weekends and holidays were excluded only if the period was less than 7 days; after those amendments, such days were excluded if the period was less than 11 days.) Under current Rule 26(a), intermediate weekends and holidays are counted for all periods. Accordingly, revised subdivision (a)(3)(A) once again sets the period at 10 days.

Subdivision (a)(4). Subdivision (a)(4) formerly required that a reply to a response be filed "within 5 days after service of the response." Prior to the 2002 amendments, this period was set at 7 days; in 2002 it was shortened in the light of the 2002 change in time-

computation approach (discussed above). Under current Rule 26(a), intermediate weekends and holidays are counted for all periods, and revised subdivision (a)(4) once again sets the period at 7 days.

Rule 28.1. Cross-Appeals

* * * * *

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

* * * * *

(4) the appellee's reply brief, within 14 days after the appellant's response and reply brief is served, but at least ~~3~~ 7 days before argument unless the court, for good cause, allows a later filing.

Committee Note

Subdivision (f)(4). Subdivision (f)(4) formerly required that the appellee's reply brief be served "at least 3 days before argument unless the court, for good cause, allows a later filing." Under former Rule 26(a), "3 days" could mean as many as 5 or even 6 days. See the Note to Rule 26. Under revised Rule 26(a), intermediate weekends and holidays are counted. Changing "3 days" to "7 days" alters the period accordingly. Under revised Rule 26(a), when a

period ends on a weekend or holiday, one must continue to count in the same direction until the next day that is not a weekend or holiday; the choice of the 7-day period for subdivision (f)(4) will minimize such occurrences.

Rule 30. Appendix to the Briefs

* * * * *

(b) All Parties' Responsibilities.

(1) **Determining the Contents of the Appendix.** The parties are encouraged to agree on the contents of the appendix. In the absence of an agreement, the appellant must, within ~~10~~ 14 days after the record is filed, serve on the appellee a designation of the parts of the record the appellant intends to include in the appendix and a statement of the issues the appellant intends to present for review. The appellee may, within ~~10~~ 14 days after receiving the designation, serve on the appellant a designation of additional parts to which it wishes to direct the

court's attention. The appellant must include the designated parts in the appendix. The parties must not engage in unnecessary designation of parts of the record, because the entire record is available to the court. This paragraph applies also to a cross-appellant and a cross-appellee.

* * * * *

Committee Note

Subdivision (b)(1). The times set in the former rule at 10 days have been revised to 14 days. See the Note to Rule 26.

Rule 31. Serving and Filing Briefs

(a) Time to Serve and File a Brief.

(1) The appellant must serve and file a brief within 40 days after the record is filed. The appellee must serve and file a brief within 30 days after the appellant's brief is served. The appellant may serve

and file a reply brief within 14 days after service of the appellee's brief but a reply brief must be filed at least ~~3~~ 7 days before argument, unless the court, for good cause, allows a later filing.

* * * * *

Committee Note

Subdivision (a)(1). Subdivision (a)(1) formerly required that the appellant's reply brief be served "at least 3 days before argument, unless the court, for good cause, allows a later filing." Under former Rule 26(a), "3 days" could mean as many as 5 or even 6 days. See the Note to Rule 26. Under revised Rule 26(a), intermediate weekends and holidays are counted. Changing "3 days" to "7 days" alters the period accordingly. Under revised Rule 26(a), when a period ends on a weekend or holiday, one must continue to count in the same direction until the next day that is not a weekend or holiday; the choice of the 7-day period for subdivision (a)(1) will minimize such occurrences.

Rule 39. Costs

* * * * *

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

* * * * *

(2) Objections must be filed within ~~10~~ 14 days after service of the bill of costs, unless the court extends the time.

* * * * *

Committee Note

Subdivision (d)(2). The time set in the former rule at 10 days has been revised to 14 days. See the Note to Rule 26.

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

* * * * *

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

9 * * * * *

Committee Note

Under former Rule 26(a), short periods that span weekends or holidays were computed without counting those weekends or holidays. To specify that a period should be calculated by counting all intermediate days, including weekends or holidays, the Rules used the term "calendar days." Rule 26(a) now takes a "days-are-days" approach under which all intermediate days are counted, no matter how short the period. Accordingly, "7 calendar days" in subdivision (b) is amended to read simply "7 days."

MEMORANDUM

DATE: March 13, 2008

TO: Advisory Committee on Appellate Rules

CC: Reporters and Advisory Committee Chairs

FROM: Catherine T. Struve

RE: Item No. 07-AP-B: Proposed Appellate Rule 12.1

The Committee's proposed new Rule 12.1 concerning indicative rulings was published for comment in August 2007. Appellate Rule 12.1 is designed to work with proposed Civil Rule 62.1. Both rules will formalize the practice of indicative rulings. (A copy of my March 27, 2007 memo concerning indicative rulings is enclosed.)

Part I of this memo provides Rule 12.1's text and Note as published. Part II summarizes the public comments on Rule 12.1 (and/or Civil Rule 62.1). Part III recommends that the Committee approve Rule 12.1 as published, but with two changes to the Note.

I. Text of Rule and Committee Note

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE*

Rule 12.1. Remand After an Indicative Ruling by the District Court on a Motion for Relief That Is Barred by a Pending Appeal

(a) **Notice to the Court of Appeals.** If a timely motion is made in the district court for relief that it lacks authority to grant because of an appeal that has been docketed and is pending, the movant must promptly notify the circuit clerk if the district court states either that it would grant the motion or that the motion raises a substantial issue.

(b) **Remand After an Indicative Ruling.** If the district court states that it would grant the motion or that the motion raises a substantial issue, the court of appeals may remand for further proceedings but retains jurisdiction unless it expressly dismisses the appeal. If the court of appeals

*New material is underlined.

remands but retains jurisdiction, the parties must promptly notify the circuit clerk when the district court has decided the motion on remand.

Committee Note

This new rule corresponds to Federal Rule of Civil Procedure 62.1, which adopts for any motion that the district court cannot grant because of a pending appeal the practice that most courts follow when a party moves under Civil Rule 60(b) to vacate a judgment that is pending on appeal. After an appeal has been docketed and while it remains pending, the district court cannot grant relief under a rule such as Civil Rule 60(b) without a remand. But it can entertain the motion and deny it, defer consideration, or state that it would grant the motion if the action is remanded or that the motion raises a substantial issue. Experienced appeal lawyers often refer to the suggestion for remand as an "indicative ruling."

[Appellate Rule 12.1 is not limited to the Civil Rule 62.1 context; Rule 12.1 may also be used, for example, in connection with motions under Criminal Rule 33. *See United States v. Cronic*, 466 U.S. 648, 667 n.42 (1984).] The procedure formalized by Rule 12.1 is helpful whenever relief is sought from an order that the court cannot reconsider because the order is the subject of a pending appeal.

Rule 12.1 does not attempt to define the circumstances in which an appeal limits or defeats the district court's authority to act in face of a pending appeal. The rules that govern the relationship between trial courts and appellate courts may be complex, depending in part on the nature of the order and the source of appeal jurisdiction. Appellate Rule 12.1 applies only when those rules deprive the district court of authority to grant relief without appellate permission.

To ensure proper coordination of proceedings in the district court and in the court of appeals, the movant must notify the circuit clerk if the district court states that it would grant the motion or that the motion raises a substantial issue. The "substantial issue" standard may be illustrated by the following hypothetical: The district court grants summary judgment dismissing a case. While the plaintiff's appeal is pending, the plaintiff moves for relief from the judgment, claiming newly discovered evidence and also possible fraud by the defendant during the discovery process. If the district court reviews the motion and indicates that the motion "raises a substantial issue," the court of appeals may well wish to remand rather than proceed to determine the appeal.

If the district court states that it would grant the motion or that the motion raises a substantial issue, the movant may ask the court of appeals to remand the action so that the district court can make its final ruling on the motion. In accordance with Rule 47(a)(1), a local rule may prescribe the format for the litigants' notifications and the district court's statement.

Remand is in the court of appeals' discretion. The court of appeals may remand all proceedings, terminating the initial appeal. In the context of postjudgment motions, however, that procedure should be followed only when the appellant has stated clearly its intention to abandon the appeal. The danger is that if the initial appeal is terminated and the district court then denies the requested relief, the time for appealing the initial judgment will have run out and a court might rule that the appellant is limited to appealing the denial of the postjudgment motion. The latter appeal may well not provide the appellant with the opportunity to raise all the challenges that could have been raised on appeal from the underlying judgment. *See, e.g., Browder v. Dir., Dep't of Corrections of Ill.*, 434 U.S. 257, 263 n.7 (1978) ("[A]n appeal from denial of Rule 60(b) relief does not bring up the underlying judgment for review."). The Committee does not endorse the notion that a court of appeals should decide that the initial appeal was abandoned – despite the absence of any clear statement of intent

to abandon the appeal – merely because an unlimited remand occurred, but the possibility that a court might take that troubling view underscores the need for caution in delimiting the scope of the remand.

The court of appeals may instead choose to remand for the sole purpose of ruling on the motion while retaining jurisdiction to proceed with the appeal after the district court rules on the motion (if the appeal is not moot at that point and if any party wishes to proceed). This will often be the preferred course in the light of the concerns expressed above. It is also possible that the court of appeals may wish to proceed to hear the appeal even after the district court has granted relief on remand; thus, even when the district court indicates that it would grant relief, the court of appeals may in appropriate circumstances choose a limited rather than unlimited remand.

If the court of appeals remands but retains jurisdiction, subdivision (b) requires the parties to notify the circuit clerk when the district court has decided the motion on remand. This is a joint obligation that is discharged when the required notice is given by any litigant involved in the motion in the district court.

When relief is sought in the district court during the pendency of an appeal, litigants should bear in mind the likelihood that a separate notice of appeal will be necessary in order to challenge the district court's disposition of the motion. *See, e.g.*, *Jordan v. Bowen*, 808 F.2d 733, 736-37 (10th Cir. 1987) (viewing district court's response to appellant's motion for indicative ruling as a denial of appellant's request for relief under Rule 60(b), and refusing to review that denial because appellant had failed to take an appeal from the denial); *TAAG Linhas Aereas de Angola v. Transamerica Airlines, Inc.*, 915 F.2d 1351, 1354 (9th Cir. 1990) ("[W]here a 60(b) motion is filed subsequent to the notice of appeal and considered by the district court after a limited remand, an appeal specifically from the ruling on the motion must be taken if the issues raised in that motion are to be considered by the Court of Appeals.").

II. Summary of Public Comments

Three comments were submitted concerning proposed new Appellate Rule 12.1. In addition, two other comments concern proposed new Civil Rule 62.1. In the interest of completeness, all five of those comments are summarized here.

07-AP-011: Public Citizen Litigation Group. Public Citizen suggests one substantive and one stylistic change in the text of proposed Rule 12.1, and also suggests a change in the Note.

The proposed substantive change to the text stems from Public Citizen's concern that courts of appeals should be absolutely barred from dismissing an appeal (when remanding for an indicative ruling) unless the appellant expressly requests that the appeal be dismissed. To set such an absolute bar, Public Citizen suggests adding a new sentence to Rule 12.1(b). With their proposed addition, Rule 12.1(b) would read:

> **Remand After an Indicative Ruling.** If the district court states that it would grant the motion or that the motion raises a substantial issue, the court of appeals may remand for further proceedings but retains jurisdiction unless it expressly dismisses the appeal. The court of appeals shall not dismiss the appeal unless, in the notice referred to in subdivision (a), the appellant expressly requests that the appeal be dismissed. If the court of appeals remands but retains jurisdiction, the parties must promptly notify the circuit clerk when the district court has decided the motion on remand.

Public Citizen also suggests amending the Note's observation that "[w]hen relief is sought in the district court during the pendency of an appeal, litigants should bear in mind the likelihood that a separate notice of appeal will be necessary in order to challenge the district court's disposition of the motion." Public Citizen "believe[s] that the committee note should remind litigants that an *amended* notice of appeal may be filed in this circumstance. That is a worthwhile reminder because an amended notice of appeal does not require a new filing fee."

Finally, Public Citizen suggests that in Rule 12.1(a) "because of an appeal that has been docketed" should be changed to read "because an appeal has been docketed."

07-AP-014: United States Solicitor General. Paul D. Clement writes in support of proposed Rule 12.1 but urges that the Note be amended. The Department of Justice is concerned about the potential breadth of Rule 12.1's application. The DOJ has identified only three instances in the criminal context where the indicative-ruling procedure would "legitimately arise[]," and the DOJ worries that unless the Note restricts Rule 12.1's application in the criminal context to those instances, the federal trial courts "will be swamped with inappropriate motions by prisoners acting *pro se* who do not understand the limited purposes for which indicative rulings are warranted." Thus, the DOJ proposes that the first sentence of the Note's second paragraph be deleted and the following sentence added in its place: "Appellate Rule 12.1 is limited to the Civil Rule 62.1 context and to newly discovered evidence motions under Criminal Rule 33(b)(1), as provided in *United States v. Cronic*, 466 U.S. 648 n.42 (1984), reduced sentence motions under Criminal Rule 35(b), and motions under 18 U.S.C. 3582(c)."

07-AP-018; 07-BR-036; 07-CV-018: **Rules and Practice Committee of the Seventh Circuit Bar Association.** Thomas J. Wiegand writes on behalf of the Seventh Circuit Bar Association's Rules and Practice Committee ("Seventh Circuit Bar Association"). He reports that the Seventh Circuit Bar Association sponsored a lunchtime discussion of the proposed Rules amendments this past December. One of the comments that resulted from this discussion is as follows: "It appear[s] that [Civil Rule 62.1 and Appellate Rule 12.1] are aimed primarily or exclusively at motions pursuant to [C]ivil Rule 60. If that indeed is the case, then the new rules or the comments might mention that fact, so as to avoid a variety of other motions being made under the new rules, such as motions for fees."

07-CV-012: Professor Bradley Scott Shannon. Professor Shannon "agree[s] that proposed Rule 62.1 is eminently pragmatic," but he "object[s] to this (and any) rule that purports to authorize courts to decide matters (or indicate how they might decide matters) that are not currently before them." If the district court lacks jurisdiction to decide the motion, he asserts, than an indicative ruling on the motion "is improper, certainly as a matter of established principles of American legal process, if not also as a matter of constitutional justiciability."

07-CV-015: U.S. Department of Justice. Jeffrey S. Bucholtz, Acting Assistant Attorney General, Civil Division, writes on behalf of the Department of Justice to support proposed Civil Rule 62.1.

III. Recommendation

I recommend that the Committee approve the proposal as published, but with two changes to the Note (stemming from comments by the DOJ and by Public Citizen).

Public Citizen's concern about unwarranted dismissals of appeals is understandable. But on the other hand there may be reasons to preserve some flexibility for the court of appeals. It may be the case, for example, that an unconditional remand would not be risky where the district court has stated unequivocally its intention to grant the motion. Indeed, an unconditional remand might be the appropriate action in such a situation. Writing in the context of request for relief under Civil Rule 60(b), the Seventh Circuit has stated that partial remands are inappropriate "because the grant of the Rule 60(b) motion operates to vacate the original judgment, leaving nothing for the appellate court to do with it – in fact mooting the appeal." *Boyko v. Anderson*, 185 F.3d 672, 673-74 (7th Cir. 1999).** Even if one is unsure about preserving the court of appeals' discretion in the context of appeals from final judgments, one might conclude that the answer should differ for at least some interlocutory appeals. In the context of interlocutory appeals a dismissal of the current appeal might not always have the same implications for the appellant as would the dismissal of an appeal from a final judgment. Thus, in the interlocutory context it seems useful for the Rule to give the court of appeals discretion concerning whether to dismiss the appeal – yet Public Citizen's proposal would remove that discretion. It is, moreover, not easy to arrive at a drafting fix which would remove discretion with respect to appeals from final judgments but not with respect to interlocutory appeals. For example, how would one characterize collateral-order appeals?

I thus think that the best course may be to reject Public Citizen's proposed change to the Rule. The published proposal preserves the court of appeals' discretion while stating clearly in the Note that unconditional remands should only be used with great care. A circuit that wishes to further circumscribe the court of appeals' discretion would be free to do so via a local rule. I think that a circuit would be free, under the text of the Rule as published, to adopt a local rule stating, for example, that the remand should be unconditional only if the appellant has stated clearly its intention to abandon the appeal. In any event, litigants who read the Note will be alerted to the fact that when seeking a remand they should state clearly whether they seek a limited or a complete remand.

Public Citizen's proposed change to the Note seems helpful. Although Rule 4(a) does not explain

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** On the other hand, if the court of appeals remanded unconditionally and the district court later changed its mind and denied the motion, it is not clear whether the appellant would then be "remitted to the limited appellate review conventionally accorded rulings on" Rule 60(b) motions. *Boyko*, 185 F.3d at 674.

in general terms when an amended (as opposed to a new) notice of appeal can be used,[***] it would seem reasonable to conclude that an amended notice is appropriate when the appellant has already filed an effective notice of appeal.[****] I thus think it would not be misleading to change the relevant paragraph of the Note to read:

> When relief is sought in the district court during the pendency of an appeal, litigants

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[***] Rule 4(a)(4)(B)(ii) explicitly authorizes the use of an amended notice of appeal to challenge the disposition of a tolling motion or the alteration or amendment of a judgment upon a tolling motion. That is a somewhat different use than is discussed in the Rule 12.1 Note: The Rule 12.1 mechanism would not come into play with a tolling motion (since if a post-judgment motion tolls the time to appeal under Rule 4(a)(4), then any previously-filed notice of appeal is held in abeyance and the district court has jurisdiction to determine the motion).

[****] *See, e.g.*, West v. Ortiz, No. 06-1192, 2007 WL 706924, at *4 (10th Cir. Mar. 9, 2007) (unpublished opinion) ("To confer appellate jurisdiction over the post-dismissal orders denying his motions to appoint counsel or his Rule 60(b) motion, therefore, Mr. West should have filed an additional or amended notice of appeal from those orders at the appropriate time."); Gann v. Johnson, No. 96-20648, 1997 WL 255698, at *1 (5th Cir. Apr. 16, 1997) (unpublished opinion) ("Gann's postjudgment motion must be construed as a Fed.R.Civ.P. 60(b) motion. Gann has not evinced an intent to appeal from the denial of the Rule 60(b) motion. Gann has not filed a new or an amended notice of appeal from the order denying the Rule 60(b) motion.") (citation omitted); Best v. Lewis, No. 94-15999, 1996 WL 747898, at *1 (9th Cir. Dec. 31, 1996) (unpublished opinion) ("Best moved to remand to the district court for the limited purpose of allowing the district court to rule on a Fed.R.Civ.P. 60(b) motion to vacate the judgment. We granted his motion to remand and stayed this appeal pending disposition of the Rule 60(b) motion on remand.... [T]he district court denied the Rule 60(b) motion. Thereafter, we lifted the stay of his appeal .... Both parties filed letter briefs. In addition, Best filed an amended notice of appeal to encompass the denial of the Rule 60(b) motion ....").

should bear in mind the likelihood that a ~~separate~~ new or amended notice of appeal will be necessary in order to challenge the district court's disposition of the motion. *See, e.g.*, *Jordan v. Bowen*, 808 F.2d 733, 736-37 (10th Cir. 1987) (viewing district court's response to appellant's motion for indicative ruling as a denial of appellant's request for relief under Rule 60(b), and refusing to review that denial because appellant had failed to take an appeal from the denial); *TAAG Linhas Aereas de Angola v. Transamerica Airlines, Inc.*, 915 F.2d 1351, 1354 (9th Cir. 1990) ("[W]here a 60(b) motion is filed subsequent to the notice of appeal and considered by the district court after a limited remand, an appeal specifically from the ruling on the motion must be taken if the issues raised in that motion are to be considered by the Court of Appeals.").

Public Citizen gives no reason for its proposed style change to Rule 12.1.***** The suggestion – changing "because of an appeal that has been docketed" to "because an appeal has been docketed" – is one which was previously made by Professor Kimble, and which the Appellate and Civil Advisory Committees rejected on the ground that it could make a substantive change in the Rule's meaning.

The Department of Justice's concern about possible misuses of new Rule 12.1 has merit. And I agree with the DOJ's suggestion that this issue be dealt with in the Note; although *pro se* litigants may not all be likely to read the Note initially, language in the Note could be used by court clerks or others who may need to explain to a *pro se* litigant why the Rule 12.1 procedure is unavailable for certain uses. It would, moreover, be awkward to try to put such a limitation in the text of the Rule. One way to address the DOJ's concerns would be to change Note's second paragraph to read as follows:

> The procedure formalized by Rule 12.1 is helpful when relief is sought from an order that the court cannot reconsider because the order is the subject of a pending appeal. In the criminal context, the Committee anticipates that Rule 12.1's use will be limited to newly discovered evidence motions under Criminal Rule 33(b)(1) (*see United States v. Cronic*, 466 U.S. 648, 667 n.42 (1984)), reduced sentence motions under Criminal Rule 35(b), and motions under 18 U.S.C. § 3582(c).

***** Public Citizen did not submit a comment on proposed Civil Rule 62.1, though its style suggestion concerning Appellate Rule 12.1 would seem to apply equally to the proposed Civil Rule.

This formulation differs slightly from that suggested by the DOJ. I think it may be useful to say "the Committee anticipates that Rule 12.1's use will be limited" – rather than "Rule 12.1 is limited" – because that leaves room for the possibility that in some rare instances another use for the Rule may exist. (For example, what if the defendant is convicted and sentenced, immediately files a notice of appeal, and then moves – within 7 days after the verdict – for a new trial on grounds other than newly discovered evidence?)

The Seventh Circuit Bar Association suggests that Rules 62.1 and 12.1 (or their Notes) should mention that the new rules are directed either solely or primarily to Civil Rule 60 motions. It is already the case that the Notes to both new Rules highlight Civil Rule 60(b) motions as a traditional area where the indicative-ruling procedure is used. The Seventh Circuit Bar Association is concerned that "a variety of other motions ... such as motions for fees" might be made under the new Rules. The example of fee motions is somewhat puzzling, because a district court can act under Civil Rule 54(d) to determine a request for attorney fees despite the pendency of an appeal from the underlying merits judgment;****** thus, such an instance would not fall within Rule 12.1(a)'s language concerning motions that the district court "lacks authority to grant." The Seventh Circuit Bar Association's comment might thus be taken as evidence that even skilled lawyers may not always accurately distinguish between motions that do and motions that do not justify an indicative-ruling motion. But there seems to be no ready solution for that problem. Limiting the use of the indicative-ruling mechanism to the Civil Rule 60 context could foreclose the mechanism's use in some instances where it would be helpful. And it would be unwise to attempt to list, in the Note, the types of district court actions as to which district court authority is ousted by an appeal from a particular type of judgment or order. To the extent that the Seventh Circuit Bar Association wishes the Note to provide additional guidance to practitioners, this concern may be partially met by adopting the change, discussed above, suggested by the Department of Justice concerning criminal cases. Apart from that change, I do not suggest any other modifications in response to this suggestion.

I do not suggest any changes in response to Professor Shannon's comment on Civil Rule 62.1. He correctly stops short of asserting that the proposed Rules' indicative-ruling mechanism violates Article III

****** *See, e.g.*, 1993 Committee Note to Civil Rule 54(d) ("If an appeal on the merits of the case is taken, the court may rule on the claim for fees, may defer its ruling on the motion, or may deny the motion without prejudice, directing under subdivision (d)(2)(B) a new period for filing after the appeal has been resolved.").

justiciability constraints.******* He does not specify the "established principles of American legal process" which he believes are violated by the indicative-ruling practice. The indicative-ruling practice has been explicitly approved (for use in the criminal context) by eight members of the Supreme Court,******** and the practice is regularly used by courts of appeals in both civil and criminal contexts.

Encl.

******* Such an assertion would be erroneous. Instances involving the use of the indicative-ruling mechanism would be no more likely than any other phase of litigation to lack a live dispute between the parties: The movant would like to get the district court's favorable ruling (that the motion would be granted or raises a substantial issue) in order to get the court of appeals to remand, and the opponent would like to get the district court to deny the motion. True, the court of appeals might simply ignore the indicative ruling; remand is in the court of appeals' discretion. But why should the court of appeals' ability to ignore an indicative ruling pose a justiciability problem any more than, for example, the fact that in the 28 U.S.C. § 1292(b) mechanism for interlocutory appeals the court of appeals can deny review even though the district court has made the requisite certification?

******** *See United States v. Cronic*, 466 U.S. 648, 667 n.42 (1984).

MEMORANDUM

DATE: March 13, 2008

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 05-06

The Committee published for comment a proposal to amend Rule 4(a)(4)(B)(ii) to eliminate an ambiguity that resulted from the 1998 restyling. The Rule's current language might be read to require the appellant to amend a prior notice of appeal if the district court amends the judgment after the notice of appeal is filed, even if the amendment is in the appellant's favor. This ambiguity will be removed by replacing the current reference to challenging "a judgment altered or amended upon" a timely post-trial motion with a reference to challenging "a judgment's alteration or amendment upon" such a motion.

Part I of this memo sets forth the proposal as published. Part II summarizes the comments on the proposal. Part III recommends that the Committee approve the proposal as published and suggests that the Committee consider placing some of the commentators' suggestions on the Committee's agenda for further study.

I. Text of Rule and Committee Note

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE*

Rule 4. Appeal as of Right—When Taken

(a) Appeal in a Civil Case.

* * * * *

(4) Effect of a Motion on a Notice of Appeal.

* * * * *

(B) (i) If a party files a notice of appeal after the court announces or enters a judgment — but before it disposes of any motion listed in Rule 4(a)(4)(A) — the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.

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*New material is underlined; matter to be omitted is lined through.

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a ~~judgment altered or amended~~ judgment's alteration or amendment upon such a motion, must file a notice of appeal, or an amended notice of appeal — in compliance with Rule 3(c) — within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

* * * * *

Committee Note

Subdivision (a)(4)(B)(ii). Subdivision (a)(4)(B)(ii) is amended to address problems that stemmed from the adoption — during the 1998 restyling project — of language referring to "a judgment altered or amended upon" a post-trial motion.

FEDERAL RULES OF APPELLATE PROCEDURE

Prior to the restyling, subdivision (a)(4) instructed that "[a]ppellate review of an order disposing of any of [the post-trial motions listed in subdivision (a)(4)] requires the party, in compliance with Appellate Rule 3(c), to amend a previously filed notice of appeal. A party intending to challenge an alteration or amendment of the judgment shall file a notice, or amended notice, of appeal within the time prescribed by this Rule 4 measured from the entry of the order disposing of the last such motion outstanding." After the restyling, subdivision (a)(4)(B)(ii) provided: "A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment altered or amended upon such a motion, must file a notice of appeal, or an amended notice of appeal — in compliance with Rule 3(c) — within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion."

One court has explained that the 1998 amendment introduced ambiguity into the Rule: "The new formulation could be read to expand the obligation to file an amended notice to circumstances where the ruling on the post-trial motion alters the prior judgment in an insignificant manner or in a manner favorable to the appellant, even though the appeal is not directed against the alteration of the judgment." *Sorensen v. City of New York*, 413 F.3d 292, 296 n.2 (2d Cir. 2005). The current amendment removes that ambiguous reference to "a judgment altered or amended upon" a post-trial motion, and refers instead to "a judgment's alteration or amendment" upon such a motion. Thus, subdivision (a)(4)(B)(ii) requires a new or amended notice of appeal when an appellant wishes to challenge an order disposing of a motion listed in Rule 4(a)(4)(A) or a judgment's alteration or amendment upon such a motion.

II. Summary of Public Comments

07-AP-009: Peder K. Batalden. Peder K. Batalden, an associate at Horvitz & Levy, LLP, argues that the proposed amendment "carries an unintended consequence." He points out that the proposed amended Rule 4(a)(4)(B)(ii) "[t]ether[s] the time to appeal from the *amended judgment* to the entry of the *order*" disposing of the last remaining tolling motion. He observes that this "poses a problem in cases where the amended judgment is not entered until more than 30 days after the entry of the order." He points out that a district court may permit the prevailing party to submit a proposed amended judgment, may then allow the other party time to object, and thus may take more than 30 days between entering the order disposing of the tolling motion and entering the amended judgment. Mr. Batalden underscores his point by reporting that he "face[s] a comparable issue in a current case."

Mr. Batalden suggests "delet[ing] entirely the language 'or a judgment's alteration or amendment upon such a motion' from the amended rule." He envisions that the effect of such a deletion would be as follows:

> In the few cases where the district court does enter an amended judgment, the losing party could file a separate notice of appeal from the amended judgment if the amendment is substantive.... [B]y operation of Rule 4, the losing party could timely file that separate notice of appeal within 30 days of the entry of the amended judgment.

07-AP-011: Public Citizen Litigation Group. Public Citizen has "no quarrel with the proposed wording change." But Public Citizen further suggests deleting Rule 4(a)(4)(B)(ii) and substituting a provision stating that "the original notice of appeal serves as the appellant's appeal from any order disposing of any post-trial motion." Public Citizen argues that where the appellant has already filed a notice of appeal from the original judgment, it serves no useful purpose to require a new or amended notice of appeal when the appellant also wishes to challenge the disposition of a post-judgment motion. Public Citizen asserts that there are many instances when a notice of appeal does not itself provide clear notice of the precise nature of the issues to be raised on appeal – for example, when a notice of appeal from a final judgment brings

up for review issues relating to prior orders that merged into that judgment. In many instances, Public Citizen argues, the appellee instead "is put on notice of the issues on appeal when, shortly after an appeal is filed, the appellant states the issues on a form or in some other filing required by the circuit clerk." Thus, deleting the requirement that appellants file a new or amended notice in order to challenge the disposition of a postjudgment motion "would prevent the inadvertent loss of issues on appeal, without harming appellees or the courts."

07-AP-018; 07-BR-036; 07-CV-018: Rules and Practice Committee of the Seventh Circuit Bar Association. Thomas J. Wiegand writes on behalf of the Seventh Circuit Bar Association's Rules and Practice Committee ("Seventh Circuit Bar Association"). He reports that the Seventh Circuit Bar Association sponsored a lunchtime discussion of the proposed Rules amendments this past December. Participants in that discussion doubted whether the proposed amendment to Rule 4(a)(4)(B)(ii) "would have any practical effect because, if there is any chance that the amended judgment could be argued as affecting the appeal, the appealing party always will file an amended notice of appeal." Participants suggested amending Rule 4(a) "to state that any post-appeal amendment to an underlying judgment is automatically incorporated into the scope of the originally filed notice of appeal."

III. Recommendation

I recommend that the Committee approve the proposal as published. The commentators' further suggestions for amending Rule 4(a) are separable from the current proposal and would go well beyond it. Thus, I recommend that the commentators' further suggestions be placed on the Appellate Rules Committee's agenda for further study.

Neither Public Citizen nor the Seventh Circuit Bar Association appears to oppose the proposed amendment as such; rather, each of these commentators advocates a further change in Rule 4(a). Mr. Batalden does argue that the proposed amendment "carries an unintended consequence" – but the problem that he identifies (counting from entry of the order on the tolling motion in order to determine the time to appeal from the amended judgment) is one that already

exists under current Rule 4(a)(4)(B)(ii).** Thus, the issue that Mr. Batalden raises has nothing specifically to do with the proposed amendment that was out for comment; rather, Mr. Batalden's suggestion – like those of Public Citizen and the Seventh Circuit Bar Association – is best viewed as a freestanding suggestion for further changes to Rule 4(a).

Mr. Batalden's proposal is worth exploring. His assertion that – in cases where it takes more than 30 days after entry of the postjudgment order for the amended judgment to be entered – "it is literally impossible for the losing party to file a timely notice of appeal from the amended judgment" may be somewhat hyperbolic. For one thing, it would seem that in such a case the litigant should file the notice of appeal within the 30 days as measured from entry of the order disposing of the last post-judgment motion; the fact that an amended judgment has not yet been entered at that point need not stop the litigant from filing the notice of appeal. (*Cf.* Rule 4(a)(2)'s statement that "[a] notice of appeal filed after the court announces a decision or order – but before the entry of the judgment or order – is treated as filed on the date of and after the entry.") Moreover, if a litigant is truly troubled by this problem, and anticipates that the amended judgment will be entered longer than 30 days after the entry of the order disposing of the last post-judgment motion, the litigant could seek an extension of the time to appeal under Rule 4(a)(5). (Of course, another question is whether such a request would demonstrate the "good cause" needed for a Rule 4(a)(5) extension.) In sum, assessing the gravity of the problem identified by Mr. Batalden is not a simple task, and neither is assessing the possible consequences of the change he suggests. For this reason, if the Committee feels that his proposal warrants exploration, I recommend adding it to the study agenda rather than dealing with it in conjunction with the current amendment to Rule 4(a)(4)(B).

Public Citizen's proposal – that "the original notice of appeal [should] serve[] as the appellant's appeal from any order disposing of any post-trial motion" – and the Seventh Circuit Bar Association's proposal – that the original notice should be deemed to encompass "any post-appeal amendment" – are also worth exploring. In this regard it is worthwhile to note Rule 4(b)'s approach with respect to criminal appeals. *See* Rule 4(b)(3)(C) ("A valid notice of appeal

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** Indeed, that aspect of current Rule 4(a)(4)(B)(ii) traces its roots back through all prior versions of Appellate Rule 4 to former Civil Rule 73 as it existed from the time of the 1946 amendments (which took effect in 1948).

is effective--without amendment--to appeal from an order disposing of any of the motions referred to in Rule 4(b)(3)(A)."). On the other hand, before concluding that Public Citizen's suggestion should be adopted, it would be necessary to research the historical reasons for the difference between criminal and civil appeals, and to consider the possible significance (post-*Bowles*) of the fact that there is a statutory provision concerning civil notices of appeal but no corresponding statutory provision concerning criminal defendants' notices of appeal. Thus, if the Committee feels that these suggestions are worth pursuing, I recommend that they be placed on the study agenda.

MEMORANDUM

DATE: March 13, 2008

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 07-AP-C: Proposed amendment relating to Rules 11 of the Rules governing 2254 and 2255 proceedings

The Committee proposed an amendment to Rule 22 that would conform the Appellate Rules to a change that the Criminal Rules Committee proposes to make to the Rules Governing Proceedings under 28 U.S.C. §§ 2254 or 2255.

Part I of this memo sets forth the Appellate Rule proposal as published. (A copy of the Criminal Rules proposal as published is enclosed.) Part II discusses the public comments on the proposals. Part III suggests that though the comments are directed most centrally to the Criminal Rules Committee's proposal, it would be useful for the Appellate Rules Committee to consider those comments so as to provide the Criminal Rules Committee with members' views on the concerns raised by the commentators. Part III recommends that the Appellate Rules Committee make its approval of the Rule 22 amendment contingent upon the approval of the Criminal Rules Committee's Rule 11(a) proposal. Assuming approval of the Rule 22 proposal, Part III recommends that the Committee adopt Professor Kimble's style suggestions

I. Text of Rule and Committee Note

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE*

Rule 22. Habeas Corpus and Section 2255 Proceedings

* * * * *

(b) Certificate of Appealability.

(1) In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c). ~~If an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a certificate of appealability or state why a certificate should not~~

*New material is underlined; matter to be omitted is lined through.

~~issue.~~ The district clerk must send the certificate ~~or statement~~ and the statement described in Rule 11(a) of the Rules Governing Proceedings under 28 U.S.C. § 2254 or § 2255 to the court of appeals with the notice of appeal and the file of the district-court proceedings. If the district judge has denied the certificate, the applicant may request a circuit judge to issue the certificate.

* * * * *

Committee Note

Subdivision (b)(1). The requirement that the district judge who rendered the judgment either issue a certificate of appealability or state why a certificate should not issue has been deleted from subdivision (b)(1). Rule 11(a) of the Rules Governing Proceedings under 28 U.S.C. § 2254 or § 2255 now delineates the relevant requirement. Subdivision (b)(1) continues to require that the district clerk send the certificate and the statement of reasons for grant of the certificate to the court of appeals along with the notice of appeal and the file of the district-court proceedings.

II. Summary of Public Comments

A number of the public comments focused on the habeas / 2255 Rule 11 proposal rather than the Appellate Rule 22 proposal. In the interests of completeness, all comments on either Rule 11 or Rule 22 are summarized here.

07-AP-005; 07-BK-008; 07-CR-006; 07-CV-006: Jack E. Horsley. Mr. Horsley states that the proposed amendment to Rule 22 "is well put as shown," and he "do[es] not suggest any changes."

07-AP-013; 07-CR-012: Massachusetts Attorney General. Martha Coakley, the Attorney General of Massachusetts, writes in opposition to both the Rule 11 proposal and the Rule 22 proposal. Ms. Coakley fears that these proposed amendments "would (1) impose unnecessary burdens on district court judges and (2) dramatically increase the number of habeas appeals filed in courts of appeal." The proposal would burden district judges, she argues, by requiring the district judge to assess whether a certificate of appealability should issue under 28 U.S.C. § 2253(c)** in *all cases*, rather than only those in which an appeal is ultimately taken. She also suggests that such a requirement – by producing some instances where the district judge issues a certificate of appealability – might lead some habeas petitioners to appeal when they would not otherwise have done so. And she notes that by requiring the district judge to make the COA determination "without any opportunity for input from petitioners or their counsel," the proposal would eliminate the chance for petitioners to "narrow the claims on which they seek issuance of a certificate." Ms. Coakley suggests that the goal of efficiency would be better served by stricter enforcement of Rule 22's existing requirements, which she asserts are "rarely followed in practice."

07-AP-019; 07-CV-020; 07-CR-016: Jordan Center for Criminal Justice and Penal Reform. Mark Jordan writes on behalf of the Jordan Center for Criminal Justice and Penal

** Section 2253(c)(2) provides that "A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right."

Reform to oppose the Rule 11 proposals. He states that "requiring judges entering adverse final orders to contemporaneously issue or deny a certificate of appealability deprives, possibly in an unconstitutional fashion, the parties of the opportunity to brief ... the issue." He suggests that the Rule 11 proposals not be adopted, or alternatively that "the Court, before issue or denial of a certificate of appealability, first be required to permit the parties to show cause why a certificate of appealability should not issue."

07-CR-005: Gene Vorobyov. Mr. Vorobyov, a criminal appellate practitioner who devotes a portion of his practice to handling § 2254 appeals in the Ninth Circuit, writes in opposition to the proposed amendment because he prefers the existing procedure under which the would-be appellant seeks a certificate of appealability post-judgment. The time span that may elapse between the entry of judgment and the request for the certificate of appealability benefits the judge, Mr. Vorobyov argues, by providing an opportunity to "look at [the case] with a fresh eye." Moreover, he argues that this time span gives habeas petitioners an opportunity to research and "prepare a more effective argument" in favor of a certificate of appealability, and that the petitioner may also use the time span to seek counsel. Mr. Vorobyov predicts that in a case in which the habeas petition is referred to a magistrate judge, and the magistrate judge's report and recommendation recommends dismissal of the petition, the proposed procedure would be inefficient and unfair because the habeas petitioner would feel constrained to "make an anticipatory request for the COA [when filing objections to the report and recommendation] even though [the report and recommendation] may not be fully adopted by the district court."

07-CR-010: Paul R. Bottei. Mr. Bottei, an Assistant Federal Public Defender in Nashville, Tennessee, expresses concern about the proposed amendment because it would deprive the petitioner of the opportunity to brief the issue of his or her entitlement to a certificate of appealability. The petitioner should have the opportunity to brief that issue separately from and after the merits, Mr. Bottei argues, because "[i]t is the petitioner who bears the burden of showing entitlement to a certificate," because "[s]uch entitlement is governed by a standard that differs from the standard for granting habeas relief," and because the authorities that the petitioner may adduce to meet the COA standard may differ from those that would have been relevant to the merits briefing itself. Those authorities might, for example, include "otherwise non-precedential rulings from other courts (including other circuits, district courts, and possibly state courts)."

In place of the proposed provisions, Mr. Bottei offers a different proposal under which (1) the district judge must issue a COA when dismissing a habeas petition if the judge "independently determines" the petitioner is entitled to a COA; (2) the petitioner then has a time limit for asking the district judge to issue a COA on any other claims; and (3) the district judge then rules on the petitioner's entitlement to a COA on any other claims.

07-CR-013: Public Interest Litigation Clinic. Joseph W. Luby, Acting Executive Director of the Public Interest Litigation Clinic, writes to express "great concern" about the proposed Rule 11 for cases under Section 2254. Mr. Luby, whose office represents capital habeas petitioners, observes that "a district court's decision to grant or deny a COA carries tremendous and often final consequences." Like Mr. Bottei, Mr. Luby points out that "the standard governing issuance of a COA differs from that governing the petitioner's entitlement to relief." Like Ms. Coakley, Mr. Luby notes that the proposal would eliminate the opportunity for petitioners to narrow the issues by seeking a COA only as to a handful of the strongest claims. He also observes that the proposal "deprives a petitioner of the opportunity to cite post-petition developments in support of" the issuance of a COA. He argues that it would be undesirable "for the court to deny a COA before the parties even know what the [district court's] reasoning is, much less before they have the opportunity to comment upon it."

Mr. Luby offers an alternative proposal: He suggests setting a 10- or 15-day deadline post-judgment for prisoners to apply to the district court for a COA.

Style suggestions. Professor Kimble suggests that the proposed Rule 22 amendment be slightly modified, by capitalizing "under" in the phrase "Proceedings under 28 U.S.C. § 2254 or § 2255," and by inserting ", along" between "court of appeals" and "with the notice"; as modified by Professor Kimble's style suggestions, the proposed amendment would read:

Rule 22. Habeas Corpus and Section 2255 Proceedings

* * * * *

(b) Certificate of Appealability.

(1) In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c). ~~If an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a certificate of appealability or state why a certificate should not issue.~~ The district clerk must send the certificate ~~or statement~~ and the statement described in Rule 11(a) of the Rules Governing Proceedings Under 28 U.S.C. § 2254 or § 2255 to the court of appeals, along with the

notice of appeal and the file of the district-court proceedings. If the district judge has denied the certificate, the applicant may request a circuit judge to issue the certificate.

* * * * *

III. Recommendation

The commentators' objections to the proposed change in the timing of the district court's COA determination seem most directly addressed to the Criminal Rules Committee, since that Committee is of course the one with responsibility for procedure at the level of the district court. On the other hand, because the district-court procedure concerning the COA does affect the availability of the appeal, and because the district court's reasoning on the COA determination may affect the court of appeals' later consideration of a COA application, it may be helpful for the Appellate Rules Committee to share with the Criminal Rules Committee any reactions to the comments submitted on the timing issue.

Obviously, the proposed amendment to Appellate Rule 22 should proceed only if the Criminal Rules Committee's Rule 11(a) proposal moves forward as well. Thus, the Appellate Rules Committee should make its approval of the Rule 22 amendment contingent upon the approval of the Criminal Rules Committee's Rule 11(a) proposal. Assuming approval of the Rule 22 proposal, I recommend that the Committee adopt Professor Kimble's style suggestions.

Encl.

PROPOSED AMENDMENT TO RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS

Rule 11. Certificate of Appealability

At the same time the judge enters a final order adverse to the petitioner, the judge must either issue or deny a certificate of appealability. If the judge issues a certificate, the judge must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2).

Committee Note

As provided in 28 U.S.C. § 2253(c), an appeal may not be taken to the court of appeals from a final order in a proceeding under § 2254 unless a judge issues a certificate of appealability, which must specify the specific issues for which the applicant has made a substantial showing of a denial of constitutional right. New Rule 11 makes the requirements concerning certificates of appealability more prominent by adding and consolidating them in the appropriate rule of the Rules Governing § 2254 Proceedings in the District Courts. Rule 11 also requires the judge to grant or deny the certificate at the time a final order is issued, see 3d Cir. L.A.R. 22.2, 111.3, rather than after a notice of appeal is filed up to 60 days later, see Fed. R. App. P. 4(a)(1)(B). This will ensure prompt decision-making when the issues are fresh. It will also expedite proceedings, avoid unnecessary remands, and inform the moving party's decision whether to file a notice of appeal.

Rule 12 ~~11~~. Applicability of the Federal Rules of Civil Procedure.

The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules.

PROPOSED AMENDMENT TO RULES GOVERNING SECTION 2255 PROCEEDINGS FOR THE UNITED STATES DISTRICT COURTS

Rule 11. Certificate of Appealability; Time to Appeal

(a) Certificate of Appealabilty. At the same time the judge enters a final order adverse to the applicant, the judge must either issue or deny a certificate of appealability. If the judge issues a certificate, the judge must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2).

(b) Time to Appeal. Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered under these rules. These rules do not extend the time to appeal the original judgment of conviction.

Committee Note

Subdivision (a). As provided in 28 U.S.C. § 2253(c), an appeal may not be taken to the court of appeals from a final order in a proceeding under § 2255 unless a judge issues a certificate of appealability, which must specify the specific issues for which the applicant has made a substantial showing of a denial of constitutional right. New Rule 11(a) makes the requirements concerning certificates of appealability more prominent by adding and consolidating them in

the appropriate rule of the Rules Governing § 2255 Proceedings in the District Courts. Rule 11(a) also requires the judge to grant or deny the certificate at the time a final order is issued, see 3d Cir. L.A.R. 22.2, 111.3, rather than after a notice of appeal is filed up to 60 days later, see Fed. R. App. P. 4(a)(1)(B). This will ensure prompt decision-making when the issues are fresh. It will also expedite proceedings, avoid unnecessary remands, and inform the moving party's decision whether to file a notice of appeal.

MEMORANDUM

DATE: March 13, 2008

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 07-AP-D: Defining the term "state"

As you know, last November the Committee voted to adopt a new Appellate Rule 1(b) that defines the term "state" for purposes of the FRAP. Because it seemed useful for the Committee to consider a few additional issues prior to finalizing the proposal,[1] Judge Stewart (with the Committee's concurrence) decided to hold this item for further discussion at the Committee's Spring 2008 meeting. Part I of this memo provides the properly-worded Rule 1(b) proposal. Part II proposes a corresponding amendment to Rule 29. Part III reviews the proposed definition's effect on Rules 44(b) and 46(a)(1).

I. Proposed amendment to Appellate Rule 1(b)

The rationale for adopting proposed Appellate Rule 1(b) is stated in my March 2007 memo, a copy of which is enclosed.[2] This section sets forth the wording of the proposal, updated

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[1] At the November 2007 meeting, the Committee had before it my March 2007 memo and voted to adopt the language suggested in that memo, which read: "In these rules, 'state' includes the District of Columbia and any commonwealth, territory, or possession of the United States." Not having anticipated that the Committee would be ready to act on the proposal at our November meeting, I had failed to update the memo to reflect stylistic suggestions made by Professor Kimble in connection with the time-computation project. In the light of that stylistic advice, minor changes to the text of the amendment are warranted, so that it will instead read "In these rules, 'state' includes the District of Columbia and any United States commonwealth, territory, or possession." That language is set forth in Part I of this memo. On further consideration after the meeting, I realized that I had failed to draw attention to the March 2007 memo's suggestion that the Committee might wish to consider amending FRAP 29 to remove the current reference to "a ... Territory, Commonwealth, or the District of Columbia," since that reference appears to be redundant if the FRAP-wide definition is adopted. Part II of this memo proposes such an amendment. Because the Committee might also wish to discuss the FRAP-wide definition's effect on Rules 44(b) and 46(a)(1), Part III reviews those issues.

[2] As you know, Doug Letter, at the Committee's request, pursued inquiries through the U.S. Attorney's offices in various places that would be affected by the proposed definition. Those offices themselves expressed no objections to the proposal. Doug asked the U.S. Attorney's offices in Puerto Rico, the Virgin Islands, Washington D.C., and Guam to contact

to reflect Professor Kimble's style suggestions.

It should be noted that the proposed amendment shown below is similar to the proposed amendment to Civil Rule 81 that was published for comment in August 2007. (A copy of that proposal as published is enclosed.) The proposed amendment to Civil Rule 81 refers to "the District of Columbia and any United States commonwealth, territory [, or possession]." The Civil Rules Committee's report noted: "Comment should be separately invited on the question whether to include 'possessions.' There is at least some reason to believe that the United States does not now have any possessions. Even if that is so, symmetry with the Criminal Rules might support retaining the reference on the chance that a possession might be acquired in the future." Jeffrey S. Bucholtz, writing on behalf of the Department of Justice, commented on the Civil Rule 81 proposal (*see* Comment 07-CV-015). He stated in part:

> The Department supports the application of the term "state" to both a commonwealth and territory. This will eliminate any uncertainty as to the status of Puerto Rico, the Virgin Islands, and Guam and the Northern Mariana Islands, all of which have district courts.
>
> With respect to the use of the term 'possession,' the Committee acknowledges that its research has not shown that any 'possessions' currently exist. The only possible land that could fit this definition is American Samoa. The Department notes its concern that the term 'possession' might be interpreted – incorrectly – to include United States military bases overseas. We understand that the United States military's control over such bases is addressed through agreements with the foreign nations upon whose land the base is situated. The Department opposes including the term 'possession' in the amended Rule.

As noted in my March 27, 2007 memo, information posted on the website of the Department of Interior's Office of Insular Affairs suggests that "possession" is equivalent to "territory" and is no longer commonly used.[3] The Committee may wish to alter the proposal shown below by removing "possession" from the list of entities that count as "states." The Civil Rules Committee meets a few days before this Committee. In considering the merits of the proposal shown below, it will be useful to know what the Civil Rules Committee has decided to do with respect to the pending proposal concerning Civil Rule 81, and it will also be useful to know if the Department of Justice's concerns regarding the use of the term "possession" extend to the proposed amendment to Appellate Rule 1.

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their local counterparts to see if there are any objections to the proposal. (He was unable to find a U.S. Attorney's office that covered either American Samoa or the Northern Mariana Islands.) Local justice officials in Puerto Rico and D.C. saw no problem with the proposed definition. He did not receive an answer from local officials in the Virgin Islands and in Guam.

[3] See http://www.doi.gov/oia/Islandpages/political_types.htm (last visited March 13, 2008).

PROPOSED AMENDMENT TO THE FEDERAL
FEDERAL RULES OF APPELLATE PROCEDURE

Rule 1. Scope of Rules; Definition; Title

(a) Scope of Rules.

(1) These rules govern procedure in the United States courts of appeals.

(2) When these rules provide for filing a motion or other document in the district court, the procedure must comply with the practice of the district court.

(b) ~~[Abrogated]~~ **Definition.** In these rules, 'state' includes the District of Columbia and any United States commonwealth, territory, or possession.

(c) Title. These rules are to be known as the Federal Rules of Appellate Procedure.

* * * * *

Committee Note

Subdivision (b). New subdivision (b) defines the term "state" to include the District of Columbia and any commonwealth, territory, or possession of the United States. Thus, as used in these Rules, "state" includes the District of Columbia, Guam, American Samoa, the U.S. Virgin Islands, the Commonwealth of Puerto Rico, and the Commonwealth of the Northern Mariana Islands.

II. Proposed amendment to Appellate Rule 29

Rule 29(a) currently provides that "[t]he United States or its officer or agency, or a State, Territory, Commonwealth, or the District of Columbia 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." If Rule 1(b) is to define "state" to include D.C. and U.S. commonwealths, territories, or possessions, it seems reasonable to delete from Rule 29(a) the reference to a "Territory, Commonwealth, or the District of Columbia." This Part briefly discusses whether such an amendment to Rule 29(a) would effect a change in substance; it then sets forth the proposed amendment and Committee Note.

I have found no caselaw and no local rules explaining the scope of Rule 29(a)'s reference to a "Territory [or] Commonwealth." It seems clearly to extend to Puerto Rico and the Northern Mariana Islands, which are commonwealths. If the Rule's reference to "Territory" with a capital "T" were read to invoke the technical definition provided by the Office of Insular Affairs – an "incorporated United States insular area" – that reference would make no current sense, since it would encompass only the unpopulated Palmyra Atoll. It makes more sense, instead, to interpret the Rule's reference to "Territory" to encompass "territories" with a small "t" – in which case the term would encompass American Samoa, Guam, and the Virgin Islands.[4] Such an interpretation technically would also encompass the other U.S. territories, but – since those territories have few or no inhabitants and no local governments – there would be no occasion for Rule 29 to apply to them. Accordingly, adopting proposed Rule 1(b) and amending Rule 29(a) to refer simply to "the United States or its officer or agency or a state" should not effect any significant change in substance.

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[4] The National Association of Attorneys General lists among its members not only the Attorneys General of the fifty states but also the Attorney General of the District of Columbia and "the chief legal officers of the Commonwealths of Puerto Rico (Secretary of Justice) and the Northern Mariana Islands, and the territories of American Samoa, Guam, and the Virgin Islands." NAAG, http://www.naag.org/about_naag.php (last visited March 4, 2008).

Here is the proposed amendment to Rule 29:

Rule 29. Brief of an Amicus Curiae

(a) When Permitted. The United States or its officer or agency~~,~~ or a state ~~State, Territory, Commonwealth, or the District of Columbia~~ 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.

* * * * *

Committee Note

Subdivision (a). New Rule 1(b) defines the term "state" to include "the District of Columbia and any United States commonwealth, territory or possession." That definition renders subdivision (a)'s reference to a "Territory, Commonwealth, or the District of Columbia" redundant. Accordingly, subdivision (a) is amended to refer simply to "[t]he United States or its officer or agency or a state."

III. Effect on Rules 44(b) and 46(a)(1)

As explained below, there is no particular reason to think that Rule 1(b)'s adoption will have an untoward effect on the operation of Rules 44(b) and 46(a)(1).[5] In any event, the public comment period will provide an opportunity to seek input on that question.

A. Rule 44(b)

Rule 44(b) provides:

> (b) Constitutional Challenge to State Statute. If a party questions the constitutionality of a statute of a State in a proceeding in which that State or its agency, officer, or employee is not a party in an official capacity, the questioning party must give written notice to the circuit clerk immediately upon the filing of the record or as soon as the question is raised in the court of appeals. The clerk must then certify that fact to the attorney general of the State.

This provision was added in 2002. The 2002 Committee Note does not define "State." The Note explains that the amendment is designed to implement 28 U.S.C. § 2403(b).

Section 2403(b) provides:

> In any action, suit, or proceeding in a court of the United States to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The State shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

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[5] The term "state" also appears in Rule 22(b)'s discussion of the certificate-of-appealability requirement. As explained in my March 2007 memo, courts have held that the District of Columbia, Guam, Puerto Rico, and the Virgin Islands count as states for purposes of the habeas statutes. The status of American Samoa and the Northern Mariana Islands is less clear. In any event, defining "state," for FRAP purposes, to include all these entities should not cause a problem in the application of Rule 22(b): If, for example, American Samoa is not subject to the federal habeas framework, the question of Rule 22(b)'s applicability to American Samoa will simply never arise.

There is no statutory definition of "state" for purposes of Section 2403(b). The statute has been applied to intervention by the Puerto Rico Attorney General, *see Cruz v. Melecio*, 204 F.3d 14, 18 (1st Cir. 2000); *see also In re Unanue Casal*, 998 F.2d 28, 30 (1st Cir. 1993), but I found no caselaw applying the statute to intervention by the other entities discussed in this memo.

It thus seems that adopting a general definition of "state" that encompasses the other entities mentioned in this memo would at least clarify and perhaps expand the application of Rule 44(b). One question is whether such an expansion would be appropriate in the light of the fact that Rule 44(b) was designed to implement a statutory provision. There would, at any rate, be no problem with rulemaking power, in that the change would not seem to modify substantive rights. Another question is whether Rule 44(b) would make sense as applied to the other entities. It seems that constitutional challenges could arise with respect to statutes enacted by any of the political entities discussed in this memo; though some of the entities are not subject to all federal constitutional provisions, all the entities are subject to some constitutional constraints. Moreover, each entity presumably has a chief legal officer – whether or not termed the "attorney general" – who could receive the Rule 44(b) certification.

B. Rule 46

Rule 46(a)(1) provides:

> (a) Admission to the Bar.
>
> (1) Eligibility. An attorney is eligible for admission to the bar of a court of appeals if that attorney is of good moral and professional character and is admitted to practice before the Supreme Court of the United States, the highest court of a state, another United States court of appeals, or a United States district court (including the district courts for Guam, the Northern Mariana Islands, and the Virgin Islands).

I was unable to find caselaw that addresses whether "state," as used in Rule 46, includes the entities discussed in this memo. The Ninth Circuit held in *In re Rothstein* that

> [t]he Trust Territory of the Pacific Islands is not a territory nor an insular possession of the United States, but was only held under a trusteeship agreement with the Security Council of the United Nations. Admission to the High Court of the Trust Territory of the Pacific Islands does not qualify counsel to practice in the United States District Court for the Northern District of California or in the United States Court of Appeal for the Ninth Circuit.

In re Rothstein, 884 F.2d 490, 492 (9th Cir. 1989). But the *Rothstein* court's mention of territories and possessions is less probative than it might be, because the court was also interpreting a Northern District of California local rule that authorized admission of "attorneys of

good moral character who are active members in good standing of the bar and who are eligible to practice before any United States Court or the highest court of any State, Territory or Insular Possession of the United States." *Rothstein*, 884 F.2d at 491.

Thus, as with Rule 44, adopting a general definition of "state" that encompasses the other entities mentioned in this memo would at least clarify and perhaps expand the application of Rule 46. With respect to Rule 46, the policy question for the Committee is whether admission to the highest court of each relevant political entity (Guam, the Northern Mariana Islands, etc.) serves as an appropriate qualification for practice before the federal courts of appeals.

IV. Conclusion

I recommend that the Committee seek permission to publish for comment the proposed amendments to Rules 1 and 29. I recommend that the Committee consider the likely effect of the new Rule 1(b) on Rules 44 and 46; but, as noted in Part III of this memo, I see no particular reason to anticipate an untoward effect. When publishing the proposed Rule 1(b) for comment, it would be useful for the Committee to highlight the fact that the term "state" appears in Rules 22, 44, and 46, so that those who comment on the proposal can take those provisions into account.

Encls.

MEMORANDUM

DATE: March 27, 2007

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 07-AP-D: Defining the term "state"

As explained in the materials concerning the Time-Computation Project, the Chair of the Time-Computation Subcommittee has asked the Advisory Committees (other than the Criminal Rules Committee) to consider whether they wish to adopt a general definition of the term "state" such as that in Criminal Rule 1(b)(9). That Rule provides: "'State' includes the District of Columbia, and any commonwealth, territory, or possession of the United States."

The reason for the request is that the time-computation rules' definition of legal holidays includes state holidays. Because some litigation occurs not within states but rather in D.C. or in a commonwealth or territory, state holidays should include commonwealth and territorial holidays. If each set of Rules is amended to contain a definition like that in Criminal Rule 1(b)(9), then no change to the template's definition of legal holiday would be required. If such a definition is not adopted for the Appellate Rules generally, then it would be necessary to consider adding a definition to proposed Rule 26(a)(6) (concerning legal holidays).

I. Should the Committee propose to define "state" for purposes of the Appellate Rules?

If the Committee were to adopt a general definition of the term "state," it would affect all Appellate Rules that currently use that term, and would also affect the proposed amendments to Rules 4(a)(1)(B) and 40(a)(1). This Part first considers which entities might be included in the definition. It then reviews each of the relevant Appellate Rules provisions to consider the possible effect of a general definition.

A. Definitions

The first task is to define the relevant terms. No global statutory definition of territories, possessions or commonwealths appears to exist. The following information from the website of the Department of Interior's Office of Insular Affairs seems helpful in defining the terms (see http://www.doi.gov/oia/Islandpages/political_types.htm):

commonwealth	An organized United States insular area, which has established with the Federal Government, a more highly developed relationship, usually embodied in a written mutual agreement. Currently, two United States insular areas are commonwealths, the Northern Mariana Islands and Puerto Rico....
Territory	An incorporated United States insular area, of which only one exists currently, Palmyra Atoll. With an area of 1.56 square miles, Palmyra consists of about fifty small islands and lies approximately one thousand miles south of Honolulu.
incorporated territory	Equivalent to *Territory*, a United States insular area, of which only one territory exists currently, Palmyra Atoll, in which the United States Congress has applied the full corpus of the United States Constitution as it applies in the several States. Incorporation is interpreted as a perpetual state. Once incorporated, the Territory can no longer be de-incorporated.
territory	An unincorporated United States insular area, of which there are currently thirteen, three in the Caribbean (Navassa Island, Puerto Rico and the United States Virgin Islands) and ten in the Pacific (American Samoa, Baker Island, Guam, Howland Island, Jarvis Island, Johnston Atoll, Kingman Reef, Midway Atoll, the Northern Mariana Islands and Wake Atoll).
possession	Equivalent to *territory*. Although it still appears in Federal statutes and regulations, *possession* is no longer current colloquial usage.
unincorporated territory	A United States insular area in which the United States Congress has determined that only selected parts of the United States Constitution apply.
organized territory	A United States insular area for which the United States Congress has enacted an organic act.
unorganized territory	An unincorporated United States insular area for which the United States Congress has not enacted an organic act.

Assuming that the Office of Insular Affairs' definitions are accurate, a provision that defines states to include any "commonwealth, territory, or possession of the United States"

would include the Northern Mariana Islands,[1] Puerto Rico,[2] American Samoa,[3] Guam,[4] and the

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[1] "In 1976, Congress approved the mutually negotiated Covenant to Establish a Commonwealth of the Northern Mariana Islands (CNMI) in Political Union with the United States. The CNMI Government adopted its own constitution in 1977, and the constitutional government took office in January 1978. The Covenant was fully implemented on November 3, 1986, pursuant to Presidential Proclamation no. 5564, which conferred United States citizenship on legally qualified CNMI residents." U.S. Dep't of Interior, Office of Insular Affairs, Commonwealth of the Northern Mariana Islands, available at http://www.doi.gov/oia/Islandpages/cnmipage.htm (last visited March 24, 2007). *See also* 48 U.S.C. § 1801 (approving "Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America"); *Saipan Stevedore Co. Inc. v. Director, Office of Workers' Compensation Programs*, 133 F.3d 717, 720 (9th Cir. 1998) ("The Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America ... established the Commonwealth as an unincorporated territory of the United States.").

