ADVISORY COMMITTEE
ON
APPELLATE RULES

Atlanta, GA
October 13-14, 2011

Agenda for Fall 2011 Meeting of
Advisory Committee on Appellate Rules
October 13-14, 2011
Atlanta, GA

I. Introductions

II. Approval of Minutes of April 2011 Meeting

III. Report on June 2011 Meeting of Standing Committee

IV. Action Items

A. For publication

1. Item No. 09-AP-C (FRAP 6 / direct bankruptcy appeals)

2. Item No. 08-AP-L (FRAP 6(b)(2)(A) / *Sorensen* issue)

V. Discussion Items

A. Item No. 08-AP-D (FRAP 4(a)(4))

B. Item No. 09-AP-B (definition of "state" and Indian tribes)

C. Item No. 10-AP-A (premature notices of appeal)

D. Item No. 10-AP-I (consider issues raised by redactions in appellate briefs)

VI. Additional Old Business and New Business

A. Item No. 11-AP-B (FRAP 28 / introductions in briefs)

B. Item Nos. 11-AP-D (changes to FRAP in light of CM/ECF), 08-AP-A (changes to FRAP 3(d) in light of CM/ECF), and 11-AP-C (same)

VII. Other Information Items

A. Item No. 10-AP-D (taxing costs under FRAP 39)

B. FRAP-related circuit splits and certiorari petitions

VIII. Adjournment

ADVISORY COMMITTEE ON APPELLATE RULES

Chair:	**Reporter:**
Honorable Jeffrey S. Sutton United States Circuit Judge United States Court of Appeals 260 Joseph P. Kinneary U.S. Courthouse 85 Marconi Boulevard Columbus, OH 43215	Professor Catherine T. Struve University of Pennsylvania Law School 3400 Chestnut Street Philadelphia, PA 19104
Members:	
Professor Amy Coney Barrett University of Notre Dame Law School 3165 Eck Hall of Law Notre Dame, IN 46556	James F. Bennett, Esq. [term ended 9/30/11] Dowd Bennett LLP 7733 Forsyth Blvd., Suite 1410 St. Louis, MO 63105
Honorable Michael A. Chagares United States Court of Appeals United States Post Office and Courthouse Two Federal Square, Room 357 Newark, NJ 07102-3513	Honorable Robert Michael Dow, Jr. United States District Court Everett McKinley Dirksen U.S. Courthouse 219 South Dearborn Street, Room 1978 Chicago, IL 60604
Honorable Allison Eid Supreme Court Justice Colorado Supreme Court 101 W. Colfax Avenue – Suite 800 Denver, CO 80202	Honorable Peter T. Fay United States Court of Appeals James Lawrence King Federal Justice Building 99 Northeast Fourth Street, Room 1255 Miami, FL 33132

Douglas Letter, Esq. Appellate Litigation Counsel Civil Div., U.S. Department of Justice 950 Pennsylvania Ave., N.W., Rm 7513 Washington, DC 20530	Maureen E. Mahoney, Esq. [term ended 9/30/11] Latham & Watkins LLP 555 11th Street, N.W., Suite 1000 Washington, DC 20004-1304
Richard G. Taranto, Esq. Farr & Taranto 1150 18th Street, N.W. Washington, DC 20036-2435	Honorable Donald Verrilli Solicitor General (ex officio) Department of Justice 950 Pennsylvania Ave., N.W., Rm 5143 Washington, DC 20530

Secretary:	**Rules Committee Support Officer:**
Peter G. McCabe Secretary, Committee on Rules of Practice & Procedure Washington, DC 20544	Jonathan Rose Rules Committee Support Officer Rules Committee Support Officer Washington, DC 20544

Advisory Committee on Appellate Rules

Members	Position	District/Circuit	Start Date		End Date
Jeffrey S. Sutton Chair	C	Sixth Circuit	Member: Chair:	2005 2009	---- 2012
Amy Coney Barrett	ACAD	Indiana		2010	2013
James Forrest Bennett	ESQ	Missouri		2005	2011
Kermit Edward Bye	C	Eighth Circuit		2005	2011
Robert Michael Dow, Jr.	D	Ilinois (Northern)		2010	2013
Allison Eid	JUST	Colorado		2010	2013
Peter T. Fay	C	Eleventh Circuit		2009	2012
Maureen E. Mahoney	ESQ	Washington, DC		2005	2011
Richard G. Taranto	ESQ	Washington, DC		2009	2012
Donald B. Verrilli, Jr.*	DOJ	Washington, DC		----	Open
Catherine T. Struve Reporter	ACAD	Pennsylvania		2006	Open
Principal Staff: Jonathan C. Rose 202-502-1820 _____ * Ex-officio					

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

Peter G. McCabe Secretary Committee on Rules of Practice & Procedure Washington, DC 20544
Jonathan C. Rose Rules Committee Officer Rules Committee Support Office Washington, DC 20544
Benjamin J. Robinson Rules Committee Support Office Deputy Rules Committee Support Office Washington, DC 20544
James N. Ishida Senior Attorney Advisor Office of Judges Programs Administrative Office of the U.S. Courts Washington, DC 20544
Jeffrey N. Barr Attorney Advisor Office of Judges Programs Administrative Office of the U.S. Courts Washington, DC 20544
James H. Wannamaker III Senior Attorney Bankruptcy Judges Division Administrative Office of the U.S. Courts Washington, DC 20544
Scott Myers Attorney Advisor Bankruptcy Judges Division Administrative Office of the U.S. Courts Washington, DC 20544
Bernida D. Evans Management Analyst Rules Committee Support Office Administrative Office of the U.S. Courts Washington, DC 20544

Gale B. Mitchell Administrative Specialist Office of Judges Programs (detailed to Rules Committee Support Office) Administrative Office of the U.S. Courts Washington, DC 20544
Lisa R. Webb Staff Assistant Office of Judges Programs Administrative Office of the U.S. Courts Washington, DC 20544
LiAnn Shepard Program Assistant Office of Judges Programs Administrative Office of the U.S. Courts Washington, DC 20544

LIAISON MEMBERS

Appellate:	
Dean C. Colson	(Standing Committee)
Bankruptcy:	
Judge James A. Teilborg	(Standing Committee)
Civil:	
Judge Arthur I. Harris	(Bankruptcy Rules Committee)
Judge Diane P. Wood	(Standing Committee)
Criminal:	
Judge Marilyn Huff	(Standing Committee)
Evidence:	
Judge Judith H. Wizmur	(Bankruptcy Rules Committee)
Judge Paul S. Diamond	(Civil Rules Committee)
Judge John F. Keenan	(Criminal Rules Committee)
Judge Richard Wesley	(Standing Committee)

FEDERAL JUDICIAL CENTER

Joe Cecil (Rules of Practice & Procedure) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003	Marie Leary (Appellate Rules Committee) Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003
Molly T. Johnson (Bankruptcy Rules Committee) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003	Emery G. Lee (Civil Rules Committee) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003
Laural L. Hooper (Criminal Rules Committee) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003	Tim Reagan (Evidence Rules Committee) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003

TAB 1

JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

PRELIMINARY REPORT
JUDICIAL CONFERENCE ACTIONS
September 13, 2011

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All the following matters requiring the expenditure of funds were approved by the Judicial Conference *subject to the availability of funds* and to whatever priorities the Conference might establish for the use of available resources.

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At its September 13, 2011 session, the Judicial Conference of the United States —

EXECUTIVE COMMITTEE

Approved a resolution in recognition of the substantial contributions made by the Judicial Conference committee chairs whose terms of service end in 2011.

Approved a resolution in honor of outgoing Administrative Office Director James C. Duff.

Delegated to the Director of the Administrative Office, the Director of the Federal Judicial Center, and the Chair of the United States Sentencing Commission the authority to designate supervisors and managers of their respective agencies with regard to eligibility for professional liability insurance reimbursement. This authority may be re-delegated to executives or human resources officials of the respective judicial branch agencies.

COMMITTEE ON THE ADMINISTRATION OF THE BANKRUPTCY SYSTEM

With regard to official duty stations for bankruptcy judges:

a. Authorized the designation of Los Angeles as the duty station for a vacant bankruptcy judgeship in the Central District of California; and

b. Authorized the designation of Charleston as the duty station for Chief Bankruptcy Judge John E. Waites in the District of South Carolina.

COMMITTEE ON THE BUDGET

Approved the Budget Committee's budget request for fiscal year 2013, subject to amendments necessary as a result of (a) new legislation, (b) actions of the Judicial Conference, or (c) any other reason the Executive Committee considers necessary and appropriate.

Approved the expansion of reprogramming authority so that local funds can be reprogrammed among court units (regardless of type, geographical location, or judicial district or circuit) for voluntary shared services arrangements. The new reprogramming authority is subject to the approval of the Administrative Office, and semi-annual reports will be provided to the Budget Committee.

COMMITTEE ON CODES OF CONDUCT

Approved proposed Model Forms for Waiver of Judicial Disqualification and delegated to the Committee on Codes of Conduct the authority to make technical, conforming, and non-controversial changes, as necessary.

Approved a revised Model Confidentiality Statement (Form AO-306) and delegated to the Committee on Codes of Conduct the authority to make technical, conforming, and non-controversial changes, as necessary.

Approved a revised Application for Approval of Compensated Teaching Activities (Form AO-304) and delegated to the Committee on Codes of Conduct the authority to make technical, conforming, and non-controversial changes, as necessary.

COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT

Took the following actions with regard to fees:

a. Amended the miscellaneous fee schedules for the courts of appeals, district courts, bankruptcy courts, U.S. Court of Federal Claims, and Judicial Panel on Multidistrict Litigation to increase certain fees for inflation, to be effective November 1, 2011; and

b. Amended the Electronic Public Access (EPA) Fee Schedule to—

   (1) Increase the EPA fee to $.10 per page;

   (2) Suspend for three years the increase for local, state, and federal government agencies; and

   (3) Provide that no fee be owed until an account holder accrues charges of more than $15 in a quarterly billing cycle.

Endorsed a courtroom sharing policy for bankruptcy judges in new courthouse and courtroom construction for inclusion in the *U.S. Courts Design Guide*.

Approved the removal of the three-year electronic record transfer reference from the records disposition schedules for civil and criminal case files.

Approved amending the district court records disposition schedule for criminal case files to designate non-trial cases pertaining to embezzlement, fraud, or bribery by a public official (nature of suit codes 4350 and 7100) as permanent records.

Approved an amended bankruptcy court records disposition schedule.

Approved an exception to the policy restricting PACER access to bankruptcy filings filed before December 1, 2003 in cases closed for more than one year, as follows:

> Access may be granted pursuant to a judicial finding that such access is necessary for determining class member certification, subject to the following limitations to be set forth in the judge's order:
>
> - Access limited to a particular identified list of cases or a specified universe of cases (e.g., lift stay motions filed by a specified lender in a limited period of time);
>
> - Time limitations on the period of access (corresponding to the scope and number of potential cases involved);
>
> - Inclusion of a verified statement of counsel that access would be solely for the purpose of determining class member status and that counsel is aware that unauthorized use is prohibited and may result in sanctions; and
>
> - Any other conditions, limitations, or direction that the judge deems necessary under the specific circumstances of the request.

Approved the following policy regarding the sealing of entire civil case files:

> An entire civil case file should only be sealed consistent with the following criteria:
>
> a. Sealing the entire civil case file is required by statute or rule or justified by a showing of extraordinary circumstances and the absence of narrower feasible and effective alternatives (such as sealing discrete documents or redacting information), so that sealing an entire case file is a last resort;
>
> b. A judge makes or promptly reviews the decision to seal a civil case;

c. Any order sealing a civil case contains findings justifying the sealing of the entire case, unless the case is required to be sealed by statute or rule; and

d. The seal is lifted when the reason for sealing has ended.

COMMITTEE ON CRIMINAL LAW

Amended standard condition number two in national forms, including the judgment in a criminal case (AO forms 7A, 7A-S, 245, 245B-D, 245I and 246), to state that the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer.

Authorized the Director of the Administrative Office to adopt regulations governing the disclosure of federal probation system data by the AO to entities outside the courts.

Agreed to seek legislation amending 18 U.S.C. § 3154 and § 3603 to specifically authorize probation and pretrial services officers to supervise sexually dangerous persons who have been conditionally released following a period of civil commitment pursuant to 18 U.S.C. § 4248.

COMMITTEE ON DEFENDER SERVICES

Approved revisions to chapters 2 and 3 of the *Guide to Judiciary Policy*, Volume 7A (Criminal Justice Act Guidelines), regarding the proration of claims by attorneys and other service providers and the billing of interpreting services.

COMMITTEE ON INFORMATION TECHNOLOGY

Approved the fiscal year 2012 update to the *Long Range Plan for Information Technology in the Federal Judiciary.*

COMMITTEE ON THE JUDICIAL BRANCH

Approved an amendment to section 220.30.10(g)(3)(B) of the Travel Regulations for United States Justices and Judges to provide that if a senior judge is commissioned to a court of national jurisdiction and the judge intends to travel a distance of more than 75 miles from his or her residence to hold court or to transact official business for that court and to claim reimbursement for any expenses associated with that travel, such travel must be authorized by the chief judge of the court.

Approved an amendment to section 220.30.10(g)(3)(A) of the Travel Regulations for United States Justices and Judges to require the authorization of the circuit judicial council rather than the chief circuit judge when a senior judge relocates his or her residence outside the district or circuit of the judge's original commission and intends to seek reimbursement for travel back to the court for official business.

Approved amendments to sections 250.20.20, 250.20.30, 250.20.50, 250.20.60, and 250.40.20 of the Travel Regulations for United States Justices and Judges to limit judges' actual expense reimbursement for meals in connection with official travel, and agreed that the limits will be subject to annual and automatic adjustment for inflation in the same manner as the judges' alternative maximum daily subsistence allowance.

COMMITTEE ON JUDICIAL RESOURCES

Approved a new executive grading process for determining the target grades for district and bankruptcy clerks of court and chief probation and pretrial services officers.

Eliminated the saved pay policy for the courts, but grandfathered for two years any employees currently in a saved pay status under the policy. After two years, the Administrative Office will place those employees who remain in a saved pay status at the top step of their respective grade or classification level.

Approved the following policy for Court Personnel System temporary pay adjustments:

> An appointing officer may provide a temporary pay adjustment in the full performance range to a Court Personnel System employee who is temporarily in charge of a work project with other employees. A temporary pay adjustment provides for a temporary pay increase within the employee's existing classification level at the lowest step which equals or exceeds the employee's existing rate of pay by anywhere from one to three percent, at the appointing officer's discretion. A temporary pay adjustment may not exceed 52 weeks without re-authorization.

Approved a clarification to the policy for granting awards to court employees to prohibit time-off awards for intermittent employees.

Approved a revision to the current telework policy for courts and federal public defender organizations to state that a court or federal public defender organization, at its discretion, may require eligible employees to telework as needed during a continuity of operations event, inclement weather, or similar situation.

Authorized a second fully funded JSP-16 Type II chief deputy clerk position for the District of Idaho. This position is subject to any budget-balancing reductions.

With regard to additional staff court interpreter positions:

a. Authorized one additional Spanish staff court interpreter position beginning in fiscal year 2013 for the District of Arizona based on the Spanish language interpreting workload in this court; and

b. Authorized accelerated funding in fiscal year 2012 for the additional Spanish staff court interpreter position for the District of Arizona.

Amended the maximum realtime transcript rate policy adopted in March 1999 to eliminate the requirement that a litigant who orders realtime services in the courtroom must purchase a certified transcript (original or copy) of the same pages of realtime unedited transcript at the regular rates, effective January 1, 2012.

COMMITTEE ON ADMINISTRATION OF THE MAGISTRATE JUDGES SYSTEM

Approved recommendations regarding specific magistrate judge positions to (1) authorize three new full-time magistrate judge positions and make no other change in those three district courts; (2) make no change in one district court that had requested an additional magistrate judge position; (3) make no change in one part-time magistrate judge position in one district court; and (4) make no change in the magistrate judge positions in five other district courts reviewed by the Magistrate Judges Committee.

Designated the new full-time magistrate judge positions at Wilmington in the District of Delaware, Durham in the Middle District of North Carolina, and Orlando or Tampa in the Middle District of Florida for accelerated funding effective April 1, 2012.

Agreed not to authorize the Middle District of Louisiana to fill the magistrate judge position to be vacated in May 2012.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

With regard to bankruptcy rules:

a. Approved proposed amendments to Bankruptcy Rules 1007, 2015, 3001, 7054, and 7056, and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law; and

b. Approved proposed revisions of Official Forms 1, 9A–9I, 10, and 25A and new Official Forms 10 (Attachment A), 10 (Supplement 1), and 10 (Supplement 2), to take effect on December 1, 2011.

Approved proposed amendments to Criminal Rules 5, 15, and 58, and new Rule 37, and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Approved revised "Procedures for the Judicial Conference's Committee on Rules of Practice and Procedure and Its Advisory Rules Committees."

COMMITTEE ON SPACE AND FACILITIES

Approved the *Five-Year Courthouse Project Plan for Fiscal Years 2013-2017* and granted the Committee authority to remove the Los Angeles project from that plan when appropriate.

Endorsed a General Services Administration feasibility study for the backfill of Moss Courthouse in Salt Lake City, Utah, contingent upon final court approval of the District of Utah long-range facilities plan.

Approved changes to the *U.S. Courts Design Guide* to take into account recent policy and planning methodology revisions.

Approved a new approach for planning the size of new courthouses and agreed that this approach will be incorporated into the *U.S. Courts Design Guide* and the asset management planning business rules.

Advisory Committee on Appellate Rules
Table of Agenda Items — September 2011

FRAP Item	Proposal	Source	Current Status
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 Discussed and retained on agenda 04/08 FRAP 40(a)(1) amendment approved 11/08 for submission to Standing Committee FRAP 40(a)(1) proposal remanded to Advisory Committee 06/09 Discussed and retained on agenda 11/09 Draft approved 05/10 for submission to Standing Committee Approved by Standing Committee 06/10 Approved by Judicial Conference 09/10 Approved by Supreme Court 04/11
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
07-AP-E	Consider possible FRAP amendments in response to Bowles v. Russell (2007).	Mark Levy, Esq.	Discussed and retained on agenda 11/07 Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 04/11
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	Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08
07-AP-I	Consider amending FRAP 4(c)(1) to clarify the effect of failure to prepay first-class postage.	Hon. Diane Wood	Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09

FRAP Item	Proposal	Source	Current Status
08-AP-A	Amend FRAP 3(d) concerning service of notices of appeal.	Hon. Mark R. Kravitz	Discussed and retained on agenda 11/08
08-AP-C	Abolish FRAP 26(c)'s three-day rule.	Hon. Frank H. Easterbrook	Discussed and retained on agenda 11/08 Discussed and retained on agenda 11/09
08-AP-D	Delete reference to judgment's alteration or amendment from FRAP 4(a)(4)(B)(ii)	Peder K. Batalden, Esq.	Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 10/10 Discussed and retained on agenda 04/11
08-AP-G	Consider substantive and style changes to FRAP Form 4	Appellate Rules Committee	Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 10/10 Draft approved 04/11 for submission to Standing Committee Approved for publication by Standing Committee 06/11 Published for comment 08/11
08-AP-H	Consider issues of "manufactured finality" and appealability	Mark Levy, Esq.	Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 10/10 Discussed and retained on agenda 04/11
08-AP-J	Consider FRAP implications of conflict screening	Committee on Codes of Conduct	Discussed and retained on agenda 11/08
08-AP-L	Amend FRAP 6(b)(2)(A)(ii) to remove ambiguity	Reporter	Discussed and retained on agenda 11/08 Discussed and retained on agenda 11/09 Discussed and retained on agenda 10/10 Discussed jointly with Bankruptcy Rules Committee and retained on agenda 04/11

FRAP Item	Proposal	Source	Current Status
08-AP-M	Consider FRAP implications of interlocutory appeals in tax cases	Reporter	Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Draft approved 10/10 for submission to Standing Committee Approved for publication by Standing Committee 01/11 Published for comment 08/11
08-AP-N	Amend FRAP 5 to allow parties to submit an appendix of key documents from the record along with petitions and answers	Peder K. Batalden, Esq.	Discussed and retained on agenda 04/09
08-AP-P	Amend FRAP 32 to change from double line-spacing to 1.5 line-spacing for briefs	Peder K. Batalden, Esq.	Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09
08-AP-Q	Consider amending FRAP 10(b) to permit the use of digital audio recordings in place of written transcripts	Hon. Michael M. Baylson	Discussed and retained on agenda 04/09 Discussed and retained on agenda 10/10
08-AP-R	Consider amending FRAP 26.1 (corporate disclosure) and the corresponding requirement in FRAP 29(c)	Hon. Frank H. Easterbrook	Discussed and retained on agenda 04/09
09-AP-A	Consider amending FRAP 26.1 (corporate disclosure) and the corresponding requirement in FRAP 29(c)	ABA Council of Appellate Lawyers	Discussed and retained on agenda 04/09
09-AP-B	Amend FRAP 1(b) to include federally recognized Indian tribes within the definition of “state”	Daniel I.S.J. Rey-Bear, Esq.	Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10
09-AP-C	Consider possible FRAP amendments in the light of project to revise Part VIII of the Bankruptcy Rules	Bankruptcy Rules Committee	Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10 Discussed jointly with Bankruptcy Rules Committee and retained on agenda 04/11
09-AP-D	Consider implications of Mohawk Industries, Inc. v. Carpenter	John Kester, Esq.	Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10

FRAP Item	Proposal	Source	Current Status
10-AP-A	Consider treatment of premature notices of appeal under FRAP 4(a)(2)	Hon. Jeffrey S. Sutton	Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10 Discussed and retained on agenda 04/11
10-AP-B	Consider FRAP 28's treatment of statements of the case and of the facts	Hon. Jeffrey S. Sutton	Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10 Draft approved 04/11 for submission to Standing Committee Approved for publication by Standing Committee 06/11 Published for comment 08/11
10-AP-D	Consider factors to be taken into account when taxing costs under FRAP 39	Hon. Jeffrey S. Sutton	Discussed and retained on agenda 10/10 Discussed and retained on agenda 04/11
10-AP-H	Consider issues relating to appellate review of remand orders	Committee on Federal-State Jurisdiction	Discussed and retained on agenda 10/10
10-AP-I	Consider issues raised by redactions in appellate briefs	Paul Alan Levy, Esq.	Discussed and retained on agenda 04/11
11-AP-B	Consider amending FRAP 28 to provide for introductions in briefs	Appellate Rules Committee	Awaiting initial discussion
11-AP-C	Amend FRAP 3(d)(1) to take account of electronic filing	Harvey D. Ellis, Jr., Esq.	Awaiting initial discussion
11-AP-D	Consider changes to FRAP in light of CM/ECF	Hon. Jeffrey S. Sutton	Awaiting initial discussion

TAB 2

DRAFT

Minutes of Spring 2011 Meeting of
Advisory Committee on Appellate Rules
April 6 and 7, 2011
San Francisco, California

I. Introductions

Judge Jeffrey S. Sutton called the meeting of the Advisory Committee on Appellate Rules to order on Wednesday, April 6, 2011, at 8:35 a.m. at the Fairmont Hotel in San Francisco, California. The following Advisory Committee members were present: Judge Kermit E. Bye, Judge Robert Michael Dow, Jr., Justice Allison Eid, Judge Peter T. Fay, Professor Amy Coney Barrett, Mr. James F. Bennett, Ms. Maureen E. Mahoney, and Mr. Richard G. Taranto. 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 H. Rosenthal, Chair of the Standing Committee; Professor Daniel R. Coquillette, Reporter for the Standing Committee; Mr. Peter G. McCabe, Secretary to the Standing Committee; Mr. Leonard Green, liaison from the appellate clerks; Mr. James N. Ishida and Mr. Jeffrey N. Barr from the Administrative Office ("AO"); Ms. Holly Sellers, a Supreme Court Fellow assigned to the AO; and Ms. Marie Leary from the Federal Judicial Center ("FJC"). Peder K. Batalden, Esq., attended the meeting on April 6. Prof. Catherine T. Struve, the Reporter, took the minutes. (On the second day of the meeting, the Appellate Rules Committee met jointly with the Bankruptcy Rules Committee. The attendees of the joint meeting are noted in Part VIII below.)

Judge Sutton welcomed the meeting participants and introduced the Committee's newest member, Professor Amy Coney Barrett. He noted that Professor Barrett attended Rhodes College and Notre Dame Law School, clerked for Judge Silberman and then for Justice Scalia, and now teaches Civil Procedure (among other subjects) at Notre Dame. Judge Bye introduced Mr. Batalden, who clerked for Judge Bye and who now, as an appellate practitioner, has submitted thoughtful suggestions and comments to the Appellate Rules Committee. Judge Sutton welcomed Mr. Batalden.

During the meeting, Judge Sutton thanked Mr. McCabe, Ms. Kuperman, Mr. Ishida, Mr. Barr, and the AO staff for their expert work in preparing for the meeting.

II. Approval of Minutes of October 2010 Meeting

A motion was made and seconded to approve the minutes of the Committee's October 2010 meeting. The motion passed by voice vote without dissent.

III. Report on January 2011 Meeting of Standing Committee

Judge Sutton summarized relevant events at the Standing Committee's January 2011 meeting. The Standing Committee approved for publication proposed amendments to Rules 13, 14, and 24; these amendments would address permissive interlocutory appeals from the United States Tax Court and also would revise Rule 24(b)'s reference to the Tax Court to remove a possible source of confusion concerning the Tax Court's legal status.

Judge Sutton noted that he also discussed with the Standing Committee the pending proposal to treat federally recognized Native American tribes the same as states for the purpose of amicus filings. Members of the Standing Committee expressed varying views concerning this proposal, with a couple of members expressing support and two or three others taking a contrary view. Judge Rosenthal observed that members from western states tend to be more familiar with the issue. Judge Sutton noted that the Appellate Rules Committee has consulted the Chief Judges of the Eighth, Ninth, and Tenth Circuits (where relatively many tribal amicus filings occur) for their views; so far, the Committee has received formal responses from the Eighth and Ninth Circuits and informal feedback from the Tenth Circuit. With that input, the Committee will be in a position to revisit this item in the fall.