[2] "Puerto Rico, a U.S. possession since 1898, became a commonwealth in 1952. Since then, Puerto Ricans have been considering three significantly different political status options --statehood, enhanced commonwealth, and independence -- as an alternative to the present relationship with the United States. The political status debate continues, in part, because the last plebiscite, held on December 13, 1998, failed to yield a majority vote on any of the five options: 0.29% enhanced commonwealth, 46.4 statehood; 2.5% independence, 0.06% free association, 50.3% none of the above." U.S. Dep't of Interior, Office of Insular Affairs, Puerto Rico, available at http://www.doi.gov/oia/Islandpages/prpage.htm (last visited March 24, 2007). See also 48 U.S.C. § 731 et seq. (provisions relating to Puerto Rico); Puerto Rico Const. Art. I, § 1 (constituting the Commonwealth of Puerto Rico).

[3] "American Samoa, an unincorporated and unorganized territory of the United States, is administered by the U.S. Department of the Interior. It is 'unincorporated' because not all provisions of the U.S. Constitution apply to the territory. The Congress has not provided the territory with an organic act, which organizes the government much like a constitution would. Instead, the Congress gave plenary authority over the territory to the Secretary of the Interior, who in turn allowed American Samoans to draft their own constitution under which their government functions." U.S. Dep't of Interior Office of Insular Affairs, American Samoa, available at http://www.doi.gov/oia/Islandpages/asgpage.htm (last visited March 24, 2007); see also U.S. v. Standard Oil Co., 404 U.S. 558, 558-59 (1972) (per curiam) ("American Samoa is a group of seven small islands in the South Pacific.... By Act of Congress, 45 Stat. 1253, 48 U.S.C. s 1661, pow[e]rs to govern the islands are vested in the President, who has delegated the authority to the Secretary of the Interior ...."); U.S. v. Lee, 472 F.3d 638, 639 (9th Cir. 2006) (terming American Samoa "an unincorporated territory of the United States located in the South Pacific"); 8 U.S.C. § 1101(a)(29) ("As used in this chapter [concerning immigration and nationality] ... [t]he term 'outlying possessions of the United States' means American Samoa and

Virgin Islands.[5]

Technically, such a definition would also include Palmyra Atoll; Navassa Island; Baker Island; Howland Island; Jarvis Island; Johnston Atoll; Kingman Reef; Midway Atoll; and Wake Atoll. But with few or no inhabitants and no local government, these small islands, atolls and reefs seem irrelevant in the contexts covered by the Appellate Rules' references to "states."

B. Effect on Appellate Rule 22(b)

Appellate Rule 22(b) concerns the certificate-of-appealability requirement imposed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Rule 22(b) currently[6]

Swains Island.").

[4] "Currently, Guam is an unincorporated, organized territory of the United States. It is 'unincorporated' because not all provisions of the U.S. Constitution apply to the territory. Guam is an 'organized' territory because the Congress provided the territory with an Organic Act in 1950 which organized the government much as a constitution would. The Guam Organic Act currently provides a republican form of government with locally-elected executive and legislative branches and an appointed judicial branch.... Seeking to improve its current political status, the Guam Commission on Self-Determination has drafted a proposed Guam Commonwealth Act, which was approved in two 1987 plebiscites. In February 1988, the document was submitted to the Congress for its consideration and was introduced in four consecutive Congresses--the 100th through the 104th." Dep't of Interior, Office of Insular Affairs, Guam, available at http://www.doi.gov/oia/Islandpages/gumpage.htm (last visited March 24, 2007). *See also* 48 U.S.C. § 1421a ("Guam is declared to be an unincorporated territory of the United States....").

[5] "The U.S. Virgin Islands, an unincorporated territory of the United States, was placed under the administration of the Secretary of the Interior pursuant to Executive Order 5566 in 1931. These islands are under the sovereignty of the United States. The Organic Act of 1936 established local government under the control of the Secretary of Interior. The Revised Organic Act of 1954 is the Virgin Islands analogue of a state constitution, replacing the makeshift Organic Act of 1936. Under the territory's 1954 Revised Organic Act, the Governor of the Virgin Islands was appointed by the President of the United States and reported to the Secretary of the Interior. Under legislation passed in 1968, the Virgin Islands has had a democratically elected form of government since 1970." U.S. Dep't of Interior, Office of Insular Affairs, U.S. Virgin Islands, available at http://www.doi.gov/oia/Islandpages/vipage.htm (last visited March 24, 2007). See also 48 U.S.C. § 1541(a) ("The Virgin Islands as above described are declared an unincorporated territory of the United States of America.").

[6] A separate memo (on Item 07-AP-C) discusses the proposal to amend FRAP 4(a)(4)(A) and 22 in the light of proposed amendments to the Rules governing 2254 and 2255 proceedings.

provides:

> (b) Certificate of Appealability.
>
> (1) In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c). If an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a certificate of appealability or state why a certificate should not issue. The district clerk must send the certificate or statement to the court of appeals with the notice of appeal and the file of the district-court proceedings. If the district judge has denied the certificate, the applicant may request a circuit judge to issue the certificate.
>
> (2) A request addressed to the court of appeals may be considered by a circuit judge or judges, as the court prescribes. If no express request for a certificate is filed, the notice of appeal constitutes a request addressed to the judges of the court of appeals.
>
> (3) A certificate of appealability is not required when a state or its representative or the United States or its representative appeals.

To determine how a FRAP-wide definition of "state" would affect Rule 22(b), it is necessary to determine how courts currently interpret that term as it is used in Rule 22 and in the habeas statutes. Neither the Rule nor the habeas statutes define the term. *See* Rule 22; 28 U.S.C. §§ 2241 - 2254. Caselaw indicates the following:

- District of Columbia: Included
    - The D.C. Circuit Court of Appeals has held that the District of Columbia counts as a state for purposes of 28 U.S.C. § 2253's certificate-of-appealability requirement. *See Madley v. U.S. Parole Com'n*, 278 F.3d 1306, 1309 (D.C. Cir. 2002). The *Madley* court reasoned that it had previously held the pre-AEDPA certificate-of-probable-cause requirement applicable to District of Columbia prisoners, and that Congress had not disapproved that caselaw when it enacted AEDPA. *See id.*
- American Samoa: Unclear
    - Federal caselaw on habeas relief for prisoners convicted in Samoan courts is sparse to nonexistent. In *King v. Morton*, 520 F.2d 1140 (D.C. Cir. 1975), a dissenting opinion referred in passing to the possibility of a habeas claim by King,

who was prosecuted in Samoan court. *See King*, 520 F.2d at 1151 n.6 (Tamm, J., dissenting). But since King's claim (for a declaration that he had a federal constitutional right to a jury trial) was brought against the Secretary of the Interior, Judge Tamm's reference to the possibility of habeas relief says nothing about whether American Samoa would be treated as a state for purposes of the habeas statutes.

- Guam: Included

  - The Ninth Circuit has held that "Guam prisoners may seek federal habeas relief under 28 U.S.C. § 2254 to the same extent as state prisoners." *White v. Klitzkie*, 281 F.3d 920, 923 n.3 (9th Cir. 2002).

- Northern Mariana Islands: Apparently included

  - Section 403(a) of the Covenant To Establish a Commonwealth of the Northern Mariana Islands in Political Union With the United States of America provides: "The relations between the courts established by the Constitution or laws of the United States and the courts of the Northern Mariana Islands with respect to appeals, certiorari, removal of causes, the issuance of writs of habeas corpus and other matters or proceedings will be governed by the laws of the United States pertaining to the relations between the courts of the United States and the courts of the several States in such matters and proceedings, except as otherwise provided in this Article...." Pub. L. No. 94-241, March 24, 1976, 90 Stat. 263.

  - This provision is codified at 48 U.S.C. § 1824: "The relations between the courts established by the Constitution or laws of the United States and the courts of the Northern Mariana Islands with respect to appeals, certiorari, removal of causes, the issuance of writs of habeas corpus, and other matters or proceedings shall be governed by the laws of the United States pertaining to the relations between the courts of the United States including the Supreme Court of the United States, and the courts of the several States in such matters and proceedings, except as otherwise provided in article IV of the covenant...."

  - In one recent case, the Supreme Court of the Northern Mariana Islands relied on the availability of habeas corpus review to support its conclusion that the defendant was not entitled to a new trial. *See Commonwealth of Northern Mariana Islands v. Diaz*, 2003 WL 24270039, at *3 & n.14 (N. Mariana Islands Sept. 4, 2003) (stating that despite AEDPA's one-year statute of limitations "ample time is still available to remedy errors made at trial with a writ of habeas corpus").

- Puerto Rico: Included

    - The First Circuit has applied the habeas statutes to habeas petitions by prisoners convicted in the courts of the Commonwealth of Puerto Rico. *See, e.g., Maldonado-Pagan v. Malave*, 145 Fed.Appx. 375, 376 (1st Cir. 2005) (unpublished opinion) (reviewing district court's denial of habeas petition filed by Puerto Rico prisoner under 28 U.S.C. § 2254).

- Virgin Islands: Included

    - The Third Circuit has held that Section 2254 "applies to the District Court of the Virgin Islands so as to confer jurisdiction upon it to entertain habeas corpus petitions from those in custody pursuant to a judgment of the Territorial Court." *Walker v. Government of Virgin Islands*, 230 F.3d 82, 87 (3d Cir. 2000). The *Walker* court held that Section 2253(c)'s certificate-of-appealability requirement applies to petitioners in custody pursuant to a Virgin Islands judgment. *See id.* at 89.

In sum, courts have held that the District of Columbia, Guam, Puerto Rico and the Virgin Islands count as states for purposes of the habeas statutes. The status of American Samoa and the Northern Mariana Islands is less clear. In any event, defining "state," for FRAP purposes, to include all these entities should not cause a problem in the application of Appellate Rule 22(b): If, for example, American Samoa is not subject to the federal habeas framework, the question of Rule 22(b)'s applicability to American Samoa will simply never arise.

C. Effect on Appellate Rule 29(a)

Rule 29(a) provides that

> [t]he United States or its officer or agency, or a State, Territory, Commonwealth, or the District of Columbia 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.

I found no caselaw and no local rules explaining the scope of this provision. It explicitly extends to the District of Columbia. It also seems clearly to extend to Puerto Rico and the Northern Mariana Islands, which are commonwealths. If the Rule's reference to "Territory" with a capital "T" were read to invoke the technical definition provided by the Office of Insular Affairs – an "incorporated United States insular area" – that reference would make no current sense, since it would encompass only the unpopulated Palmyra Atoll. It makes more sense, instead, to interpret the Rule's reference to "Territory" to encompass "territories" with a small "t" – in which case the

term would encompass American Samoa, Guam and the Virgin Islands.[7] Such an interpretation technically would also encompass the other U.S. territories, but – since those territories have few or no inhabitants and no local governments – there would be no occasion for Rule 29 to apply to them.

If a FRAP-wide definition of "state" were adopted, FRAP 29(a) could be amended to refer simply to "the United States or its officer or agency or a state."

D. Effect on Appellate Rule 44(b)

Rule 44(b) provides:

> (b) Constitutional Challenge to State Statute. If a party questions the constitutionality of a statute of a State in a proceeding in which that State or its agency, officer, or employee is not a party in an official capacity, the questioning party must give written notice to the circuit clerk immediately upon the filing of the record or as soon as the question is raised in the court of appeals. The clerk must then certify that fact to the attorney general of the State.

This provision was added in 2002. The 2002 committee note does not define "State." The note explains that the amendment is designed to implement 28 U.S.C. § 2403(b).

Section 2403(b) provides:

> In any action, suit, or proceeding in a court of the United States to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The State shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

There is no statutory definition of "state" for purposes of Section 2403(b). The statute has been

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[7] The National Association of Attorneys General lists among its members not only the attorneys general of the fifty states but also "the chief legal officers of the District of Columbia, the Commonwealths of Puerto Rico (Secretary of Justice) and the Northern Mariana Islands, and the territories of American Samoa, Guam, and the Virgin Islands." http://www.naag.org/naag/about_naag.php, last visited March 24, 2007.

applied to intervention by the Puerto Rico Attorney General, *see Cruz v. Melecio*, 204 F.3d 14, 18 (1st Cir. 2000); *see also In re Casal*, 998 F.2d 28, 30 (1st Cir. 1993), but I found no caselaw applying the statute to intervention by the other entities discussed in this memo.[8]

It thus seems that adopting a general definition of "state" that encompasses the other entities mentioned in this memo would at least clarify and perhaps expand the application of Rule 44(b). One question is whether such an expansion would be appropriate in the light of the fact that Rule 44(b) was designed to implement a statutory provision. There would, at any rate, be no problem with rulemaking power, in that the change would not seem to modify substantive rights. Another question is whether Rule 44(b) would make sense as applied to the other entities. It seems that constitutional challenges could arise with respect to statutes enacted by any of the political entities discussed in this memo; though some of the entities are not subject to all federal constitutional provisions, all the entities are subject to some constitutional constraints. And each entity presumably has a chief legal officer – whether or not termed the "attorney general" – who could receive the Rule 44(b) certification.

E. Effect on Appellate Rule 46

Rule 46(a)(1) provides:

> (a) Admission to the Bar.
>
> (1) Eligibility. An attorney is eligible for admission to the bar of a court of appeals if that attorney is of good moral and professional character and is admitted to practice before the Supreme Court of the United States, the highest court of a state, another United States court of appeals, or a United States district court (including the district courts for Guam, the Northern Mariana Islands, and the Virgin Islands).

I was unable to find caselaw that addresses whether "state," as used in Rule 46, includes the entities discussed in this memo. The Ninth Circuit held in *In re Rothstein* that

> [t]he Trust Territory of the Pacific Islands is not a territory nor an insular possession of the United States, but was only held under a trusteeship agreement with the Security Council of the United Nations. Admission to the High Court of the Trust Territory of the Pacific Islands does not qualify counsel to practice in the United States District Court for the Northern District of California or in the United States Court of Appeal for the Ninth Circuit.

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[8] We could seek information on this question – and the question, discussed below, concerning Rule 46 – by asking Fritz Fulbruge to make inquiries among the circuit clerks.

In re Rothstein, 884 F.2d 490, 492 (9th Cir. 1989). But the *Rothstein* court's mention of territories and possessions is less probative than it might be, because the court was also interpreting a Northern District of California local rule which authorized admission of "attorneys of good moral character who are active members in good standing of the bar and who are eligible to practice before any United States Court or the highest court of any State, Territory or Insular Possession of the United States." *Rothstein*, 884 F.2d at 491.

Thus, as with Rule 44, adopting a general definition of "state" that encompasses the other entities mentioned in this memo would at least clarify and perhaps expand the application of Rule 46. With respect to Rule 46, the policy question for the Committee is whether admission to the highest court of each relevant political entity (Guam, the Northern Mariana Islands, etc.) serves as an appropriate qualification for practice before the federal courts of appeals.

F. Effect on Item No. 06-06

A pending agenda item – Item No. 06-06 – concerns Virginia's proposal to amend 4(a)(1)(B) and 40(a)(1) so as to treat state-government litigants the same as federal-government litigants for purposes of the time to take an appeal or to seek rehearing. If that proposal is adopted, then those Rules would, of course, be among the Rules that refer to states. If the Committee decides to proceed with Virginia's proposal, and if the Committee feels that the proposal should extend to D.C., the commonwealths, and the territories, then these proposed amendments would mesh comfortably with a FRAP-wide definition of the term "state."

II. Crafting the proposed amendment

If the Committee is inclined to propose a general definition of the term "state," the next questions concern placement and drafting. Adding a new Rule 49 might be a cumbersome way to accomplish the change. An alternative would be to place the definition in Rule 1; that would parallel the placement of the corresponding definition in Criminal Rule 1.

When drafting the definition, it may make sense to follow the wording employed in the Criminal Rules. The Office of Insular Affairs' commentary suggests that including "possession" may be unnecessary because "possession" is equivalent to "territory" and is no longer commonly used; on the other hand, including the term probably cannot hurt and might help to avoid confusion stemming from the use of the term in older caselaw.

Rule 1. Scope of Rules; Definition; Title

(a) Scope of Rules.

(1) These rules govern procedure in the United States courts of appeals.

(2) When these rules provide for filing a motion or other document in the district court, the procedure must comply with the practice of the district court.

(b) ~~[Abrogated]~~ **Definition.** In these rules, "state" includes the District of Columbia and any commonwealth, territory, or possession of the United States.

(c) Title. These rules are to be known as the Federal Rules of Appellate Procedure.

Committee Note

Subdivision (b). New subdivision (b) defines the term "state" to include the District of Columbia and any commonwealth, territory or possession of the United States. Thus, as used in these Rules, "state" includes the District of Columbia, Guam, American Samoa, the U.S. Virgin Islands, the Commonwealth of Puerto Rico, and the Commonwealth of the Northern Mariana Islands.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE*

Rule 81. Applicability of the Rules in General; Removed Actions

* * * * *

(d) Law Applicable.

(1) ***"State Law" Defined.*** When these rules refer to state law, the term "law" includes the state's statutes and the state's judicial decisions.

(2) ~~***District of Columbia***~~ ***"State" Defined.*** The term "state" includes, where appropriate, the District of Columbia and any United States commonwealth, territory [, or possession]. ~~When these rules provide for state law to apply, in the District Court for the District of Columbia:~~

~~(A) the law applied in the District governs; and~~

(3) ***"Federal Statute" Defined in the District of Columbia.*** ~~(B)~~ In the United States District Court for the

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*New material is underlined. Matter to be omitted is lined through. Includes amendments to rules that will take effect on December 1, 2007.

District of Columbia, the term "federal statute" includes any Act of Congress that applies locally to the District.

COMMITTEE NOTE

Several Rules incorporate local state practice. Original Rule 81(e) provided that "the word 'state' * * * includes, if appropriate, the District of Columbia." The definition is expanded to include any commonwealth, territory [, or possession] of the United States. As before, these entities are included only "where appropriate." They are included for the reasons that counsel incorporation of state practice. For example, state holidays are recognized in computing time under Rule 6(a). Other, quite different, examples are Rules 64(a), invoking state law for prejudgment remedies, and 69(a)(1), relying on state law for the procedure on execution. Including commonwealths, territories[, and possessions] in these and other rules avoids the gaps that otherwise would result when the federal rule relies on local practice rather than provide a uniform federal approach. Including them also establishes uniformity between federal courts and local courts in areas that may involve strong local interests, little need for uniformity among federal courts, or difficulty in defining a uniform federal practice that integrates effectively with local practice.

Adherence to a local practice may be refused as not "appropriate" when the local practice would impair a significant federal interest.

Discussion

Consideration of Rule 81(d)(2) began with the Time-Computation Project. Civil Rule 6(a) and its counterparts extend a time period that ends on a state holiday. The reasons that make it useful to integrate federal time-counting practices with state practices seem to apply as well in a commonwealth or territorial court. If the more general proposal to publish Rule 81 for comment is deferred, it is recommended that Civil Rule 6(a)(6)(B) be amended by adding a new final sentence: "The word 'state,' as used in this Rule, includes [the District of Columbia] and any commonwealth, territory], or possession] of the United States." ("District of Columbia" is shown in brackets. It is

not necessary in Rule 6(a) because the District already is defined as a state by Rule 81(d)(2). More than a few casual readers might be misdirected, however, if forced to remember Rule 81 when reading Rule 6(a).)

The reasons for including commonwealths, territories, and perhaps possessions in the rules that incorporate state practice are sketched in the Committee Note. The closest analogue in the Rules is Criminal Rule 1(b)(9): "The following definitions apply to these rules * * * (9) 'State' includes the District of Columbia, and any commonwealth, territory, or possession of the United States." The Criminal Rule does not include the qualifying "where appropriate" found in Style Rule 81(d)(2) and carried forward by this proposal. Retaining "where appropriate" seems desirable in light of the inability to know or foresee all of the ways in which a territorial procedure, for example, might prove unsuitable for adoption into federal-court practice.

Comment should be particularly invited from those familiar with procedures in the commonwealths and territories. If there are a significant number of local practices unsuitable for adoption into federal practice, it may not suffice to rely on "where appropriate" as an escape clause.

Comment should be separately invited on the question whether to include "possessions." There is at least some reason to believe that the United States does not now have any possessions. Even if that is so, symmetry with the Criminal Rules might support retaining the reference on the chance that a possession might be acquired in the future.

Finally, an apparent miscue in the Style Rule is corrected. Present Rule 81(e) provides that "the term 'statute of the United States' * * * includes * * * any Act of Congress locally applicable to and in force in the District of Columbia." Style Rule 81(d)(2) limits this provision by the introductory language: "When these rules provide for state law to apply, in the District Court for the District of Columbia * * * (B) the term 'federal statute' includes any Act of Congress that applies locally to the District." That is at best narrower than present Rule 81(e), and at worst confusing.

Authority to adopt the proposed definition of "state" seems secure. The Rules Enabling Act, 28 U.S.C. § 2072(a), establishes Supreme Court authority to adopt procedure rules for "the United States district courts." 28 U.S.C. § 451 defines "district court of the United States" for all of Title 28 — it "mean[s] the courts constituted by chapter 5 of this title." Chapter 5 in turn includes §§ 132(a) and 133. Section 132(a) provides for a district court in each judicial district, "known as the United States District Court" for the district. Section 133 enumerates the districts; the list includes Puerto Rico but not Guam, the Northern Mariana Islands, or the Virgin Islands. Up to this point, authority to make rules for federal courts in those places seems uncertain. But the Enabling Act rules are incorporated by the territorial organic acts for each place — as an Enabling Act Rule is "promulgated and made effective," it is incorporated in territorial court practice. 48 U.S.C. §§ 1424-4 (Guam); 1614(b) (Virgin Islands); 1821(c) (Northern Mariana Islands).

MEMORANDUM

DATE: March 14, 2008

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 03-09: Proposed amendments to Rules 4(a)(1)(B) and 40(a)(1) concerning federal officers and employees

The Committee published for comment proposed amendments to Rules 4(a)(1) and 40(a)(1) that would clarify those Rules' application to cases in which a federal officer or employee is sued in his or her individual capacity.

Part I of this memo sets forth the proposals as published. Part II summarizes the public comments. Part III discusses the proposed amendments from a policy standpoint. Part III argues that the public comments underscore the strong policy reasons in favor of the proposed amendments, but that they also suggest that the proposed amendments should be altered to clarify whose view of the facts should control when determining the provisions' applicability to individual-capacity suits.

In sum, as I discuss in Part III, I think that as a policy matter it would be useful to (1) make clear that the longer periods apply to federal officers *and employees*; (2) make clear that the longer periods apply to *individual-capacity suits arising from acts or omissions alleged to have occurred while the federal officer or employee was acting on the United States' behalf*; and (3) make clear that the relevant question for purposes of (2) is *whether there is a colorable allegation* that the acts or omissions occurred while the person was acting on the United States' behalf – not whether the court of appeals ultimately determines that the acts or omissions occurred in such a context. Goals (1) and (2) are served by the proposed amendments as published. Goal (3) would require some alteration of the amendments' text and Notes.

Consideration of the best policy choices, however, only commences the analysis. As to the proposed amendment to Rule 4(a)(1), it is also necessary to consider the implications of the fact that civil appeal deadlines are set not only by Rule 4(a) but also by 28 U.S.C. § 2107. This issue was not raised during the public comment period; but in the aftermath of the *Bowles v. Russell* decision the relevant concerns are evident. As to each of the three changes mentioned

above, the Committee should consider whether the change would alter the appeal periods set by Section 2107. Part IV discusses these concerns, and tentatively finds some reason to question whether the statutory sixty-day period extends to non-officer employees; it also notes arguments for and against the view that the statutory sixty-day period extends to individual-capacity suits. Part V concludes by suggesting that the Committee hold Item 03-09 for further study.

I. Text of Rules and Committee Notes

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE*

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

(1) Time for Filing a Notice of Appeal.

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

(B) ~~When the United States or its officer or agency is a party, t~~The notice of appeal may be filed by any party within 60 days after

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* New material is underlined; matter to be omitted is lined through.

entry of the judgment or order appealed from ~~is entered.~~ if one of the parties is:

(i) the United States;

(ii) a United States agency;

(iii) a United States officer or employee sued in an official capacity; or

(iv) a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf.

* * * * *

Committee Note

Subdivision (a)(1)(B). Rule 4(a)(1)(B) has been amended to make clear that the 60-day appeal period applies in cases in which an officer or employee of the United States is sued in an individual capacity for acts or omissions occurring in connection with duties performed on behalf of the United States. (A concurrent amendment to Rule 40(a)(1) makes clear that the 45-day period to file a petition

for panel rehearing also applies in such cases.) The amendment to Rule 4(a)(1)(B) is consistent with a 2000 amendment to Civil Rule 12(a)(3)(B), which specified an extended 60-day period to respond to complaints in such cases. The Committee Note to the 2000 amendment explained: "Time is needed for the United States to determine whether to provide representation to the defendant officer or employee. If the United States provides representation, the need for an extended answer period is the same as in actions against the United States, a United States agency, or a United States officer sued in an official capacity." The same reasons justify providing additional time to the Solicitor General to decide whether to file an appeal.

Rule 40. Petition for Panel Rehearing

(a) Time to File; Contents; Answer; Action by the Court if Granted.

(1) **Time.** Unless the time is shortened or extended by order or local rule, a petition for panel rehearing may be filed within 14 days after entry of judgment. But in a civil case, ~~if the United States or its officer or agency is a party, the time within which any party may seek rehearing is 45 days after entry of judgment,~~ unless an order shortens or

extends the time~~.~~, the petition may be filed by any party within 45 days after entry of judgment if one of the parties is:

(A) the United States;

(B) a United States agency;

(C) a United States officer or employee sued in an official capacity; or

(D) a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf.

* * * * *

Committee Note

Subdivision (a)(1). Rule 40(a)(1) has been amended to make clear that the 45-day period to file a petition for panel rehearing applies in cases in which an officer or employee of the United States is sued in an individual capacity for acts or omissions occurring in connection with duties performed on behalf of the United States. (A concurrent amendment to Rule 4(a)(1)(B) makes clear that the 60-day

period to file an appeal also applies in such cases.) In such cases, the Solicitor General needs adequate time to review the merits of the panel decision and decide whether to seek rehearing, just as the Solicitor General does when an appeal involves the United States, a United States agency, or a United States officer or employee sued in an official capacity.

II. Summary of Public Comments

07-AP-003; 07-BR-015; 07-CR-003; 07-CV-003: Chief Judge Frank H. Easterbrook. Chief Judge Easterbrook assails the proposals' "stylistic backsliding." He asserts that "[t]reating a proper noun as an adjective ('a United States agency') is not correct; it is an example of noun plague." Instead, he suggests, "[f]ederal agency' is better, using a real adjective as an adjective. If you have some compelling need to used 'United States,' then say 'agency of the United States' (etc.)."

07-AP-011: Public Citizen Litigation Group. Brian Wolfman writes on behalf of Public Citizen Litigation Group to express general support for the proposed amendments, but to suggest one change. Public Citizen is concerned that proposed Rule 4(a)(1)(B)(iv) and proposed Rule 40(a)(1)(D) could be read to exclude instances when the court of appeals ultimately concludes that the federal officer's or employee's act did *not* occur "in connection with duties performed on the United States' behalf." Public Citizen argues that this possibility creates a risk that appellants might rely on the longer appeal time only to have their appeals dismissed due to a ruling by the court of appeals on this factual question. Public Citizen argues that the wording should be changed to make clear that the extended time periods' availability (under 4(a)(1)(B)(iv) and 40(a)(1)(D)) turns on the nature of the act *as alleged by the plaintiff* rather than on the nature of the act *as ultimately found by the court.* Public Citizen suggests that this could be achieved by changing "an act or omission occurring in connection with" to read "an act or omission alleged to have occurred in connection with."

07-AP-014: United States Solicitor General. United States Solicitor General Paul D. Clement writes in support of the proposed amendments to Rules 4(a)(1) and 40(a)(1). He argues

that these amendments "would be consistent with the rules governing the district courts, and will serve important policy interests."

III. A policy perspective on the proposed amendments and the public comments

Solicitor General Clement's letter persuasively sets forth the policy arguments in favor of the proposed amendments as published. As the Solicitor General notes, Department of Justice regulations provide that the Department may decide to provide representation to a federal officer or employee sued in his or her individual capacity "when the actions for which representation is requested reasonably appear to have been performed within the scope of the employee's employment and the Attorney General or his designee determines that providing representation would otherwise be in the interest of the United States."** As he states,

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** 28 C.F.R. § 50.15(a). Distinct issues arise when the suit falls within the Federal Tort Claims Act:

> When a federal employee is sued for a wrongful or negligent act, the Federal Employees Liability Reform and Tort Compensation Act of 1988 (commonly known as the Westfall Act) empowers the Attorney General to certify that the employee "was acting within the scope of his office or employment at the time of the incident out of which the claim arose...." 28 U.S.C. § 2679(d)(1). Upon certification, the employee is dismissed from the action and the United States is substituted as defendant. The case then falls under the governance of the Federal Tort Claims Act (FTCA).

Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 419-20 (1995). "The Westfall Act makes a suit against the United States under the Federal Tort Claims Act the exclusive remedy for most nonconstitutional torts by employees of the federal government." Apampa v. Layng, 157 F.3d 1103, 1104 (7th Cir. 1998).

Federal Tort Claims Act cases are covered by a different set of regulations. See 28 C.F.R. § 15.2(a) (requiring "[a]ny Federal employee against whom a civil action or proceeding is brought for money damages for loss or damage to property, or personal injury or death, on account of any act or omission in the scope of the employee's office or employment with the Federal Government" to deliver the pleadings to his or her superior); id. § 15.3(a) (directing agency to submit report "addressing whether the employee was acting within the scope of his office or employment with the Federal Government at the time of the incident out of which the suit arose"); id. §§ 15.4(a) & (b) (authorizing U.S. Attorney to certify whether "the Federal employee was acting within the scope of his office or employment with the Federal Government at the time of the incident out of which the suit arose" and whether "the covered person was acting at the time of the incident out of which the suit arose under circumstances in which Congress has provided by statute that the remedy provided by the Federal Tort Claims Act is made the exclusive remedy"); id. § 15.4(c) ("A certification under this section may be withdrawn if a further evaluation of the relevant facts or the consideration of new or additional evidence calls for such action.").

> [w]hen a United States officer or employee is sued in his individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States, and the Government decides to provide representation to the officer or employee, the Government, as in any other appeal to which it is a party, requires time to conduct a review of the case, determine whether appeal or rehearing is appropriate, and seek approval from the Solicitor General.

The Solicitor General also observes that the proposed amendments would render Appellate Rules 4(a) and 40(a) consistent with Civil Rule 12(a).[***]

In the light of these considerations, it is understandable that the proposed amendments are drafted so as to condition the inclusion of individual-capacity suits on the fact that the officer or employee is "sued ... for an act or omission occurring in connection with duties performed on the United States' behalf." But as Public Citizen's comment makes clear, the application of the proposed individual-capacity provisions will require a determination of whose view of the facts should prevail when assessing whether the suit is one "for an act or omission occurring in connection with duties performed on the United States' behalf." A large number of decisionmakers may opine on that factual question during the course of a lawsuit:

- The plaintiff's complaint may allege that the suit is one for an act or omission occurring in connection with duties performed on the United States' behalf.

[***] Civil Rule 12(a) provides in relevant part:

> (2) United States and Its Agencies, Officers, or Employees Sued in an Official Capacity. The United States, a United States agency, or a United States officer or employee sued only in an official capacity must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the United States attorney.
>
> (3) United States Officers or Employees Sued in an Individual Capacity. A United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the officer or employee or service on the United States attorney, whichever is later.

- The defendant may allege that the suit is one for an act or omission occurring in connection with duties performed on the United States' behalf, when asking his or her agency for federal representation in the lawsuit.

    - See 28 C.F.R. § 50.15(a)(1) ("When an employee believes he is entitled to representation by the Department of Justice in a proceeding, he must submit forthwith a written request for that representation, together with all process and pleadings served upon him, to his immediate supervisor or whomever is designated by the head of his department or agency.")

- The employing agency will assess whether the employee was acting within the scope of employment, and will submit that finding along with its recommendation on whether the federal government should represent the employee.

    - See 28 C.F.R. § 50.15(a)(1) (" Unless the employee's employing federal agency concludes that representation is clearly unwarranted, it shall submit, in a timely manner, to the Civil Division or other appropriate litigating division (Antitrust, Civil Rights, Criminal, Land and Natural Resources or the Tax Division), a statement containing its findings as to whether the employee was acting within the scope of his employment and its recommendation for or against providing representation.").

- The DOJ's litigating division will assess whether the employee was acting within the scope of employment. If not, the employee will not receive federal representation.

    - See 28 C.F.R. § 50.15(a)(2) ("Upon receipt of the individual's request for counsel, the litigating division shall determine whether the employee's actions reasonably appear to have been performed within the scope of his employment and whether providing representation would be in the interest of the United States.").

- The defendant's response to the complaint may assert that the suit is one for an act or omission occurring in connection with duties performed on the United States' behalf.

- During the course of the lawsuit, the district court may make factual findings that resolve the question of whether the relevant acts or omissions occurred in connection with duties performed on the United States' behalf.

    - But, on the other hand, the district court may resolve the case without determining the question. One can think of numerous grounds for disposition that would not resolve the question.

    - Moreover, if the district court does determine the question, one or more parties may challenge the district court's determination on appeal.

- Either party may seek to assert that the suit is one for an act or omission occurring in connection with duties performed on the United States' behalf, if they need the benefit of the longer appeal period.

    - And note that this may be true even if the party's assertion at this juncture conflicts with a position that they took at an earlier stage in the lawsuit for some other strategic reason (e.g., having to do with immunity doctrines).

- The court of appeals may reach its own conclusion as to whether the suit is one for an act or omission occurring in connection with duties performed on the United States' behalf.

There are thus at least seven different possible decisionmakers whose views on this factual question might be consulted. As a matter of policy, Public Citizen seems clearly correct to argue that it would be highly undesirable to have the appeal time turn on a subsequent assessment by the court of appeals.**** Whatever rule is chosen to resolve the question of whose view of the facts controls, it should be a rule that results in a fixed determination prior to the running of the shorter (30-day) appeal time.

**** Cf. U.S. v. American Soc. of Composers, Authors and Publishers, 331 F.2d 117, 119 (2d Cir. 1964) ("It is in the last degree undesirable to read into a procedural statute or rule, fixing the time within which action may be taken, a hidden exception or qualification that will result in the rights of clients being sacrificed when capable counsel have reasonably relied on the language.").

But Public Citizen's suggested fix – though it is preferable to the published version – is nonetheless indeterminate. Public Citizen suggests saying "alleged to have occurred in connection." Alleged by whom? The plaintiff? The employee in his or her request for representation? The employee's agency? The DOJ's litigating division? The employee's response to the complaint? Either party at any time before judgment? The appellant by the time of the filing of the notice of appeal? (Presumably "alleged" would not naturally be read to refer to *findings* by the district court.)

Moreover, one might question whether a patently unfounded allegation that the act or omission occurred in connection with duties the employee performed on the United States' behalf should qualify. If the facts have clearly demonstrated that the action was outside the scope of the defendant's employment, then the United States will not represent the employee.***** If there is no possibility that United States will represent the employee, then one might conclude that there is no likelihood that the rationale described by Solicitor General Clement would counsel a lengthened appeal time. Thus, perhaps the lengthened appeal time should be available in individual-capacity suits only if any party has, prior to the entry of judgment, made a *colorable* allegation (in the course of the lawsuit) that the suit arises from an act or omission occurring in connection with duties performed on the United States' behalf.****** Adding the qualifier "colorable" might suffice to screen out truly preposterous assertions, while protecting one who

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***** See 28 C.F.R. § 50.15(b)(1) ("Representation is not available to a federal employee whenever: (1) The conduct with regard to which the employee desires representation does not reasonably appear to have been performed within the scope of his employment with the federal government ....").

****** Addressing an analogous context, where the availability of removal jurisdiction depended on the litigant's ability to come within 28 U.S.C. § 1442(a)(1)'s reference to acts "under color of ... office," the Court has held:

> The federal officer removal statute is not 'narrow' or 'limited.'.... At the very least, it is broad enough to cover all cases where federal officers can raise a colorable defense arising out of their duty to enforce federal law. One of the primary purposes of the removal statute-as its history clearly demonstrates-was to have such defenses litigated in the federal courts. The position of the court below would have the anomalous result of allowing removal only when the officers had a clearly sustainable defense. The suit would be removed only to be dismissed. Congress certainly meant more than this when it chose the words 'under color of * * * office.' In fact, one of the most important reasons for removal is to have the validity of the defense of official immunity tried in a federal court. The officer need not win his case before he can have it removed.

Willingham v. Morgan, 395 U.S. 402, 406-07 (1969).

reasonably relies on the availability of the sixty-day period from the possibility that the court of appeals might later take a different view of the relevant facts.

Further deliberation seems called for in order to define the precise scope of such a provision. But it does seem to me that the Committee should consider revising the proposed Rule 4(a)(1)(B)(iv) to further specify which individual-capacity suits are included and, in particular, whose view of the facts should control if the determining factor is that the suit is "for an act or omission occurring in connection with duties performed on the United States' behalf." I would also suggest that whatever language is adopted for Rule 4(a)(1)(B)(iv) should be adopted for proposed Rule 40(a)(1)(D).*******

IV. Section 2107 and its implications for the proposed amendments

As noted above, I believe that the proposed amendments are well grounded as a policy matter, though I recommend some alteration to take account of Public Citizen's critique. Specifically, I believe that it would be useful if the appeal-period provisions could be amended to (1) make clear that the longer periods apply to federal officers *and employees*; (2) make clear that the longer periods apply to *individual-capacity suits arising from acts or omissions alleged to have occurred while the federal officer or employee was acting on the United States' behalf*; and (3) make clear that the relevant question for purposes of (2) is *whether there is a colorable allegation* that the acts or omissions occurred while the person was acting on the United States' behalf – not whether the court of appeals ultimately determines that the acts or omissions occurred in such a context. But before concluding that the Advisory Committee should send forward such a proposal, it is necessary to consider the fact that the 30-day and 60-day appeal periods are set by statute.

******* With respect to Chief Judge Easterbrook's style suggestions, I recommend that the Committee defer to the Style Subcommittee. Professor Kimble has reviewed Chief Judge Easterbrook's suggestions and responds that he does not think it is incorrect usage to employ a proper noun as an "attributive noun – that is, an adjective." Although Professor Kimble agrees that "federal" might have been a good substitute for "United States," he points out that the language proposed for Appellate Rules 4 and 40 tracks that used in Civil Rules 12(a)(2) and 12(a)(3), which refer to "a United States agency" and "a United States officer or employee."

In this regard, the Supreme Court's holding in *Bowles v. Russell* is significant. *Bowles*, of course, was decided on June 14, 2007, after the Standing Committee had already met and voted to publish the proposed amendments for comment. As you know, under *Bowles*, appeal deadlines set by statute are jurisdictional. (The developing caselaw under *Bowles* is discussed elsewhere in the materials in this agenda book.) *Bowles*' brief discussion of the rulemaking process raises a question concerning the role of rulemaking in altering jurisdictional deadlines. The Committee should therefore consider whether any of the changes it proposes to make in the application of Rule 4(a)'s 30-day and 60-day appeal deadlines depart from the regime set by the governing statute, 28 U.S.C. § 2107.

Part IV.A. examines the background, context, and text of Section 2107. Part IV.B discusses subsequent developments, including legislation, rule amendments, and court decisions concerning the sixty-day appeal period. Part IV.C. attempts to draw from the narrative in Parts IV.A. and IV.B some tentative conclusions concerning the three proposed changes described above.

A. The background, context, and text of Section 2107

28 U.S.C. § 2107(b) provides that in any civil "action, suit or proceeding in which the United States or an officer or agency thereof is a party, the time as to all parties shall be sixty days from" the entry of the judgment, order or decree appealed from.******** Does the statute's reference to federal "officer[s]" encompass federal employees? Does the statutory sixty-day period apply to individual-capacity suits, and if so, which ones? An examination of these questions might usefully include a consideration of the likely meaning of the statutory language at the time of its initial adoption in 1948. That question, in turn, suggests the usefulness of reaching yet further back in order to understand the context in which Congress used the term federal "officer."

******** Current Rule 4(a)(1)(B) parallels that wording very closely: "When the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered."

It may be helpful to start by examining one of the more notable contexts in which the Constitution itself refers to federal "officers." The Appointments Clause provides that the President

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2. "[A]ny appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by" the Appointments Clause. Buckley v. Valeo, 424 U.S. 1, 126 (1976). However, *Buckley* noted that "'Officers of the United States' does not include all employees of the United States .... Employees are lesser functionaries subordinate to officers of the United States." *Id.* n. 162.

The Supreme Court has in the past referred to the Appointments Clause to illuminate its interpretation of the statutory term "officer." In determining that a surgeon appointed by the Commissioner of Pensions was not an "officer of the United States" for purposes of a statute criminalizing extortion under color of office,********* the Court reasoned:

> The Constitution for purposes of appointment very clearly divides all its officers into two classes. The primary class requires a nomination by the President and confirmation by the Senate. But foreseeing that when offices became numerous, and sudden removals necessary, this mode might be inconvenient, it was provided that, in regard to officers inferior to those specially mentioned, Congress might by law vest their appointment in the President alone, in the courts of law, or in the heads of departments. That all persons who can be said to hold an office under the government

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********* The statute in question provided: "That, if any officer of the United States shall be guilty of extortion, under, or by colour of his office, every person so offending shall, on conviction thereof, be punished ...." 4 Stat. 118.

about to be established under the Constitution were intended to be included within one or the other of these modes of appointment there can be but little doubt.

U.S. v. Germaine, 99 U.S. 508, 509-10 (1878). The *Germaine* Court reasoned that the Commissioner of Pensions did not count as the head of a department within the meaning of the Appointments Clause, id. at 511, and that "the nature of defendant's employment" further indicated that the defendant surgeon was not an "officer":

> [T]he term embraces the ideas of tenure, duration, emolument, and duties .... In the case before us, the duties are not continuing and permanent, and they are occasional and intermittent. The surgeon is only to act when called on by the Commissioner of Pensions in some special case, as when some pensioner or claimant of a pension presents himself for examination. He may make fifty of these examinations in a year, or none. He is required to keep no place of business for the public use. He gives no bond and takes no oath, unless by some order of the Commissioner of Pensions of which we are not advised.
>
> No regular appropriation is made to pay his compensation, which is two dollars for every certificate of examination, but it is paid out of money appropriated for paying pensions in his district, under regulations to be prescribed by the commissioner. He is but an agent of the commissioner, appointed by him, and removable by him at his pleasure, to procure information needed to aid in the performance of his own official duties. He may appoint one or a dozen persons to do the same thing. The compensation may amount to five dollars or five hundred dollars per annum. There is no penalty for his absence from duty or refusal to perform, except his loss of the fee in the given case. If Congress had passed a law requiring the commissioner to appoint a man to furnish each agency with fuel at a price per ton fixed by law high enough to secure the delivery of the coal, he would have as much claim to be an officer of the United States as the surgeons appointed under this statute.

Id. at 511-12.

Germaine, decided in 1878, was roughly contemporaneous with the compilation of the Revised Statutes; and the latter provide a similar perspective on the nature of the term "officer." Various provisions in the Revised Statutes refer to "clerks,"********** "agents,"********** and "employés"********** in ways that suggest each of those terms was distinct from the term "officer."

One might ask, however, whether nineteenth-century terminology tells us much about the language that Congress used in 1948. Webster's Second Edition provides some idea of common usage in the 1940s.********** The entry for "employee" reads:

> em'ploy•ee' ... , em•ploy'é ... , n.... One employed by another; one who works for wages or salary in the service of an employer; — disting. From *official* or *officer*. See OFFICE.

The entry for "officer" states:

> of'fi•cer ... , n. .... 1. One charged with a duty; an agent; a minister. *Obs.* "*Officers* of vengeance." *Milton.*

********** See, e.g., Rev. Stat. § 161 ("The head of each Department is authorized to prescribe regulations, not inconsistent with law, for the government of his Department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it.").

********** See, e.g., Rev. Stat. § 183 ("Any officer or clerk of any of the Departments lawfully detailed to investigate frauds or attempts to defraud on the Government, or any irregularity or misconduct of any officer or agent of the United States, shall have authority to administer an oath to any witness attending to testify or depose in the course of such investigation").

********** See, e.g., Rev. Stat. § 190 ("It shall not be lawful for any person appointed after [June 1, 1872], as an officer, clerk, or employé in any of the Departments, to act as counsel, attorney, or agent for prosecuting any claim against the United States which was pending in either of said Departments while he was such officer, clerk, or employé ...."); Rev. Stat. § 198 ("The head of each Department shall, as soon as practicable after the last day in September in each year in which a new Congress is to assemble, cause to be filed in the Department of the Interior a full and complete list of all officers, agents, clerks, and employés employed in his Department, or in any of the offices or Bureaus connected therewith. He shall include in such list all the statistics peculiar to his Department required to enable the Secretary of the Interior to prepare the Biennial Register.").

********** Webster's New International Dictionary of the English Language 839, 1690-91 (2d ed. 1941).

2. One who holds an office; specif.: a A person lawfully invested with an office, whther civil, military, or ecclesiastical, and whether under the state or a private corporation or the like; as, a church *officer*; a police *officer*; an *officer* of an insurance company. See OFFICE, 5. b In a large household or college, a chief, or, formerly, a subordinate, official engaged in domestic management or service. c One holding office in an institution, society, or similar organization; as, the *officers* of women's clubs; class-day *officers*.
3. a *Mil. & Nav.* One who holds a position of authority or command in an army or navy; specif., a *commissioned officer*, as distinguished from *warrant, noncommissioned,* and *petty officers*. b On a merchant or pleasure vessel, the master or any of the mates. The first, second, etc., mates are often called first, second, etc., *officers*, although the master is an officer.
4. A policeman, constable, bailiff, or the like; also, formerly, a jailor or executioner.
5. In some honorary orders, a member in some grade above the lowest; as, an *officer* of the Legion of Honor.

The definitions for "office" are numerous, so I will quote here only definition (5), since that is the one referred to in the definition of "officer" (the full excerpts from Webster's are enclosed):

5. a A special duty, trust, charge, or position, conferred by an exercise of governmental authority and for a public purpose; a position of trust or authority conferred by an act of governmental power; a right to exercise a public function or employment and receive the emoluments (if any) thereto belonging; as, an executive or judicial *office*; a municipal *office*; — distinguished from an *employment*. In its fullest sense an *office* embraces the elements of tenure, duration, duties, and emoluments, but the element of emoluments is not essential to the existence of an office. b In a wider sense, any position or place in the employment of the government, esp. one of trust or authority; also, that of an employee of a corporation invested with a part of the executive authority. c Official status or employment; — often personified. "The insolence of *Office*." Shak.

These entries suggest that, as of the 1940s, "officer" and "employee" were distinct terms with differing implications. Thus, the entry for "employee" "disting[uishes]" that term "[f]rom

official or *officer*," while the entry for "office" notes that that term can be "distinguished from an *employment*." The definition of "employment" is broad, appearing to cover all those who work for an employer in return for wages or salary. The definition of "officer" seems narrower, in that it seems to imply some distinction, whether it be in the form of a public duty, a formal investiture, or perhaps a position of authority. The definition of "officer" refers in turn to the definition of "office," and the latter reinforces the notion that an office-holder is a distinct sort of employee. "Office," in the definition quoted above, implies a special duty, trust or authority.

On the other hand, one could argue for a broader reading of "officer" based on the Webster's definitions. This argument might point out that "officer" extends to policemen, constables and bailiffs – hardly exalted office-holders. Further, one might note that the definition of "office" includes, "[i]n a wider sense, any position or place in the employment of the government" (although one would then have to concede that this definition is followed by the qualifier "esp. one of trust or authority") Since the definition of "office" also embraces "[o]fficial status or employment," one might argue this means that "officer" and "employee" could be viewed interchangeably.

Webster's, in sum, suggests that "employee" covered all those working for pay in government employment. Webster's indicates that it was *possible* to read "officer" equally broadly, but that (on the other hand) "officer" often meant some narrower subset of government employees – those distinguished in some way, whether by the formality of their appointment or by the nature of their authority or duties.

Some 1940s federal legislation suggests that Congress used "officer" in that narrower sense, distinct from its use of the term "employee." An example can be found in the provisions of the Federal Tort Claims Act of 1946. The 1946 Act's main purpose was "to allow recovery against the United States" for negligent or wrongful acts or omissions by government employees acting within the scope of their employment, "on the basis and to the extent of recoveries for like torts committed by private tortfeasors in the State in which the act or omission giving rise to the claim against the United States occurred."********** Section 402 of the Act defined "Employee of the Government" to include "officers or employees of any Federal agency, members of the military

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********** Massachusetts Bonding & Ins. Co. v. U.S., 352 U.S. 128, 139 (1956).

or naval forces of the United States, and persons acting on behalf of a Federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation."********** The use of the term "employee" to encompass, inter alios, "officers or employees of any Federal agency" suggests an understanding that the term "employee" was broader than the term "officer."

The Act of June 25, 1948, which included Section 2107,********** carried forward the FTCA. Though the 1948 Act changed some aspects of the FTCA, the definition of "Employee of the government" was substantially the same.********** The 1948 Act's federal officer removal provision is also of interest. It stated in relevant part:

> § 1442. Federal officers sued or prosecuted
>
> (a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> (1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue....**********

The Reviser's Note explained that "[t]he revised subsection (a)(1) is extended to apply to all officers and employees of the United States or any agency thereof. Section 76 of Title 28, U.S.C., 1940 ed., was limited to revenue officers engaged in the enforcement of the criminal or revenue

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********** 60 Stat. 843.

********** See 62 Stat. 963, June 25, 1948 ("In any such action, suit or proceeding in which the United States or an officer or agency thereof is a party, the time as to all parties shall be sixty days from such entry.").

********** 62 Stat. 982.

********** 62 Stat. 938.

laws."********** This is of interest because it indicates that when the drafters intended to cover all federal employees, they used the phrase "[a]ny officer of the United States or any agency thereof, *or person acting under him*" (emphasis added).

Section 2107 owed its design to the efforts of the rulemakers and the Judicial Conference. The 1948 Act's history evidences a fair degree of overlap between the rulemaking process and the process that produced the Judicial Code. The latter process involved a "staff of experts" plus "[a]n impartial advisory committee composed of outstanding men with years of practical experience at the bar and on the bench."********** The House Report explains that "[t]he Judicial Conference Committee on the Revision of the Judicial Code ... worked in close cooperation in preparation of this bill."********** Moreover, "[t]he work of revision was greatly facilitated and advanced through the cooperation of a committee of Supreme Court justices appointed by the Chief Justice."**********

The Reviser's Notes to Section 2107 state in part:

> Section 227a of title 28 U.S.C., 1940 ed., provided a time limit of 30 days for appeals from patent-infringement decisions, and section 230 of title 28, U.S.C., 1940 ed., permitted 3 months for appeals generally. The revised section adopts the 30-day limit in conformity with recommendations of members of the Judicial Conference of the United States and proposed amendment to rule 73 of the Federal Rules of Civil Procedure.

********** H.R. Rep. No. 308, 80th Cong., 1st Sess., at A134.

********** H.R. Rep. No. 308, 80th Cong., 1st Sess., at 2-3.

********** Id. at 3.

********** Id. at 4.

> Section 1142 of title 26, U.S.C., 1940 ed., provided for 3 months within which to petition for appeal from a decision of the Tax Court. The second paragraph of the revised section reduces this to 60 days for reasons explained above.**********

The reference to "reasons explained above" is intriguing – but also frustrating, since I have skimmed the rest of the House Report in vain, looking for any indication of these "reasons." I am left to wonder whether this phrase is meant to indicate that the 60-day period, like the 30-day period, was adopted at the recommendation of the Judicial Conference and in conformity with the 1946 amendment to Civil Rule 73(a).

It is certainly true that some clarification of the goals behind the sixty-day period may be found in the history of Civil Rule 73(a). In March 1948 – some three months prior to the enactment of the 1948 Act – the 1946 amendment to Civil Rule 73(a) took effect. That amendment set the now-familiar 30-day and 60-day appeal time limits, using wording – for the 60-day provision – that was substantially the same as that which Congress would enact a few months later in Section 2107.********** The Committee Note to the Civil Rule 73 amendment explained:

> In cases where the United States or an officer or agency thereof is a party, allowance of sixty days to the government, its officers and agents is well justified. For example, in a tax case the Bureau of Internal Revenue must first consider and decide whether it thinks an appeal should be taken. This recommendation goes to the Assistant Attorney General in charge of the Tax Division in the Department of Justice, who must examine the case and make a recommendation. The file then goes to the Solicitor General, who must take the time to go through the papers and reach a conclusion. If these departments are rushed, the result will be that an appeal is taken merely to preserve the right, or without adequate consideration, and once taken it is likely to go forward, as it is easier to refrain from an appeal than to dismiss it. Since it would be unjust to allow the United States, its officers or agencies extra time and yet deny it to other parties in

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********** Id. at A174.

********** Civil Rule 73(a), as amended effective March 19, 1948, provided in relevant part for a 60-day appeal period "in any action in which the United States or an officer or agency thereof is a party."

the case, the rule gives all parties in the case 60 days. The Judicial Conference of Senior Circuit Judges in 1945 recorded itself as in favor of extending the additional time of 60 days to all parties in any case where the United States or its officers or agencies were parties. The term "officer" is defined in amended Rule 81(f).

As the Committee Note to Civil Rule 73(a) explained, the 1946 amendments added a new Civil Rule 81(f). Effective March 1948, that Rule provided: "(f) References to Officer of the United States. Under any rule in which reference is made to an officer of the United States, the term 'officer' includes a collector of internal revenue, a former collector of internal revenue, or the personal representative of a deceased collector of internal revenue."********** The Committee Note explained:

> The use of the phrase "United States or an officer or agency thereof" in the rules (as e.g., in Rule 12(a) and amended Rule 73(a)) could raise the question of whether "officer" includes a collector of internal revenue, a former collector, or the personal representative of a deceased collector, against whom suits for tax refunds are frequently instituted. Difficulty might ensue for the reason that a suit against a collector or his representative has been held to be a personal action. Sage v. United States, 1919, 250 U.S. 33; Smietanka v. Indiana Steel Co., 1921, 257 U.S. 1; United States v. Nunnally Investment Co., 1942, 316 U.S. 258. The addition of subdivision (f) to Rule 81 dispels any doubts on the matter and avoids further litigation.

The clarification provided by former Civil Rule 81(f) is interesting. It shows that the rulemakers (1) recognized that there might be litigation over whether personal-capacity suits would count as suits involving federal "officers" for purposes of Civil Rules 12(a) and 73(a); and (2) amended the Rules so as to ensure that *in the context of tax refund suits* personal-capacity suits would count.********** Point (1) suggests that as of 1946 (and 1948, when Section 2107

********** Rule 81(f) was deleted by the 2007 amendments because the relevant IRS position was abolished by statute. See 2007 Committee Note to Rule 81.

********** From the Court's discussion in *Nunnally Investment*, it appears that the doctrine casting tax refund suits against a collector as personal-capacity suits was of long standing (though by then somewhat outmoded in terms of actual practice):

was enacted) it was not clear that a reference to a suit involving a federal "officer" included personal-capacity suits. Point (2) indicates that with respect to tax refund suits the rulemakers had a clear intention to include personal-capacity tax refund suits within the 60-day provision. The difficulty, for present purposes, is that points (1) and (2), taken together, raise a question as to all *other* types of personal-capacity suits against federal officers.

B. Post-1948 developments

Ordinarily it is both tedious and unnecessary to provide a *chronological* development of relevant caselaw. But in this instance, it is worth following the chronology of both the decisional law and certain statutory and Rules amendments.

The Second Circuit was evidently the first court to discuss whether the 60-day appeal period applied to an individual-capacity suit. The suit concerned a car accident involving "a vehicle owned by the U.S. Department of Commerce, ... being driven on government business by one Harry Smith, a maintenance technician employed by the Civil Aeronautics Administration." Hare v. Hurwitz, 248 F.2d 458, 459 (2d Cir. 1957). Construing Civil Rule 73(a), the court first inquired whether Smith was a federal "officer":

> The phrase 'officer of the United States' has often been interpreted by the court. Generally, it is understood as referring only to those government officials appointed by

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> Nearly a quarter-century ago in Sage v. United States, 250 U.S. 33 ... , this Court upon full consideration announced the doctrine that the United States is a 'stranger' to a judgment resulting from a suit brought against a collector, and that such a judgment is, therefore, not a bar in a subsequent action upon the same claim against the United States. This was not a novel doctrine. The result was drawn from the conception of a suit against a collector as 'personal', since he was personally responsible for illegally exacting monies under the claim that they were due as taxes. Such a 'personal' remedy against the collector, derived from the common-law action of indebitatus assumpsit, has always been part of our fiscal administration. Unless the application given to this remedy by the doctrine of the Sage case has been displaced by Congress or renounced by later decisions of this Court, the judgment must stand. Concededly Congress has not done so. And although recognition has been made of the technical nature of a suit against a collector, no support can be found for the contention that the Sage doctrine has been discarded as an anachronism.
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> United States v. Nunnally Inv. Co., 316 U.S. 258, 260 (1942).

> the President, by members of his Cabinet, or by the courts, i.e., only those officials appointed in the manner prescribed by Article 2, Section 2, Clause 2 of the Constitution. United States v. Germaine, 1878, 99 U.S. 508 ...; United States v. Mouat, 1888, 124 U.S. 303 ... ; Burnap v. United States, 1920, 252 U.S. 512, 513 ... ; Hoeppel v. United States, 1936, 66 App.D.C. 71, 85 F.2d 237; McGrath v. United States, 2 Cir., 1921, 275 F. 294; United States v. Davis, D.C.M.D.Tenn.1948, 80 F.Supp. 875. The courts, however, have at times interpreted the phrase more broadly, recognizing that its definition depends upon the context in which it appears. See, e.g., United States v. Hendee, 1888, 124 U.S. 309 ... , Steele v. United States No. 2, 1925, 267 U.S. 505 ....

Concluding that the language itself did not settle the question, the court turned to an examination of the provision's purpose: "[T]he appropriate means of determining the meaning of the phrase is to examine the purpose which it serves in the particular statute where it occurs, thereby to determine whether that purpose will be furthered by extension of the phrase beyond its limited constitutional meaning." Id. at 461. After citing the discussion in the 1946 Committee Note to Civil Rule 73(a), the court held the 60-day period inapplicable:

> The action was brought against [Smith] in his individual capacity and the judgment against him was entered against him as an individual. Although the United States Attorney appeared in his behalf, Smith could have chosen private counsel. Moreover, [i]f Smith had decided to appeal from the judgment against him he would not have needed the approval of any government department. Therefore, the reasons for which the usual 30 day time limit for filing an appeal was extended to 60 days in cases in which the 'United States or an officer or agency thereof' is a party are not applicable to Smith.

Hare v. Hurwitz, 248 F.2d 458, 462 (2d Cir. 1957).

Three years later, the Ninth Circuit confronted a case in which federal narcotics investigators were sued for abuse of process and constitutional violations. The plaintiff had (unsuccessfully) attempted to avoid an absolute immunity problem by pleading that the investigators had acted outside their lawful authority. Michaels v. Chappell, 279 F.2d 600, 602 (9th Cir. 1960). After the district court dismissed on immunity grounds, the plaintiff noticed an

appeal – but did so more than thirty days after the entry of judgment. Id. at 602. Stressing the plaintiff's earlier allegations concerning lack of lawful authority, the court rejected the plaintiff's contention that the defendants counted as "officers" for purposes of Civil Rule 73(a):

> We find no authority, either in reason or adjudicated cases, to justify such a hot and cold change of position, as appellant urges. What little authority as there appears to be is to the contrary.
>
> ... Hare v. Hurwitz, 2 Cir., 1957, 248 F.2d 458 ... indicates clearly that appellees should not be considered officers of the United States for purposes of Fed.R.Civ.P. 73.... The court reasoned that the reason for the additional time allowed the government, to allow time for several echelons of authority to consider the proposed appeal, did not exist in a case where the employee was sued in his individual capacity, and thus the extended time was not intended to be applied in suits of this nature.

Michaels, 279 F.2d at 602. The problem in *Michaels* appears to have been slightly different from that in *Hare*, because in *Michaels* the court emphasized the plaintiff's allegations that the defendants had acted outside their authority, rather than stressing the fact that the suit was brought against them in their individual capacities. But the *Michaels* court clearly followed *Hare*'s approach by analyzing Civil Rule 73(a)'s purpose and refusing to apply the provision to a questionable set of facts when it concluded that the provision's purpose would not be served.

Congress shed some light on the relationship (at least as of the 1960s) between the terms "officer" and "employee" when in 1966 it codified the civil service laws as Title 5 of the United States Code.********** 5 U.S.C. § 2104, as enacted in 1966, provided:

> (a) For the purpose of this title, "officer", except when specifically modified, means a justice or judge of the United States and an individual who is--

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********** See Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 378. The Act was designed "[t]o enact title 5, United States Code, 'Government Organization and Employees,' codifying the general and permanent laws relating to the organization of the Government of the United States and to its civilian officers and employees." Act of Sept. 6, 1966, 80 Stat. 378.

(1) required by law to be appointed in the civil service by one of the following acting in an official capacity--

(A) the President;
(B) a court of the United States;
(C) the head of an Executive agency; or
(D) the Secretary of a military department;

(2) engaged in the performance of a Federal function under authority of law or an Executive act; and

(3) subject to the supervision of an authority named by paragraph (1) of this section, or the Judicial Conference of the United States, while engaged in the performance of the duties of his office.**********

5 U.S.C. § 2105(a) provided:

(a) For the purpose of this title, "employee", except as otherwise provided by this section or when specifically modified, means an officer and an individual who is--

(1) appointed in the civil service by one of the following acting in an official capacity--

(A) the President;
(B) a Member or Members of Congress, or the Congress;
(C) a member of a uniformed service;
(D) an individual who is an employee under this section; or
(E) the head of a Government controlled corporation;

(2) engaged in the performance of a Federal function under authority of law or an Executive act; and

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********** 80 Stat. 408-09.