IV. Other Information Items

Judge Sutton reported that the Supreme Court has approved the proposed amendments to Appellate Rules 4 and 40 that will clarify the treatment of the time to appeal or to seek rehearing in civil cases to which a United States officer or employee is a party. Because the time to appeal in a civil case is set not only by Appellate Rule 4 but also by 28 U.S.C. § 2107, the Judicial Conference is seeking legislation to make the same clarifying change to Section 2107. Senate Judiciary staff have conveyed an inquiry by the Office of Senate Legal Counsel (SLC), who have questioned whether the "safe harbors" in the proposed rule and statute amendments[1] apply in cases in which a House or Senate Member, officer, or employee is sued in an individual capacity and is represented by SLC or by the House Office of General Counsel rather than by the DOJ. Judge Sutton noted that the language of the proposals, as drafted, covers such cases, but he observed that the Senate Judiciary staff have expressed an inclination to add language underscoring that point in the legislative history of the proposed amendment to Section 2107. It has also been suggested that similar language should be added to the Committee Notes to Rules 4 and 40; but changing the Notes at this stage would be unusual and complicated, given that the Supreme Court has already approved the proposed amendments. Mr. Letter noted that he has spoken with House staffers to underscore the DOJ's support for the proposed amendments.

[1] The "safe harbors" provide the longer appeal or rehearing periods when the United States represents the officer or employee at the time the relevant judgment is entered or when the United States files the appeal or petition for the officer or employee.

Judge Sutton recalled that the Committee, at its fall 2010 meeting, had discussed Chief Judge Rader's proposal, on behalf of the judges of the Federal Circuit, that 28 U.S.C. § 46(c) be amended to include in an en banc court any senior circuit judge "who participated on the original panel, regardless of whether an opinion of the panel has formally issued."[2] It turns out that the Judicial Conference Committee on Court Administration and Case Management (CACM) simultaneously considered this proposal and decided to recommend it favorably to the Judicial Conference. The CACM proposal was on the agenda for the Judicial Conference's March 2011 meeting, but was taken off the agenda in order to permit time for coordinated consideration of the proposal by CACM and the Appellate Rules Committee. The two committees will form a joint subcommittee to consider this question over the summer.

V. Action Items

A. For publication

1. Item No. 08-AP-G (substantive and style changes to Form 4)

Judge Sutton invited the Reporter to introduce this item, which concerns proposed revisions to Form 4 (the form that is used in connection with applications to proceed in forma pauperis ("IFP") on appeal). Effective December 1, 2010, Form 4 was revised to accord with the recently-adopted privacy rules. During the discussions that led to the 2010 amendments, the Committee also discussed possible substantive changes to the Form. In particular, it was suggested that Questions 10 and 11 request unnecessary information. Question 10 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; Question 11 inquires about payments for non-attorney services in connection with the case. In the past, the National Association of Criminal Defense Lawyers ("NACDL") has suggested that questions like Question 10 intrude upon the attorney-client privilege. More recently, comments received from attorneys in the Pro Se Staff Attorneys Office for the District of Massachusetts have suggested that requiring IFP applicants to disclose information concerning legal representation could impose a strategic disadvantage on those applicants.

The Reporter stated that, at least in most instances, the information requested by Questions 10 and 11 would not seem to be covered by attorney-client privilege. However, to the extent that Question 11 is read to encompass payments to investigators or to experts (especially non-testifying experts), it might elicit information that reveals litigation theories and strategy and that therefore qualifies as opinion work product. In addition, as the comments mentioned above suggest, the disclosures required by Questions 10 and 11 would enable an IFP applicant's opponent to learn the details of a represented applicant's fee arrangement with the applicant's

[2] The statute currently provides that a senior judge may participate in an en banc court that is "reviewing a decision of a panel of which such judge was a member."

lawyer, and could reveal the fact that an IFP applicant who is proceeding pro se has obtained legal advice from a lawyer who has not appeared in the case.

During the Committee's previous discussions of Form 4, members did not identify any reason to think that the details currently sought by Questions 10 and 11 are necessary to the disposition of IFP applications. Because Form 4 is also used in connection with applications to proceed IFP in the Supreme Court, members suggested seeking the Court's views on the question. Judge Sutton spoke informally to the Supreme Court Clerk's Office, which could not think of any reason why the information was necessary. In light of these discussions, the Reporter suggested, it would make sense to amend Form 4 by combining Questions 10 and 11 into a single, simpler question: "Have you spent – or will you be spending – any money for expenses or attorney fees in connection with this lawsuit? If yes, how much?"

The Reporter also suggested that the Committee make certain technical amendments to Form 4, to bring the official Form into conformity with changes that were approved by the Judicial Conference in fall 1997 but were not subsequently transmitted to Congress. The proposed technical amendments would add columns in Question 1 to permit the applicant to list the applicant's spouse's income; would limit the requests for employment history in Questions 2 and 3 to the past two years; and would specify that the requirement for inmate account statements applies to civil appeals.

A district judge member stated if the purpose of Form 4 is to enable the court to determine whether the applicant's finances qualify him or her to proceed IFP, then the simpler the form is, the better. He noted that information showing that a litigant has obtained legal advice might affect a judge's determination of how to construe the litigant's pleadings, but that the question of the amount of latitude to give a pro se litigant is separate from the question of whether a litigant should be permitted to proceed IFP. Professor Coquillette observed that the proposed amendment would address the complaints that NACDL has raised in the past.

Apart from the merits of the proposed amendments, Professor Coquillette suggested, the Committee should give attention to the process by which they are to be adopted. He reported that the Civil Rules Committee has begun to reconsider the procedures for adopting and amending forms. Participants have queried whether the forms should go through the standard rulemaking process. Judge Rosenthal observed that, at present, Civil Rule 84 addresses the forms that accompany the Civil Rules. The time may be opportune to reconsider the relationship of the forms and the rulemaking process. In 1938, the forms had a key function: to instruct the bench and bar concerning the new approach taken by the Civil Rules. But in 2011, the forms are no longer necessary for that purpose. Rather, in the case of the Civil Rules, it may be preferable for the Forms to focus on ministerial topics. Moreover, it is no longer practicable for the Rules Committees to monitor and maintain the forms on an ongoing basis in the way that they monitor and maintain the Rules themselves. It seems worthwhile for the rules committees jointly to consider how to handle the revision and maintenance of the forms. Mr. McCabe stated that the Bankruptcy Forms raise special issues. Under Bankruptcy Rule 9009, the Official Bankruptcy Forms go to the Judicial Conference for approval, but the Director of the AO is authorized to

issue additional forms as well. Depending how quickly this inter-committee project proceeds, the fruits of this project may yield a new process that can be used to implement the proposed Form 4 amendments. However, it was noted that the project was likely to take at least three years.

An attorney member asked how a litigant responding to the proposed new Question 10 should answer the question if the litigant has a contingent fee arrangement with a lawyer. The Reporter responded that this excellent question also arises with respect to current Question 10. She suggested that such a litigant should check the "Yes" box in response to the amended Question 10, but that it would be unclear how to respond to the question's inquiry concerning "how much" money would be spent. The attorney member, though, predicted that an applicant who has a contingent fee arrangement might well check the "No" box in response to proposed Question 10 as drafted. He suggested revising proposed Question 10 to ask whether the litigant has agreed to share part of any recovery. Another attorney member, though, questioned whether that additional query is worthwhile; most of those applying to proceed IFP on appeal, she noted, will have lost in the court below.

Professor Coquillette mentioned the significant changes that are occurring concerning litigation financing. Mr. Letter noted that if a litigant's answers on Form 4 left the Clerk's Office unsatisfied, the office could inquire further of the litigant; given this possibility, he suggested, there is no need to further complicate the form. Mr. Green agreed that if the information provided on Form 4 proved inadequate, his office would request more information from the litigant; he reported that such situations are very rare.

A judge member suggested that even if the proposed amended Question 10 might not elicit full information in all cases, it strikes a reasonable balance. He noted that one might, in fact, argue for striking Questions 10 and 11 altogether, as unnecessary to the assessment of the litigant's finances. But he has seen some cases in which a litigant who was represented during part of a lawsuit later applies for IFP status. Gathering some information about the money spent on the litigation could be useful in assessing such requests.

A district judge member suggested that proposed Question 10 might be revised to read, in part, "or might you be spending" (rather than "or will you be spending") in order to more clearly encompass contingent fees arrangements. An attorney member responded that the key question is whether the Committee feels that it is necessary for Form 4 to elicit information that will reveal whether the applicant has a contingent-fee arrangement with a lawyer who may be advancing some of the litigation costs. If that is not a pressing concern, then it would be less important to draft Form 4 with a view to eliciting detailed information on this question. The Reporter observed that IFP status also relieves the litigant from any otherwise-applicable obligation to post security for costs.

Professor Coquillette expressed strong support for revising Questions 10 and 11. These questions, he suggested, should not be posed without a good reason. If the only goal of Form 4 is to elicit information concerning a litigant's poverty, Questions 10 and 11 are not germane. An

appellate judge member asked whether it would be useful to seek the views of some practitioners' organizations such as the Litigation Section of the American Bar Association; another appellate judge predicted that such groups would be happy with the proposed revisions to Questions 10 and 11. An attorney member expressed support for adopting the proposed revisions to Form 4 as shown in the agenda book. The main issue that usually rides on IFP status, this member stated, is whether a litigant will be required to pay the $450 docket fee.

A motion was made and seconded to approve for publication all of the proposed revisions to Form 4 as shown in the agenda book. The motion passed by voice vote without dissent.

2. Item No. 10-AP-B (statement of the case)

Judge Sutton presented this item, which concerns Rule 28(a)(6)'s requirement that the brief contain "a statement of the case briefly indicating the nature of the case, the course of proceedings, and the disposition below." The statement required by Rule 28(a)(6) must precede the "statement of facts" required by Rule 28(a)(7); and these requirements have confused practitioners and produced redundancy in briefs. Judge Sutton observed that the Committee has obtained input on this item from two groups – the ABA Council of Appellate Lawyers and the American Academy of Appellate Lawyers. Nearly everyone whom the Committee has heard from agrees that there is a problem with the current Rule. To focus the discussion, the agenda materials presented three possible options for revising Rule 28(a). The first option would revise Rule 28(a) to emulate the Supreme Court's approach of combining the statement of the case and of the facts. The second option would retain the separate subdivisions of Rule 28(a) requiring statements of the case and the facts, but would reverse their order and revise the reference to the "course of proceedings." The third option would relocate the "course of proceedings" requirement from Rule 28(a)(6) to Rule 28(a)(7) so as to permit the description of the course of proceedings in chronological order (after the facts). Mr. Batalden, in a recent letter, suggested another possible variation. Ms. Sellers, meanwhile, provided the Committee with illuminating research on similar requirements in state-court briefing rules. Judge Sutton invited Ms. Sellers to present the results of her research.

Ms. Sellers noted that characterizing the various state approaches had presented a challenge. It is possible to sort states into two rough categories – those with rules similar to Rule 28 and those with rules that diverge from Rule 28. Some states appear to model their rules on a former version of the U.S. Supreme Court rules. Three states have rules that provide explicitly for an introduction. Depending on what approach the Committee decides to take, the state-court rules may provide models. Judge Sutton thanked Ms. Sellers for her thorough and informative research, and noted that it was useful to know that the states have reached no consensus on the best means of approaching the question. He observed that the question of providing for an introduction in briefs warrants consideration as a distinct agenda item.

Judge Sutton next invited Mr. Batalden to comment. Mr. Batalden stated that the most important question, for attorneys, is the ordering of the statements: Was it necessary, he asked,

that the statement of the course of proceedings precede the statement of the facts? Mr. Letter noted that he is part of a group of lawyers whom Chief Judge Kozinski has appointed to advise the Ninth Circuit on various matters; Mr. Letter reported that the group has discussed this question, and that judges who were present observed that when lawyers comply with the current Rule's ordering the result is unhelpful.[3] Judges, Mr. Letter emphasized, are the audience for briefs, so the question is what judges find most useful. Judge Sutton reported that he spoke with one appellate judge who does not read the statement of the case in view of the redundancy caused by it. Mr. Letter agreed that judges' perspectives on this question are likely to vary; but most judges, he suggested, would favor a change in the order of the requirements.

An attorney member stated that she has always struggled with Rule 28(a)'s requirements, and she stressed that there is a need for more flexibility in the Rule. This member stated that she liked the first option set forth in the agenda materials, but suggested a change to that option. The first option, as shown in the agenda materials, proposed that the later references in Rules 28 and 28.1 to the "statement of the case" and "statement of the facts" be replaced by references to "the statement of the case and the facts." The member proposed deleting "and the facts," so as to refer simply to the "statement of the case." (Later in the discussion the Committee determined by consensus that conforming revisions should be made to the proposed amendments to Rules 28(b) and 28.1 – so that those Rules, as amended, would refer simply to "the statement of the case" rather than to "the statement of the case and the facts.") Also, the member proposed deleting from the Committee Note to the proposed amendment to Rule 28(a) a statement that the amendment "permits the lawyer to present the factual and procedural history in one place chronologically." The member stated that she did not favor the second of the options shown in the agenda materials because that option did not provide attorneys with flexibility in drafting their briefs. Nor did she favor the third option; that option, she suggested, could confuse attorneys who might wonder what the revised Rule 28(a)(6) meant by referring (without more) to "a statement of the case briefly indicating the nature of the case." Responding to the suggestion that flexibility is better than an approach that simply reverses the order of the statement-of-the-case and statement-of-the-facts requirements, Mr. Letter observed that in some instances a lawyer may wish to provide context for the brief and an introductory statement can be useful in that regard.

An attorney member stated that he also favored the first option set forth in the agenda materials, but he suggested inserting a reference to the "rulings presented for review" into the proposed new Rule 28(a)(6) so that the amended Rule would require "a concise statement of the case setting out the facts relevant to the issues submitted for review and identifying the rulings presented for review with appropriate references to the record (see Rule 28(e))." Mr. Batalden agreed that the inclusion of that language would be helpful, but wondered whether it could instead be added to Rule 28(a)(5), which currently directs the inclusion of "a statement of the issues presented for review." The attorney member responded that inserting the "rulings

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[3] Later in the discussion, Mr. Letter noted that the Ninth Circuit is currently considering moving the table of authorities to the back of the brief.

presented for review" requirement into subdivision (a)(5) might make the statement of the issues unduly long. An appellate judge noted that briefs filed in the Eleventh Circuit have a separate page for the issues and a separate page for the standard of review; this system, he observed, is very helpful. The attorney member suggested that it would also be useful to revise the Committee Note to Rule 28(a) to state that the amended Rule 28(a)(6) "permits but does not require the lawyer to present the factual and procedural history chronologically."

A motion was made and seconded to approve for publication the proposed amendments to Rules 28 and 28.1, with the changes noted above. The motion passed by voice vote without dissent.

Prior to the vote, an attorney member had stated that she read the proposed amended Rule 28(a)(6) to permit brief writers to include an introduction at the beginning of the "statement of the case" section of the brief. This member suggested that it might be useful to mention that fact in the Committee Note – perhaps by saying something like "Briefs may, but are not required to, include an introduction in the statement of the case." Judge Sutton responded, however, that it would be better to keep the issue of introductions to briefs separate from the proposed amendment to the statement of the case. Accordingly, after the Committee completed its consideration of Item No. 10-AP-B, Judge Sutton invited further discussion of the topic of introductions to briefs.

Mr. Letter reported that the United States Attorneys' Offices in the Southern District of New York and in districts within the Ninth Circuit customarily include introductions in their briefs. The U.S. Attorney's Office in the Southern District of New York usually keeps the introduction to a single page. But Mr. Letter reported occasions when a very complex case had occasioned a four-page introduction in a brief. He noted that there are no local rules provisions in the Second or Ninth Circuits that explicitly provide for introductions in briefs but that courts do not reject briefs that include such introductions. Mr. Letter noted the possibility that the Ninth Circuit might consider revising the Ninth Circuit's local rules to permit (though not require) an introduction. Judges, he reported, consider introductions very useful. Mr. Letter also observed that he has read briefs by public interest groups such as Public Citizen and the ACLU that make very effective use of introductions. Mr. Letter noted that one question that might arise is whether the inclusion of an introduction diminishes the need for a summary of the argument.

An appellate judge noted that introductions can be provided for by local rule; given that fact, he wondered, was it necessary for the national rules to address introductions? Mr. Letter responded that the key is what judges prefer; if judges would prefer to have an introduction, then the rules should require it. Mr. Batalden observed that lawyers include introductions in their briefs despite the fact that Rule 28 does not mention them. Thus, any rule amendment would be a matter of accommodating existing practice. He pointed out that if Rule 28(a) is amended to refer explicitly to introductions, then such an amendment could alter existing practice by mandating a particular placement for the introduction (because Rule 28(a) states that the listed items must be included "in the order indicated").

An attorney member reiterated her view that the new statement of the case provision that the Committee had approved for publication would permit the inclusion of an introduction in the statement of the case, and she advocated revising the Committee Note to mention that. The introduction, she suggested, could be placed either at the start of the statement of the case or directly before it. Somewhat later in the discussion, another attorney member returned to this suggestion. He wondered whether it might be useful to consider moving the statement of issues (currently required by Rule 28(a)(5)) so that it comes after rather than before the statement of the case. The jurisdictional statement required by Rule 28(a)(4) is short, but the statement of issues can be longer. If the statement of issues followed rather than preceded the statement of the case, then an introduction contained in the statement of the case would be the first item of substance in the brief. An appellate judge member noted that under the Supreme Court's rules, the questions presented are the first item in petitions for certiorari and in merits briefs. The attorney member suggested, however, that the questions presented section in a Supreme Court brief differs from the statement of issues section in a court of appeals brief. Mr. Letter noted that Supreme Court briefs tend to include, in the questions presented section, a couple of sentences that serve, in effect, as an introduction.

An attorney member noted that if the Rule were revised to mandate (rather than merely permit) an introduction, then the Committee would have to determine what the introduction should contain. An appellate judge responded to this observation by asking what an introduction would contain that is not already set forth somewhere in the existing parts of the brief. Mr. Letter noted that while introductions can be designed to provide information concerning the posture of the case and the relevant issues, introductions can also serve a persuasive function. He observed that the proposal currently being considered by the Ninth Circuit contemplates that if the brief is to have an introduction, the introduction should be the first substantive item in the brief.

A member asked whether a provision concerning introductions would be better placed in the national rules or in local rules. Addressing the topic through local rules, she suggested, might provide more flexibility. A district judge member stated that he saw appeal in the idea of including the introduction in the statement of the case; that option, he suggested, would provide flexibility. He noted that the lawyers know more about the case than the judges do. On the other hand, he observed, the inclusion of an introduction in the statement of the case might occasion tension to the extent that the introduction is argumentative. This member noted that in the Seventh Circuit, lawyers must anchor in the record any citations to the facts. An appellate judge member asked Mr. Letter whether the proposed Ninth Circuit rule concerning introductions would provide for citations to the record in the introduction. Mr. Letter responded that the rule would not provide for record citations in the introduction, but that factual assertions elsewhere in the brief would be accompanied by citations to the record. The judge member noted that the quality of briefs filed in the Eleventh Circuit is very high. Mr. Letter suggested that judges in the Ninth Circuit may be less satisfied with the briefs filed in their circuit.

Judge Sutton summed up the range of issues that might arise with respect to introductions in briefs: Should introductions be permitted? Should they be mandatory? What should an

introduction contain? Where should it be placed? He stated that it would make sense to solicit input on these questions. He suggested, however, that it would be difficult to take up these questions simultaneously with the proposed amendment to Rule 28(a)(6). Instead, he proposed, the Committee should make the introduction question a separate agenda item and discuss it in the fall. This new agenda item would include both the topic of introductions and also the possibility, noted above, of moving the statement of issues so that it follows rather than precedes the statement of the case.

VI. Discussion Items

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

Judge Sutton invited the Reporter to update the Committee on this item, which concerns issues related to the Supreme Court's decision in *Bowles v. Russell*, 551 U.S. 205 (2007). The Reporter noted that in *Dolan v. United States*, 130 S. Ct. 2533 (2010), the Court had provided a typology of deadlines. The *Dolan* Court noted (citing *Bowles*) that some deadlines are jurisdictional; some other deadlines are claim-processing rules; and still other deadlines "seek[] speed by creating a time-related directive that is legally enforceable but do[] not deprive a judge ... of the power to take the action to which the deadline applies if the deadline is missed."

More recently still, in *Henderson ex rel. Henderson v. Shinseki*, 2011 WL 691592 (U.S. March 1, 2011), the Court held that the 120-day deadline set by 38 U.S.C. § 7266(a) for seeking review in the Court of Appeals for Veterans Claims of a final decision of the Board of Veterans' Appeals is not jurisdictional. The Court of Appeals for Veterans Claims had dismissed Mr. Henderson's appeal because he had filed it 15 days late. A divided en banc Federal Circuit affirmed, holding (in reliance on *Bowles*) that the deadline is jurisdictional. The dissenters pointed out that the very veterans who most deserve service-related benefits may be the litigants least likely to be able to comply with the filing deadline. The sympathetic facts of the case spurred legislative action, and four bills were introduced in Congress in response to the Federal Circuit's decision. This spring, the Supreme Court (with all eight participating Justices voting unanimously) reversed. The Court held that *Bowles* was inapplicable because *Bowles* involved a deadline for taking an appeal from one court to another; by contrast, Section 7266(a) sets a deadline for taking an appeal from an agency to an Article I court in connection with a "unique administrative scheme." Instead of applying *Bowles*, the Court applied the clear statement rule from *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006). The Court found no clear indication that Congress intended Section 7266(a)'s deadline to be jurisdictional. This holding, the Reporter observed, does not directly affect any deadlines that affect practice in the courts of appeals. But the *Henderson* Court's method of distinguishing *Bowles* – as a case that concerned court/court review – might leave the door open in future cases for the argument that *Bowles* does not govern the nature of deadlines for seeking court of appeals review of an administrative agency decision. Such an argument, though, would have to confront the precedent set by *Stone v. INS*, 514 U.S. 386 (1995), in which the Court held that the then-applicable statutory provision delineating the procedure for petitioning for court of appeals review of a final deportation order by the Board of

Immigration Appeals was jurisdictional. The Reporter suggested that it will be interesting to see how this branch of the doctrine continues to develop. She also suggested that the Court's decision in *Henderson* appears likely to remove the impetus for the legislative proposals that grew out of the Federal Circuit's decision.

The Reporter also briefly noted a certiorari petition pending before the Court in *United States ex rel. O'Connell v. Chapman University* (No. 10-810), in which the petitioner seeks to narrow *Bowles* through the application of 28 U.S.C. § 2106. With respect to the development of *Bowles*-related caselaw in the courts of appeals, the Reporter observed that the most interesting questions continue to arise with respect to hybrid deadlines – namely, appeal deadlines set partly by statute and partly by rule.

B. Item No. 08-AP-D (FRAP 4(a)(4))

Judge Sutton invited Ms. Mahoney to introduce this item. Ms. Mahoney observed that this item arose from Mr. Batalden's observation that under Appellate Rule 4(a)(4)(B) the time to appeal from an amended judgment runs from the entry of the order disposing of the last remaining tolling motion. In some scenarios, Mr. Batalden had suggested, the judgment might not be issued and entered until well after the entry of the order. Ms. Mahoney noted that the Committee has been considering how to clarify the Rule. The Committee has discussed a possible solution that would peg the re-starting of appeal time to the "later of" the entry of the order disposing of the last remaining tolling motion or the entry of any resulting judgment.

Ms. Mahoney reported that Mr. Taranto had recently suggested another possible approach – one that would require the entry of a new judgment on a separate document after the disposition of all tolling motions. If the court were to deny all of the tolling motions, it would re-enter the same judgment that it had originally entered. Such an approach, Ms. Mahoney suggested, could be by far the most sensible solution. Judge Sutton observed that Mr. Taranto has presented the Committee with a new way of thinking about the issue, and he suggested that it would be worthwhile to consider this new proposal over the summer.

Mr. Taranto noted that the proposal will require joint discussion with the Civil Rules Committee. He explained that his proposal uses the term "resetting motion," rather than "tolling motion," to indicate that the relevant motions, when timely filed, reset the appeal-time clock to 0. He stated that the objective of extending the separate-document requirement is to provide the benefit of formality in all cases, even when the end of a case follows from the disposition of a resetting motion. Extending the separate-document requirement, Mr. Taranto noted, might eliminate the need to define the term "disposing of" (a question that had occupied the Committee at the fall 2010 meeting). The extension of the separate-document requirement could also, he argued, provide an opportunity to simplify Civil Rule 58 and Appellate Rule 4(a), because there would be no need to address separately the situations in which no separate document is currently required. Mr. Taranto explained that the proposal would make use of the statutory authorization, in 28 U.S.C. § 2072(c), to define when a district court's ruling is final for purposes of appeal

under 28 U.S.C. § 1291. Under the proposal, the judgment in a case where timely resetting motions have been made would not be final for appeal purposes until the entry of the required separate document after the disposition of all resetting motions. But an appellant could waive the separate-document requirement and appeal an otherwise-final judgment after disposition of all resetting motions but prior to the provision of the separate document.

Judge Sutton expressed the Committee's gratitude for Mr. Taranto's work on this item, and he suggested that Mr. Taranto's proposal be forwarded to the Civil / Appellate Subcommittee for its consideration. Judge Sutton noted he had previously heard some misgivings about the separate document requirement. Judge Rosenthal observed that it would be optimistic to assume that the separate document requirement is widely known or understood. Judge Sutton asked Mr. Green how the circuit clerks would react to an expansion of the separate document requirement. Mr. Green responded that the change should be straightforward from the clerks' perspective. A district judge member observed that district judges within the Seventh Circuit do not question the separate document requirement. If a separate document were always (rather than sometimes) required, this member suggested, that could make compliance simpler for the district judges. Mr. Batalden expressed support for Mr. Taranto's proposal; he suggested that an additional benefit of requiring a new judgment on a separate document would be that enforcement of the judgment would be easier.

Judge Sutton thanked Mr. Taranto, Ms. Mahoney, Mr. Letter, and Mr. Batalden for their efforts with respect to this item.

C. Item No. 08-AP-H (manufactured finality)

Judge Sutton invited Mr. Letter to introduce this item, which concerns the doctrines that govern a litigant's attempt to "manufacture" a final judgment in order to take an appeal. Mr. Letter offered the following example: Suppose that a plaintiff includes five claims in a complaint and the court dismisses two of the five. Without obtaining a certification under Civil Rule 54(b), the plaintiff cannot appeal the dismissal of the two claims until the other three claims have been finally disposed of. Some lawyers have suggested that the option of seeking a Civil Rule 54(b) certification does not satisfactorily address this scenario because Rule 54(b) certification lies within the district judge's discretion. It is generally accepted that if the plaintiff dismisses the remaining three claims with prejudice, that dismissal results in a final judgment so that the plaintiff can appeal the dismissal of the two claims. If the plaintiff dismisses the three remaining claims without prejudice, some would argue this produces finality for appeal purposes but most take the contrary view. More difficult questions arise if the plaintiff dismisses the remaining three claims with conditional prejudice (that is to say, stating that the dismissal is without prejudice to the reinstatement of the remaining three claims if the two previously-dismissed claims are reinstated on appeal).

Mr. Letter reported that the Civil / Appellate Subcommittee, which has been considering this item, has recently discussed suggestions by Ms. Mahoney and by Mr. Keisler. Judge

Rosenthal observed that the Civil Rules Committee – at its spring meeting – discussed this item and concluded that it would welcome guidance from the Appellate Rules Committee.

Mr. Letter noted that lawyers in his office regularly ask him questions relating to the manufactured-finality doctrine. During the Subcommittee's prior discussions, questions were raised concerning the experience within the Second Circuit (which is the only Circuit so far to issue a decision approving the use of a conditional-prejudice dismissal to create an appealable judgment). Mr. Letter informally canvassed Assistant United States Attorneys in the Second Circuit – and especially in the Southern District of New York – to ask their experience; they told him that the issue of conditional-prejudice dismissals does not come up frequently.

Ms. Mahoney noted that there is consensus on the Subcommittee that a dismissal of the remaining claims with prejudice should produce finality. As to dismissals without prejudice, there is a circuit split, but the Subcommittee members believe that such dismissals should not produce finality. The question on which the Subcommittee has not reached consensus is how to treat conditional-prejudice dismissals. An attorney member of the Subcommittee from the Civil Rules Committee has expressed support for permitting conditional-prejudice dismissals to produce finality, and has expressed opposition to amending the rules to bar such dismissals from producing finality. Ms. Mahoney argued that the rules should be amended to provide for a nationally uniform approach to the question of manufactured finality. She noted that she finds the conditional-prejudice idea appealing but that it is proving complicated to devise a rule that would implement the idea in multi-party cases. In such cases, she observed, there is a possibility that unrestrained use of the conditional-prejudice dismissal mechanism could result in unfairness to parties other than the would-be appellant. Ms. Mahoney suggested that one possible approach would be to amend Civil Rule 54(b) to provide that the district court shall certify a separate Rule 54(b) judgment when the would-be appellant has dismissed all other claims with conditional prejudice, unless another party shows that such a certification would be unfair.

Mr. Taranto observed that the question of manufactured finality also arises in the context of criminal cases, and he asked Mr. Letter whether the DOJ has a view concerning potential amendments that would address this topic. Mr. Letter responded that the DOJ would definitely wish to express its views on the matter. Judge Rosenthal observed that many districts will not allow a criminal defendant to plead guilty unless the defendant waives appeal (including with respect to constitutional issues). Thus, in the criminal context, these issues could implicate the dynamic of plea bargaining. She noted that it would be wise to seek the views of the Criminal Rules Committee in order to gain a sense of how such changes would be viewed on the criminal side.

An appellate judge member observed that it is useful to ask whether a question of this nature is better resolved by rule or by caselaw; in this instance, he noted, the fact that the question concerns appellate jurisdiction might weigh against leaving the issue to development in the caselaw. Concerning Ms. Mahoney's suggestion that it would be useful for a rules amendment to address the circuit split concerning the effect of dismissals without prejudice, the member noted that such an amendment would seek to achieve uniformity by adopting the more

stringent side of the circuit split. Ms. Mahoney acknowledged this point but argued that the circumstances under which an appeal is available should be uniform from one circuit to another. She suggested that it would be useful to know whether the Appellate Rules Committee feels that the circuit split should be addressed.

An appellate judge member of the Civil / Appellate Subcommittee expressed a preference for not amending the rules to address the manufactured-finality issue. Amending the rules, he suggested, might interfere with the flexibility that is currently available to district judges. Another appellate judge member of the Committee expressed agreement with this view. An attorney member argued, in response, that in the circuits where the manufactured-finality doctrine currently permits the appellant an alternative way to appeal without obtaining a Civil Rule 54(b) certification, the existing doctrine can be seen as removing control from the district judges. The appellate judge member responded that such a result would only occur in a circuit in which the court of appeals has chosen to move the doctrine in that direction. This judge member stated that if the Rules Committees were to do anything with respect to this item, he would lean toward putting control in the hands of the district judge.

An appellate judge member wondered whether it would be beneficial for the Committee to ask the Subcommittee whether the Subcommittee's members could reach consensus on a concrete proposal. Mr. Letter suggested that it would be a mistake not to take action to address the question of manufactured finality. The appellate judge member responded that it would be helpful for the Subcommittee to craft a concrete proposal, at least concerning the treatment of dismissals without prejudice. An attorney member of the Subcommittee suggested that it would be useful to encourage the Subcommittee to address both dismissals without prejudice and conditional-prejudice dismissals. An appellate judge member of the Subcommittee reiterated his view that the rulemakers should not proceed at this time to propose an amendment; rather, he suggested, the Committee could re-consider the question later if someone in the future formulates a proposal on the subject.

It was decided that the Committee would request that the Subcommittee attempt to reach consensus on a specific proposal. Consultation with the Criminal Rules Committee will become necessary in the event that the Civil and Appellate Rules Committees decide to move forward with a proposal.

D. Item No. 08-AP-K (alien registration numbers)

Judge Sutton invited the Reporter to introduce this item, which arose from concerns voiced in 2008 by Public.Resource.Org about the presence of social security numbers and alien registration numbers in federal appellate opinions. The Appellate Rules Committee discussed the issue in fall 2008 and referred it to the Standing Committee's Privacy Subcommittee, which was considering various privacy-related questions relating to the national Rules. The Privacy Subcommittee reviewed the materials submitted by Public.Resource.Org; it commissioned the FJC to conduct a survey of court filings; it reviewed local rules concerning redaction; with the

assistance of the FJC, it surveyed judges, clerks and attorneys about privacy-related issues; and it held a day-long conference at Fordham Law School in April 2010. One of the panels at the Fordham Conference focused specifically on immigration cases.

In its recent report to the Standing Committee, the Privacy Subcommittee concluded that alien registration numbers should not be added to the list of items for which the national Rules require redaction. The Subcommittee found that disclosure of alien registration numbers does not pose a substantial risk of identity theft. In addition, the Subcommittee noted that both the DOJ and circuit clerks had emphasized that alien numbers provide an essential means of distinguishing among litigants and preventing confusion.

The Reporter suggested that in the light of the Privacy Subcommittee's determination, the Committee might wish to consider removing Item No. 08-AP-K from the Committee's study agenda. A motion to remove that item from the study agenda was made and seconded and passed by voice vote without opposition.

E. Item No. 10-AP-A (premature notices of appeal)

Judge Sutton introduced this item, which concerns the possibility of amending Appellate Rule 4(a)(2) to address the question of the relation forward of a premature notice of appeal. Judge Sutton noted that the Committee's previous review of the caselaw applying the relation-forward doctrine to a range of fact patterns had found a number of lopsided circuit splits concerning the availability of relation forward in particular sorts of circumstances. He observed that, since the time that the Committee commenced its consideration of this issue, developments in the caselaw appear to have lessened or removed some of the circuit splits. He suggested that the Committee should consider whether it would prefer to consider amending Rule 4(a)(2); or hold the item on the agenda while monitoring the developing caselaw; or remove the item altogether.

Judge Sutton pointed out that if the Committee decides to consider amending Rule 4(a), the agenda materials included four sketches designed to illustrate different possible approaches. Judge Sutton stated that among those four sketches, he slightly favored the fourth, which would amend Rule 4(a)(2) to provide a (non-exhaustive) list of scenarios in which relation forward occurs. He asked participants for their views on whether pursuit of a Rules amendment would be worthwhile.

A district judge member asked whether the relation-forward ruling in in *Strasburg v. State Bar of Wisconsin*, 1 F.3d 468 (7th Cir. 1993), *overruled on other grounds by Otis v. City of Chicago*, 29 F.3d 1159 (7th Cir. 1994), was still good law. He suggested that the Seventh Circuit's caselaw may be moving away from the *Strasburg* approach for cases where a decision is announced contingent on a future event and the notice of appeal is filed between the announcement and the occurrence of the contingency. He wondered whether there is any problem that needs to be addressed through a Rules amendment.

Judge Sutton responded that Rule 4(a)(2) does not set out the approaches that courts have developed through the caselaw, and he wondered whether the Rule could usefully codify existing practice. The question, he suggested, is whether the existence of inter-circuit consensus on a given approach provides a reason to codify that approach in the Rule. Judge Rosenthal observed that one could view the recent adoption of Civil Rule 62.1 and Appellate Rule 12.1 as an example of such codification. There was general consensus (subject to variation on some details) among the circuits concerning the practice of indicative rulings, but many practitioners were unfamiliar with the indicative-ruling mechanism. There is a role, she suggested, for Rule amendments that codify and/or clarify existing practice. Such rules can be especially helpful in providing guidance to pro se litigants.

An attorney member expressed support for retaining this item on the agenda and continuing to work on it while also monitoring the caselaw developments. This member pointed out that the Eighth Circuit has rejected the majority approach to scenarios that involve a judgment as to fewer than all claims or parties, with later disposition of all remaining claims with respect to all parties. There is no reason to think, the member suggested, that the Eighth Circuit will reverse itself on this point. Turning to the four possibilities sketched in the agenda materials, this member expressed skepticism concerning the second and third sketches because those approaches would not resolve all of the existing circuit splits. The member stated that the first sketch[4] provides an approach that seems harsh but would be clear. As to the fourth sketch, the member suggested that the list of scenarios in which relation forward can occur should be introduced by the phrase "including but not limited to" in order to avoid creating the impression that the listed scenarios are the only ones in which relation forward can occur. There are, the member observed, many possible permutations.

By consensus, the Committee resolved to continue its work on this item.

F. Item No. 10-AP-D (taxing costs under FRAP 39)

Judge Sutton thanked Ms. Leary for her excellent research concerning the award of costs under Appellate Rule 39, and he invited her to present that research to the Committee. Ms. Leary observed that the Committee had asked the FJC to provide data in response to concerns raised about the taxation of costs by the Fourth Circuit in the case of *Snyder v. Phelps*. Ms. Leary explained that the FJC had researched each circuit's local rules and procedures for determining cost awards, and that the FJC had used the courts of appeals' CM/ECF databases to identify cases in which cost awards had been made.

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[4] In that sketch, Rule 4(a)(2) would be amended to read: "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, if and only if the decision or order, as announced, would otherwise be appealable."

Ms. Leary reported that there is no simple answer to the question what constitutes a typical award of appellate costs under Rule 39. Multiple variables determine the amount of a Rule 39 cost award, and each circuit has adopted its own combination of those variables. The variables include the range of documents and fees that are recoverable, the amount recoverable for copying each page of a document, and the number of copies for which costs are recoverable.

Turning to the results of the FJC's database search, Ms. Leary cautioned that the search was limited by the fact that the FJC had not obtained data from the Federal Circuit because that Circuit was not yet live on CM/ECF. In addition, the data from the Second and Eleventh Circuits were limited because those Circuits only recently went live on CM/ECF. Some limitations also applied to the data from the Fifth, Seventh, and Ninth Circuits. The data show that most cost awards go to appellees upon affirmance of the judgment below. But when appellants received cost awards upon reversal, partial reversal, modification, or vacatur of the judgment below, their average cost award was higher than the average cost award to appellees. Using the range in size of a majority of the awards in a given circuit as a benchmark, the FJC assessed whether any awards in that circuit could be seen as "outliers" in relation to that circuit's normal range. Such outliers were found in nine circuits; the award in *Snyder* was one such outlier. The very large award in *Snyder* resulted from the length of the appendix and the fact that the Fourth Circuit permits recovery of printing costs up to $4.00 per page (which in *Snyder* meant recovery of 50 cents per page for each of eight copies of the appendix).

Judge Sutton noted that in the *Snyder* case, the existing rules gave the court of appeals the discretion not to impose costs on the appellant. Professor Coquillette agreed that Rule 39 gives the court of appeals discretion. Mr. Letter noted that it would not be a good idea for Rule 39 to be amended to distinguish among particular types of cases with respect to the permissibility of cost awards.

Judge Sutton asked how costs would be computed in a case where the briefs are filed electronically. Mr. Green responded that if the briefs were filed only in electronic form, then no printing costs would be awarded. However, he noted that – with the exception of the Sixth Circuit – the circuits that have transitioned to electronic filing nonetheless require paper copies as well.

Judge Sutton stated that he would send a copy of Ms. Leary's report to the Chief Judge and Circuit Clerk for each Circuit. By consensus, the Committee retained this item on its study agenda.

G. Item No. 10-AP-E (effect of withdrawal of a timely-filed post-judgment motion on the time to appeal in a civil case)

Judge Sutton invited the Reporter to introduce this item, which arose from Howard Bashman's suggestion that the Committee consider issues raised by *Vanderwerf v. SmithKline Beecham Corp.*, 603 F.3d 842 (10th Cir. 2010). The Reporter reminded the Committee that in

Vanderwerf, the majority held that the withdrawal of a Civil Rule 59(e) motion deprived that motion of tolling effect and rendered the movant's appeal untimely. No consensus emerged, at the fall 2010 meeting, in favor of a rulemaking response to *Vanderwerf*. Members did express interest in considering further the situation faced by a non-movant who has relied on the tolling effect of a post-judgment motion that is subsequently withdrawn. One might question whether the *Vanderwerf* holding extends to cases in which the movant and the appellant are different parties. It would not seem to make sense to extend the *Vanderwerf* holding to situations in which the tolling motion is made (and then withdrawn) by a litigant other than the would-be appellant. Admittedly, no textual basis is readily apparent in Appellate Rule 4(a)(4) for distinguishing between appeals by the litigant that made the withdrawn motion and appeals by other litigants. However, there has as yet been no decision that applies *Vanderwerf* to an appeal by a non-movant. The Reporter suggested that the Committee consider whether, in the absence of such a decision, it is worthwhile to maintain this item on the study agenda.

A motion was made and seconded to remove Item No. 10-AP-E from the study agenda. The motion passed by voice vote without dissent.

H. Item No. 10-AP-G (intervention on appeal)

Judge Sutton invited discussion of this item, which arose from Mr. Letter's observation that Civil Rule 24 sets standards for intervention in the district courts, but that no comparable provision covers the general question of intervention in the courts of appeals. Mr. Letter noted that the United States has been successful in moving to intervene in a number of appeals. He observed that unless a statute provides a right to intervene, the decision whether to allow intervention rests in the court's discretion. An attorney member expressed concern with the idea of formalizing a procedure for seeking to intervene in the court of appeals (instead of in the district court); such a measure, this member suggested, might have unintended consequences.

A motion was made and seconded to remove Item No. 10-AP-G from the study agenda. The motion passed by voice vote without dissent.

VII. Additional Old Business and New Business

A. Item No. 10-AP-I (consider issues raised by redactions in appellate briefs)

Judge Sutton invited the Reporter to present this item, which arises from concerns expressed by Paul Alan Levy, an attorney at Public Citizen Litigation Group, concerning redactions in appellate briefs. Mr. Levy explains that in some cases, broadly worded district court orders permitting the parties to designate discovery materials as confidential may be followed by the filing, on appeal, of briefs that are heavily redacted to obscure references to those materials. Mr. Levy reports that the filers of such redacted briefs often provide no justification for the redactions. In some cases, no one files a motion to unseal the unredacted

copies of the briefs; and even if such a motion is filed, by the time that the unredacted copies of the briefs are filed it is too late for would-be amici to have a meaningful chance to draft their briefs in the light of the unredacted record.

The Reporter noted that she had shared Mr. Levy's suggestion with the Chairs and Reporters of the Privacy and Sealing Subcommittees, and that Judge Hartz had provided thoughtful comments. Judge Hartz observed that the questions raised by Mr. Levy fall outside the scope of the Sealing Subcommittee's inquiries, because that Subcommittee considered only the sealing of entire cases. But some of the Subcommittee's suggestions – such as requiring judicial oversight of sealing decisions and sealing as little as necessary – could be relevant to Mr. Levy's concerns. Judge Hartz noted that the appellate context poses challenges because judges are not usually assigned to a case until after the answering brief is filed, and even then judges may feel uncomfortable resolving a sealing question before having had a chance to fully consider the merits of the appeal. The challenge, he suggested, is to provide for judicial involvement without creating too great a burden. One possibility might be an approach that provides that matters are unsealed when submitted to the court of appeals absent a showing of good cause.

The Reporter noted that all circuits have one or more local provisions dealing with sealed materials. Not all circuits specify whether materials sealed below presumptively remain sealed on appeal. Seven circuits have provisions that state or imply (with varying degrees of explicitness) that materials sealed below presumptively remain sealed on appeal. But two of those seven circuits – the First and the Sixth – also provide that a party wishing to file a sealed brief must move for leave to do so. Two circuits take a different approach: When records have been sealed below, these circuits maintain the seal only for a limited period to afford an opportunity for a party to move in the court of appeals to seal the materials. The Seventh Circuit applies this approach to all cases, except where a statute or procedural rule provides otherwise. The Third Circuit follows this approach in appeals in civil cases, and also provides that a litigant must move for leave to file a sealed brief.

Mr. Taranto drew the Committee's attention to the Federal Circuit's recent decision in *In re Violation of Rule 28(d)*, 2011 WL 1137296 (Fed. Cir. Mar. 29, 2011), in which the court of appeals sanctioned counsel for improperly marking portions of briefs confidential in violation of Federal Circuit Rule 28(d). Judge Rosenthal noted the Civil Rules Committee's extensive consideration of protective orders issued under Civil Rule 26. She observed that the law is quite clear that good cause is required in order for the court to seal discovery items. And a more stringent showing is required in order to seal materials filed with the court in support of a request for judicial action. Despite the clarity of the law, however, practitioners persist in asserting that materials subject to a protective order are for that reason subject to sealing even when submitted as part of a court filing. There is a divide between law and practice. A district judge member agreed, and noted that in the Seventh Circuit matters are presumptively unsealed if the litigant fails to show within 14 days why they should remain sealed. Judge Sutton asked whether the concerns about sealing in the court of appeals would dissipate if questions of sealing were properly addressed at the district court level. A district judge participant said that they would.

A district judge member suggested that practices would improve if the Appellate Rules embodied the approach taken by the Seventh Circuit; the presence of such a provision in the Appellate Rules would help to focus district judges on the need to require a stringent showing to seal materials filed in support of a request for judicial action. An attorney member stated that the standards for sealing in the district court and the court of appeals should be the same. Another attorney member agreed, but noted that the application of those standards in the court of appeals might differ from that in the district court if the reason for protecting the materials at issue has dissipated by the time of the appeal. Mr. Letter pointed out that D.C. Circuit Rule 47.1(b) requires the parties to an appeal to review the record to make sure that continued sealing is appropriate.

Judge Sutton suggested that the Committee coordinate its consideration of these questions with the Civil Rules Committee. Mr. Letter observed that this topic also has implications for criminal matters. He suggested that one approach to the issue might be to impose a requirement that the district court review any sealing orders before closing a case. An alternative approach would be to adopt the D.C. Circuit's requirement of continuing review. Judge Rosenthal observed that the question of Rule 26 and protective orders has been on the agenda of the Civil Rules Committee for a very long time. The Civil Rules Committee has not, to date, found it necessary to update Rule 26 as it relates to protective orders and confidentiality, because the caselaw dealing with this issue is on the right track. However, a conclusion by the Civil Rules Committee that there is no need to amend Civil Rule 26 does not necessarily answer the question raised by Mr. Levy. The Appellate Rules Committee could consider requiring re-justification of any sealing decisions in the context of an appeal; it might be the case that a separate set of arguments becomes relevant in the appeal context. Professor Coquillette expressed agreement.

A district judge member observed that in the Seventh Circuit, lawyers know that the court of appeals will unseal matters that should not have been sealed, and this provides accountability. An attorney member asked whether the Appellate Rules Committee should consider adopting in the national rules an approach like the Seventh Circuit's. An appellate judge member asked whether the Supreme Court has a rule governing sealed documents. Mr. Letter stated that he did not think that the Supreme Court has a rule. Sealed filings are rare in the Supreme Court, he observed, but the DOJ has made such filings on occasion.

By consensus, the Committee retained this item on its study agenda. Judge Dow agreed to work with the Reporter to develop a proposal for presentation to the Committee in the fall.

B. Item No. 11-AP-A (exempt amicus statement of interest from length limit)

Judge Sutton invited the Reporter to introduce this item, which concerns a proposal by R. Shawn Gunnarson and Alexander Dushku that Appellate Rule 32(a)(7)(B)(iii) be amended to "provide that the statement of interest by an amicus curiae, required by Rule 29(c)(4), is not included in the word count for purposes of the type-volume limitation of Rule 32(a)(7)(B)." The

proponents argue that amici's statements of interest are more similar to items already excluded from Rule 32(a)(7)(B)'s limits than to other items that must be counted under those limits. They report that counting the statement of interest for purposes of Rule 32(a)(7)(B)'s limits is burdensome when a brief is filed by a large consortium of amici. And they state that the interpretations of the current Rule by clerk's offices vary from circuit to circuit.

The Reporter stated that Messrs. Gunnarson and Dushku make good arguments for exempting the statement of interest from the length limit. On the other hand, it is worth considering the possible downside of such an exemption: It might tempt amici to skirt the length limits by smuggling argument into the statement of interest. To get a sense of length of statements of interest, the Reporter had performed a small and rough search on Westlaw. The search – described in the agenda materials – found a wide variation in length, both in absolute terms and when measured in number of words per amicus. Many statements in the sample were concise, but not all were. And the three briefs, within the sample, that had the greatest number of words per amicus contained argumentation.

The Reporter noted that most circuits do not appear to address by local rule whether the statement of interest is included in the length limit; the Third Circuit, though, does have a local rule that appears intended to exclude the statement. A member asked whether the three longest statements in the sample came from briefs filed in a circuit that excluded the statement of interest from the length limit. The Reporter stated that she would check.[5] An attorney member observed that the Rules should attempt to encourage multiple amici to file a single brief when possible. This member wondered whether a rule could be drafted that would exclude the statement of interest from the word count, but only up to a specific number of words per amicus. Another attorney member responded that any rule that depended on the number of amici could be manipulated – for example, by listing as amici not only an association but also its members. This member suggested, as an alternative, a rule that would exclude the statement of interest up to a uniform ceiling (such as 250 words). A third attorney member stated that he did not think it was worthwhile to address this matter in the national Rules.

An attorney member noted that in Supreme Court briefs, it has become customary to place in a separate addendum or appendix a paragraph describing each amicus; that addendum or appendix does not count toward the length limit. A district judge member observed that some court of appeals judges prefer not to encourage amicus filings, and he suggested that such judges would fail to see a reason to address this question in the national Rules; he noted that an amicus can make a motion for permission to serve an over-length brief. Judge Sutton asked the meeting participants whether any of them had found the current Rule to be problematic. An attorney member responded that she could envision cases in which it could be a problem, but that in such instances the amicus could file a motion.

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[5] Subsequent to the meeting, the Reporter determined that one of the three briefs in question was filed in the Third Circuit.

The Reporter had noted earlier that an argument might be made for excluding new Rule 29(c)(5)'s authorship-and-funding disclosure requirement from the length limits. Judge Sutton recommended that the Committee defer considering that possibility until such time as it is considering other amendments to the relevant Rule.

A motion was made and seconded to remove Item No. 11-AP-A from the study agenda. The motion based by voice vote without dissent.

VIII. Joint Discussion with Advisory Committee on Bankruptcy Rules concerning Item No. 09-AP-C (Bankruptcy Rules Committee's project to revise Part VIII of the Bankruptcy Rules), and Item No. 08-AP-L (FRAP 6(b)(2)(A) / *Sorensen* issue)

At 8:35 a.m. on April 7, Judge Sutton and Judge Eugene R. Wedoff called to order the joint meeting of the Bankruptcy Rules Committee and the Appellate Rules Committee. Present from the Bankruptcy Rules Committee were Judge Wedoff (the Chair of the Committee); Judge Karen K. Caldwell; Judge Arthur I. Harris; Judge Sandra Segal Ikuta; Judge Robert James Jonker; Judge Adalberto Jordan; Judge William H. Pauley III; Judge Elizabeth L. Perris; Chief Judge Judith H. Wizmur; J. Michael Lamberth, Esq.; David A. Lander, Esq.; and John Rao, Esq. J. Christopher Kohn, Esq., Director of the Commercial Litigation Branch of the Civil Division of the DOJ, was present as an ex officio member of the Bankruptcy Rules Committee. Judge Laura Taylor Swain attended as the past Chair of the Bankruptcy Rules Committee. Judge James A. Teilborg attended as liaison from the Standing Committee and Judge Joan Humphrey Lefkow attended as liaison from the Committee on the Administration of the Bankruptcy System. Present as Advisors or Consultants to the Bankruptcy Rules Committee were Patricia S. Ketchum, Esq.; Mark A. Redmiles (Deputy Director, Executive Office for U.S. Trustees); and James J. Waldron (Clerk of the United States Bankruptcy Court for the District of New Jersey). Also present were Judge Dennis Montali, Molly T. Johnson from the FJC, and James H. Wannamaker III and Scott Myers from the AO. Professor S. Elizabeth Gibson and Professor Troy A. McKenzie were present as the Reporter and Assistant Reporter for the Bankruptcy Rules Committee. Also in attendance were Philip S. Corwin, Esq. of Butera & Andrews; David Melcer, Esq. of Bass & Associates P.C.; and Lisa A. Tracy of the Executive Office for U.S. Trustees.

Judge Sutton commenced by observing that the joint meeting would be interesting and helpful. He noted that the Appellate Rules Committee members were eager to benefit from discussions with the Bankruptcy Rules Committee, including with respect to the experience with electronic filing in bankruptcy. Judge Wedoff thanked the Appellate Rules Committee for agreeing to meet jointly with the Bankruptcy Rules Committee. He noted that one of the goals of the Bankruptcy Rules Committee's Part VIII revision project is to achieve consistency with the Appellate Rules. Judge Wedoff introduced three new members of the Bankruptcy Rules Committee. Judge Robert James Jonker is a district judge in the Western District of Michigan who has had a longstanding interest in bankruptcy law. Judge Adalberto Jordan, who clerked for Justice O'Connor, will be joining the subcommittee on appeals and will bring a great deal of

appellate experience to that subcommittee. Professor Troy A. McKenzie joins the Committee as its Assistant Reporter; Professor McKenzie, who teaches at N.Y.U. Law School, has a rare combination of expertise in both bankruptcy and civil procedure.