(3) subject to the supervision of an individual named by paragraph (1) of this subsection while engaged in the performance of the duties of his position.**********

The Revision Note to Section 2105 stated: "Subsection (a) is supplied to avoid the necessity of defining 'employee' each time it appears in this title. The subsection is based on a definition worked out independently by the Civil Service Commission and the Department of Labor and in use by both for more than a decade." These new statutory definitions might thus shed some light on usage in the 1950s and 1960s.

The definitions in Sections 2104 and 2105, by their own terms, do not apply to Title 28. But in the same legislation that included those sections, Congress also adopted 28 U.S.C. § 516, which states: "Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General."********** Section 516 traces its origins back to Revised Statute § 361, which provided:

> The officers of the Department of Justice, under the direction of the Attorney-General, shall give all opinions and render all services requiring the skill of persons learned in the law necessary to enable the President and heads of Departments, and the heads of Bureaus and other officers in the Departments, to discharge their respective duties; and shall, on behalf of the United States, procure the proper evidence for, and conduct, prosecute, or defend all suits and proceedings in the Supreme Court and in the Court of Claims, in which the United States, or any officer thereof, as such officer, is a party or may be interested; and no fees shall be allowed or paid to any other attorney or

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********** 80 Stat. 409.

********** Pub.L. 89-554, § 4(c), Sept. 6, 1966, 80 Stat. 613. At the same time, Congress also enacted 28 U.S.C. § 519, which provides: "Except as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party, and shall direct all United States attorneys, assistant United States attorneys, and special attorneys appointed under section 543 of this title in the discharge of their respective duties."

counselor at law for any service herein required of the officers of the Department of Justice, except in the cases provided by section three hundred and sixty-three.

The Revision Notes that accompany Section 516 explain why the current statute (adopted in 1966) is more streamlined:

> The section is revised to express the effect of the law. As agency heads have long employed, with the approval of Congress, attorneys to advise them in the conduct of their official duties, the first 56 words of R.S. § 361 and of former section 306 of title 5 are omitted as obsolete.
>
> The section concentrates the authority for the conduct of litigation in the Department of Justice. The words "Except as otherwise authorized by law," are added to provide for existing and future exceptions (e.g., section 1037 of title 10). The words "an agency" are added for clarity and to align this section with section 519 which is of similar import. The words "as such officer" are omitted as unnecessary since it is implied that the officer is a party in his official capacity as an officer.
>
> So much as prohibits the employment of counsel, other than in the Department of Justice, to conduct litigation is omitted as covered by R.S. § 365, which is codified in section 3106 of title 5, United States Code.

The explanation for the omission of "as such officer" indicates that Section 516's drafters used "litigation in which ... an ... officer ... is a party" to refer to official-capacity suits against officers.

Meanwhile, an Advisory Committee on Appellate Rules had begun work in the early 1960s. By 1966, the Appellate Rules Advisory Committee had produced a draft of proposed rules on appellate procedure;********** and the new Appellate Rules took effect in 1968. Appellate Rule 4(a) carried forward the 60-day period, providing that "if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days of" entry

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********** The Supreme Court took "that part of the Appellate Rules Committee's work which related to the ground covered by Civil Rules 73 and 75 and Criminal Rule 37 and incorporated them in the civil and criminal rules effective July 1, 1966." Robert L. Stern, *Changes in the Federal Appellate Rules*, 41 F.R.D. 297, 297 (1967).

of the judgment or order appealed from. The Committee Note observed that Rule 4(a) was "derived from [Civil Rule 73(a)] without any change of substance."

The next development relevant to our story occurred in 1971, when the Court held that a Fourth Amendment violation "by a federal agent acting under color of his authority gives rise to a cause of action for damages." Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 389 (1971). Since *Bivens* actions are brought against federal officials in their individual capacities, they have come to constitute – as the Solicitor General notes – a type of litigation in which the applicability of the 60-day appeal period may frequently be in question.

In 1980, the Fifth Circuit became the next court of appeals to confront the meaning of the term "officer" for purposes of the sixty-day appeal period. The suit was one by NeSmith, "a civilian technician in the Georgia Air National Guard," against various defendants including the Adjutant General of Georgia. NeSmith v. Fulton, 615 F.2d 196, 197-98 & n.1 (5th Cir. 1980). Thirty-four days after the entry of judgment dismissing NeSmith's Section 1983 complaint (which challenged "his civilian dismissal and denial of his military reenlistment"), NeSmith filed his notice of appeal. Id. at 198. In assessing the applicability of the sixty-day period, the Fifth Circuit first concluded that NeSmith did not qualify as a federal "officer" under Rule 4(a):

> As a civilian technician employed under the National Guard Technicians Act ... , NeSmith enjoyed the status of federal employee.... However, NeSmith's federal employee status did not make him an "officer or agency" of the United States for purposes of Rule 4(a) of the Federal Rules of Appellate Procedure. The role of civilian technician did not vest any managerial decisions or other significant authority in him, see Buckley v. Valeo, 424 U.S. 1, 125-126 ... (1976) .... Nor did a suit by NeSmith involve the United States as a real party in interest requiring various government officials to review the decision to appeal. See Michaels v. Chappell, 279 F.2d 600, 602 (9th Cir. 1960) ... ; Hare v. Hurwitz, 248 F.2d 458, 461-62 (2d Cir. 1957). In addition, NeSmith was not an officer of the United States by virtue of his military membership in the Georgia Air National Guard, for he had not been ordered into active service.

NeSmith, 615 F.2d at 198-99. The court reasoned, however, that the suit qualified for the sixty-day period because Georgia's adjutant general was a defendant:

> It is true that an adjutant general is at least in part a state officer. In Davis v. Vandiver, supra, 494 F.2d at 832, we observed: "The principal purpose of the National Guard Technicians Act of 1968, 32 U.S.C. s 709 et seq., was to create a bifurcated nature of technician employment to confer federal status on civilian technicians while granting administrative authority to State officials, headed in each state by the Adjutant General...." However, that an adjutant general is a state officer does not preclude his simultaneously being a federal agency.... The conclusion that an adjutant general is a federal agency as well as a state officer reflects the hybrid state-federal character of the National Guard and of the role of adjutants general in administering it. We therefore ... find NeSmith's appeal timely because brought in a suit to which a federal agency is a party.

NeSmith, 615 F.2d at 199.

The Ninth Circuit's 1981 decision in *Wallace v. Chappell*, 637 F.2d 1345 (9th Cir. 1981) (per curiam) (en banc), overrruled the earlier *Michaels* decision and took a relatively broad view on the question of whether the 60-day appeal time applies in individual-capacity suits. The suit was one by U.S. Navy personnel against their superiors, seeking "money damages and injunctive relief for alleged racial discrimination in job assignments, schooling, punishment, quarterly marks and skill ratings." Id. at 1346. Thirty-five days after entry of the judgment dismissing their suit, the plaintiffs filed a notice of appeal. Id. Presumably out of a desire to avoid various possible immunity defenses, the plaintiffs had alleged that "the defendants acted 'ultra vires' and outside the scope of their official duties." Id. But, as the court observed, "the complaint also alleged acts and omissions of the defendants that could occur only in their line of duty as naval officers, and prayed for injunctive relief to change their behavior." Id. at 1346-47. The *Wallace* court noted that *Michaels* had "held in effect that a party could not take inconsistent positions" – i.e., "that a plaintiff who contended (in order to avoid a defense of immunity) that the government agent was acting as a private citizen, could not, upon appeal, contend that the defendant was a government officer on government business in order to avail himself of the 60-day rule." Id. at 1347. Rejecting the notion "that Rule 4(a) should be narrowly construed to foreclose appeals," the *Wallace* court noted its "preference for a liberal reading of Rule 4(a) in order to alleviate uncertainty when the government has even an indirect interest." Id. The court observed that "[t]he defendants are 'officers of the United States' within a literal reading of Rule

4(a) and the 60-day rule is strongly indicated." Id.********** But the court cautioned that "a 'literal reading' is not entirely dispositive," and that "[s]ome interpretation of the language is required." Id. The court reasoned that "Congress intended the reference to officers of the United States to be read in context with their activities, authority, and duties":

> A workable rule would be one that looks at who represents the parties and the relationship of the parties to each other and to the government during the course of the conduct that gave rise to the action. Whenever the alleged grievance arises out of a government activity, the 60-day filing period of Rule 4(a) applies if: (a) the defendant officers were acting under color of office, *or* (b) the defendant officers were acting under color of law or lawful authority, *or* (c) any party in the case is represented by a government attorney. In this case, all of the relevant indicators point to the 60-day rule.

Id. at 1347-48.

The Fifth Circuit soon followed the Ninth Circuit's reasoning concerning individual-capacity suits. In Williams v. Collins, 728 F.2d 721, 722 (5th Cir. 1984), "Williams sued nine federal officials who participated in personnel and administrative proceedings which resulted in his removal from federal employment."********** Noting that "Williams has purported to sue the defendant government officers only in their 'individual' capacity," the court – quoting

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********** The *Wallace* court's brief analysis of this issue suggests that the court did not view the term "officer" as extending to all federal employees (such as, for example, the enlisted personnel who were plaintiffs in the action):

> Permanent appointments to grades above chief warrant officer in the Regular ... Navy "shall be made by the President, by and with the advice and consent of the Senate." 10 U.S.C. s 5572, s 5001(a)(1), (9). Among the defendants here are a commander, a lieutenant commander, and three lieutenants. The briefs and the complaint are silent on whether any are reserve officers. The complaint states that the defendants essentially constitute the command group aboard USS DECATUR. We assume for this case that defendants are "officers of the United States."

Wallace, 637 F.2d 1347 n.4.

********** The question previously addressed by the Fifth Circuit in *NeSmith* – namely, who counts as a federal "officer" as opposed to a federal "employee" – did not arise in *Williams*, presumably because the defendants included military commanders in the Army Corps of Engineers, see 728 F.2d at 722 n.1.

Wallace's test – held that the 60-day appeal time limit was nonetheless applicable. *Williams*, 728 F.2d at 723-24.

In 1987, the Tenth Circuit followed *NeSmith*'s view of the term "officer." See Costner v. Oklahoma Army Nat. Guard, 833 F.2d 905, 906-07 (10th Cir. 1987). Costner, a former unit personnel technician with (and former member of) the Oklahoma National Guard, appealed the dismissal of his federal age discrimination suit but filed his notice of appeal more than 30 days after entry of judgment. The court noted that Costner had originally named one Gibson, a Lieutenant Colonel in the U.S. Army as a defendant, and that Gibson would clearly qualify as an "officer of the United States" for purposes of Rule 4(a). But because Costner had voluntarily dismissed his claims against Gibson, the court reasoned that it was required to address "whether the Oklahoma National Guard or Major General Robert M. Morgan, the defendants named in plaintiff's amended complaint, may be considered as 'officials or agencies' of the United States for purposes of the time limit." Id. at 906-07. Citing *NeSmith*, the court held that Morgan, the adjutant general of the Oklahoma National Guard, qualified as a "federal officer" for purposes of determining the time for appeal. See *Costner*, 833 F.2d at 907.

Also in 1987, the Sixth Circuit noted but declined to address the circuit split concerning individual-capacity suits. Sinclair v. Schriber, 834 F.2d 103 (6th Cir. 1987), involved a continuation of litigation that had already given rise to Supreme Court holdings "that the Fourth Amendment does not allow warrantless wiretaps in cases involving domestic threats to national security, and ... that Attorney General John Mitchell had immunity for wiretaps that he authorized in violation of but before" the holding concerning warrantless wiretaps. In *Sinclair*, the plaintiffs had sued "FBI agents who performed the wiretaps that Mitchell authorized," alleging "that these agents exceeded the authority that Mitchell gave them and violated plaintiffs' Sixth Amendment right to counsel by overhearing plaintiffs' conversations with their attorneys." Id. at 104. The defendants sought to appeal the district court's denial of summary judgment on immunity grounds, but the panel majority held that the appeal failed for lack of jurisdiction because it did not come within the collateral order doctrine. See id. at 104-05. In a footnote, the majority observed:

> An issue we leave open is whether the appeal was timely filed. The notice of appeal was filed more than 30 days but within 60 days after Judge Joiner's order was filed....

> As we understand it, at this juncture only damages are sought against the defendants personally, but they are for actions allegedly taken by defendants while officers or agents of the United States, and we note also that their defense has been undertaken below and in these proceedings by the Civil Division of the Department of Justice. Our circuit has not yet directly addressed this question. The Second Circuit denied the defendant the benefit of the 60-day rule in a suit against him seeking damages arising out of his negligence in operating a federal government car on business, notwithstanding that the United States Attorney had appeared on his behalf. Hare v. Hurwitz, 248 F.2d 458 (1957). The Ninth Circuit adopted Hare without analysis in Michaels v. Chappell, 279 F.2d 600 (1960) ... , but later reversed itself in Wallace v. Chappell, 637 F.2d 1345 (1981) (en banc). The Wallace case was later adopted by the Fifth Circuit without discussion in Williams v. Collins, 728 F.2d 721 (1984). In view of our finding that the order appealed from was not final in all events, we need not determine whether the appeal is doubly dead for want of timeliness as well.

Sinclair, 834 F.2d at 105 n.3.

An unpublished 1991 decision from the Seventh Circuit likewise identified the circuit split and likewise equivocated. A pro se prisoner plaintiff sought to appeal the dismissal of his civil rights complaint, which alleged "misconduct on the part of an Indianapolis police officer – defendant Tammie Terrell – and an employee of the Indianapolis office of the Immigration and Naturalization Service (INS) – defendant Larry Wall." Diaz v. Terrell, 1991 WL 114464, at *1 (7th Cir. 1991) (unpublished opinion). In holding Diaz's appeal timely, the court considered but did not resolve the question of whether Wall's presence in the suit triggered the 60-day appeal period:

> One could argue that because the United States is a party to this action through INS agent Larry Wall, Diaz had sixty days from April 13 to file his appeal. See Fed.R.App.P. 4(a)(1); Wallace v. Chapelle, 637 F.2d 1345, 1348 (9th Cir.1981) (en banc); but see Hare v. Hurwitz, 248 F.2d 458, 462 (2nd Cir.1957). Even if the U.S. was not a party, the district court found that Diaz delivered his notice of appeal to prison authorities on May 10, 1989. Therefore his notice of appeal, received from

prison authorities on May 17, was within the 30 day time limit. See Houston v. Lack, 487 U.S. 266 (1988).

Diaz, 1991 WL at *1.

Meanwhile, in the spring of 1991, the Supreme Court had transmitted to Congress the 1991 amendment to Rule 4. That amendment added new subdivision (a)(6) in order to "provide[] a limited opportunity for relief in circumstances where the notice of entry of a judgment or order, required to be mailed by the clerk of the district court pursuant to [Civil] Rule 77(d) ... , is either not received by a party or is received so late as to impair the opportunity to file a timely notice of appeal." 1991 Committee Note to Rule 4(a). The transmittal note accompanying the 1991 amendment stated: "Upon transmittal of this rule to Congress, the Advisory Committee recommends that the attention of Congress be called to the fact that language in the fourth paragraph of 28 U.S.C. § 2107 might appropriately be revised in light of this proposed rule."**********

On December 9, 1991 – a few days after the 1991 amendment to Rule 4(a) took effect – Congress amended Section 2107 to conform the statute to the Rule (the amendment was part of a package of technical amendments). As the House Report noted, "The first sentence of new subsection (c) [of Section 2107] uses language almost identical to that in the first sentence of current [Appellate] Rule 4(a)(5).... The remainder of the language is almost identical to that found in proposed [Appellate] Rule 4(a)(6), ... which is scheduled to become effective on

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********** The Standing Committee's September 1990 report to the Judicial Conference explained:

> The Advisory Committee has ... suggested that, if the proposed amendment to Appellate Rule 4 is adopted, the Judicial Conference recommend that Congress amend the fourth paragraph of 28 U.S.C. § 2107 to conform to amended Appellate Rule 4(a). The Advisory Committee has also suggested that, whether or not Appellate Rule 4(a) is amended, the Congress eliminate the inconsistency between the current version of Rule 4 and the provision of 28 U.S.C. § 2107 that pertains to appeals in admiralty cases. Section 2107 provides for a period of 90 days to file such an appeal, while Rule 4(a)(1) sets a 30-day time limit for filing civil appeals unless the United States is a party, in which case the period is 60 days. Although there is case law indicating that Rule 4(a)(1) supersedes section 2107, the conflict continues to be troublesome.

Report of the Judicial Conference Committee on the Rules of Practice and Procedure, September 1990, at 2.

December 1, 1991."********** As this observation indicates, by the time of the amendment to Section 2107, amendments to Rule 4(a) had altered the functioning of the appeal time in significant ways – not just by virtue of the 1991 amendment, which added subdivision (a)(6), but also by virtue of the 1979 amendment, which had changed the framework for extensions of time to appeal by adding subdivision (a)(5). The House Report is worth quoting at some length:

> [A] fourth technical error arises from the proposed amendments to the Federal Rules of Appellate Procedure. The amendments to Rule 4(a)(5), which relates to authorization for extension of time to file notices of appeal, create a conflict with the current statutory provisions found in section 2107 of title 28, United States Code. If the rule change take effect, without modifications to the statutory text, questions may arise about which of the different provisions is controlling. The result will breed mindless litigation. As aptly observed by the Chairman of the Standing Committee on Rules of Practice and Procedure, the Honorable Robert E. Keeton, "doubts about the consistency of meaning of the statute and the rule could lead to wastefully expensive litigation and inadvertent loss of rights of appeal in a procedural snarl.***" In the view of the Committee, this snarl can be avoided with the curative legislation found in section 12 of S. 1284, as amended.
>
> The Committee is mindful of the fact that the various Rules Enabling Acts permit rules to supersede inconsistent procedural statutes previously enacted by the Congress. In 1988 the House of Representatives passed legislation proposed by this Committee to eliminate the supersession clauses, finding them to be unnecessary and of dubious constitutionality. The Senate would not accept the proposal but a nonstatutory agreement was brokered by Chief Justice Rehnquist that allowed other needed reforms to be enacted into law.
>
> In a letter to the Honorable Peter W. Rodino, Jr., the Chief Justice reiterated that the judiciary did not object to repeal of the supersession clauses. However, if they remained in the statute books, the Chief Justice suggested that the judicial branch

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********** H. Rep. No. 102-322, at 10, 1991 U.S.C.C.A.N. 1303, 1310 (1991).

would not supersede statutes without giving Congress every opportunity to examine the proposals. Chief Justice Rehnquist observed:

> The Judicial Conference and its committees on rule have participated in the rules promulgation process for over a half century. During this time they have always been keenly aware of the special responsibility they have in the rules process and the duty incumbent upon them not to overreach their charter. The advisory committees should undertake to be circumspect in superseding procedural statutes. At the very least, we will undertake to identify such situations when they arise so that the Congress will have every opportunity to examine these instances on the merits as part of your review. This is generally the approach we have undertaken in the past and I assure you that it will continue to be the standard operating procedure of the Standing Committee on Rules of Practice and Procedure and its advisory committees on rules.

The Committee has every expectation that the Chief Justice will remain true to his word.**********

The 1991 amendment did not alter Section 2107's language concerning the 60-day appeal time, except to designate that sentence as subsection (b) of the amended Section 2107.

The next relevant development occurred in 1995, when the Fourth Circuit adopted *Wallace*'s broad approach to the treatment of individual-capacity suits. In Buonocore v. Harris, 65 F.3d 347, 350 (4th Cir. 1995), "a homeowner alleged that two law enforcement officers, after obtaining a warrant to search his home, invited a private person to engage in an independent general search of the home for items never mentioned in the warrant." Buonocore sued the officers and other defendants, asserting various claims; by the time of the Fourth Circuit's decision, the district court had dismissed all of Buonocore's claims except his *Bivens* claims against the two officers. Id. at 351-52. After the district court refused to grant the officers' motion for summary judgment on immunity grounds, the officers appealed, but one of them filed his notice of appeal more than 30 days after the entry of the relevant order. The court held the

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********** H. Rep. No. 102-322, at 5-6, 1991 U.S.C.C.A.N. 1303, 1305 - 06 (1991) (footnotes omitted).

60-day appeal period applicable despite the fact that the officers were sued in their individual capacities:

> In general, courts have construed Rule 4(a)(1) broadly.... For example, it has been held that the rule does not require the United States to be a party to the appeal.... Nor need the United States even have an interest in the particular order being appealed....
>
> In *Wallace v. Chappell*, ... the Ninth Circuit noted it was adopting "a liberal reading of Rule 4(a) in order to alleviate uncertainty when the government has even an indirect interest" in a case. It then enumerated three factors, any of which, if present in a particular case, would permit invocation of the sixty-day appeal period. Under Wallace, the sixty-day rule applies if:
>
> > (a) the defendant officers were acting under color of office, *or* (b) the defendant officers were acting under color of law or lawful authority, *or* (c) any party in the case is represented by a government attorney.
>
> Id. at 1348 (emphasis in original).
>
> In this case, not one, but all three *Wallace* factors, appear to be present. First, notwithstanding the fact that Harris and Cundiff are being sued in their personal capacities ... , it is clear that when conducting the search, Harris and Cundiff were "acting under color of" their respective offices, i.e. as a federal agent and a state police officer assisting a federal agent, respectively.... Secondly, it is equally clear that they were conducting the search "under color of law."..... Furthermore, since Harris was represented by government counsel until October 27, 1994-three months after Cundiff filed his notice of appeal-arguably, a "party in the case" was "represented by a government attorney." Moreover, at the time the district court issued the order which Cundiff appeals, the United States was indeed a named party in this case. It was this order-issued on June 6, 1994-that initiated the appeal period. Therefore, despite the fact that the June 6 order also dismissed the United States as a party to the case, the United States was a party up until the moment the order was issued.

> For all of these reasons, we conclude that Cundiff was entitled to the extended sixty-day period in which to file his appeal. The government's lack of participation or interest in this appeal does not affect Cundiff's entitlement to the extended filing period.

Buonocore, 65 F.3d at 352-53. *Buonocore* thus appears to adopt *Wallace*'s approach to individual-capacity suits. But it does equivocate somewhat, by including a discussion of the United States' involvement as a party.**********

C. Tentative inferences concerning the scope of Section 2107(b)

What inferences can we draw from this record concerning the issues relevant to the proposed amendment to Rule 4(a)(1)(B)? I should emphasize at the outset that any such inferences must be tentative. The narrative above attempts to capture the relevant developments, but it may not be comprehensive; because the questions discussed in Part IV of this memo did not occur to me until shortly before the agenda book was due for the Committee's spring meeting, I did not have as much time as I would have preferred in which to research the matter. Nonetheless, in the hope that even tentative inferences may be of use to the Committee in determining its next steps, I discuss the officer / employee question in Part IV.C.1 and the individual-capacity question in Part IV.C.2. Part IV.C.3 assumes for argument's sake that certain individual-capacity suits may be permitted, and discusses whose view of the facts should control in determining whether a given individual-capacity suit qualifies for the 60-day appeal period.

As will be seen, the conclusions that might be drawn from the evidence may vary depending on one's method of statutory interpretation; in the discussion that follows, I have noted instances where differing methods may produce different results. I should also note a peculiarity about the caselaw. The few cases that bear directly upon the questions addressed in this memo – *Hare*, *Michaels*, *NeSmith*, *Wallace*, *Williams*, *Costner*, *Sinclair*, *Diaz*, and *Buonocore* – all interpret the

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********** That part of the court's analysis presumably referred to the fact that the district court had earlier dismissed Harris as a party with respect to Buonocore's trespass claim and had substituted the United States in his stead "under the Federal Employees Liability Reform and Tort Compensation Act, 28 U.S.C. § 2679(d)." *Buonocore*, 65 F.3d at 351. The district court subsequently dismissed that claim, in the same order from which the officers were seeking to appeal. See id.

rule-based sixty-day period, and none of them mentions Section 2107. Thus, the light these cases shed on the statute's meaning is indirect – but, I would argue, nonetheless apposite, because with respect to the sixty-day period the statute's language, context and history are so closely entwined with the Rule's.

1. The officer / employee question

My tentative conclusion is that one could construct a strong textualist argument that the term "officer" in Section 2107(b) does not extend to all federal employees. The sparse caselaw on the topic appears to agree that not all federal employees are "officers" for purposes of the sixty-day appeal period. On the other hand, if one is willing to take either a purposive or an evolutive approach to statutory interpretation, one can argue that Section 2107(b) should be read to extend to federal employees who would not (for other purposes) be viewed as federal officers.

The textualist argument would begin by noting that Section 2107(b) refers to "officers" and not to employees. Decisions interpreting the Constitution's Appointments Clause have established a distinction between "officers" (even "inferior" officers) and other federal employees; and some of those decisions pre-dated the enactment of the 1948 Act. Not only did nineteenth-century terminology (as evidenced by the Revised Statutes) distinguish "officers" from "clerks" and "employés," but much more recent sources made a similar distinction. The Federal Tort Claims Act – both as enacted in 1946 and as revised in the 1948 legislation – defined "employee" to "include[] officers or employees," displaying the view that employee was the broader of the two terms. The 1948 Act's version of the federal officer removal statute – 28 U.S.C. § 1442 – authorized removal by "[a]ny officer of the United States or any agency thereof, or person acting under him," and the Reviser's Note to that provision stated an intent to cover "all officers and employees" of the United States. The 1966 civil service legislation, of course, cannot provide direct evidence of usage in 1948, and the definitions in Title 5 do not apply to provisions in Title 28; but it is nonetheless worthwhile to note Title 5's statutory distinction between federal "officers" (defined in 5 U.S.C. § 2104) and federal "employees" (defined in 5 U.S.C. § 2105).

If, instead, one looks to the purpose of the 1948 legislation,********** one could argue that Section 2107(b) should be read to include all federal employees. The Reviser's Note to Section 2107 points us to the Committee Note to the 1946 amendments to Civil Rule 73(a). That Committee Note indicates that the purpose of the 60-day appeal provision in Rule 73(a) was to ensure that the United States had adequate time to determine whether to take an appeal in cases where it represented a federal officer. It might have been the case that in the late 1940s the United States was more likely to provide representation to a federal officer than to one who was a federal employee but not an officer; I have not had a chance to research that question. At the present time, though, the DOJ's regulations explicitly provide that the federal government may provide representation to "a federal employee (hereby defined to include present and former Federal officials and employees)," so long as "the actions for which representation is requested reasonably appear to have been performed within the scope of the employee's employment and the Attorney General or his designee determines that providing representation would otherwise be in the interest of the United States." 28 C.F.R. § 50.15(a). In all such suits, the government is likely to need the extra time – whether the person represented is a federal officer or some other federal employee. Thus, the purpose of the sixty-day provision would be served by interpreting "officer" to include federal employees.

The cases rarely address who qualifies as an officer for purposes of the sixty-day period. The most extensive discussion of that question comes in the *NeSmith* case, which takes the view that not all federal employees qualify as "officers" for purposes of the sixty-day appeal time. Likewise, the Ninth Circuit's discussion in *Wallace* – the case that is ordinarily noted for its holding that individual-capacity suits can qualify for the sixty-day period – suggests that the court did not view all federal employees as federal "officers" for purposes of the sixty-day provision. On the other hand, the fact that the Fourth Circuit did not pause in *Buonocore* to examine whether a special agent of the BATF qualified as an "officer" might suggest a somewhat less strict approach to the question.

********** Purposive interpretation would not have been unfamiliar to lawyers in the 1940s and 1950s. See, e.g., Felix Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 538-39 (1947) ("Legislation has an aim; it seeks to obviate some mischief, to supply an inadequacy, to effect a change of policy, to formulate a plan of government. That aim, that policy ... is evinced in the language of the statute, as read in the light of other external manifestations of purpose."); see also Henry M. Hart, Jr. & Albert M. Sacks, Basic Problems in the Making and Application of Law 1374-80 (William N. Eskridge, Jr. & Philip P. Frickey eds. 1994).

2. The individual-capacity question

The question of whether the 60-day period can apply to individual-capacity suits is hard to answer using a purely textualist approach, though such an approach could permit one to argue that some individual-capacity suits should be included. Section 2107's legislative history could be used to ground an argument that individual-capacity suits should be excluded. But, on the other hand, that history also could form the basis of a purposive argument for including some individual-capacity suits.

Section 2107's text refers simply to an "action, suit or proceeding in which the United States or an officer or agency thereof is a party." The term "officer" obviously cannot mean *all* suits in which a federal officer is a party: Take, for example, a diversity suit against a federal officer arising from an injury suffered by a child attending a birthday party at the federal officer's house. The noscitur a sociis canon counsels us to interpret "officer" in light of the other listed terms – an analysis which tells us that the term "officer" should be limited to contexts that have something to do with the officer's federal employment. But this does not prevent one from arguing – based on a purely textualist approach – that "officer" includes individual-capacity suits, so long as the suit in question has to do with the officer's employment by the federal government.

If we are willing to consult Section 2107's legislative history, the analysis becomes richer though not necessarily more determinate. As noted above, the 1948 Reviser's Note to Section 2107 points us to the Committee Note to the 1946 amendments to Civil Rule 73(a). That Committee Note indicates that the purpose of the 60-day appeal provision in Rule 73(a) was to ensure that the United States had adequate time to determine whether to take an appeal in cases where it represented a federal officer. If one takes a purposive approach to interpretation, then the current DOJ regulations support the notion that including personal-capacity suits in the sixty-day provision furthers the provision's goals (so long as the actions out of which the suit arises reasonably appear to have been performed within the scope of the employee's employment such that the federal government may provide representation).

However, if one uses the legislative history to elucidate the meaning of Section 2107 as it might have been understood in 1948, then one could find reason to argue that Section 2107(b) might not encompass individual-capacity suits. The 1946 Committee Note to Civil Rule 73(a)

states that "[t]he term 'officer' is defined in amended Rule 81(f)." And, as discussed above, the 1946 Committee Note to Civil Rule 81(f) raises at least some doubt as to whether a "suit ... in which .. an officer ... is a party" would have been clearly understood to refer to personal-capacity as well as official-capacity suits.

One obviously cannot view a statute enacted in 1966 as direct evidence concerning the meaning of a statute enacted in 1948. But as noted in Part IV.B., the differences between 28 U.S.C. § 516 (adopted in 1966) and the predecessor provision in the Revised Statutes are suggestive. Revised Statutes § 361 referred to certain suits "in which the United States, or any officer thereof, as such officer, is a party or may be interested." The drafters of Section 516 instead chose to refer to "litigation in which the United States, an agency, or officer thereof is a party, or is interested." As the 1966 Revision Note observed, "The words 'as such officer' are omitted as unnecessary since it is implied that the officer is a party in his official capacity as an officer."

More directly on point, of course, are the cases that have addressed the sixty-day appeal time's application to individual-capacity suits. As noted in Part IV.B. above, there is a circuit split between the Second Circuit's narrow approach (see *Hare*) and the broader, multi-factor approach adopted by the Ninth Circuit (*Wallace*), the Fifth Circuit (*Williams*), and the Fourth Circuit (*Buonocore*). The Sixth Circuit (*Sinclair*) has declined to enter the debate. The Seventh Circuit in an unpublished opinion (*Diaz*) noted that "one could argue" that a *Bivens* suit qualified for the sixty-day period, but avoided the question by holding that in any event the notice of appeal was filed within the thirty-day period under the prison mailbox rule.

3. Whose view of the facts should control

If one assumes that individual-capacity suits can come within the sixty-day appeal time so long as the suit arises from acts or omissions in connection with the defendant's federal duties, one should next ask whether Section 2107 has anything to say on the subject of whose view of the facts should control the determination as to whether the act or omission in question was in connection with the defendant's federal duties. *(Wallace*, *Williams* and *Buonocore*, which held

the sixty-day period available in some individual-capacity suits, did not address the question of whose view of the facts should control.)

A textualist approach gives even less insight into this question than into the question of whether individual-capacity suits can come within the 60-day appeal period. A purposive approach may shed somewhat more light: Since the goal of the 60-day appeal period is to give the government extra time when considering whether to appeal, the period should apply whenever a colorable argument has been made by any party in the litigation that the defendant acted in connection with his or her federal duties. In such cases, the government may decide (or may already have decided) to provide representation, and the extra appeal time is warranted. The availability of the 60-day appeal period should not be subject to second-guessing by the court of appeals, so long as the assertion that the defendant acted in connection with his or her federal duties is colorable.

V. Conclusion

Based on the analysis tentatively sketched above, it would seem that at least one aspect of the published Rule 4(a)(1)(B) proposal may expand the scope of the sixty-day appeal time beyond that provided in Section 2107(b). Specifically, stating that the sixty-day appeal time extends to cases involving federal "officers or employees" – rather than to cases involving federal "officers" – may extend beyond the statutory provision's scope.

It is not as clear that the published proposal's inclusion of certain individual-capacity suits extends beyond the statutory provision's current scope. One could argue the question either way. Under the view taken by the Second Circuit in *Hare* – or a view that uses Section 2107's legislative history and stresses the original meaning of the provision as of 1948 – one could conclude that the published provision's inclusion of individual-capacity suits expands the reach of the sixty-day appeal period. By contrast, under the view taken by the Fourth, Fifth and Ninth Circuits – or a view that stresses a purposive approach to interpreting Section 2107 – one could conclude that the current statutory provision extends to some individual-capacity suits.

I believe that it would be useful for the Committee to have the benefit of further study of these issues before it decides how to proceed concerning the FRAP 4 and FRAP 40 proposals. Additional research on the questions discussed in this memo, and input from the Department of Justice, may help to illuminate the relevant concerns and the relative benefits of alternative courses of action. I therefore suggest that the Committee hold Item 03-09 for further study.

Encl.

Excerpts from Webster's New International Dictionary of the English Language (2d ed. 1941):

em'ploy-ee' (ĕm'ploi-ē'; ĕm-ploi'ē; 66), **em-ploy'é** (ĕm-ploi'ē *or, esp. Brit.*, ŏm-ploi'ā; *F.* äN'plwà'yā'), **employe**, *n.*; *pl.* **-EES** (-ēz'; -ēz), **-ÉS** (-ēz), **-ES**. [F. *employé*, past part. of *employer*.] One employed by another; one who works for wages or salary in the service of an employer; — distinguished from *official* or *officer*. See OFFICE.

of'fice (ŏf'ĭs; 185), *n.* [OF., fr. L. *officium*, prob. fr. *opus* work + *facere* to do. See OPERATE; FACT.] **1.** That which a person does for, or with reference to, another or others; a service.

> I would I could do a good *office* between you. *Shak.*

2. That which one ought to do or must do; a requirement or thing to be expected; specif.: **a** Duty connected with an occupation, position, etc.; an assigned service; one's task or part. **b** Position of trust or ministration.

3. That which is performed, or intended to be done, by a particular thing; that which anything is fitted to perform; proper action; function.

> They [the eyes] resign their *office* and their light. *Shak.*
>
> In this experiment the several intervals of the teeth of the comb do the *office* of so many prisms. *Sir I. Newton.*

4. Voiding of excretions; evacuation. *Obs. exc. Dial.*

5. a A special duty, trust, charge, or position, conferred by an exercise of governmental authority and for a public purpose; a position of trust or authority conferred by an act of governmental power; a right to exercise a public function or employment and receive the emoluments (if any) thereto belonging; as, an executive or judicial *office;* a municipal *office;* — distinguished from an *employment.* In its fullest sense an *office* embraces the elements of tenure, duration, duties, and emoluments, but the element of emoluments is not essential to the existence of an office. **b** In a wider sense, any position or place in the employment of the government, esp. one of trust or authority; also, that of an employee of a corporation invested with a part of the executive authority. **c** Official status or employment; — often personified. "The insolence of *Office.*" *Shak.*

6. A ceremonial observance, religious or social; a ceremony; a rite; esp., *pl.*, obsequies.

7. The place where a particular kind of business or service for others is transacted; a house, room, or apartment in which public officers and others transact business; the building, room, or department in which the clerical work of an establishment is done; a countinghouse; the room, etc., in which the business or work of some particular department of a large concern or institution is carried on or from which it is directed; as, the register's *office;* a lawyer's *office;* the *office* of a school or hospital; freight *office.*

8. *pl.* The apartments, attached buildings, or outhouses in which the domestics discharge the duties attached to the service of a house, as kitchens, pantries, stables, etc.

9. The company, or persons collectively, whose place of business is in an office; as, I have notified the *office.*

> In England the life insurance company is almost universally referred to as the *office.* *J. A. Jackson.*

10. Specif., any of various buildings or sets of rooms in which the business of some branch of governmental administration is conducted or from which it is directed; also, the persons, esp. the chief and his immediate assistants, who conduct or direct the business; — with a qualifying word; as, War *Office;* Colonial *Office;* Home *Office;* Foreign *Office;* Patent *Office;* Pension *Office.* In Great Britain the term is applied to all branches or departments of government business, including those (called in the United States *departments*) of which the chief is a member of the cabinet. In the United States it is applied to certain large branches of the national government's business which rank below the departments, or principal branches, and whose chiefs are not cabinet members.

11. A privy. *Colloq.*

12. A signal; hint; intimation; "tip"; as, to give one the *office* to bet. *Slang.*

13. Discharge of a duty or service; attendance. *Obs.*

14. *Eccl.* Any prescribed service or form of worship; specif.: **a** The daily service of the breviary; the canonical hours; as, to say one's *office.* **b** The daily rites as contained in the missal; as, to begin the *office* of the Mass. **c** The Communion Service. **d** The Morning or Evening Prayer. **e** [*cap.*] An occasional service; as, the Little *Office;* the *Office* of the Dead.

15. *Law.* Inquest of office.

☞ COMBINATIONS and PHRASES are:

office building	**office furniture**	**office seeker**
office fixture	**office girl**	**office-seeking**, *adj.*
office force	**office manager**	

Syn. — OFFICE, POST, APPOINTMENT, SITUATION, PLACE agree in the idea of a position, but differ somewhat in their connotations. OFFICE commonly suggests a position of (esp. public) trust or authority; POST emphasizes the idea of duty or responsibility, sometimes also of attendant difficulty or danger; as, "Choose what *office* thou wilt in the land, 't is thine" (*Shak.*); "Men like soldiers may not quit the *post* allotted by the gods" (*Tennyson*). An APPOINTMENT is an office to which one is nominated or appointed; as, the various *appointments* at the disposal of the President. SITUATION emphasizes the idea of employment, esp. in a subordinate position; as, to seek a *situation* as governess, as private secretary. PLACE, once common in the sense of high position, is now used, esp. familiarly or colloq., for position in general; as, he has found a good *place;* to lose one's *place.* The word is often employed particularly with reference to servants; as, a cook, a coachman, looking for a *place.* Cf. OCCUPATION, TRADE.

office premium. See PREMIUM.

of'fi-cer (ŏf'ĭ-sẽr; 185), *n.* [OF. *officier*, fr. ML. *officiarius*, fr. *officium*. See OFFICE.] **1.** One charged with a duty; an agent; a minister. *Obs.* "*Officers* of vengeance." *Milton.*

2. One who holds an office; specif.: **a** A person lawfully invested with an office, whether civil, military, or ecclesiastical, and whether under the state or a private corporation or the like; as, a church *officer;* a police *officer;* an *officer* of an insurance company. See OFFICE, 5. **b** In a large household or college, a chief, or, formerly, a subordinate, official engaged in domestic management or service. **c** One holding office in an institution, society, or similar organization; as, the *officers* of women's clubs; class-day *officers.*

3. a *Mil. & Nav.* One who holds a position of authority or command in an army or navy; specif., a *commissioned officer,* as distinguished from *warrant, noncommissioned,* and *petty officers.* **b** On a merchant or pleasure vessel, the master or any of the mates. The first, second, etc., mates are often called first, second, etc., *officers,* although the master is an officer.

4. A policeman, constable, bailiff, or the like; also, formerly, a jailor or executioner.

5. In some honorary orders, a member in some grade above the lowest; as, an *officer* of the Legion of Honor.

6. *Chess.* = PIECE, *n.*, 11 a.

MEMORANDUM

DATE: March 13, 2008

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 07-AP-E

As the Committee discussed at its fall 2007 meeting, the Court's decision in *Bowles v. Russell*, 127 S. Ct. 2360 (2007), has raised a number of questions concerning the nature of appeal deadlines (as well as other litigation deadlines). My October 2, 2007 memo on *Bowles* – which reviewed a number of initial questions about the decision – is enclosed; so are the *Bowles* decision and the Court's more recent decision in *John R. Sand & Gravel.*

The purpose of this memo is to update the Committee on the developing caselaw under *Bowles*. The Committee has indicated its desire to monitor such developments. And *Bowles*' implications may affect some of the proposals that are currently before the Committee.

Part I of this memo discusses further developments in the Supreme Court; it analyzes the decision in *John R. Sand & Gravel* and discusses the certiorari grant in *Greenlaw*. Part II briefly surveys court of appeals precedents that analyze *Bowles*' effect on various deadlines relating to appellate practice.[1]

I. Further developments in the Supreme Court

Both the oral argument and the resulting opinion in *John R. Sand & Gravel Co. v. United States*, 128 S.Ct. 750 (2008), reflect obliquely on the issues raised by *Bowles*. Those issues are implicated more directly in *Greenlaw v. United States*, which is set for argument on April 15.

A. John R. Sand & Gravel

John R. Sand & Gravel has nothing directly to do with appeal times; it concerns instead the

[1] With respect to the court of appeals' decisions, this memo limits its survey to decisions relating to appellate practice. Decisions analyzing deadlines that are relevant only to trial-level litigation are omitted; so are non-precedential decisions. This memo does not cover district court discussions of *Bowles*.

statute of limitations for suits filed against the United States in the Court of Federal Claims. But because the question was whether that statute of limitations is jurisdictional and thus non-waivable, both the argument and the Court's opinion touched upon *Bowles*.

During the oral argument, petitioner's counsel contended that the limitations period is merely an affirmative defense rather than a jurisdictional limit. The Chief Justice questioned that position, noting that the Court's "more recent decision in *Bowles* suggested that there may be a difference between statutory and rule limitations and also suggested that the prior history of the interpretation of a provision was highly relevant."[2] When counsel for the United States later picked up on this suggestion, his reliance on *Bowles* drew questioning from Justice Ginsburg:

> MR. STEWART: ..... I'd like to say a couple of words about *Bowles*. I think *Bowles* doesn't compel a ruling in the government's favor, but it does support our position in various respects. First, as the Chief Justice alluded to earlier, *Bowles* emphasized that time limits for filing notices of appeal had historically been treated as jurisdictional limits, and the Court said that, given the choice between calling into question some dicta in our recent opinions and effectively overruling a century worth of practice, we think the former option is the only prudent course.
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> JUSTICE GINSBURG: But, of course, *Bowles* -- I mean the Court did miss something. Everyone on the Court did, and that is that the period to file your notice of appeal was originally not in any statute. It was in the rule, the FRAP rule. The opinions, both sides, assumed that the statute came first, and the rule was adopted to conform to the statute, but in fact it was just the opposite. It was a rule, a Federal Rule of Civil Procedure, which can't affect jurisdiction. We know that. As Congress says rules of procedure don't affect jurisdiction. So there was the rule, and then the U.S. Judicial Conference said to Congress, when it referred the rule to Congress, you might consider a conforming amendment. And then the statute, after the rule came into effect, conformed to the rule. So what the Court, both sides, thought in Bowles -- we just had it in reverse.
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> MR. STEWART: I agree that the Court's opinions didn't note that fact, but I don't think that fact would or should have affected the treatment of the statute as jurisdictional. That is, once it was brought to Congress's attention that there was a potential conflict or tension between the language of the jurisdictional statute and the language of the corresponding Federal rule, Congress had the choice to make as to which should govern, and if Congress had wanted a different result from the one that was in the Federal rule, it could have enacted different language. I think it would not -- whatever we might privately think is the level of attention that Congress --

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[2] Transcript of Oral Argument at 6, John R. Sand & Gravel Co. v. United States, 128 S. Ct. 750 (2008) (No. 06-1164), 2007 WL 3265512, at *6.

JUSTICE GINSBURG: Well, Congress didn't think about it at all until the U.S. Judicial Conference said do this --

MR. STEWART: But --

JUSTICE GINSBURG: -- and the U.S. Judicial Conference wasn't thinking that thereby it became jurisdictional.

MR. STEWART: But my point is that, once this was brought to Congress's attention, Congress could have chosen to stick with other language, in which case I have no doubt that the corresponding rule would have been amended to fit the statute. Again, whatever level of attention we might privately think that Congress devoted to this question, the fact is that Congress acted as a body, passed a law, it was signed -- passed statutes in both houses. It was signed into law by the President. And from that point forward, it was a statutory rule and had to be treated as such. So I agree that this aspect of the problem wasn't addressed specifically by the opinions in *Bowles*, but I don't see any basis --

JUSTICE GINSBURG: It was addressed specifically. It was addressed that the rule -- that the -- that all of this was statute driven. But the rule before -- before there was a conforming statute, you would say, well, then it wasn't jurisdictional, right?

MR. STEWART: I think to treat it as a conforming statute suggests that, in some way, Congress was obligated to do what the advisors told it to do or was obligated to conform Section 2107(a) to the terms of the Federal rule, and that's not the case. Congress could have -- once this matter was brought to its attention, Congress could have enacted whatever statute it wanted. It chose to enact a statute that tracked the preexisting language of the rule, but from that time forward, the notice of appeal deadline was grounded in statute, and it was a statutory limit that applied to Bowles's own notice of appeal. So I don't think there is a basis for saying the case would or should have come out differently if the Court had been aware of the history of the statute's development.[3]

Ultimately, the Court held in *John R. Sand & Gravel* that the Court of Federal Claims limitation statute does set a jurisdictional time limit which must therefore be raised by the court *sua sponte*.[4] Justice Breyer, writing for a seven-Justice majority, set the stage for this holding by distinguishing between limitations periods that are waivable and those that are not:

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[3] *Id.* at 44 - 47.

[4] John R. Sand & Gravel Co. v. United States, 128 S. Ct. 750, 752 (2008).

> Most statutes of limitations seek primarily to protect defendants against stale or unduly delayed claims.... Thus, the law typically treats a limitations defense as an affirmative defense that the defendant must raise at the pleadings stage and that is subject to rules of forfeiture and waiver.... Such statutes also typically permit courts to toll the limitations period in light of special equitable considerations....
>
> Some statutes of limitations, however, seek not so much to protect a defendant's case-specific interest in timeliness as to achieve a broader system-related goal, such as facilitating the administration of claims, ... limiting the scope of a governmental waiver of sovereign immunity, ... or promoting judicial efficiency, see, e.g., Bowles v. Russell, 551 U.S. ----, --- - ----, 127 S.Ct. 2360, 2365-66, 168 L.Ed.2d 96 (2007). The Court has often read the time limits of these statutes as more absolute, say as requiring a court to decide a timeliness question despite a waiver, or as forbidding a court to consider whether certain equitable considerations warrant extending a limitations period. See, e.g., ibid. .... As convenient shorthand, the Court has sometimes referred to the time limits in such statutes as "jurisdictional." See, e.g., Bowles, supra, at 2364.[5]

The *John R. Sand & Gravel* Court's treatment of *Bowles* is interesting because it suggests that the reason why the time limit at issue in *Bowles* is jurisdictional is that its purpose is "promoting judicial efficiency." This is intriguing because *Bowles* itself did not adduce such a rationale. Rather, at the pages cited by the *John R. Sand & Gravel* Court, the *Bowles* opinion stressed "the jurisdictional significance of the fact that a time limitation is set forth in a statute," 127 S. Ct. at 2364, emphasized "the jurisdictional distinction between court-promulgated rules and limits enacted by Congress," id. at 2365, and explained why "[j]urisdictional treatment of statutory time limits makes good sense": "Within constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider. Because Congress decides whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them." Id.

B. *Greenlaw*

Greenlaw appealed from his conviction and sentence on federal drug and firearms charges. The United States did not cross-appeal. On appeal, not only did the court of appeals reject Greenlaw's challenge to his sentence, it held that the district court had erred in failing to apply a statutory mandatory minimum. It vacated the sentence and remanded for the imposition of an additional "statutory mandatory consecutive minimum sentence of 25 years." United States v. Carter, 481 F.3d 601, 608, 611 (8th Cir. 2007).

Greenlaw sought certiorari, arguing, inter alia, that the Court should resolve a "conflict over whether the cross-appeal requirement imposes a restriction on appellate jurisdiction - allowing for

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[5] *John R. Sand & Gravel*, 128 S. Ct. at 753.

no exceptions, even to correct a plain error - or a rule of practice subject to exception in appropriate cases."[6] Though the United States agreed that the court of appeals erred in increasing Greenlaw's sentence in the absence of a cross-appeal, it argued that the Court should vacate and remand rather than addressing the question of the nature of the cross-appeal requirement.[7] The Court, however, granted certiorari, ordered briefing, 128 S. Ct. 829 (2008) (memorandum), and invited separate counsel "to brief and argue this case, as *amicus curiae*, in support of the judgment below," 128 S. Ct. 976 (2008) (memorandum). The case will be argued April 15, 2008.

The issues in *Greenlaw* are complex, and this memo will not attempt to distill them. A sense of the nature of the dispute can be gleaned from the summary of argument in the United States' brief:

> I. Congress is constitutionally charged with defining the jurisdictional limits of the federal appellate courts. Congress can place limits not only on the general class of cases over which those courts have jurisdiction, but also when and under what conditions they can hear those cases. In Section 3742 of Title 18, Congress specifically defined and limited the jurisdiction of courts of appeals over sentencing errors in criminal cases. The text, structure, and history of Section 3742 compel the conclusion that the government's filing of a notice of appeal is a jurisdictional prerequisite for an appellate court to correct a sentencing error that aggrieves the government.
>
> This Court has long recognized that courts of appeals lack jurisdiction over government appeals of final judgments in criminal cases absent statutory provisions that expressly grant that authority. The Court has also construed any such authority narrowly. Acting against this background understanding, Congress conferred appellate jurisdiction over sentencing errors in Section 3742, but only in certain limited circumstances. In particular, Congress separately delineated which types of sentencing errors defendants could appeal and which types of errors the government could appeal. This Court has held that this delineation of claims places a jurisdictional limitation on appellate jurisdiction. See United States v. Ruiz, 536 U.S. 622 (2002).
>
> Section [3742] not only limits the types of errors that appellate courts have jurisdiction to correct, it also requires that the particular party aggrieved by a sentencing error file a notice of appeal in order to vest jurisdiction in the court of appeals to correct that error. As such, a notice of appeal by a defendant does not vest the court of appeals with jurisdiction to correct a sentencing error that aggrieves the

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[6] Petition for a Writ of Certiorari, Greenlaw v. United States, No. 07-330 (Sept. 7, 2007), at 5, 2007 WL 2681963, at * 5.

[7] Brief for the United States, Greenlaw v. United States, No. 07-330 (Nov. 13, 2007), at 7-8, 2007 WL 3444960, at *7 - *8.

government. Rather, the statute requires the government to file a notice of appeal to trigger court of appeals' jurisdiction to correct such an error. Section [3742]'s requirement that one of three high-ranking Department of Justice officials must personally approve any government sentencing appeal further confirms that a defendant's decision to appeal does not vest the court of appeals with jurisdiction to correct an error that aggrieves the government. That conclusion is bolstered by the structure of the statute, which provides for notices of appeal by defendants in a separate subsection from its provision authorizing notices of appeals by the government. And, given the historical limitations on government appeals in criminal cases, the statute should not be read to vest courts of appeals with jurisdiction to correct errors that aggrieve the government on the basis of only a defendant's appeal, in the absence of plain language doing so. The court of appeals thus lacked jurisdiction to order an increase in petitioner's sentence.

II. Even if the Court concludes that a government notice of appeal is not a prerequisite to an appellate court's jurisdiction to correct a sentencing error that aggrieves the government, the filing of a timely notice of a cross-appeal is a mandatory claim-processing rule that the court has a duty to enforce when the rule is timely asserted. For over two hundred years, this Court has recognized that an appellate court cannot enlarge the judgment in favor of a party that fails to file a cross-appeal. And the Federal Rules establish rigid time limitations for the filing of a cross-appeal.

These long-established rules of practice are the type of inflexible rules that do not admit of judicial exception. Where, as here, the court would lack authority under the rules to extend the time for filing a notice of appeal, it would be counter-intuitive to allow it to excuse the filing of the notice of appeal altogether. The requirement of a timely cross-appeal serves the same interests as other claim-processing rules that this Court has recognized are mandatory: it promotes the interests of the orderly function of the judicial system, provides notice to opposing parties, and advances repose of issues. The rule must be enforced when it is timely asserted. Here, petitioner timely asserted the government's failure to cross-appeal, and the court of appeals therefore should not have enlarged the judgment against him.

There is no warrant for creating an exception to this long-standing requirement in this case. Contrary to the apparent view of the court of appeals, nothing in the language or history of Rule 52(b) suggests that it creates an exception to the long-standing cross-appeal requirement. Nor is there any reason to create an exception to the cross-appeal requirement in this case, under the rubric of Rule 52(b) or otherwise. Section 3742(b) charges three high-ranking Department of Justice officials with the prosecutorial discretion to determine whether the government should appeal an erroneous sentence. Those officials are institutionally better suited to protect, and fully capable of protecting, the interests of the government and the

public with respect to such sentences. Appellate courts should not take on that role *sua sponte*.[8]

II. Court of appeals decisions analyzing *Bowles*' effect

After *Bowles*, the status of many appeal-related deadlines is in flux. As discussed in Part II.A., statutorily-backed appeal deadlines are likely to be held jurisdictional. But Part II.B. notes that some courts have now held certain entirely rule-based appeal deadlines to be non-jurisdictional. Part II.C. notes a developing split among courts concerning rule-based provisions that fill gaps in statutory appeal deadline schemes; some courts hold such provisions non-jurisdictional because they are rule-based, while other courts, focusing on the fact that the provisions fill gaps in a statutory scheme, hold even the rule-based gap-filling provisions to be jurisdictional requirements. Part II.D. notes a recent Tenth Circuit decision that addresses whether a court can raise a non-jurisdictional deadline *sua sponte*.

A. Statutory, ergo jurisdictional

My October 2, 2007 memo predicted that statutory appeal deadlines would likely be held jurisdictional. Post-*Bowles* decisions tend to confirm this, as a quick review of recent immigration-law cases illustrates.[9] 8 U.S.C. § 1252(b)(1) provides that a petition for review of an order of removal by the Board of Immigration Appeals "must be filed not later than 30 days after the date of the final order of removal." In a pre-*Bowles* case, the Second Circuit had held this deadline jurisdictional; when the court recently reaffirmed that holding, it cited *Bowles*'s emphasis on the jurisdictional nature of such statutory limits.[10] The Second Circuit applied similar reasoning to hold

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[8] Brief for the United States, Greenlaw v. United States, No. 07-330 (Feb. 14, 2008), at 8-11, 2008 WL 466092, at *8-*11.

[9] See also Marandola v. United States, 2008 WL 597528, *1 (Fed Cir. Mar. 6, 2008) (citing *Bowles* and holding that the 60-day appeal deadline set by 28 U.S.C. § 2107(b) and Rule 4(a)(1)(B) is jurisdictional).

[10] See Ruiz-Martinez v. Mukasey, 2008 WL 383228, at *15 (2d Cir. Feb. 14, 2008). The Ninth Circuit reached a similar conclusion, relying both on *Bowles* and on pre-*Bowles* caselaw:

> The provision establishing the 30-day filing period is mandatory and jurisdictional, see Stone v. INS, 514 U.S. 386, 405 ... (1995), because it is imposed by statute. See 8 U.S.C. § 1252(b)(1); cf. United States v. Sadler, 480 F.3d 932, 936-37 (9th Cir.2007). A mandatory and jurisdictional rule cannot be forfeited or waived, see Sadler, 480 F.3d at 933-34, and courts lack the authority to create equitable exceptions to such a rule. See Bowles v. Russell, --- U.S. ----,

that 8 U.S.C. § 1252(d)(1)'s exhaustion requirement[11] is a jurisdictional prerequisite.[12]

B. Entirely non-statutory, ergo non-jurisdictional

My October 2007 memo argued that, after *Bowles*, entirely non-statutory appeal deadlines should be viewed as claim-processing rules rather than jurisdictional deadlines. A number of courts agree.

The most prominent example of such a deadline is Rule 4(b)(1)(A)'s deadline for appeals by criminal defendants.[13] The Tenth Circuit, after discussing *Kontrick*, *Eberhart*, and *Bowles*, reasoned

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127 S.Ct. 2360, 2366-67 ... (2007).

Magtanong v. Gonzales 494 F.3d 1190, 1191 (9th Cir. 2007) (per curiam).

[11] Section 1252 provides in relevant part: "A court may review a final order of removal only if– (1) the alien has exhausted all administrative remedies available to the alien as of right . . . ."

[12] See Grullon v. Mukasey 509 F.3d 107, 112 (2d Cir. 2007) (citing *Bowles* and reasoning that because Section 1252(d)(1) "is a *statutory* limit on the Court's power, it is jurisdictional, not merely mandatory" (emphasis in original)).

[13] Another example – and a contrast with the decisions discussed in Part II.A. – is found in a Second Circuit decision concerning the 30-day deadline for administrative appeals (in matters other than asylum cases) from an immigration judge to the Board of Immigration Appeals. In assessing whether *Bowles* weakened prior Second Circuit precedent holding that deadline to be subject to a unique-circumstances exception, the court reasoned that "[b]ecause *Bowles* was concerned exclusively with congressional limitations on judicial authority, we must consider what, if any, statutes impose the time limits at issue in the instant case." Khan v. U.S. Dept. of Justice, 494 F.3d 255, 258 (2d Cir. 2007). Noting that the only apparently applicable time limit was set by administrative regulation rather than by statute, the court held that its prior precedent was still good law and that thus "petitioner was not jurisdictionally barred from establishing extraordinary or unique circumstances that would excuse his untimely appeal." Id. at 259.

A further example arises in the bankruptcy context. A district court certified a bankruptcy matter for review by the court of appeals under 28 U.S.C. § 158(d)(2)(A); the certification occurred before the case was docketed in the district court. Though the statute itself did not make clear whether certification by a district court is improper before the case is docketed in the district court, Interim Bankruptcy Rule 8001(f) provides that in such an instance the case is still considered to be pending the bankruptcy court and thus only the bankruptcy court can make

as follows:

> Unlike Rules 4(a)(1)(A) and 4(a)(6), Rules 4(b)(1)(A) and 4(b)(4), which govern appeals from defendants in criminal trials, do not have statutory grounding. See United States v. Sadler, 480 F.3d 932, 938 n. 6 (9th Cir.2007). Several other circuits have held that, as a result, Rule 4(b)(1)(A) is a non-jurisdictional claim-processing rule. United States v. Molina Martinez, 496 F.3d 387, 388-89 (5th Cir.2007); Sadler, 480 F.3d at 940.... This court joins those circuits in holding that Rules 4(b)(1)(A) and 4(b)(4) are "inflexible claim-processing rule[s]," which, unlike a jurisdictional rule, may be forfeited if not properly raised by the government. See Kontrick, 540 U.S. at 456 .... The timeliness requirements of Rules 4(b)(1)(A) and 4(b)(4), however, remain inflexible and "thus assure relief to a party properly raising them."

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the Section 158(d)(2)(A) certification at that time. Citing *Bowles*, the Fifth Circuit held that this error did not deprive it of jurisdiction: "Because the procedure for certification of judgments in bankruptcy cases is a court-promulgated rule and not governed by statute, certification by the district court in this case did not deprive this Court of jurisdiction." In re Scotia Pacific Co., LLC, 508 F.3d 214, 219 (5th Cir. 2007).

Yet another example is Civil Rule 23(f)'s 10-day time limit for appeals from orders granting or denying class certification. A recent Seventh Circuit case did not require the court to decide whether this time limit is jurisdictional, because the appellee timely raised the timeliness issue. But the court noted the issue:

> Bowles ... holds that statutory deadlines for appeal are jurisdictional, but read in conjunction with decisions such as Eberhart ... , holds out the possibility that deadlines in the federal rules are just claim-processing norms.... Rule 23(f) was adopted in 1998 as an exercise of the Supreme Court's power under 28 U.S.C. § 1292(e) to authorize interlocutory appeals by promulgating rules under the Rules Enabling Act, 28 U.S.C. § 2072. How much time litigants have to take interlocutory appeals is a question for the rulemaking process, which implies that the deadline is not jurisdictional....

Asher v. Baxter Intern. Inc., 505 F.3d 736, 741 (7th Cir. 2007).

Another related issue is whether a defendant's guilty plea that neither "refer[s] to a conditional plea" under Criminal Rule 11(a)(2) nor "identif[ies] issues preserved for appeal" deprives the court of appeals of jurisdiction to review claims that the defendant later wishes to raise on appeal. United States v. Jacobo Castillo, 496 F.3d 947, 950 (9th Cir. 2007) (en banc). After discussing, inter alia, *Kontrick*, *Eberhart*, and (briefly) *Bowles*, the en banc Ninth Circuit reasoned that the Criminal Rules neither expand nor contract the court's jurisdiction and, thus, that the unconditional nature of the defendant's plea did not deprive the court of jurisdiction to hear the appeal. Id. at 954.

Eberhart, 546 U.S. at 19 ....

United States v. Garduno, 506 F.3d 1287, 1290-91 (10th Cir. 2007). A recent decision by the Fifth Circuit takes the same view:

> The Government correctly cites precedent reflecting our traditional view that the time limitation in Fed. R.App. P. 4(b)(1)(A), which governs the filing of notices of appeal in criminal cases, is mandatory and jurisdictional. We would ordinarily be constrained to follow this dispositive precedent. However, a series of recent Supreme Court cases had cast doubt on our traditional view, and any remaining doubt has been eradicated by the Supreme Court's recent opinion in Bowles v. Russell. Although not directly on point, the analysis in Bowles establishes that the time limit specified in Rule 4(b)(1)(A) is mandatory, but not jurisdictional, because it does not derive from a statute.