Judge Pauley observed that the Part VIII revision project arose from the efforts of Eric Brunstad, who produced an initial draft of the proposed revision. The Bankruptcy Rules Committee's Subcommittee on Privacy, Public Access, and Appeals has held two mini-conferences on the subject. The process has been iterative and thoughtful.

Professor Gibson proposed that the joint meeting focus on issues of common interest to the two Committees. Those include issues relating to electronic filing and transmission, as well as issues concerning the intersection of the Bankruptcy and Appellate Rules (especially with respect to appeals directly from the bankruptcy court to the court of appeals). Professor Gibson noted that bankruptcy appeals are relatively rare, and that it is thus a challenge to find practitioners who specialize in appellate bankruptcy practice. She reported that there have been two perspectives voiced during the deliberations thus far – that of practitioners who handle bankruptcy appeals only occasionally and who view the Part VIII Rules as difficult, and that of appellate specialists who would like the Part VIII Rules to more closely resemble the Appellate Rules.

Professor Gibson observed that the Bankruptcy Rules elsewhere incorporate by reference a number of Civil Rules. Thus, a question that arose early on was whether the Part VIII Rules should simply incorporate the Appellate Rules by reference. At the Standing Committee's January 2011 meeting, it became clear that the Standing Committee does not favor such an approach for the Part VIII Rules.

Professor Gibson suggested that it might be useful for the joint meeting to commence by discussing the possibility of incorporating into the national Rules a presumption of electronic filing and transmission. For example, how would such a change affect the rules concerning the submission of briefs, the form of briefs, and how the record is assembled? Professor Gibson noted that it would be particularly useful to learn about the experience in the Sixth Circuit; she observed that other courts, such as the Ninth Circuit Bankruptcy Appellate Panel ("BAP"), have also moved toward electronic filing. She pointed out that a key question is how to manage the transition to electronic filing while also retaining paper filing where necessary. Judge Sutton responded that in the courts of appeals, there is a presumption that there will continue to be paper filings; the courts must accommodate filings by inmates, who will ordinarily file in paper form rather than electronically. Professor Gibson noted that in bankruptcy a similar accommodation must be made for paper filings by pro se debtors. A member of the Bankruptcy Rules Committee noted that the rates of paper filings vary by district but can be as high as 25 or 30 percent; this member noted that the court will scan paper filings into PDF format. Judge Wedoff noted that the requirement that attorneys file electronically has worked well. Mr. Green observed that while circuits other than the Sixth Circuit will accept electronic filings, those circuits also require paper copies. In courts within the Sixth Circuit, he reported, some 40 to 45 percent of the filings are paper filings by inmates; the court converts those filings to PDF format.

The Sixth Circuit generally will not accept paper filings from attorneys and does not accept the appendix or record excerpts in paper form. Instead, the judges access the electronic record themselves. But the Sixth Circuit, he noted, is an outlier in this respect. Judge Wedoff asked whether the Sixth Circuit's system has worked well. Judge Sutton responded that it is the right approach, but that it took years for judges' chambers to adjust; the Sixth Circuit's system transfers the burden of printing to chambers. During the first year of electronic filing, Judge Sutton printed paper copies of briefs; now, he reads them on an iPad. Professor Gibson asked how the record is handled in the Sixth Circuit. Mr. Green responded that the electronic case filing architecture differs in the court of appeals, so the Clerk's Office must reach out and bring the electronic record from the court below into the court of appeals' system. The Clerk's Office is able to use that method to provide the court of appeals judges with electronic links to the record. Counsel identify for the court of appeals what the relevant portions of the record are. Judge Sutton noted that the Sixth Circuit used to include in the case schedule time to assemble the appendix; things move faster now because there is no need to allow time for putting the appendix together.

A participant asked whether bankruptcy judges like the system of electronic filing. Judge Wedoff responded that the system works well because the Clerk's Office provides whatever support the judges need. A key benefit is that a judge can work on the latest filings from anywhere, whether at home or during travel. And litigants, similarly, can file wherever and whenever they prefer. A bankruptcy judge from the Ninth Circuit agreed. In his district, each judge posts his or her policy concerning chambers copies. Another advantage of electronic filing is that emergency matters can be filed and accessed at any time. Electronic filing is particularly useful for the BAP because the Ninth Circuit spans such a large area. Judge Sutton asked what provisions the bankruptcy courts have made for situations in which the computer system crashes. Judge Wedoff responded that the courts have backup centers at other locations; backing up court files, he observed, is easier when those files are in electronic format.

Professor Gibson turned the Committees' attention to proposed Bankruptcy Rule 8006, which concerns the certification of a direct appeal to the court of appeals. Professor Gibson explained that the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") put in place for bankruptcy appeals a framework – in 28 U.S.C. § 158(d)(2) – for direct appeals by permission that is in some ways similar to, but in other ways quite distinct from, the interlocutory-appeal framework set by 28 U.S.C. § 1292(b). Under Section 158(d)(2), a direct appeal from the bankruptcy court to the court of appeals requires a certification from a lower court and also requires permission from the court of appeals. Section 158(d)(2)'s criteria for the certification differ from those set by Section 1292(b) for interlocutory appeals from the district court to the court of appeals. Moreover, Section 158(d)(2) sets out a variety of means for certification. The certification may be made by the court on its own motion; by the court on a party's motion; by the court on request by a majority of the appellants and a majority of the appellees; or jointly by all the appellants and appellees. Three different courts can make the required certification in appropriate circumstances – the bankruptcy court, the BAP, or the district court. Proposed Rule 8006(d) provides that the certification is to be made by the court in which the matter is pending, and proposed Rule 8006(b) sets for the rule for determining in

which court the matter is pending at a given time. Proposed Rule 8006(g) then sets a 30-day time limit for filing in the court of appeals a request for permission to take a direct appeal to the court of appeals.

Professor Gibson invited Professor Struve to discuss proposed new Appellate Rule 6(c), which would address the procedure for permissive direct appeals under Section 158(d)(2) subsequent to the filing in the court of appeals of the petition for leave to appeal. Proposed Rule 6(c)(1) provides that the Appellate Rules, with specified exceptions, govern such an appeal. Proposed Rule 6(c)(2) provides that Bankruptcy Rule 8009 and 8010 govern the designation and transmission of the record on appeal.

Professor Struve noted that it would be useful to obtain participants' views on whether proposed Appellate Rule 6(c), as drafted, appropriately addresses the procedure for direct appeals under Section 158(d)(2). As an example, she noted the question of stays pending appeal. The proposal as drafted would provide that Appellate Rule 8 would apply to direct appeals. That Rule's treatment of stays is basically similar to proposed Bankruptcy Rule 8007 (which addresses stays in the context of appeals from the bankruptcy court to the district court or BAP), but there is a question about Rule 8's provision for proceeding directly against a surety. Rule 8 provides that a surety's liability can be enforced on motion in the district court without the need for an independent action. If Rule 8 applies to bankruptcy direct appeals, then it would contemplate such a direct proceeding in the bankruptcy court. One question is whether such a proceeding would fall naturally within the existing jurisdiction of the bankruptcy court. Professor Gibson noted that Bankruptcy Rule 9025 currently provides that sureties submit to the jurisdiction of the bankruptcy court. Rule 9025, though, provides for the determination of the surety's liability in an adversary proceeding. This raises a question as to whether any provision for proceedings against the surety in the bankruptcy court should contemplate an adversary proceeding; perhaps proposed Appellate Rule 6(c) could be revised to incorporate by reference the terms of Bankruptcy Rule 9025. Professor Gibson asked whether any of the bankruptcy judges on the Committee wished to comment on their experiences with proceedings against sureties, but no members volunteered a response.

Professor Gibson asked whether participants in the meeting had experience with direct appeals under Section 158(d)(2). Mr. Green reported that there have been few such direct appeals in the Sixth Circuit, and that there have been no problems with their processing. A bankruptcy judge observed that *Blausey v. United States Trustee*, 552 F.3d 1124 (9th Cir. 2009), illustrates the confusion that can arise concerning the appropriate procedure in connection with direct appeals under Section 158(d)(2). This judge observed that it would be salutary for the Rules to settle the question of the proper procedures on such appeals.

An attorney member of the Appellate Rules Committee observed that proposed Bankruptcy Rule 8006's certification provisions seem odd. Professor Gibson explained that those provisions are drawn from Section 158(d)(2). A participant questioned why Section 158(d)(2) provides for the four different means of certification noted previously. A bankruptcy judge member of the Bankruptcy Rules Committee observed that a Section 158(d)(2)

certification can read in various ways; the bankruptcy judge can draft the certification with varying degrees of forcefulness. For example, if the judge is issuing the certification only because he or she is required to do so in response to a request by a majority of the appellants and a majority of the appellees, the judge may draft a certification that sounds equivocal.

Professor Struve noted that the joint Part VIII project also provides an occasion to address possible revisions to Appellate Rule 6(b), which concerns appeals from a district court or BAP exercising appellate jurisdiction in a bankruptcy case. One proposed amendment to Rule 6(b) would update a cross-reference to Appellate Rule 12. Another proposed amendment would revise Rule 6(b)(2)(A) to eliminate an ambiguity; a similar ambiguity in Appellate Rule 4(a)(4) was eliminated by a 2009 amendment.

Professor Struve observed that the Appellate Rules Committee is currently considering other possible changes to Appellate Rule 4(a)(4), stemming from the fact that the time to appeal after disposition of a tolling motion runs from entry of the order disposing of the last remaining tolling motion rather than from entry of any resulting altered or amended judgment. In some instances, there can be a time lag between the two events – as when the court grants a motion for remittitur and the plaintiff has a period of time within which to decide whether to accept the remitted amount. At the Appellate Rules Committee's meeting the previous day, the Committee's consensus was that the possibilities it had previously considered for addressing this issue were not worth proceeding with. Instead, the Committee has decided to consider a new suggestion by Mr. Taranto that takes a different approach. Mr. Taranto's proposal addresses the timing question by extending Civil Rule 58's separate document requirement to the disposition of tolling motions. Such an extension would provide clarity concerning the point at which the appeal time resets under Appellate Rule 4(a)(4). The Committee has not yet had an opportunity to seek the views of the Civil Rules Committee or the Civil / Appellate Subcommittee. Professor Struve noted that this project, as it develops, may be of interest to the Bankruptcy Rules Committee for several reasons. First, Bankruptcy Rule 7058 incorporates by reference the terms of Civil Rule 58. Second, it would be useful for participants to consider whether the issue that gave rise to the Appellate Rule 4(a)(4) project is salient in the bankruptcy context. Is a similar time lag (between entry of an order disposing of the last remaining tolling motion under current Bankruptcy Rule 8015 and entry of any resulting altered or amended judgment) a problem in bankruptcy practice? Professor Gibson noted an additional reason for coordination on this issue: Proposed Bankruptcy Rule 8002 includes a subdivision modeled on Appellate Rule 4(a)(4). As to Appellate Rule 6(b)(2)(A), Professor Gibson observed that this Rule may present fewer current problems than Appellate Rule 4(a)(4) because Appellate Rule 6(b)(2)(A) treats only one type of tolling motion (namely, rehearing motions). Professor Gibson observed that current Bankruptcy Rule 8015 might provide a useful model for resolving any timing issue that arises from the disposition of such motions.

Judge Sutton asked the meeting participants for their thoughts on Civil Rule 58's separate document requirement. A participant responded that in bankruptcy, the separate document requirement becomes a trap for the unwary. To impose the separate document requirement, this participant suggested, could in effect be to extend appeal time in the name of clarity. Professor

Struve asked whether compliance with the separate document requirement might increase if the requirement applied across the board (in contrast to the present system, which exempts dispositions of tolling motions). A participant predicted that such a change would not result in greater compliance. This participant observed that there used to be a brighter line for the separate document requirement in bankruptcy, but now the rules only impose the separate document requirement in adversary proceedings and not in contested matters. Another participant observed that adversary proceedings are very like civil actions; contested matters, however, can be a hodgepodge, and the operation of the separate document requirement in that context could be confusing. A bankruptcy judge member expressed gratitude for the fact that the separate document requirement no longer applies in contested matters.

Professor Gibson noted that another point of intersection between the Bankruptcy Rules and the Appellate Rules concerns indicative rulings. Proposed Bankruptcy Rule 8008 is intended to serve two functions. With respect to appeals pending in the court of appeals, it is the equivalent of Civil Rule 62.1 – namely, it tells the trial court what to do if someone seeks relief that the trial court lacks authority to grant due to a pending appeal. Proposed Bankruptcy Rule 8008 is also designed to address the indicative-ruling procedure for the appellate court when the appellate court in question is a district court or a BAP. Professor Gibson noted a further issue: Should the procedures set out in proposed Bankruptcy Rule 8008 apply when an indicative ruling is sought in the bankruptcy court while a non-direct appeal is pending in the court of appeals under Section 158(d)(1)? A participant responded that she thought the Rule should apply in that context as well.

Professor Gibson raised a question concerning the source of the authority to promulgate local rules for BAPs. She noted that it would be useful to determine whether that authority resides in the court of appeals, in the circuit judicial council, or in the BAP. Perhaps, she suggested, it would make sense that the body that creates the BAP also has the authority to promulgate rules for the BAP. Mr. Green reported that the Sixth Circuit BAP relies on the circuit council for promulgation of its local rules; the proposed rules are sent out for comment during the development of the proposals, and are ultimately sent to the circuit judicial council for approval. Another participant observed that in the Ninth Circuit, the Circuit's standing rules committee handles the task of obtaining public comment on proposed BAP rules; this participant noted the importance of public comment.

Professor Gibson noted that the Appellate Rules contain a high level of detail concerning briefs, and she stated that it would be useful to get a sense whether participants favor a similar approach for the Part VIII Rules. An attorney member of the Appellate Rules Committee noted that detailed rules are useful to practitioners because such rules provide guidance. On the other hand, this member questioned whether district judges really want to receive briefs that conform to the Appellate Rules. A participant responded that the district court cares less about formalities than about simplicity and speed; the goal is to get the briefs in and resolve the case quickly. A court of appeals judge stated that it would be useful for the rules to evolve so that they do not specify the colors of brief covers. Another participant noted that Mr. Brunstad had proposed setting a default rule for the color of brief covers when the briefs are filed in paper form.

Professor Gibson also noted the potential importance of maintaining similar length limits for briefs at both stages of the appellate process (in the district court or BAP, and in the court of appeals). A bankruptcy judge agreed, and observed that Mr. Brunstad had expressed concern with the "dumbbell problem" – namely, that if the district court's length limit is tighter than the one that applies in the court of appeals, a party may find it difficult to preserve adequately all the points that it wishes to argue on appeal. A bankruptcy judge member stated that he likes the idea of specific requirements because they provide attorneys with structure; and he favors ensuring that the length limits are consistent at the two levels of appeal. An attorney participant agreed that he favors consistency between the two levels of appeal.

A district judge member of the Appellate Rules Committee expressed agreement with the idea that detailed briefing rules make things fairer for the lawyers. He noted that his district has a local rule that imposes a low page limit. Another district judge observed that bankruptcy cases are sufficiently challenging to begin with, and that it would be helpful for the briefs to be consistent from case to case.

Professor Gibson drew the Committees' attention to proposed Bankruptcy Rule 8009(f), concerning the treatment of sealed documents on appeal. The Appellate Rules do not currently address that issue. Professor Struve noted that the local rules in some circuits do address some issues relating to sealed documents. She also observed that another question might be whether all the circuits are ready to handle sealed documents electronically. Mr. Green responded that some circuits are prepared but that others are not. Another participant observed that it would be a good idea to look into the way in which the CM/ECF system handles sealed documents; she noted that the relevant technology is changing. A bankruptcy judge suggested that the Rule be drafted so as to incorporate by reference whatever the current CM/ECF technology and practice are.

In closing, Professor Gibson predicted that the Bankruptcy Rules Committee would discuss a portion of the project at its fall 2011 meeting and another portion at the spring 2012 meeting. In the meantime, the Bankruptcy Rules Committee's working group will further refine the proposals. She expressed the Bankruptcy Rules Committee's desire to continue coordinating efforts with the Appellate Rules Committee. Judge Sutton promised to appoint one or two members of the Appellate Rules Committee to the working group, and expressed commitment to coordinating the two Committees' work going forward.

Judge Sutton thanked Judge Wedoff and the Bankruptcy Rules Committee for inviting the Appellate Rules Committee to join them. Judge Sutton noted that this was Judge Rosenthal's last meeting with the Appellate Rules Committee. He thanked her for her prodigious efforts and superb work as Chair of the Standing Committee. He observed that during her time as Chair she has attended the meetings of the Advisory Committees and the Standing Committee and the Judicial Conference. Judge Rosenthal thanked the Advisory Committees for their thorough, thoughtful, and innovative work. Judge Wedoff thanked the Appellate Rules Committee for their participation in the joint meeting.

IX. Adjournment

The Appellate Rules Committee adjourned at 10:25 a.m. on April 7, 2011.

Respectfully submitted,

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Catherine T. Struve
Reporter

TAB 3

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 2-3, 2011
Washington, D.C.
Draft Minutes

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ATTENDANCE

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Washington, D.C. on Thursday and Friday, June 2 and 3, 2011. The following members were present:

Judge Lee H. Rosenthal, Chair
Douglas R. Cox, Esquire
Roy Englert, Esquire
Judge Marilyn L. Huff
Chief Justice Wallace Jefferson
Dean David F. Levi
William J. Maledon, Esquire
Judge Reena Raggi
Judge Patrick J. Schiltz
Judge James A. Teilborg
Judge Diane P. Wood

Deputy Attorney General James M. Cole participated in part of the meeting. In addition, the Department of Justice was represented by Kathleen Felton, Esquire; Elizabeth J. Shapiro, Esquire; Jessica Hertz, Esquire; and Ted Hirt, Esquire.

Judge Neil M. Gorsuch was unable to attend the meeting.

Judge Anthony J. Scirica, former chair of the committee, participated in much of the meeting, and Judge Barbara J. Rothstein, Director of the Federal Judicial Center, attended a portion of the meeting. Also participating were the committee's consultants: Joseph F. Spaniol, Jr.; Professor Geoffrey C. Hazard, Jr.; and Professor R. Joseph Kimble.

Providing support to the committee were:

Professor Daniel R. Coquillette	The committee's reporter
Peter G. McCabe	The committee's secretary
Andrea L. Kuperman	The committee's chief counsel
James N. Ishida	Senior attorney, Administrative Office
Jeffrey N. Barr	Senior attorney, Administrative Office
Joe Cecil	Research Division, Federal Judicial Center
Emery G. Lee	Research Division, Federal Judicial Center

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Jeffrey S. Sutton, Chair
Professor Catherine T. Struve, Reporter
Advisory Committee on Bankruptcy Rules —
Judge Eugene R. Wedoff, Chair
Professor S. Elizabeth Gibson, Reporter
Professor Troy A. McKenzie, Associate Reporter
Advisory Committee on Civil Rules —
Judge Mark R. Kravitz, Chair
Professor Edward H. Cooper, Reporter
Advisory Committee on Criminal Rules —
Judge Richard C. Tallman, Chair
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter
Advisory Committee on Evidence Rules —
Judge Sidney A. Fitzwater, Chair
Professor Daniel J. Capra, Reporter

INTRODUCTORY REMARKS

Committee Changes

Judge Rosenthal reminded the committee that her term as chair will expire on October 1, 2011, and that Chief Justice Roberts had named Judge Kravitz as her successor. The Chief Justice also named Judge David Campbell to succeed Judge Kravitz as chair of the Advisory Committee on Civil Rules and Judge Raggi to succeed Judge Tallman as chair of the Advisory Committee on Criminal Rules. Judge Rosenthal said that these selections were truly extraordinary and will greatly benefit the rules program.

She pointed out that Judge Tallman was attending his last Standing Committee meeting and had been an enormously successful chair of the Advisory Committee on Criminal Rules. Among his many accomplishments, she noted, were the package of technology amendments scheduled to take effect on December 1, 2011, the pending amendments to Rule 12 (pretrial motions) and Rule 15 (depositions), and the comprehensive and meticulous review of prosecutors' obligations to disclose exculpatory and impeachment information to the defense. She emphasized that he had steered the committee carefully among major competing interests and considerations. In doing so, he had shown consistently great insight and was a delight to work with.

Judge Rosenthal pointed out that the terms of Mr. Cox and Mr. Maledon were also due to expire on October 1, 2011. She emphasized the importance of both members' contributions to the Standing Committee and noted that the committee will celebrate their distinguished service more formally at the next meeting.

Remembering Judge John M. Roll

Judge Tallman asked the committee to remember and honor the late Chief Judge John M. Roll, a beloved former member of the Advisory Committee on Criminal Rules. He pointed out that Judge Roll had contributed mightily to the federal rules process, had been a major force in restyling the Federal Rules of Criminal Procedure, and had worked tirelessly in the cause of justice until his untimely death.

Judicial Conference Report

Judge Rosenthal reported that no proposed rule amendments had been presented to the Judicial Conference at its March 2011 session. In January 2011, the Conference's Executive Committee approved the committee's report on the privacy rules, which was then submitted to Congress.

She noted that the Conference in March had been asked to approve a proposal from the Court Administration and Case Management Committee to revise the standard for senior judges to participate in en banc decisions. The Conference deferred the matter, however, to allow the rules committees time to collaborate with the Court Administration Committee on the matter. Judge Sutton affirmed that the Advisory Committee on Appellate Rules was currently in the process of considering the proposal, but would most likely not recommend a change in the rules.

Pending Rule Amendments

Judge Rosenthal reported that the Supreme Court had approved all the rule amendments approved by the Judicial Conference in September 2010, except for two minor language changes in the restyled evidence rules. She pointed out that it is clear that the Court reviews the proposed rules extremely closely, and it had raised specific concerns regarding the language of four of the restyled rules. Judge Rosenthal worked with the chair and reporter of the Advisory Committee on Evidence Rules to address those concerns. In the end, two of the rules were promulgated by the Court as originally presented to it, and minor changes were made in the text of the other two rules with the approval of the Judicial Conference's Executive Committee.

Judge Rosenthal noted that the amendments were now pending before Congress and scheduled to take effect on December 1, 2011. She added, though, that there may be some concerns in Congress over some of the bankruptcy rule amendments.

Professor Capra announced that the restyled evidence rules had won two prestigious legal-writing awards – the Clear Mark Award for clear legal writing and the Burton Reform in Law Award. He said that principal credit for this major achievement belonged to Professor Kimble and the style committee – Judge Teilborg, Judge Huff, and Mr. Maledon.

Legislative Report

Ms. Kuperman reported that the proposed Lawsuit Abuse Reduction Act of 2011 had been introduced in each house of Congress, and a hearing had been held before the House Judiciary Committee. The proposed legislation, she said, would restore the 1983 version of FED. R. CIV. P. 11 (sanctions), thereby eliminating the current safe harbor provision in the rule and making imposition of sanctions mandatory for rule violations. She noted that the committee had sent a letter to Congress opposing the legislation, noting, among other things, that an empirical study by the Federal Judicial Center had demonstrated that the 1983 version of the rule simply did not work, had led to strategic gamesmanship by lawyers, and had resulted in satellite litigation over imposition of sanctions. Nevertheless, the House bill was scheduled for markup within a week. The Senate bill, she added, was still pending before the Senate Judiciary Committee.

Ms. Kuperman reported that the proposed Sunshine in Litigation Act of 2011 was similar to other Sunshine Acts introduced in every Congress since the 1990s. It would prevent a court from issuing a discovery protective order without first making particularized findings of fact that the order would not restrict the disclosure of information relevant to protection of public health and safety. The latest version of the legislation, she noted, was limited to cases where the pleadings state facts relevant to protection of public health or safety. The committee, she said, had written to the Senate expressing its opposition to the bill on the grounds that it was inconsistent with the Rules Enabling Act and would make discovery more burdensome and costly. Nevertheless, she said, the Senate Judiciary Committee favorably reported a substitute version of the bill.

Ms. Kuperman reported that efforts were well underway to obtain legislation to conform 28 U.S.C. § 2107 to the pending amendment to FED. R. APP. P. 4(a)(1) (time to file a notice of appeal in a civil case), scheduled to take effect on December 1, 2011. The amendment will clarify the time to appeal in civil cases in which one of the parties is a United States officer or employee sued in an individual capacity for acts or omissions in connection with official duties.

She added that no legislation was pending to deal with pleading standards in civil cases in light of the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S. Ct. 1937 (2009).

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee without objection by voice vote approved the minutes of the last meeting, held on January 6-7, 2011.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Sutton and Professor Struve presented the report of the advisory committee, as set forth in Judge Sutton's memorandum and attachments of May 2, 2011 (Agenda Item 6).

Amendments for Publication

FED. R. APP. P. 28 and 28.1

Judge Sutton reported that the proposed amendments to FED. R. APP. P. 28(a) (briefs) would remove the current requirement that an appellant's brief contain separate statements of the case and of the facts. The proposed changes in Rule 28(b) (appellee's brief) and Rule 28.1 (cross-appeals) complement those in Rule 28(a).

Rule 28(a) currently requires a brief to contain a statement of the case – including the nature of the case, the course of proceedings, and the disposition below – followed in order by a statement of the facts. The current rule, he said, has confused practitioners and led to redundancy of information in briefs. Moreover, it is not logical in most cases for an attorney to address the case before setting forth the underlying facts.

Judge Sutton noted that the revised rule would allow appellants to weave the two statements together and present the events to the court in a more logical order, such as in chronological order. The proposed rule would consolidate subdivisions (a)(6) and (a)(7) into a single new subdivision that requires a "concise statement of the case setting out the facts relevant to the issues submitted for review and identifying the rulings presented for review. . . ." That approach, he said, was very similar to the Supreme Court's Rule 24.1(g).

Judge Sutton noted that the advisory committee had discussed the proposed revisions with leading appellate lawyers and had received largely favorable reactions to them. A member added that the proposed rule would be very beneficial because it is open-ended and flexible, rather than prescriptive.

The committee without objection by voice vote approved the proposed amendments for publication.

APPELLATE FORM 4

Judge Sutton reported that the advisory committee was proposing to modify APPELLATE FORM 4 (affidavit accompanying a motion for permission to appeal in forma pauperis). Questions 10 and 11 on the current form ask litigants to disclose: (1) the name of any attorney or other person (such as a paralegal or typist) whom they have paid, or will pay, for services in connection with the case; and (2) the amount of the payments. Critics have said that the questions are overly intrusive and unnecessary in making a determination of in forma pauperis status. They also assert that the questions may raise issues involving attorney-client privilege and work-product protection.