United States v. Martinez, 496 F.3d 387, 388 (5th Cir. 2007) (footnotes omitted). That the nature of criminal defendants' Rule 4(b)(1)(A) deadline to file a notice of appeal is in question after *Bowles* is also suggested by the fact that the Supreme Court has vacated and remanded judgments in criminal cases for further consideration in the light of *Bowles*.[14]

C. Hybrid, ergo debatable

Further complications ensue if the basic deadline is set by statute but the Rules fill in statutory gaps or otherwise elaborate on the statutory framework. Here the post-*Bowles* appellate caselaw has so far centered on the nature of the timeliness requirement for tolling motions under

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[14] For example, in *Lopez v. United States* the defendant alleged that his trial counsel failed to follow his instruction to file a notice of appeal; that the district court granted him leave to file a notice of appeal "out of time"; and that the Eleventh Circuit *sua sponte* dismissed the appeal for lack of jurisdiction. See Petition for Writ of Certiorari, Lopez v. United States, No. 07-6032 (Aug. 14, 2007), at 2-3, 2007 WL 4332987, at *2-*3. The Supreme Court vacated and remanded "for further consideration in light of Bowles." Lopez v. United States, 128 S.Ct. 806, 806 (2007) (memorandum).

In another case, the Supreme Court vacated and remanded, and on remand, the Tenth Circuit applied its new caselaw to the effect "that, in light of Bowles, Federal Rule of Appellate Procedure 4(b)(1) is a claim-processing rule. United States v. Garduño, [506 F. 3d 1287, 1288 (10th Cir. 2007)]. As a result, dismissal of Mitchell's appeal, based on his failure to file a timely notice of appeal, is no longer mandatory and jurisdictional." United States v. Mitchell, 2008 WL 542130, at *2 (10th Cir. Feb. 29, 2008).

Rule 4(a)(4).[15] Rule 4(a)(4) provides, of course, that "[i]f a party timely files in the district court" certain post-judgment motions, "the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion." The statutory provision setting the deadlines for civil appeals – 28 U.S.C. § 2107 – contains no mention of such tolling motions. So is the "timeliness" requirement – set jointly by Appellate Rule 4[16] and certain Civil Rules[17] – merely a rule-based claim-processing rule? Or, given that the period being tolled by a "timely" post-judgment motion is set by statute, is the timeliness requirement jurisdictional? The Sixth and Ninth Circuits have reached differing conclusions.

A Sixth Circuit panel majority recently held that Civil Rule 59(e)'s 10-day time limit is non-jurisdictional, and that when a litigant fails to timely object to the untimeliness of a Rule 59(e) motion and the district court considers that motion, the motion counts as "timely" for purposes of Appellate Rule 4(a)(4)(A):

> "A party indisputably forfeits a timeliness objection based on a claim-processing rule if he raises the issue after the court has issued a merits decision." Wilburn v. Robinson, 480 F.3d 1140, 1147 (D.C. Cir. 2007). Because the district court ruled on the State's Rule 59(e) motion before NEF raised the issue of untimeliness, NEF has forfeited its timeliness defense.
>
> Nevertheless, NEF contends that "[t]he time for appealing the November 23, 2005 Order was not tolled because the State's Rule 59(e) motion was untimely." .... [H]owever, we conclude that, where a party forfeits an objection to the untimeliness of a Rule 59(e) motion, that forfeiture makes the motion "timely" for the purpose of Rule 4(a)(4)(A)(iv). The Rules themselves do not define "timely," but we can discern no reason for holding that an otherwise properly filed motion that was considered by the district court would fail to toll the time for filing a notice of appeal. We conclude that we have jurisdiction to entertain the State's appeal.

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[15] A similar issue arises with respect to Appellate Rule 4(a)(4)(B)(ii)'s requirement of a new or amended notice of appeal. In DL Resources, Inc. v. FirstEnergy Solutions Corp., 506 F.3d 209 (3d Cir. 2007), the Third Circuit avoided having to decide whether that requirement is jurisdictional, because in any event the appellee had timely asserted that the appellant had failed to comply with the requirement. See id. at 214 n.3.

[16] Under Rule 4(a)(4)(A), the motion must be timely and, if it is a Civil Rule 60 motion, it must be filed "no later than 10 days after the judgment is entered."

[17] Motions under Civil Rules 50(b), 52(b), and 59 are subject to 10-day time limits. Attorney fee motions, which can sometimes function as tolling motions under Appellate Rule 4(a)(4), are ordinarily subject to a 14-day time limit. See Civil Rules 54(d)(2)(B) and 58(c)(2).

National Ecological Foundation v. Alexander, 496 F.3d 466, 476 (6th Cir. 2007).[18]

The Ninth Circuit reached a different view, reasoning that because the issue of "timeliness" under Rule 4(a)(4)(A) determines the method for counting Section 2107's jurisdictional appeal deadline, the motion's timeliness must (for Rule 4(a)(4)(A)'s purposes) likewise be a jurisdictional requirement:

> The government argues that "Rule 4(a) does not incorporate a statutory time limit in its provision of tolling for Rule 59(e) or Rule 60 motions" and therefore that any failure to comply with the rule should be immunized against belated attack. However, although Fed. R.App. P. 4(a)(4) does not contain language from 28 U.S.C. § 2107, which lacks a tolling provision, the Supreme Court's decision in Bowles suggests that the same characterization applies: "Today we make clear that the timely filing of a notice of appeal in a civil case is a jurisdictional requirement." Id.
>
> And even if Bowles did not settle the matter with respect to Fed. R.App. P. 4(a)(4), we could not consider the underlying order granting the Rule 41(g) motion. In order to accept the government's argument, we would have to grant the jurisdictional benefit of tolling while denying the tolling rule's jurisdictional significance. We cannot defeat logic or text in this manner. If Fed. R.App. P. 4(a)(4) is jurisdictional, the government's motion does not qualify for tolling because it was filed outside the time frame specified in that rule. See Fed. R.App. P. 4(a)(4)(iv), (vi) (permitting tolling for such motions only if they are filed within 10 days of entry of judgment). If Fed. R.App. P. 4(a)(4) is *non* jurisdictional, satisfaction of that provision (or forfeiture of a claim that the government failed to satisfy it) would not enable us to ignore the jurisdictional 60-day rule of Fed. R.App. P. 4(a)(1). See Bowles, 127 S.Ct. at ----, Slip Op. at 8. Under either interpretation of Fed. R.App. P. 4(a)(4), the government's notice of appeal was untimely as to Judge Cooper's underlying order granting the Rule 41(g) motion and must be dismissed for lack of jurisdiction.

United States v. Comprehensive Drug Testing, Inc., 513 F.3d 1085, 1100 -01 (9th Cir. 2008).[19]

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[18] Judge Sutton concurred in the judgment. He would have construed the untimely Civil Rule 59(e) motion as a Rule 60(b) motion filed more than 10 days after entry of judgment. Thus construed, the motion would not have had a tolling effect under Appellate Rule 4(a)(4)(A). See National Ecological Foundation, 496 F.3d at 481-82 (Sutton, J., concurring in the judgment).

[19] The reasoning of *Comprehensive Drug Testing* highlights a conundrum that arises from *Bowles*: If Section 2107's appeal deadlines are jurisdictional, and if the rulemakers (absent a specific delegation of authority for that purpose) are not authorized to alter the courts' subject matter jurisdiction, then how did the rulemakers have the authority to adopt the tolling rules now contained in Rule 4(a)(4)? One answer might be that the tolling rule – which predated the

Though the *Comprehensive Drug Testing* opinion did not mention it, another Ninth Circuit case decided just before *Comprehensive Drug Testing* took a similar approach with respect to Appellate Rule 4(a)(7)(A)'s definition of the entry of judgment. Section 2107 does not define the entry of judgment; Civil Rule 58 and Appellate Rule 4(a)(7)(A) fill that gap by, among other things, setting a 150-day cap for instances when a separate document is required but never provided. Addressing the 180-day time limit produced by adding the 30-day appeal time limit to the 150-day cap set by the Rules, the Ninth Circuit held the 180-day limit jurisdictional:

> 28 U.S.C. § 2107(a) and Federal Rule of Appellate Procedure 4(a)(1) require that a notice of appeal be filed in a civil case "within 30 days after the judgment or order appealed from is entered." Fed. R.App. P. 4(a)(1)(A). Because the district court did not enter judgment on the order to compel arbitration, CCI had 180 days to appeal the order. See Fed. R.App. P. 4(a)(7)(A)(ii); see also Bowles v. Russell, --- U.S. ----, 127 S.Ct. 2360, 2363 ... (2007) (stating that "the taking of an appeal within the prescribed time is mandatory and jurisdictional" ...).
>
> CCI filed its first notice of appeal of the district court's order compelling arbitration on May 16, 2005, 287 days after the order was entered on August 2, 2004. This is well beyond the 180 days allowed by Federal Rule of Appellate Procedure 4(a)(7)(A)(ii). CCI's appeal of the district court's order compelling arbitration is untimely, and we lack jurisdiction to hear the appeal of that issue.

Comedy Club, Inc. v. Improv West Associates, 514 F.3d 833, 841-42 (9th Cir. 2007) (opinion amended Jan. 23, 2008).

D. Treatment of non-jurisdictional deadlines

It is widely recognized that courts must raise jurisdictional deadline issues *sua sponte*, and that they need not raise non-jurisdictional deadlines *sua sponte*. What is less clear is whether courts *may* raise non-jurisdictional deadlines of their own accord. A thoughtful Tenth Circuit opinion in *United States v. Mitchell* addresses this question in the context of Rule 4(b)'s deadline for criminal defendants' appeals. In *Mitchell*, the defendant filed his notice of appeal one day late and the court of appeals dismissed, *sua sponte*, for lack of appellate jurisdiction. The Supreme Court vacated and remanded for further consideration in the light of *Bowles*. United States v. Mitchell, 2008 WL 542130, at *2 (10th Cir. Feb. 29, 2008). Applying its post-*Bowles* holding in *Garduno* (discussed above), the court on remand treated the Rule 4(b)(1)(A) 10-day appeal deadline as non-jurisdictional. Noting that the government had failed to raise the timeliness issue, the court proceeded to address whether the court "could and should raise and decide the issue *sua sponte*." *Mitchell*, 2008 WL

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adoption of Section 2107, see, e.g., Leishman v. Associated Wholesale Electric Co., 318 U.S. 203, 205 (1943) – was part of the framework that Congress implicitly adopted when it enacted Section 2107.

542130, at *2.

The court noted that *Kontrick* and *Eberhart* "generally indicate ... that claim-processing rules must be raised by the parties," *id.*, but stated that those cases involved "rules that apply at the trial level where Fed.R.Civ.P. 8(c) operates as the mechanism for pleading affirmative defenses," *id.* at *3. The court next addressed the doctrine that "district courts are permitted, but not obliged, to consider, *sua sponte*, the timeliness of a state prisoner's habeas petition." Day v. McDonough, 547 U.S. 198, 209 (2006). The *Mitchell* court distinguished *Day* on the ground "that habeas proceedings are different from ordinary civil litigation and, as a result, our usual presumptions about the adversarial process may be set aside." *Mitchell*, 2008 WL 542130, at *4. "While Fed. R.App. P. 4(b) certainly impacts judicial efficiency and contributes to the finality of federal criminal sentences, it does not raise the federalism concerns so crucial in the habeas context." *Id.* Ultimately, the panel majority[20] concluded:

> Ours is an adversarial system of justice. The presumption, therefore, is to hold the parties responsible for raising their own defenses.... A narrow exception may exist, however, when the issue implicates the court's power to protect its own important institutional interests.... This principle was at work in *Day* where the court looked to the important values the habeas scheme was designed to protect and determined they went beyond the interests of the parties.... It also underlies *Kontrick* where, in an initial step in its analysis, the Court examined the purposes of the Bankruptcy Rule at issue and determined the rule functioned as an affirmative defense for the debtor.... Together, these cases suggest that when a rule implicates judicial interests beyond those of the parties, it may be appropriate for a court to invoke the rule sua sponte in order to protect those interests....
>
> This court, therefore, should look to the purposes of Rule 4(b) in addressing sua sponte application. Although they function in much the same way as a statute of limitations, the time bars of the federal rules of procedure are not necessarily for the exclusive benefit of the litigants as are statutes of limitations in civil litigation. Rule

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[20] Judge Lucero dissented. He argued:

> To the extent my respected colleagues recognize that we have discretion to dismiss, sua sponte, an appeal as untimely under Federal Rule of Appellate Procedure 4(b), even when an appellee has forfeited the issue, I concur with their opinion. I part company with the majority in articulating what circumstances justify the exercise of our discretion to dismiss. In my judgment, the time limits for filing a notice of appeal in criminal cases are of sufficient importance-to both this court and the parties it serves-that we should apply Rule 4(b) in accordance with its clear terms in all but extraordinary circumstances.

Id. at *9 (Lucero, J., dissenting) (footnotes omitted).

> 4(b) differs from most time bars, including the time bar in *Kontrick*, in that it plays an important role in ensuring finality of a criminal conviction. Finality is not solely an interest of the parties to a criminal case. It also serves societal interests and the interests of judicial administration by minimizing uncertainty and waste of judicial resources caused by undue delay....
>
> Because Rule 4(b) implicates important judicial interests beyond those of the parties, we hold that this court may raise its time bar sua sponte. This power, however, is limited and should not be invoked when judicial resources and administration are not implicated and the delay has not been inordinate.... Mitchell's notice of appeal was one day late. This breach of Rule 4(b), however, was not itself the cause of any waste of judicial resources nor did it constitute inordinate delay in appellate claim processing. The record does not indicate any waste of judicial resources were we to reach the merits of Mitchell's appeal. Nor is there any indication that efficiency of judicial administration or finality are implicated. As a consequence, it would be inappropriate to raise sua sponte the timeliness of Mitchell's notice of appeal. Accordingly this court proceeds to the merits of the appeal.

Id. at *6-*7.

III. Conclusion

The courts have only begun to work out the effects of the interplay between *Kontrick* and *Eberhart* (on one hand) and *Bowles* (on the other). The Court's decision later this Term in *Greenlaw* may serve to clarify some relevant issues. In the meantime, a few trends can be identified in the court of appeals decisions: Statutory appeal deadlines are treated as jurisdictional; entirely non-statutory deadlines are treated as non-jurisdictional claim-processing rules; but the courts are already divided concerning how to treat rules that fill gaps in or otherwise elaborate on statutory deadline frameworks.

Encls.

MEMORANDUM

DATE: March 13, 2008

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 03-02

Last fall, the Committee discussed the pending proposal to amend Appellate Rule 7 to make clear that Rule 7 "costs" for which an appeal bond can be required do not include attorney fees. Issues relating to that proposal are reviewed in my October 2, 2007 memo to the Committee, a copy of which is enclosed. The Committee noted the complexity of the issues involved and concluded that empirical data could shed light on those issues.

At the Committee's direction, Marie Leary, Andrea Thomson, James Ishida, Jeff Barr, and I pursued a number of lines of empirical research. Marie, Andrea, James and Jeff did prodigious amounts of work on that research, and the results of their work should be of great value to the Committee in determining the further steps to be taken.

Part I of this memo provides an overview of our inquiries; further detail concerning Marie Leary's pilot study will be provided under separate cover. Part II of this memo notes the need for Committee input concerning the design of Marie's study, and recommends that the Committee schedule a mini-conference on the topic of Rule 7 cost bonds to be held in connection with the Committee's fall 2008 meeting.

I. Empirical inquiries to date

During the Committee's fall 2007 discussion of Rule 7 cost bonds, members suggested that empirical data would assist the Committee in its evaluation of possible amendments to Rule 7. It was suggested, for example, that it would be useful to gain a better sense of the types of cases in which sizeable Rule 7 bonds are required; whether such bonds play a greater role in class actions or non-class actions; whether imposition of a large bond amount deters appeals; and whether the use of Rule 7 cost bonds varies by geographic area.

After the Committee's fall meeting, Andrea Thomson and I worked together (with Andrea doing the lion's share of the work) to review Rule 7 rulings that are available on Westlaw

(obtained by "keyciting" Rule 7).[1] A copy of the resulting spreadsheet is enclosed.[2] The results reflected in the spreadsheet are intriguing. They show, for example, quite a number of sizeable bonds, especially in the context of appeals by class action objectors.

Also on the topic of class actions, Judge Rosenthal invited Daniel Girard (a member of the Civil Rules Committee) to provide the Appellate Rules Committee with his views concerning the use of Rule 7 bonds in the class action context. Daniel's thoughtful memo on this question is enclosed.

Meanwhile, Marie Leary began to explore approaches for conducting a docket search to attempt to address the frequency with which FRAP 7 bonds have been required, the types of cases and litigants in cases involving these bonds, the amount of the bonds, and any other information that could be gleaned from the dockets and accessible documents.

In mid-December, Marie, Andrea, James, Jeff and I held a conference call to discuss and coordinate our research efforts. Marie described her work towards designing a pilot study, using a text-based search in the CM/ECF replication database. She designed the docket sheet search broadly, so as not to miss any relevant cases; for instance, she made sure to look for all discussions of FRAP 7 bond requests, whether or not the court ultimately decided to impose a bond requirement. She did a test run looking at fiscal year 2006 data from E.D. Mich., S.D.N.Y., and C.D.Cal.; interestingly, this test run turned up few or no instances of FRAP 7 bonds. Based on our discussion, Marie decided to expand the pilot study to cover more years (probably a decade or so), with the goal of having some results of the pilot study ready for presentation at the

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[1] Andrea also undertook to ask the Clerk in the Southern District of Texas about that office's experience with Rule 7 bonds. She learned that that clerk's office has little experience with Rule 7 cost bonds. Because the Rule 7 bond issue arises so rarely in the Southern District of Texas, the clerk's office has no special code for entering Rule 7 cost bond orders on the docket sheet; such an order would be filed as a miscellaneous order.

[2] I reviewed the court of appeals decisions, while Andrea reviewed the many district court decisions. Andrea and I limited our analysis to decisions to which the post-1979 version of Rule 7 applied -- basically, decisions from August 1, 1979 on, since the 1979 amendments were effective August 1, 1979. We assumed that pre-1979-amendment cases would not be very interesting to us, since under the pre-1979 regime there was a presumption of an appeal bond in the amount of $250.

For court of appeals decisions, columns relating to the bond itself (e.g., "bond required", "amount") describe what the district court did, while the "bond affirmed / reversed" column describes what the court of appeals had to say about the bond question.

The spreadsheet omits cases in which the only type of bond discussed was a supersedeas bond (i.e., where there was no discussion of a Rule 7 cost bond).

Appellate Rules Committee's April 2008 meeting.

During the December conference call, we also discussed whether it would be worthwhile to ask district clerks, going forward, to use particular wording or codes when entering FRAP 7 bond matters in the docket sheets (so as to enable easier searching with respect to future periods). We tentatively concluded that this would be unrealistic, given that it would be difficult to get the relevant people (even within a particular district) to remember to comply with such a request. (James undertook to ask an administrator in the Southern District of New York whether it would be practicable to ask the relevant people in that district to use a particular wording when entering FRAP 7 issues in the docket; the response to James' inquiry confirmed our intuitions.)

Jeff and James generously volunteered to use the PACER system to ascertain, as to the cases uncovered by the Westlaw search, whether any required bonds were ultimately paid and whether the appellant followed through with the appeal. The enclosed materials summarize their findings; they emphasize that it is difficult to draw any causal conclusions from the fact that an appeal was not pursued. Their materials include an updated version of the spreadsheet, showing not only the data that Andrea and I gathered but also the additional information brought to light by James' and Jeff's research.

By the beginning of February, Marie had completed her text-based search of the CM/ECF replication databases for three districts, going back 10 years from FY2006. She carefully reviewed the "hits" pulled up by those searches and examined the docket records of cases in which the search terms appeared to confirm the presence of FRAP 7-related activities. This yielded a database of cases that fall into two categories: (1) cases in which an appellate cost bond issue was definitively raised under FRAP 7; and (2) cases that involved an appellate cost bond but as to which Marie could not be certain from the docket entries whether or not the bond involved was imposed under FRAP 7. Her tentative impression was that the number of Rule 7 bond rulings was relatively low in all three districts.

At this stage, Marie developed a protocol for Phase Two of her Rule 7 study. The protocol serves as the data-gathering tool for capturing relevant information from the cases identified in her search. Marie circulated that protocol to the group in February, and made a few changes to it based on our discussions.

By the time of the Committee's April meeting, Marie will be in a position to provide additional information concerning her pilot study.

II. Questions for the Committee

I suggest that the Committee consider two questions at this stage in the project.

First, it would be useful to obtain the Committee's views on our research so far and on

the design of Marie's empirical study. We hope to obtain members' views on whether Marie's protocol will gather all the information that the Committee would find useful; we also would like to obtain feedback on the overall study strategy. Marie's experience so far indicates that gaining a full understanding of the relevant issues relating to a given Rule 7 bond ruling will often require recourse to documents that are not available through PACER. She has suggested two possible ways in which to design her research from this point on: One option would be to limit the number of districts studied, so that Marie would be able to study those districts' practices in depth (including by retrieving any needed documents from the districts). The other option would be to include many or all districts, but to limit the data collection to information and documents available through PACER.

Second, I suggest that the Committee consider scheduling a mini-conference focusing on issues relating to Rule 7 cost bonds. The mini-conference could be held in conjunction with the Committee's fall 2008 meeting, and could be limited to a half-day or so. The goal would be to invite participants who have experience with Rule 7 bonds, in order to obtain practical input concerning the impact of the current Rule and the possible implications of any amendment. Among other planning questions, we hope to obtain members' suggestions concerning possible participants in such a mini-conference.

Encls.

Case name	Cite	Year	Circuit	District	Type of case	Appellant	Bond required?	Amount	Attorney fee discussed?	Attorney fee included?	Statutory or Rule 38?	Appeal taken on underlying issue?	Bond affirmed / reversed?	Sanction for noncompliance?	IFP status?	Comments
Sckolnick v. Harlow	820 F.2d 13	1987	1	AAA	FHA	Pro se plaintiff	Y	500 or deed	Y	[Y]	Rule 38		Affirmed			
In re Pharm. Indus. Average Wholesale Price Litig.	2007 WL 3235418	2007	1	D. Mass.	Class action	Objector	Y	61,000	Y	N	Rule 38					Court includes administrative costs but not attorney fees, due to lack of evidence as to the amount of the latter.
Capizzi v. States Res. Corp.	2005 WL 958400	2005	1	D. Mass.	Foreclosure on property	Plaintiff and Defendant	Y	26,000 26,000 1,000 1,000 1,000	Y	Y & N	Provided for in underlying mortgage documents.					Rule 7 bond can include attorneys' fees as a sanction for a frivolous appeal. Court set separate bond amounts for each of the cases involved and for different parties. The $26,000 amounts included an estimate of $25,000 in attorneys' fees. The $1,000 bonds did not include attorneys' fees because the appeals were not frivolous and apparently weren't subject to the mortgage documents.
In re Compact Disc Minimum Advertised Price Antitrust Litig.	2003 WL 22417252	2003	1	D. Me.	Class action (Clayton Act)	Objectors	Y	35,000	Y	Y (some)	Rule 38					Attorneys' fees and costs of delay may be included in an appellate bond under Rule 38. "Accordingly an appeal bond recognizing some of the costs this appeal imposes on the plaintiffs is in order under Rule 7. But I am also mindful of the fact that objectors sometimes serve a useful role in helping police class action settlements in cases where the assumptions that customarily underlie the adversary system may be inaccurate (for example, defendants may co-opt plaintiffs' counsel by agreeing to unreasonably high attorney fees). To pose too high a hurdle for objectors, therefore, could create a general deterrent that might well not comport with public policy."
Donato v. McCarthy	2001 WL 1326583	2001	1	D.N.H.	State claim regarding collective bargaining agreement, preempted by the Labor Management Relations Act	Pro se plaintiff	N		Y			Y			Plaintiff was pro se and court discussed appellant's lack of resources, but didn't specify IFP.	"Given the precedent in this circuit, then, this court likely has discretion to require plaintiff to post a bond to secure appellate 'costs' that include a possible award of attorney's fees as a sanction against plaintiff for having taken a frivolous appeal." "But, pro se plaintiff's argument is not so far removed from the arena of rational discourse that her appellate rights should be unnecessarily encumbered by a significant (and perhaps prohibitive) bond requirement." "While Rule 7 serves a legitimate purpose, it should be applied carefully to avoid depriving a plaintiff who might have a legitimate claim, but limited financial resources, of the opportunity to have that claim finally resolved on the merits." Appeal on underlying issue is located at*Donato v. McCarthy*, 2002 WL 338747 (1st Cir. March 5, 2002) (unpublished).
Walsh v. New London Hosp.	1994 WL 287756	1994	1	D.N.H.	Medical malpractice	Plaintiff	N		N							Motion for bond was unopposed, but the motion did not specify the amount of bond needed, so court denied without prejudice.

Case name	Cite	Year	Circuit	District	Type of case	Appellant	Bond required ?	Amount	Attorney fee discussed ?	Attorney fee included?	Statutory or Rule 38?	Appeal taken on underlying issue?	Bond affirmed / reversed?	Sanction for noncompliance ?	IFP status?	Comments
Pan Am. Grain Mfg. Co. v. Puerto Rico Ports Auth.	193 F.R.D. 26	2000	1	D.P.R.	Admiralty negligence	Plaintiff	N									"PRPA and Progranos have requested that Pan American file a bond in the amount of $75,000.00. This sum simply does not correlate with the taxable costs under Rule 39(e) that are likely to accrue on appeal. Further, '[d]efendants have made no attempt ... to justify their request for a bond in [that amount].'" (citing *Lundy v. Union Carbide Corp.*, 598 F. Supp. 451, 452 (D. Or.1984)). Appeal on underlying issue (not on bond) is located at*Pan Am. Grain Mfg. Co. v. Puerto Rico Ports Auth.*, 295 F.3d 108 (1st Cir. 2002).
Baker v. Urban Outfitters, Inc.	2007 WL 2908272	2007	2	AAA	Copyright	Plaintiff	Y	50,000 +	Y	Y	Statutory	Y				D Ct ordered both plaintiff & counsel to post $50,000 each, see 2006 WL 3635392, S.D.N.Y., 2006. But Ct Apps opinion refers to lawyer satisfying his requirement by posting a 15,000 bond. Ct Apps reaches merits (despite plaintiff's failure to post bond), and affirms.
Tri-Star Pictures, Inc. v. Unger	1999 WL 973506, 198 F.3d 235 (unpublished)	1999	2	AAA	Trademark etc.	Pro se defendant	Y	50,000	Y	Y	Statutory		Affirmed			The district court decision is located at *Tri-Star Pictures, Inc. v. Ungar*, 32 F. Supp. 2d 144 (S.D.N.Y. 1999). The district court found that the appellant's argument that he lacked funds contradicted other statements he made, that the appellant acted in bad faith, that the right to an appeal is not absolute and may be encumbered by requiring reasonable security, and that the appeal was likely meritless. District court declined to modify bond on request for reconsideration despite defendant's argument that the bond would deny his right to appeal because the defendant was a payment risk, demonstrated bad faith, and the issues on appeal were meritless. *Tri-Star Pictures, Inc. v. Unger*, No. 88 CIV. 9129(DNE), 1999 WL 129497 (S.D.N.Y. Feb. 8, 1999).
Adsani v. Miller	139 F.3d 67	1998	2	AAA	Copyright	Plaintiff	Y	35,000	Y	Y			Affirmed			
C.H. Sanders Co. v. BHAP Hous. Dev. Fund Co.	750 F. Supp. 67	1990	2	E.D.N.Y.	Contractor's action against government for direct enforcement of state court judgment affirming arbitration award	Defendant	N/A									The Government is not required to file a security bond to appeal, but that does not mean that there is an automatic stay on execution of judgment.

Case name	Cite	Year	Circuit	District	Type of case	Appellant	Bond required ?	Amount	Attorney fee discussed ?	Attorney fee included?	Statutory or Rule 38?	Appeal taken on underlying issue?	Bond affirmed / reversed?	Sanction for noncompliance ?	IFP status?	Comments
In re AOL Time Warner, Inc., Sec. and "ERISA" Litig.	2007 WL 2741033	2007	2	S.D.N.Y.	Securities fraud class action	Objector	Y	800	Y	N						"[W]hen deciding whether to require an appellant to post an appeal bond, district courts consider several factors, including '(1) the appellant's financial ability to post a bond, (2) the risk that the appellant would not pay appellee's costs if the appeal loses, (3) the merits of the appeal, and (4) whether the appellan has shown any bad faith or vexatious conduct.'" (quoting*Baker v. Urban Outfitters, Inc.*, 01 Cv. 5440(LAP), 2006 WL 3635392, at *1 (S.D.N.Y. Dec. 12, 2006)). "The Second Circuit allows the inclusion only of those costs enumerated in Appellate Rule 39, 28 U.S.C. § 1920, or the substantive statute underlying the appeal." The $800 bond included only the printing and copying costs anticipated on appeal. The bond could not include the costs of delay of the settlement because there was no relevant underlying statute that provided for awarding such costs. The court refused to include attorneys' fees because there was no underlying statute permitting it and it did not find the authority to do so under FRAP 38 or 28 U.S.C. 1927. The court also declined to rely on FRAP 38 to double the amount of the bond
Watson v. E.S. Sutton, Inc.	2006 WL 4484160	2006	2	S.D.N.Y.	Title VII of Civil Rights Act of 1964	Defendant	Y	43,987.16	Y	Y	Statutory (Title VII)	Y				FRAP 7 bond can include attorneys' fees if the statute governing the underlying cause of action defines "costs" to include attorneys' fees.
RBFC One, LLC v. Zeeks, Inc.	2005 WL 2140994	2005	2	S.D.N.Y.	Breach of contract, breach of implied covenant of good faith and fair dealing, fraud, and tortious interference with contract.	Plaintiff	Y	5,000	Y	N		Y				FRAP 7 bond could not include attorneys' fees because there was no underlying statute defining costs as including fees. The private contractual clause requiring payment of fees could not require bond including attorneys' fees because the clause was not even-handed. The court left open the option of the parties deciding to mutually post two bonds to cover future fees.
In re Auction Houses Antitrust Litig.	2003 WL 21666633	2003	2	S.D.N.Y.	Class action alleging price fixing conspiracy	Class member	Y	100,000	N							Court determined that appeal was frivolous, "and part of a frivolous and vexatious course of conduct." The appellant had failed to file an opposition to the motions for appellate bond.

Case name	Cite	Year	Circuit	District	Type of case	Appellant '	Bond required ?	Amount	Attorney fee discussed ?	Attorney fee included?	Statutory or Rule 38?	Appeal taken on underlying issue?	Bond affirmed / reversed?	Sanction for noncompliance ?	IFP status?	Comments
Goldstein v. Allstate Ins. Co.	1999 WL 76811	1999	2	S.D.N.Y.	Insurance contract dispute	Plaintiffs (potentially)	Y	5,000	N						Denied	Bond appeared to cover just the cost of the trial transcript. The court noted that if the plaintiffs appealed, the Defendant would have to purchase the trial transcript at a cost of $4,950.
In re NASDAQ Market-Makers Antitrust Litig.	187 F.R.D. 124	1999	2	S.D.N.Y.	Class action	Pro se class member/ Objector	Y	101,500	Y	Y	Statutory (Section 4 of the Clayton Act)					Class member shouldn't be permitted to use class action for his own unrelated purposes and should not be permitted to delay administration of $1.027 billion settlement. Bond included costs on appeal, attorneys' fees on appeal, and damages that could result from the delay and/or disruption of settlement administration caused by his appeal. Court declined to double bond under Rule 38 because doubling costs under FRAP 38 is
In re T.R. Acquisition Corp.	1997 WL 528156	1997	2	S.D.N.Y.	Bankruptcy	Defendant (sought to recover security posted to cover attorneys' costs for appeal)	Not under FRAP 7		N							Court found FRAP 7 inapplicable because the appeal was pending in the district court, not the court of appeals. The court noted, however, that FRAP 7 does not permit a district court to include attorneys' fees in setting the appeals bond.
Haberman v. Tobin	1981 WL 317605	1981	2	S.D.N.Y.	Shareholder's derivative suit	Plaintiff	Y	1,500	N							
U.S. v. Mason Tenders Dist. Council of Greater N.Y.	1997 WL 97836	1997	2	S.D.N.Y. (on appeal from decision of court-appointed monitor)	RICO and ERISA	Defendant (appeal from disciplinary action)	Y	TBD	Y	Y						Case was based on a consent decree that appointed an Investigations Officer to investigate proscribed acts and to bring charges based on the conduct before a court-appointed Monitor. Court found that any appellant unsuccessful in reversing the court's decision would be required to pay all reasonable attorneys' fees and costs incurred by the Monitor and/or the Investigations Officer in connection with the appeal. The bond had to be "an amount satisfactory to the Court, the Monitor and/or the Investigations Officer, in accordance with [FRAP 7]."
Cuyahoga Wrecking Corp. v. Laborers Int'l Union of N. Am., Local Union # 210	1986 WL 397	1986	2	W.D.N.Y.	Contract dispute	Plaintiffs	N									The defendant requested an appellate bond equivalent to a supersedeas bond even though there was not yet a money judgment in its favor. Envisioned arbitration award was not sufficient basis for requiring bond.

Case name	Cite	Year	Circuit	District	Type of case	Appellant	Bond required?	Amount	Attorney fee discussed?	Attorney fee included?	Statutory or Rule 38?	Appeal taken on underlying issue?	Bond affirmed / reversed?	Sanction for noncompliance?	IFP status?	Comments
Hirschensohn v. Lawyers Title Ins. Corp.	1997 WL 307777	1997	3	AAA	Fraud	Plaintiff	Y	7,250	Y	Y	Statutory		Reversed			The district court opinion is located at *Hirschensohn v. Lawyers Title Ins. Corp.*, No. 94-187, 1996 WL 493173 (D.V.I. Aug. 15, 1996). "In the Virgin Islands, attorney's fees are included as costs in a civil action. 5 V.I.C. § 541. The Federal Rules of Appellate Procedure permit recovery of the costs of printing or otherwise producing necessary copies of briefs, appendices, and copies of records." *Id.* at *4 (citing Fed. R. App. P. 39).
Hughes v. Defender Ass'n of Philadelphia	509 F. Supp. 140	1981	3	D.C. Pa.	Employment discrimination (Section 1981, Section 1983, Title VII)	Plaintiff	Y	2,500	N			N (dismissed)		3rd Circuit dismissed appeal for failure to post bond, with leave to comply within 15 days.	Denied because appeal was in bad faith.	
In re Ins. Brokerage Antitrust Litig.	2007 WL 1963063	2007	3	D.N.J.	Class action	Objector	Y	25,000	Y	N						
Leff v. First Horizon Home Loan	2007 WL 2572362	2007	3	D.N.J.	Predatory lending practices, fraud, New Jersey Consumer Fraud Act, negligent misrepresentation	Defendant	Y	54,500	N	Y						Bond was set to cover post judgment interest, attorneys' fees, and appellate costs.
Patrick v. John Odato Water Serv.	767 F. Supp. 107	1991	3	D.V.I.			Y	5,000								FRAP applied (pursuant to VI Code) to appeal from territorial court to district court.
Feddersen v. Feddersen	191 F.R.D. 490 (per curiam)	2000	3	D.V.I. (on appeal from Territorial Court)	Divorce	Defendant	N/A		Y							"The rules of appellate procedure promulgated by this Court differ from Federal Rules of Appellate Procedure 7 and 39 which specify that the 'costs' that may be taxed against an unsuccessful litigant include printing and producing copies of briefs, appendices, records, court reporter transcripts, premiums or costs for supersedeas bonds, or other bonds to secure rights pending appeal, and fees for filing the notice of appeal. In this Court, attorney's fees are expressly included among the expenses that are described as costs for purposes of Virgin Islands Rule of Appellate Procedure 30."
O'Keefe v. Mercedes-Benz USA, LLC	2003 WL 22097451	2003	3	E.D. Pa.	Class action	Objectors	Y	13,467	Y	N						Bond to cover all appellate costs other than attorneys' fees was required because Objectors did not oppose that portion of the bond. Request to include attorneys' fees was denied because under any potentially applicable test, they would not be included If the authority stating that bonds can never include attorneys' fees applies, then attorneys' fees may not be included. If the applicable authority is the authority stating that attorneys' fees may only be included in the bond if the underlying statute defines costs as including fees, then there would still be no inclusion of attorneys' fees because the underlying New Jersey consumer protection statute defined attorneys' fees as separate from costs.

Case name	Cite	Year	Circuit	District	Type of case	Appellant	Bond required?	Amount	Attorney fee discussed?	Attorney fee included?	Statutory or Rule 38?	Appeal taken on underlying issue?	Bond affirmed / reversed?	Sanction for noncompliance?	IFP status?	Comments
In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab.	2000 WL 1665134	2000	3	E.D. Pa.	Class action	Objector	Y	25,000	Y	N						
Lattomus v. Gen. Bus. Servs. Corp.	1990 WL 116571	1990	4	AAA	RICO etc.	Plaintiffs	Y	250								Court notes that appellants failed to post required bond, but reaches the merits anyway and affirms.
Page v. A.H. Robins Co.	85 F.R.D. 139	1980	4	D.C. Va.		Pro se plaintiffs	Not yet	potentially $2,500	N						TBD	"Rather than imposing a bond of arbitrary amount[,] an amount which could bear adversely on the appellants' right to appeal[,] the Court will direct appellants, within 15 days, to comply with the requirements of Rule 24(a) of the Federal Rules of Appellate Procedure. Should appellants fail so to respond, the Court will enter an order directing that appellants post a bond in the amount heretofore requested by the appellee."
Symeonidis v. Eagle Constr. of Va.	2005 WL 3054043	2005	4	E.D. Va.	Rescission, fraud in the inducement, fraud, misrepresentation, wrongful eviction, abuse of process	Pro se plaintiff (potentially)	Y	at least 75,000	N							In the event of appeal, plaintiff was required to file appeal bond or other security in cash or certified funds pursuant to FRAP 7 and 8 and Local Rule 8 of the 4th Cir. Rules.
Symeonidis v. Hurley & Koort, P.L.C.	2005 WL 3478873	2005	4	E.D. Va.	Conspiracy, fraud, breach of fiduciary duty	Pro se plaintiffs (potentially)	Y	at least 75,000	N							In the event of appeal, plaintiffs were required to file appeal bond or other security in cash or certified funds pursuant to FRAP 7 and 8 and Local Rule 8 of the 4th Cir. Rules.
Brinn v. Tidewater Transp. Dist. Comm'n	113 F. Supp. 2d 935	2000	4	E.D. Va.	Class action under Americans with Disabilities Act and Rehabilitation Act	Defendant	Y	50,000 (but court didn't separate the appellate bond from the bond required to stay the district judgment)	N	N		Y				Bond to ensure payment of costs on appeal can be required of a political subdivision, office, or state agency. Court has discretion to require a bond to cover costs and to cover the judgment and post-judgment interest and costs. It was not clear whether the court imposed the bond under FRAP 7 or only as a condition to staying the district court judgment. The court granted a stay conditioned upon an appeal bond of $50,000 to "cover judgment, post-judgment interest, and costs." Appeal on underlying issue of granting attorneys' fees (not on bond issue) is located at *Brinn v. Tidewater Transp. Dist. Comm'n*, 242 F.3d 227 (4th Cir. 2001).
Vaughn v. Am. Honda Motor Co., Inc.	2007 WL 3172068	2007	5	AAA	Consumer class action	Objector	Y	150,000	Y	Y	Rule 38		Reversed			Ct Apps reduces bond to $ 1,000. "The district court could not use Rule 7 in conjunction with Rule 38 as a vehicle to erect a barrier to Hawthorn's appeal in the form of a $150,000 bond for costs on appeal. Even if the rules permitted such a procedure, the district court's assessment of potential damages in the amount of $150,000 is not supported by any findings or reference to evidence in the record, assuming, without deciding, that 'damages' under Rule 38 includes attorneys' fees." District court decision is located at *Vaughn v. Am. Honda Motor Co.*, 2007 WL 2901666 (E.D. Tex. Sept. 28, 2007). The district court noted that there was a significant possibility that the objectors' appeal would be subject to FRAP 38.

Case name	Cite	Year	Circuit	District	Type of case	Appellant	Bond required?	Amount	Attorney fee discussed?	Attorney fee included?	Statutory or Rule 38?	Appeal taken on underlying issue?	Bond affirmed / reversed?	Sanction for noncompliance?	IFP status?	Comments
Fernon v. Smajstrala	189 F.3d 469	1999	5	AAA	Section 1983	Plaintiff	Y	5,000					Affirmed			
Delor v. Intercosmos Media Group, Inc.	2007 WL 1063299	2007	5	E.D. La.	Alleged improper transfer of ownership of domain name	Plaintiff	Y	5,000 + 5,000	N							Court ordered $5,000 appeal bond that was paid. Court then ordered a second $5,000 appeal bond to cover three additional appeals. The second appeal bond was discharged in bankruptcy and also was no longer necessary. Bond was also mentioned in another opinion in the case. *See Delor v. Intercosmos Media Group, Inc.*, 2006 WL 1968922 (E.D. La. 2006).
Moore v. Prestley	2006 WL 901978	2006	5	S.D. Miss.	Habeas	Petitioner	N									FRAP 7 did not apply because the case was not on appeal, but rather involved a habeas corpus proceeding to collaterally attack a criminal proceeding. Rule 7 relates to civil proceedings and does not refer to a release from custody.
In re Cardizem CD Antitrust Litig.	391 F.3d 812	2004	6	AAA	Class action	Objector	Y	174,429	Y	Y	State statute		Affirmed	Dismissal of appeal		Bond included "$1,000.00 in filing and brief preparation costs, $123,429.00 in incremental administration costs, and $50,000 in projected attorneys' fees."
Otworth v. Vanderploeg	61 Fed. Appx. 163	2003	6	AAA	Section 1983	Pro se plaintiff	Y						Affirmed			
In re Munn	1989 WL 149417	1989	6	AAA	Bankruptcy	Petitioner	Y	10,000								Ct Apps denies writ of mandamus, noting it's an extraordinary writ.
In re Miller	325 B.R. 178	2005	6	Bankr. W.D. Ky.	Bankruptcy	Defendant	Y	5,000	Y	Y (but see comments)						"Based on the above authority, this Court believes that a bond under Rule 7 cannot encompass attorney's fees unless the statutory basis for the underlying action provides for such an award." Appellant had been ordered to and did post bond to cover costs and attorney's fees in the event she did not prevail on appeal. The appeal was unsuccessful, and the appellant contended that the Trustee and his law firm were not entitled to the bond to cover the Trustee's attorneys' fees in defending the defendant's appeal. The opinion approved of the original setting of bond because FRAP 7 leaves appellate bond in the discretion of the district court, and that bond may properly include attorneys' fees where the action is based on a statute defining costs to include attorneys' fees or where the appeal appears frivolous. Nonetheless, the scarcity of authority in the circuit as to including attorneys' fees without a statutory basis led the court to conclude that it could not turn over the bond solely to cover attorneys' fees on appeal.
Kattula v. Lim	2007 WL 2984117	2007	6	E.D. Mich.	Legal malpractice, breach of fiduciary duty	Plaintiff	N		Y							Court noted that attorneys' fees may be included in appeal bond if appeal is frivolous. Finding that appeal was not frivolous, the court denied any appellate cost bond.

Case name	Cite	Year	Circuit	District	Type of case	Appellant	Bond required?	Amount	Attorney fee discussed?	Attorney fee included?	Statutory or Rule 38?	Appeal taken on underlying issue?	Bond affirmed / reversed?	Sanction for noncompliance?	IFP status?	Comments
Mitchell v. Ainbinder	2006 WL 2594868	2006	6	E.D. Mich.	Petition to vacate arbitration award made pursuant to federal and state securities laws, common law claims of unsuitability, churning, unauthorized trading, fraud, and breach of fiduciary duty	Petitioners	N		Y			Y				Federal Arbitration Act was the underlying statute, which did not provide any particular cost for a prevailing party. "Petitioners are correct in their assertion that a district court may only include in an appeal bond those categories listed in FRAP 39(e) and 28 U.S.C. § 1920, in addition to any remedy that the underlying statute involved in the litigation may provide." Request to include travel expenses in appeal bond was denied because no authority for that. Only costs that would be taxed to Respondents were copying and printing of briefs, which is nominal, and appellate court could assess taxes against losing party if deemed appropriate.
Johnson v. Howard	2006 WL 1417848	2006	6	W.D. Mich.	Civil Rights (Section 1983)	Plaintiff	Y	2,000	Y	N				Not yet, but court said noncompliance with bond may result in dismissal of appeal.	N	Court found that appeal was likely frivolous and that attorneys' fees would likely be recoverable under 42 U.S.C 1988, FRAP 38, and/or the federal courts' inherent authority. But the court did not find this case appropriate for entering a bond based on a future sanction.
U.S. ex rel. Scott v. Metro. Health Corp.	2005 WL 3434830	2005	6	W.D. Mich.	Qui tam action under False Claims Act. Court was considering a motion for attorneys' fees.	Plaintiff (potentially)	Y	25,000	Y	N		Y				Rule 7 bond can only include the costs allowed under Rule 39 (court fees, copying fees, etc.), and cannot include attorneys' fees that may accrue on appeal. Appeal on underlying issue is located at *Scott v. Metro. Health Corp.*, 2007 WL 1028853 (6th Cir. 2007) (unpublished).
Corley v. Rosewood Care Ctr., Inc.	142 F.3d 1041	1998	7	AAA	RICO	Plaintiff	Y	5,750								
Perry v. Pogemiller	16 F.3d 138	1993	7	AAA	Tort	Plaintiff	Y									Appellee moved to dismiss appeal for failure to post FRAP 7 bond, but Ct Apps reached merits & denied motion as moot.
Antonic Rigging & Erecting of Minn., Inc. v. MDCON, Inc.	1991 WL 169374	1991	7	N.D. Ill.	Breach of contract, unjust enrichment, conspiracy to defraud, and liability under the Illinois Mechanics' Lien Act	Plaintiffs	Y	TBD	N							Party requesting bond did not provide information as to amount of bond required. Court ordered the party requesting bond to file information regarding costs on appeal.
Littlefield v. Mack	134 F.R.D. 234	1991	7	N.D. Ill.	Civil rights	Defendant	TBD		Y	N						Rule 39 costs cannot include Section 1988 attorneys' fees. (citing *Kelley v. Metro. Cty. Bd. of Ed.*, 773 F.2d 677 (6th Cir. 1985). Court thus denied request for attorneys' fees and ordered that if the plaintiff sought a bond for other costs in Rule 39, she should refile her motion to specify the costs needing security.
In re Alexander	2000 WL 1717177	2000	8	AAA	Bankruptcy	Debtor	Y							Dismissal		
Buffington v. First Serv. Corp.	672 F.2d 687	1982	8	AAA	Bankruptcy	Debtors	Y	3,000	N							Court imposed sanctions on appellants and their counsel, partly due to their failure to comply with district court's cost bond requirement.

Case name	Cite	Year	Circuit	District	Type of case	Appellant	Bond required?	Amount	Attorney fee discussed?	Attorney fee included?	Statutory or Rule 38?	Appeal taken on underlying issue?	Bond affirmed / reversed?	Sanction for noncompliance?	IFP status?	Comments
Phillips v. Grendahl	2001 WL 1110370	2001	8	D. Minn.	Fair Credit Reporting Act violations and invasion of privacy claims	Plaintiff	Y	1,000	N							Concern about the plaintiff's ability to pay costs of appeal required a bond. Appeal on underlying issue is located at*Phillips v. Grendahl*, 312 F.3d 357 (8th Cir. 2002) (affirming in part, reversing in part the district court decision).
Azizian v. Federated Dept. Stores, Inc.	499 F.3d 950	2007	9	AAA	Class action	Objector	Y	42,000	Y	Y			Reversed			"a district court may require an appellant to secure appellate attorney's fees in a Rule 7 bond, but only if an applicable fee-shifting statute includes them in its definition of recoverable costs, and only if the appellee is eligible to recover such fees. The fee-shifting provision in Section 4 of the Clayton Act, 15 U.S.C. § 15, includes attorney's fees in its definition of costs recoverable by a prevailing plaintiff. However, this provision does not authorize taxing attorney's fees against a class member/objector challenging a settlement in an antitrust suit. Therefore, we hold that the district court erred by requiring [$40,000 of] security in the Rule 7 bond for attorney's fees...."
In re Heritage Bond Litigation	233 Fed. Appx. 627	2007	9	AAA	Class action	Claimant subject to bar order	Y	228,000	Y	Y	Probably Rule 38		Reversed			Ct Apps holds that PSLRA does not define attorney fees as "costs," and thus that the D Ct erred in including attorney fees in the FRAP 7 bond amount. The district court's opinion is located at NO. MDL 02-ML-1475 DT, 2005 WL 2401111 (C.D. Cal. 2005). The district court granted an appeal bond of $208,000 against certain defendants and an appeal bond of $228,000 against certain other defendants.
Moore v. Int'l Bhd. of Elec. Workers Local 569	1998 WL 60867	1998	9	AAA		Pro se plaintiff	Y	500					Affirmed			
Baker v. Milnes	1991 WL 268779	1991	9	AAA	Section 1983	Pro se plaintiff	Y									
Richmark Corp. v. Timber Falling Consultants, Inc.	1991 WL 81866	1991	9	D. Or.	Contract & tort	Third-party defendant	Y	TBD	Y	N						Docket indicates imposition of bond(s) in amount(s) of $ 884 and $ 500. Docket language: "cost bond on appeal" / "costs on appeal."
Lundy v. Union Carbide Corp.	598 F. Supp. 451	1984	9	D. Or.	Personal injury (asbestos)	Plaintiff	Y	500	N							
U.S. for Use of Terry Inv. Co. v. United Funding and Investors, Inc.	800 F. Supp. 879	1992	9	E.D. Cal.	Contract	Defendant	Y	500	Y	N						
Bryson v. Volkswagen of Am., Inc.	1996 WL 192975	1996	10	AAA	Tort	Plaintiff	Y									
Jenson v. Fisher	1996 WL 606505	1996	10	AAA	Section 1983	Attorney for plaintiff	Y	1,500					Affirmed			
Westinghouse Credit Corp. v. Bader & Dufty	627 F.2d 221	1980	10	AAA	Securities	Plaintiff	Y	5,000					Affirmed			
Sierra Club v. El Paso Gold Mines, Inc.	2003 WL 25265871	2003	10	D. Colo.	Citizen suit to enforce Clean Water Act	Defendant	Y	50,000	Y	Y	Statutory					Agreed with 2nd and 11th Circuits that bond can include attorneys' fees if the underlying statute includes attorneys fees as part of costs.

Case name	Cite	Year	Circuit	District	Type of case	Appellant	Bond required?	Amount	Attorney fee discussed?	Attorney fee included?	Statutory or Rule 38?	Appeal taken on underlying issue?	Bond affirmed / reversed?	Sanction for noncompliance?	IFP status?	Comments
U.S. v. De Paz	2006 WL 625985	2006	10	D. Kan.	Habeas	Defendant	N									Rule 7 does not apply to criminal cases.
Scheufler v. Gen. Host Corp.	1996 WL 38269	1996	10	D. Kan.	Nuisance	Plaintiffs and Defendant (but Plaintiffs invoke FRAP 7)	Y	1,287,500	N			Y				Court called the bond a supersedeas bond, but referenced FRAP 7. Court set amount based on local rule regarding supersedeas bonds.
Stagner v. U.S. Patent and Trademark Office	1992 WL 190643	1992	10	D. Kan.	Action against PTO officials for alleged wrongful denial of a patent.	Pro se plaintiff	Y	600	N	N						Bond included estimated costs on appeal of preparing and copying brief and accompanying appendix.
Young v. New Process Steel, LP	419 F.3d 1201	2005	11	AAA	Title VII etc.	Plaintiff	Y	61,000	Y	Y	Statutory		Reversed			60,000 of the 61,000 was for attorney fees. Ct Apps holds that "a district court may not require an unsuccessful plaintiff in a civil rights case to post an appellate bond that includes not only ordinary costs but also the defendant's *1208 anticipated attorney's fees on appeal, unless the court determines that the appeal is likely to be frivolous, unreasonable, or without foundation." On remand, the court, in accordance with the 11th Cir. mandate, evaluated whether the appeal was frivolous, groundless, and/or unreasonable. The court found it to be unreasonable and thus set the bond at the original amount of $61,000, including $1,000 of taxable costs and $60,000 in anticipated attorneys' fees. 427 F. Supp. 2d 1126 (N.D. Ala. 2006).
Baynham v. PMI Mortgage Ins. Co.	313 F.3d 1337	2002	11	AAA	RESPA	Objectors	Y	180,000	Y	Y			Reversed			Companion case to Pedraza.
Downey v. Mortgage Guar. Ins. Corp.	313 F.3d 1341	2002	11	AAA	RESPA	Objectors	Y	180,000	Y	Y	Statutory		Reversed			Companion case to Pedraza. The district court opinion is located at *Downey v. Mortgage Guar. Ins. Corp.*, 2001 WL 34092617 (S.D. Ga. 2001). The district court found that if underlying statute permits recovery of attorneys' fees, then Rule 7 bond can include the fees. RESPA provides attorneys' fees to the prevailing party.
Pedraza v. United Guar. Corp.	313 F.3d 1323	2002	11	AAA	RESPA	Objectors	Y	180,000	Y	Y			Reversed			"the district court's requirement that Olorunnisomo post an appellate cost bond that included estimated attorneys' *1337 fees was not justified under Fed. R. App. P. 7 because RESPA's fee shifting provision, § 2607(d)(5), does not define 'costs' to include attorneys' fees, and was not warranted under its inherent power to manage its affairs because the court did not find that appellant had acted in bad faith, vexatiously, wantonly, or for oppressive reasons. Although the district court was free to require Olorunnisomo to post an appellate cost bond, it was improper to include anticipated attorneys' fees within such a bond."

Case name	Cite	Year	Circuit	District	Type of case	Appellant	Bond required?	Amount	Attorney fee discussed?	Attorney fee included?	Statutory or Rule 38?	Appeal taken on underlying issue?	Bond affirmed / reversed?	Sanction for noncompliance?	IFP status?	Comments
Home Design Servs., Inc. v. Schwab Dev. Corp.	2006 WL 1319427	2006	11	M.D. Fla.	Copyright	Plaintiff	Y	20,500	Y	Y						"Plaintiff concedes, as it must, that the Court retains authority to include anticipated attorney's fees as 'costs' under Rule 7, in certain circumstances, but contends that the reasons advanced here (the alleged risk of insolvency of Plaintiff and frivolousness of the appeal) have not been shown to be anything other than speculation. The Court is not persuaded."
Young v. New Process Steel, LP	430 F. Supp. 2d 1242	2006	11	N.D. Ala.	Title VII etc.	Plaintiff	Y	10,000	Y	Y	Statutory					After the appeals court reversed the original $61,000 bond granted by the district court, the district court on remand ordered the plaintiffs to post a cost bond that included anticipated attorneys' fees and the plaintiff appealed again. The defendant moved to require the employees to post bond for the appeal of the bond amount set in the remand from the 11th Cir. The court found the appeal to be unreasonable and noted, "Potentially, if not actually, the present Rule 7 motion creates the conundrum of an endless series of appeals from sequential impositions of Rule 7 bonds . . . ."
Garrett v. Bd. of Trs. of Univ. of Ala. at Birmingham	359 F. Supp. 2d 1200	2005	11	N.D. Ala.	Rehabilitation Act	Plaintiff	Y	TBD	Y	Y	Statutory	Yes				court directs parties to try to reach agreement on amount of bond
Vickery v. Cavalier Home Builders, LLC	405 F. Supp. 2d 1352	2005	11	N.D. Ala.	ADA	Plaintiff	Y	2,000	Y	N					Denied	Court holds that under ADA's attorney fee provision, 42 U.S.C. § 12205, attorney fees are not part of "costs." Court appears to take view that Rule 7 "costs" would not include any attorney fees available under FRAP 38.
Allapattah Servs., Inc. v. Exxon Corp.	2006 WL 1132371	2006	11	S.D. Fla.	Class action	Objector (potential appellant)	Y	13,500,000	N	N						No appeal had yet been filed, but the court noted that one of the objectors might appeal. If objector appealed on behalf off the entire class, bond had to be an amount sufficient to cover damages, costs, and interest that entire class would lose as result of the appeal.
Wakefield v. City of Miami-Dade	2005 WL 2891775	2005	11	S.D. Fla.	Civil rights	Pro se plaintiff	Y	10,000	Y	Probably, but not clear					No (because appeal is frivolous, unreasonable, and without foundation; no showing of entitlement to relief; and concern about abuse of judicial system)	Court found that appeal would likely be frivolous, unreasonable, and without foundation.

Case name	Cite	Year	Circuit	District	Type of case	Appellant	Bond required ?	Amount	Attorney fee discussed ?	Attorney fee included?	Statutory or Rule 38?	Appeal taken on underlying issue?	Bond affirmed / reversed?	Sanction for noncompliance ?	IFP status?	Comments
In re Am. President Lines, Inc.	779 F.2d 714	1985	D.C.	AAA	Bankruptcy	Petitioner	Y	10,000	Y				Reversed			"The costs referred to, however, are simply those that may be taxed against an unsuccessful litigant under Federal Appellate Rule 39, [FN16] and do not include attorneys' fees that may be assessed on appeal. [FN17] Rule 7 thus sustains the bond in suit to the extent of $450--APL's estimate of its costs on appeal-but not in any greater amount."
Fed. Prescription Serv., Inc. v. Am. Pharm. Ass'n	636 F.2d 755	1980	D.C.	AAA	Section 1 of Sherman Act	Plaintiff and Defendant	N									"[T]he new Rule 7, effective August 1979, leaves the requirement of an appeal bond to the district court's discretion: 'The district court may require an appellant to file a bond or provide other security ... to ensure payment of costs on appeal' (emphasis added). We cannot dismiss American's appeal for failure to post a bond the district court chose not to require. Moreover, we cannot say the district court abused its discretion in dispensing with an appeal bond requirement given that both parties were appealing and that appellant was highly solvent."
U.S. v. York	909 F. Supp. 4	1995	D.C.	D.D.C.	Judgment debtor collection effort	Defendants	Y	$1,000	N			Y				Original order regarding posting appellate bond is found in *U.S. v. York*, 890 F. Supp. 1117 (D.D.C. 1995) (district court did not specify bond amount in this opinion), *rev'd*, 112 F.3d 1218 (D.C. Cir. 1997) (reversal was on the merits (not on bond)). Appeal on underlying issue is located at *U.S. v. York*, 112 F.3d 1218 (D.C. Cir. 1997).
Hayhurst v. Calabrese	1992 WL 118296	1992	D.C.	D.D.C.	Conspiracy	Plaintiff	N								N	"The imposition of a bond is a matter of discretion for the district court."

MEMORANDUM

To: Hon. Lee Rosenthal

Cc: Hon. Mark Kravitz
Catherine Struve

From: Daniel Girard

Date: January 31, 2007

Re: Proposed Amendment to Exclude Attorneys' Fees from Authorized "Costs" Included in FRAP 7 Bond

I understand the Committee on Appellate Rules is considering a proposed amendment to FRAP 7 that would prohibit a district court from including attorneys' fees as "costs," in setting the amount of an appeal bond. Thank you for providing me with a copy of Catherine Struve's memorandum of October 2, 2007 and for your invitation to comment on the implications of the proposed amendment for practice under FRCP 23.

Appeals from settlement approval orders in class actions have become routine. Appellate courts in recent years have emphasized the importance of appellate review of judgments in class actions and facilitated the availability of appeal for absent class members. *See, e.g., Devlin v. Scardalletti*, 536 U.S. 1, 14 (2002) ("Just as class action procedure allows nonnamed class members to object to a settlement at the fairness hearing without first intervening, [] it should similarly allow them to appeal the District Court's decision to disregard their objections."); *Churchill Vill., L.L.C. v. GE*, 361 F.3d 566, 572-573 (9th Cir. 2004) (discussing *Devlin* and the "longstanding pre-*Devlin* practice of permitting objecting class members to appeal settlements"); *Vaughn v. Am. Honda Motor Co.*, 507 F.3d 295, 300 (5th Cir. 2007) ("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."). The right to appeal exists even where the class member has been afforded the opportunity to request exclusion under FRCP 23(b)(3). *See, e.g., In re Pharm. Ind. Average Wholesale Price Litig.*, 2007 U.S. Dist. LEXIS 82144, *13, 16 (D. Mass. Nov. 2, 2007) (objector had opportunity to opt out and stood to recover at least 100% of her loss as class member, but court permitted appeal to proceed); *Churchill Vill., L.L.C.*, 361 F.3d at 572 (opportunity to opt out is an "ostensible independence [] belied by an essential impracticability. Because each objector's claim is too small to justify individual litigation, a class action is the only feasible means of obtaining relief.")

Courts have recognized that practically speaking, an appeal from an order approving a class action settlement effectively stays the order.[1] *See, e.g., In re Cardizem*

[1] Class action settlements generally do not require performance by the settling defendant until the order approving the settlement has become "final," i.e., the time to appeal has expired or the order approving the settlement has been upheld on appeal. While the settling parties remain free to perform their obligations under the settlement notwithstanding the pendency of the appeal, as a practical matter, the objector effectively stays the implementation of the settlement by noticing the appeal.