Judge Sutton explained that the advisory committee would replace the current two questions with a single new Question 10 that would read as follows: "Have you spent – or will you be spending – any money for expenses or attorney fees in connection with this lawsuit? If yes, how much?" In addition, some technical changes would be made in the form.

He also reported that the advisory committee believed that it may be time to separate the appellate forms from the full, three-year Rules Enabling Act process. That issue was also discussed during the presentation of the report of the Advisory Committee on Civil Rules. (See pages 30-31 of these minutes.)

The committee without objection by voice vote approved the proposed amendments for publication.

Informational Items

FED. R. APP. P. 4(a)(1) and 28 U.S.C. § 2107

Judge Sutton reported that the advisory committee was continuing its efforts to secure legislation to amend 28 U.S.C. § 2107 to conform that statute to the amendment to FED. R. APP. P. 4(a)(1) (time to file a notice of appeal in a civil case) that will take effect on December 1, 2011. The legislative change, he said, was necessary to buttress the rule amendment because the Supreme Court held in *Bowles v. Russell*, 551 U.S. 205 (2007), that appeal time limits set forth in statutes are jurisdictional in nature. The proposed statutory amendment, he said, mirrors the amended rule and will clarify the time to appeal in civil cases when a federal officer or employee is sued in an individual capacity for an act or omission occurring in connection with duties performed on behalf of the United States.

Judge Sutton noted that in pursuing the legislation, Congressional staff had expressed concern that the additional time provided by the rule and statute might not be applicable if they themselves were sued. The proposed statutory language gives all parties 60 days, rather than 30 days, to file a notice of appeal if one of the parties is "a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection [with official duties], including all instances in which the United States represents that [person] when the judgment, order, or decree is entered or files the appeal for that [person]."

Congressional staff appeared to have read the safe harbors in that text as applicable only to representation by the Department of Justice, and not to representation by congressional counsel. Judge Sutton argued, though, that the reference to representation by the "United States" clearly covers representation by congressional counsel, as all agree that the reference to a suit against "a United States officer" covers members of Congress and their staff.

It is likely, he said, that the legislation will proceed as planned. It is important to have it enacted in time to take effect along with the amended rule on December 1, 2011.

FED. R. APP. P. 29

Judge Sutton reported that the advisory committee had not yet determined whether and how to proceed with a proposed amendment to FED. R. APP. P. 29 (amicus briefs) that would treat federally recognized Indian tribes the same as states for the purpose of filing amicus briefs. He noted that both the advisory committee and the Standing Committee had been divided on the merits of the proposal. Moreover, two of the three circuit courts that hear the bulk of the cases in which tribes file amicus briefs had shown little interest in changing the rule. But, he said, the Ninth Circuit – the court with the largest number of cases – had now informed the advisory committee that it favored adoption of a national rule permitting Indian tribes to file amicus briefs without party consent or court permission.

Judge Sutton pointed out that a recent study by the Federal Judicial Center had demonstrated that the courts of appeals deny very few applications from Indian tribes to file amicus briefs. Accordingly, the key issue at stake is the sovereignty and dignity of the tribes, not the actual denial of any rights.

JOINT MEETING WITH THE BANKRUPTCY ADVISORY COMMITTEE

Judge Sutton reported that the advisory committee had met jointly in April 2011 with the Advisory Committee on Bankruptcy Rules to discuss proposed, major revisions to Part VIII of the bankruptcy rules. Part VIII governs appeals from a bankruptcy judge to a district court or bankruptcy appellate panel. The meeting, he said, had been very productive.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Wedoff and Professor Gibson presented the report of the advisory committee, as set forth in Judge Wedoff's memorandum and attachments of May 6, 2011 (Agenda Item 9). He reported that the advisory committee had 22 action items to present, falling into three categories:

1. Eight matters published in August 2010 and ready for final approval by the Judicial Conference;
2. Five matters for final approval by the Conference without publication; and
3. Nine matters to be published for public comment.

To aid in presenting the 22 proposals, Judge Wedoff grouped them by subject matter, rather than by procedural status, and he discussed the subjects in the following order:

1. Procedures for creditor claims and claim objections;
2. Incorporating recent Supreme Court rulings;
3. Simplified procedure for filing a certificate of debtor financial education;
4. Adjusting time deadlines; and
5. Other corrections and adjustments.

1. Creditor Claims and Claim Objections

Background and Procedural Status

Judge Wedoff reported that several bankruptcy judges have voiced concern about the accuracy and adequacy of the information that creditors submit to support their claims, especially in cases where the original creditor has sold the debt to another entity before the bankruptcy case is filed. The problems arise most frequently with regard to home mortgages and credit-card debt. As a result, it is often unclear: (1) who the original holder of the debt was; (2) what the current balance on the debt is; and (3) what it will take to pay off the debt. Moreover, he added, there is often no way for a debtor or trustee to know from the documentation filed with the proof of claim whether the statute of limitations has passed.

To address these problems, he said, the advisory committee in 2009 published proposed amendments to FED. R. BANKR. P. 3001 (proof of claim) and proposed new FED. R. BANKR. P. 3002.1 (notice related to claims secured by a security interest in the debtor's principal residence).

Proposed Rule 3001(c)(2) – scheduled to take effect on December 1, 2011 – will require that additional supporting information accompany proofs of claim in all individual-debtor cases. The revised rule also prescribes the sanctions that may be imposed by the court against a creditor in an individual-debtor case that fails to provide that information.

Another proposed amendment in 2009, new subdivision 3001(c)(1), would have required creditors holding claims based on an open-end or revolving consumer-credit agreement to file with the proof of claim a copy of the last account statement sent to the debtor before the bankruptcy petition was filed. The advisory committee, however, withdrew the proposal because of adverse comments from representatives of bulk purchasers of credit-card debt asserting that often a copy of the last account statement simply cannot be produced.

Instead, the committee was now proposing a new subdivision 3001(c)(3) that would require the creditor of a claim based on an open-end or revolving consumer-credit agreement to provide with the proof of claim five specific pieces of information in support of the claim. That provision was published for further comment in August 2010 and is currently before the Standing Committee for final approval. (See pages 12-13 of these minutes.)

Mortgage Debt

OFFICIAL FORM 10

Judge Wedoff explained that the proposed changes to OFFICIAL FORM 10 (proof of claim) were minor and relatively technical. The form would ask claimants for additional information about the interest rate on secured claims, and some of the instructions would be clarified. The revised form also adds space for an optional uniform claim identifier number, which will assist creditors in facilitating electronic payment in chapter 13 cases. In addition, he said, stylistic and formatting changes would be made.

The committee unanimously by voice vote approved the amendments for final approval by the Judicial Conference, effective December 1, 2011.

OFFICIAL FORM 10 (ATTACHMENT A)
OFFICIAL FORM 10 (SUPPLEMENT 1)
OFFICIAL FORM 10 (SUPPLEMENT 2)

Judge Wedoff pointed out that the three new forms associated with OFFICIAL FORM 10 were designed to implement new Rule 3002.1. The new rule – scheduled to take effect on December 1, 2011 – will assist in implementing § 1322(b)(5) of the Bankruptcy Code. It permits a chapter 13 debtor to cure a default and maintain home mortgage payments over the course of the plan.

OFFICIAL FORM 10, ATTACHMENT A (mortgage proof of claim attachment) implements Rule 3002.1(c)(2). It will give the debtor and the trustee important information on the status of a claim secured by a security interest in the debtor's principal residence. The holder of the claim must specify the principal and interest due on the residence as of the date of filing the petition; itemize pre-petition interest, fees, expenses, and charges included in the claim; and specify the amount needed to cure any default.

OFFICIAL FORM 10, SUPPLEMENT 1 (notice of mortgage payment change) implements Rule 3002.1(b). It applies in chapter 13 cases where the debtor is maintaining current payments on the principal residence and attempting to cure any default. The debtor and trustee need to know whether there have been any changes in the installment payment amount. The new form provides the notification and requires the

holder of a home mortgage claim to provide 21 days' advance notice of any escrow account payment adjustment, interest payment change, or other mortgage payment change.

OFFICIAL FORM 10, SUPPLEMENT 2 (notice of post-petition mortgage fees, expenses, and charges) implements Rule 3002.1(c). It will be used in a chapter 13 case by the holder of a home mortgage claim to notify the debtor and trustee of the amount of all post-petition fees, expenses, and charges and the dates incurred.

Judge Wedoff noted that no opposition had been voiced to the forms during the public comment period, with one important exception regarding OFFICIAL FORM 10 (ATTACHMENT A). He explained that two bankruptcy judges had pointed out that the manner in which mortgage servicers treat mortgage payments varies considerably. The servicers commonly credit late-received payments to late charges and attorney fees before applying them to the principal. Therefore, fees and charges may pile up, and the debtor or trustee cannot tell how the payments have been allocated without a full mortgage history.

The judges proposed that home-mortgage claimants be required to submit a complete loan history with their proofs of claim reflecting all amounts received and credited by the lender. This would allow the debtor and trustee to compare and reconcile the claimed arrearages with their own payment records.

Judge Wedoff noted that the proposed new OFFICIAL FORM 10 (ATTACHMENT A) does not require a loan history because the advisory committee concluded that it is not necessary in most chapter 13 cases. It might also impose an undue burden on the mortgagee and overwhelm debtors with too much detail. Moreover, the additional loan history information that debtors or trustees need in a specific case may be obtained through discovery.

In addition, the advisory committee concluded as a practical matter that there was simply insufficient time to redraft the form to incorporate additional information and still meet the deadline of having the form take effect at the same time as new Rule 3002.1, on December 1, 2011. Amending the form to require a loan history, for example, would require republication and an additional year's delay in issuing the form. Therefore, he said, the committee had decided to approve the form as currently drafted, but to keep the matter on its docket and gather information about the experience of debtors and creditors with the new rule and forms after they go into effect. Informed by those experiences, the committee will be in a better position in the future to decide whether to require the holder of a claim secured by the debtor's principal residence to attach a complete loan history to the proof of claim.

A member noted that OFFICIAL FORM 10, ATTACHMENT A will likely be opposed by bankruptcy judges who have developed their own forms and do not want to switch to a new national form that gives them less information. Her own chief bankruptcy judge, for example, had expressed concern that the proposed new form may preclude continued use of his more detailed local form. Judge Wedoff and Professor Gibson responded that FED. R. BANKR. P. 9009 allows the official forms to be used "with alterations as may be appropriate." They also suggested that a district might consider using the national form, but also requiring a supplemental local form asking for additional information. A member favored the use of supplemental local forms and said that they would inform the advisory committee in fashioning any needed changes in the national form in the future.

The committee unanimously by voice vote approved the three new forms for final approval by the Judicial Conference, effective December 1, 2011.

Open-Ended Credit Card Debt

FED. R. BANKR. P. 3001(c)(3)

Judge Wedoff reported that the amendments to Rule 3001 (proof of claim) originally proposed by the advisory committee in 2009 would have required that a proof of claim based on open-end or revolving consumer-credit agreements be accompanied by a copy of the last account statement sent to the debtor before the bankruptcy filing. The additional documentation, he said, would merely provide needed definition to the basic requirement currently set forth in FED. R. BANKR. P. 3001(c) that "[w]hen a claim . . . is based on a writing, the original or a duplicate shall be filed with the proof of claim." The debtor, he said, needs the information to associate the claim with a known account and to ascertain whether the claim is timely.

The proposal, however, was opposed vigorously by the bulk purchasers of credit-card claims on two grounds. First, they asserted that buyers of credit-card debt receive only a computer print-out of basic information when they purchase the debt and do not have access to the last account statement. Second, they said that producing the statements would raise serious privacy issues because the debtor's full credit-card debts would be disclosed on the public record, including such sensitive matters as medical debts.

Judge Wedoff said that the advisory committee had redrafted the proposal in light of the comments from the credit industry, and it had published a substitute proposal in 2010 that would require creditors to provide certain specific information to the extent applicable – the name of the entity from which the creditor purchased the debt, the name of the entity to which the debt was owed at the time of the debtor's last transaction, the date of the last transaction on the account, the date of the last payment, and the charge-off date.

He reported that the advisory committee had received no objections to the revised proposal based either on the unavailability of the information or on privacy concerns. Nevertheless, he said, some creditors are still opposed on the grounds that the amendments are not needed and would place an unreasonable burden on consumer lenders and debt purchasers.

Judge Wedoff noted, on the other hand, that the advisory committee had received several comments from debtors' representatives that the rule does not go far enough in making creditors document their claims, and it should require a complete chain of title. They assert that creditors regularly ignore the rule's current requirement of attaching to a proof of claim the writing on which it is based. As a result, they say, debtors do not receive sufficient information to pursue their interests effectively.

He explained that proposed FED. R. BANKR. P. 3001(c)(3)(B) would authorize a debtor or trustee to request a copy of the writing on which a credit-card claim is based, and the creditor would have a deadline of 30 days to comply with the request. That provision also received some opposition from the creditors, who recommended that the requesting party be required to make a threshold showing of need for the writing. The advisory committee decided, though, that a good cause showing is unnecessary and would lead to needless litigation. Realistically, he said, debtors will only seek a copy of the underlying contract if they have good reasons for doing so.

Judge Wedoff noted that a new objection raised by creditors relates to the provision in FED. R. BANKR. P. 3001(c)(2)(D) that lists sanctions that a court may impose when a creditor fails to provide required information. Under the rule, for example, a debtor or trustee could ask that certain papers not be allowed or that appropriate attorney fees be imposed. Creditors argue, he said, that the provision is overly harsh.

Judge Wedoff said that sanctions will rarely arise. The sanctions specified in Rule 3001(c)(2)(D), moreover, are the same as those available generally in every bankruptcy and civil case for violations of the rules. In addition, Rule 3001(c)(2)(D) actually serves as a limitation on actions that several bankruptcy judges have already been taking, such as ruling that a creditor's failure to produce needed information requires disallowance of a claim.

Judge Wedoff added that the sanction provision is not set forth in the proposed new Rule 3001(c)(3), but in Rule 3001(i), scheduled to take effect on December 1, 2011. That general provision, moreover, applies in all individual-debtor cases and is not limited to claims based on an open-end or revolving consumer-credit agreement.

The committee unanimously by voice vote approved the proposed amendments for final approval by the Judicial Conference.

Procedures for Objecting to Claims

FED. R. BANKR. P. 3007(a)

Judge Wedoff explained that there is confusion under the current rule about the proper procedure for filing an objection to a claim. The rule seems to require that every objection to a claim be noticed for a hearing, although many courts do not follow that procedure. The proposed amendments to Rule 3007(a) (objections to claim) would authorize a negative-notice procedure for filing objections and clarify the method for serving the objections.

The proposed amendments would allow a court to place the burden on a claimant to request a hearing after receiving notice of an objection. The change, he said, is consistent with § 502(b) of the Bankruptcy Code, which defines the phrase "after notice and a hearing" as allowing a court to act without a hearing if notice is properly given and a party in interest does not timely request a hearing.

With respect to the manner of serving objections to claims, Judge Wedoff explained that courts currently disagree on whether an objection to a claim must be served by one of the methods specified for service of a complaint in FED. R. BANKR. P. 7004 or whether it is sufficient to serve the objection by mail on the person designated on the proof of claim. The advisory committee concluded that the matter should be clarified, and it proposes that objections be served by first-class mail addressed to the person designated on the proof of claim to receive notices.

The committee, he said, also concluded that two types of claimants should be served in the manner prescribed by FED. R. BANKR. P. 7004 – insured depository institutions and officers and agencies of the United States. The service methods for depository institutions are statutorily mandated, and the size and dispersion of authority in the federal government necessitate service on the Attorney General and the appropriate U.S. attorney's office, as well as on the person designated on the proof of claim.

The committee unanimously by voice vote approved the proposed amendments for publication.

FED. R. BANKR. P. 3001(c)(1)

Judge Wedoff reported that FED. R. BANKR. P. 3001(c)(1) (supporting information for a proof of claim) would be amended to delete the option of filing with a proof of claim the original of a writing on which the claim is based. The instructions to OFFICIAL FORM 10 (proof of claim) direct claimants not to "send original documents, as attachments may be destroyed after scanning." Those instructions reflect the current practice of filing copies, not originals, in the bankruptcy courts. The advisory committee

therefore would amend Rule 3001(c)(1) to conform it to the official form and current practice by replacing "the original or a duplicate" with "a copy of the writing" on which the claim is based.

The committee approved the proposed conforming amendment for final approval by the Judicial Conference without publication.

2. Responses to Recent Supreme Court Decisions

OFFICIAL FORM 6C

Judge Wedoff reported that the Supreme Court ruled in *Schwab v. Reilly*, 560 U.S. __, 130 S. Ct. 2652 (2010), that if a debtor claims property as exempt and enters a specific dollar amount on OFFICIAL FORM 6C, he or she is limited to that amount. If the full fair market value of the property is found to exceed that amount, the trustee may use the overage.

The Supreme Court suggested in *Schwab* that the debtor could claim the full amount of the property by stating so on the face of the form. But the current form does not provide a space for the debtor to exercise that option. So the advisory committee proposed rearranging the form and adding an additional column to give the debtor two options: (1) to claim a specific dollar amount; or (2) to claim the full fair market value of the exempted property.

The committee unanimously by voice vote approved the proposed amendments for publication.

OFFICIAL FORMS 22A and 22C

Judge Wedoff reported that OFFICIAL FORM 22C (chapter 13 statement of current monthly income and calculation of commitment period and disposable income) would be amended to reflect the Supreme Court's decision in *Hamilton v. Lanning*, 560 U.S. ___, 130 S. Ct. 2464 (2010). The case dealt with calculating a chapter 13 debtor's "projected disposable income" under § 1325(b)(1) of the Bankruptcy Code. That income normally has to be devoted to paying unsecured claims.

The term "projected disposable income" is not defined in the Code, but "disposable income" is defined in § 1325(b)(2) as the debtor's "current monthly income" less reasonably necessary expenses. In turn, "current monthly income" is calculated under § 101(10A) of the Code by averaging the debtor's monthly income for the six months preceding the filing of the bankruptcy petition.

In *Lanning*, the debtor's financial situation had changed just before her chapter 13 filing, as she had received a one-time severance buyout from her former employer and had acquired a new job at a considerably lower salary. The buyout payment greatly inflated her gross income for the six-month period before she filed the bankruptcy petition.

The Supreme Court rejected the purely "mechanical" approach of considering only the debtor's average monthly income for the six months before the bankruptcy filing. Instead, it adopted a "forward looking" approach allowing courts to consider changes that have occurred, or are likely to occur, in a debtor's income and expenses after filing.

Judge Wedoff explained that OFFICIAL FORM 22C currently calculates disposable income based only on information about the debtor's pre-bankruptcy average monthly income and current expenses. In light of *Lanning*, though, the Advisory Committee decided to amend the form by adding a new paragraph 61. It will ask the debtor to specify any change in the income or expenses reported on the form that has occurred, or that is virtually certain to occur, during the 12-month period following filing of the bankruptcy petition.

Professor Gibson added that both OFFICIAL FORM 22C and OFFICIAL FORM 22A (Chapter 7 statement of current monthly income and means-test calculation) would also be amended to make a minor adjustment in the deduction for telecommunication expenses. The revision will allow deduction of telecommunication services, including business cell phone service, to the extent necessary for production of income, if not reimbursed by the debtor's employer.

The committee unanimously by voice vote approved the proposed amendments for publication.

3. Simplified Procedure for Filing a Certificate of Debtor Financial Education

FED. R. BANKR. P. 1007(b)(7)

Judge Wedoff explained that the Bankruptcy Code was amended in 2005 to require individual debtors in chapter 7, 11, and 13 cases to complete an instructional course on personal financial management approved by the local U.S. trustee or bankruptcy administrator before they may receive a discharge. The Code does not address what document must be filed to provide notice that the course has been completed, or who must file it. The procedure is set forth in FED. R. BANKR. P. 1007(b)(7) (schedules, statements, and other required documents), which requires the debtor to file a "statement of completion of a course concerning personal financial

management, prepared as prescribed by the appropriate Official Form" – OFFICIAL FORM 23 (debtor's certification of completion of instructional course concerning financial management).

Judge Wedoff noted that the rule imposes the burden of providing notice of completing the course on the debtor, not on the course provider. If the debtor fails to file the notice, the court must close the case without a discharge, even if the debtor has in fact completed the course.

He said that the judges and clerks designing the judiciary's Next Generation of CM/ECF system have recommended that approved providers of financial-management courses be authorized to file course-completion statements electronically and directly with the bankruptcy courts. That procedure will be more efficient, require less human involvement, and reduce the number of cases dismissed for failure to file the required certificate.

Judge Wedoff reported that the advisory committee had concluded that it would be inappropriate for a bankruptcy rule to impose a requirement directly on providers of personal financial-management courses. But Rule 1007(b)(7) should be amended to facilitate approved course providers filing the statements. The proposed amendments would eliminate the requirement that an individual debtor file Form 23 if a course provider has notified the court that the debtor has completed the course after filing the petition.

The committee unanimously by voice vote approved the proposed amendments for publication.

FED. R. BANKR. P. 5009(b)

Judge Wedoff reported that the proposed amendment to FED. R. BANKR. P. 5009(b) (notice of failure to file Rule 1007(b)(7) statement) conforms to the proposed amendments to Rule 1007(b)(7). Rule 5009(b) requires the clerk to send an individual debtor who has not filed the certificate of completing a financial-management course a notice within 45 days after the first date set for the meeting of creditors that the case will be closed without entry of a discharge unless the required statement is timely filed. The proposed amendment recognizes that the clerk need not send the notice if the course provider has already notified the court that the debtor has completed the course.

The committee unanimously by voice vote approved the proposed amendment for publication.

4. Timing and Deadlines

FED. R. BANKR. P. 7054

Judge Wedoff noted that FED. R. BANKR. P. 7054 (judgment and costs) incorporates FED. R. CIV. P. 54(a)-(c) for adversary proceedings and provides for the award of costs. The proposed amendments would expand from one day to 14 days the time for a party to respond to the prevailing party's bill of costs and from five days to seven days the time for seeking court review of the costs taxed by the clerk. He noted that both time limits follow the general rule that time limits be expressed in multiples of seven days. He also pointed out that one public comment had suggested extending both time periods to 14 days, but the advisory committee decided that it was important to make Rule 7054(b) consistent with the civil rule, FED. R. CIV. P. 54(d)(1).

The committee unanimously by voice vote approved the proposed amendments for final approval by the Judicial Conference.

FED. R. BANKR. P. 7056

Judge Wedoff explained that FED. R. BANKR. P. 7056 (summary judgment) makes FED. R. CIV. P. 56 applicable in adversary proceedings. He added that it is also applicable in contested matters under FED. R. BANKR. P. 9014(c) unless the court directs otherwise. Civil Rule 56, as revised in 2009, sets a default deadline to file a summary judgment motion of 30 days after the close of all discovery. That deadline, however, is not appropriate in bankruptcy cases because hearings are frequently held very shortly after the close of discovery.

Therefore, the proposed amendment would depart from the civil rule and establish a new default deadline of 30 days before the initial date set for an evidentiary hearing on any issue for which summary judgment is sought. That change would give the court at least 30 days to consider the motion before the hearing. Judge Wedoff emphasized that the deadlines under both FED. R. CIV. P. 56 and FED. R. BANKR. P. 7056 are default deadlines, applicable only if no local rule or court order sets a different date.

The committee unanimously by voice vote approved the proposed amendment for final approval by the Judicial Conference.

OFFICIAL FORM 25A

Judge Wedoff explained that the proposed amendment to OFFICIAL FORM 25A (plan of reorganization in a small business chapter 11 case) would change the effective-date provision of a small business chapter 11 plan to conform to amendments to the bankruptcy rules that took effect in 2009. Those amendments increased from 10 days to 14 days the time periods for the duration of a stay of an order confirming a plan, FED. R. BANKR. P. 3020(e), and for filing a notice of appeal, FED. R. BANKR. P. 8002(a). Under

the proposed amendment to § 8.02 of the form, the effective date of the plan would generally be the first business day following the date that is 14 days after entry of the order of confirmation.

The committee unanimously by voice vote approved the proposed conforming amendment for final approval by the Judicial Conference without publication, effective December 1, 2011.

FED. R. BANKR. P. 1007(c)

Judge Wedoff reported that the proposed amendment to FED. R. BANKR. P. 1007(c) (time limits to file documents) was a technical and conforming change to remove an inconsistency in the current rule with FED. R. BANKR. P. 1007(a)(2) (filing documents in an involuntary case). Rule 1007(c) prescribes time limits for filing various lists, schedules, statements, and other documents. It specifies that in an involuntary case the debtor must file the list of creditors specified in Rule 1007(a)(2), as well as certain other documents, within 14 days of entry of the order for relief. In 2010, however, Rule 1007(a)(2) was amended to reduce to seven days the time for an involuntary debtor to file the list of creditors. As a result, the proposed amendment would delete from subdivision (c) the inconsistent reference to the time limit for filing the list of creditors in an involuntary case.

The committee unanimously by voice vote approved the proposed conforming amendment for final approval by the Judicial Conference without publication.

FED. R. BANKR. P. 9006(d)

Judge Wedoff explained that FED. R. BANKR. P. 9006(d) (time limit for serving motions and affidavits) would be amended to draw attention to the fact that it prescribes default deadlines for service of motions and written responses. A bankruptcy judge had suggested deleting the rule because most districts have their own local rules governing motion practice. Moreover, Rule 9006(d) may be overlooked by parties filing and responding to motions because motion practice and contested matters generally are covered by Rules 9013 (form and service of motions) and 9014 (contested matters).

The advisory committee concluded that Rule 9006(d) needed to be retained, but decided that it should be amended, highlighted, and made more like the civil rule on which is it based – FED. R. CIV. P. 6 (computing and extending time; time for motion papers). Unlike the civil rule, though, FED. R. BANKR. P. 9006 does not state in its title that it governs time periods for motion papers. Moreover, Bankruptcy Rule 9006 is not followed immediately by a rule that addresses the form of motions, as in the civil rules – FED. R. CIV. P. 7 (pleadings allowed; form of motions and other papers).

The advisory committee would amend the title of Rule 9006 to add a reference to the "time for motions papers." Subdivision (d) would be amended to govern the timing of service of any written response to a motion, not just opposing affidavits. The title of the subdivision would be changed from "For Motions–Affidavits" to "Motion Papers."

The committee unanimously by voice vote approved the proposed amendments for publication.

FED. R. BANKR. P. 9013

Judge Wedoff reported that the proposed amendment to FED. R. BANKR. P. 9013 (form and service of motions) would provide a cross-reference to the time periods in FED. R. BANKR. P. 9006(d) to call greater attention to the default deadlines for motion practice. In addition, some stylistic changes would be made to provide greater clarity.

The committee unanimously by voice vote approved the proposed amendments for publication.

FED. R. BANKR. P. 9014

Judge Wedoff reported that the proposed amendment to FED. R. BANKR. P. 9014 (contested matters) would add a cross-reference to the time limits for serving motions and responses in FED. R. BANKR. P. 9006(d).

The committee unanimously by voice vote approved the proposed amendment for publication.

5. Corrections and Adjustments

FED. R. BANKR. P. 2015(a)

Judge Wedoff reported that FED. R. BANKR. P. 2015(a) (duty to keep records, make reports, and give notice) would be amended with a technical change to correct its reference to § 704 of the Bankruptcy Code from § 704(8) to § 704(a)(8).

The committee unanimously by voice vote approved the proposed conforming amendment for final approval by the Judicial Conference without publication.

OFFICIAL FORM 1

Judge Wedoff said that OFFICIAL FORM 1 (voluntary petition) would be amended to include lines for a foreign representative filing a chapter 15 petition to state the

country of the debtor's center of main interests and the countries in which related proceedings are pending. The change merely implements the requirements of new FED. R. BANKR. P. 1004.2 (petition in a chapter 15 case), scheduled to take effect on December 1, 2011.

The committee unanimously by voice vote approved the proposed conforming amendment for final approval by the Judicial Conference without publication, effective December 1, 2011.

OFFICIAL FORM 7

Judge Wedoff reported that the proposed change to OFFICIAL FORM 7 (statement of financial affairs) would make the definition of an "insider" consistent with the Bankruptcy Code's definition of the term. The form currently defines an insider as one who holds more than a 5% voting interest in a corporate debtor – a bright-line test not found in the Code. The revised form, on the other hand, refers more generally to a person in a position to control the entity. He noted that the proposed change is substantive and needed to be published for public comment.

The committee unanimously by voice vote approved the proposed amendment for publication.

OFFICIAL FORMS 9A - 9I

Judge Wedoff explained that the proposed changes in OFFICIAL FORMS 9A - 9I (notice of meeting of creditors and deadlines) are technical and would conform the forms to an amendment to FED. R. BANKR. P. 2003(e), scheduled to take effect on December 1, 2011. Rule 2003(e) currently states that a meeting of creditors may be adjourned "by announcement at the meeting of the adjourned date and time without further notice." The 2011 amendment to the rule will require the presiding official to file a written statement for the record specifying the date and time to which the meeting is adjourned.

The revised forms would be amended to make the explanation of the meeting of creditors on the back of the form consistent with the amended rule. In addition, the revised forms correct a spelling error, correct a punctuation error, and call greater attention to the instructions.

The committee unanimously by voice vote approved the proposed conforming amendments for final approval by the Judicial Conference without publication, effective December 1, 2011.

Information Items

MODERNIZING THE BANKRUPTCY FORMS

Judge Wedoff reported that the advisory committee, working through a subcommittee chaired by Judge Elizabeth L. Perris, was making substantial progress on its major project to modernize the bankruptcy forms. The goals of the project are to avoid redundant information on the forms, make them more user-friendly, elicit more accurate information, and take advantage of technological developments, especially the judiciary's Next Generation of CM/ECF system, currently under development.

He said that the forms project was currently running ahead of the projected deployment of the Next Generation system. A package of forms for use by individual debtors may be ready for publication in August 2012, and the committee may decide to release the forms serially and implement them before the Next Generation system is in place.

He noted that the bankruptcy process relies heavily on forms and added that Judge Perris, chair of the advisory committee's forms modernization project, will serve as the committee's representative on the new inter-committee subcommittee on forms.

MODEL CHAPTER 13 PLAN

Judge Wedoff said that the advisory committee was considering developing a new model chapter 13 plan form. Under the pertinent case law, bankruptcy judges have an obligation to review proposed chapter 13 plans carefully and to deny any that include improper provisions. In *United Student Aid Funds, Inc. v. Espinosa,* 559 U.S. ___, 130 S. Ct. 1367 (2010), the Supreme Court upheld the enforceability of a chapter 13 plan that called for the discharge of a government-sponsored student loan. A loan of that sort, though, may only be discharged if the debtor brings an adversary proceeding and the bankruptcy court rules that failure to discharge the debt would impose an undue hardship on the debtor and the debtor's dependents.

In *Espinosa*, the discharge was never the subject of an adversary proceeding. But since the bankruptcy court confirmed the plan, even without the necessary finding of undue hardship, the Supreme Court ruled that it was a binding final judgment. The Court noted that bankruptcy judges have an obligation to review a chapter 13 plan carefully, to direct that debtors conform their plan to the requirements of the Bankruptcy Code, and to deny confirmation if the plan does not. But there are thousands of plans that busy judges must review and a great many variations among them. It would be very helpful, he said, to have a standard plan to aid in the review process.

REVISING THE BANKRUPTCY APPELLATE RULES

Judge Wedoff reported that the advisory committee was proceeding well with its comprehensive revision of the bankruptcy appellate rules (Part VIII of the Federal Rules of Bankruptcy Procedure). It had just conducted a very productive joint meeting with the Advisory Committee on Appellate Rules to discuss issues presented by the intersection of the bankruptcy appellate rules and the Federal Rules of Appellate Procedure.

Professor Gibson added that a working group of advisory committee members, plus the reporter and a member of the appellate advisory committee, would conduct further drafting sessions in July 2011. Professor Kimble, the Standing Committee's style consultant, will then review the draft later in the summer. At its fall 2011 meeting, the advisory committee may be able to approve half, or possibly all, the rules. She said that some rules may be presented to the Standing Committee as early as January 2012, and the full package of proposed rules should be ready for publication in August 2012.

ASBESTOS TRUSTS

Judge Wedoff reported that the Chamber of Commerce had suggested a new rule that would require asbestos trusts created in accordance with § 524(g) of the Bankruptcy Code to file quarterly reports with the bankruptcy court that detail each claimant's demand for payment from the trust and each amount paid. He noted that the matter had been referred to the advisory committee's business subcommittee. The subcommittee, he said, had expressed concern over whether the committee has jurisdiction under the Rules Enabling Act to issue a rule requiring a trust to file documents after the debtor's plan has been confirmed and the bankruptcy court has closed the case.

Judge Wedoff said that the committee was in the process of seeking additional information on the matter from interested organizations with relevant expertise. In the meantime, he added, the committee had received a letter from the chairman of the Judiciary Committee of the House of Representatives asking that the proposal move forward.

RESTYLING THE BANKRUPTCY RULES

Judge Rosenthal pointed out that the committee needed to decide in the not-too-distant future whether the bankruptcy rules should be restyled. She noted that restyling would be a major and difficult project, complicated by the interface of the bankruptcy rules with the Bankruptcy Code. Nevertheless, she suggested, there are various ways in which the matter might be accomplished.

OFFICIAL SET OF BANKRUPTCY RULES

Judge Wedoff thanked Mr. Ishida for his dedicated and painstaking work in producing the first official version of the Federal Rules of Bankruptcy Procedure and in leading the successful efforts to have the rules printed for the first time in handy pamphlet form by the Government Printing Office.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Kravitz and Professor Cooper presented the report of the advisory committee, as set forth in Judge Kravitz's memorandum and attachments of May 2, 2011 (Agenda Item 5). Judge Kravitz reported that the advisory committee had conducted its April 2011 meeting at the University of Texas Law School in Austin. Chief Justice Jefferson of Texas participated in the meeting, and Justice Stephen Breyer spoke to the committee.

Amendments for Publication

FED. R. CIV. P. 45

Judge Kravitz pointed out that the advisory committee had received many letters from lawyers complaining about the current Rule 45 (subpoenas) and its complexity. In 2008, the committee formed a subcommittee, with Judge David G. Campbell as chair and Professor Richard L. Marcus as reporter, to conduct a comprehensive study of the rule. Most of the members of the subcommittee, he said, were practicing lawyers.

As part of its extensive study, the subcommittee sorted through about twenty different areas for potential amendments to Rule 45, and it eventually settled on four areas that it deemed in need of amendment:

1. Notice of service of a subpoena;
2. Transfer of subpoena-related motions;
3. Trial subpoenas for distant parties and party officers; and
4. Simplification of the rule.

The subcommittee worked with many judges and lawyers in fashioning appropriate amendments to the rule, and in October 2010 it conducted a productive mini-conference in Dallas to obtain feedback from lawyers on the proposed amendments.

1. Notice

Judge Kravitz reported that Rule 45(b)(1) requires that each party be given notice of subpoenas that require document production. The advisory committee was informed that many lawyers are unaware of the notice requirement and regularly fail to comply with it. Accordingly, the advisory committee proposed moving the notice requirement to a more prominent position as Rule 45(a)(4) and adding a new caption entitled "Notice to Other Parties." The amended rule also requires that the subpoena be attached to the notice, and include trial subpoenas.

Judge Kravitz noted that some attorneys had argued that the rule should go further and require additional notice each time that a subpoena is modified or updated. The American Bar Association had suggested that notice be provided not only of service of the subpoena, but also of compliance with it. Some lawyers wanted the rule to require a description of the materials produced and access to them. The advisory committee, however, unanimously rejected these proposals for two reasons.

First, the committee concluded that a national rule simply cannot prescribe every aspect of the lawyering process needed to obtain documents in a given case. As a practical matter, discovery materials are often produced on a rolling basis. Negotiations and production may occur over a considerable period of time, and lawyers need to communicate directly and periodically with their opponents and with the targets of subpoenas. They may also assert their need for additional notices and access in their Rule 26(f) plans or ask a court to include appropriate provisions in its scheduling order. These matters are too much dependent on context to be addressed by rule text

Second, the advisory committee wanted to avoid litigation over compliance issues. It was concerned that lawyers might be tempted to ask courts to preclude documents from evidence on the grounds that the other side's notices were inadequate.

2. Transfer

Judge Kravitz explained that the proposed amendments to Rule 45 do not change the direction in the current rule that motions to enforce or quash a subpoena be made in the district of compliance, even though the underlying civil action may be pending in a different district. Proposed Rule 45(f), however, would in very limited circumstances explicitly allow the court for the district of compliance to transfer subpoena-related motions to the court presiding over the main action. He added that the bar was very supportive of including a transfer provision in the rule.

He said that the advisory committee was concerned about the standard for transferring a subpoena dispute, and it wanted to avoid making a transfer so easy that judges might reflexively transfer subpoena disputes on a regular basis. But he pointed out that there are strong reasons in certain cases to have enforcement of the subpoena handled by the judge who presides over the underlying case. The presiding judge, for example, may have already ruled on the same issues raised by the subpoena. The subpoena dispute, moreover, might relate to the merits of the underlying action or impact the judge's management of the case. The committee, he said, had concluded that local production issues should be handled locally in the district of compliance, and only issues affecting the merits or case management should be transferred. To balance these considerations, he said, the committee had decided on a standard that requires "exceptional circumstances" to permit transfer.

A member argued that "exceptional circumstances" was too narrow a standard. He said that the kinds of situations described in the Committee Note, in which a subpoena dispute relates to the merits of the main case, occur quite regularly and are not at all "exceptional." He suggested that "good cause" might be better.

Judge Kravitz said that the advisory committee recognized the importance of allowing the subpoenaed party to litigate a dispute in its own, convenient forum. It wanted to discourage transfers and therefore had selected the narrower term "exceptional circumstances." He noted that the American Bar Association's Litigation Section also favored the narrower standard, as it was concerned that a looser standard might tempt judges to transfer cases to remove them from their dockets. Members added that it might also encourage gamesmanship by some lawyers.

Judge Kravitz explained that the committee was proposing to publish the tougher standard, and it may later relax it if the public comments indicate that the standard should be more permissive. He noted, too, that even if a subpoena dispute is not transferred, the judge in the district of compliance may seek informal advice from the judge presiding over the main case. A participant added that the proposed rule merely establishes a framework for handling enforcement issues, and it is simply not possible to address or resolve every potential problem in a rule. He suggested that the committee note emphasize that point.

Judge Kravitz pointed out that proposed Rule 45(f) would also allow the court in the district of compliance to transfer subpoena-related motions if the parties and the person subject to the subpoena consent to the transfer. A member suggested, though, that only the views of the subpoenaed party should prevail, and the parties should not be allowed to block a transfer. Judge Kravitz agreed to have the advisory committee consider the matter further.

A member pointed out that the proposed language in Rule 45(f) attempts to resolve the issue of legal representation when a case is transferred and the witness does not have a lawyer in the other state. To ease the burden on the witness, who would have to hire another lawyer, the rule creates something akin to an automatic *pro hac vice* admission. It would allow an attorney authorized to practice in the court where the motion is made to file papers and appear in the court in which the action is pending.

A member cautioned that this provision constitutes attorney regulation and would preempt local court rules, state rules, and local legal culture. In effect, he said, the rule would order a district court to accept an out-of-state lawyer to practice before it, even though the lawyer may not be subject to regulation by the state bar or meet other requirements traditionally imposed by the district court. He predicted that the committee will receive negative public comments on the issue. A participant agreed, but emphasized that the particular proposal is limited and restrained, and it is good policy.

Judge Kravitz noted that if enforcement is transferred to the court where the underlying action is pending, that court may have to deal with contempt orders if the subpoena is not obeyed. Therefore, the advisory committee added proposed Rule 45(g), giving the transferee court flexibility to transfer the contempt matter back to the court having jurisdiction over the disobedient party.

Professor Cooper explained that the committee note points out that in the event of a transfer, disobedience constitutes contempt of both the court where compliance is required and the court where the action is pending. Judge Kravitz noted that contempt matters will normally be transferred back to the court of compliance because it is difficult for a judge to hold a person in contempt who is not actually before the judge. He added that the rule raises potential choice-of-law issues, but the committee had decided that these issues were not appropriate for treatment in procedural rules and should be left to case-law development.

3. Trial subpoenas

Judge Kravitz explained that there was a split of authority in the case law over whether subpoenas for parties or party officers to testify at trial may compel them to travel more than 100 miles from outside the state. Most recent district court opinions, he said, have followed *In re Vioxx Products Liability Litigation*, 438 F. Supp. 2d 664 (E.D.La. 2006). In *Vioxx*, an officer of the defendant corporation, who lived and worked in New Jersey, was required to testify at trial in New Orleans. The advisory committee, however, noted that there is a growing body of law rejecting *Vioxx*, as exemplified by *Johnson v. Big Lots Stores, Inc.*, 251 F.R.D. (E.D.La. 2008), holding that Rule 45 did not require attendance of plaintiffs at trial in New Orleans when they would have to travel more than 100 miles from outside the state.

The advisory committee concluded that Rule 45 was not intended to create the expanded subpoena power recognized in *Vioxx*, and the *Vioxx* decision should not be followed. The committee was also concerned that allowing subpoenas on an adverse party and its officers without regard to the traditional geographical limits would raise a real risk of lawyers using subpoenas tactically to apply inappropriate litigation pressure and undue burdens on their opponents.

In many cases, moreover, an adverse party's other employees, rather than its distant executives, are the best witnesses to testify about matters actually in dispute in a case. Judge Kravitz suggested that when a truly knowledgeable person chooses not to show up at trial, the jury notices the absence. In addition, he said, there are satisfactory alternatives to compelling personal attendance of distant witnesses at trial, such as audiovisual recording of deposition testimony and testimony at trial by contemporaneous transmission.

Judge Kravitz said that the advisory committee planned on publishing an appendix to the publication package setting out an alternative amendment that leans in the direction of *Vioxx* and permits a judge, for good cause, to order a party or its officer to attend trial and testify. The publication, however, will not indicate that the two choices are of equal value. Rather, it will state that the committee unanimously favors the *Big Lots* approach and rejects the *Vioxx* line of cases. But since there is a clear split of authority on the issue, an opposing approach is set forth in an appendix and comments are invited on both. He noted that at the committee's recent mini-conference, all the defense lawyers supported the *Big Lots* approach, while all the plaintiffs' lawyers, many of whom handle multi-district litigation, favored *Vioxx.*

A member strongly opposed publishing the appendix. Judge Kravitz responded that publication of both versions is advisable because the committee's approach is currently the minority view of the law. Publishing both versions, moreover, will avoid the need to republish the amendments if the public comments were to favor *Vioxx* and the advisory committee were to change its decision and adopt a *Vioxx*-inspired approach. A member added that another reason to publish an alternative text is to enhance the likelihood that the committee will receive thoughtful and focused comments on the issue.

A member observed that there are appropriate cases in which a judge should have authority to compel attendance of a particular executive or party at trial, despite the distance. It may be difficult, he said, to define those situations, but the courts should have discretion to bring in witnesses when they are really needed. Judge Kravitz added that lawyers at the recent mini-conference had said that if the person has meaningful knowledge and is really needed in a case, the court will normally make it clear to the parties that the witness should be brought in for the trial.

4. Simplification of the rule

Judge Kravitz pointed out that the current Rule 45 is very complex and needs to be simplified. The current rule, for example, requires independent determinations regarding the issuing court, the place of service, and the place of performance. To make those determinations, one has to consult ten different sections of the rule.

To simplify the rule, the proposed amendments adopt the approach of the corresponding criminal rule regarding service of a subpoena. Under FED. R. CRIM. P. 17 (subpoenas), a subpoena is issued by the court where the action is pending and may be served anywhere in the United States. But the proposed civil rule differs from the criminal rule by specifying that the court of compliance is the court for the district where the subpoenaed party is located.

A member said that the proposal was a remarkable piece of work that will greatly improve Rule 45, even though he did not agree with a couple of its provisions. He said that it had been very carefully drafted, enjoyed a broad consensus, and should be published essentially as is. He argued against publishing any alternative version.

Judge Kravitz reiterated that the advisory committee was planning to include in the publication a preface stating that the committee has rejected the *Vioxx* view of nationwide service of trial subpoenas, but recognizes that there is a split of authority and welcomes public comments on the matter. He added that the publication will state clearly that each provision in the proposed rule had been approved unanimously by the advisory committee.

The committee without objection by voice vote approved the proposed amendments for publication.

FED. R. CIV. P. 37

Judge Kravitz noted that the advisory committee was recommending publication of a change in FED. R. CIV. P. 37(b)(1) as a conforming amendment to proposed Rule 45. It would add a second sentence to paragraph (b)(1) specifying that after a subpoena-related motion has been transferred, failure to obey a court order may be treated as contempt of either the court where the discovery is taken or the court where the action is pending.

The committee without objection by voice vote approved the proposed amendment for publication.

Informational Items

PRESERVATION AND SPOLIATION

Judge Kravitz reported that the advisory committee was actively following up on the key issues raised by the bar at the May 2010 Duke Law School conference, especially those relating to discovery of electronically stored information. In particular, the committee was focusing on potential rule amendments addressing: (1) obligations to preserve information in anticipation of litigation; and (2) imposition of sanctions for failure to preserve. He added that in September 2011 the committee will convene a mini-conference with knowledgeable members of the bench and bar to consider these issues and potential rule amendments.

He said that the advisory committee will consider specific rule proposals on preservation and spoliation at its November 2011 and April 2012 meetings, and it may propose amendments for publication at the Standing Committee's June 2012 meeting.

PLEADING STANDARDS

Judge Kravitz reported that Dr. Cecil and his colleagues at the Federal Judicial Center had conducted an amazing empirical study to ascertain whether the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S. Ct. 1937 (2009), have had an appreciable effect on motions to dismiss for failure to state a claim under FED. R. CIV. P. 12(b)(6). He summarized the Center's report as concluding that there was a slight increase in the number of dismissal motions filed in the district courts from 2006 to 2010, but no increase in the percentage of motions granted by the court without leave to amend.

A key conclusion to be derived from the study so far, he suggested, is that civil cases are not being jettisoned out of the federal system in the way that some academic writers have claimed. He noted, though, that the Center's study could not capture whether plaintiffs are simply not filing cases in the federal courts that they might have filed before *Twombly* and *Iqbal*. He added that the committee had asked the Center to begin analyzing the cases in which the courts granted a motion to dismiss, but with leave to amend, to see what happened later in those cases. The Center will also attempt to ascertain whether any discovery preceded the amendments to the complaints and whether the amendments repaired the problems in the complaints.

FORMS

Judge Kravitz reported that the advisory committee was contemplating removing the illustrative civil forms from the full operation of the Rules Enabling Act process. He pointed out that some of the forms, such as the patent infringement complaint form, are

of questionable validity and have been subject to criticism. The committee, though, would probably continue to deal with forms in some way. One alternative would be to abrogate FED. R. CIV. P. 84 (forms) and have the forms handled like the bankruptcy forms, for which Judicial Conference approval is sufficient. Another approach would be to have the forms issued and maintained by the Administrative Office with committee approval.

Judge Rosenthal added that the advisory committees currently handle forms in a variety of different ways, and greater consistency among the different sets of rules might be in order. She said that she would appoint an inter-committee Forms Subcommittee, led by representatives of the Advisory Committee on Civil Rules and chaired by Judge Gene E. K. Pratter. The subcommittee will coordinate information among the advisory committees, but most of the work will be done by each advisory committee separately conducting a detailed examination of its own forms. The work, she said, will begin in the summer of 2011. Judge Kravitz added that the advisory committee may make a recommendation to the Standing Committee regarding FED. R. CIV. P. 84 in June 2012.

DUKE SUBCOMMITTEE

Judge Kravitz reported that the advisory committee had appointed an ad hoc subcommittee, chaired by Judge John G. Koeltl, to implement the recommendations made at the 2010 Duke Law School conference The subcommittee's work, he said, was proceeding hand-in-hand with that of the committee's discovery subcommittee. Its scope of inquiry includes not only potential changes to the Federal Rules of Civil Procedure, but also potential pilot projects and experiments conducted by the Federal Judicial Center and others and educational efforts to educate judges about what they can do to make better use of the many management tools provided by the present rules.

He reported that participants at the Duke conference had emphasized that more cooperation among parties and lawyers was needed in the discovery process to reduce unnecessary costs and delay. In addition, they stressed the importance of bringing greater proportionality to the discovery process, as contemplated in FED. R. CIV. P. 26(b)(2)(C). He added that proportionality is also a key concept in determining a party's need to preserve materials in anticipation of litigation.

Judge Kravitz said that the advisory committee was not proposing rule amendments addressing cooperation and proportionality at this time. But he reported that Judge Paul W. Grimm, a member of the committee, was developing a set of materials to provide detailed guidance on the importance of proportionality in civil discovery and to give practical examples for the bench and bar to work with.

FED. R. CIV. P. 6(d)

Judge Kravitz noted that Rule 6(d) (additional time after certain kinds of service) contains a glitch resulting from a 2005 amendment that established a uniform rule for calculating three added days. Until 2005, the rule had been clear that a party has three added days to act after service "upon the party" by certain designated means. The amended rule, though, merely provides three added days "after service." That revised language may be read as giving additional time to both the serving party and the party being served. To restore the rule to its intended meaning, the advisory committee would simply change the language of Rule 6(d) to state that: "When a party may or must act within a specified time after ~~service~~ being served . . . 3 days are added after the period would otherwise expire. . . ."

Judge Kravitz noted that there may be other places in the rules where changes have introduced unintentional errors. The question before the committee, therefore, concerns timing – whether the advisory committee should correct any errors as it uncovers them or accumulate the fixes and include them in a package of non-controversial, technical amendments. The glitch in Rule 6(d), he emphasized, had not caused any problems, and there has been no case law on it. That fact, he said, argues for deferring making a corrective amendment at this time. Moreover, the rule will likely need to be reconsidered in the near future to determine whether to eliminate electronic service as one of the service methods that trigger the extra three days for the receiving party to act.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Tallman and Professor Beale presented the report of the advisory committee, as set forth in Judge Tallman's memorandum and attachments of May 12, 2011 (Agenda Item 7).

Amendments for Final Approval

FED. R. CRIM. P. 5(c)(4)

Judge Tallman reported that the proposed amendment to FED. R. CRIM. P. 5(c)(4) (initial appearance for persons extradited to the United States) clarifies that the initial appearance for a defendant charged with a criminal offense in the United States, arrested outside the country, and surrendered to the United States following extradition must be held in the district where the defendant has been charged. He added that the rule applies even when a defendant arrives first in another district and has already been informed of his or her rights during the earlier stages of the extradition proceedings. The amendment,

he said, will avoid the delay in the extradited person's transportation resulting from an unneeded initial appearance in the district of initial arrival in the United States.

The committee without objection by voice vote approved the proposed amendment for final approval by the Judicial Conference.

FED. R. CRIM. P. 5(d) and 58(b)(2)(H)

Judge Tallman explained that the United States has treaty obligations that require it to advise detained foreign nationals that they may have their home country's consulate notified of their arrest and detention. The executive branch, through the Department of Justice, is responsible for informing the defendants, and the Department has effective procedures and training programs in place to do so. Bilateral agreements with numerous countries also require consular notification whether or not the detained foreign national requests it.

The proposed amendment to FED. R. CRIM. P. 5(d) (initial appearance in a felony case) was designed as a back-up precaution to ensure that the government fulfills its international obligations to make the required consular notification. It will also produce a court record establishing that the defendant has been notified.

The proposed amendment to FED. R. CRIM. P. 58(b)(2)(H) (initial appearance in a misdemeanor case) would add the identical requirement in misdemeanor cases.

The committee without objection by voice vote approved the proposed amendments for final approval by the Judicial Conference.

FED. R. CRIM. P. 15

Judge Tallman reported that the proposed amendments to Rule 15 (depositions) would establish a clear procedure for taking depositions outside the United States without the defendant's presence in certain limited circumstances if the district court makes a number of case-specific findings. The amendments had been presented before to the Supreme Court for approval, but the Court returned them without comment to the advisory committee in 2010 for further consideration.

The advisory committee, he said, believed that the Supreme Court's concern was over the ultimate admissibility of the deposition as evidence at trial. He pointed out that the committee note accompanying the rule had made it clear that a district judge's decision to permit a deposition to be taken under revised Rule 15 was an entirely separate matter from the later judicial determination of whether the deposition should be admitted into evidence at trial.