CD Antitrust Litig., 391 F.3d 812, 818 (6th Cir. 2004) (appeal bond justified because pursuit of objections "has the practical effect of prejudicing the other injured parties by increasing transaction costs and delaying disbursement of settlement funds"); *In re Compact Disc Minimum Advertised Price ("MAP") Antitrust Litig.*, 2003 U.S. Dist. LEXIS 25788, *4 (D. Me. 2003) (courts frequently acknowledge that appeal causes delay of settlement distribution, but there is disagreement among courts as to whether anticipated costs of delay may be included in FRAP 7 bond); *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 124, 128 (S.D.N.Y. 1999) (including damages resulting from the delay and/or disruption of settlement administration caused by the appeal in FRAP 7 bond). In consequence, an unnamed class member who appeals from an order finally approving a settlement can tie up the settlement for the time it takes for the court of appeal to review the judgment. The ability of a single class member to appeal a settlement approval order (or an award of attorneys' fees to class counsel) vests considerable power in objectors. By the simple act of filing a notice of appeal, an objector can prevent a settlement from proceeding, sometimes for years.

The strategic potential of the current rules has not been lost on a segment of the bar. A specialized "objector's bar" routinely advances unsuccessful objections to settlements, followed by equally unsuccessful appeals. *See, e.g., In re Royal Ahold N.V. Sec. & ERISA Litig.*, 461 F. Supp. 2d 383, 386 (D. Md. 2006) (repeat objectors' counsel "is a professional and generally unsuccessful objector"); *In re Compact Disc MAP*, 2003 U.S. Dist. LEXIS 25788, at n.3 (court characterizes same objectors' attorney as "repeat objector in class action cases,"); *Barnes v. FleetBoston Fin. Corp.*, 2006 U.S. Dist. LEXIS 71072, *3-4 (D. Mass. 2006) ("Repeat objectors to class action settlements can make a living simply by filing frivolous appeals and thereby slowing down the execution of settlements.").[2] Objectors' attorneys routinely agree to drop the objections in

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[2] Two examples among the objectors' bar demonstrate the volume of objections and appeals a professional objector can undertake. The "repeat objector" referred to in *In re Compact Disc MAP* has filed objections to at least 28 class settlements since 2001. *See, e.g., Rodriguez v. West Publishing*, 2007 U.S. Dist. LEXIS 74767 (C.D. Cal. Sept. 10, 2007); *In re Royal Ahold*, 461 F. Supp. 2d 383 (D. MD. 2006); *Azizian v. Federated Dept. Stores, Inc.*, 2006 U.S. Dist. LEXIS 21129 (N.D. Ca. 2006); *In re Serzone Prod. Liab.*, 2006 U.S. Dist. LEXIS 92618 (S.D.W.V. 2006); *In re Visa Check/Mastermoney Antitrust Litigation*, 297 F. Supp.2d 503 (E.D.N.Y. 2003); *In re Relafen Antitrust Litig.*, 231 F.R.D. 52 (D. Mass. 2005); *In re Excess Value Insurance Coverage Litigation*, 2004 U.S. Dist. LEXIS 14822 (S.D.N.Y. 2004); *LiPuma v. American Express Co.*, 406 F. Supp.2d 1298 (S.D. Fla. 2005); *Synfuel Technol. v. DHL Express*, 463 F.3d 646 (7th Cir. 2006); *Spark v. MBNA Corporation, et al.*, 48 Fed. Appx. 385 (3d Cir. 2002); *Taubenfeld v. AON Corp*, 415 F.3d 597 (7th Cir. 2005); *Tenuto v. Transworld Systems*, 2002 U.S. Dist. LEXIS 1764 (E.D.Pa. 2002); *Schwartz v. Dallas Cowboys Football Club*, 2001 U.S. Dist. LEXIS 24121 (E.D. Pa. 2001); *Reynolds v. Beneficial National Bank*, 288 F.3d 277 (7th Cir. 2002); *In re PayPal Litigation*, 2004 U.S. Dist. LEXIS 22470 (N.D.Cal. 2004); *Morris v. Lifescan*, 2003 WL 133119 (9th Cir. 2003); *Clark v. Trans Union Corporation*, 219 F.R.D. 375 (D.S.C. 2003); *In re Insurance Brokerage Antitrust Litigation*, 2007 U.S. Dist. LEXIS 47659 (D.N.J. Sept. 4, 2007); *In re Warfarin Sodium Antitrust Litigation*, 212 F.R.D. 231 (D. Del. 2002).

Similarly, another attorney has filed objections in at least 24 class action settlements since 2001, and has appealed at least 16 of those cases. *See, e.g., In re Relafen Antitrust Litig.*, 231 F.R.D. 52 (D. Mass. 2005); *In re Warfarin Sodium Antitrust Litigation*, 212 F.R.D. 231 (D. Del. 2002); *Varacallo v. Mass. Mut. Life Ins. Co.*, 226 F.R.D. 207 (D. N.J. 2005); *Synfuel Technol. v. DHL Express*, 463 F.3d 646 (7th Cir. 2006); *In re Diet Drugs Prod. Liab.Litig.*, 2000 U.S. Dist. LEXIS 16085 (E.D. Pa. 2004); *In re Ikon Office*

exchange for a monetary payment, without conferring a benefit on the class. *See, e.g., Vaughn*, 507 F.3d at 300 ("In some circumstances objectors may use an appeal as a means of leveraging compensation for themselves or their counsel. The detriment to class members can be substantial."); *Barnes*, 2006 U.S. Dist. LEXIS 71072, at *3-4 ("The larger the settlement, the more cost-effective it is to pay the objectors rather than suffer the delay of waiting for an appeal to be resolved (even an expedited appeal). Because of these economic realities, professional objectors can levy what is effectively a tax on class action settlements, a tax that has no benefit to anyone other than to the objectors."). The cost of asserting "canned" objections is minimal, and there are rarely adverse consequences for advancing unsuccessful arguments. *See, e.g., Vollmer v. Selden*, 350 F.3d 656, 663 (7th Cir. 2003) (vacating district court's imposition of sanctions against repeat objectors); *In re Diet Drugs Prods. Liability Litig.*,2000 U.S. Dist. LEXIS 16085, *4 (E.D. Pa. 2000) (reducing requested bond amount including attorneys' fees and rejecting class counsel's argument that the appeals were meritless, delay-inducing and "solely an attempt to leverage settlements in separate cases or obtain unauthorized fees"). Objectors and their counsel thus have little incentive to exercise restraint.

FRAP 7 applies equally in class and non-class cases, just as a cost prohibitive bond deters class and non-class appeals. *See, e.g., In re Cardizem.*, 391 F.3d at 818 (failure to post bond can result in dismissal of the appeal); *In re Diet Drugs,*2000 U.S. Dist. LEXIS 16085, at *10 (same); *but see* Wright, Miller & Cooper, 16A Federal Practice & Procedure: Jurisdiction 2d § 3953 at 278-79 (1996) (stating that "failure to post such a bond is easily correctable and, standing alone, should not warrant dismissal"). Several leading cases discussing the inclusion of attorneys' fees as "costs" involve appeals from class settlements. *See, e.g., Pedraza v. United Guaranty Corp.*, 313 F.3d 1323 (11th Cir. 2002); *In re Cardizem CD Antitrust Litigation,* 481 F.3d 355 (6th Cir. 2007); *Azizian v. Federated Dep't Stores, Inc.*, 499 F.3d 950 (9th Cir. 2007). While the most frequently cited decisions holding that attorneys' fees may not be included in a Rule 7 bond are non-class cases, those decisions have also been applied to appeals from class action settlements. *See In re American President Lines, Inc.*, 779 F.2d 714, 716 (D.C. Cir 1985); *Hirschensohn v. Lawyers Title Ins. Corp.*, 1997 U.S. App. LEXIS 13793 (3rd Cir. 1997); *In re Diet Drugs,*2000 U.S. Dist. LEXIS 16085, at *16 (attorneys' fees may not be included as costs under FRAP 7 in class context); *In re Insurance Brokerage Antitrust Litig.*, 2007 U.S. Dist. LEXIS 47659, *43 (D.N.J. July 2, 2007) (same); *O'Keefe v. Mercedes-Benz USA, LLC,* 2003 U.S. Dist. LEXIS 9838, *17 (E.D. Pa. 2003) (same but

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Solutions, Inc. Sec. Litig., 194 F.R.D. 166 (E.D. Pa. 2000); *In re Cendent Corp. Litig.*, 264 F.3d 201 (3d Cir. 2001); *Velma-Alma Independent School District v. Texaco*, 162 P.3d 238 (Okla. Civ. App. Div. 2007); *In re Visa Check/Mastermoney Antitrust Litigation,* 297 F. Supp.2d 503 (E.D.N.Y. 2003); *Baynham v. PMI Mortgage Insurance Co.*, 313 F.3d 1337 (11th Cir. 2002); *In re Lorazepam/Cloraze & Clorazepam Antitrust Litig.*, 205 F.R.D. 369 (D.D.C. 2002); *Shaw, et al. v. Toshiba American Information*, 91 F.Supp.2d 942 (E.D. Tex. 2000); *In re Serzone Prod. Liab.*, 231 F.R.D. 221 (S.D. W.Va. 2005); *Clark v. Trans Union Corporation*, 219 F.R.D. 375 (D.S.C. 2003); *In re Insurance Brokerage Antitrust Litigation*, 2007 U.S. Dist. LEXIS 47659 (D.N.J. Sept. 4, 2007); *Azizian v. Federated Dept. Stores, Inc.*, 2006 U.S. Dist. LEXIS 21129 (N.D. Ca. Sept. 29, 2006); *In re PayPal Litigation*, 2004 U.S. Dist. LEXIS 22470 (N.D.Cal. Oct. 13, 2004).

also analyzing exclusion of fees based on underlying fee-shifting statute); *Gerstein v. Micron Tech., Inc.,* 1993 U.S. Dist. LEXIS 21213, *2-3 (D. Idaho 1993) (attorneys' fees not included in bond as court found they would serve as impediment to appeal). In short, requiring one's opponent to post a substantial bond is an effective means of deterring any appeal, not just a class action appeal, and the arguments for and against inclusion of attorneys' fees in a FRAP 7 bond apply with equal force to class and non-class cases.

The application of FRAP 7 to class actions differs from non-class cases in at least one important respect, however. In a class action, the appellant is a member of the same class as the appellee. Many fee-shifting statutes do not lend themselves to an award of attorneys' fees in favor of a class member who successfully defends a settlement over the objections of another class member.

In the Ninth Circuit's recent *Azizian* decision (discussed in Catherine's memo), the underlying statute at issue was the Clayton Act. *Id.* at 960. The Clayton Act's fee-shifting provision is asymmetrical, in that it provides that only a losing defendant found to have violated antitrust laws can be ordered to pay attorneys' fees. *Id.* The court concluded that a class-member appellee was not eligible to recover attorneys' fees included in the FRAP 7 bond because "[o]rdering one class member to pay other class members' appellate attorney's fees because of a disagreement about the propriety of settlement" would not comport with the purpose of the Clayton Act's fee-shifting provision. *Id. Azizian* recognizes that merely because the underlying litigation may have involved a fee-shifting statute, a bond should not include an attorneys' fee component if the statute would not allow for shifting of fees from one class member to another.

The result reached in *Azizian* and other similar cases seems correct, as it makes no sense to impose a bond merely because a statute provides for fee-shifting, if the appellee could not expect to recover fees incurred in defending the appeal. I also found persuasive Catherine's observation that a rule precluding inclusion of attorneys' fees in an appellate bond when the underlying fee-shifting statute allows for recovery of fees seems to raise Rules Enabling Act concerns. In light of these principles, I find persuasive decisions like *Azizian*, that allow for inclusion of attorneys' fees in a FRAP 7 bond when the statute provides for fee-shifting, but only when the underlying statute would support an award of attorneys' fees in the context of one class member recovering from another, following the successful defense of a class action settlement or attorneys' fee award on appeal.

While the stakes in class actions are often higher than in non-class cases, there is no basis for treating class and non-class appeals differently under FRAP 7. Thus, even if one accepts the premise that frivolous appeals from class action approval orders present a problem, there are obvious problems with the use of FRAP 7 as a deterrent.

- The ability of a class member to maintain an appeal (and conversely, the appellees' right to security for fees on appeal) may turn on fine distinctions in statutory phraseology that have little relationship to the merits of the appeal.
- It seems difficult to justify the inclusion of attorneys' fee in a FRAP 7 bond when the underlying statute would not allow for fee-shifting.

- The broader problem of nuisance appeals from class action approval orders remains unaddressed.

Until the rules governing appeals in class actions are modified to end the perception that objectors enjoy "rights without responsibilities," however, district courts and litigants will continue to restrain appeals from class action settlement approval orders.

Thanks again for the opportunity to comment on the proposal to amend FRAP 7.

MEMORANDUM

DATE: March 11, 2008

FROM: Jeff Barr, AO; James Ishida, AO

SUBJECT: Examining Docket Sheets in Reported Cases involving Rule 7 Bonds

TO: Catherine Struve, Reporter, Advisory Committee on Appellate Rules
Marie Leary, FJC
Andrea Thomson, Law Clerk, Hon. Lee Rosenthal

Recently you generated a chart listing all federal court opinions available on Westlaw in which there was raised an issue of the posting of a rule 7 bond. For each case you inserted on the chart various categories of information for that case. Because of the limitations of Westlaw, many blanks necessarily remained on the chart. You asked us to retrieve from PACER the docket sheets for each case on the chart; to use the docket sheets to fill in blanks on the chart wherever possible; and to see what else could be gleaned from the docket sheets.

Attached is a revised version of the chart, revised to include the additional information we were able to extract from the docket sheets. Also attached is a compilation of all the cases we looked at, with a short summary of what we learned from the docket sheets in each case.

What follows is an overview of what we noticed from the docket sheets in these cases. We state the patterns that we observed. By noting the existence of a pattern in these particular cases, we do not mean to suggest that the pattern is necessarily meaningful and not random. We are not social scientists or statisticians, and this of course was not a closely-controlled research effort of the kind the FJC might perform.

- Motions for a Rule 7 bond are usually granted.

We looked at a total of 57 cases. In 49 of these 57 cases, a court ordered that something akin to a rule 7 appeal bond be posted. In 8 of these 57 cases, a court denied a motion that such a bond be required.

- A required Rule 7 bond, more often than not, is never posted, and is apparently less likely to be posted if it includes attorneys' fees.

In the 49 cases in which a bond was required to be posted, in only 16 cases did we find an indication on the docket sheet that the bond actually was, or at least may have been, ultimately

posted. In 33 cases of the 49, there appeared to be no suggestion on the docket sheet that the bond ever was posted.

Of the 49 cases in which a court required that an appeal bond be posted, in 16 of those cases the chart identified the appeal bond as including attorneys' fees of some kind. In only 3 (***Baker***, ***Hirschenhorn***, and ***Watson***) of those 16 cases did we find an indication on the docket sheet that the bond actually was, or at least may have been, ultimately posted. In the other 33 cases in which a court required that an appeal bond be posted, the chart identified the appeal bond as not including attorneys' fees of any kind. In 13 of those 33 cases we found some indication on the docket sheet that the bond actually was, or at least may have been, ultimately posted. Thus, in this decidedly unscientific sample, the bond was posted in 19% (3/16) of the cases in which the bond included attorneys' fees, and the bond was posted in 39% (13/33) of the cases in which the bond did not include attorneys' fees.

- Appellants required to post Rule 7 bonds usually prosecute their appeals (even if they do not ever post the bond).

In the 49 cases in which a bond was required to be posted, in only 7 cases did appellants fail to prosecute the appeal. These 7 cases were ***Adsani*** (court of appeals dismissed the appeal for appellants' failure to post the bond), ***Capizzi*** (court of appeals dismissed the appeal for appellants' failure to pay a $300 docketing fee), ***Goldstein*** (court of appeals dismissed for appellants' failure to comply with a scheduling order), ***In re Auction Houses*** (court of appeals dismissed for appellants' failure to comply with a scheduling order), ***Wakefield*** (court of appeals dismissed the appeal for appellants' failure to post the bond), ***Symeonidis*** (appellant never filed an appeal), and ***Mason Tenders*** (appellants never filed an appeal). In cases where appellants failed to prosecute the appeal, there is no way to tell how their conduct may have been affected by the bond requirement; in none of these cases did appellant ever actually post a bond.

In almost every case an appeal was filed. In only the two cases just listed – ***Symeonidis*** and ***Mason Tenders*** – did the appellant fail to appeal at all. In many cases the notice of appeal already had been filed before the court ordered the rule 7 bond.

Of the 7 cases in which it is clear that appellant failed to file and/or prosecute an appeal, 4 (***Adsani***, ***Capizzi***, ***Wakefield***, ***Mason Tenders***) were cases for which the chart identified the appeal bond as including attorneys' fees of some kind. In 2 others among these 7 cases the appeal bond was substantial in amount: $100,000 in ***In re Auction Houses***, at least $75,000 in ***Symeonidis***. ***Goldstein*** was the only case not prosecuted in which the bond was both small ($5,000) and did not include attorneys' fees.

- Pro se appellants required to post a Rule 7 bond are even less likely than non-pro se appellants ever to post the bond.

In 7 cases the appellant was pro se. In 6 of those 7 cases a court required the pro se appellant to post a bond. In only one of those 6 cases requiring a bond did the pro se appellant ever actually post the bond (in ***Otworth***, where the amount of the bond was $300).

- No salient, different pattern revealed itself in cases where the appellants required to post a bond were class actions members or objectors.

Class action members or objectors were required to post a bond in 12 cases. There was no case in which a court declined to require a class action member or objector to post a bond. Of the 12 cases in which a class action member or objector was required to post a bond, in only 2 cases (***In re AOL Time Securities***, $800; ***O'Keefe***, $13,467) did the docket sheet show that the bond ever actually was posted. In only one of these cases, ***In re Auction Houses*** (court of appeals dismissed for appellants' failure to comply with a scheduling order), did it seem clear that appellant failed to prosecute the appeal.

The district court order in ***Vaughn v. American Honda Motor Co.*** does appear to illustrate a concern about class action objectors appealing for strategic reasons in order to extract favorable settlement terms at the expense of other class members. In that case the district court ordered not only that any party wishing to appeal had to post a rule 7 bond in the amount of $150,000, but also that any appeal would be summarily dismissed, giving rise to imposition of attorneys' fees and costs under Fed. R. App. P. 38.

CASE SUMMARIES INVOLVING FRAP 7 BONDS

Adsani v. Miller, S.D.N.Y. No. 94-9131. Second Circuit No. 96-9415, 96-9593. The district court on November 20, 1996 ordered appellant to "file a bond in the amount of $35,000 to cover the costs of appeal and a possible award of attorneys' fees associated with that appeal." Appellant appealed from this order (appeal no. 96-9593), and the court of appeals affirmed the bond order. Appellant never did post the bond. On July 1, 1998, the court of appeals ordered "that appellant comply with the [bond] order affirmed in 96-9593 by posting a $35,000 security bond for appellate costs within 30 days of the entry of this order. Failure to do so will result in the dismissal with prejudice of the instant appeal." On October 14, 1998, the court of appeals dismissed the appeal for appellants' failure to post the bond.

Antonic Rigging v. Kehe Food, N.D. Illinois, No. 90-4800. Seventh Circuit No. 91-3131. The district court required a bond in an amount to be determined later, and did not discuss attorneys' fees. The appellant voluntarily dismissed the appeal under Appellate Rule 42(b) on April 6, 1992, before the appeal really got started, after the court of appeals had ordered the filing of memoranda on the question of the court's jurisdiction. So far as appears, nothing concerning the bond ever was raised again. I see no indication on the docket whether or not appellant actually posted the rule 7 bond. I see nothing to suggest that appellee ever requested or obtained costs from appellant. There is nothing to suggest the voluntary dismissal of the appeal had anything to do with the bond.

Azizian v. Federated Department Stores, N. D. Cal. No. 03-3359. Ninth Circuit No. 05-15847. The district court on August 9, 2005 ordered appellants to post a bond in the amount of $42,000 "within fourteen (14) days of the date of this Order." Appellants appealed from this order insofar as $40,000 of the $42,000 total was earmarked as security for attorneys' fees that might be incurred by appellee on appeal. The district court on October 14, 2005 denied appellant's motion that – since a $40,000 portion of the bond was being challenged on appeal – the clerk accept a bond in the amount of $2,000 only. I see no indication on the docket whether or not appellant actually posted the rule 7 bond, in whatever amount. The case proceeded in the court of appeals to final judgment, as part of which the court of appeals directed that each party bear its own costs of appeal. [APPEAL from the bond order?]

Baker v. Urban Outfitters, S.D.N.Y. No. 01-5440. Second Circuit No. 06-2753. The district court on December 8, 2006 ordered appellant and appellant's counsel, Mr. Weingrad, each to post a rule 7 bond in the amount of $50,000. On December 13, 2006, the district court – in light of filings by Mr. Weingrad suggesting that he lacked the assets to file a $50,000 bond – modified this order to require Mr. Weingrad to file a bond in the lesser amount of $15,000. "The requirement that Mr. Baker post a bond in the amount of $50,000 remains in effect." Mr.

Weingrad posted his $15,000 bond on December 14, 2006. I see no indication in the docket that Mr. Baker ever posted a bond. In the court of appeals, appellees on July 27, 2007 filed a motion to dismiss on grounds not specified by the docket sheet. An August 3, 2007 court of appeals order for a response from appellee characterized this motion as a motion "to dismiss the appeal pursuant to Rule 7 of the [FRAP]." On October 16, 2007 the court of appeals deferred this motion to dismiss for consideration at the same time as the merits. The appeal was orally argued and then the court of appeals affirmed the district court. The docket sheet does not reveal the basis for affirmance.

Brinn v. Tidewater Transport, E. D. Va. No. 99-1637. Fourth Circuit No. 00-2116. The district court imposed a bond; it was unclear whether this was a rule 7 bond or a supersedeas bond. From the docket sheets it certainly appears to be a supersedeas bond, not a rule 7 bond. The bond was posted October 18, 2000. The case proceeded in the court of appeals to final judgment.

Bryson v. Volkswagen America, D. Colo. No. 92-1522. Tenth Circuit No. 94-1542. The district court on May 2, 1995, ordered a "cost bond" in the amount of $500. On May 17, 1995, appellee filed a motion in the court of appeals asking that the appeal be dismissed because appellant had not paid the cost bond. This motion was referred to the merits panel. The appeal proceeded to final judgment for appellee, at which time all pending motions were denied. Appellee was then awarded costs of $957.60 (but presumably there was no bond out of which that award could be partly defrayed).

Capizzi v. States Resources, D. Mass. No. 02-12319. First Circuit No. 05-1500. The district court on April 26, 2005, ordered the posting of a rule 7 bond in the amount of $26,000. The court of appeals dismissed the case on June 7, 2005, because of appellants' failure to pay the $300 docketing fee. There is no way to tell whether the requirement of a rule 7 bond – in an amount far greater than the $300 docketing fee – was a cause of the appellants' default and the subsequent dismissal of the appeal. I see no indication on the docket whether or not appellant actually posted the rule 7 bond.

Corley v. Rosewood Care Center, C.D. Illinois, No. 95-3350. Seventh Circuit, Nos. 96-2464, et al. The district court on April 25, 1997, ordered a bond "pursuant to FRAP 7 and 8," in the sum of $5,750, without mentioning the question of attorneys' fees. The bond was posted on April 29, 2007. Appellant proceeded with its appeal. The appeal proceeded to final judgment. Ultimately the court of appeals dismissed issues surrounding the bond as moot.

Delor v. Intercosmos Media, E.D. La. No. 04-3262. Fifth Circuit No. 05-31068. The district court on May 17, 2006 ordered the posting of a bond. On July 6, 2006, appellant posted a bond in the district court in the amount of $5,000. The appeal was ultimately dismissed, apparently – given that appellant did file the bond – for reasons having nothing to do with the bond.

Donato v. McCarthy, D. N. H. No. 00-39. First Circuit No. 01-2212. The district court on October 9, 2001, declined to order a bond. The appeal proceeded to final judgment.

Feddersen v. Feddersen, D.V.I. No. 95-185. Third Circuit No. 00-3045. The district court on January 31, 2000 ordered that the $1,000 cost bond that already had been filed – as security for costs surrounding this appeal to the federal district court from the Territorial Court for the Virgin Islands – "shall remain as security pending resolution of this matter in the Third Circuit Court of Appeals." The appeal was voluntarily dismissed by the court of appeals under FRAP 42(b) following a filed stipulation by the parties.

Fernon v. Smajstrala, N. D. Tex. No. 97-25. Fifth Circuit No. 98-10276, 97-11395, et al. The district court on February 6, 1998, ordered appellant to "post a bond or other security in the amount of $5,000 within 30 of the date of this Order." The appeals proceeded to final judgment. I see no indication on the docket whether or not appellant actually posted the rule 7 bond.

Goldstein v. Allstate Insurance, S.D.N.Y. No. 95-8783. Second Circuit No. 99-7374. The district court on February 16, 1999 ordered appellants to post a rule 7 bond in the amount of $5,000. Appellants were pro se. I see no indication on the docket whether or not appellant actually posted the rule 7 bond. Apparently appellant never did. At least, this conclusion is suggested by appellant's letter to the court of appeals docketed April 26, 1999 in which he purported to remind the court of appeals that the propriety of the bond was an issue on appeal (seemingly implying that he did not regard himself as obligated to post it). The appeal was dismissed on June 10, 1999 for appellants' failure to comply with a scheduling order.

Hayhurst v. Calabrese, D.D.C. No. 91-2546. D.C. Circuit No. 93-7132. The district court on May 22, 1992, denied a motion that appellant be required to post a bond. The appeal was dismissed for lack of appellate jurisdiction.

Hirschensohn v. Lawyers Title Insurance Corp., D.V.I. No. 94-187. Third Circuit No. 96-7312. The district court on August 15, 1996, required appellant to file a cost bond. The docket sheet doesn't reveal the details; Andrea's list states that the bond was in the amount of $7,250

and included security for attorneys' fees. The appeal proceeded to final judgment. On the same day as the court of appeals' final judgment, June 10, 1997, the court of appeals reversed the district court's ruling on the rule 7 bond. I see no entry on the docket stating that appellant actually posted the rule 7 bond. However, on July 14, 1997, the district court granted appellant's "motion for release of security for costs." This entry suggests that appellant had filed some form of security to be released.

In re Alexander, i.e., Alexander v. Chrysler Financial, D. Minn. No. 99-46. Eighth Circuit No. 99-3236. The district court on October 8, 1999 (with an amended order on October 13, 1999) ordered appellant to post a $20,000 bond to ensure payment of costs on appeal. I see no indication on the docket whether or not appellants actually posted the rule 7 bond. The appeal was dismissed, following a motion to dismiss, on November 17, 2000. The docket sheet does not state the reason for the dismissal. The icon on the docket sheet that should produce the court of appeals' opinion produces nothing except the message, "this page cannot be displayed."

In re AOL Time Securities, S. D. N. Y. No. 02-5575. Second circuit No. 07-2409. The district court on September 20, 2007 ordered appellant to post "an appeal bond" in the amount of $800. Appellant posted the bond in that amount on October 1, 2007. The appeal is proceeding, and is still in the briefing stage.

In re Auction Houses, S.D.N.Y. No. 00-648. Second Circuit No. 03-7616. The district court on July 18, 2003, ordered appellants to post a rule 7 bond in the amount of $100,000. The district court on October 7, 2003, on motion by appellee that the court set a deadline for the posting of the bond, ordered appellants to post the bond by October 10, 2003. I see no indication on the docket whether or not appellants actually posted the rule 7 bond. The appeal was dismissed by the court of appeals on April 1, 2005, because of appellants' failure to comply with a scheduling order.

In re Cardizem, E. D. Mich. No. 99-1278. Sixth Circuit Nos. 03-2514, 03-2635. The district court on December 12, 2003, imposed an appeal bond in the amount of $174,429. The court of appeals dismissed the appeal in no. 03-2514 on December 14, 2004, for failure to post the appeal bond. On that same date, December 14, 2004, the district court in no. 03-2635 affirmed the judgment of the district court. On February 6, 2005, a motion was filed to hold appellants in contempt for failing to post the appeal bond. On September 9, 2005, the district court denied that motion.

In re Compact Disc, D. Me. No. 00-1361. First Circuit No. 03-2017, 03-2177. The district court on October 3, 2003 granted appellee's motion for assessment of an appeal bond. I

see no indication on the docket whether or not appellants actually posted the rule 7 bond. Appeal no. 03-2017 was voluntarily dismissed pursuant to the parties' stipulation. Appeal no. 03-2177 proceeded to final judgment.

In re Diet Drugs, i.e., Brown v. American Home Products, E. D. Pa. No. 99-20593. Third Circuit No. 03-2766, inter alia.. The district court on July 21, 2000 granted "class counsel's motion to impose bond for costs on appeal." (I did not print this page out because the entire district court docket sheet was 772 pages, this and surrounding entries were not numbered, and it was too difficult to figure out what page number to print.) Motions for a bond had been filed on June 16, 2000 and December 19, 2000. I see no indication on the docket – which is voluminous, so I may have missed something – whether or not appellant actually posted the rule 7 bond. The appeal in no 03-2766 proceeded to final judgment. There were 20 other appeals.

In re Heritage Bond Litigation, i.e., Kivenson v. US Trust Corp., S.D. Cal. No. 02-382. On appeal, Talley v. US Trust Corp., Ninth Circuit No. 05-56621. The district court on September 12, 2005 ordered appellants to post a rule 7 bond. The amount of the bond is not stated on the docket. On October 13, 2005, the district court reduced the amount of the bond from $228,000 to some other amount not stated on the docket. The appeal proceeded to final judgment. I see no indication on the docket whether or not appellant actually posted the rule 7 bond.

In re Insurance Brokerage Antitrust Lit., i.e., QLM Assocs. v. Marsh & McLennan Companies, D.N.J. No. 04-5184. Third Circuit No. 07-1759. The district court on July 2, 2007 directed appellants to post a bond in the amount of $25,000. The appeal is still only in the early stages of briefing. I see no indication on the docket – which is voluminous, so I may have missed something – whether or not appellant actually posted the rule 7 bond.

In re Miller, Bank. W. D. Ky. No. 00-32499. W. D. Ky. No. 05-425. The bankruptcy court on May 12, 2005 denied the trustee's "application for compensation and for turnover of bond." I see no other reference in the docket sheet to a bond. The appeal to the district court was dismissed with prejudice on October 24, 2005. The docket sheet does not state why.

In re NASDAQ, i.e., Robinson v. Herzog, S.D.N.Y. No. 94-3996. Second Circuit No. 99-7163. The district court on June 3, 1999, ordered appellant to post a rule 7 bond in the amount of $101,500. I see no indication on the docket whether or not appellant actually posted the rule 7 bond. The latest appeal I can find in the court of appeals, no. 99-7163, was dismissed with prejudice, pursuant to a stipulation, on April 7, 1999 – before the district court order to post a rule 7 bond. Apparently the appellant John Genins, a pro se, continued to file repeated notices

of appeal, many of which were quickly dismissed without a court of appeals docket sheet ever being created.

In re Pharmaceutical Indus. Average Wholesale Price Litigation, i.e., Citizens for Consumers v. Abbott Lab., D. Mass. No. 01-12257. First Circuit No. 08-1054. The district court on November 2, 2007, ordered an "appeal bond" in the amount of $61,000. The appeal is now proceeding. I see no indication on the docket whether or not appellant actually posted the rule 7 bond.

Jenson v. Fisher, D. Colo., No. 92-1694. Tenth Circuit No. 95-1512. The district court on September 18, 1995, ordered a rule 7 bond in the amount of $1500. No question of attorneys' fees appears on the docket. The appeal proceeded to final judgment. I see no indication on the docket whether or not appellant actually posted the rule 7 bond.

Johnson v. Howard, W. D. Mich. No. 96-662. Sixth Circuit No. 06-1722. The district court on May 19, 2006 ordered appellant to post a bond in the amount of $2,000. On June 29, 2006, appellant did post a $2,000 bond with the district court. But in the court of appeals, appellant moved to voluntarily dismiss his appeal under FRAP 42(b), and the appeal was dismissed. Given that appellant had already posted the bond, the voluntary dismissal of the appeal presumably had nothing to do with the bond requirement. (I suppose it is conceivable that appellant simply ran out of money – partly because of the expense of the bond – and voluntarily dismissed the appeal for that reason.)

Kattula v. Lim, E.D. Mich. No. 07-10157. Sixth Circuit No. 07-1873. The district court on September 21, 2007, denied appellee's motion for a rule 7 bond. The case on appeal was dismissed following a filed stipulation by the parties.

Leff v. First Horizon Home Loan, D.N.J. No. 05-3648. Third Circuit No. 07-4670. The district court on September 4, 2007 required a "Costs Bond" in the amount of $54,500. The appeal is still proceeding. The appeal was docketed only very recently, on December 21, 2007. The court of appeals advised counsel on December 21, 2007, that the "appeal has been listed for possible dismissal," but the docket does not reveal on what basis. That issue, whatever it is, does not appear to have yet been resolved as of this writing. I see no indication on the docket whether or not appellant has actually posted the bond.

Littlefield v. Mack, N.D. Illinois, No. 88-9803. The district court on January 16, 1991 denied a motion for an order requiring defendant to file bond to ensure payment of costs on appeal. The appeal proceeded to final judgment.

Mitchell v. Ainbinder, E. D. Mich. No. 04-72847. Sixth Circuit No. 05-1497. The district court on September 11, 2006, denied appellee's motion for a bond. The appeal proceeded to final judgment.

Moore v. IBEW, S. D. Cal. No. 93-1857. Ninth Circuit No. 96-56248. The district court on July 24, 1996 ordered appellant to post a bond in the amount of $500 "as security for costs on appeal." The appeal proceeded to final judgment. I see no indication on the docket whether or not appellant actually posted the bond.

Moore v. Prestley, S.D Miss. No. 05-347. The district court denied a motion for a bond because the case was not on appeal. This was a petition for a writ of habeas corpus to challenge a state criminal conviction. [This case is not included in accompanying statistical summaries regarding federal district court cases that were, or might have been, appealed to a federal court of appeals.]

O'Keefe v. Mercedes-Benz, E.D. Pa. No. 01-2902. Third Circuit No. 03-2318. The district court on June 5, 2003 required a rule 7 bond in the amount of $13,467. The bond was posted on June 19, 2003. On July 18, 2003, the court of appeals granted appellants' motion to voluntarily dismiss the appeal under FRAP 42(b). Apparently the case settled.

Otworth v. Vanderploeg, W.D. Mich. No. 01-635. Sixth Circuit No. 02-2035. The district court on November 8, 2002, ordered "a $300 bond on appeal." The bond was filed in the district court on November 18, 2002. The appeal proceeded to final judgment.

Pan American Grain v. Puerto Rico Ports, D. P. R. No. 96-1499. First Circuit No. 99-2024. The district court on January 5, 2000, declined to order a bond. The appeal proceeded to final judgment.

Perry v. Pogemiller, N.D. Ill. No. 92-824. Seventh Circuit No. 93-1460. The district court on June 3, 1993 ordered appellant to file a bond "for cost on appeal" in the amount of $1,000. I see no indication on the docket whether or not appellant actually posted the bond. The appeal proceeded to final judgment.

Phillips v. Grendahl, D. Minn. No. 00-1382. Eighth Circuit No. 01-2616. The district court on September 19, 2001, imposed a cost bond in the amount of $1,000. The appeal proceeded to final judgment. I see no indication on the docket whether or not appellant actually posted the bond.

RBFC One v. Zeeks, S.D.N.Y. No. 02-3231. Second Circuit No. 05-3453. The district court on September 2, 2005 ordered appellant to post a rule 7 bond in the amount of $5,000. Appellant posted a bond in that amount in the district court on September 9, 2005. The appeal proceeded to final judgment.

Richmark Corp. v. Timber Falling, D. Oregon No. 88-1203. Ninth Circuit No. 91-35281. The district court on May 8, 1991 granted a motion for an order requiring appellant to post a rule 7 bond, in an amount to be determined later. On July 16, 1991, the district court set the amount of the bond at $884.40. Appellant posted the required bond in the amount of $884.40 on July 24, 1991. Appeal No. 91-35281 was dismissed by the court of appeals following the parties' stipulation. Appeal No. 91-35966 proceeded to final judgment.

Scheufler v. General Host Corp., D. Kansas No. 91-1053. Tenth Circuit No. 96-3011. District court on January 19, 1996, ordered a "supersedeas bond" in the amount of $1,287,500. The appeal proceeded to final judgment. I see no indication on the docket whether or not appellant actually posted the bond.

Watson v. E.S. Sutton, S.D. N.Y. No. 02-2739. Second Circuit No. 05-5388-cv. In April 2004, a jury found that Defendant unlawfully retaliated against Plaintiff, violating her rights under Title VII of the Civil Rights Act of 1964, and awarded her $4.4 million (later reduced to $2.2 million). Defendant later filed its notice of appeal. Plaintiff then moved for, among other things, an order requiring Defendant to post a FRAP 7 bond in the amount of $43,987.16 to cover attorney's fees and costs incurred on appeal. In its order granting the request, the district court discussed Second Circuit case law that states a FRAP 7 bond may include anticipated appellate attorneys' fees if the statute governing the underlying cause of action defines "costs" to include fees. The district court concluded that under Title VII a court may award attorneys' fees as part of costs to the prevailing party. Defendant posted the bond on January 4, 2007. On February 14, 2007, the Second Circuit Court affirmed the judgment of the district court.

Walsh v. New London Hospital, D.N.H. No. 91-cv-710. First Circuit No. 94-1518. On April 28, 1994, Plaintiff filed his notice of appeal from the judgment of the district court in this medical malpractice case. Plaintiff's attorney later filed notices of withdrawal on May 6 and 11, 1994. Defendants New London Hospital and Francis Evans then moved to require Plaintiff pro

se to post a bond. (Defendant New London Hospital was later dismissed on June 3, 1994, and it subsequently withdrew its motion for bond.) On June 22, 1994, the district court denied without prejudice Defendant Evans' motion for bond. The First Circuit Court eventually dismissed the appeal for want of prosecution on November 25, 1994.

Wakefield v. City of Miami-Dade, S.D.FL No. 05-cv-21792. Eleventh Circuit No. 05-14915. Plaintiff pro se filed a complaint in state court for $350 million against the City of Miami-Dade and others alleging various violations of his constitutional rights, which was later removed to federal district court on July 5, 2005. On the same day, Defendants also moved to dismiss the complaint. Plaintiff failed to file papers opposing the motion to dismiss. The district court eventually granted the motion on August 2, 2005. Plaintiff appealed. On September 6, 2005, Defendant Miami-Dade moved for an order requiring Plaintiff to post a FRAP 7 bond in the amount of $10,000. The district court granted the motion on October 6, 2005, and ordered Plaintiff to post the bond. Plaintiff did not post the bond and on January 4, 2006, the Eleventh Circuit granted Defendant's motion to dismiss the appeal for failure to post the bond.

Vickery v. Cavalier Home Builders, N.D. Ala. No. 03-cv-2987. Eleventh Circuit No. 05-14957. Plaintiff unsuccessfully sued her employer for alleged violations of the Americans with Disabilities Act. Plaintiff filed her notice of appeal pro se whereupon Defendant moved for an order requiring Plaintiff to post a FRAP 7 bond. At the hearing on the motion, Defendant asked for a bond in the amount of $25,000, arguing that Plaintiff's appeal is frivolous, unreasonable, and without foundation and the $25,000 bond would adequately cover attorneys' fees expected to be incurred on appeal. Plaintiff opposed the motion, insisting that her appeal is not frivolous, unreasonable, or without foundation and that Defendant's appellate attorneys' fees should be no more than $4,000. On December 12, 2005, the district court found that Plaintiff's appeal is frivolous, unreasonable, and groundless, but concluded that it could not include attorneys' fees in the bond because the ADA does not have a provision allowing fees to be taxed as costs against the non-prevailing party. The court granted the motion and ordered Plaintiff to post a bond in the amount of $2,000 by December 19, 2005, giving leave to Defendant to file a motion to dismiss in the appellate court if Plaintiff failed to post the bond. Plaintiff did not post a bond. On January 24, 2006, the circuit court granted a motion to dismiss the appeal, noting that the dispute had been settled.

Vaughn v. American Honda Motor Co., E.D. Tex. No. 04-cv-142. Fifth Circuit No. 07-41056. Plaintiff filed a class action lawsuit against Defendants alleging the odometer in the Honda minivan she purchased somehow inflated the actual mileage traveled, resulting in numerous breaches of warranty, etc. On September 28, 2007, the district court entered its final judgment approving the settlement agreement and dismissing the complaint. The court also concluded that any appeal from the judgment would be summarily denied under FRCP 38, resulting in the assessment of attorney's fees and costs. The court therefore ordered pursuant to

FRAP 7 that any party appealing the judgment must post a bond in the amount of $150,000. Another Honda owner, Zack Hawthorn, filed a notice of appeal on October 24, 2007, and moved to stay the bond and have it reduced to $1,000. The Fifth Circuit Court granted the motion and reduced the bond to $1,000. The circuit court ruled: (1) the district court had erroneously relied on FRAP 7 (bond for costs) instead of FRAP 8 (supersedeas bond); (2) any costs incurred during the pendency of an appeal are adequately addressed in the settlement agreement; (3) there is no provision in FRAP that allows a district court to set the bond amount based on the frivolousness of an appeal; (4) a fee-shifting statue was not implicated; and (5) no one argued that the $1,000 bond was inadequate. No bond was filed and Zack Hawthorn later dismissed his appeal on January 7, 2008. (There appears there were several other class members that took the same tack as Hawthorn.)

United States v York, D.D.C. No. 93-cv-839. D.C. Circuit Nos. 95-5243, 95-5244, and 95-5279. York Associates was a mortgage lender that made loans to homeowners which were insured by HUD under the National Housing Act. In 1991, York filed Civil Action No. 91-3094 against HUD and the Government National Mortgage Association (GNMA), alleging that HUD/GNMA failed to pay mortgage insurance benefits owed to it as a result of loans made by York to borrowers that later defaulted. Plaintiffs GNMA and the United States filed a separate action, Civil Action No. 93-839, against John York individually, First Commonwealth Savings Bank, and USGI, Inc., alleging that each had "induced" the breach of duty owed by York Associates to GNMA and were therefore jointly and severally liable. In Civil 93-839, the district court eventually entered an amended judgment in favor of Plaintiffs and against Defendants, jointly and severally, in the amount of $6.3 million. In the judgment, the court also ordered Defendant USGI to post a "bond sufficient to satisfy the requirements of law . . . which . . . compl[ies] with Rules 7 and 8 of the Federal Rules of Appellate Procedure" by July 24, 1995. (Defendant York and First Commonwealth reached an agreement with the Plaintiff on the posting of a supersedeas bond.) On July 27, 1995, Plaintiff and USGI stipulated to the posting of a $1,000 bond, which was deposited on August 1, 1995. USGI later filed its notice of appeal. On appeal, the circuit court reversed the amended judgment, holding that York Associates did not owe GNMA a duty to refrain from participating in the transactions in question.

Westinghouse Credit Corporation v. Bader & Dufty, D. Colo. Tenth Circuit No. 80-1222. Plaintiff brought action to enjoin alleged violations of federal securities laws. The district court dismissed the complaint and ordered Plaintiff to post bond in the amount of $5,000. Plaintiff posted the bond and thereafter appealed. On appeal, Plaintiff argued, inter alia, the amount of the bond was too high. The circuit court was skeptical as to whether the bond issue was properly preserved on appeal. Nevertheless, the court went on to affirm the judgment and rule the district court did not abuse its discretion in fixing a cost bond in the amount of $5,000.

Sierra Club v. El Paso Gold Mines, Inc., D. Colo. 01-cv-2163. Tenth Circuit No. 03-1105. Plaintiffs filed suit against Defendant to enforce provisions of the Clean Water Act. Both sides filed cross motions for summary judgment. In its motion, Defendant argued, among other things, that Plaintiff failed to prove that its abandoned mine had polluted a navigable waterway. In separate proceedings, the magistrate judge: (1) granted Plaintiffs' motion for summary judgment, (2) denied Defendant's motion for summary judgment, (3) ordered Defendant to pay civil penalties in the amount of $94,900, and (4) ordered Defendant to post a $50,000 bond covering Plaintiffs' costs and attorneys' fees on appeal. In ordering the bond, the court agreed with the reasoning in Second and Eleventh Circuit case law, finding that the term "costs" included attorney fees where the underlying statute defines "costs" to include attorney fees. The court noted that because the Clean Water Act defines "costs of litigation" to "includ[e] reasonable attorney and expert witness fees," it concluded that it had discretion to impose a cost bond that included anticipated appellate attorney fees. Defendant thereafter appealed. (It is difficult to tell from PACER whether Defendant had posted the bond.) The Tenth Circuit later reversed the judgment and remanded for further proceedings. A new magistrate judge ultimately found that Defendant did not violate the Clean Water Act.

Stagner v. U.S. Patent and Trademark Office, D. Kans. 90-cv-1435. Federal Circuit No. 92-1340. In 1990, Plaintiff pro se filed suit against Defendant apparently alleging that it wrongfully denied his patent application. (The complaint was similar to three prior civil actions that Plaintiff filed but were eventually dismissed by the district court.) In March 1992, the district court granted Defendant's motion to dismiss and entered judgment against Plaintiff. Plaintiff filed his notice of appeal on May 7, 1992. On May 27, 1992, Defendant moved for an order to compel Plaintiff to post a FRAP 7 bond. The court granted the motion and ordered Plaintiff to post bond in the amount of $600, wearily pointing out that Defendant would probably end up copying the record for Plaintiff (again) and would incur costs in excess of $600. The Federal Circuit Court affirmed. (There is no record in PACER that Plaintiff posted the $600 bond.)

Symeonidis v. Eagle Contruction, E.D. Va. 05-cv-589 and Symeonidis v. Koort, E.D. Va. 05-cv-762 . In these related cases, Plaintiff George Symeonidis, acting on behalf of his mother Marie, sold his mother's house to Defendant Eagle Construction. The deal purportedly allowed the mother to remain in the house until Eagle obtained all necessary construction permits. Eagle later tried to evict Marie from the premises, whereupon Plaintiff responded by trying to rescind the contract on the bases of fraud, misrepresentation, and forgery. In Civil 05-cv-589, the district court granted Eagle's motion to dismiss and ordered Plaintiff George Symeonidis to post a $75,000 bond pursuant to FRAP 7 and 8 if an appeal was taken. Plaintiff neither posted a bond nor filed an appeal. In Civil 05-cv-762, Plaintiff George Symeonidis and his brother Solon filed a substantially similar suit against the same defendants in Civil 05-cv-589 and also included Defendants' attorneys as additional parties. Defendants attorneys later moved to dismiss for lack of jurisdiction, which the district court granted. The district court also ordered Plaintiff to post a

bond if he elected to file an appeal. Plaintiff did not appeal or post a bond. (PACER does not specify the bond amount in Civil 05-cv-762.)

Tri-Star Pictures v. Unger, S.D.N.Y. 88-cv-9129. Second Circuit Court No. No. 99-7220. Plaintiffs Tri-Star Pictures, et al., (Tri-Star) filed suit against Defendants Kurt Unger, et al., (Unger) alleging trademark infringement and seeking to enjoin them from releasing and distributing in the United States the movie, "Return from the River Kwai." Following trial, the district court held that Unger infringed Tri-Star's trademark rights and that he did so in bad faith. Because the district court concluded that Unger acted in bad faith, it held that Tri-Star was entitled to both costs and attorney's fees. Unger appealed. Tri-Star later moved for an order requiring Unger to post a FRAP 7 bond in the amount of $50,000, which included attorneys' fees and costs. The district court granted the motion and ordered Unger to post the $50,000 bond because: (1) Unger, a non-U.S. resident, was a payment risk "having failed to establish [his] financial soundness to this Court", (2) the issues raised on appeal appeared to be "wholly without merit", and (3) Unger acted in bad faith. Unger then appealed the bond order, arguing that the court abused its discretion in ordering the $50,000 bond because it violated his due process rights and denied him access to the courts. (Unger's appeal on the merits was stayed pending a decision on the bond appeal.) The circuit court later affirmed the bond order, finding that the district court did not abuse its discretion in imposing the bond. Unger did not post a bond and the circuit court eventually dismissed the underlying appeal based on its inherent powers to manage its own docket and caseload.

United States ex rel. Scott v. Metropolitan Health Corporation, W.D. Mich. No. 02-cv-485, Sixth Circuit Court No. 05-2642/06-1122. In 2002, Plaintiff filed her complaint alleging that Defendants retaliated against her after she filed a qui tam suit under False Claims Act. Defendants later moved for summary judgment. On June 23, 2005, the district court granted the motion in part and dismissed with prejudice Plaintiff's federal law claims and dismissed without prejudice Plaintiff's state law claims. Plaintiff filed her notice of appeal on July 6, 2005. Shortly thereafter, Defendants filed their motion for bill of costs, attorneys fees, expenses, and non-taxed costs as sanctions. On September 29, 2005, the district court granted the motion and awarded $18,966.40 as costs under 28 U.S.C. § 1920. The court also concluded that Plaintiff acted in bad faith and awarded fees and costs under FRCP 26(g) and 56(g), which were later determined to be $1.6 million. The district court also ordered Plaintiff to post a FRAP 7 bond in the amount of $25,000, if she elected to appeal. Plaintiff filed her notice of appeal on January 6, 2006, and deposited $25,000 with the court on January 31, 2006. The Sixth Circuit Court eventually affirmed the underlying summary judgment decision and sanctions order. Plaintiff thereafter filed a petition for writ of certiorari with the Supreme Court.

Terry Investment Co v. United Funding, E.D. Cal. No. CV-F-90-675, Ninth Circuit No. ? In 1990, Plaintiff filed suit against Defendants alleging breach of contract. On December 18,

1991, the district court granted summary judgment for Plaintiff and later entered judgment in the amount of $98,762, plus interest and attorney's fees. Defendants thereafter appealed. After the notice of appeal was filed, Plaintiff moved to compel Defendants to post a supersedeas bond. The court denied the motion, holding that it did not have authority in this case to order Defendant to post a supersedeas bond. The court did, however, order Defendants to post a FRAP 7 bond in the amount of $500. The court noted that "Rule 7 bonds are to be strictly limited to the costs of filing and proceeding with a case in the court of appeals. A bond under Rule 7 may not include attorney's fees, and may not be used as a surety against the original judgment." No bond was posted and the appeal was eventually dismissed on March 18, 1994.

De Paz v. United States, D. Kan. No. 06-cv-3028. In December 2005, Plaintiff was sentenced on an unspecified criminal conviction, which he promptly appealed. Shortly thereafter, Plaintiff pro se filed a motion to vacate his sentence under 28 U.S.C. § 2255. Plaintiff also filed a motion to require an appeal bond under FRAP 7. The district court denied the request for § 2255 relief, pointing out that a court is generally precluded from considering a § 2255 motion while a direct appeal of the criminal conviction is pending. The court also denied Plaintiff's request for a bond, ruling that FRAP 7 doesn't apply in a criminal proceeding. To the extent that Plaintiff was seeking to be released on bond, the court denied that request as well.

United States v. Mason Tenders, S.D.N.Y. No. 94-cv-6487. In 1994, Plaintiffs filed suit against Defendants under the RICO and ERISA statutes. In their complaint, Plaintiffs allege, among other things, that over a twenty-year period executives and appointees of Defendant Mason Tenders District Council (MTDC) had: (1) extorted payoffs from employers in exchange for those officials condoning the employers' use of non-union labor; (2) embezzled and converted MTDC Trust Fund; (3) engaged in kickback schemes with companies and individuals providing services to MTDC; and (4) failed to police and knowingly condoned similar activities on the part of certain officials of the constituent local unions of MTDC.

In December 1994, Plaintiffs, MTDC, and the employer-trustees of the MTDC Trust Funds entered into a consent decree approved by the district court. The consent decree set forth three categories of prohibited conduct: (a) any acts of racketeering as defined in the RICO statute; (b) any knowing association with any member or associate of any La Cosa Nostra crime family or any other criminal group, or with any person prohibited from participating in union affairs; and (c) any obstruction or interference with the work of the court-appointed officers or with the purposes of the consent decree. The court thereafter appointed a monitor and investigations officer to enforce the terms of the consent decree.

On July 25, 1995, the investigations officer filed 14 disciplinary charges against Salvatore Lanza, a member and business manager of Mason Tenders Local 30, alleging that Lanza committed acts of racketeering by demanding and receiving payments from two contractors employed or would employ members of Mason Tenders Local 30. The officer also charged

Lanza with cavorting with members of the Genovese crime family and obstructing his investigative efforts. In April 1996, the monitor held a hearing on the disciplinary charges against Lanza. The monitor eventually adopted four of the 14 disciplinary charges against Lanza ordered him expelled from the Mason Tenders Union. Lanza thereafter appealed.

In March 1997, the district court denied Lanza's appeal. The court also held:

> The decisions of this Court with respect to the decisions of the Monitor shall be final and subject to appeal only as follows: any appellant who is unsuccessful in reversing the Court's decision shall be obligated to pay all reasonable attorneys' fees and costs incurred by the Monitor and/or Investigations Officer in connection with opposing the appeal. Accordingly, each such appellant shall be required to post a bond prior to prosecuting an appeal in an amount satisfactory to the Court, the Monitor and/or the Investigations Officer, in accordance with Rule 7 of the Federal Rules of Appellate Procedure.

It appears no one appealed from the district court's decision.

Young v. New Process, N.D. Ala. 01-cv-1151-ar. Eleventh Circuit Nos. 04-11554, 06-12101, 06-12879. In May 2001, Plaintiffs filed a lawsuit alleging various acts of racial discrimination against their employer, New Process Steel, pursuant to 42 U.S.C. § 1981 and Title VII of the Civil Rights Act. The district court eventually dismissed all claims against Defendant, save for claims of a racially hostile work environment and a single retaliation claim. The case eventually went to trial, where a jury found in favor of Defendant. Plaintiffs thereafter appealed.

Several months after Plaintiffs filed their notice of appeal, the district court entered the following order:

> Pursuant to Rule 7, Federal Rule of Appellate Procedure, this court would require appellant to file a bond or provide other security in an amount necessary to ensure payment of costs on appeal if the potential costs taxable on appeal can be fairly approximated. If appellee wishes to invoke Rule 7, it shall within fourteen (14) days submit evidentiary materials to support the fixing of a bond amount.

Taking the hint, Defendant filed a motion for a FRAP 7 bond. In its motion, Defendant sought to have the bond cover its anticipated appellate attorney's fees as well as the other costs it would incur as a result of the appeal. The court thereafter granted the motion, requiring Plaintiffs to post a cost bond in the amount of $61,000 as a prerequisite to their appeal. All but $1,000 of that amount was to cover the attorney's fees Defendant estimated it would incur in the appeal. The district court also ruled that "[t]he fixing of a Rule 7 bond, pursuant to Pedraza v. United

Guaranty Corp., 313 F.3d 1323 (11th Cir.2002), does not require the court to predict whether or not a defendant will prevail on appeal, or to require that defendant demonstrate that the appeal is frivolous." Plaintiffs appealed from the bond order. The appeal on the merits was stayed pending the outcome of the bond appeal.

On appeal, a panel of the Eleventh Circuit vacated the district court's bond order and instructed the court to not include Defendant's anticipated appellate attorney's fees absent a finding that Plaintiffs' appeal would be frivolous, unreasonable, or groundless. Defendant filed a petition for rehearing en banc. The court granted the petition and eventually reversed the judgment of the district court, holding that the court "may not require an unsuccessful plaintiff in a civil rights case [under a fee-shifting statute] to post an appellate bond that includes not only ordinary costs but also the defendant's anticipated attorney's fees on appeal, unless the court determines that the appeal is likely to be frivolous, unreasonable, or without foundation. If the court does make that determination, it has discretion to grant the defendant's motion and require the plaintiff to post a bond in the amount of the defendant's anticipated costs including appellate attorney's fees."

On remand, the district court eventually concluded that Plaintiffs' appeal was unreasonable and imposed a FRAP 7 bond in the amount of $61,000. Instead of posting the bond, however, Plaintiffs filed yet another appeal from the bond order. Defendant again moved for the imposition of a FRAP 7 bond, this time in the amount of $10,000. Recognizing the endless cycle of appeal-bond-appeal, the district court granted the motion and ordered Plaintiffs to post a $10,000 bond. The court also concluded that Plaintiffs' current appeal is frivolous, unreasonable, and/or groundless. As night follows day, Plaintiffs appealed the court's second bond order. The circuit court later denied the bond appeal and the underlying appeal for failure to post the FRAP 7 bond. The court concluded that Plaintiffs' appeal were frivolous because the district court properly complied with its earlier ruling in imposing a FRAP 7 bond.

Cases Found Unavailable on PACER, by circuit. A total of 21 cases were unavailable on PACER.

First Circuit. First Circuit PACER found no case for Scknolnick, no. 87-1006.

Second Circuit. SDNY PACER found no case for Haberman, no. 74-5740, and could not retrieve the docket sheet for In re TR Acquisition, no. 95-41322. EDNY PACER found no case for CH Sanders, no. 87-3874. WDNY PACER found no case for Cuyahoga, no. 85-416E.

Third Circuit. ED Pa. PACER found no case for Hughes, no. 78-2888. D.V.I. PACER could not retrieve the docket sheet for Patrick, No. 91-64.

Fourth Circuit. D. Md. PACER says the docket report for Lattomus v. General Business Services Corp., No. 89-842, is "not available." EDVa. PACER found no case for Page, no. 78-1043.

Fifth Circuit. There were no PACER problems in the Fifth Circuit.

Sixth Circuit. Sixth Circuit PACER found no case for Munn, no. 89-2240.

Seventh Circuit. There were no PACER problems in the Seventh Circuit.

Eighth Circuit. Eighth Circuit PACER found no case for Buffington, no. 81-2013.

Ninth Circuit. 9th Circuit PACER could not retrieve the docket sheet for Baker, no. 90-35787. D. Oregon PACER found no case for Lundy, no. 79-821.

Tenth Circuit. There were no PACER problems in the Tenth Circuit.

Eleventh Circuit. Eleventh Circuit PACER was largely inaccessible altogether. The Eleventh Circuit web-page asks for a PACER ID even though one is already in PACER, and then will not accept the PACER ID. Thus the Eleventh Circuit docket sheets for Allapattah, Baynham, Downey, Garrett, Home Design, and Pedraza all were unavailable. In addition, none of these cases registered a hit for the Eleventh Circuit in the Case Index. Also, N.D. Alabama PACER found no case for Garrett, no. 97-925.

D. C. Circuit. D. C. Circuit PACER found no case for Fed. Prescription Service, Nos. 80-1359, 80-1368, or for In re Am. President Lines, No. 84-5228.

Case name	Cite	Year	Circuit	District	Type of case	Appellant	Bond required?	Amount	Attorney fee discussed?	Attorney fee included?	Statutory or Rule 38?	Appeal taken on underlying issue?	Bond affirmed / reversed?	Sanction for noncompliance?	IFP status?	Comments
Sckolnick v. Harlow	820 F.2d 13	1987	1	AAA	FHA	Pro se plaintiff	Y	500 or deed	Y	[Y]	Rule 38		Affirmed			
In re Pharm. Indus. Average Wholesale Price Litig.	2007 WL 3235418	2007	1	D. Mass.	Class action	Objector	Y	61,000	Y	N	Rule 38	Y				Court includes administrative costs but not attorney fees, due to lack of evidence as to the amount of the latter.
Capizzi v. States Res. Corp.	2005 WL 958400	2005	1	D. Mass.	Foreclosure on property	Plaintiff and Defendant	Y	26,000 26,000 1,000 1,000 1,000	Y	Y & N	Provided for in underlying mortgage documents.	Y				Rule 7 bond can include attorneys' fees as a sanction for a frivolous appeal. Court set separate bond amounts for each of the cases involved and for different parties. The $26,000 amounts included an estimate of $25,000 in attorneys' fees. The $1,000 bonds did not include attorneys' fees because the appeals were not frivolous and apparently weren't subject to the mortgage documents.
In re Compact Disc Minimum Advertised Price Antitrust Litig.	2003 WL 22417252	2003	1	D. Me.	Class action (Clayton Act)	Objectors	Y	35,000	Y	Y (some)	Rule 38	Y				Attorneys' fees and costs of delay may be included in an appellate bond under Rule 38. "Accordingly an appeal bond recognizing some of the costs this appeal imposes on the plaintiffs is in order under Rule 7. But I am also mindful of the fact that objectors sometimes serve a useful role in helping police class action settlements in cases where the assumptions that customarily underlie the adversary system may be inaccurate (for example, defendants may co-opt plaintiffs' counsel by agreeing to unreasonably high attorney fees). To pose too high a hurdle for objectors, therefore, could create a general deterrent that might well not comport with public policy."
Donato v. McCarthy	2001 WL 1326583	2001	1	D.N.H.	State claim regarding collective bargaining agreement, preempted by the Labor Management Relations Act	Pro se plaintiff	N		Y			Y			Plaintiff was pro se and court discussed appellant's lack of resources, but didn't specify IFP.	"Given the precedent in this circuit, then, this court likely has discretion to require plaintiff to post a bond to secure appellate 'costs' that include a possible award of attorney's fees as a sanction against plaintiff for having taken a frivolous appeal." "But, pro se plaintiff's argument is not so far removed from the arena of rational discourse that her appellate rights should be unnecessarily encumbered by a significant (and perhaps prohibitive) bond requirement." "While Rule 7 serves a legitimate purpose, it should be applied carefully to avoid depriving a plaintiff who might have a legitimate claim, but limited financial resources, of the opportunity to have that claim finally resolved on the merits." Appeal on underlying issue is located at*Donato v. McCarthy*, 2002 WL 338747 (1st Cir. March 5, 2002) (unpublished).
Walsh v. New London Hosp.	1994 WL 287756	1994	1	D.N.H.	Medical malpractice	Plaintiff	N	—	N	N	—	Y	—	—	Y	Motion for bond was unopposed, but the motion did not specify the amount of bond needed, so court denied without prejudice. Appeal eventually dismissed for lack of prosecution.

Case name	Cite	Year	Circuit	District	Type of case	Appellant	Bond required ?	Amount	Attorney fee discussed ?	Attorney fee included?	Statutory or Rule 38?	Appeal taken on underlying issue?	Bond affirmed / reversed?	Sanction for noncompliance ?	IFP status?	Comments
Pan Am. Grain Mfg. Co. v. Puerto Rico Ports Auth.	193 F.R.D. 26	2000	1	D.P.R.	Admiralty negligence	Plaintiff	N					Y				"PRPA and Progranos have requested that Pan American file a bond in the amount of $75,000.00. This sum simply does not correlate with the taxable costs under Rule 39(e) that are likely to accrue on appeal. Further, '[d]efendants have made no attempt ... to justify their request for a bond in [that amount].'" (citing *Lundy v. Union Carbide Corp.*, 598 F. Supp. 451, 452 (D. Or.1984)). Appeal on underlying issue (not on bond) is located at*Pan Am. Grain Mfg. Co. v. Puerto Rico Ports Auth.*, 295 F.3d 108 (1st Cir. 2002).
Baker v. Urban Outfitters, Inc.	2007 WL 2908272	2007	2	AAA	Copyright	Plaintiff	Y	50,000 +	Y	Y	Statutory	Y				D Ct ordered both plaintiff & counsel to post $50,000 each, see 2006 WL 3635392, S.D.N.Y., 2006. But Ct Apps opinion refers to lawyer satisfying his requirement by posting a 15,000 bond. Ct Apps reaches merits (despite plaintiff's failure to post bond), and affirms.
Tri-Star Pictures, Inc. v. Unger	1999 WL 973506, 198 F.3d 235 (unpublished)	1999	2	AAA	Trademark etc.	Pro se defendant	Y	50,000	Y	Y	Statutory	Y	Affirmed	Dismissed appeal	N	The district court decision is located at *Tri-Star Pictures, Inc. v. Unger*, 32 F. Supp. 2d 144 (S.D.N.Y. 1999). The district court found that the appellant's argument that he lacked funds contradicted other statements he made, that the appellant acted in bad faith, that the right to an appeal is not absolute and may be encumbered by requiring reasonable security, and that the appeal was likely meritless. District court declined to modify bond on request for reconsideration despite defendant's argument that the bond would deny his right to appeal because the defendant was a payment risk, demonstrated bad faith, and the issues on appeal were meritless. *Tri-Star Pictures, Inc. v. Unger*, No. 88 CIV. 9129(DNE), 1999 WL 129497 (S.D.N.Y. Feb. 8, 1999).
Adsani v. Miller	139 F.3d 67	1998	2	AAA	Copyright	Plaintiff	Y	35,000	Y	Y		N	Affirmed			
C.H. Sanders Co. v. BHAP Hous. Dev. Fund Co.	750 F. Supp. 67	1990	2	E.D.N.Y.	Contractor's action against government for direct enforcement of state court judgment affirming arbitration award	Defendant	N/A									The Government is not required to file a security bond to appeal, but that does not mean that there is an automatic stay on execution of judgment.

Case name	Cite	Year	Circuit	District	Type of case	Appellant	Bond required?	Amount	Attorney fee discussed?	Attorney fee included?	Statutory or Rule 38?	Appeal taken on underlying issue?	Bond affirmed / reversed?	Sanction for noncompliance?	IFP status?	Comments
In re AOL Time Warner, Inc., Sec. and "ERISA" Litig.	2007 WL 2741033	2007	2	S.D.N.Y.	Securities fraud class action	Objector	Y	800	Y	N		Y				"[W]hen deciding whether to require an appellant to post an appeal bond, district courts consider several factors, including '(1) the appellant's financial ability to post a bond, (2) the risk that the appellant would not pay appellee's costs if the appeal loses, (3) the merits of the appeal, and (4) whether the appellan has shown any bad faith or vexatious conduct.'" (quoting*Baker v. Urban Outfitters, Inc.*, 01 Cv. 5440(LAP), 2006 WL 3635392, at *1 (S.D.N.Y. Dec. 12, 2006)). "The Second Circuit allows the inclusion only of those costs enumerated in Appellate Rule 39, 28 U.S.C. § 1920, or the substantive statute underlying the appeal." The $800 bond included only the printing and copying costs anticipated on appeal. The bond could not include the costs of delay of the settlement because there was no relevant underlying statute that provided for awarding such costs. The court refused to include attorneys' fees because there was no underlying statute permitting it and it did not find the authority to do so under FRAP 38 or 28 U.S.C. 1927. The court also declined to rely on FRAP 38 to double the amount of the bond
Watson v. E.S. Sutton, Inc.	2006 WL 4484160	2006	2	S.D.N.Y.	Title VII of Civil Rights Act of 1964	Defendant	Y	43,987.16	Y	Y	Statutory (Title VII)	Y	Affirmed	Bond posted	N	FRAP 7 bond can include attorneys' fees if the statute governing the underlying cause of action defines "costs" to include attorneys' fees.
RBFC One, LLC v. Zeeks, Inc.	2005 WL 2140994	2005	2	S.D.N.Y.	Breach of contract, breach of implied covenant of good faith and fair dealing, fraud, and tortious interference with contract.	Plaintiff	Y	5,000	Y	N		Y				FRAP 7 bond could not include attorneys' fees because there was no underlying statute defining costs as including fees. The private contractual clause requiring payment of fees could not require bond including attorneys' fees because the clause was not even-handed. The court left open the option of the parties deciding to mutually post two bonds to cover future fees.
In re Auction Houses Antitrust Litig.	2003 WL 21666633	2003	2	S.D.N.Y.	Class action alleging price fixing conspiracy	Class member	Y	100,000	N			Y				Court determined that appeal was frivolous, "and part of a frivolous and vexatious course of conduct." The appellant had failed to file an opposition to the motions for appellate bond.
Goldstein v. Allstate Ins. Co.	1999 WL 76811	1999	2	S.D.N.Y.	Insurance contract dispute	Plaintiffs (potentially)	Y	5,000	N			Y			Denied	Bond appeared to cover just the cost of the trial transcript. The court noted that if the plaintiffs appealed, the Defendant would have to purchase the trial transcript at a cost of $4,950.

Case name	Cite	Year	Circuit	District	Type of case	Appellant	Bond required?	Amount	Attorney fee discussed?	Attorney fee included?	Statutory or Rule 38?	Appeal taken on underlying issue?	Bond affirmed / reversed?	Sanction for noncompliance?	IFP status?	Comments
In re NASDAQ Market-Makers Antitrust Litig.	187 F.R.D. 124	1999	2	S.D.N.Y.	Class action	Pro se class member/ Objector	Y	101,500	Y	Y	Statutory (Section 4 of the Clayton Act)	Y				Class member shouldn't be permitted to use class action for his own unrelated purposes and should not be permitted to delay administration of $1.027 billion settlement. Bond included costs on appeal, attorneys' fees on appeal, and damages that could result from the delay and/or disruption of settlement administration caused by his appeal. Court declined to double bond under Rule 38 because doubling costs under FRAP 38 is
In re T.R. Acquisition Corp.	1997 WL 528156	1997	2	S.D.N.Y.	Bankruptcy	Defendant (sought to recover security posted to cover attorneys' costs for appeal)	Not under FRAP 7		N							Court found FRAP 7 inapplicable because the appeal was pending in the district court, not the court of appeals. The court noted, however, that FRAP 7 does not permit a district court to include attorneys' fees in setting the appeals bond.
Haberman v. Tobin	1981 WL 317605	1981	2	S.D.N.Y.	Shareholder's derivative suit	Plaintiff	Y	1,500	N							
U.S. v. Mason Tenders Dist. Council of Greater N.Y.	1997 WL 97836	1997	2	S.D.N.Y. (on appeal from decision of court-appointed monitor)	RICO and ERISA	Defendant (appeal from disciplinary action)	Y	TBD	Y	Y	Consent decree	N	—	—	N	Case was based on a consent decree that appointed an Investigations Officer to investigate proscribed acts and to bring charges based on the conduct before a court-appointed Monitor. Court found that any appellant unsuccessful in reversing the court's decision would be required to pay all reasonable attorneys' fees and costs incurred by the Monitor and/or the Investigations Officer in connection with the appeal. The bond had to be "an amount satisfactory to the Court, the Monitor and/or the Investigations Officer, in accordance with [FRAP 7]." No appeal taken; no bond posted.
Cuyahoga Wrecking Corp. v. Laborers Int'l Union of N. Am., Local Union # 210	1986 WL 397	1986	2	W.D.N.Y.	Contract dispute	Plaintiffs	N									The defendant requested an appellate bond equivalent to a supersedeas bond even though there was not yet a money judgment in its favor. Envisioned arbitration award was not sufficient basis for requiring bond.
Hirschensohn v. Lawyers Title Ins. Corp.	1997 WL 307777	1997	3	AAA	Fraud	Plaintiff	Y	7,250	Y	Y	Statutory	Y	Reversed			The district court opinion is located at *Hirschensohn v. Lawyers Title Ins. Corp.*, No. 94-187, 1996 WL 493173 (D.V.I. Aug. 15, 1996). "In the Virgin Islands, attorney's fees are included as costs in a civil action. 5 V.I.C. § 541. The Federal Rules of Appellate Procedure permit recovery of the costs of printing or otherwise producing necessary copies of briefs, appendices, and copies of records." *Id.* at *4 (citing Fed. R. App. P. 39).
Hughes v. Defender Ass'n of Philadelphia	509 F. Supp. 140	1981	3	D.C. Pa.	Employment discrimination (Section 1981, Section 1983, Title VII)	Plaintiff	Y	2,500	N			N (dismissed)		3rd Circuit dismissed appeal for failure to post bond, with leave to comply within 15 days.	Denied because appeal was in bad faith.	
In re Ins. Brokerage Antitrust Litig.	2007 WL 1963063	2007	3	D.N.J.	Class action	Objector	Y	25,000	Y	N		Y				

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Leff v. First Horizon Home Loan	2007 WL 2572362	2007	3	D.N.J.	Predatory lending practices, fraud, New Jersey Consumer Fraud Act, negligent misrepresentation	Defendant	Y	54,500	N	Y		Y				Bond was set to cover post judgment interest, attorneys' fees, and appellate costs.
Patrick v. John Odato Water Serv.	767 F. Supp. 107	1991	3	D.V.I.			Y	5,000								FRAP applied (pursuant to VI Code) to appeal from territorial court to district court.
Feddersen v. Feddersen	191 F.R.D. 490 (per curiam)	2000	3	D.V.I. (on appeal from Territorial Court)	Divorce	Defendant	N/A	1,000	Y			Y				"The rules of appellate procedure promulgated by this Court differ from Federal Rules of Appellate Procedure 7 and 39 which specify that the 'costs' that may be taxed against an unsuccessful litigant include printing and producing copies of briefs, appendices, records, court reporter transcripts, premiums or costs for supersedeas bonds, or other bonds to secure rights pending appeal, and fees for filing the notice of appeal. In this Court, attorney's fees are expressly included among the expenses that are described as costs for purposes of Virgin Islands Rule of Appellate Procedure 30."
O'Keefe v. Mercedes-Benz USA, LLC	2003 WL 22097451	2003	3	E.D. Pa.	Class action	Objectors	Y	13,467	Y	N						Bond to cover all appellate costs other than attorneys' fees was required because Objectors did not oppose that portion of the bond. Request to include attorneys' fees was denied because under any potentially applicable test, they would not be included If the authority stating that bonds can never include attorneys' fees applies, then attorneys' fees may not be included. If the applicable authority is the authority stating that attorneys' fees may only be included in the bond if the underlying statute defines costs as including fees, then there would still be no inclusion of attorneys' fees because the underlying New Jersey consumer protection statute defined attorneys' fees as separate from costs.
In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab.	2000 WL 1665134	2000	3	E.D. Pa.	Class action	Objector	Y	25,000	Y	N		Y				
Lattomus v. Gen. Bus. Servs. Corp.	1990 WL 116571	1990	4	AAA	RICO etc.	Plaintiffs	Y	250								Court notes that appellants failed to post required bond, but reaches the merits anyway and affirms.
Page v. A.H. Robins Co.	85 F.R.D. 139	1980	4	D.C. Va.		Pro se plaintiffs	Not yet	potentially $2,500	N						TBD	"Rather than imposing a bond of arbitrary amount[,] an amount which could bear adversely on the appellants' right to appeal[,] the Court will direct appellants, within 15 days, to comply with the requirements of Rule 24(a) of the Federal Rules of Appellate Procedure. Should appellants fail so to respond, the Court will enter an order directing that appellants post a bond in the amount heretofore requested by the appellee."
Symeonidis v. Eagle Constr. of Va.	2005 WL 3054043	2005	4	E.D. Va.	Rescission, fraud in the inducement, fraud, misrepresentation, wrongful eviction, abuse of process	Pro se plaintiff	Y	at least 75,000	N	N	—	N	—	—	N	Related to Symeonidis v. Hurley & Koort In the event of appeal, plaintiff was required to file appeal bond or other security in cash or certified funds pursuant to FRAP 7 and 8 and Local Rule 8 of the 4th Cir. Rules. Plaintiff did not appeal or post a bond.

Case name	Cite	Year	Circuit	District	Type of case	Appellant	Bond required?	Amount	Attorney fee discussed?	Attorney fee included?	Statutory or Rule 38?	Appeal taken on underlying issue?	Bond affirmed / reversed?	Sanction for noncompliance?	IFP status?	Comments
Symeonidis v. Hurley & Koort, P.L.C.	2005 WL 3478873	2005	4	E.D. Va.	Conspiracy, fraud, breach of fiduciary duty	Pro se plaintiffs (potentially)	Y	at least 75,000	N	N	—	N	—	—	N	Related to Symeonidis v. Eagle Construction In the event of appeal, plaintiffs were required to file appeal bond or other security in cash or certified funds pursuant to FRAP 7 and 8 and Local Rule 8 of the 4th Cir. Rules. Plaintiff did not appeal or pos a bond.
Brinn v. Tidewater Transp. Dist. Comm'n	113 F. Supp. 2d 935	2000	4	E.D. Va.	Class action under Americans with Disabilities Act and Rehabilitation Act	Defendant	Y	50,000 (but court didn't separate the appellate bond from the bond required to stay the district judgment)	N	N		Y				Bond to ensure payment of costs on appeal can be required of a political subdivision, office, or state agency. Court has discretion to require a bond to cover costs and to cover the judgment and post-judgment interest and costs. It was not clear whether the court imposed the bond under FRAP 7 or only as a condition to staying the district court judgment. The court granted a stay conditioned upon an appea bond of $50,000 to "cover judgment, post-judgment interest, and costs." Appeal on underlying issue of granting attorneys' fees (not on bond issue) is located at *Brinn v. Tidewater Transp. Dist. Comm'n*, 242 F.3d 227 (4th Cir. 2001).
Vaughn v. Am. Honda Motor Co., Inc.	2007 WL 3172068	2007	5	AAA	Consumer class action	Objector	Y	150,000	Y	Y	Rule 38	Y	Reversed, reduced to $1,000.	Bond not posted, dispute settled.	N	Ct Apps reduces bond to $ 1,000. "The district court could not use Rule 7 in conjunction with Rule 38 as a vehicle to erect a barrier to Hawthorn's appeal in the form of a $150,000 bond for costs on appeal. Even if the rules permitted such a procedure, the district court's assessment of potential damages in the amount of $150,000 is not supported by any findings or reference to evidence in the record, assuming, without deciding, that 'damages' under Rule 38 includes attorneys' fees." District court decision is located at *Vaughn v. Am. Honda Motor Co.*, 2007 WL 2901666 (E.D. Tex. Sept. 28, 2007). The district court noted that there was a significant possibility that the objectors' appeal would be subject to FRAP 38.
Fernon v. Smajstrala	189 F.3d 469	1999	5	AAA	Section 1983	Plaintiff	Y	5,000				Y	Affirmed			
Delor v. Intercosmos Media Group, Inc.	2007 WL 1063299	2007	5	E.D. La.	Alleged improper transfer of ownership of domain name	Plaintiff	Y	5,000 + 5,000	N			Y				Court ordered $5,000 appeal bond that was paid. Court then ordered a second $5,000 appeal bond to cover three additional appeals. The second appeal bond was discharged in bankruptcy and also was no longer necessary. Bond was also mentioned in another opinion in the case. See *Delor v. Intercosmos Media Group, Inc.*, 2006 WL 1968922 (E.D. La. 2006).
Moore v. Prestley	2006 WL 901978	2006	5	S.D. Miss.	Habeas	Petitioner	N									FRAP 7 did not apply because the case was not on appeal, but rather involved a habeas corpus proceeding to collaterally attack a criminal proceeding. Rule 7 relates to civil proceedings and does not refer to a release from custody.
In re Cardizem CD Antitrust Litig.	391 F.3d 812	2004	6	AAA	Class action	Objector	Y	174,429	Y	Y	State statute	Y	Affirmed	Dismissal of appeal		Bond included "$1,000.00 in filing and brief preparation costs, $123,429.00 in incremental administration costs, and $50,000 in projected attorneys' fees."
Otworth v. Vanderploeg	61 Fed. Appx. 163	2003	6	AAA	Section 1983	Pro se plaintiff	Y	300				Y	Affirmed			

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In re Munn	1989 WL 149417	1989	6	AAA	Bankruptcy	Petitioner	Y	10,000								Ct Apps denies writ of mandamus, noting it's an extraordinary writ.
In re Miller	325 B.R. 178	2005	6	Bankr. W.D. Ky.	Bankruptcy	Defendant	Y	5,000	Y	Y (but see comments)		Y				"Based on the above authority, this Court believes that a bond under Rule 7 cannot encompass attorney's fees unless the statutory basis for the underlying action provides for such an award." Appellant had been ordered to and did post bond to cover costs and attorney's fees in the event she did not prevail on appeal. The appeal was unsuccessful, and the appellant contended that the Trustee and his law firm were not entitled to the bond to cover the Trustee's attorneys' fees in defending the defendant's appeal. The opinion approved of the original setting of bond because FRAP 7 leaves appellate bond in the discretion of the district court, and that bond may properly include attorneys' fees where the action is based on a statute defining costs to include attorneys' fees or where the appeal appears frivolous. Nonetheless, the scarcity of authority in the circuit as to including attorneys' fees without a statutory basis led the court to conclude that it could not turn over the bond solely to cover attorneys' fees on appeal.
Kattula v. Lim	2007 WL 2984117	2007	6	E.D. Mich.	Legal malpractice, breach of fiduciary duty	Plaintiff	N		Y			Y				Court noted that attorneys' fees may be included in appeal bond if appeal is frivolous. Finding that appeal was not frivolous, the court denied any appellate cost bond.
Mitchell v. Ainbinder	2006 WL 2594868	2006	6	E.D. Mich.	Petition to vacate arbitration award made pursuant to federal and state securities laws, common law claims of unsuitability, churning, unauthorized trading, fraud, and breach of fiduciary duty	Petitioners	N		Y			Y				Federal Arbitration Act was the underlying statute, which did not provide any particular cost for a prevailing party. "Petitioners are correct in their assertion that a district court may only include in an appeal bond those categories listed in FRAP 39(e) and 28 U.S.C. § 1920, in addition to any remedy that the underlying statute involved in the litigation may provide." Request to include travel expenses in appeal bond was denied because no authority for that. Only costs that would be taxed to Respondents were copying and printing of briefs, which is nominal, and appellate court could assess taxes against losing party if deemed appropriate.
Johnson v. Howard	2006 WL 1417848	2006	6	W.D. Mich.	Civil Rights (Section 1983)	Plaintiff	Y	2,000	Y	N		Y		Not yet, but court said noncompliance with bond may result in dismissal of appeal.	N	Court found that appeal was likely frivolous and that attorneys' fees would likely be recoverable under 42 U.S.C 1988, FRAP 38, and/or the federal courts' inherent authority. But the court did not find this case appropriate for entering a bond based on a future sanction.
U.S. ex rel. Scott v. Metro. Health Corp.	2005 WL 3434830	2005	6	W.D. Mich.	Qui tam action under False Claims Act. Court was considering a motion for attorneys' fees.	Plaintiff (potentially)	Y	25,000	Y	N		Y	Affirmed	Bond posted	N	Rule 7 bond can only include the costs allowed under Rule 39 (court fees, copying fees, etc.), and cannot include attorneys' fees that may accrue on appeal. Appeal on underlying issue is located at *Scott v. Metro. Health Corp.*, 2007 WL 1028853 (6th Cir. 2007) (unpublished).
Corley v. Rosewood Care Ctr., Inc.	142 F.3d 1041	1998	7	AAA	RICO	Plaintiff	Y	5,750				Y				

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Perry v. Pogemiller	16 F.3d 138	1993	7	AAA	Tort	Plaintiff	Y	1,000				Y				Appellee moved to dismiss appeal for failure to post FRAP 7 bond, but Ct Apps reached merits & denied motion as moot.
Antonic Rigging & Erecting of Minn., Inc. v. MDCON, Inc.	1991 WL 169374	1991	7	N.D. Ill.	Breach of contract, unjust enrichment, conspiracy to defraud, and liability under the Illinois Mechanics' Lien Act	Plaintiffs	Y	TBD	N			Y				Party requesting bond did not provide information as to amount of bond required. Court ordered the party requesting bond to file information regarding costs on appeal.
Littlefield v. Mack	134 F.R.D. 234	1991	7	N.D. Ill.	Civil rights	Defendant	N		Y	N		Y				Rule 39 costs cannot include Section 1988 attorneys' fees. (citing *Kelley v. Metro. Cty. Bd. of Ed.*, 773 F.2d 677 (6th Cir. 1985). Court thus denied request for attorneys' fees and ordered that if the plaintiff sought a bond for other costs in Rule 39, she should refile her motion to specify the costs needing security.
In re Alexander	2000 WL 1717177	2000	8	AAA	Bankruptcy	Debtor	Y	20,000				Y		Dismissal		
Buffington v. First Serv. Corp.	672 F.2d 687	1982	8	AAA	Bankruptcy	Debtors	Y	3,000	N							Court imposed sanctions on appellants and their counsel, partly due to their failure to comply with district court's cost bond requirement.
Phillips v. Grendahl	2001 WL 1110370	2001	8	D. Minn.	Fair Credit Reporting Act violations and invasion of privacy claims	Plaintiff	Y	1,000	N			Y				Concern about the plaintiff's ability to pay costs of appeal required a bond. Appeal on underlying issue is located at*Phillips v. Grendahl*, 312 F.3d 357 (8th Cir. 2002) (affirming in part, reversing in part the district court decision).
Azizian v. Federated Dept. Stores, Inc.	499 F.3d 950	2007	9	AAA	Class action	Objector	Y	42,000	Y	Y		Y	Reversed	N		"a district court may require an appellant to secure appellate attorney's fees in a Rule 7 bond, but only if an applicable fee-shifting statute includes them in its definition of recoverable costs, and only if the appellee is eligible to recover such fees. The fee-shifting provision in Section 4 of the Clayton Act, 15 U.S.C. § 15, includes attorney's fees in its definition of costs recoverable by a prevailing plaintiff. However, this provision does not authorize taxing attorney's fees against a class member/objector challenging a settlement in an antitrust suit. Therefore, we hold that the district court erred by requiring [$40,000 of] security in the Rule 7 bond for attorney's fees...."
In re Heritage Bond Litigation	233 Fed. Appx. 627	2007	9	AAA	Class action	Claimant subject to bar order	Y	228,000	Y	Y	Probably Rule 38	Y	Reversed			Ct Apps holds that PSLRA does not define attorney fees as "costs," and thus that the D Ct erred in including attorney fees in the FRAP 7 bond amount. The district court's opinion is located at NO. MDL 02-ML-1475 DT, 2005 WL 2401111 (C.D. Cal. 2005). The district court granted an appeal bond of $208,000 against certain defendants and an appeal bond of $228,000 against certain other defendants.
Moore v. Int'l Bhd. of Elec. Workers Local 569	1998 WL 60867	1998	9	AAA		Pro se plaintiff	Y	500				Y	Affirmed			
Baker v. Milnes	1991 WL 268779	1991	9	AAA	Section 1983	Pro se plaintiff	Y									

Case name	Cite	Year	Circuit	District	Type of case	Appellant	Bond required?	Amount	Attorney fee discussed?	Attorney fee included?	Statutory or Rule 38?	Appeal taken on underlying issue?	Bond affirmed / reversed?	Sanction for noncompliance?	IFP status?	Comments
Richmark Corp. v. Timber Falling Consultants, Inc.	1991 WL 81866	1991	9	D. Or.	Contract & tort	Third-party defendant	Y	884.40	Y	N		Y				Docket indicates imposition of bond(s) in amount(s) of $ 884 and $ 500. Docket language: "cost bond on appeal" / "costs on appeal."
Lundy v. Union Carbide Corp.	598 F. Supp. 451	1984	9	D. Or.	Personal injury (asbestos)	Plaintiff	Y	500	N							
U.S. for Use of Terry Inv. Co. v. United Funding and Investors, Inc.	800 F. Supp. 879	1992	9	E.D. Cal.	Contract	Defendant	Y	500	Y	N	—	Y	—		N	FRAP 7 bonds strictly limited to cost of filing and proceeding with appeal. Bond may not include fees and may not be used as surety against original judgment. No bond posted. Appeal later dismissed.
Bryson v. Volkswagen of Am., Inc.	1996 WL 192975	1996	10	AAA	Tort	Plaintiff	Y	500				Y		N		
Jenson v. Fisher	1996 WL 606505	1996	10	AAA	Section 1983	Attorney for plaintiff	Y	1,500				Y	Affirmed			
Westinghouse Credit Corp. v. Bader & Dufty	627 F.2d 221	1980	10	AAA	Securities	Plaintiff	Y	5,000				Y	Affirmed	Bond posted	N	No PACER records.
Sierra Club v. El Paso Gold Mines, Inc.	2003 WL 25265871	2003	10	D. Colo.	Citizen suit to enforce Clean Water Act	Defendant	Y	50,000	Y	Y	Statutory	Y	—	—	—	Agreed with 2nd and 11th Circuits that bond can include attorneys' fees if the underlying statute includes attorneys fees as part of costs.
U.S. v. De Paz	2006 WL 625985	2006	10	D. Kan.	Habeas	Defendant	N	—	N	N	—	N	Denied	—		Rule 7 does not apply to criminal cases. To the extent that Defendant sought release on bond pending appeal, request denied.
Scheufler v. Gen. Host Corp.	1996 WL 38269	1996	10	D. Kan.	Nuisance	Plaintiffs and Defendant (but Plaintiffs invoke FRAP 7)	Y	1,287,500	N			Y				Court called the bond a supersedeas bond, but referenced FRAP 7. Court set amount based on local rule regarding supersedeas bonds.
Stagner v. U.S. Patent and Trademark Office	1992 WL 190643	1992	10	D. Kan.	Action against PTO officials for alleged wrongful denial of a patent.	Pro se plaintiff	Y	600	N	N	—	N	Affirmed	—	N	Bond included estimated costs on appeal of preparing and copying brief and accompanying appendix.
Young v. New Process Steel, LP	419 F.3d 1201	2005	11	AAA	Title VII etc.	Plaintiff	Y	61,000	Y	Y	Statutory	Y	Reversed	Dismissed second appeal for failure to post bond	—	60,000 of the 61,000 was for attorney fees. Ct Apps holds that "a district court may not require an unsuccessful plaintiff in a civil rights case to post an appellate bond that includes not only ordinary costs but also the defendant's *1208 anticipated attorney's fees on appeal, unless the court determines that the appeal is likely to be frivolous, unreasonable, or without foundation." On remand, the court, in accordance with the 11th Cir. mandate, evaluated whether the appeal was frivolous, groundless, and/or unreasonable. The court found it to be unreasonable and thus set the bond at the original amount of $61,000, including $1,000 of taxable costs and $60,000 in anticipated attorneys' fees. 427 F. Supp. 2d 1126 (N.D. Ala. 2006). Appellants filed a second appeal from the bond order. Appellee moved for a FRAP 7 bond, which the court granted in the amount of $10,000. 430 F. Supp. 2d 1242 (N.D. Ala. 2006).

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Baynham v. PMI Mortgage Ins. Co.	313 F.3d 1337	2002	11	AAA	RESPA	Objectors	Y	180,000	Y	Y			Reversed			Companion case to Pedraza.
Downey v. Mortgage Guar. Ins. Corp.	313 F.3d 1341	2002	11	AAA	RESPA	Objectors	Y	180,000	Y	Y	Statutory		Reversed			Companion case to Pedraza. The district court opinion is located at *Downey v. Mortgage Guar. Ins. Corp.*, 2001 WL 34092617 (S.D. Ga. 2001). The district court found that if underlying statute permits recovery of attorneys' fees, then Rule 7 bond can include the fees. RESPA provides attorneys' fees to the prevailing party.
Pedraza v. United Guar. Corp.	313 F.3d 1323	2002	11	AAA	RESPA	Objectors	Y	180,000	Y	Y			Reversed			"the district court's requirement that Olorunnisomo post an appellate cost bond that included estimated attorneys' "1337 fees was not justified under Fed. R. App. P. 7 because RESPA's fee shifting provision, § 2607(d)(5), does not define 'costs' to include attorneys' fees, and was not warranted under its inherent power to manage its affairs because the court did not find that appellant had acted in bad faith, vexatiously, wantonly, or for oppressive reasons. Although the district court was free to require Olorunnisomo to post an appellate cost bond, it was improper to include anticipated attorneys' fees within such a bond."
Home Design Servs., Inc. v. Schwab Dev. Corp.	2006 WL 1319427	2006	11	M.D. Fla.	Copyright	Plaintiff	Y	20,500	Y	Y						"Plaintiff concedes, as it must, that the Court retains authority to include anticipated attorney's fees as 'costs' under Rule 7, in certain circumstances, but contends that the reasons advanced here (the alleged risk of insolvency of Plaintiff and frivolousness of the appeal) have not been shown to be anything other than speculation. The Court is not persuaded."
Young v. New Process Steel, LP	430 F. Supp. 2d 1242	2006	11	N.D. Ala.	Title VII etc.	Plaintiff	Y	10,000	Y	Y	Statutory	Y	Affirmed	Dismissed appeal for failure to post bond	—	After the appeals court reversed the original $61,000 bond granted by the district court, the district court on remand ordered the plaintiffs to post a cost bond that included anticipated attorneys' fees and the plaintiff appealed again. The defendant moved to require the employees to post bond for the appeal of the bond amount set in the remand from the 11th Cir. The court found the appeal to be unreasonable and noted, "Potentially, if not actually, the present Rule 7 motion creates the conundrum of an endless series of appeals from sequential impositions of Rule 7 bonds . . ."
Garrett v. Bd. of Trs. of Univ. of Ala. at Birmingham	359 F. Supp. 2d 1200	2005	11	N.D. Ala.	Rehabilitation Act	Plaintiff	Y	TBD	Y	Y	Statutory	Yes				court directs parties to try to reach agreement on amount of bond
Vickery v. Cavalier Home Builders, LLC	405 F. Supp. 2d 1352	2005	11	N.D. Ala.	ADA	Plaintiff	Y	2,000	Y	N	Rule 38	Y	—	No bond posted; dispute settled	Denied	Court holds that under ADA's attorney fee provision, 42 U.S.C. § 12205, attorney fees are not part of "costs." Court appears to take view that Rule 7 "costs" would not include any attorney fees available under FRAP 38.
Allapattah Servs., Inc. v. Exxon Corp.	2006 WL 1132371	2006	11	S.D. Fla.	Class action	Objector (potential appellant)	Y	13,500,000	N	N						No appeal had yet been filed, but the court noted that one of the objectors might appeal. If objector appealed on behalf off the entire class, bond had to be an amount sufficient to cover damages, costs, and interest that entire class would lose as result of the appeal.

Case name	Cite	Year	Circuit	District	Type of case	Appellant	Bond required?	Amount	Attorney fee discussed?	Attorney fee included?	Statutory or Rule 38?	Appeal taken on underlying issue?	Bond affirmed / reversed?	Sanction for noncompliance?	IFP status?	Comments
Wakefield v. City of Miami-Dade	2005 WL 2891775	2005	11	S.D. Fla.	Civil rights	Pro se plaintiff	Y	10,000	Y	Probably, but not clear	Statutory	Y	Affirmed	Dismissed appeal for failure to post bond	No (because appeal is frivolous, unreasonable, and without foundation; no showing of entitlement to relief; and concern about abuse of judicial system)	Court found that appeal would likely be frivolous, unreasonable, and without foundation.
In re Am. President Lines, Inc.	779 F.2d 714	1985	D.C.	AAA	Bankruptcy	Petitioner	Y	10,000	Y				Reversed			"The costs referred to, however, are simply those that may be taxed against an unsuccessful litigant under Federal Appellate Rule 39, [FN16] and do not include attorneys' fees that may be assessed on appeal. [FN17] Rule 7 thus sustains the bond in suit to the extent of $450--APL's estimate of its costs on appeal-but not in any greater amount."
Fed. Prescription Serv., Inc. v. Am. Pharm. Ass'n	636 F.2d 755	1980	D.C.	AAA	Section 1 of Sherman Act	Plaintiff and Defendant	N									"[T]he new Rule 7, effective August 1979, leaves the requirement of an appeal bond to the district court's discretion: 'The district court may require an appellant to file a bond or provide other security ... to ensure payment of costs on appeal' (emphasis added). We cannot dismiss American's appeal for failure to post a bond the district court chose not to require. Moreover, we cannot say the district court abused its discretion in dispensing with an appeal bond requirement given that both parties were appealing and that appellant was highly solvent."
U.S. v. York	909 F. Supp. 4	1995	D.C.	D.D.C.	Judgment debtor collection effort	Defendants	Y	$1,000	N	N	—	Y	—	Parties stipulated to $1,000 bond, which was posted.	N	Original order regarding posting appellate bond is found in *U.S. v. York*, 890 F. Supp. 1117 (D.D.C. 1995) (district court did not specify bond amount in this opinion), *rev'd*, 112 F.3d 1218 (D.C. Cir. 1997) (reversal was on the merits (not on bond)). Appeal on underlying issue is located at *U.S. v. York*, 112 F.3d 1218 (D.C. Cir. 1997).
Hayhurst v. Calabrese	1992 WL 118296	1992	D.C.	D.D.C.	Conspiracy	Plaintiff	N					Y			N	"The imposition of a bond is a matter of discretion for the district court."

MEMORANDUM

DATE: March 13, 2008

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 06-08

At its November meeting, the Committee discussed Mark Levy's proposal concerning amicus briefs with respect to panel rehearing and rehearing en banc. (A copy of my October 2, 2007 memo on the proposal is enclosed.) The Committee retained the proposal on its study agenda and directed me to work with Doug Letter and with Mark to develop a proposal for the Committee's consideration at its spring meeting.

This memo sets forth proposed amendments that embody Mark's proposal. Part I provides the proposed amendments, while Part II discusses the choices made in drafting the proposal outlined in Part I. Part III discusses feedback that Fritz Fulbruge obtained from the appellate clerks on the question of amicus filings in connection with rehearing.

I circulated this memo draft to Mark and Doug for their comments. Doug (who emphasized that he was writing only for himself and that he had not yet had time to consult with others in the Department of Justice) expressed differing views from Mark's on a number of facets of Mark's proposal. Due to the need to finalize a memo for inclusion in the agenda book, we collectively decided that, rather than attempt to reach consensus on the proposal, it would be most helpful for me to present Mark's proposal in this memo, while noting Doug's questions and points of disagreement.

I. Proposed amendments

Here are proposed amendments that would implement Mark's suggestion:

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

Rule 29. Merits Brief of an Amicus Curiae

(a) When Permitted.

(1) Generally. The United States or its officer or agency, or a State, Territory, Commonwealth, or the District of Columbia may file an amicus-curiae brief without the consent of the parties or leave of court.[1] 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.

(2) Rehearing without briefing. If the court orders rehearing but does not direct additional briefing by the parties, an amicus curiae that filed a brief prior to the grant of rehearing may file an additional brief only by

[1] N.B.: If the proposed definition of "state" is adopted as Rule 1(b), then a conforming amendment will change this sentence to read: "The United States or its officer or agency, or a state ~~State, Territory, Commonwealth, or the District of Columbia~~ may file an amicus-curiae brief without the consent of the parties or leave of court. "

leave of court.[2]

* * * * *

(e) Time for Filing.

(1) With respect to the court's initial consideration of a case on the merits –

(A) An amicus curiae must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the principal brief of the party being supported is filed.

(B) An amicus curiae that does not support either party must file its brief no later than 7 days after the appellant's or petitioner's principal brief is filed.

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[2] As noted in Part II, Doug would suggest that the Committee consider whether it would be appropriate to add a different provision, namely that if the court does not provide for new briefing after rehearing is granted, further *private* amicus filings should be made only with leave of court.

(2) With respect to the court's rehearing of a case –

(A) If the court orders rehearing and directs additional briefing by the parties, an amicus curiae must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the principal brief of the party being supported is filed. An amicus curiae that does not support either party must file its brief no later than 7 days after the earliest-filed brief of a party is filed.

(B) If the court orders rehearing but does not direct additional briefing by the parties, unless the court directs otherwise any amicus curiae brief must be filed within 28 days after the date of the order granting rehearing, and any party may file a response to such an amicus curiae brief within 21 days after the amicus curiae brief is served.

(3) A court may grant leave for later filing, specifying the time within which an opposing party may answer.

Committee Note

Rule 29's title is amended to specify that the Rule governs amicus filings on the merits. Rule 35 addresses amicus filings with respect to whether a court should grant en banc consideration, while Rule 40 addresses amicus filings with respect to whether a panel should grant rehearing.

Subdivision (a). New subdivision (a)(2) provides that if the court grants rehearing but orders no additional briefing by the parties, an amicus that filed a brief prior to the grant of rehearing cannot file another amicus brief without leave of court. But an amicus that did not file a brief prior to the grant of rehearing can file an amicus brief if subdivision (a)(1) permits. The reason for the difference is that an amicus that has already submitted an amicus brief prior to the grant of rehearing should not necessarily be allowed to submit an additional brief when the parties themselves are not permitted to do so. An amicus that has not yet submitted such a brief, however, is subject to the general provisions in subdivision (a)(1); for example, if the amicus is a state, then the brief can be filed without the consent of parties or leave of court.

Subdivision (e). Subdivision (e) is subdivided; existing provisions are placed in subdivisions (e)(1) and (e)(3). New subdivision (e)(2) specifies the timing for amicus briefs on rehearing. If rehearing is granted and additional briefing is directed, the timing for amicus briefs is set by subdivision (e)(2)(A). If the court grants

rehearing but directs no additional party briefing, subdivision (e)(2)(B) sets the timing for amicus briefs.

Rule 35. En Banc Determination

* * * * *

(g) Amicus curiae briefs.[3] Amicus curiae briefs that address whether a matter should be considered en banc must comply with Rules 29(a) and 29(b) and also with the following requirements:

(1) If an amicus curiae is a corporation, the brief must include a disclosure statement like that required of parties by Rule 26.1.

(2) An amicus curiae brief may not exceed seven

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[3] As noted in Part II, Doug questions whether the proposal should cover amicus filings at the rehearing consideration stage at all.

Doug also suggests that the proposal use "pleading" rather than "brief" to describe an amicus filing at the rehearing consideration stage. He worries that using the word "brief" would suggest to lawyers that the requirements of Rule 28 apply.

pages.

(3) An amicus curiae brief in support of consideration en banc, accompanied by a motion for filing when necessary, must be filed no later than 7 days after the petition for en banc consideration is filed. A court may grant leave for later filing.

(4) An amicus curiae brief in opposition to consideration en banc is permitted only if the court permits a party to respond to a suggestion for consideration en banc.[4] The amicus curiae brief must be filed no later than 7 days after the party's response is filed.

* * * * *

[4] As noted in Part II, Doug suggests that the proposal should not mention amicus filings in opposition to rehearing – or at the least that the proposal should say that no amicus filings in opposition to rehearing will be accepted, except at the invitation of the court.

Committee Note

Subdivision (g). New subdivision (g) addresses requirements for amicus filings concerning whether the court should grant en banc consideration. If en banc consideration is granted, Rule 29 governs amicus filings on the merits.

Under subdivision (e), a party may not file a response to a petition for en banc consideration unless the court so orders. If the court orders a response to the petition, then subdivision (g)(4) permits an amicus filing in opposition to the petition, subject to the other requirements set by subdivision (g).

Rule 40. Petition for Panel Rehearing

* * * * *

(c) **Amicus curiae briefs.**[5] Amicus curiae briefs that address whether the court should grant panel rehearing must comply with Rules 29(a) and 29(b) and also with the

[5] As noted in Part II, Doug questions whether the proposal should cover amicus filings at the rehearing consideration stage at all.

Doug also suggests that the proposal use "pleading" rather than "brief" to describe an amicus filing at the rehearing consideration stage. He worries that using the word "brief" would suggest to lawyers that the requirements of Rule 28 apply.

following requirements:

(1) If an amicus curiae is a corporation, the brief must include a disclosure statement like that required of parties by Rule 26.1.

(2) An amicus curiae brief may not exceed seven pages.

(3) An amicus curiae brief in support of panel rehearing, accompanied by a motion for filing when necessary, must be filed no later than 7 days after the petition for panel rehearing is filed. A court may grant leave for later filing.

(4) An amicus curiae brief in opposition to panel rehearing is permitted only if the court permits a

party to respond to a petition for panel rehearing.[6]

The amicus curiae brief must be filed no later than 7 days after the party's response is filed.

Committee Note

Subdivision (c). New subdivision (c) addresses requirements for amicus filings concerning whether the court should grant panel rehearing. If the panel grants rehearing, Rule 29 governs amicus filings on the merits.

Under subdivision (a)(3), a party may not file an answer to a petition for panel rehearing unless the court requests. If the court requests an answer, then subdivision (c)(4) permits an amicus filing in opposition to the petition, subject to the other requirements set by subdivision (c).

II. Drafting choices

The following are some drafting choices made in preparing the proposed amendments set forth in Part I:

- Placement

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[6] As noted in Part II, Doug suggests that the proposal should not mention amicus filings in opposition to rehearing – or at the least that the proposal should say that no amicus filings in opposition to rehearing will be accepted, except at the invitation of the court.

- The proposals place the requirements concerning amicus filings with respect to whether en banc consideration should be granted in Rule 35. Likewise, they place the requirements for amicus filings concerning whether panel rehearing should be granted in Rule 40.

- Rule 29's title is amended to indicate that it covers amicus filings with respect to the merits. This includes not only run-of-the-mill merits briefings but also merits briefings submitted once the court grants en banc consideration or panel rehearing. Amendments to Rules 29(a) and 29(e) are discussed below.

- Permission concerning filings before rehearing is granted

  - With respect to amicus filings in support of a petition for en banc consideration or panel rehearing, the proposals adopt Rule 29(a)'s approach (government filers need no permission; other amici need permission or consent).

  - With respect to amicus filings in opposition to a petition, the proposals require court permission even for government filers. The reasoning is that parties are not allowed to file in opposition to a petition unless the court permits.

    - By contrast, Ninth Circuit Rule 29-2(a) appears to permit a government amicus to file without leave whether the government amicus supports or opposes rehearing.

  - Doug suggests that we should seriously consider not extending the proposals to cover amicus filings prior to a court's grant of rehearing. He notes that such filings ought to be very rare, and that a motion for leave to file can be made if necessary.

    - Doug notes that he has in the past made amicus filings in support of rehearing, but his recollection is that these occurred only "in unique areas involving only the Federal Government, such as the US supporting rehearing on behalf of a qui tam relator under the False Claims Act (a situation in which the relator is actually litigating in part on behalf of the United States), and in support of a foreign government that is litigating in our courts." As Doug notes, such situations are unlikely to arise for private amici.

    - Doug questions whether most amicus filings in support of rehearing are helpful to judges. He notes that, as stated in Part III of this memo, some circuit clerks

have expressed unwillingness to encourage such filings.

- At a minimum, Doug suggests that the proposal should not mention amicus filings in opposition to rehearing – or that the proposal should say that no such filings will be accepted except at the invitation of the court.

- Permission concerning filings once rehearing has been granted

  - With respect to amicus filings once rehearing has been granted, the proposed amendment to Rule 29(a) distinguishes between a new amicus and one who has already filed an amicus brief prior to the grant of rehearing. The rationale for this is stated in the note.

  - Doug has expressed doubts about the choices the proposal makes with regard to cases in which the court orders rehearing but does not direct additional briefing by the parties. He questions whether the court will necessarily circulate to the full en banc panel amicus briefs that were filed before the prior panel. If such amicus briefs are not routinely distributed to the en banc court, he argues, then amici who appeared before the panel should not face a higher bar to filing before the en banc court than other amici. Doug also notes that even an amicus who appeared before the panel might wish to respond to a filing by a new amicus.

- Timing

  - The proposals adopt the seven-day stagger for amicus filings.

  - A new provision – Rule 29(e)(2)(B) – is added to address the timing of amicus filings on the merits in the event that the court grants rehearing but orders no additional briefing from the parties.

    - This provision is modeled on Third Circuit Local Appellate Rule 29.1.

    - Ninth Circuit Rule 29-2(e)(2) sets a similar framework but with different time limits.

- Recusal

  - Some circuits permit amicus filings in connection with rehearing only if the amicus'

filing would not cause a recusal.[7] The proposed amendments take no position on this issue, but would permit a court to adopt that position by local rule.

III. Input from appellate clerks

Fritz Fulbruge undertook to ask his colleagues about their experience with amicus filings in connection with rehearing. He wrote to them, noting that a Committee member had asked whether other circuits are considering adopting a rule similar to the new Ninth Circuit Rule 29-2, and he asked the clerks to state whether their courts have a plan to adopt a similar rule.

The clerks' responses were as follows:

- Richard Donovan, First Circuit Clerk:
  - "We don't have a local rule regarding filing an amicus in support of a petition for rehearing, but the court would entertain such a request on motion."
- Marcia Waldron, Third Circuit Clerk:
  - Pointed out the Third Circuit's Local Appellate Rule 29.0.
- Pat Connor, Fourth Circuit Clerk:
  - Stated that the court "has permitted amicus briefs at the rehearing stage on motion," but that the court does not have a local rule on point.
- Leonard Green, Sixth Circuit Clerk:
  - "Re: amici briefs in the rehearing context, we have no rule and are not contemplating adopting any. We don't get many such briefs, or requests to file them, and like Michael [Gans] says, we don't want to encourage more with a rule or other formal guidance, no matter what it says."

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[7] For example, Fifth Circuit Rule 29.4 provides: "Denial of Amicus Curiae Status. After a panel opinion is issued, amicus curiae status will not be permitted if the allowance would result in the disqualification of any member of the panel or of the en banc court."

- Michael Gans, Eighth Circuit Clerk:
    - "We accept a limited number of amici motions/briefs in support of petitions for rehearing. It's up to the court to decide whether to accept them. No plans are in the works for a rule governing the topic. I would think that the motion would have to be in the form of the petition itself, and would be subject to the page limits, etc, which govern the pet. Clear guidance or a rule would - in our view - just invite more of them."
- Betsy Shumaker, Tenth Circuit Clerk:
    - Pointed out Tenth Circuit Rule 29.1, and stated: "If the briefs are allowed they must comply with the remainder of Rule 29. The court does allow them with some regularity."
- Tom Kahn, Eleventh Circuit Clerk:
    - Pointed out Eleventh Circuit Rules 40-6 and 35-9.
- Mark Langer, D.C. Circuit Clerk:
    - "As for the amicus and en bancs. We actively discourage such. DC Cir Rule 35(f) says no amicus brief 'except by invitation of the court.'"

Encl.

MEMORANDUM

DATE: October 2, 2007

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 06-08

Mark Levy has suggested that the Committee consider amending the Appellate Rules to address the procedures for amicus filings in connection with petitions for panel rehearing or rehearing en banc. Mark raises a number of good questions which the Appellate Rules do not explicitly address: Can such amicus briefs be filed at all? Can they be filed with the consent of the parties, or is permission of the court by motion required? What is the maximum length for such briefs? And when are they due -- at the same time as the petition or 7 days later? Part I of this memo considers the light shed on this issue by Rule 29 and its history. Part II reviews the practice in each circuit. Part III analyzes questions of practice under the current Rule 29 and local circuit rules, and Part IV concludes by considering arguments for and against a FRAP amendment that would address some or all of these questions.

I. Rule 29 and issues relating to rehearing

Rule 29's text does not specifically address the question of amicus briefs in connection with a petition for rehearing or with briefing en banc, but the Note and history of the 1998 amendments do contain some relevant information. Prior to the 1998 amendments, Rule 29 presumptively set the due date for amicus briefs on the same date as the deadline for the brief of the party supported by the amicus.[1] The 1998 amendments adopted the current 7-day stagger, such that Rule 29(e) now provides: "An amicus curiae must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the principal brief of the party being supported is filed. An amicus curiae that does not support either party must file its brief no later than 7 days after the appellant's or petitioner's principal brief is filed. A court may grant leave for later filing, specifying the time within which an opposing party may answer." The 1998 Committee Note states in part: "A court may grant permission to file an amicus brief in a context in which the party does not file a 'principal brief'; for example, an amicus may be permitted to

[1] The pre-1998 Rule 29 read in relevant part: "Save as all parties otherwise consent, any amicus curiae shall file its brief within the time allowed the party whose position as to affirmance or reversal the amicus brief will support unless the court for cause shown shall grant leave for later filing, in which event it shall specify within what period an opposing party may answer."

file in support of a party's petition for rehearing. In such instances the court will establish the filing time for the amicus."

In 1993, the Committee was considering various aspects of Rule 29 in response to a suggestion that grew out of the Fifth Circuit's Local Rules Project.[2] At the fall 1993 meeting, the Committee's discussion covered proposals concerning the timing, standards, page limits, and content of amicus briefs, as well as specifically whether Rule 29 should address amicus filings with respect to petitions for rehearing.

With respect to timing, the Committee had before it two alternative proposals – one, roughly similar to the provision ultimately adopted in 1998, that set a staggered deadline, and another which retained the notion that the amicus's deadline should be the same as that for the party supported. In the discussion of a motion by Judge Logan concerning the second option, the following dialogue occurred:

> Mr. Munford also asked about the time for filing an amicus brief in support of a petition for rehearing. He pointed out that the current rule does not tie the time for filing to the principal brief, rather it requires an amicus brief to be filed within the time allowed the party whose position the amicus supports. Judge Logan responded that he intended to require filing within the time allowed for filing the principal brief of the party supported. He said that he has never seen an amicus brief in support of a petition for rehearing and if one were submitted it should be accompanied by a motion for leave to file it.[3]

Later, the discussion turned to amicus filings in support of petitions for rehearing:

> The last issue discussed with respect to amicus briefs was whether a court should accept an amicus brief offered in support of a petition for rehearing. Judge Ripple indicated that his circuit receives such briefs. Little attention may be paid to a case until the court enters its judgment. Thereafter, an amicus may join the party in trying to explain the error of the decision.
>
> Judge Hall asked whether the question should be limited to petitions for rehearing or also should include requests for an in banc hearing or rehearing. Judge Ripple responded that he hoped the Committee would address all such issues.
>
> Mr. Munford suggested amending the draft rule so that it uses the language in the

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[2] See Minutes of the Advisory Committee on Federal Rules of Appellate Procedure, September 22 & 23, 1993, 1993 WL 761146, at *14.

[3] Minutes of the Advisory Committee on Federal Rules of Appellate Procedure, September 22 & 23, 1993, 1993 WL 761146, at *18.

current rule requiring an amicus to file within the time allowed the party supported. There would be no express reference to the party's principal brief or to petitions for rehearing, etc. but the language would be broad enough to encompass all such instances. He further suggested that it is unnecessary to discuss instances in which an amicus supports neither party. Several judges responded, however, that there many instances in which an amicus takes no position as to affirmance. Mr. Munford therefore suggested that the sentence be amended to state that in such instances the amicus must file within the time allowed the appellant -- dropping the reference to the appellant's principal brief.

Judge Logan expressed hesitation to specifically mention that an amicus brief may be filed in support of a petition for rehearing. He feared that any such statement would encourage the filing of such briefs. On the other hand, he expressed support for Mr. Munford's language changes that would make the rule broad enough to cover the timing of such briefs. Judge Ripple suggested that a vote be taken on whether specific mention should be made of the possibility of filing an amicus brief in support of a petition for rehearing, etc. Five members supported that approach and two members opposed it.[4]

The fall 1993 minutes thus seem to indicate majority support for explicitly mentioning petitions for rehearing in Rule 29. But Rule 29, as ultimately amended in 1998, does not include such language.

II. Current circuit practices

The chart that follows summarizes the existing circuit provisions relating to amicus filings in connection with petitions for panel rehearing or rehearing en banc.

Circuit	Provisions regarding amicus briefs with respect to rehearing?
First	No local rule or other provision.
Second	No local rule or other provision. Interim Local Rule 29 addresses one related concern by providing: "The court ordinarily will deny leave to file brief for an amicus curiae where, by reason of a relationship between a judge who would hear the proceeding and the amicus or counsel for the amicus, the filing of the brief would cause the recusal of the judge."

[4] Minutes of the Advisory Committee on Federal Rules of Appellate Procedure, September 22 & 23, 1993, 1993 WL 761146, at *21.

Third	Third Circuit Local Appellate Rule 29.1 provides: "29.1 Time for Filing Amici Curiae Briefs on Rehearing. In a case ordered for rehearing before the court en banc or before the original panel, if the court permits the parties to file additional briefs, any amicus curiae shall file its brief in accordance with Rule 29(e) of the Federal Rules of Appellate Procedure. In a case ordered for rehearing in which no additional briefing is directed, unless the court directs otherwise any amicus brief must be filed within 28 days after the date of the order granting rehearing, and any party may file a response to such an amicus brief within 21 days after the amicus brief is served. Before completing the preparation of an amicus brief, counsel for an amicus curiae shall attempt to ascertain the arguments that will be made in the brief of any party whose position the amicus is supporting, with a view to avoiding any unnecessary repetition or restatement of those arguments in the amicus brief."
Fourth	No local rule or other provision. But the Fourth Circuit – construing current Appellate Rule 29 – stated in 2006 that it would "henceforth ... disfavor[]" requests to file an amicus brief in the first instance at the stage of a request for rehearing: "Federal Rule of Appellate Procedure 29(e) directs the filing of an amicus brief "no later than 7 days after the principal brief of the party being supported is filed." Fed. R.App. P. 29(e) (emphasis added). The term "principal brief" would appear to refer to the lead brief filed by a party in anticipation of argument (either before a panel or the en banc court) and not to something such as a reply brief or petition for rehearing. The language of that rule sets forth no exceptions. While a court is not precluded from granting leave to file an amicus brief in other circumstances, see id. advisory committee's note, waiting until a petition for rehearing has been filed is a disfavored litigation tactic and fails to serve the litigants' interest in having all views considered thoroughly at the initial briefing and argument stage. While it may suit the agency's convenience to troll for panel results to which it takes exception, such a practice is not consistent with the orderly and conscientious disposition of claims in an appellate court. See Sup.Ct. R. 44(5) ("The Clerk will not file any brief for an amicus curiae in support of, or in opposition to, a petition for rehearing."); D.C.Cir. R. 35(f) ("No amicus curiae brief in response to or in support of a petition for rehearing en banc will be received by the clerk except by invitation of the court.")." LaRue v. DeWolff, Boberg & Associates, Inc., 458 F.3d 359, 361 (4th Cir. 2006).

Fifth	Fifth Circuit Rule 29.4 provides: "Denial of Amicus Curiae Status. After a panel opinion is issued, amicus curiae status will not be permitted if the allowance would result in the disqualification of any member of the panel or of the en banc court."
Sixth	No local rule or other provision.[5]
Seventh	Seventh Circuit Rule 35 provides: "Every petition for rehearing en banc, and every brief of an amicus curiae supporting or opposing a petition for rehearing en banc, must include a statement providing the information required by Fed. R. App. P. 26.1 and Circuit Rule 26.1 as of the date the petition is filed."
Eighth	No local rule or other provision.
Ninth	New Ninth Circuit Rule 29-2 (effective July 1, 2007) provides the most detailed local-rule treatment to date (see enclosure).
Tenth	Tenth Circuit Rule 29.1 provides: "The court will receive but not file proposed amicus briefs on rehearing. Filing will be considered shortly before the oral argument on rehearing en banc if granted, or before the grant or denial of panel rehearing."

[5] In a recent weblog posting, Professor Orin Kerr complained that the Sixth Circuit rejected his amicus brief and two others submitted for or against rehearing in *Warshak v. United States*, 490 F.3d 455 (6th Cir. June 18, 2007). Professor Kerr speculates that the court may have read Appellate Rule 40(a)(3) "to disallow amicus briefs at the rehearing stage. That Rule states that '[u]nless the court requests, no answer to a petition for panel rehearing is permitted.' In this case, the court requested an answer to the petition for rehearing: Warshak was ordered to respond. However, there's some reason to think that the court is interpreting amicus briefs as 'answers' and reading the Rule to mean that no amicus briefs are permitted with respect to any rehearing issues unless the court specifically invites that particular brief."

Eleventh	Eleventh Circuit Rule 35-6 provides: "Motion for Leave to File Amicus Brief in Support of Petition for Rehearing En Banc. The United States or its officer or agency, or a State, Territory, Commonwealth, or the District of Columbia may file an amicus brief in support of a petition for rehearing en banc without the consent of the parties or leave of court. Any other amicus curiae must request leave of court to file an amicus brief in support of a petition for rehearing en banc. The request must be made by motion accompanied by the proposed brief in conformance with 11th Cir. R. 35-5, except that subsections (f) and (k) may be omitted. The proposed amicus brief must not exceed 15 pages, exclusive of items required by 11th Cir. R. 35-5(a), (b), (c), (d), and (j). The cover must be green. An amicus curiae must file its proposed brief, accompanied by a motion for filing when necessary, no later than 7 days after the petition for rehearing en banc being supported is filed." Eleventh Circuit Rule 35-9 provides: "En Banc Amicus Briefs. The United States or its officer or agency, or a State, Territory, Commonwealth, or the District of Columbia may file an en banc amicus brief without the consent of the parties or leave of court. Any other amicus curiae must request leave of court by filing a motion accompanied by the proposed brief in conformance with FRAP 29(b) through (d) and the corresponding circuit rules. An amicus curiae must file its en banc briefs, accompanied by a motion for filing when necessary, no later than the due date of the principal en banc brief of the party being supported. An amicus curiae that does not support either party must file its en banc briefs, accompanied by a motion for filing when necessary, no later than the due date of the appellant's or petitioner's principal en banc brief. An amicus curiae must also comply with 11th Cir. R. 35-7." Eleventh Circuit Rule 40-6 provides: "The United States or its officer or agency, or a State, Territory, Commonwealth, or the District of Columbia may file an amicus brief in support of a petition for panel rehearing without the consent of the parties or leave of court. Any other amicus curiae must request leave of court to file an amicus brief in support of a petition for panel rehearing. The request must be made by motion accompanied by the proposed brief in conformance with FRAP 29(b) and (c) and the corresponding circuit rules. The proposed amicus brief must not exceed 15 pages, exclusive of items that do not count towards page limitations as described in 11th Cir. R. 32-4. The cover must be green. An amicus curiae must file its proposed brief, accompanied by a motion for filing when necessary, no later than 7 days after the petition for panel rehearing being supported is filed."
D.C.	D.C. Circuit Rule 35(f) provides: "No amicus curiae brief in response to or in support of a petition for rehearing en banc will be received by the clerk except by invitation of the court."

Federal	Federal Circuit Rule 35(g) provides: "Except by the court's permission or direction, an amicus curiae brief submitted in connection with a petition for hearing en banc, a petition for rehearing en banc, or a combined petition for panel rehearing and rehearing en banc, must be accompanied by a motion for leave and must not exceed 10 pages." Federal Circuit Rule 40(g) provides: "Except by the court's permission or direction, an amicus curiae brief submitted in connection with a petition for panel rehearing must be accompanied by a motion for leave to file and must not exceed 10 pages."

III. Specific questions of practice

This section reviews various circuits' approaches to a number of practice issues. Two conclusions can be drawn from this review. First, each of the questions reviewed here is answered by local rule in only a few circuits. Second, among the circuits that do answer any given question, the answers may vary widely.

A. Can such amicus briefs be filed at all?

As the 1998 Committee Note to Rule 29 recognizes, the courts of appeals have authority to permit the filing of amicus briefs in connection with a petition for rehearing. (As a point of comparison, Supreme Court Rule 44.5 provides: "The Clerk will not file any brief for an amicus curiae in support of, or in opposition to, a petition for rehearing.")

Ninth Circuit Rule 29-2(a) specifies that "[a]n amicus curiae may be permitted to file when the court is considering a petition for panel or en banc rehearing or when the court has granted rehearing." The Circuit Advisory Committee Note warns, however, that "[t]he court considers the filing of amicus curiae briefs related to petitions for rehearing or en banc review to [be] appropriate only when the post-disposition deliberations involve novel or particularly complex issues."