Judge Tallman reported that the advisory committee had voted to resubmit the proposed rule to the Judicial Conference and the Supreme Court. At first, it decided not to change the text of the rule, but to give greater prominence in a revised committee note to the difference between taking a deposition and admitting evidence. But after further consultation among the committee chairs and reporters of the criminal rules committee, the evidence rules committee, and the Standing Committee, a consensus was reached that it would be desirable to make that point explicitly in Rule 15(f) itself. Accordingly, in a handout distributed at the meeting, the advisory committee recommended that the Standing Committee add the following text to Rule 15(f): "An order authorizing a deposition to be taken under this rule does not determine its admissibility."

In addition, the advisory committee revised the committee note further to clarify the relationship between the authority to take a deposition under Rule 15(c)(3) and the admission of deposition testimony at trial. The revised note therefore states that although "a party invokes Rule 15 to preserve testimony for trial, the Rule does not determine whether the resulting deposition will be admissible in whole or in part."

He noted that the defense bar had understandably opposed the rule on Confrontation Clause grounds. That, he said, is further reason to clarify the bifurcated nature of the proceedings and emphasize the limited scope of the amendments.

Judge Tallman explained that the amendments establish a two-step process: (1) court authorization to take a deposition; and (2) later, if an objection is made, a court ruling on admissibility of some or all of the deposition at trial. He noted that the party conducting the deposition may not in fact seek to introduce it at trial. Circumstances may change, for example, and it may become possible later to bring the witness to the United States to testify at trial.

The courts, he said, will determine admissibility on a case-by-case basis applying the Constitution and the Federal Rules of Evidence. A court, moreover, might not admit a deposition into evidence because of the Confrontation Clause or FED. R. EVID. 402. It might refuse to admit it because of unforeseen problems created by foreign law or foreign officials in taking the deposition, or because of problems with the technical equipment, communications, or recording.

He pointed out that courts will continue to be faced with ad hoc requests to take depositions outside the United States. International criminal investigations are increasing as the world grows smaller, and courts have been adapting and authorizing new evidence-gathering techniques on a case-by-case basis. The advisory committee, he said, was firmly convinced that the Department of Justice had made the case for the proposed procedure and had concluded that it was appropriate to establish a uniform, national procedure through Rule 15. The proposed amendments, he added, were modeled in large

part on procedures approved by the Fourth Circuit in *United States v. Ali*, 528 F.3d 210 (4th Cir. 2008), *cert. denied*, 129 S. Ct. 1312 (2009).

A member urged that the proposed amendments be given particularly careful reflection because the Supreme Court had returned the earlier version of the same proposal without approving it. The advisory committee, moreover, was now only making a small change in the rejected proposal, based on what it believes to have been the Court's concern over admissibility.

A member said that she had no problem with approving the revised proposal and sending it back to the Supreme Court with the recommended changes in the rule and the committee note. She added that it might be helpful to include information in the note stating that the rule applies only to the United States legal system and does not attempt to govern whatever laws there are in other countries. Many foreign countries, for example, require that any deposition be taken only in accordance with their own court procedures.

A member observed that the current Rule 15 could be construed as only permitting depositions to be taken if the defendant is physically present. Therefore, some judges may now deny authorization for any foreign deposition outside the defendant's presence. The proposed rule, therefore, is an improvement because it will remove that potential impediment and permit a judge to authorize a foreign deposition in the defendant's absence in limited, appropriate circumstances. The situations in which the revised rule will be used are very few, and courts have been handling them to date on an ad hoc basis.

The member asked whether it would be better for the proposed rule to make it clear that Rule 15 does not absolutely foreclose foreign depositions at which the defendant is not present, without detailing all the specific conditions that would have to be met. As drafted, the proposed amendments are very strict in setting forth all conditions that have to be met. Clearly, they are designed that way deliberately to maximize the likelihood of eventual admissibility of the testimony. But the revised rule later goes on to state that it does not govern admissibility. That seems strange because admissibility is the very reason for taking the deposition.

It is possible, she said, that the Supreme Court might eventually rule that no set of circumstances will permit a deposition to be taken in the defendant's absence. At that point, the courts will be left with a rule that imposes strict conditions, even in cases where the Confrontation Clause may not be implicated. But compliance with the conditions will never lead to admissible evidence. Moreover, by listing all the specific conditions, the revised rule may invite satellite litigation. It might well be more effective just to allow a deposition to be taken at the court's discretion and then admit if it satisfies the requirements of the Sixth Amendment and the Federal Rules of Evidence.

Deputy Attorney General Cole stated that the rule will rarely be used, but it is very much needed in certain cases. The potential occasions for its use cannot all be foreseen, but they are expanding every day with the gathering of evidence of international crimes that impact the United States. The proposed rule, he said, had been carefully crafted to achieve the right balance between admissibility of essential information in a few important criminal cases and protecting defendants' rights under the Confrontation Clause. It will be used only in situations where a deposition is truly important – in large part because of restrictions imposed by foreign countries and the amount of effort it takes for the Department of Justice to coordinate with the State Department and others in arranging for depositions overseas.

He said that the Department was comfortable with the strict criteria set out in the rule and did not find them onerous. The rule will, he said, provide welcome guidance to judges and help the Department establish a record that will assist it in obtaining admissibility.

The committee without objection by voice vote approved the proposed amendments for final approval by the Judicial Conference.

FED. R. CRIM. P. 37

Judge Tallman reported that FED. R. APP. P. 12.1 and FED. R. CIV. P. 62.1, which took effect on December 1, 2009, established a uniform national procedure for obtaining indicative rulings. The proposed new FED. R. CRIM. P. 37, he said, is parallel to FED. R. CIV. P. 62.1 and would make the indicative ruling procedure applicable in criminal cases.

The proposed new rule would facilitate remand from the court of appeals when certain post-judgment motions are filed in the district court after an appeal has been docketed and the district court has stated that it would grant the motion if the court of appeals were to remand for that purpose or that the motion raises a substantial issue. The matter might arise, for example, if the district court were to state that it would grant a motion for a new trial on the basis of newly discovered evidence.

The committee without objection by voice vote approved the proposed new rule for final approval by the Judicial Conference.

Amendments for Publication

FED. R. CRIM. P. 12

Judge Tallman explained that the Supreme Court in *Cotton v. United States,* 535 U.S. 625 (2002), changed what had previously been thought to be the law by holding that an indictment's failure to state an offense does not deprive the court of jurisdiction over

the case. But FED. R. CRIM. P. 12 (pleadings and pretrial motions) currently allows a claim that the indictment fails to state an offense to be raised at any time, even on appeal, because it had been thought to be jurisdictional.

Based on a request from the Department of Justice, the advisory committee decided to amend Rule 12, in light of *Cotton*, to require that a motion to dismiss an indictment for failure to state an offense be made before trial. The proposed change, however, opened up a number of difficult issues concerning the appropriate standard for relief when a claim is untimely filed. In addition, Standing Committee members expressed concern over whether the term "waiver" should continue to be used in the rule and whether other types of motions should also be revisited.

Judge Tallman reported that the advisory committee had been studying proposals to amend Rule 12 since 2006, and amendments were now before the Standing Committee for the third time. He pointed out that at the last Standing Committee meeting, in January 2011, members had offered comments that were enormously helpful in guiding the advisory committee's current proposal.

The advisory committee, he said, undertook an additional, comprehensive review and approved a more fundamental revision of Rule 12 at its April 2011 meeting. The current version, which the committee now seeks approval to publish, addresses all the members' concerns and makes some additional improvements in the rule.

Proposed Rule 12(b)(1), he said, specifies that a motion asserting that the court lacks jurisdiction may be made at any time while a case is pending. Proposed Rule 12(b)(3) then lists all the common defenses, objections, and requests that must be raised by motion before trial. For those motions, the revised rule introduces a new factor for determining whether a motion must be raised before trial – that the basis for the motion was "then reasonably available." The motion must also be able to be determined without a trial on the merits. The outdated reference in the current rule to "a trial of the general issue" would be deleted.

Proposed Rule 12(c) specifies the consequences for not timely raising those motions. Judge Tallman said that courts have struggled with the concepts of "waiver" and "forfeiture" and the respective consequences of each. They have also struggled with the tension between the standards of relief under the current Rule 12 and the plain error standard under Rule 52 (harmless and plain error).

Proposed Rule 12(c), he said, would resolve the current confusion and specify the consequences of not making a timely motion. Generally, it provides that untimely motions will be extinguished and not considered on the merits unless the party shows both good cause and prejudice – as the Supreme Court has held in interpreting the "good

cause" standard in the current Rule 12(e) in *Davis v. United States*, 371 U.S. 233, 242 (1973), and *Shotwell Mfg. Co. v. United States*, 371 U.S. 341, 363 (1963).

The rule, however, makes two exceptions for late-filed motions that may be excused more readily. Under proposed Rule 12(c)(2)(B), a party need only show prejudice if the defense or objection is based either on failure of the indictment to state an offense or on double jeopardy.

Judge Tallman said that double jeopardy requires special treatment and a more lenient standard for relief. He noted, for example, that a defendant may raise the issue of double jeopardy even after having entered a guilty plea.

A member warned that some judges may object to the proposed rule change because they believe that double-jeopardy claims are no different from any other defense. Professor Beale said that there is a good deal of case law on the matter. Although the law is not uniform, most cases currently give double-jeopardy claims preferential treatment under Rule 12 and analyze a late-filed claim for "plain error." Rather than have three different standards in the rule – cause plus prejudice, prejudice only, and plain error – she explained that the advisory committee decided to abandon the "plain error" test and let double-jeopardy claims, like claims of failure to state an offense, be governed by the prejudice-only standard. The change would likely not affect the result of any case.

A member recommended that the rule be published as presented but that the issue of double jeopardy be highlighted for comment in the publication or transmittal letter. Judge Tallman agreed with the suggestion.

Judge Tallman said that the proposed rule will clarify a difficult area of the law, provide guidance to both bench and bar, and lead to more uniform, nationwide application of the rule. Moreover, by specifying that Rule 52 does not apply, the rule will clarify how cases should be handled on appeal. The standards set forth in Rule 12 will apply exclusively, both in the trial courts and on appeal.

A member noted that a district court currently may forgive a matter not timely raised before trial for good cause, and it should continue to have maximum flexibility before trial to forgive any matter not raised in a timely manner. The proposed rule, however, requires a showing of both cause and prejudice at any stage.

Professor Beale responded although the rule itself is strict, it gives the court considerable leeway to be lenient in appropriate circumstances. Rule 12(b)(3) states that motions must be made before trial, but Rule 12(c)(1) and (2) allow the court to set a deadline for making motions and to provide extensions of the deadline. Judge Tallman also pointed to the language in paragraph 12(b)(3) that the basis for the motion must have been "then reasonably available."

Several members praised the advisory committee for its accomplishment and noted that all their concerns from earlier meetings had been addressed. Some offered suggestions for specific changes in the language of the proposed rule and committee note. Judge Tallman agreed to make further edits before publication.

The committee without objection by voice vote approved the proposed amendments for publication.

FED. R. CRIM. P. 34

Judge Tallman noted that the proposed amendment to Rule 34(b) (arresting judgment) conforms to the proposed amendments to FED. R. CRIM. P. 12(b). It would delete language from the current rule that the court "at any time while the case is pending . . . may hear a claim that the indictment or information fails to . . . state an offense." The revised rule will require that a defect in the indictment or information be raised before trial. He noted that the Standing Committee had previously approved the conforming amendment to Rule 34. Therefore, there was no need to seek further approval.

Informational Items

FED. R. CRIM. P. 16

Judge Tallman reported that the advisory committee at its April 2011 meeting had decided not to proceed at this time with any proposed amendments to Rule 16 (discovery and inspection) dealing with the government's obligation to disclose exculpatory and impeaching information under *Brady v. Maryland*, 373 U.S. 83 (1963). He explained that the committee could not reach a consensus on rule language that would effectively solve the problems that proponents of the amendments had cited regarding the failure of certain prosecutors to turn over needed information. Moreover, the Federal Judicial Center's recent survey had shown that there is a lack of consensus within the judiciary as to whether an amendment to Rule 16 is needed. The committee also had not been convinced that a rule change would actually prevent or dissuade an unscrupulous prosecutor from knowingly withholding exculpatory or impeaching information.

Judge Tallman thanked the Department of Justice for its comprehensive efforts to address its disclosure obligations through various internal means, including revision of the Department's manuals, compulsory training programs for prosecutors and staff, district-wide disclosure plans, local points of contact, and appointment of a national disclosure coordinator. Deputy Attorney General Cole added that the Department was further institutionalizing its policies by making the national criminal discovery coordinator a permanent position.

Judge Tallman thanked the Federal Judicial Center for its excellent research efforts, including the massive survey soliciting the views of judges and lawyers on disclosure of exculpatory and impeaching information. He also noted that the advisory committee was working with the Center to improve training for judges regarding disclosure issues, to create a good-practices guide on criminal discovery, and to amend the *Bench Book for U.S. District Court Judges* to provide additional practical advice for judges on how to handle disclosure issues.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Fitzwater and Professor Capra presented the report of the advisory committee, as set forth in Judge Fitzwater's memorandum and attachments of April 8, 2011 (Agenda Item 8).

Judge Fitzwater reported that the advisory committee had held its April 2011 meeting at the University of Pennsylvania Law School in Philadelphia and had one amendment to present for publication.

Amendment for Publication

FED. R. EVID. 803(10)

He explained that the proposed amendment to Rule 803(10) (hearsay exception for the absence of a public record) responds to the Supreme Court's decision in *Melendez-Diaz v. Massachusetts,* 129 S. Ct. 2527 (2009). In that case, the Court held that certifications reporting the results of forensic tests conducted by analysts are "testimonial" under the Confrontation Clause, as construed in *Crawford v. Washington,* 541 U.S. 36 (2004).

Under *Melendez-Diaz,* admitting a certification in lieu of in-court testimony violates the accused's right of confrontation. Likewise, it would be constitutionally infirm to admit a certification under FED. R. EVID. 803(10) offering to prove the absence of a public record. In both cases, admission would allow the truth of a matter to be proven by a written certification without live testimony.

Judge Fitzwater said that the proposed amendment to Rule 803(10) was based on a notice-and-demand procedure used in Texas and sanctioned in the Supreme Court's decision in *Melendez-Diaz.* The amendments specify that a prosecutor who intends to offer a certification must provide the defendant advance written notice of that intent at least 14 days before trial. The defendant is then given seven days to object in writing to use of the certification, putting the prosecutor on notice to produce the official preparing the certification at trial. If the defendant does not timely object, the certification may be

admitted. Professor Capra added that the advisory committee had worked closely with the Department of Justice and the federal public defenders in preparing the language of the proposal.

The committee without objection by voice vote approved the proposed amendment for publication.

Informational Items

SYMPOSIUM

Judge Fitzwater reported that the advisory committee will hold a symposium in October 2011 at William and Mary Law School to celebrate the restyled evidence rules – six weeks before the rules take effect. Several members of the Standing Committee will participate as panelists. One panel will look back at the decisions made during the restyling process. Another will explore the evidence issues likely to be considered in the future. The proceedings, he said, will eventually be printed in the *William and Mary Law Review*.

FED. R. EVID. 801

Judge Fitzwater said that the advisory committee at its April 2011 meeting had considered a proposed amendment to Rule 801(d)(1)(B) (hearsay exemption for certain prior statements) suggested initially by Judge Frank W. Bullock, Jr., a former member of the Standing Committee. He had proposed that the rule be amended to provide that all prior consistent statements be admissible under the hearsay exemption whenever they would be admissible to rehabilitate the witness's credibility. The amendment would eliminate the distinction between admission of a prior consistent statement solely for impeachment purposes and admission of the statement for its truth.

A member expressed strong support for the change and said that juries never understand the distinction and always use the prior consistent statement for all purposes, even though instructed that it may be used only for impeachment. Judge Fitzwater said that the advisory committee would take up a proposed amendment at its October 2011 meeting and was in the process of soliciting the views of interested parties and researching practices in state courts that have similar rules.

RULES COMMITTEE PROCEDURES

Ms. Kuperman reported that she, the committee reporters, and the rules staff had made additional changes in the draft revisions to *Procedures for the Conduct of Business*

by the Judicial Conference Committees on Rules of Practice and Procedure. An earlier draft had been presented to the committee at its January 2011 meeting.

She noted that the recent refinements defined such matters as: the appropriate standard for republishing proposed amendments, which documents comprise the official records of the committees, which records should be posted on the rules website, whether transcripts should be prepared of public hearings, and when hearings may be canceled because of insufficient public interest.

The committee unanimously by voice vote approved the proposed revisions in the committee procedures for approval by the Judicial Conference.

STRATEGIC PLANNING

Judiciary's Strategic Plan

Judge Rosenthal reported that Judge Charles R. Breyer, the Judiciary Planning Coordinator, had written to all Judicial Conference committees on May 5, 2011, seeking information on their efforts to implement the Judiciary's *Strategic Plan.* Specifically, he asked them to: (1) verify and update the information they had previously provided regarding the strategic initiatives they are pursuing; and (2) begin to consider how to measure progress in implementing the *Strategic Plan.* He also asked the committees at their June 2011 meetings to identify how they will assess whether each initiative's outcome has been met and the metrics they use to gauge progress.

Judge Rosenthal asked the committee to consider a draft committee response that she had prepared in response to Judge Breyer's requests.

The committee unanimously by voice vote approved sending the proposed response to the Judicial Conference's Advisory Committee on Judiciary Planning.

Status of the Rules Program

Judge Rosenthal said that the work of the rules committees was of a uniformly high standard and pointed out that the agenda book currently before the committee was excellent. She emphasized that a great deal of detailed work is needed on an ongoing basis to prepare a dozen committee agenda books each year, an annual package of proposed rule amendments for publication and comment, an annual package of rule amendments and supporting documents for the Supreme Court, and numerous letters and reports to Congress. All the work, moreover, has to be perfect.

She said that each committee has an excellent chair, reporters, and membership. She explained that the chair, with the help of others, makes recommendations to the Chief Justice on a regular basis of individuals who would be outstanding future members. She asked the members to help her and her successor, Judge Kravitz, in identifying people who would be candidates for the committees in the future.

She noted that one of the committees' overarching concerns is guaranteeing productive relations with Congress. She said that the committees currently have very good communications with the Hill and work hard to maintain them. It is essential, she added, that the rules committees continue to be viewed as truly professional and truly nonpartisan. She emphasized that the committees' work is subject to great public scrutiny, and it is becoming more common to receive last-minute calls from Congressional staff motivated by suggestions made by opponents of particular amendments. She predicted that those calls would likely continue, and the committees will have to be prepared to deal with them.

She noted that the committees had succeeded well in explaining the Rules Enabling Act process to Congressional staff and demonstrating how careful and meticulous the committees are in their work. But these educational efforts, she said, are complicated by the regular turnover in Congressional staff, as well as in members of Congress. The work of the rules committees, she said, is very different from the legislative process that Congress is used to. Moreover, unlike the Congressional process, the work of the rules committees, and the positions the committees take, defy partisan lines.

Judge Rosenthal reported that the committees' relations with the Supreme Court are very important. She noted that the Standing Committee chair and reporter meet every year with the chief justice to make sure that he is apprised of pending rules projects and proposed amendments. She added that both Chief Justice Roberts and Justice Alito are alumni of the rules committees. The other members of the Court, though, may not know in detail how the committees operate. She said that she was pursuing the idea of having an informal discussion with the full Court about how the committees do their work and what projects they are working on.

She pointed out that relations with the Department of Justice are also very important and have been very productive. Department officials serve on each of the committees, and Department staff have been extremely cooperative and helpful.

She noted that the committees need to be more effective in their relationships with other Judicial Conference committees and with other parts of the Administrative Office. She emphasized that the rules committees gain a great deal of useful information regarding court practices and procedures as part of their detailed work under the Rules

Enabling Act process. They also have an important interest in implementing the rules and educating judges and lawyers about them.

The committees, she said, need to be more consistent in following up on suggestions made to other committees. She urged closer coordination, in particular, with the Court Administration and Case Management Committee, mentioning the recent collaborative efforts with that committee on the privacy and sealing reports. She pointed out that the committees were also working closely with the Federal Judicial Center on revising the *Bench Book for U.S. District Judges*, suggesting educational programs for judges, and producing guidebooks and other supporting information.

She suggested that the committees' relationship with the academy is not where it needs to be. She noted that several law professors had expressed skepticism about the rules process during the recent debates on the impact of the Supreme Court's decisions in *Twombly* and *Iqbal*. She recommended that the committees meet more often at law schools and invite law professors to observe and participate in what the committees do and how they do it. In addition, it would be beneficial, both for the students and the professors, for committee members to go to law schools and teach classes explaining the rules process. It is also essential to continue inviting law professors to attend the various committee special programs and mini-conferences.

Judge Rosenthal pointed to the close and growing relations between the committees and the American Bar Association and other bar organizations. She said that the committees had encouraged ongoing working relations with the major bar associations, but more work was needed in the area of criminal rules. She noted that a meeting had been held with representatives of the National Association of Criminal Defense Lawyers, and the association had been invited to send a member as liaison to the rules meetings. She added that more outreach could also be done with the bankruptcy community. It is likely, she said, that there will be political opposition in Congress to some of the proposed bankruptcy rules.

She reported that all the rules committees have to deal with the twin issues of the impact of technology and the tension between making all records and proceedings widely available to the public and protecting valid privacy interests. She suggested that the committees need to examine all the rules to consider the impact of technology on the legal process.

Finally, Judge Rosenthal thanked the Administrative Office staff for their excellent work in supporting all the many functions of the rules committees and the Federal Judicial Center for its superb efforts on all the many research projects that the committees have asked it to undertake.

NEXT MEETING

The committee will hold its next meeting on Thursday and Friday, January 5 and 6, 2012, in Phoenix, Arizona.

Respectfully submitted,

Peter G. McCabe,
Secretary

TAB 4

MEMORANDUM

DATE: September 21, 2011

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve

RE: Item Nos. 09-AP-C and 08-AP-L

This memo presents proposed changes to Appellate Rule 6 (concerning appeals in bankruptcy matters). As discussed at the joint Appellate and Bankruptcy Rules Committee meeting last spring, the Bankruptcy Rules Committee is proceeding with its project to revise Part VIII of the Bankruptcy Rules (dealing with appeals to the district court or bankruptcy appellate panel (BAP) in bankruptcy matters).[1] The Bankruptcy Rules Committee will consider a portion of the proposed revision of Part VIII at its fall 2011 meeting,[2] and is planning to have the entire proposed revision ready for publication in summer 2012 if the Standing Committee approves. This therefore seems like a good time to consider possible revisions to Appellate Rule 6.

One key topic that seems worth addressing is that of direct appeals from the bankruptcy court to the court of appeals. Part I of this memo discusses a proposed new Appellate Rule 6(c) that would govern those appeals and that would dovetail with provisions in the proposed revised Part VIII rules (especially proposed Bankruptcy Rule 8006). In the light of the attention that specialists in bankruptcy appellate procedure will focus on the proposals that are to be published for comment in summer 2012, it also makes sense to consider any additional revisions that should be made to Appellate Rule 6. Accordingly, Part II of this memo discusses proposed revisions to Appellate Rule 6(b) (which concerns appeals from district courts or BAPs exercising appellate jurisdiction in a bankruptcy case). Part III of this memo sets forth the proposed amendments to Rule 6.[3]

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[1] The Part VIII proposals have several goals: to emulate the style of the Appellate rules; to add to the Part VIII rules useful features currently found in the Appellate Rules but not the Part VIII rules; to retain distinctive features of the Part VIII rules that are suited to bankruptcy practice; to clarify rules that have caused uncertainty; and to update the Part VIII rules to account for recent and future technological developments.

[2] The proposed revisions to Part VIII of the Bankruptcy Rules are enclosed. If you are viewing an electronic version of the Part VIII draft, portions in red type are new compared with the spring 2011 draft and portions that are struck out show deletions compared with the spring 2011 draft. If you are reading a print copy of the Part VIII draft, the red type may not be readily distinguishable from the black type.

[3] The proposed amendments are similar but not identical to those included in the spring 2011 agenda materials. The current version incorporates the results of discussions held over the

I. Proposed new Appellate Rule 6(c)

Proposed new Appellate Rule 6(c) will address permissive direct appeals under 28 U.S.C. § 158(d)(2). Part I.A of this memo summarizes the reasons why the Appellate Rules should address such appeals; the rest of Part I discusses specific features of proposed Rule 6(c).

A. The background

At the time that Section 158(d)(2) came into being as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 [BAPCPA], the Appellate Rules Committee decided that no immediate action was necessary with respect to the Appellate Rules. The minutes of the Committee's April 2005 meeting explain:

> ... [BAPCPA] would amend § 158 to permit appeals by permission -- both of final orders and of interlocutory orders -- directly from a bankruptcy court to a court of appeals....
>
> When Rule 5 was restyled in 1998, the Committee intentionally wrote the rule broadly so that it could accommodate new permissive appeals authorized by Congress or the Rules Enabling Act process. In this instance, that strategy appears to have worked, as Rule 5 seems broad enough to handle the new permissive appeals authorized by § 1233 [of BAPCPA]. Indeed, § 1233 specifically provides that "an appeal authorized by the court of appeals under section 158(d)(2)(A) of title 28 ... shall be taken in the manner prescribed in subdivisions (a)(1), (b), (c), and (d) of rule 5 of the Federal Rules of Appellate Procedure." Section 1233 clarifies that references in Rule 5 to "district court" should be deemed to include a bankruptcy court or BAP and that references to "district clerk" should be deemed to include a clerk of a bankruptcy court or BAP.
>
> The Reporter said that neither he nor Prof. Morris (the Reporter to the Bankruptcy Rules Committee) believes that anything in § 1233 requires this Committee to amend Rule 5. With the clarifications made by § 1233 itself, Rule 5 should suffice to handle the new permissive appeals.
>
> .... By consensus, the Committee agreed to remove Item No. 05-03 from its study agenda.

Importantly, a key basis for the Committee's conclusion that no Appellate Rules amendments were needed was the fact that BAPCPA put in place interim procedures for administering the new direct appeals mechanism. Section 1233(b) – the uncodified BAPCPA

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summer.

provision setting forth those interim procedures – specifies that "[a] provision of this subsection shall apply to appeals under section 158(d)(2) of title 28, United States Code, until a rule of practice and procedure relating to such provision and such appeals is promulgated or amended under chapter 131 of such title [28 U.S.C.A. § 2071 et seq.]."