Some circuits have indicated that they will limit such filings. D.C. Circuit Rule 35(f) provides: "No amicus curiae brief in response to or in support of a petition for rehearing en banc will be received by the clerk except by invitation of the court." The Fourth Circuit has stated that it disfavors amicus submissions in connection with petitions for rehearing (at least when the amicus has not attempted to submit a brief earlier in the proceeding). Some circuits will restrict amicus filings in order to avoid disqualifying a member of the original panel (or of the en banc

court) from sitting.[6] Since the opposing party itself may not (unless the court requests) submit a response to a petition for panel rehearing or rehearing en banc,[7] amicus filings in *opposition* to a petition for rehearing may – by analogy – be even less welcomed than amicus filings in *support* of such a petition.[8]

Other circuits' rules, though they do not explicitly set standards for when the court will permit amicus filings relating to rehearing, do contain provisions that presume that some such filings will occur.[9]

B. Can they be filed with the consent of the parties, or is permission of the court by motion required?

Ninth Circuit Rule 29-2(a) explicitly addresses this question, and tracks the answer provided by Appellate Rule 29(a).[10]

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[6] Fifth Circuit Rule 29.4 provides that "[a]fter a panel opinion is issued, amicus curiae status will not be permitted if the allowance would result in the disqualification of any member of the panel or of the en banc court." The Circuit Advisory Committee Note to Ninth Circuit Rule 29-2 states: "The court will ordinarily deny motions and disallow stipulations for leave to file an amicus curiae brief where the filing of the brief woudl result in the recusal of a member fo the en banc court. Any member of the court who would be subject to disqualification in light of the amicus curiae brief may, of course, voluntarily recuse, thereby allowing the filing of the amicus brief." Cf. Second Circuit Interim Local Rule 29.

[7] See Appellate Rules 35(e) and 40(a)(3).

[8] Thus, for instance, Eleventh Circuit Rule 35-9 specifies that "[a]n amicus curiae must ... comply with 11th Cir. R. 35-7." Eleventh Circuit Rule 35-7 provides: "A response to a petition for en banc consideration may not be filed unless requested by the court."

[9] See Third Circuit Local Appellate Rule 29.1; Fifth Circuit Rule 29.4; Seventh Circuit Rule 35; Tenth Circuit Rule 29.1; Federal Circuit Rules 35(g) and 40(g).

[10] Ninth Circuit Rule 29-2(a) provides in relevant part: "The United States or its officer or agency, or a State, Territory, Commonwealth, or the District of Columbia may file an amicus curiae brief without the consent of the parties or leave of court. Subject to the provisions of subsection (f) of this rule, 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." Ninth Circuit Rule 29-2(f) specifies to which judges the motion for leave to file the amicus brief will be circulated.

Eleventh Circuit Rules 35-6,[11] 35-9,[12] and 40-6[13] permit amicus filings by the United States or its officer or agency, or a State, Territory, Commonwealth, or the District of Columbia, without consent of the parties or leave of court. However, these Eleventh Circuit rules require any other would-be amicus to obtain court permission.

Federal Circuit Rules 35(g) and 40(g) indicate that court permission is always required: Both these rules state that "[e]xcept by the court's permission or direction, an amicus curiae brief ... must be accompanied by a motion for leave ...."

C. What is the maximum length for such briefs?

Ninth Circuit Rule 29-2(c) sets two different length limits: a shorter one for amicus filings while a petition for rehearing is pending and a longer one for amicus filings after the grant of rehearing en banc.

Eleventh Circuit Rules 35-6 and 40-6 set a 15-page limit for amicus filings with respect to a petition for en banc or panel rehearing. Eleventh Circuit Rule 35-9 incorporates – for amicus filings once en banc rehearing has been granted – Appellate Rule 29(d)'s length limitation.

Federal Circuit Rules 35(g) and 40(g) each set a 10-page limit.

D. When are they due -- at the same time as the petition or 7 days later?

The 1998 Committee Note to Rule 29, by stating that "the court will establish the filing time for the amicus" when permitting an amicus filing in support of a petition for rehearing, suggests that Rule 29(e)'s timing provisions do not directly govern. There are at least two timing questions that could arise in connection with petitions for rehearing.

First, there is the question as to amicus briefs in support of (or opposition to) a petition for rehearing. Ninth Circuit Rule 29-2(e)(1) addresses this question, and adopts an approach similar (though not identical) to that taken by Appellate Rule 29(e).[14] Eleventh Circuit Rules 35-

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[11] This rule concerns amicus filings with respect to a petition for rehearing en banc.

[12] This rule concerns amicus filings once rehearing en banc has been granted.

[13] This rule concerns amicus filings with respect to a petition for panel rehearing.

[14] Ninth Circuit Rule 29-2(e)(1) provides: "Brief Submitted to Support or Oppose a Petition for Rehearing. An amicus curiae must serve its brief along with any necessary motion no later than ten (10) calendar days after the petition or response of the party the amicus wishes

6 and 40-6 adopt – for amicus filings at the petition stage – an approach similar to that taken by Appellate Rule 29(e).[15]

Second, there is the question as to amicus briefs submitted once rehearing is granted. Third Circuit Local Appellate Rule 29.1 addresses this question, as does Ninth Circuit Rule 29-2(e)(2).[16] Though, as noted above, the Eleventh Circuit Rules track Rule 29(e)'s staggered approach for amicus filings in connection with a rehearing petition, for amicus filings once rehearing en banc has been granted, Eleventh Circuit Rule 35-9 diverges from Appellate Rule 29(e)'s staggered approach.[17]

E. Other requirements

Seventh Circuit Rule 35 specifies that amicus filings in support of or opposition to a petition for rehearing en banc must include the disclosures required by Appellate Rule 26.1 and Circuit Rule 26.1.

Ninth Circuit Rule 29-2(b) incorporates the requirements set by Appellate Rule 29(b). Ninth Circuit Rule 29-2(d) sets the number of copies that must be submitted.

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to support is filed or is due. An amicus brief that does not support either party must be served along with any necessary motion no later than ten (10) calendar days after the petition is filed. Motions for extensions of time to file an amicus curiae brief submitted under this rule are disfavored."

[15] These Eleventh Circuit rules provide that the proposed brief (and motion if needed) must be filed "no later than 7 days after the petition ... being supported is filed."

[16] Ninth Circuit Rule 29-2(e)(1) provides: "Briefs Submitted During the Pendency of Rehearing. Unless the court orders otherwise, an amicus curiae supporting the position of the petitioning party or not supporting either party must serve its brief, along with any necessary motion, no later than twenty-one (21) days after the petition for rehearing is granted. Unless the court orders otherwise, an amicus curiae supporting the position of the responding party must serve its brief, along with any necessary motion, no later than thirty-five (35) days after the petition for panel or en banc rehearing is granted. Motions for extensions of time to file an amicus curiae brief submitted under this rule are disfavored."

[17] Eleventh Circuit Rule 35-9 provides: "An amicus curiae must file its en banc briefs, accompanied by a motion for filing when necessary, no later than the due date of the principal en banc brief of the party being supported. An amicus curiae that does not support either party must file its en banc briefs, accompanied by a motion for filing when necessary, no later than the due date of the appellant's or petitioner's principal en banc brief."

Eleventh Circuit Rules 35-9 and 40-6 incorporate by reference Appellate Rules 29(b) and (c) concerning the contents and form of the brief and the contents of the motion for leave to file.

IV. Conclusion

A number of arguments can be made in favor of adopting a national rule governing amicus filings in connection with rehearing petitions. Rule 29 does not provide direct guidance on all the questions discussed in Part III. In many circuits, no local provision speaks to those questions either. And the fact that some circuits do address those questions may be seen as a mixed blessing: The existence of local rules on these questions may provide certainty to the practitioner who knows of the local provisions – but the diversity of local rule approaches from circuit to circuit may cause difficulties for lawyers who practice in more than one circuit.

Arguments against adopting a national rule could take a number of forms. Here, the diversity of approaches among the circuits may be seen as double-edged: Though this diversity may be confusing (weighing in favor of a national rule) it may also signal strong preferences on the part of a circuit's judges (suggesting that there might be judicial resistance to a national rule). For example, a national rule permitting government amici to file (in connection with a rehearing petition) without party consent or leave of court would likely be disfavored by a number of judges in the D.C. Circuit and the Fourth Circuit. Another argument might be that there is little need for a national rule, since one who wishes to make an amicus filing in connection with a rehearing petition can simply move for leave to make the filing (and, in connection with that motion, obtain guidance on questions of timing, content, form and length).

Perhaps it might be possible to adopt a national rule that addresses some, but not all, of the matters treated in Part III of this memo. The Committee may wish to consider, as to each question, the competing values of certainty and national uniformity, versus permissible local variation.

To the extent that the Committee wishes to adopt a national rule, differences between routine merits briefing and briefing in connection with rehearing may weigh in favor of departures from Rule 29's approach. For example, it is unclear that amici would require staggered timing for their filings in connection with en banc briefing, since (as with Supreme Court briefing) the parties will already have filed a complete set of briefs which the amicus can review prior to the parties' en banc filing deadlines.

Encl.

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Amendments to Ninth Circuit Rules and Advisory Committee Notes

effective, **July 1, 2007**

New or revised language is highlighted in yellow.

RULE	TITLE	New or Revised	PURPOSE OF AMENDMENT
Circuit Rules 17-1.6 & 30-1.6 ACN to Rule 30-1.6	Format of the Excerpts of Record	New & Revised	To require the mandatory contents of the excerpts of record to be contained in the first volume for ease of use by judicial officers
Circuit Rule 28-2.7	Addendum to Briefs	New 2nd paragraph	To provide the bench with a ready access to documents that are central to review of an immigration case.
New Advisory Committee Note to CR 28-6	Citation of Supplemental Authorities	Revised	To provide guidance to the bar about when to file FRAP 28(j) letters.
Circuit Rule 29-2 & ACN to CR 29-2	Brief of Amicus Curiae (during en banc considerations)	New	To provide guidance to the bar concerning the filing of amicus curiae briefs with respect to petitions for rehearing or rehearing en banc.
Circuit Rule 35-3	Limited En Banc Court	Revised	To return to 11-member en banc court.
Circuit Rule 39-1 & ACN to CR 39-1.6	Request for Attorneys' Fees	Revised	To reflect the filing deadline set forth in EAJA, and to improve the clarity of the rule.
Circuit Rule 39-2	Attorneys' Fees and Expenses under the Equal Access to Justice Act	Abrogated	

CIRCUIT RULE 28-2

CONTENTS OF BRIEFS

28-2.7 Addendum to Briefs

If determination of the issues presented requires the study of statutes, regulations or rules, relevant parts thereof shall be reproduced in an addendum at the end of a party's brief. The addendum shall be separated from the brief by a distinctively colored page.

All opening briefs filed in counseled petitions for review of immigration cases must include an addendum comprised of the orders being challenged, including any orders of the immigration court and Board of Immigration Appeals. The addendum shall be separated from the brief by a distinctively colored page. *(New 7-1-07)*

CIRCUIT RULE 28-6

CITATION OF SUPPLEMENTAL AUTHORITIES

The body of letters filed pursuant to Federal Rule of Appellate Procedure 28(j) shall not exceed two (2) pages, unless it complies with the alternative length limitations of 350 words or 39 lines of text. Litigants shall submit an original and four (4) copies of a Fed. R. App. P. 28(j) letter. (New, 12-1-02)

CIRCUIT ADVISORY COMMITTEE NOTE TO CIRCUIT RULE 28-6

In the interests of promoting full consideration by the court and fairness to all sides, the parties should file all Fed. R. App. P. 28(j) letters as soon as possible. When practical, the parties are particularly urged to file Rule 28(j) letters at least seven (7) calendar days in advance of any scheduled oral argument or within seven (7) calendar days after notification that the appeal will be submitted on the briefs. (New 7-1-07)

CIRCUIT RULE 29-2

BRIEF OF AMICUS CURIAE SUBMITTED TO SUPPORT OR OPPOSE A PETITION FOR PANEL OR EN BANC REHEARING OR DURING THE PENDENCY OF REHEARING

(a) When Permitted. An amicus curiae may be permitted to file when the court is considering a petition for panel or en banc rehearing or when the court has granted rehearing. The United States or its officer or agency, or a State, Territory, Commonwealth, or the District of Columbia may file an amicus curiae brief without the consent of the parties or leave of court. Subject to the provisions of subsection (f) of this rule, 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.

(b) Motion for Leave to File: The motion must be accompanied by the proposed brief and include the recitals set forth at Fed. R. App. P. 29(b).

(c) Format/Length:

(1) A brief submitted while a petition for rehearing is pending shall be styled as an amicus curiae brief in support of or in opposition to the petition for rehearing or as not supporting either party. A brief submitted during the pendency of panel or en banc rehearing shall be styled as an amicus curiae brief in support of appellant or appellee or as not supporting either party.

(2) A brief submitted while a petition for rehearing is pending brief shall not exceed 15 pages unless it complies with the alternative length limits of 4,200 words of 390 lines of monospaced text. Motions for leave to file an oversize brief are disfavored.

(3) Unless otherwise ordered by the court, a brief submitted after the court has voted to rehear a case en banc shall not exceed 25 pages unless it complies with the alternative length limits of 7,000 words or 650 lines of monospaced text. Motions for leave to file an oversize brief are disfavored.

(d) Number of Copies:
If the brief pertains to a petition for panel rehearing, an original and four (4) copies shall be submitted. If the brief pertains to a pending petition for rehearing en banc, an original and fifty (50) copies shall be submitted. If a petition for rehearing en banc has been granted, an original and thirty (30) copies of the brief shall be submitted.

(e) Time for Filing:

(1) Brief Submitted to Support or Oppose a Petition for Rehearing
An amicus curiae must serve its brief along with any necessary motion no later than ten (10) calendar days after the petition or response of the party the amicus wishes to support is filed or is due. An amicus brief that does not support either party must be served along with any necessary motion no later than ten (10) calendar days after the petition is filed. Motions for extensions of time to file an amicus curiae brief submitted under this rule are disfavored.

(2) Briefs Submitted During the Pendency of Rehearing
Unless the court orders otherwise, an amicus curiae supporting the position of the petitioning party or not supporting either party must serve its brief, along with any necessary motion, no later than twenty-one (21) days after the petition for rehearing is granted. Unless the court orders otherwise, an amicus curiae supporting the position of the responding party must serve its brief, along with any necessary motion, no later than thirty-five (35) days after the petition for panel or en banc rehearing is granted. Motions for extensions of time to file an amicus curiae brief submitted under this rule are disfavored.

(f) Circulation: Motions for leave to file an amicus curiae brief to support or oppose a petition for panel rehearing are circulated to the panel. Motions for leave to file an amicus curiae brief to support or oppose a petition for en banc rehearing are circulated to all members of the court. Motions for leave to file an amicus curiae brief during the pendency of en banc rehearing are circulated to the en banc court.

(New, 7-1-07)

Cross-reference: Fed. R. App. P. 29; Circuit Rule 25-4

CIRCUIT ADVISORY COMMITTEE NOTE TO RULE 29-2

Circuit Rule 29-2 only concerns amicus curiae briefs submitted to support or oppose a petition for panel or en banc rehearing and amicus curiae brief submitted during the pendency or rehearing. The court considers the filing of amicus curiae briefs related to petitions for rehearing or en banc review to appropriate only when the post-disposition deliberations involve novel or particularly complex issues.

The court will ordinarily deny motions and disallow stipulations for leave to file an amicus curiae brief where the filing of the brief would result in the recusal of a member of the en banc court. Any member of the court who would be subject to disqualification in light of the amicus curiae brief may, of course, voluntarily recuse, thereby allowing the filing of the amicus curiae brief.

(New, 7-1-07)

CIRCUIT RULE 35-3

LIMITED EN BANC COURT

The en banc court, for each case or group of related cases taken en banc, shall consist of the Chief Judge of this circuit and 10 additional judges to be drawn by lot from the active judges of the Court. In the absence of the Chief Judge, a 11th active judge shall be drawn by lot, and the most senior active judge on the panel shall preside. [rev. 1-1-06, 7-1-07]

The drawing of the en banc court will be performed by the Clerk or a deputy clerk of the Court in the presence of at least one judge and shall take place on the first working day following the date of the order taking the case or group of related cases en banc.

If a judge whose name is drawn for a particular en banc court is disqualified, recused, or knows that he or she will be unable to sit at the time and place designated for the en banc case or cases, the judge will immediately notify the Chief Judge who will direct the Clerk to draw a replacement judge by lot. [rev. 1-1-06]

In appropriate cases, the Court may order a rehearing by the full court following a hearing or rehearing en banc.

MEMORANDUM

DATE: March 13, 2008

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 07-AP-F

At the November 2007 meeting, the Committee discussed a suggestion by Judge Jerry Smith that Rule 35(e) should be amended to state that ordinarily the court will not grant rehearing en banc without first allowing a response to the request. (A copy of my October 2, 2007 memo on this subject is enclosed.) This memo suggests possible language for a proposed amendment in the event that the Committee decides to move forward with this proposal.

Some members expressed support for the proposal; they noted that providing for a response can contribute to the perception that the process is fair. It was also observed that the party opposing rehearing will not always get an opportunity to submit new briefing during the en banc procedure itself – in which event the opportunity to oppose the request for rehearing en banc can be particularly important. On the other hand, one member did question whether there is a need for the proposed amendment, given that in practice courts generally seem to request a response before granting a request for rehearing en banc.

There is the further complication that courts sometimes order rehearing en banc at the suggestion of a circuit judge rather than a party.[1] The rules and internal operating procedures in a number of the circuits that ordinarily request a response before acting on a petition for rehearing en banc do not indicate whether the court would likewise ask for input from the parties concerning a circuit judge's suggestion for rehearing en banc.[2] The Ninth Circuit, on the other

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[1] For example, the D.C. Circuit Handbook states: "In the absence of a request from a party, any active judge of the Court, or member of the panel, may suggest that a case be reheard *en banc*. If a majority of the active judges who are not recused agree, the Court orders rehearing *en banc*." Likewise, Sixth Circuit Rule 35(a) states: "A suggestion for a hearing or rehearing en banc may be made as provided in FRAP 35 or by any member of the en banc Court."

[2] For instance, Sixth Circuit I.O.P. 35(d) states: "When a poll is requested [concerning rehearing en banc], the clerk will ask for a response *to the petition* if none has been previously requested" (emphasis added). That this provision concerning a response focuses exclusively on instances where there is a petition suggests that the Sixth Circuit procedures contemplate a response only if the question of rehearing en banc arises from a party's petition (not a judge's

hand, has a General Order which provides that supplemental briefing ordinarily will be requested.[3]

One member has stated that the rationale for providing for a response applies equally to sua sponte suggestions for rehearing en banc. It is clearly true that the party who prevailed before the panel would appreciate the opportunity to be heard in opposition to a judge's suggestion for rehearing en banc. It is less clear, though, that the sense of unfairness (if rehearing en banc is granted without seeking such input) would be *as great* when the grant of rehearing en banc is sua sponte as it would be when a petition for rehearing en banc is granted; in the sua

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suggestion).

Likewise, though Eighth Circuit I.O.P. IV.D states that "[w]hen a poll is requested, the clerk's office will request the opposing party file a response to the petition for rehearing," that statement appears in a paragraph devoted solely to petitions for rehearing en banc. Sua sponte rehearing en banc is treated in the next paragraph: "On their own motion, active judges or any senior judge who sat on the three-judge panel may also request a poll for rehearing en banc within the same time limit fixed for the filing of petitions for rehearing by the parties."

Seventh Circuit Rule 40(e) provides for "rehearing sua sponte before decision" in situations where a panel proposes to overrule circuit precedent or to create a circuit split. The description of this process suggests that no party involvement is contemplated:

> (e) Rehearing Sua Sponte before Decision. A proposed opinion approved by a panel of this court adopting a position which would overrule a prior decision of this court or create a conflict between or among circuits shall not be published unless it is first circulated among the active members of this court and a majority of them do not vote to rehear en banc the issue of whether the position should be adopted. In the discretion of the panel, a proposed opinion which would establish a new rule or procedure may be similarly circulated before it is issued. When the position is adopted by the panel after compliance with this procedure, the opinion, when published, shall contain a footnote worded, depending on the circumstances, in substance as follows:
>
> This opinion has been circulated among all judges of this court in regular active service. (No judge favored, or, A majority did not favor) a rehearing en banc on the question of (e.g., overruling Doe v. Roe.)

[3] "Upon receipt of a timely *sua sponte* en banc call, the author of the panel opinion or the Clerk of Court upon the request of the En Banc Coordinator shall ordinarily enter an order directing the parties to file simultaneous briefs within 21 days setting forth their respective positions on whether the matter should be reheard en banc." Ninth Circuit General Order 5.4(c)(3).

sponte case, *neither* party has been heard on the issue of rehearing en banc, and the grant of rehearing en banc arises from deliberations that are internal to the court. It might be the case that a national rule requiring courts ordinarily to provide for a response prior to voting on a sua sponte suggestion would be seen as imposing a change from current practice. Moreover, amending Rule 35 to provide for a party's response prior to a sua sponte grant of rehearing en banc would mean that the amended Rule 35 would likely work differently from Rule 40 – because Rule 40 appears to provide for a response only when there is a petition for panel rehearing, and not when the panel orders rehearing sua sponte. Thus, if one of the goals of the amendment is to bring en banc rehearing practice into closer conformity with panel rehearing practice, it may be preferable to apply the provision for a response only to instances involving a petition.

Another choice that the Committee should make if it proceeds with this proposal is whether the provision for a response should cover only rehearings en banc, or whether it should also cover initial hearings en banc. As the Committee is aware, initial hearing en banc is even more rare than rehearing en banc. If the Committee proceeds with the proposal, I would think it would be useful for the proposed amendment to cover both petitions for rehearing en banc and petitions for initial hearing en banc. The basis for requesting initial en banc consideration may be similar to the basis for requesting rehearing en banc. For example, in either case the basis may be that "the proceeding involves one or more questions of exceptional importance." Rule 35(b)(1)(B). Instances in which initial en banc hearing may be particularly apposite might include a case in which the litigant asks the court to overturn circuit precedent.[4] Or a litigant might argue that en banc consideration is warranted and that the case should proceed straight to initial en banc consideration in order to avoid the delay that would result from proceeding first to a hearing by a panel and then to en banc rehearing.[5] In the rare instance in which a court is

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[4] See, e.g., In re Osborne, 76 F.3d 306, 309 (9th Cir. 1996) ("[A] panel of this court may not overrule a decision of a previous panel; only a court in banc has such authority."); Atonio v. Wards Cove Packing Co., Inc., 810 F.2d 1477, 1478-79 (9th Cir. 1987) (en banc) ("[W]hen faced with an irreconcilable conflict between the holdings of controlling prior decisions of this court," a panel "must call for en banc review, which the court will normally grant unless the prior decisions can be distinguished.").

[5] It is not clear that such an argument would succeed. Compare Belk v. Charlotte-Mecklenburg Bd. of Educ., 211 F.3d 853, 856 (4th Cir. 2000) (Luttig, J., dissenting from denial of hearing en banc) ("In a case of this magnitude, where the district court has held that after thirty-five years of federal court supervision the jurisdiction's school system is, and has been for over twenty years, unitary and fully integrated, but where the massive bussing of school children continues and there remain classroom seats literally unfilled because of the assignment of students on the basis of race authorized now by this court, I believe that we have an obligation to act more expeditiously to decide whether the district court's injunction was in error or not."), with id. (Wilkinson, C.J., concurring in denial of initial hearing en banc) ("This is a case that arouses keen interest. It is my belief that courts should respond to that circumstance in a calm,

inclined to grant initial hearing en banc, it would seem that the reasons for inviting a response to the petition are as strong in that context as they are in the context of rehearing en banc.

To illustrate the various possibilities, two options are presented below. Option 1 would operate only when there is a petition for en banc consideration. Option 2 would also cover sua sponte grants of en banc consideration. In both options, there are bracketed alternatives – one that would cover initial hearing en banc, and one that would not.

Option 1:

Rule 35. En Banc Determination

* * *

(e) Response. No response may be filed to a petition for an en banc consideration unless the court orders a response. But ordinarily a court will grant [the petition] [a petition for rehearing en banc] only after allowing a response to it.

* * *

Committee Note

Subdivision (e). Subdivision (e) is amended to provide that the court ordinarily will not grant a petition for [en banc consideration] [rehearing en banc] without first ordering a response to the petition. This amendment parallels Rule 40(a)(3) concerning petitions for panel rehearing, and reflects the general practice in most circuits. Most petitions for [en banc consideration] [rehearing en banc] are denied. But in the rare instances when the court is inclined to grant [en banc consideration] [rehearing en banc], it is ordinarily best to provide [the other party] [the party who prevailed before the panel] with a chance to respond to the petition before the court decides whether to grant [en banc consideration] [rehearing en banc].

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orderly, and deliberative fashion in accordance with the best traditions of the law.").

Option 2:

Rule 35. En Banc Determination

* * *

(e) Response. No response may be filed to a petition for an en banc consideration unless the court orders a response. But ordinarily a court will grant [the petition] [a petition for rehearing en banc] only after allowing a response to it. And ordinarily a court will, on its own, grant [en banc consideration] [rehearing en banc] only after requesting briefing on whether to do so.

* * *

Committee Note

Subdivision (e). Subdivision (e) is amended to provide that the court ordinarily will not grant [en banc consideration] [rehearing en banc] without first ordering a response to the petition (if there has been a petition) or supplemental briefing (if the suggestion for en banc consideration comes from a member of the court). Most petitions for [en banc consideration] [rehearing en banc] are denied. But in the rare instances when the court is inclined to grant [en banc consideration] [rehearing en banc], it is ordinarily best to provide [the affected party or parties] [the party who prevailed before the panel] with a chance to opine on whether [en banc consideration] [rehearing en banc] should be granted.

Encl.

MEMORANDUM

DATE: March 13, 2008

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 07-AP-G

The privacy rules which took effect December 1, 2007[1] require redaction of social security numbers (except for the last four digits) and provide that references to an individual known to be a minor should include only the minor's initials. New Criminal Rule 49.1(a)(5) also requires redaction of individuals' home addresses (so that only the city and state are shown). At its November 2007 meeting, the Committee discussed the fact that the privacy rules would require immediate changes in Appellate Form 4, which concerns the information that must accompany a motion for permission to appeal in forma pauperis.[2] The Committee also discussed other possible changes that might be made in Form 4.

Part I of this memo updates the Committee on the actions taken to date as a result of the Committee's discussions at the fall meeting; it notes interim changes to Form 4. Part II recommends that the Committee amend Form 4 to eliminate the now-inappropriate requests for information. Part III suggests that the Committee place on its longer-term agenda the possibility of additional changes to Form 4.

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[1] See Civil Rule 5.2, Criminal Rule 49.1, and Bankruptcy Rule 9037. Appellate Rule 25(a)(5) provides:

> 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.

[2] Form 4 is referred to in Rule 24, which states that motions for leave to proceed in forma pauperis status must attach an affidavit that shows in the detail prescribed by Form 4 the party's inability to pay.

I. Actions taken since the Committee's fall meeting

After the Committee's November 2007 meeting, the Administrative Office acted quickly to alter the version of Form 4 that is provided as a word-processing template on the uscourts.gov website.[3] The altered version requests only initials rather than the names of the applicant's minor dependents; requests only the city and state of the applicant's residence; and requests only the last four digits of the applicant's social security number. A copy of the altered version is enclosed, along with a copy of the official (unaltered) version of Form 4.

Meanwhile, Fritz Fulbruge undertook to communicate to his colleagues the implications of the new privacy requirements for Form 4. A copy of his November 5, 2007 letter is enclosed. Fritz's letter noted that the courts of appeals might not get many Form 4 filings, given that Rule 24 directs the applicant to make the i.f.p. motion in the district court in the first instance. Interestingly, four clerks (from the Third, Eighth, Tenth, and D.C. Circuits) responded that they receive a substantial number of i.f.p. motions.[4]

II. Proposed amendment to Form 4

I propose that the Committee proceed with an amendment to Form 4 that eliminates the improper requests for information. The necessary changes have been made in the version maintained on the uscourts.gov website, but the official version (which is, for example, what one finds on Westlaw) continues to ask for information that should no longer be requested. Here is the proposed amendment.

You will see that I propose to add, in Item 7, the words "or, if a minor (i.e., underage), initials only." This conforms to the privacy rules' directives concerning references to minors, and tracks the changes that the AO has already made to the word-processing-ready version of the form maintained on the uscourts.gov website. I circulated the proposed amendment to Professor Kimble for his style comments, and he states that, for style reasons, this amendment should omit "(i.e., underage)." In Professor Kimble's version, the addition to Item 7 would read: "or, if a minor, initials only." I recounted to Professor Kimble the AO's rationale for adding "i.e., underage" – namely, that pro se litigants may not understand the term "minor." Professor Kimble responded that pro se litigants would likely not understand "i.e." and that "underage" is

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[3] See http://www.uscourts.gov/rules/apforms2.htm.

[4] Marcia Waldron, the Third Circuit Clerk, explained: "We get a great many ifp motions in the court of appeals. Any litigant whose d.ct. case was dismissed as frivolous must reapply. All PLRA cases must reapply to us." Betsy Shumaker, the Tenth Circuit Clerk, echoed Marcia Waldron's assessment. Mark Langer, the D.C. Circuit Clerk, noted, "We too get a fair number of ifp applications." And Michael Gans, the Eighth Circuit Clerk, stated: "[W]e have plenty of IFP motions. Perhaps we will lock them and make them only accessible to the judges and staff."

not all that common a term either. I can see the merit of Professor Kimble's view. But I also see the merit of the AO's effort to try to make the wording as accessible as possible to the lay person, and I tend to agree with the AO's intuition that "underage" may be more enlightening to some readers than "minor."

Regardless of how one resolves the disagreement noted above, it underscores a more basic point, which is that a specific age cutoff (e.g., "under 18" or "under 21") would be much more understandable to lay readers than either "minor" or "underage." Notably, the privacy rules do not define "minor." One might therefore be inclined to wonder what "minor" means – does it depend on an underlying definition in federal law? Does it depend on the age of majority in the relevant state?[5] (For a court of appeals, which would be the relevant state?) The proposed wording leaves the litigant to figure this out; presumably, the litigant could seek clarification from the clerk's office if in doubt. Rather than leaving this ambiguity, one possibility would be to pick an age, e.g.: "Name (or, if under 21, initials only)." I doubt that setting 21 as the cutoff would conflict with the privacy rules; such a conflict could only arise if "minor," as used in the privacy rules, could extend to age 21 or older – which seems unlikely. So the question would be whether setting 21 as the cutoff would conflict with the goals served by requiring the i.f.p. applicant to disclose his or her dependents. In other words, if we assume that in many instances the set of dependents age 20 and younger will include some persons who are no longer "minors," will it thwart the relevant goals to require only the dependent's initials rather than his or her full name? It is not clear that directing the use of initials in such a situation would be problematic. The Committee may thus wish to consider specifying "under 21" rather than using the words "minor (i.e., underage)."

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[5] I have not attempted a survey of state law on the age of majority. My impression is that the age of majority is 18 in almost all states. However, a few states have selected an age other than 18. See, e.g., Ala. Code 1975 § 26-1-1(a) ("Any person in this state, at the arrival at the age of 19 years, shall be relieved of his disabilities of minority and thereafter shall have the same legal rights and abilities as persons over 21 years of age."); Miss. Code Ann. § 1-3-27 ("The term 'minor,' when used in any statute, shall include any person, male or female, under twenty-one years of age.").

Moreover, some states have differing age cutoffs for different purposes. Thus, for example, in New York the age of majority is 18 for most purposes, but a parent's support duty continues to age 21. See N.Y. D.R.L. § 2 ("A "minor" or "infant", as used in this chapter, is a person under the age of eighteen years."); N.Y. Family Court Act § 413(1)(a) ("Except as provided in subdivision two of this section, the parents of a child under the age of twenty-one years are chargeable with the support of such child and, if possessed of sufficient means or able to earn such means, shall be required to pay for child support a fair and reasonable sum as the court may determine.").

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

* * *

7. *State the persons who rely on you or your spouse for support.*

Name [or, if a minor (i.e., underage), initials only]	Relationship	Age
_____	_____	_____

* * *

13. *State the ~~address~~ city and state of your legal residence.*

_____

Your daytime phone number: (____) _____

Your age: _____ Your years of schooling: _____

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

III. Possible future changes to Form 4

The Committee should consider other changes to Form 4. For one thing, an effort is underway to restyle all the forms. More substantively, participants in the Committee's fall 2007 meeting noted that Form 4 requires a lot of detail. Not all i.f.p. applications require so much detail; for example, a much simpler form might be appropriate in the habeas context.[6]

In addition, Professor Coquillette has noted that the Committee may wish to consider revising Question 10, which requests the name of any attorney whom the litigant has paid (or will pay) for services in connection with the case, as well as the amount of such payments. Professor Coquillette stated that the National Association of Criminal Defense Lawyers has argued that these questions seek information that is protected by the attorney-client privilege; he noted that some other commentators dispute that view.

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[6] The AO's Form 240, a copy of which is enclosed, provides a useful comparison. The Administrative Office Forms Working Group of judges and clerks has concluded that it would be useful to have both a long form (along the lines of FRAP Form 4) and a shorter form (along the lines of AO Form 240). The Forms Working Group is in the process of restyling AO Form 240, and will be discussing that effort during its annual meeting in July 2008.

These changes all merit the Committee's consideration, but not the Committee's immediate action. Indeed, because Form 4 is often used in the district courts, these proposed changes to Form 4 warrant input from other Advisory Committees. I therefore recommend that the Committee place these items on its study agenda, while moving forward – in the meantime – with the proposed amendment described in Part II above.

Encls.

UNITED STATES DISTRICT COURT

for the

<_____> DISTRICT OF <_____>

<Name(s) of plaintiff(s)>,	)	
	)	
Plaintiff(s)	)	
	)	
v.	)	
	)	Case No. <Number>
<Name(s) of defendant(s)>,	)	
	)	
Defendant(s)	)	
	)	

AFFIDAVIT ACCOMPANYING MOTION FOR PERMISSION TO APPEAL IN FORMA PAUPERIS

Affidavit in Support of Motion	**Instructions**
I swear or affirm under penalty of perjury that, because of my poverty, I cannot prepay the docket fees of my appeal or post a bond for them. I believe I am entitled to redress. I swear or affirm under penalty of perjury under United States laws that my answers on this form are true and correct. (28 U.S.C. § 1746; 18 U.S.C. § 1621.)	Complete all questions in this application and then sign it. Do not leave any blanks: if the answer to a question is "0," "none," or "not applicable (N/A)," write that response. If you need more space to answer a question or to explain your answer, attach a separate sheet of paper identified with your name, your case's docket number, and the question number.
Signed: _____	Date: _____

My issues on appeal are:

1. *For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.*

Income source	**Average monthly amount during the past 12 months**		**Amount expected next month**	
	You	Spouse	You	Spouse
Employment	$	$	$	$
Self-employment	$	$	$	$
Income from real property (such as	$	$	$	$
Interest and dividends	$	$	$	$
Gifts	$	$	$	$
Alimony	$	$	$	$
Child support	$	$	$	$
Retirement (such as social security, pensions, annuities, insurance)	$	$	$	$
Disability (such as social security, insurance payments)	$	$	$	$
Unemployment payments	$	$	$	$
Public-assistance (such as welfare)	$	$	$	$
Other (specify):	$	$	$	$
Total monthly income:	**$**	**$**	**$**	**$**

2. *List your employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)*

Employer	**Address**	**Dates of employment**	**Gross monthly pay**
			$
			$
			$

3. *List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)*

Employer	**Address**	**Dates of employment**	**Gross monthly pay**
			$
			$
			$

4. *How much cash do you and your spouse have? $_____*

Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial Institution	**Type of Account**	**Amount you have**	**Amount your spouse has**
		$	$
		$	$
		$	$

If you are a prisoner, you must attach a statement certified by the appropriate institutional officer showing all receipts, expenditures, and balances during the last six months in your institutional accounts. If you have multiple accounts, perhaps because you have been in multiple institutions, attach one certified statement of each account.

5. *List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.*

Home	**Other real estate**	**Motor vehicle #1**
(Value) $	(Value) $	(Value) $
		Make and year:
		Model:
		Registration #:

Motor vehicle #2	**Other assets**	**Other assets**
(Value) $	(Value) $	(Value) $
Make and year:		
Model:		
Registration #:		

6. *State every person, business, or organization owing you or your spouse money, and the amount owed.*

Person owing you or your spouse money	**Amount owed to you**	**Amount owed to your spouse**
	$	$
	$	$
	$	$
	$	$

7. *State the persons who rely on you or your spouse for support.*

Name [or, if a minor (i.e., underage), initials only]	**Relationship**	**Age**

8. *Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate.*

	You	**Your Spouse**
Rent or home-mortgage payment (including lot rented for mobile home) Are real estate taxes included? [ ] Yes [ ] No	$	$

Is property insurance included? [ ] Yes [ ] No		
Utilities (electricity, heating fuel, water, sewer, and telephone)	$	$
Home maintenance (repairs and upkeep)	$	$
Food	$	$
Clothing	$	$
Laundry and dry-cleaning	$	$
Medical and dental expenses	$	$
Transportation (not including motor vehicle payments)	$	$
Recreation, entertainment, newspapers, magazines, etc.	$	$
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's:	$	$
Life:	$	$
Health:	$	$
Motor vehicle:	$	$
Other:	$	$
Taxes (not deducted from wages or included in mortgage payments) (specify):	$	$
Installment payments		
Motor Vehicle:	$	$
Credit card (name):	$	$
Department store (name):	$	$
Other:	$	$
Alimony, maintenance, and support paid to others	$	$
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$	$
Other (specify):	$	$
Total monthly expenses:	**$**	**$**

9. *Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?*

[ ] Yes [ ] No If yes, describe on an attached sheet.

10. *Have you paid — or will you be paying — an attorney any money for services in connection with this case, including the completion of this form?* [ ] Yes [ ] No

If yes, how much? $ _____
If yes, state the attorney's name, address, and telephone number:

11. *Have you paid-or will you be paying-anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?* [ ] Yes [ ] No

If yes, how much? $ _____
If yes, state the person's name, address, and telephone number:

12. *Provide any other information that will help explain why you cannot pay the docket fees for your appeal.*

13. *State the [city and state] of your legal residence.*

Your daytime phone number: (____) _____

Your age: _____ *Your years of schooling*: _____

[Last four digits of] your social-security number: _____

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

Form 4. Affidavit to Accompany Motion for Leave to Appeal in Forma Pauperis

United States District Court for the _____ District of _____

A.B., Plaintiff

v. **Case No. _____**

C.D., Defendant

Affidavit in Support of Motion	**Instructions**
I swear or affirm under penalty of perjury that, because of my poverty, I cannot prepay the docket fees of my appeal or post a bond for them. I believe I am entitled to redress. I swear or affirm under penalty of perjury under United States laws that my answers on this form are true and correct. (28 U.S.C. § 1746; 18 U.S.C § 1621.)	Complete all questions in this application and then sign it. Do not leave any blanks: if the answer to a question is "0," "none," or "not applicable (N/A)," write in that response. If you need more space to answer a question or to explain your answer, attach a separate sheet of paper identified with your name, your case's docket number, and the question number.
Signed: _____	Date: _____

My issues on appeal are:

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	**Average monthly amount during the past 12 months**		**Amount expected next month**	
	You	**Spouse**	**You**	**Spouse**
Employment	$_____	$_____	$_____	$_____
Self-employment	$_____	$_____	$_____	$_____
Income from real property (such as rental income)	$_____	$_____	$_____	$_____
Interest and dividends	$_____	$_____	$_____	$_____
Gifts	$_____	$_____	$_____	$_____
Alimony	$_____	$_____	$_____	$_____
Child support	$_____	$_____	$_____	$_____
Retirement (such as social security, pensions, annuities, insurance)	$_____	$_____	$_____	$_____
Disability (such as social security, insurance payments)	$_____	$_____	$_____	$_____
Unemployment payments	$_____	$_____	$_____	$_____
Public-assistance (such as welfare)	$_____	$_____	$_____	$_____
Other (specify):_____	$_____	$_____	$_____	$_____
Total monthly income:	$_____	$_____	$_____	$_____

2. *List your employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)*

Employer	Address	Dates of employment	Gross monthly pay

3. *List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)*

Employer	Address	Dates of employment	Gross monthly pay

4. *How much cash do you and your spouse have?* $_____
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
		$_____	$_____
		$_____	$_____
		$_____	$_____

If you are a prisoner seeking to appeal a judgment in a civil action or proceeding, you must attach a statement certified by the appropriate institutional officer showing all receipts, expenditures, and balances during the last six months in your institutional accounts. If you have multiple accounts, perhaps because you have been in multiple institutions, attach one certified statement of each account.

5. *List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.*

Home	(Value)	Other real estate	(Value)	Motor vehicle #1	(Value)
				Make & year:	
				Model:	
				Registration #:	

Motor vehicle #2	(Value)	Other assets	(Value)	Other assets	(Value)
Make & year:					
Model:					
Registration #:					

6. *State every person, business, or organization owing you or your spouse money, and the amount owed.*

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse

7. State the persons who rely on you or your spouse for support.

Name	Relationship	Age
_____	_____	_____
_____	_____	_____
_____	_____	_____

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate.

	You	Your Spouse
Rent or home-mortgage payment (include lot rented for mobile home)	$_____	$_____
Are real-estate taxes included? ☐Yes ☐No Is property insurance included? ☐Yes ☐No		
Utilities (electricity, heating fuel, water, sewer, and telephone)	$_____	$_____
Home maintenance (repairs and upkeep)	$_____	$_____
Food	$_____	$_____
Clothing	$_____	$_____
Laundry and dry-cleaning	$_____	$_____
Medical and dental expenses	$_____	$_____
Transportation (not including motor vehicle payments)	$_____	$_____
Recreation, entertainment, newspapers, magazines, etc.	$_____	$_____
Insurance (not deducted from wages or included in mortgage payments)	$_____	$_____
Homeowner's or renter's	$_____	$_____
Life	$_____	$_____
Health	$_____	$_____
Motor Vehicle	$_____	$_____
Other: _____	$_____	$_____
Taxes (not deducted from wages or included in mortgage payments) (specify): _____	$_____	$_____
Installment payments	$_____	$_____
Motor Vehicle	$_____	$_____
Credit card (name): _____	$_____	$_____
Department store (name): _____	$_____	$_____
Other: _____	$_____	$_____
Alimony, maintenance, and support paid to others	$_____	$_____
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$_____	$_____
Other (specify): _____	$_____	$_____
Total monthly expenses:	$_____	$_____

9. *Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?*
☐Yes ☐No If yes, describe on an attached sheet.

10. *Have you paid — or will you be paying — an attorney any money for services in connection with this case, including the completion of this form?* ☐Yes ☐No

If yes, how much? $_____

If yes, state the attorney's name, address, and telephone number:

_____

_____

_____

11. *Have you paid — or will you be paying — anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?*
☐Yes ☐No

If yes, how much? $_____

If yes, state the person's name, address, and telephone number:

_____

_____

_____

12. *Provide any other information that will help explain why you cannot pay the docket fees for your appeal.*

13. *State the address of your legal residence.*

_____

_____

Your daytime phone number: (____) _____

Your age: _____ Your years of schooling: _____

Your social-security number: _____

(As amended Apr. 24, 1998, eff. Dec. 1, 1998.)

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES R. FULBRUGE III
CLERK OF COURT

TEL. 504-310-7654
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

November 5, 2007

Clerks of Court
U.S. Courts of Appeal

Dear Colleagues:

Last Friday at the Appellate Rules Committee meeting I was asked to communicate with you about two matters.

First, on December 1, 2007 certain privacy provisions of the E-Government Act go into effect. An AO working group notes a problem with Form 4 to the FED. R. APP. P.:

> The new privacy rules require redaction of certain "personal identifiers," including social security numbers and home addresses .... Appellate Form 4, Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis, asks for the social security number and address of legal residence.

The working group's suggestions were to require a person completing the form to give only the last four digits of the social security number on the last line of the form, and only the individual's city and state of residence, but not street address. The Rules Committee also noted item 7 requests the name of persons who rely on you for support. The names of minor children are protected by privacy provisions and only their initials should be required.

I recognize our courts rarely receive an initial Form 4 as FED. R. APP. P 24(a)(1) generally requires motions to proceed in forma pauperis on appeal to be made to the district court. Nonetheless, I bring this information to your attention. We anticipate additional notice will be sent to the district courts, but you may wish to pass it on to those courts within your circuits. You may also want to advise the Bureau of Prisons, state and local prisons, as they may have a number of the Form 4s in stock for use by prisoners. If you have questions, you can contact me at charles_fulbruge@ca5.uscourts.gov.

Second, we discussed whether and when an amicus brief could be filed in support of a petition for panel rehearing or rehearing en banc. A committee member asked whether other appellate courts are considering adopting a rule similar to Ninth Circuit Rule 29-2, enclosure. This rule makes clear that an amicus brief can be filed, the conditions on filing, length, format, number of copies, and timing of filing such briefs. I understand some courts do not permit such filings, and others may permit them but do not provide

clear guidance about how to file them or in what form the briefs need be. I would appreciate it if you could advise me of any plans your courts have on this subject.

Sincerely,

Fritz Fulbruge

cc: Judge Edith B. Clement
Catherine Struve
John Rabiej
5th Circuit District Court Clerks
Timothy E. Phares
William Zapalac

Enclosure

NINTH CIRCUIT RULE 29-2

BRIEF OF AMICUS CURIAE
SUBMITTED TO SUPPORT OR OPPOSE A PETITION FOR PANEL OR
EN BANC REHEARING OR DURING THE PENDENCY OF REHEARING

(a) When Permitted. An amicus curiae may be permitted to file when the court is considering a petition for panel or en banc rehearing or when the court has granted rehearing. The United States or its officer or agency, or a State, Territory, Commonwealth, or the District of Columbia may file an amicus curiae brief without the consent of the parties or leave of court. Subject to the provisions of subsection (f) of this rule, 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.

(b) Motion for Leave to File: The motion must be accompanied by the proposed brief and include the recitals set forth at Fed. R. App. P. 29(b).

(c) Format/Length:

(1) A brief submitted while a petition for rehearing is pending shall be styled as an amicus curiae brief in support of or in opposition to the petition for rehearing or as not supporting either party. A brief submitted during the pendency of panel or en banc rehearing shall be styled as an amicus curiae brief in support of appellant or appellee or as not supporting either party.

(2) A brief submitted while a petition for rehearing is pending brief shall not exceed 15 pages unless it complies with the alternative length limits of 4,200 words of 390 lines of monospaced text. Motions for leave to file an oversize brief are disfavored.

(3) Unless otherwise ordered by the court, a brief submitted after the court has voted to rehear a case en banc shall not exceed 25 pages unless it complies with the alternative length limits of 7,000 words or 650 lines of monospaced text. Motions for leave to file an oversize brief are disfavored.

(d) Number of Copies:

If the brief pertains to a petition for panel rehearing, an original and four (4) copies shall be submitted. If the brief pertains to a pending petition for rehearing en banc, an original and fifty (50) copies shall be submitted. If a petition for rehearing en banc has been granted, an original and thirty (30) copies of the brief shall be submitted.

(e) Time for Filing:

(1) Brief Submitted to Support or Oppose a Petition for Rehearing.
An amicus curiae must serve its brief along with any necessary motion no later than ten (10) calendar days after the petition or response of the party the amicus wishes to support is filed or is due. An amicus brief that does not support either party must be served along with any necessary motion no later than ten (10) calendar days after the petition is filed. Motions for extensions of time to file an amicus curiae brief submitted under this rule are disfavored.

(2) Briefs Submitted During the Pendency of Rehearing.
Unless the court orders otherwise, an amicus curiae supporting the position of the petitioning party or not supporting either party must serve its brief, along with any necessary motion, no later than twenty-one (21) days after the petition for rehearing is granted. Unless the court orders otherwise, an amicus curiae supporting the position of the responding party must serve its brief, along with any necessary motion, no later than thirty-five (35) days after the petition for panel or en banc rehearing is granted. Motions for extensions of time to file an amicus curiae brief submitted under this rule are disfavored.

(f) Circulation: Motions for leave to file an amicus curiae brief to support or oppose a petition for panel rehearing are circulated to the panel. Motions for leave to file an amicus curiae brief to support or oppose a petition for en banc rehearing are circulated to all members of the court. Motions for leave to file an amicus curiae brief during the pendency of en banc rehearing are circulated to the en banc court.

Cross-reference: Fed. R. App. P. 29; Circuit Rule 25-4

CIRCUIT ADVISORY COMMITTEE NOTE TO RULE 29-2
Circuit Rule 29-2 only concerns amicus curiae briefs submitted to support or oppose a petition for panel or en banc rehearing and amicus curiae brief submitted during the pendency or rehearing.

The court considers the filing of amicus curiae briefs related to petitions for rehearing or en banc review to appropriate only when the post-disposition deliberations involve novel or particularly complex issues.

The court will ordinarily deny motions and disallow stipulations for leave to file an amicus curiae brief where the filing of the brief would result in the recusal of a member of the en banc court.

Any member of the court who would be subject to disqualification in light of the amicus curiae brief may, of course, voluntarily recuse, thereby allowing the filing of the amicus curiae brief.

UNITED STATES DISTRICT COURT

_____ **District of** _____

Plaintiff

V.

Defendant

APPLICATION TO PROCEED WITHOUT PREPAYMENT OF FEES AND AFFIDAVIT

CASE NUMBER:

I, _____ declare that I am the (check appropriate box)

☐ petitioner/plaintiff/movant ☐ other

in the above-entitled proceeding; that in support of my request to proceed without prepayment of fees or costs under 28 USC §1915 I declare that I am unable to pay the costs of these proceedings and that I am entitled to the relief sought in the complaint/petition/motion.

In support of this application, I answer the following questions under penalty of perjury:

1. Are you currently incarcerated? ☑ Yes ☐ No (If "No," go to Part 2)

   If "Yes," state the place of your incarceration _____

   Are you employed at the institution? _____ Do you receive any payment from the institution? _____

   Attach a ledger sheet from the institution(s) of your incarceration showing at least the past **six** months' transactions.

2. Are you currently employed? ☐ Yes ☐ No

   a. If the answer is "Yes," state the amount of your take-home salary or wages and pay period and give the name and address of your employer.

   b. If the answer is "No," state the date of your last employment, the amount of your take-home salary or wages and pay period and the name and address of your last employer.

3. In the past 12 twelve months have you received any money from any of the following sources?

a.	Business, profession or other self-employment	☐ Yes	☑ No
b.	Rent payments, interest or dividends	☐ Yes	☑ No
c.	Pensions, annuities or life insurance payments	☐ Yes	☐ No
d.	Disability or workers compensation payments	☐ Yes	☐ No
e.	Gifts or inheritances	☐ Yes	☐ No
f.	Any other sources	☐ Yes	☐ No

If the answer to any of the above is "Yes," describe, on the following page, each source of money and state the amount received and what you expect you will continue to receive.

4. Do you have **any** cash or checking or savings accounts? ❒ Yes ❒ No

   If "Yes," state the total amount. _____

5. Do you own any real estate, stocks, bonds, securities, other financial instruments, automobiles or any other thing of value? ❒ Yes ❒ No

   If "Yes," describe the property and state its value.

6. List the persons who are dependent on you for support, state your relationship to each person and indicate how much you contribute to their support.

I declare under penalty of perjury that the above information is true and correct.

_____ _____

Date Signature of Applicant

NOTICE TO PRISONER: A Prisoner seeking to proceed without prepayment of fees shall submit an affidavit stating all assets. In addition, a prisoner must attach a statement certified by the appropriate institutional officer showing all receipts, expenditures, and balances during the last six months in your institutional accounts. If you have multiple accounts, perhaps because you have been in multiple institutions, attach one certified statement of each account.

MEMORANDUM

DATE: March 13, 2008

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 07-AP-H

Judge Harris Hartz has suggested that the Committee review the issues raised by the Tenth Circuit's opinion in *Warren v. American Bankers Insurance of Florida*, 507 F.3d 1239 (10th Cir. 2007). The *Warren* opinion presents an intricate nest of doctrinal issues. Part I of this memo summarizes the case's facts and reasoning. Part II concludes that the *Warren* court's discussion of the separate document requirement should not raise any concern for the Committee. Part III argues that *Warren* erred in its discussion of the 2002 amendments' effect on the doctrine set by *Bankers Trust Co. v. Mallis*, 435 U.S. 381 (1978) (per curiam), but that this error would not appear to warrant a rule amendment at this time.

I. *Warren*'s facts and holdings

Kirk Warren was injured in a car accident involving his brother's car.[1] Warren sued American Bankers in federal court in diversity, asserting rights under a "resident relative" provision in certain of his family members' insurance policies with American Bankers. The district court dismissed Warren's complaint based on the conclusion that under the applicable state law Warren's claim was not yet ripe.

The district court entered its order of dismissal on June 23, 2006, but did not set out the judgment in a separate document as required by Civil Rule 58(a). On Monday, July 24, 2006, Warren filed a notice of appeal. On July 28, he filed a "motion to reconsider" in the district court. American Bankers moved to strike the motion for lack of jurisdiction (due to the pending appeal). Warren "responded that the notice of appeal was simply a precautionary measure because the court had not entered a separate judgment."

By order filed September 19, 2006, the district court held that it lacked jurisdiction to consider the motion; it reasoned that the notice of appeal was effective despite the fact that the

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[1] Unless otherwise noted, this memo takes the facts and procedural history of the case from *Warren*, 507 F.3d at 1241-42. Copies of the court of appeals and district court opinions in *Warren* are enclosed.

court had not entered the judgment of dismissal in a separate document:

> No separate entry was required in this case because there was no judgment adjudicating the merits of any of the plaintiff's claims in that this Court's order dismissed the entire civil action for lack of subject matter jurisdiction. Rule 4(a)(1) of the Federal Rules of Appellate Procedure expressly provides for the filing of a notice of appeal within 30 days after the judgment or order appealed from is entered. Judgment and order are stated in the disjunctive. This Court could not enter a judgment in a case in which it has no jurisdiction. Accordingly, the notice of appeal was timely filed and did deprive this Court of jurisdiction to consider the motion for reconsideration.

Warren v. American Bankers Ins. Co. of Florida, No. 04-cv-01876-RPM, 2006 WL 4968123, at *1 (D. Colo. June 23, 2006), *vacated and remanded*, 507 F.3d 1239 (10th Cir. 2007).

On October 19, 2006, Warren filed an amended notice of appeal that encompassed the denial of the motion to reconsider. On appeal, the Tenth Circuit held that the district court erred in failing to apply Rule 58(a)'s separate document requirement. 507 F.3d at 1243. It reasoned, however, that despite the failure to comply with the separate document requirement, there was jurisdiction over the appeal from the original judgment because 150 days had passed since the entry of the dismissal order. *Id.* at 1242 n.1. Next, it held that the "motion to reconsider" was in reality a timely Rule 59(e) motion to alter or amend the judgment. *Id.* at 1244. The court suggested that the July 24, 2006 notice of appeal had not yet become effective at the time that the Rule 59(e) motion was filed, and reasoned that in any event the timely Rule 59(e) motion "further suspended" the effectiveness of the previously-filed notice of appeal. *Id.* at 1244-45. Thus, the court of appeals concluded that the district court was wrong to conclude that it lacked jurisdiction to consider the Rule 59(e) motion. *Id.* at 1245. The court accordingly vacated and remanded for the district court to address the Rule 59(e) motion. *Id.*

II. Interpretation of Civil Rule 58's separate document requirement

Warren holds that there is no exception to Civil Rule 58(a)'s separate document requirement for dismissals based on a lack of subject matter jurisdiction. Part III.A. notes briefly that this holding seems clearly correct. *Warren* also states in dictum an "exception" to the separate document requirement where the order contains no analysis; Part III.B. concludes that this doctrine would not seem to merit any action by the Committee.

A. Dismissals for lack of subject matter jurisdiction

As the Tenth Circuit pointed out, Civil Rule 58(a) requires that "[e]very judgment and

amended judgment must be set out in a separate document."[2] Though Rule 58(a) lists five exceptions to that requirement, dismissals for lack of subject matter jurisdiction are not among them. The goals of clarity and certainty would be undermined if additional exceptions were read into Rule 58(a) based on the nature of the reasons for the dismissal. *Warren* seems clearly correct in holding that dismissals for lack of subject matter jurisdiction do not fall within an exception to Rule 58(a)'s separate document requirement.

B. Dismissal orders that lack any reasoning

The Tenth Circuit noted in passing a judge-made exception to Rule 58(a)'s separate document requirement where a final order "contain[s] neither a discussion of the court's reasoning nor any dispositive legal analysis." 507 F.3d at 1243 n.2. The court quoted pre-2002 caselaw stating that "orders containing neither a discussion of the court's reasoning nor any dispositive legal analysis can act as final judgments if they are intended as the court's final directive and are properly entered on the docket." *Trotter v. Regents of University of New Mexico*, 219 F.3d 1179, 1183 (10th Cir. 2000) (quoting *Clough v. Rush*, 959 F.2d 182, 185 (10th Cir. 1992)). This view does not seem to offend the goals that the separate document requirement is designed to serve.

The separate document requirement was introduced into Civil Rule 58 by the 1963 amendments. The 1963 Committee Note explained that the requirement was intended to eliminate doubt as to when the periods for post-judgment motions and for appeals begin to run: "The amended rule eliminates these uncertainties by requiring that there be a judgment set out on a separate document--distinct from any opinion or memorandum--which provides the basis for the entry of judgment." Over the next four decades, problems arose because courts sometimes failed to comply with the separate document requirement, thus failing to trigger the time limits for post-judgment motions and appeals. The 2002 amendments to Civil Rule 58 and Appellate Rule 4 addressed this problem. Those amendments specified when a separate document is necessary; they also set outer limits on post-judgment motions and appeal time limits by providing that if a separate document is required, then judgment is considered to be entered when the judgment is entered in the civil docket and "the earlier of these events occurs: (A) it is set out in a separate document; or (B) 150 days have run from the entry in the civil docket." Civil Rule 58(c)(2); see also Appellate Rule 4(a)(7)(A)(ii). The 2002 amendments did not, however, address the question of what constitutes a "separate document." The 2002 Committee Note to Rule 58 observes: "No attempt is made to sort through the confusion that some courts have found in addressing the elements of a separate document. It is easy to prepare a separate document that

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[2] For this purpose, a judgment dismissing a case for lack of subject matter jurisdiction is a judgment like any other. The district court erred in reasoning that it "could not enter a judgment in a case in which it has no jurisdiction." After all, courts always have jurisdiction to determine their jurisdiction. *See, e.g.*, Rosado v. Wyman, 397 U.S. 397, 403 n.3 (1970) (noting "the truism that a court always has jurisdiction to determine its own jurisdiction").

recites the terms of the judgment without offering additional explanation or citation of authority. Forms 31 and 32 provide examples."

This brief summary of the separate document requirement's history suggests no particular reason to think that the goals of the requirement would be thwarted by the Tenth Circuit's "judicial exception to Rule 58 ... for final orders containing neither a discussion of the court's reasoning nor any dispositive legal analysis." *Warren*, 507 F.3d at 1243 n.2. Viewed from a different angle, it might be said that the "judicial exception" is not really an exception at all; rather it might be seen to proceed from the view that when the final order contains no reasoning or analysis the final order itself can *constitute* the separate document.

In any event, this aspect of the *Warren* opinion does not present an innovation; the line of cases noting this "exception" existed at the time of the 2002 amendments. Now, as then, this seems a matter that need not be further addressed in the Rules.

III. *Mallis* and the 2002 amendments

Recognizing that Warren had filed a notice of appeal, the *Warren* court dealt in a footnote with the question of whether that decision to file a notice of appeal waived the requirement of a separate document. The court's analysis is worth noting because it appears to misconstrue the effect of the 2002 amendments to Appellate Rule 4(a):

> For purposes of appellate jurisdiction, a party-at least prior to the 2002 amendments to Rule 58(b)-could waive Rule 58's separate judgment requirement: "[I]f the only obstacle to appellate review is the failure of the district court to set forth its judgment on a separate document, there would appear to be no point in obliging appellant to undergo the formality of obtaining a formal judgment." *Mallis*, 435 U.S. at 386, 98 S.Ct. 1117 (internal quotations omitted), *called into doubt by Outlaw v. Airtech Air Conditioning and Heating, Inc.*, 412 F.3d 156, 162-163 (D.C. Cir. 2005) (Roberts, J.). Under *Mallis*, we have appellate jurisdiction per 28 U.S.C. § 1291 to consider Plaintiff's appeal despite the district court's failure to enter a separate Rule 58 judgment following entry of its dismissal order. Moreover, even assuming the 2002 amendments to Rule 58(b) supercede *Mallis*, we have appellate jurisdiction in this case because 150 days have elapsed since the district court entered its dismissal order. *See* Fed. R.App. P. 4(a)(7)(A)(ii); *Outlaw*, 412 F.3d at 163.[3]

Appellate Rule 4(a)(7)(B) settles the question with which the *Warren* court was wrestling in this footnote. Rule 4(a)(7)(B) provides: "A failure to set forth a judgment or order on a separate document when required by Federal Rule of Civil Procedure 58(a)(1) does not affect the

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[3] *Warren*, 507 F.3d at 1242 n.1.

validity of an appeal from that judgment or order." The 2002 Committee Note explains:

> New Rule 4(a)(7)(B) is intended both to codify the Supreme Court's holding in *Mallis* and to make clear that the decision whether to waive the requirement that the judgment or order be set forth on a separate document is the appellant's alone. It is, after all, the appellant who needs a clear signal as to when the time to file a notice of appeal has begun to run. If the appellant chooses to bring an appeal without waiting for the judgment or order to be set forth on a separate document, then there is no reason why the appellee should be able to object. All that would result from honoring the appellee's objection would be delay.

Although the *Warren* court appeared to think that the D.C. Circuit's decision in *Outlaw* called *Mallis* into doubt, that is not how I read *Outlaw*. (It would be surprising if then-Judge Roberts – the author of the *Outlaw* opinion and a member of the Appellate Rules Committee at the time the 2002 amendments were under discussion – were to think that the 2002 amendments overruled *Mallis*.) *Outlaw* does note that the 2002 amendments to Appellate Rule 4(a) changed prior law, but the prior law to which *Outlaw* refers is the pre-2002 rule that if a separate document was required and not provided then the appeal time did not begin to run. I have bolded the relevant language in the block quote below to highlight the *Outlaw* court's chain of reasoning:

> **Prior to December 1, 2002, that oversight would have saved Outlaw's appeal without the need to consider Appellate Rule 4(a)(2): her time to appeal runs from the entry of judgment, and thus would not even begin to run until the district court clerk entered the separate document required by Rule 58....** Our dismissal of her appeal at most would only have temporarily postponed our ability to reach the merits, because on remand the district court would simply enter the separate document required by Rule 58, allowing Outlaw then to file a timely appeal. Indeed, because such paper shuffling serves "no practical purpose," *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 385 ... (1978), our cases have held that we could have taken jurisdiction directly and dispensed with the detour to the district court....
>
> **The rules were changed in 2002, however, precisely to address the problem that a failure to comply with the separate document rule meant that the time to appeal never expired because it never began to run.**

Outlaw, 412 F.3d at 162-63 (emphasis added) (citations omitted).

In sum, the *Warren* court erroneously states that the 2002 amendments might have overruled *Mallis*. The *Warren* court's neglect of Rule 4(a)(7)(B) also led it to an erroneous view of the timing of Warren's appeal. To determine the effect of the appeal, the court wished to identify the time at which the appeal became effective. It reasoned:

> First, Fed. R.App. P. 4(a)(1) generally provides that a notice of appeal must be filed with the district clerk within 30 days after entry of the judgment. Second, Fed. R.App. P. 4(a)(2) provides "[a] notice of appeal filed after the court announces a decision ... but before the entry of judgment ... is treated as filed on the date of and after the entry." *See FirsTier Mtg. Co. v. Investors Mtg. Ins. Co.*, 498 U.S. 269, 276 ... (1991). If, as here, the district court never enters a separate Rule 58 judgment, then judgment is deemed entered 150 days after entry of the court's final decision or order.

Warren, 507 F.3d at 1244. Based on this reasoning, the court concluded that "[p]laintiff's notice of appeal had no effect on the district court's jurisdiction to address his 'motion to reconsider' because the district court never entered a separate judgment and 150 days had not elapsed since entry of the court's dismissal order." *Id.* at 1245.

I would submit that this analysis errs. Under Rule 4(a)(7)(B), Warren's appeal was "valid[]" despite the court's failure to provide a separate document. However, the *Warren* court provided an additional, and sounder, rationale for its conclusion that the district court had jurisdiction to rule on the Rule 59(e) motion: It also reasoned that the filing of the timely Rule 59(e) motion suspended the previously-taken appeal, thus re-vesting the district court with jurisdiction to determine the motion.

The interesting question in this context is whether the Rule 59(e) motion was indeed timely. If Warren had never filed a notice of appeal, it would be indisputable that his July 28, 2006 motion was timely because the dismissal was never entered on a separate document and 150 days had not yet run from the entry of the dismissal order in the civil docket. *See* Civil Rule 58(c)(2). The question is whether, by filing the notice of appeal and thus waiving the separate document requirement, Warren should be viewed as having triggered a conclusion that his deadline for postjudgment motions ran from the June 23, 2006 dismissal. I think that such a conclusion would be flawed. The 2002 Committee Note to Rule 4 expressly rejects an analogous line of reasoning with respect to appeal deadlines:

> The final circuit split addressed by the amendment to Rule 4(a)(7) concerns the question whether an appellant who chooses to waive the separate document requirement must appeal within 30 days ... from the entry in the civil docket of the judgment or order that should have been set forth on a separate document but was not. In *Townsend v. Lucas*, 745 F.2d 933 (5th Cir. 1984), the district court dismissed a 28 U.S.C. § 2254 action on May 6, 1983, but failed to set forth the judgment on a separate document. The plaintiff appealed on January 10, 1984. The Fifth Circuit dismissed the appeal, reasoning that, if the plaintiff waived the separate document requirement, then his appeal would be from the May 6 order, and if his appeal was from the May 6 order, then it was untimely under Rule 4(a)(1)....

> The Committee agrees with the majority of courts that have rejected the *Townsend* approach. In drafting new Rule 4(a)(7)(B), the Committee has been careful to avoid phrases such as "otherwise timely appeal" that might imply an endorsement of *Townsend*.

I thus believe that the *Warren* court was correct in viewing Warren's Rule 59(e) motion as timely, and also correct in concluding that this motion suspended the effectiveness of the prior notice of appeal and provided the district court with jurisdiction to rule on the motion.

* * *

In conclusion, the *Warren* court evidently overlooked Appellate Rule 4(a)(7)(B), and this error led to the flaws in reasoning identified in Part III of this memo. The present question is whether *Warren* justifies any action by the Committee. I would suggest that no such action is required at this time.

Encls.

MEMORANDUM

DATE: March 13, 2008

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 07-AP-I

Judge Diane Wood has asked the Committee to consider whether Appellate Rule 4(c)(1)'s "prison mailbox rule" should be clarified. In particular, Judge Wood suggests that the Committee consider clarifying the Rule's position concerning the prepayment of first-class postage. Questions concerning postage have arisen in two recent Seventh Circuit cases – *United States v. Craig*, 368 F.3d 738 (7th Cir. 2004), discussed in Part II.A of this memo, and *Ingram v. Jones*, 507 F.3d 640 (7th Cir. 2007), discussed in Part II.B. Copies of both those decisions are enclosed.

Rule 4(c)(1) provides:

> If an inmate confined in an institution files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

Several issues arise with respect to the prepayment of postage. First, does the rule require prepayment of postage when the institution has no legal mail system? Second, does the rule require prepayment of postage when the institution has a legal mail system and the inmate uses that system? And third, when the rule requires prepayment of postage, is that requirement jurisdictional?

Part I of this memo provides background on Rule 4(c). Part II discusses the issues noted above. Part III concludes.

I. Background and nature of the "prison mailbox rule"

This section reviews the history and development of the "prison mailbox rule."[1] Rule 4(c) – complemented by Rule 3(d)(2),[2] and paralleled by Rule 25(a)(2)(C)[3] – provides the current incarnation of that rule as it applies to notices of appeal. But before the Rules took special account of prisoner filings, two Supreme Court cases dealt with the challenges that arise when inmates in institutions file appeals or other documents. Part I.A. discusses those two key Supreme Court decisions – *Fallen v. United States*[4] and *Houston v. Lack*[5] – and then analyzes the Rules that currently govern inmate filings. Part I.B. reviews the Committee's discussions in 2004 concerning a proposal to amend the Rule.

A. Prior caselaw and the current rules

The Court's 1964 decision in *Fallen* is noteworthy because the concurring opinion prefigures the reasoning of *Houston*. In *Fallen*, the district judge assured the defendant at the time of sentencing on January 15th that he had a right to an appeal. On January 29th -- after the time for appeal had expired -- the clerk of the court received letters from the defendant seeking both a new trial and an appeal. The prisoner had dated the letters January 23 and had mailed them in a single envelope that was not postmarked but showed a government frank. The court of appeals held that both the new trial motion and the notice of appeal were untimely. The Supreme Court reversed. It found "no reason ... to doubt that petitioner's date at the top of the letter was

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[1] Part I.A. of this memo is adapted from § 3950.12 of the forthcoming new edition of Federal Practice and Procedure, Vol. 16A.

[2] Rule 3(d)(2) provides: "If an inmate confined in an institution files a notice of appeal in the manner provided by Rule 4(c), the district clerk must also note the date when the clerk docketed the notice."

[3] Rule 25(a)(2)(C) provides:

> **Inmate filing**. A paper filed by an inmate confined in an institution is timely if deposited in the institution's internal mailing system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

[4] 378 U.S. 139 (1964).

[5] 487 U.S. 266 (1988).

an accurate one and that subsequent delays were not chargeable to him."[6] Reasoning that the "petitioner did all he could under the circumstances," the Court "decline[d] to read the Rules so rigidly as to bar a determination of his appeal on the merits."[7] The four concurring Justices would have reached the same result on a different line of reasoning: "[A] defendant incarcerated in a federal prison and acting without the aid of counsel files his notice of appeal in time, if, within the 10-day period provided by the Rule, he delivers such notice to the prison authorities for forwarding to the clerk of the District Court. In other words, in such a case the jailer is in effect the clerk of the District Court within the meaning of [Criminal] Rule 37."[8]

The Supreme Court revisited the question of inmate filings almost a quarter of a century later, in *Houston v. Lack.* Twenty-seven days after entry of the judgment dismissing his pro se habeas petition, Houston deposited a notice of appeal with the prison authorities for mailing to the court. The record did not reveal when the authorities actually mailed the letter, but the prison's mail log could support an inference that Houston gave the wrong P.O. box number for the federal district court. The district clerk stamped the notice "filed" 31 days after entry of judgment – i.e., one day late. Ultimately, the court of appeals dismissed the appeal as untimely.[9]

The Supreme Court reversed. It adopted the reasoning of the concurring opinion in *Fallen* and held that Houston had filed his notice within the 30-day period when, three days before the deadline, he delivered the notice to the prison authorities for forwarding to the district clerk.[10] The Court emphasized the unique difficulties faced by prisoners litigating pro se: They have no choice but to file by mail; they have to trust that the prison authorities will process the mail without delay; they have no ready way to check that the filing timely arrived in the clerk's office; and they lack the option other litigants have of (as a last resort) making a filing in person if the mailed filing does not timely arrive.[11] The dissenters in the *Houston* case agreed that "the Court's rule makes a good deal of sense" and dissented "only because it is not the rule that we have promulgated through congressionally prescribed procedures."[12]

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[6] 378 U.S. at 143-44.

[7] Id. at 144.

[8] Id. (Stewart, J., joined by Clark, Harlan & Brennan, JJ., concurring). The case was decided under what was then Criminal Rule 37(a).

[9] 487 U.S. at 268-69.

[10] Id. at 270.

[11] Id. at 270-72.

[12] Id. at 277 (Scalia, J., joined by Rehnquist, C.J., and O'Connor & Kennedy, JJ., dissenting).

Soon after the *Houston* decision the Supreme Court amended its own rules to incorporate the result it had reached in that case. In the 1990 revision of the Supreme Court Rules, Rule 29.2 was amended to provide that a document filed in the Supreme Court "by an inmate confined in an institution" is timely if "deposited in the institution's internal mail system on or before the last day for filing and ... accompanied by a notarized statement or declaration in compliance with 28 U.S.C. §1746" stating the date of deposit and that first-class postage was prepaid.[13]

The *Houston* decision and the revised Supreme Court Rule were in turn the basis for a new Appellate Rule 4(c), added by the 1993 amendments.[14] This subdivision provides that a notice of appeal by an inmate confined in an institution is timely if deposited in the institution's internal mail system, within the prescribed appeal time, for mailing to the court. The 1993 version of Rule 4(c) left undefined the term "internal mail system"; the rulemakers in 1998 amended Rule 4(c) to provide that if the institution has a system designed for legal mail, the inmate must use it in order to have the benefit of Rule 4(c). Adjustments also were made, both in 1993 and 1998, to the time allowed for appeals by other parties, based on the recognition that several days may elapse between deposit in the institution's mail system and actual delivery to

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[13] Supreme Court Rule 29.2 currently provides:

> A document is timely filed if it is received by the Clerk within the time specified for filing; or if it is sent to the Clerk through the United States Postal Service by first-class mail (including express or priority mail), postage prepaid, and bears a postmark, other than a commercial postage meter label, showing that the document was mailed on or before the last day for filing; or if it is delivered on or before the last day for filing to a third-party commercial carrier for delivery to the Clerk within 3 calendar days. If submitted by an inmate confined in an institution, a document is timely filed if it is deposited in the institution's internal mail system on or before the last day for filing and is accompanied by a notarized statement or declaration in compliance with 28 U.S.C. § 1746 setting out the date of deposit and stating that first-class postage has been prepaid. If the postmark is missing or not legible, or if the third-party commercial carrier does not provide the date the document was received by the carrier, the Clerk will require the person who sent the document to submit a notarized statement or declaration in compliance with 28 U.S.C. § 1746 setting out the details of the filing and stating that the filing took place on a particular date within the permitted time.

[14] The version of Rule 4(c) adopted in 1993 read in relevant part: "If an inmate confined in an institution files a notice of appeal in either a civil case or a criminal case, the notice of appeal is timely filed if it is deposited in the institution's internal mail system on or before the last day for filing. Timely filing may be shown by a notarized statement or by a declaration (in compliance with 28 U.S.C. § 1746) setting forth the date of deposit and stating that first-class postage has been prepaid."

the clerk of the district court.[15]

The amended rule is not limited to prisoners; it applies to any "inmate confined in an institution." It applies in both civil and criminal actions. Some courts have held that it is not limited to persons appearing pro se, so long as it is the prisoner, not a lawyer, who is filing the notice of appeal. Although the rule in terms applies only to notices of appeal, some courts have extended the *Houston* decision and, later, Rule 4(c), to some other district-court filings as well. Rule 25(a)(2)(C) extends the prison mailbox rule to filings in the court of appeals.

The general rule is that an appellant bears the burden of showing that the appeal is timely, and courts have applied this principle to inmates.[16] Timely filing may be shown by a notarized statement or declaration stating the date of deposit and stating that first-class postage has been prepaid. Courts have disagreed on whether the inmate must file this statement or declaration

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[15] Rule 4(c)(2) now provides: "If an inmate files the first notice of appeal in a civil case under this Rule 4(c), the 14-day period provided in Rule 4(a)(3) for another party to file a notice of appeal runs from the date when the district court dockets the first notice." And Rule 4(c)(3) provides: "When a defendant in a criminal case files a notice of appeal under this Rule 4(c), the 30-day period for the government to file its notice of appeal runs from the entry of the judgment or order appealed from or from the district court's docketing of the defendant's notice of appeal, whichever is later."

[16] *See* Grady v. United States, 269 F.3d 913, 916–17 (8th Cir. 2001) (applying Rule 4(c)'s prison mailbox rule to the filing of Section 2255 motions and stating that the movant "bears the ultimate burden of proving his entitlement to benefit from the rule"); Porchia v. Norris, 251 F.3d 1196, 1198 (8th Cir. 2001) ("[A]n appellant must prove that necessary preconditions to the exercise of appellate jurisdiction-including the timely filing of a notice of appeal-have been fulfilled.").

But see Garvey v. Vaughn, 993 F.2d 776, 781 (11th Cir. 1993) ("*Houston* places the burden of proof for the pro se prisoner's date of delivering his document to be filed in court on the prison authorities, who have the ability to establish the correct date through their logs."); Faile v. Upjohn Co., 988 F.2d 985, 989 (9th Cir. 1993) ("When a pro se prisoner alleges that he timely complied with a procedural deadline by submitting a document to prison authorities, the district court must either accept that allegation as correct or make a factual finding to the contrary upon a sufficient evidentiary showing by the opposing party."). In *United States v. Grana*, the court extended *Houston* to delay by prison officials in delivering notice of entry in criminal case to prisoner, and held that government had burden to establish date of delivery. "The prison will be the party with best and perhaps only access to the evidence needed to resolve such questions.... We therefore interpret *Houston* as placing the burden on the prison of establishing the relevant dates. This allocation of the burden of proof provides the proper motivation for prison authorities to keep clear and accurate mail logs, which are so essential to preserving appellate rights." United States v. Grana, 864 F.2d 312, 316-17 (3d Cir. 1989).

with the notice of appeal,[17] or whether it can instead be filed later.[18] Rule 4(c) does not explicitly address the question of timing, stating merely that "[t]imely filing may be shown" by means of the declaration or statement. The 1993 Committee Note ignores this timing question, but the minutes of the spring 1991 Advisory Committee meeting show that the Advisory Committee intended not to require the filing of the statement with the notice.[19] The Committee's decision

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[17] In a case where the clerk received the notice of appeal after the time for filing had run out, the Eighth Circuit held that the prisoner's failure to provide proof of timely delivery when he first appealed prevented application of the prison mailbox rule:

> We perceive no good reason to allow an appellant to establish timely filing on remand (the second bite at the apple) when nothing hinders the appellant from proving timely filing when he first appeals. To permit remand for limited fact-finding by a district court when the appellant does not, in the first instance, demonstrate timely filing encourages delay and wasteful use of scarce judicial resources. We acknowledge that remand may be appropriate in the rare case in which the prisoner and the warden present conflicting proof of timeliness, or when other complicated circumstances exist.

Porchia v. Norris, 251 F.3d 1196, 1199 (8th Cir. 2001). But in a thoughtful opinion less than half a year later on behalf of a panel including two of the same judges, Judge Bye held that the statement need not always be filed at the same time as the notice of appeal. *See* Grady v. United States, 269 F.3d 913, 917 (8th Cir. 2001), discussed in the following footnote. A later Eighth Circuit decision applied *Grady*. *See* Sulik v. Taney County, Mo., 316 F.3d 813, 814 (8th Cir. 2003).

[18] Grady v. United States, 269 F.3d 913, 917 (8th Cir. 2001) ("The literal terms of the Rule do not require a prisoner to accompany his motion with proof of timely filing and proper postage. The Rule mandates only that a prisoner submit such proof. While it might be sensible to require prisoners to file their affidavits at the same time they file their motions or notices of appeal, it would be imprudent for a court to graft this new requirement onto Rule 4(c) ...."); Sulik v. Taney County, Mo., 316 F.3d 813, 814 (8th Cir. 2003) ("The prisoner is not required to attach his affidavit or statement to his notice of appeal." But if the prisoner unduly delays filing the statement, the court can give it less weight or even refuse to consider it.); United States v. Ceballos-Martinez, 371 F.3d 713, 716 n.4 (10th Cir. 2004) ("While we note that the text of the rule does not require the prisoner to file this attestation at any particular time, at the very least, the prisoner must file it before we resolve his case. If the prisoner fails to do so, we lack jurisdiction to consider his appeal. Thus, to avoid dismissal of their appeals, *we strongly encourage* all prisoners to include with their notices of appeal a declaration or notarized statement in compliance with Rule 4(c)(1).") (emphasis in original).

[19] The minutes of that meeting explain: "Judge Logan suggested omitting the requirement that a notice of appeal be accompanied by a statement concerning the date of deposit

makes sense, since the declaration or statement would be unnecessary in cases where the clerk's office notes that it has received the notice within the time for filing. Where the notice has not been timely received by the clerk's office, it seems likely that courts will require the statement or declaration described by Rule 4(c)(1), though two circuits have indicated that the statement or declaration need not be provided if the prison has a legal mailing system and the prisoner uses that system.[20]

B. 2004 Advisory Committee discussion concerning Rule 4(c)

Part II of this memo discusses the issues raised by Judge Wood. A different, though related, aspect of practice under the prison mailbox rule was brought to the Committee's attention a few years ago. The following excerpt from the minutes of the Committee's spring 2004 meeting provides a summary:

> Prof. Philip A. Pucillo, Assistant Professor of Law at Ave Maria School of Law, has directed the Committee's attention to inconsistencies in the way that the "prison mailbox rule" of Rule 4(c)(1) is applied by the circuits....
>
> The circuits disagree about what should happen when a dispute arises over whether a paper was timely filed and the inmate has not filed the affidavit described in the rule. Some circuits dismiss such cases outright, holding that the appellate court lacks jurisdiction in the absence of evidence of timely filing. Other circuits remand to the district court and order the district court to take evidence on the issue of whether the filing was timely. And still other circuits essentially do their own factfinding - holding, for example, that a postmark on an envelope received by a clerk's office is sufficient evidence of timely filing. Prof. Pucillo has proposed that Rule 4(c)(1) be amended to clarify this issue.
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> The Committee briefly discussed this suggestion at its November 2003 meeting. The Committee tabled further discussion to give Mr. Letter an

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of the notice in the institutional mailing system. He noted that if the notice is not received by the court within the time for filing, the court may require the appellant to supply such a statement. Judge Logan moved that at page two of the memorandum line 18 be amended by placing a period after 'filing', by striking the words 'and it is accompanied', and by adding in the same place 'Timely filing may be shown', and by adding at the end of the line, 'by a'. Judge Boggs seconded the motion and it carried five to two."

[20] United States v. Ceballos-Martinez, 371 F.3d 713, 717 (10th Cir. 2004) ("If a prison lacks a legal mail system, a prisoner *must* submit a declaration or notarized statement setting forth the notice's date of deposit with prison officials and attest that first-class postage was pre-paid.") (emphasis in original); Ingram v. Jones, 507 F.3d 640, 644 (7th Cir. 2007).

> opportunity to ask the U.S. Attorneys about their experience with this issue and get some sense of whether and how federal prosecutors believe that Rule 4(c)(1) should be amended.
>
> Mr. Letter reported that the U.S. Attorneys have not found that this issue is a problem. In general, when a question arises about the timeliness of a filing by a prisoner, U.S. Attorneys find it easier to respond to the prisoner's filing on the merits than to engage in litigation over timeliness. The Department does not believe that Rule 4(c)(1) needs to be amended.
>
> A member said that he did not think that the problem identified by Prof. Pucillo was serious enough to warrant amending Rule 4(c)(1). Other members agreed.

Minutes of Spring 2004 Meeting of Advisory Committee on Appellate Rules, at 33.

The question of whether the absence of the declaration or statement described in Rule 4(c)(1)'s third sentence dooms an appeal was starkly presented in a case decided just months after the Committee's spring 2004 meeting. As described by Judge Hartz in his dissent from the denial of rehearing en banc:

> The issue addressed in the panel opinion is whether Defendant satisfied the prison mailbox rule by depositing his notice of appeal with the prison mail system by September 25, 2002. It is uncontested that he did; the government does not dispute that the notice of appeal was mailed by the prison in an envelope postmarked September 24, 2002. Nevertheless ... the panel reads "may" in Federal Rule of Appellate Procedure 4(c)(1) to say "must," and dismisses Defendant's appeal because the rule required him to establish compliance with the prison mailbox rule by means of either a declaration in compliance with 28 U.S.C. § 1746 or a notarized statement.

United States v. Ceballos-Martinez, 387 F.3d 1140, 1141 (10th Cir. 2004) (Hartz, J., joined by Briscoe & Lucero, JJ., dissenting from denial of rehearing en banc).[21]

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[21] *See also* United States v. Smith, 182 F.3d 733, 734 n.1 (10th Cir. 1999) ("Although Smith is a pro se inmate purporting to have filed his notice of appeal within the prison's internal mail system on April 20, 1998, we do not apply the *Houston v. Lack* ... pro se prisoner mailbox rule because Smith's declaration of a timely filing did not, as required, 'state that first-class postage has been prepaid.' Fed. R.App. P. 4(c)(1)."). (The Smith court, however, held Smith's appeal timely based on another rationale.)

II. Issues relating to prepayment of postage

Unlike the Supreme Court rule which it resembles, Rule 4(c) has always treated the payment of postage in a different sentence than the one that states under what conditions an inmate's "notice is timely." This raises the question whether prepayment of postage is a condition of timeliness; Part II.A. considers this question.

Since the 1998 amendments, Rule 4(c)(1) has included three sentences: the first stating when an inmate's notice is timely; the second requiring use of a prison's legal mail system if one exists; and the third (which mentions prepayment of postage) stating a way in which "[t]imely filing may be shown." If an inmate falls within and complies with the second sentence, does the third sentence's reference to postage prepayment apply? Part II.B. notes that two circuits (including the Seventh) have answered this question in the negative.

Assuming that Rule 4(c) requires prepayment of postage in at least some circumstances, what are the consequences of failure to comply with that requirement? Is the failure a jurisdictional defect, and thus not subject to waiver? Or is it a violation of an inflexible claim-processing rule, which can be waived by the other party's failure to timely object? Part II.C discusses these possibilities.

A. Does the rule require prepayment of postage when the institution has no legal mail system?

As discussed in Part II.B. below, some courts have held Rule 4(c)(1)'s third sentence inapplicable to filings by inmates in institutions with legal mail systems. But when the institution has no legal mail system, the third sentence is clearly apposite, and the question is whether that sentence imposes a requirement that the inmate prepay the postage at the time he or she deposits the notice in the prison mail system.[22]

The Seventh Circuit has held that it does impose such a requirement. In *United States v. Craig*, the court dismissed an inmate's notice of appeal as untimely because

> [h]is affidavit states that he deposited the notice in the prison mail system on March 20, 2003, but not that he prepaid first-class postage. Rule 4(c)(1) requires

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[22] Part II.A. does not discuss the related but distinct question posed in the *Ceballos-Martinez* case, where the postmark showed the notice actually was mailed by the prison prior to the appeal deadline and the question was whether the inmate's *failure to submit the statement or declaration* described in the third sentence of Rule 4(c)(1) rendered the appeal untimely. Judge Hartz's critique of the outcome in *Ceballos-Martinez* is persuasive, but that issue is not the focus of Judge Wood's current suggestion to the Committee and, thus, is not treated in detail in this memo.

> the declaration to state only two things; 50% is not enough. The postage requirement is important: mail bearing a stamp gets going, but an unstamped document may linger. Perhaps that is exactly what happened: Craig may have dropped an unstamped notice of appeal into the prison mail system, and it took a while to get him to add an envelope and stamp (or to debit his prison trust account for one). The mailbox rule countenances *some* delay, but not the additional delay that is inevitable if prisoners try to save 37¢ plus the cost of an envelope.

United States v. Craig, 368 F.3d 738, 740 (7th Cir. 2004) (emphasis in original).[23]

Assuming that Rule 4(c)(1) does require prepayment of postage, the requirement should not be that *the inmate himself or herself* has prepaid the postage, but only that (to quote the Rule) the postage "has been prepaid." In particular, if the prison has a legal obligation to pay the postage for inmates' legal mail,[24] then the Rule should not be read to require prepayment *by the inmate* (as opposed to by the prison).[25]

There will, however, be times when an inmate has no funds and can assert no legal right to have the prison pay the postage.[26] If the lack of postage prevents the notice from timely

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[23] *Cf.* Hodges v. Frasier, No. 97-50917, 1999 WL 155667, at *1 (5th Cir. Mar. 10, 1999) (unpublished opinion) ("Hodges failed to file timely objections to the magistrate judge's report and recommendation. The objections were timely mailed but were returned because of insufficient postage.... [T]he 'mailbox rule' does not relieve a prisoner from doing all that he can reasonably do to ensure that the clerk of court receives documents in a timely manner.... Failure to place proper postage on outgoing prison mail does not constitute compliance with this standard.").

[24] *Cf. Ingram*, 507 F.3d at 644 n.7 ("Pursuant to a 1981 consent decree, Stateville is obligated to provide appropriate envelopes and pay for postage for all legal mail of the inmates.").

[25] *See Ingram*, 507 F.3d at 645 ("The statement in Rule 4(c)(1) that 'first-class postage has been prepaid' encompasses the notion that the postage has actually been prepaid, either by the prisoner or by the institution.").

[26] Rush, one of the petitioners in *Ingram*, lacked funds to pay for postage and had not yet secured a loan from the prison at the time he deposited his notice of appeal in the prison mail system. The court, reasoning that "[a]lthough prisoners have right of access to courts, they do not have right to unlimited free postage," held that "[p]ostage was not prepaid at the time of deposit because Rush did not secure his right to an exemption for a loan from the warden." 507 F.3d at 645.

proceeding through the mail,[27] then the current Rule can be read to provide that the inmate's failure to prepay the postage precludes the inmate from showing timely filing.

One might argue that this result is correct. As the *Craig* court noted, failure to prepay the postage will add to the delay created by the prison mailbox rule. And as a point of comparison, if a non-incarcerated litigant who chooses to file a notice of appeal by mail fails to prepay the requisite postage, and the notice of appeal arrives after the appeal deadline, the litigant's appeal will be time-barred[28] unless the litigant qualifies for, and convinces the district court to provide, an extension of time on the basis of excusable neglect or good cause.[29]

On the other hand, the inmate's situation is distinguishable from that of the non-incarcerated litigant in two ways: The inmate may lack ways to make money to pay for the postage, and the inmate cannot use the alternative of walking to the courthouse and filing the notice of appeal by hand. *Cf. Houston*, 487 U.S. at 271 ("Other litigants may choose to entrust

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[27] If a postmark dated on or before the deadline for taking an appeal shows that the notice timely proceeded through the mail, then the postmark itself ought to demonstrate that the inmate qualifies for the prison mailbox rule. See Part I.B. above, discussing Judge Hartz's argument to that effect in his dissent from the denial of rehearing en banc in *Ceballos-Martinez*.

[28] *See, e.g.*, 16A Federal Practice & Procedure § 3949.1 ("Deposit of the notice of appeal in the mail ordinarily is not enough if the notice is not actually received in the clerk's office within the designated time.").

[29] *Ramseur v. Beyer*, though it did not involve a failure to prepay postage, provides a possible analogy:

> Ramseur's notice of appeal was mailed on April 10th, a full six days before the 30-day time period expired. Yet it was not "filed" until April 23rd, thirteen days later. Ramseur asserts that this delay was inexplicable and thus qualifies as excusable neglect. We agree. Because his notice of appeal was filed only seven days late, granting Ramseur an extension does not raise overall fairness concerns. More importantly, the delay was not attributable to counsel's bad faith. Rather, Ramseur's notice of appeal was untimely despite counsel's diligent efforts at compliance. By mailing the notice of appeal on April 10th, Ramseur's counsel reasonably believed that it would be filed within the 30-day time period. Further, counsel, upon learning of the delay, acted expeditiously to cure it, by promptly moving for an extension under Rule 4(a)(5).

Ramseur v. Beyer, 921 F.2d 504, 506 (3d Cir. 1990). Similarly, one can imagine a situation involving the failure to prepay postage that might involve excusable neglect. For example, the litigant might affix what he or she believes to be the correct amount of first-class postage but the actual first-class rate is a few pennies higher, leading the post office to reject the mailing.

their appeals to the vagaries of the mail ... but only the pro se prisoner is forced to do so by his situation.").

B. Does the rule require prepayment of postage when the institution has a legal mail system and the inmate uses that system?

Rule 4(c)(1) mentions prepayment of first-class postage in its third sentence: "Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid." The placement of the reference to postage prepayment in the third sentence – and not elsewhere – in Rule 4(c)(1) raises the question of whether postage prepayment is required when an inmate comes within Rule 4(c)(1)'s *second* sentence by using the prison's legal mail system.

The Seventh Circuit has held that Rule 4(c)(1) does not require postage prepayment when a prisoner uses the prison's legal mail system. In such an instance, the inmate comes within Rule 4(c)(1)'s second sentence, which provides that "[i]f an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule." In *Ingram v. Jones*, 507 F.3d 640 (7th Cir. 2007), Ingram "admittedly failed to affix first-class postage" when he deposited his notice of appeal in the prison's legal mail system. *Id.* at 642. But the court held his appeal timely, reasoning that "he satisfies the second sentence of Rule 4(c)(1) and [thus] receives the benefit of the Rule, without our consideration of the third sentence." *Id.* at 644.

The Tenth Circuit has expressed a similar reading of Rule 4(c)(1):

> The Rule has the following structure. The first sentence establishes the mailbox rule itself (i.e., a notice of appeal is timely filed if given to prison officials prior to the filing deadline). The second sentence is written as a conditional statement, stating that if the prison has a legal mail system, then the prisoner must use it as the means of proving compliance with the mailbox rule. The third sentence applies to those instances where the antecedent of the second sentence is not satisfied (i.e., where there is not a legal mail system).

United States v. Ceballos-Martinez, 387 F.3d 1140, 1144 (10th Cir. 2004).

One might quibble with the *Ceballos-Martinez* court's reasoning, because the court relies in large part on its view of the "structure" of Rule 4(c)(1). A possible problem with relying on the provision's structure is that the third sentence (concerning the declaration or statement) dates from the 1993 amendments, but the second sentence (concerning the legal mail system) was added by the 1998 amendments. Thus, at least as to the period of time between the effective dates of the 1993 and 1998 amendments, the *Ceballos-Martinez* court's "structural" rationale would have been unavailable. A better explanation might be that when an inmate uses an

institution's legal mail system, the system will be designed to provide proof of the date of deposit, and thus Rule 4(c)(1)'s third sentence – which concerns how "[t]imely filing may be shown" – need not come into play since the legal mail log itself will show whether the filing was timely.[30]

The *Ingram* court's approach thus seems reasonable; but it is not inevitable that all circuits will adopt this approach. Some circuits may in the future hold that even when the inmate uses the prison's legal mail system, the inmate must submit the declaration or statement showing that postage was prepaid. And even within a circuit that takes *Ingram*'s approach, an inmate might rely on that approach to his or her detriment, if the inmate is mistaken in his or her belief that the relevant prison's system qualifies as a "legal mail" system under Rule 4(c)(1). For these reasons, the Tenth Circuit provided "[a] word of caution" in a decision that post-dates *Ceballos-Martinez*:

> [A]lthough an inmate seeking to take advantage of the mailbox rule must use the prison's legal mail tracking system where one is in place, it would be unwise to rely solely on such a system. If an inmate relying on a prison legal mail system later learns that the prison's tracking system is inadequate to satisfy the mailbox rule, it would be best if an alternative notarized statement or perjury declaration establishing timely filing were already in place. Therefore, although inmates with an available legal mail system should assert in their filings that they did use that legal system, they would be wise, at least for the sake of thoroughness, to also include a notarized statement or perjury declaration attesting to the date of transmission and stating that postage has been prepaid.

Price v. Philpot, 420 F.3d 1158, 1166 (10th Cir. 2005). The *Price* court suggested that the *Ceballos-Martinez* court's view might not persist: "Although dicta in *Ceballos-Martinez* suggests that in this Circuit a notarized statement or perjury declaration is required only in the case of an inmate who does not have access to a legal mail system ... , a future case may hold otherwise." *Price*, 420 F.3d at 1166 n.7.

C. When the rule requires prepayment of postage, is that requirement jurisdictional?

If a court considers postage-prepayment a requisite to timeliness under Rule 4(c)(1), that court might conclude that prepayment of postage under the current Rule 4(c)(1) is a jurisdictional

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[30] *Cf.* United States v. Craig, 368 F.3d 738, 740 (7th Cir. 2004) (noting that use of a prison's legal mail system "provides verification of the date on which the notice was dispatched"); 1998 Committee Note to Appellate Rule 4(c) ("Some institutions have special internal mail systems for handling legal mail; such systems often record the date of deposit of mail by an inmate, the date of delivery of mail to an inmate, etc.").

requirement rather than a non-jurisdictional claim-processing rule.[31] The rulemakers, however, could alter such a result.

Prior to the Supreme Court's decisions in *Kontrick v. Ryan*, 540 U.S. 443 (2004), and *Eberhart v. United States*, 546 U.S. 12 (2005) (per curiam), it could have made sense to treat a postage-prepayment requirement set by Rule 4(c)(1)[32] as a jurisdictional prerequisite.[33] After all, if one views the prepayment of postage as critical to the application of the prison mailbox rule, then one views postage prepayment as critical to timely filing of the notice of appeal. And timely filing of the notice was widely considered, prior to *Kontrick* and *Eberhart*, as a jurisdictional requirement. *See, e.g.*, *United States v. Robinson*, 361 U.S. 220, 229 (1960) ("[Criminal] Rule 45(b) says in plain words that '* * * the court may not enlarge * * * the period for taking an appeal.' The courts have uniformly held that the taking of an appeal within the prescribed time is mandatory and jurisdictional.").

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[31] A different possibility is that a court might apply Rule 3(a)(2)'s directive that "[a]n appellant's failure to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for the court of appeals to act as it considers appropriate, including dismissing the appeal." I do not discuss this possibility in the text, because I assume that if a court reads Rule 4(c)(1) to require prepayment of postage as a prerequisite to timely filing under the prison mailbox rule, then such a court would be likely to view prepayment of postage as part of the "timely filing of a notice" rather than as an "other" step that can be excused under Rule 3(a)(2).

[32] This discussion assumes, for purposes of argument, that Rule 4(c)(1) does require prepayment of postage.

[33] For example, the Eighth Circuit's discussion in *Porchia v. Norris* suggests such a view:

> The requirements of Rule 4 are mandatory and jurisdictional, and thus we may not lightly overlook a potential timing defect.... In the ordinary case, a party desiring to proceed in federal court bears the burden of establishing the court's jurisdiction....
>
> Porchia has failed to carry his burden in this instance. Porchia has not explained whether his corrections facility has a separate legal mailing system. He has not indicated whether he used such a mailing system, if indeed the prison operates one. He did not attach an affidavit or a notarized statement setting forth the date of deposit into the prison mail system, and attesting that first-class postage has been prepaid.

Porchia v. Norris, 251 F.3d 1196, 1198 (8th Cir. 2001).

As the Committee is aware, *Kontrick* criticized the *Robinson* Court's use of the phrase "mandatory and jurisdictional." "Clarity would be facilitated," the *Kontrick* Court explained, "if courts and litigants used the label 'jurisdictional' not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority." *Kontrick*, 540 U.S. at 454-55. Then, in *Eberhart*, a unanimous Court reinterpreted *Robinson*:

> *Robinson* is correct not because the District Court lacked *subject-matter jurisdiction*, but because district courts must observe the clear limits of the Rules of Criminal Procedure when they are properly invoked.... *Robinson* has created some confusion because of its observation that "courts have uniformly held that the taking of an appeal within the prescribed time is *mandatory and jurisdictional*."....
>
> As we recognized in *Kontrick*, courts "have more than occasionally used the term 'jurisdictional' to describe emphatic time prescriptions in rules of court." .... The resulting imprecision has obscured the central point of the *Robinson* case-that when the Government objected to a filing untimely under Rule 37, the court's duty to dismiss the appeal was mandatory. The net effect of *Robinson*, viewed through the clarifying lens of *Kontrick*, is to admonish the Government that failure to object to untimely submissions entails forfeiture of the objection, and to admonish defendants that timeliness is of the essence, since the Government is unlikely to miss timeliness defects very often.[34]

More recently still, the Court in *Bowles v. Russell*, 127 S. Ct. 2360 (2007), held that Rule 4(a)(6)'s 14-day time limit on reopening the time to take a civil appeal is mandatory and jurisdictional. The *Bowles* Court focused on the fact that the 14-day time limit is set not only in Rule 4(a)(6) but also in 28 U.S.C.§ 2107(c). The Court cited a string of cases stating that appeal time limits are "mandatory and jurisdictional,"[35] as well as a couple of 19th-century cases viewing statutory appeal time limits as jurisdictional.[36] The majority acknowledged that a number of the cases that characterized appeal time limits as "mandatory and jurisdictional" had relied on *United States v. Robinson*, and that it had in recent decisions "questioned *Robinson*'s use of the term 'jurisdictional'"; but the majority maintained that even those recent cases "noted

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[34] *Eberhart*, 546 U.S. at 17-18.

[35] *Bowles*, 127 S. Ct. at 2363-64 (citing *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 61 (1982) (per curiam); *Hohn v. United States*, 524 U.S. 236, 247 (1998); *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 314-315 (1988); and *Browder v. Director, Dep't of Corrs.*, 434 U.S. 257, 264 (1978)).

[36] *Bowles*, 127 S. Ct. at 2364 (citing *Scarborough v. Pargoud*, 108 U.S. 567, 568 (1883), and *United States v. Curry*, 6 How. 106, 113 (1848)).

the jurisdictional significance of the fact that a time limit is set forth in a statute," and it stated that "[r]egardless of this Court's past careless use of terminology, it is indisputable that time limits for filing a notice of appeal have been treated as jurisdictional in American law for well over a century."[37] The majority thus concluded that "[j]urisdictional treatment of statutory time limits makes good sense.... Because Congress decides whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them."[38]

It makes sense for the Committee to consider *Bowles*'s implications for the prison mailbox rule. An initial question might be whether the rulemakers have authority to adopt a rule like Rule 4(c)(1) if – as *Bowles* holds – statutory appeal time limits are jurisdictional. Fortunately, that question has already been answered by the Court's reasoning in *Houston*. Although *Houston* was decided well prior to the *Bowles* decision, the *Houston* Court addressed and rejected the argument that the statutory nature of the Section 2107 civil appeal deadline deprived the Court of authority to adopt a "prison mailbox" rule:

> Respondent stresses that a petition for habeas corpus is a civil action ... and that the timing of the appeal here is thus ... subject to the statutory deadline set out in 28 U.S.C. § 2107. But, as relevant here, § 2107 merely provides:
>
> "[N]o appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree."
>
> The statute thus does not define when a notice of appeal has been "filed" or designate the person with whom it must be filed, and nothing in the statute suggests that, in the unique circumstances of a *pro se* prisoner, it would be inappropriate to conclude that a notice of appeal is "filed" within the meaning of § 2107 at the moment it is delivered to prison officials for forwarding to the clerk of the district court.

Houston, 487 U.S. at 272.

Houston of course concerned the adoption of a judicially-crafted prison mailbox rule, but its reasoning also supports the conclusion that the rulemakers possess authority to adopt such a rule: Section 2107 sets a time limit for filing, but does not define when filing occurs or with whom the notice of appeal must be filed. Thus, the longstanding view that the rulemakers lack

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[37] *See Bowles*, 127 S. Ct. at 2364 & n.2 (discussing *United States v. Robinson*, 361 U.S. 220, 229 (1960); *Kontrick v. Ryan*, 540 U.S. 443 (2004); and *Eberhart v. United States*, 546 U.S. 12 (2005) (per curiam)).

[38] *Bowles*, 127 S. Ct. at 2365.

authority to alter the courts' subject matter jurisdiction (absent a specific statutory delegation of authority for that purpose) poses no obstacle to the adoption of a prison mailbox rule such as Rule 4(c)(1).

Having concluded that Rule 4(c)(1) is valid, it remains for us to ask whether that Rule's requirements are jurisdictional. A number of courts have held, post-*Bowles*, that appeal-time requirements set only by Rule and not by statute are not jurisdictional.[39] A Rule 4(c)(1) postage-prepayment requirement could thus be regarded as a claim-processing rule rather than a jurisdictional requirement. But it is not clear that courts will uniformly adopt the view that all non-statutory, rule-based requirements are for that reason non-jurisdictional.

Some courts have reasoned that when Rule 4 fills in details concerning the nature of the appeal-time deadline in Section 2107, those gap-filling provisions in Rule 4 themselves take on jurisdictional status. Thus, although Rule 4(a)(4)'s tolling provisions are absent from Section 2107, the Ninth Circuit has held that the time limits incorporated by Rule 4(a)(4)(A)'s reference to "timely" tolling motions must be jurisdictional (if Rule 4(a)(4)(A) is actually to be effective in tolling Section 2107's jurisdictional appeal time limits):

> *Bowles* does not specifically discuss Fed. R.App. P. 4(a)(4), the tolling provision relevant here. The government argues that "Rule 4(a) does not incorporate a statutory time limit in its provision of tolling for Rule 59(e) or Rule 60 motions" and therefore that any failure to comply with the rule should be immunized against belated attack. However, although Fed. R.App. P. 4(a)(4) does not contain language from 28 U.S.C. § 2107, which lacks a tolling provision, the Supreme Court's decision in *Bowles* suggests that the same characterization applies: "Today we make clear that the timely filing of a notice of appeal in a civil case is a jurisdictional requirement." *Id.*
>
> And even if *Bowles* did not settle the matter with respect to Fed. R.App. P. 4(a)(4), we could not consider the underlying order granting the Rule 41(g) motion. In order to accept the government's argument, we would have to grant the jurisdictional benefit of tolling while denying the tolling rule's jurisdictional significance. We cannot defeat logic or text in this manner. If Fed. R.App. P. 4(a)(4) is jurisdictional, the government's motion does not qualify for tolling because it was filed outside the time frame specified in that rule. *See* Fed. R.App. P. 4(a)(4)(iv), (vi) (permitting tolling for such motions only if they are filed within 10 days of entry of judgment). If Fed. R.App. P. 4(a)(4) is *non* jurisdictional,

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[39] Examples are the defendant's deadline for taking a criminal appeal under Rule 4(b)(1)(A), *see United States v. Martinez*, 496 F.3d 387, 388 (5th Cir. 2007); *United States v. Garduno*, 506 F.3d 1287, 1290-91 (10th Cir. 2007), and Rule 4(b)(4)'s authorization of extensions of criminal appeal time for excusable neglect of good cause, *see Garduno*, 506 F.3d at 1290-91.

> satisfaction of that provision (or forfeiture of a claim that the government failed to satisfy it) would not enable us to ignore the jurisdictional 60-day rule of Fed. R.App. P. 4(a)(1). *See Bowles*, 127 S.Ct. at ----, Slip Op. at 8. Under either interpretation of Fed. R.App. P. 4(a)(4), the government's notice of appeal was untimely as to Judge Cooper's underlying order granting the Rule 41(g) motion and must be dismissed for lack of jurisdiction.

United States v. Comprehensive Drug Testing, Inc., 513 F.3d 1085, 1100-01 (9th Cir. 2008) (emphasis in original) (footnotes omitted).[40]

Likewise, though the 150-day cap set by Civil Rule 58 and Appellate Rule 4(a)(7)(A)(ii) – for instances when a separate document is required but never provided – does not appear in Section 2107,[41] the Ninth Circuit has reasoned that the cap is jurisdictional:

> 28 U.S.C. § 2107(a) and Federal Rule of Appellate Procedure 4(a)(1) require that a notice of appeal be filed in a civil case "within 30 days after the judgment or order appealed from is entered." Fed. R.App. P. 4(a)(1)(A). Because the district court did not enter judgment on the order to compel arbitration, CCI had 180 days to appeal the order. *See* Fed. R.App. P. 4(a)(7)(A)(ii); *see also Bowles v. Russell*, --- U.S. ----, 127 S.Ct. 2360, 2363, 168 L.Ed.2d 96 (2007) (stating that "the taking of an appeal within the prescribed time is mandatory and jurisdictional" (internal quotation marks omitted)).
>
> CCI filed its first notice of appeal of the district court's order compelling arbitration on May 16, 2005, 287 days after the order was entered on August 2, 2004. This is well beyond the 180 days allowed by Federal Rule of Appellate Procedure 4(a)(7)(A)(ii). CCI's appeal of the district court's order compelling arbitration is untimely, and we lack jurisdiction to hear the appeal of that issue.

Comedy Club, Inc. v. Improv West Associates, 514 F.3d 833, 841-42 (9th Cir. 2007) (as amended Jan. 23, 2008).

It is thus possible that a court which reads Rule 4(c)(1) to set prepayment of postage as a prerequisite to a timely appeal could conclude, post-*Bowles*, that the postage-prepayment requirement is jurisdictional (at least with respect to civil appeals). That conclusion is not

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[40] By contrast, the Sixth Circuit panel majority in *National Ecological Foundation v. Alexander*, 496 F.3d 466, 476 (6th Cir. 2007), held that "where a party forfeits an objection to the untimeliness of a Rule 59(e) motion, that forfeiture makes the motion 'timely' for the purpose of Rule 4(a)(4)(A)(iv)."

[41] Section 2107 simply sets an appeal deadline of "thirty days after the entry of" the relevant judgment, order or decree; it does not define "entry."

inevitable, however; some courts might instead reason that a requirement set only in Rule 4(c) and not in any statute is not, under *Bowles*, jurisdictional. In any event, because Rule 4(c) constitutes permissible gap-filling by the rulemakers, the rulemakers have authority to alter Rule 4(c)'s requirements. Thus, it would be possible to amend Rule 4(c) to provide that failure to prepay postage is not always fatal to timeliness. For example, the rule might be amended to excuse failure to prepay postage if the inmate has no money with which to pay the postage and no right to require the prison to pay it.

III. Conclusion

Published opinions intepreting Rule 4(c)(1) are relatively rare; most decisions applying the prison mailbox rule are unpublished and nonprecedential. But the caselaw discussed in this memo suggests that courts may disagree about whether Rule 4(c)(1) always requires prepayment of postage as a condition of timely filing under the prison mailbox rule, and, if so, whether that requirement is jurisdictional. A lack of clarity on such matters is undesirable, since failure to comply with a jurisdictional requirement is fatal to an appeal, and even a non-jurisdictional requirement can doom an appeal when an objection is properly raised. If the Committee feels that an amendment to Rule 4(c)(1) is desirable, *Bowles* would appear to pose no barrier to further rulemaking concerning the contours of the prison mailbox rule.

Encls.

MEMORANDUM

DATE: March 13, 2008

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 08-AP-B

Judge Alan D. Lourie of the U.S. Court of Appeals for the Federal Circuit has expressed concern that litigants are abusing the cross-appeal briefing length limits set by Appellate Rule 28.1(e), and he asks the Committee to consider amending the Rule to eliminate such abuses. A copy of Judge Lourie's February 7, 2008 letter to Judge Stewart is enclosed. Also enclosed is a March 11, 2008 letter from Fritz Fulbruge summarizing appellate clerks' views concerning the practicability of enforcing a provision such as that suggested by Judge Lourie.

Part I of this memo describes Rule 28.1(e)'s length limits and summarizes Judge Lourie's concerns and proposal. Part II discusses possible arguments for and against the proposal.

I. Existing length limits and Judge Lourie's proposed amendment

Appellate Rule 28.1, which took effect December 1, 2005, governs briefing in situations involving cross-appeals. Rule 28.1(c) provides that there will be four briefs: (1) appellant's[1] principal brief, (2) appellee's principal and response brief, (3) appellant's response and reply brief, and (4) appellee's reply brief. Concerning length limitations, Rule 28.1(e) sets page limits and (alternatively) type-volume limits as follows:

- Appellant's principal brief:
  - 30 pages, or
  - 14,000 words, or
  - 1,300 lines of text

- Appellee's principal and response brief:
  - 35 pages, or
  - 16,500 words, or

[1] Rule 28.1(b) sets as default rules that (1) the first party to file a notice of appeal is designated the "appellant," and (2) if parties file notices of appeal on the same day, the plaintiff in the proceeding below is the "appellant."

- 1,500 lines of text

- Appellant's response and reply brief:
  - 30 pages, or
  - 14,000 words, or
  - 1,300 lines of text

- Appellee's reply brief:
  - 15 pages, or
  - 7,000 words, or
  - 650 lines of text.

The Committee Note explains that the Rule "permits the appellee's principal and response brief to be longer than a typical principal brief on the merits because this brief serves not only as the principal brief on the merits of the cross-appeal, but also as the response brief on the merits of the appeal." Similarly, the Rule "permits the appellant's response and reply brief to be longer than a typical reply brief because this brief serves not only as the reply brief in the appeal, but also as the response brief in the cross-appeal."

Though the Rule thus enlarges the permitted length of the principal-and-response brief and the response-and-reply brief to account for the fact that such briefs serve a double function, the Rule does not allocate the permitted length as between the two components. This forms the root of Judge Lourie's concern. He describes instances in which the combined briefs devote almost all of the permitted length to a discussion of the appeal, and use a relatively tiny amount of space to discuss the cross-appeal. He argues that this allows litigants improperly to expand their discussion of issues relating to the appeal. He also suggests that "it may well be that some cross-appeals are filed precisely in order to gain added word count for responding to a principal appeal."

Judge Lourie suggests that his concerns could be addressed by "insert[ing] into the rule a proviso that in an appeal containing a cross-appeal, no more than 14,000 words in a second brief may be devoted to the subject matter of a principal appeal," and that "no more than 7,000 words in a third brief in such a case may be devoted to the subject matter of the main appeal."[2] Judge Lourie does not suggest specific wording for the proposal; one way to word such an amendment

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[2] In theory, Judge Lourie's concerns could alternatively be addressed by requiring separate briefing on the appeal and the cross-appeal. However, Judge Lourie does not make such a suggestion, and the Committee rejected that possibility during its consideration of the proposal that led to the adoption of Rule 28.1. See, e.g., Minutes of Spring 2002 Meeting of Advisory Committee on Appellate Rules, April 22, 2002, at 8 (noting DOJ's view that requiring separate briefing "would significantly increase the number of pages that would have to be drafted by parties and considered by courts and create problems regarding cross-references and other matters").

might be as follows:

Rule 28.1. Cross-Appeals

* * *

(e) Length.

(1) Page Limitation. Unless it complies with Rule 28.1(e)(2) and (3), the appellant's principal brief must not exceed 30 pages; the appellee's principal and response brief, 35 pages (of which no more than 30 pages may discuss subject matter unrelated to the cross-appeal); the appellant's response and reply brief, 30 pages (of which no more than 15 pages may discuss subject matter unrelated to the cross-appeal); and the appellee's reply brief, 15 pages.

(2) Type-Volume Limitation.

(A) The appellant's principal brief ~~or the appellant's response and reply brief~~ is acceptable if:

(i) it contains no more than 14,000 words; or

(ii) it uses a monospaced face and contains no more than 1,300 lines of text.

(B) The appellee's principal and response brief is acceptable if:

(i) it contains no more than 16,500 words (of which no more than 14,000 words may discuss subject matter unrelated to the cross-appeal); or

(ii) it uses a monospaced face and contains no more than 1,500 lines of text (of which no more than 1,300 lines may discuss subject matter unrelated to the cross-appeal).

(C) The appellant's response and reply brief is acceptable if:

(i) it contains no more than 14,000 words (of which no more than 7,000 words may discuss subject matter unrelated to the cross-appeal); or

(ii) it uses a monospaced face and contains no more than 1,300 lines of text (of which no more than 650 lines may discuss subject

matter unrelated to the cross-appeal).

(D) The appellee's reply brief is acceptable if it contains no more than half of the type volume specified in Rule 28.1(e)(2)(A).

* * *

II. Assessing the proposed amendment

Judge Lourie's concern seems well-founded in the sense that when extra length is permitted because there is a cross-appeal, the extra length ought to be used for purposes of litigating the issues relating to the cross-appeal – not to gain additional pages for use in discussing issues that relate only to the appeal. And it certainly would be improper for a litigant to file a cross-appeal solely for the purpose of obtaining extra pages for use in litigating issues relating to the appeal.

It might be questioned, though, how likely it is that a litigant would file a cross-appeal in order to gain extra space. The cross-appeal would provide such a litigant with an opportunity for at most five extra pages[3] of briefing on issues unrelated to the cross-appeal;[4] meanwhile, by taking the cross-appeal, the cross-appellant would have provided his or her opponent with an opportunity for up to fifteen extra pages of briefing on issues unrelated to the cross-appeal. Concededly, it is theoretically possible to imagine ways in which a litigant could flip these numbers around: The litigant, anticipating that the opponent will take an appeal, could file a notice of appeal early so as to be deemed the "appellant" (thus getting the fifteen extra pages of briefing space by virtue of their opponent's cross-appeal). Or, likewise, a plaintiff, learning that the defendant has filed a notice of appeal, could file a notice of appeal the same day so as to be deemed the "appellant." But neither of those stratagems would be foolproof, since both hinge on Rule 28.1(b)'s definition of the "appellant" and that definition can be altered by, *inter alia*, court order.[5] Moreover, there exist a number of means for deterring (or otherwise addressing) frivolous appeals (including frivolous cross-appeals). The opponent can move to dismiss the

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[3] For purposes of simplicity I am using pages as the unit of measure here; but the same point could be made using either words or lines as the relevant unit.

[4] I do not count the appellee-cross-appellant's 15-page reply brief in this calculation, because that brief "must be limited to the issues presented by the cross-appeal." Appellate Rule 28.1(c)(4).

[5] Rule 28.1(b) provides: "The party who files a notice of appeal first is the appellant for the purposes of this rule and Rules 30 and 34. If notices are filed on the same day, the plaintiff in the proceeding below is the appellant. These designations may be modified by the parties' agreement or by court order."

appeal;[6] sanctions can be sought against the offending litigant and its counsel (for example, under Appellate Rule 38);[7] and/or sanctions can be sought against counsel under 28 U.S.C. § 1927.[8]

In addition, the feasibility of Judge Lourie's proposal is unclear. The Advisory Committee considered that question back in 2002, when it was discussing the proposal that led to the adoption of Rule 28.1:

> A member asked whether two separate word limits could apply to Brief Three [i.e., the appellant's response and reply brief]. The cross-appeal may raise only a minor issue, one that the appellant/cross-appellee could easily address in 1000 words. In this situation, the appellant/cross-appellee is essentially allowed to file a 13,000-word reply brief. Other members thought it impracticable to try to assign word limits to portions of Brief Three, as it is often difficult to distinguish which part of Brief Three is responding to the cross-appeal and which part is replying to Brief Two's response to the appeal. Mr. Fulbruge said that the clerks would have difficulty enforcing such a rule.[9]

The enclosed letter from Fritz Fulbruge summarizing the results of his recent survey of the appellate clerks indicates that the other clerks echo Fritz's prediction concerning the difficulty of enforcing such a provision.

In sum, though the concern that Judge Lourie identifies is a legitimate one, the magnitude of the problem might be questioned and the feasibility of the proposed solution is in some doubt.

Encls.

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[6] *See, e.g.*, United States v. Mason, 343 F.3d 893, 894 (7th Cir. 2003) ("Rule 27 of the Federal Rules of Appellate Procedure, which governs motions in appeal proceedings, does not specify when a motion to dismiss can be filed; and appellees are urged to move to dismiss frivolous appeals before briefing, in order to save the parties' money and the court's time.").

[7] Appellate Rule 38 provides: "If 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."

[8] Section 1927 provides: "Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."

[9] Minutes of Spring 2002 Meeting of Advisory Committee on Appellate Rules, April 22, 2002, at 9.

United States Court of Appeals
for the Federal Circuit

Chambers of
Alan D. Lourie
Circuit Judge

717 Madison Place, N.W.
Washington, D.C. 20439
(202) 633-5851

February 7, 2008

Honorable Carl E. Stewart
Chairman
Advisory Committee on Appellate Rules
United States Court of Appeals
for the Fifth Circuit
2299 United States Courthouse
300 Fannin Street
Shreveport, LA 71101

Dear Judge Stewart:

I write to you in your capacity as Chairman of the Advisory Committee on Appellate Rules. My concern is the amendment of the word count rule several years ago in which, in cases of cross-appeals, the word count for the second brief, appellee's brief in response to the principal appeal and principal brief on the cross-appeal, was increased from 14,000 to 16,500, and for the third brief, appellants' reply brief in the principal appeal and response to the cross-appeal, from 7,000 to 14,000. My observation is that the change in the rules is being abused, in contravention of the spirit of the amendments.

An example is as follows: in a case recently before our court, the second brief containing the appellee's response to the principal appeal and his first brief on the cross-appeal contained 16,488 words, for a total of 72 pages, in accordance with the new rule. The subject matter of the cross-appeal, however, consisted of 2 pages, which one can estimate consumed about 460 words. Thus, whereas the increase in word count was intended to accommodate the need to address the cross-appeal in addition to defending against the principal appeal, in our example about 16,000 words were devoted to the main appeal. That was not what the change was intended to accomplish or permit. A response brief to a principal appeal should not exceed 14,000 words.

Moreover, continuing with my example, the third brief, intended to reply on the main appeal and to respond on the cross-appeal, contained 12,899 words in 56 pages, of which 4 pages were devoted to the cross-appeal, perhaps about 920 words on the cross-appeal, hence almost 12,000 on the main appeal. A reply brief by an appellant should be limited to 7,000 words. It goes without saying that the cross-appeal was rather minor, leading to the suspicion that it was a ruse intended to permit an invalid expansion of word count for the main appeal. In fact, it may well be that some cross-appeals are filed precisely in order to gain added word count for responding to a principal appeal. The current rule may even encourage that behavior.

We have seen this before; the above example is not rare. Another recent one also involved a minor cross-appeal. While the second brief did not consume a large word count, the third brief, the reply by the appellant on the main appeal and the response on the cross-appeal, contained 12,260 words and 54 pages, of which only 7 pages addressed the minor cross-appeal. Thus, appellant was able to use approximately 10,670 words, rather than 7,000, to reply on his principal appeal.

A remedy for this abuse may be simply to insert into the rule a proviso that in an appeal containing a cross-appeal, no more than 14,000 words in a second brief may be devoted to the subject matter of a principal appeal. Additionally, no more than 7,000 words in a third brief in such a case may be devoted to the subject matter of the main appeal.

Such an amendment would restore word count to the real purpose that the amendments were intended to accomplish and prevent abuse by counsel.

I hope the committee will consider this proposal.

Sincerely,

Alan D. Lourie

Alan D. Lourie

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES R. FULBRUGE III
CLERK OF COURT

TEL. 504-310-7654
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

March 11, 2008

Professor Catherine T. Struve
University of Pennsylvania
Law School
3400 Chestnut Street
Philadelphia, PA 19104

Re: Question regarding briefs in cross-appeals

Dear Cathie:

As requested, I surveyed the appellate clerks concerning Federal Circuit Judge Lourie's suggestion to modify FED. R. APP. P. 28.1 by:

> ... insert[ing] into the rule a proviso that in an appeal containing a cross-appeal, no more than 14,000 words in a second brief may be devoted to the subject matter of a principal appeal, and that no more than 7,000 words in a third brief in such a case may be devoted to the subject matter of the main appeal.

Eleven appellate clerks have responded so far. While I may get more in a few days, I wanted to make sure you had this information timely. Most clerks report no problems with brief lengths in cross-appeals. A couple of responses note very infrequent issues.

All clerks believe applying Judge Lourie's proposed rule would be very difficult, whether a party or the court has to determine compliance. For a party, word processing software "objectively" calculates the total number of "words" in a document. To my knowledge, only a person could identify words "devoted to the subject matter of the main appeal" in specified briefs. The party's certificate of compliance then might have to assert adherence to both the "objective" total word count limit for the brief, and the "subjective" content related word count limit. A problem could arise if an opposing party disputes which words are "devoted to the subject matter of the main appeal." Many courts likely would not welcome the burden required to resolve this issue. For the clerks, all see major problems

if the initial burden for determining content related language and counting those words falls on the court's staff.

Please let me know if you need anything further.

Sincerely,

Fitz Fulbruge

cc: Judge Carl E. Stewart
John Rabiej

VIII – IX

Calendar for September–November 2008 (United States)

September

Su	Mo	Tu	We	Th	Fr	Sa
	1	2	3	4	5	6
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October

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November

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Holidays and Observances:

Sep 1 Labor Day	Oct 13 Columbus Day	Nov 11 Veterans Day
Sep 11 Patriot Day	Oct 31 Halloween	Nov 27 Thanksgiving Day
Sep 22 Autumnal equinox	Nov 1 All Saints	
Oct 9 Leif Erikson Day	Nov 4 Election Day	

Calendar generated on www.timeanddate.com/calendar