Effective December 1, 2008, a new subdivision (f) was added to Bankruptcy Rule 8001 to address appeals under Section 158(d)(2). Thus, as to the matters covered in Rule 8001(f), the interim BAPCPA procedures no longer apply. Rule 8001(f) was amended effective December 1, 2009 to adjust time periods as part of the time-computation project. The general thrust of the Rule continues to be as described in the 2008 Committee Note to Rule 8001(f):

> Subdivision (f) is added to the rule to implement the 2005 amendments to 28 U.S.C. § 158(d). That section authorizes appeals directly to the court of appeals, with that court's consent, upon certification that a ground for the appeal exists under § 158(d)(2)(A)(i)-(iii). Certification can be made by the court on its own initiative under subdivision (f)(4), or in response to a request of a party or a majority of the appellants and appellees (if any) under subdivision (f)(3). Certification also can be made by all of the appellants and appellees under subdivision (f)(2)(B). Under subdivision (f)(1), certification is effective only when a timely appeal is commenced under subdivision (a) or (b), and a notice of appeal has been timely filed under Rule 8002. These actions will provide sufficient notice of the appeal to the circuit clerk, so the rule dispenses with the uncodified temporary procedural requirements set out in § 1233(b)(4) of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8.
>
> ...
>
> A certification under subdivision (f)(1) does not place the appeal in the circuit court. Rather, the court of appeals must first authorize the direct appeal. Subdivision (f)(5) therefore provides that any party intending to pursue the appeal in the court of appeals must seek that permission under Rule 5 of the Federal Rules of Appellate Procedure. Subdivision (f)(5) requires that the petition for permission to appeal be filed within 30 days after an effective certification.

For the moment, then, the state of play concerning permissive direct appeals under Section 158(d)(2) is that current Rule 8001(f) governs a variety of aspects of procedure before the bankruptcy court, district court and BAP and – with respect to proceedings in the court of appeals – provides that "[a] petition for permission to appeal in accordance with F. R. App. P. 5 shall be filed no later than 30 days after a certification has become effective as provided in

subdivision (f)(1)."[4] Current Rule 8001(f)'s 30-day time limit for the petition for permission to appeal thus supersedes the 10-day time limit previously set in the interim statutory provision (Section 1233(b)(4)(A) of BAPCPA).[5] But Rule 8001(f) does not address any other aspect of procedure in the court of appeals (other than to direct that it proceed under Appellate Rule 5). It therefore seems possible to argue that Sections 1233(b)(5) and (6) of BAPCPA are still operative despite the adoption of Rule 8001(f).[6] Those sections provide:

> (5) References in rule 5.--For purposes of rule 5 of the Federal Rules of Appellate Procedure--
>
> > (A) a reference in such rule to a district court shall be deemed to include a reference to a bankruptcy court and to a bankruptcy appellate panel; and
> >
> > (B) a reference in such rule to a district clerk shall be deemed to include a reference to a clerk of a bankruptcy court and to a clerk of a bankruptcy appellate panel.
>
> (6) Application of rules.--The Federal Rules of Appellate Procedure shall apply in the courts of appeals with respect to appeals authorized under section 158(d)(2)(A), to the extent relevant and as if such appeals were taken from final judgments, orders, or decrees of the district courts or bankruptcy appellate panels exercising appellate jurisdiction under subsection (a) or (b) of section 158 of title 28, United States Code.

Both of these provisions appear to serve a useful function. Rule 5's references to the district court and district clerk will not always make sense, in connection with Section 158(d)(2)

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[4] Current Rule 8001(f)(1), in turn, provides that "[a] certification of a judgment, order, or decree of a bankruptcy court to a court of appeals under 28 U.S.C. § 158(d)(2) shall not be effective until a timely appeal has been taken in the manner required by subdivisions (a) or (b) of this rule and the notice of appeal has become effective under Rule 8002." The concept of the notice of appeal becoming effective appears to refer to Rule 8002's treatment of the effect of tolling motions.

[5] Of course, the bankruptcy rules ordinarily do not have the effect of superseding statutes. (28 U.S.C. § 2075, concerning rulemaking for "cases under Title 11," does not include a supersession clause.) But in the case of the interim procedures set by BAPCPA, Section 1233(b)(1) explicitly provides for supersession. And it seems fair to count Rule 8001(f) as a "rule authorizing the appeal" for purposes of Appellate Rule 5(a)(2)'s deference to "the time specified by the statute or rule authorizing the appeal."

[6] The argument would be that as yet no rule has been promulgated "relating to such provision[s]" within the meaning of BAPCPA Section 1233(b)(1).

appeals, unless they are read to include references to the other two types of court and types of clerk as appropriate. Likewise, it is useful to specify which portions of the Appellate Rules apply to a Section 158(d)(2) appeal.

Although these interim rules are useful, it seems worthwhile to specify in more detail the way in which the Appellate Rules apply to direct appeals under Section 158(d)(2). Proposed new Appellate Rule 6(c) would provide that detail, and the remainder of this Part of the memo discusses features of that proposal.

B. The list of Appellate Rules that do not apply to direct appeals

Proposed Appellate Rule 6(c)(1) lists the Appellate Rules provisions that would not apply to direct bankruptcy appeals under Section 158(d)(2). The list is modeled roughly on the similar list of excluded provisions in existing Appellate Rule 6(b)(1)(A), with the following modifications:

- Appellate Rules 3 and 4 are excluded because they concern appeals as of right.

- Appellate Rule 5(a)(3) is excluded. That Rule provides: "If a party cannot petition for appeal unless the district court first enters an order granting permission to do so or stating that the necessary conditions are met, the district court may amend its order, either on its own or in response to a party's motion, to include the required permission or statement. In that event, the time to petition runs from entry of the amended order." This provision would cause confusion in the case of direct appeals from bankruptcy court, because the case may be in the bankruptcy court, the district court, or the BAP at the time the required certification is sought. The question of which court may make the certification is addressed in proposed Bankruptcy Rule 8006, and it seems better to leave the matter to that Rule and to exclude Appellate Rule 5(a)(3) from applying to such appeals.

- Appellate Rules 6(a) and (b) are excluded.

- Appellate Rules 8(a) and 8(c) are excluded for reasons that are discussed in Part I.F below.

- Appellate Rule 12 is excluded. Rule 12(a) appears inapposite because, in the case of permissive appeals, docketing is accounted for in Appellate Rule 5(d)(3).[7] Rule 12(c) is supplanted, in this context, by proposed Rule 6(c)(2)(C). Rule 12(b) – which requires the

[7] That Rule provides: "The district clerk must notify the circuit clerk once the petitioner has paid the fees. Upon receiving this notice, the circuit clerk must enter the appeal on the docket. The record must be forwarded and filed in accordance with Rules 11 and 12(c)." Proposed Rule 6(c)(1)(C) would direct that Rule 5(d)(3)'s reference to "Rules 11 and 12(c)" be read as referring to proposed Rules 6(c)(2)(B) and (C).

filing of a representation statement – might be useful to apply in the context of direct appeals under Section 158(d)(2), but Rule 12(b) is awkwardly worded for use in such a context. The requirement of a representation statement is set out in proposed Rule 6(c)(2)(D).

C. Dealing with the record on appeal

The Appellate Rules will need to treat the record on direct appeals differently than the record on bankruptcy appeals from a district court or BAP. Appeals from the district court or BAP exercising appellate jurisdiction in a bankruptcy case are governed by Appellate Rule 6(b). That rule contains a streamlined procedure for redesignating and transmitting the record on appeal, because the appellate record will already have been compiled for purposes of the appeal to the district court or the BAP. In the context of a direct appeal, the record will generally require compilation from scratch. The closest model for the compilation and transmission of the bankruptcy court record would appear to be the rules chosen by the Part VIII project for appeals from the bankruptcy court to the district court or the BAP. Thus, proposed Rule 6(c)(2) incorporates the relevant Part VIII rules by reference while making some adjustments to account for the particularities of direct appeals to the court of appeals.

D. Dealing with tolling motions

The process for taking a direct appeal under § 158(d)(2) requires (1) a timely appeal from the bankruptcy court, (2) a certification (by a lower court or by all parties) under Section 158(d)(2), and (3) the filing of a request for permission to appeal in the court of appeals. Proposed Bankruptcy Rule 8006 addresses events (1) and (2) in detail, and sets the time limit for event (3). As to the timeliness of the appeal from the bankruptcy court, proposed Bankruptcy Rule 8006 requires the taking of "a timely appeal ... in accordance with Rule 8003 or 8004," and proposed Bankruptcy Rules 8003 and 8004 require the filing of a notice of appeal with the bankruptcy clerk "within the time allowed by Rule 8002." Proposed Bankruptcy Rule 8002(b) provides for the effect of tolling motions on the time for taking appeals from the bankruptcy court. The question of timing is well covered by the proposed Part VIII rules, and it seems unnecessary for Appellate Rule 6(c) to discuss the effect of tolling motions filed in the bankruptcy court. The matter is, for that reason, not addressed in proposed Rule 6(c).

E. Dealing with electronic filing and transmission

The Part VIII draft assumes as a default rule the use of electronic means of transmission of documents. Rule 8001(e) defines the term "transmit" to mean "to send electronically unless the governing rules of the court permit or require mailing or other means of delivery of the document in question." This terminology is used with respect to the filing and service of briefs and other documents (Rule 8011) and the sending of the record to the appellate court (Rule 8010). In light of this reorientation to electronic transmission, references to "writings" and "copies" have been avoided. In taking this approach, the Part VIII revision would be following the path already taken by some federal courts on a local basis.

This approach of the Part VIII rules presents some challenges to the drafting of provisions relating to direct appeals from the bankruptcy court to the court of appeals. The Appellate Rules have always assumed a contrary default rule – that the record will be forwarded and filed in paper form. Proposed Rule 6(c) takes electronic filing and transmission as a given, while also accommodating the use of a paper record. Proposed Rule 6(c)(2)(D) addresses the event that traditionally has been known as filing the record. If the record is transmitted in the form of electronic links to electronic docket entries, then it might seem odd to speak of the circuit clerk "filing" the record. Thus, Rule 6(c)(2)(D) speaks instead of the clerk noting the record's receipt on the docket. Because other parts of the Appellate Rules use the date of filing of the record for purposes of computing certain deadlines, proposed Rule 6(c)(2)(D) defines the receipt date as the filing date.

Assuming that such an approach is appropriate, it would also be a good idea to consider similar modifications to Appellate Rules 6(b)(2)(C) and (D), which concern the treatment of the record on appeal from a judgment of a district court or BAP exercising appellate jurisdiction in a bankruptcy case. I discuss that issue in Part II.D of this memo.

F. Dealing with stays pending direct appeals

It is necessary to determine whether stays pending direct appeals will be governed by proposed Bankruptcy Rule 8007 or by Appellate Rule 8(a). The procedures set out in Appellate Rule 8(a) and in proposed Rule 8007 are generally but not entirely similar.

Proposed Rule 8007 addresses certain matters that Appellate Rule 8 does not, and vice versa. The matters addressed by Rule 8007 but not by Rule 8 are:

- "[T]he suspension or continuation of proceedings in a case or other relief permitted by Rule 8007(e)," see Rules 8007(a)(1)(D) and 8007(e).

- The procedure for seeking review (by motion) of a bankruptcy court's grant of relief under Rule 8007(a)(1), see Rule 8007(b)(1).

- The absence of a bond requirement in appeals by federal entities, see Rule 8007(d). (But this difference between Rule 8007 and Rule 8 is superficial, given the existence of 28 U.S.C. § 2408.)

Matters addressed by Rule 8 but not by Rule 8007 are:

- Presentation of urgent motions to a single judge rather than the panel, see Rule 8(a)(2)(D).

- Procedures for enforcement of the surety's liability, see Rule 8(b). (This is omitted from Rule 8007 because it is covered by Rule 9025.)

Reviewing these lists, it seems that the matters addressed by Rule 8007 and not by Rule 8 are matters that it would be useful to address in the context of direct appeals from the bankruptcy court to the court of appeals. In particular, it seems useful to address the matters treated in proposed Rules 8007(a)(1)(D) and 8007(e). By contrast, the matters treated by Rule 8(a) but not by Rule 8007 seem less important to include; the treatment of single-judge motions by Rule 8(a)(2)(D) is somewhat redundant when viewed in light of Appellate Rule 27(c). Accordingly, proposed Appellate Rule 6(c) and proposed Bankruptcy Rule 8007 are drafted so as to apply Bankruptcy Rule 8007 to direct appeals and to exclude Appellate Rule 8(a) from applying to those appeals. Rule 6(c) also excludes Rule 8(c), since the latter applies to criminal cases.

Rule 8(b), by contrast, probably should not be excluded. Rule 8(b) is compatible with Bankruptcy Rule 9025,[8] and Rule 8(b) is relevant beyond the context of stays and injunctions pending appeal; Rule 8(b) also applies to sureties on bonds for costs on appeal under Rule 7. Accordingly, proposed Rule 6(c) does not exclude Rule 8(b) from application to direct appeals.[9]

G. Dealing with indicative rulings

Under the proposals as currently drafted, both Appellate Rule 12.1 and proposed Bankruptcy Rule 8008 govern indicative-ruling practice in the context of direct appeals under Section 158(d)(2). Because Rule 8008 operates differently depending on whether an appeal is pending in an "appellate court" (defined in Rule 8001(d) as either the district court or BAP) or a court of appeals, the rule has been drafted to ensure that it and Appellate Rule 12.1 work together properly when an indicative ruling is sought in the bankruptcy court while a direct appeal under § 158(d)(2) is pending in the court of appeals.

Rule 8008 is modeled on Civil Rule 62.1 and Appellate Rule 12.1. When appeals are pending in the district court or BAP, Rule 8008 governs the indicative-ruling procedure in both the bankruptcy court and the appellate court. When an appeal is pending in the court of appeals under § 158(d)(2), Rule 8008 specifies only the bankruptcy court's options and the notice that must be provided to the clerk of the court of appeals.[10] Thus in the latter context it operates in a

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[8] Bankruptcy Rule 9025 provides: "Whenever the Code or these rules require or permit the giving of security by a party, and security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits to the jurisdiction of the court, and liability may be determined in an adversary proceeding governed by the rules in Part VII."

[9] I note that there might be some question whether bankruptcy judges have statutory and constitutional authority to finally determine the surety's liability. However, Rule 8(b), read together with proposed Rule 6(c), would not attempt to resolve this question, because Rule 6(c)(1)(B) would define "district court" to include the bankruptcy court only "to the extent appropriate."

[10] In subdivisions (a) and (b), the term "court in which the appeal is pending" is used to include the court of appeals as well as the district court or BAP.

similar fashion to Civil Rule 62.1. The procedures applicable to the court of appeals are then specified by Appellate Rule 12.1, which would be made applicable in the case of a direct bankruptcy appeal by proposed Rule 6(c)(1).

H. Dealing with documents under seal

Proposed Bankruptcy Rule 8009(f) deals with the treatment (for purposes of the record on appeal) of documents that were filed in the bankruptcy court under seal. The Appellate Rules do not include any similar provision, but the circuits have a number of local rules that address the treatment of sealed documents. Proposed Appellate Rule 6(c), as currently drafted, would apply proposed Bankruptcy Rule 8009(f) to direct appeals under Section 158(d)(2). Whether this is the best approach may depend on whether the Appellate Rules Committee decides to propose a national rule that would govern sealing on appeal more generally (a topic that is discussed elsewhere in the agenda materials).

II. Proposed revisions to Appellate Rule 6(b)

This section discusses the proposed amendments to Appellate Rule 6(b), which governs bankruptcy appeals from district courts and BAPs to courts of appeals.

A. Updating the list of excluded provisions in Appellate Rule 6(b)(1)(A)

Appellate Rule 6(b)(1)(A) lists Appellate Rules provisions that do not apply to bankruptcy appeals from a district court or BAP to a court of appeals. This list of exclusions originated in 1989 as part of the new Appellate Rule 6 that was adopted in the wake of *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), and the Bankruptcy Amendments and Federal Judgeship Act of 1984.[11] The list of exclusions has been updated only once, as part of the 1998 restyling; at that point, references to Appellate Rules 3.1 and 5.1 were removed (due to the 1998 abrogation of those Rules). In the light of the other changes to Rule 6 that are under consideration, it seems useful to review the Appellate Rules to see whether any other changes that have been made since 1989 might warrant an adjustment to the list of exclusions. It turns out that only one such change appears necessary.[12]

Appellate Rule 6(b)(1)(A)'s reference to Appellate Rule 12(b) appears to need updating. In 1989, Appellate Rule 12(b) concerned the record and read as follows:

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[11] Pub. L. No. 98-353, 98 Stat. 333.

[12] Appellate Rule 12.1 took effect in 2009 and formalizes the practice of indicative rulings. Though that practice may be more rare in the bankruptcy context, there seems to be no need to exclude the Rule from operating in that context. Thus, it appears that Rule 12.1 should not be added to the list of exclusions unless a reason emerges for doing so.

> (b) Filing the Record, Partial Record, or Certificate. Upon receipt of the record transmitted pursuant to Rule 11(b), or the partial record transmitted pursuant to Rule 11(e), (f), or(g), or the clerk's certificate under Rule 11(c), the clerk of the court of appeals shall file it and shall immediately give notice to all parties of the date on which it was filed.

In 1993, a new Appellate Rule 12(b) was added and the existing Appellate Rule 12(b) was re-numbered 12(c). Appellate Rule 6(b) was not amended to take account of this re-numbering. It seems useful to do so at this point so as to restore the original intent of this exclusion. It seems reasonable to assume that it would be useful to apply Appellate Rule 12(b) to bankruptcy appeals from district courts or BAPs to a court of appeals; that provision requires the filing of a representation statement, and would seem equally useful in connection with bankruptcy appeals as it is in connection with other appeals as of right. Accordingly, Rule 6(b)(1)(A)'s reference to Appellate Rule 12(b) should become a reference to Appellate Rule 12(c).

B. Adding new Rule 6(b)(1)(D) regarding indicative rulings

When a non-direct bankruptcy appeal is taken from a district court or BAP to a court of appeals, there may be instances when the indicative ruling mechanism might be useful. Appellate Rule 12.1 and proposed Bankruptcy Rule 8008 would apply to such situations, but it is necessary to account for the fact that the court in which the relevant relief is being sought might be a BAP or a bankruptcy court rather than the district court. Thus, proposed new Appellate Rule 6(b)(1)(D) would direct users to read Appellate Rule 12.1's references to the district court as also encompassing bankruptcy courts and BAPs.

C. Amending Appellate Rule 6(b)(2)(A) to track Appellate Rule 4(a)(4)

The proposed amendments to Appellate Rule 6(b)(2)(A) would parallel the 2009 amendment to Appellate Rule 4(a)(4). These changes – which are discussed in Part II.C.1 below – have received support, in principle, from the Bankruptcy Rules Committee's Subcommittee on Privacy, Public Access, and Appeals. A pending proposal to further amend Rule 4(a)(4) would address the possibility that time might elapse between the entry of an order disposing of the last remaining tolling motion and any ensuing alteration or amendment of the judgment. The fate of the latter proposal is uncertain, and thus a parallel proposal to amend Appellate Rule 6(b)(2)(A) is not reflected in the proposed rule. Issues relating to that pending proposal to amend Rule 4(a)(4) are summarized in Part II.C.2 below.

1. Paralleling the 2009 amendment to Appellate Rule 4(a)(4)

Rule 6(b)(2)(A)(ii) contains an ambiguity similar to the ambiguity in former Rule 4(a)(4) that was pointed out in *Sorensen v. City of New York*, 413 F.3d 292 (2d Cir. 2005). A 2009 amendment to Rule 4(a)(4) removed the ambiguity in that rule by altering Rule 4(a)(4)(B)(ii) as follows: "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."

Rule 6(b)(2)(A)(ii) deals with the effect of motions under current Bankruptcy Rule 8015 on the time to appeal from a judgment, order, or decree of a district court or BAP exercising appellate jurisdiction in a bankruptcy case. Rule 6(b)(2)(A)(ii) states that "[a] party intending to challenge an altered or amended judgment, order, or decree must file a notice of appeal or amended notice of appeal within the time prescribed by Rule 4 ... measured from the entry of the order disposing of the motion." Before the 1998 restyling of the Appellate Rules, the comparable subdivision of Rule 6 instead read, "A party intending to challenge an alteration or amendment of the judgment, order, or decree shall file an amended notice of appeal …."

At its fall 2008 meeting, the Appellate Rules Committee discussed the possibility of amending Rule 6(b)(2) to eliminate the Rule's ambiguity. The Committee decided to seek the views of the Bankruptcy Rules Committee on this question. The Bankruptcy Rules Committee referred the matter to its Subcommittee on Privacy, Public Access, and Appeals. The proposed amendment reflects the Subcommittee's guidance.

2. The pending proposal to amend Rule 4(a)(4)

As noted elsewhere in the Appellate Rules Committee's agenda book,[13] the Civil / Appellate Subcommittee has been considering the possibility of amending Appellate Rule 4(a)(4) to clarify appeal deadlines in cases where a motion tolls the appeal time. The Rule 4(a)(4) proposal grows out of a suggestion that problems may arise in some cases because Appellate Rules 4(a)(4)(A), (B)(i) and (B)(ii) all peg timing questions to the entry of the order disposing of the last remaining tolling motion, and they do not take account of the possibility that time may elapse between that order and any ensuing amendment or alteration of the judgment.[14] The Civil / Appellate Subcommittee, and the Appellate Rules Committee, have been considering possible ways to revise Appellate Rule 4(a)(4) to address this issue. Discussions to date have revealed a number of drafting issues and problems. Thus, any attempt to incorporate these discussions into the treatment of Appellate Rule 6(b) appears premature. But in the meantime, it will be necessary to decide how Appellate Rule 6(b)(2) should treat the re-starting of appeal time after disposition of rehearing motions.

At present, this question is addressed by both Bankruptcy Rule 8015 and Appellate Rule 6(b)(2)(A), and the two rules are inconsistent in their approach. Current Bankruptcy Rule 8015 provides that "[u]nless the district court or the bankruptcy appellate panel by local rule or by

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[13] See the memo on Item No. 08-AP-D.

[14] Such time delays might arise, for example, where remittitur is ordered.

court order otherwise provides, a motion for rehearing may be filed within 14 days after entry of the judgment of the district court or the bankruptcy appellate panel. If a timely motion for rehearing is filed, the time for appeal to the court of appeals for all parties shall run from the entry of the order denying rehearing or the entry of subsequent judgment." Appellate Rule 6(b)(2)(A)(i) currently provides in part that "[i]f a timely motion for rehearing under Bankruptcy Rule 8015 is filed, the time to appeal for all parties runs from the entry of the order disposing of the motion." Thus, oddly, both of these rules purport to set the point from which the re-started appeal time runs, and the two rules specify what may (in some cases) turn out to be two different points in time. That is to say, in cases where the order granting rehearing is entered on Day X and the resulting amended judgment is entered on Day X + 20, Appellate Rule 6(b)(2)(A) currently tells us that the appeal time runs from Day X, yet Bankruptcy Rule 8015 tells us that the appeal time runs from Day X + 20.

This inconsistency would be eliminated by the proposed amendments to Part VIII. Proposed Rule 8023 governs motions for rehearing in bankruptcy appeals filed in the district court and BAP, thus replacing current Rule 8015. Following the example of Civil Rules 50, 52 and 59, proposed Rule 8023 does not address the question of when the appeal time re-starts after disposition of a tolling motion. Instead, it leaves the issue to be addressed by Appellate Rule 6(b)(2)(A)(i). For the present, no change is proposed in Appellate Rule 6(b)(2)(A)(i)'s approach to the re-starting issue; but it may be useful to seek input on this question during the comment period.

It should also be noted that because the Part VIII project will re-number Bankruptcy Rule 8015, Appellate Rule 6(b)(2)(A)(i) should be revised to refer to Bankruptcy Rule 8023.

D. Amending Appellate Rule 6(b)(2) to address electronic filing

As noted in Part I.E above, the proposed Part VIII amendments assume as a default rule the use of electronic means of transmission of documents. The Appellate Rules have always assumed a contrary default rule, and thus contemplate that the record on appeal will be forwarded and filed in paper form. The proposed draft of Rule 6(c) (concerning direct appeals) takes electronic filing and transmission as a given, while also accommodating the use of a paper record.

Assuming that such an approach is appropriate, it would also be a good idea to consider similar modifications to Appellate Rules 6(b)(2)(C) and (D), which concern the treatment of the record on appeal from a judgment of a district court or BAP exercising appellate jurisdiction in a bankruptcy case. The proposed amendments to Rule 6 include such modifications.

III. The proposed amendments to Rule 6

Here is a copy of Rule 6, marked to show the proposed amendments:

Rule 6. Appeal in a Bankruptcy Case ~~From a Final Judgment, Order, or Decree of a~~

~~**District Court or Bankruptcy Appellate Panel**~~

(a) Appeal From a Judgment, Order, or Decree of a District Court Exercising Original Jurisdiction in a Bankruptcy Case. An appeal to a court of appeals from a final judgment, order, or decree of a district court exercising jurisdiction under 28 U.S.C. § 1334 is taken as any other civil appeal under these rules.

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

(1) Applicability of Other Rules. These rules apply to an appeal to a court of appeals under 28 U.S.C. § 158(d)(1) from a final judgment, order, or decree of a district court or bankruptcy appellate panel exercising appellate jurisdiction under 28 U.S.C. § 158(a) or (b)~~. But there are 3 exceptions~~, but with these qualifications:

(A) Rules 4(a)(4), 4(b), 9, 10, 11, ~~12(b)~~ 12(c), 13-20, 22-23, and 24(b) do not apply;

(B) the reference in Rule 3(c) to "Form 1 in the Appendix of Forms" must be read as a reference to Form 5; ~~and~~

(C) when the appeal is from a bankruptcy appellate panel, ~~the term~~ "district court," as used in any applicable rule, means "appellate panel~~.~~"; and

(D) in Rule 12.1, "district court" includes a bankruptcy court or bankruptcy appellate panel.

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

(A) Motion for r~~R~~ehearing.

(i) If a timely motion for rehearing under Bankruptcy Rule ~~8015~~ 8023 is filed, the time to appeal for all parties runs from the entry of the order disposing of the motion. A notice of appeal filed after the district court or bankruptcy appellate panel announces or enters a judgment, order, or decree – but before disposition of the motion for rehearing – becomes effective when the order disposing of the motion for rehearing is entered.

(ii) ~~Appellate review of~~ If a party intends to challenge the order disposing of the motion – or the alteration or amendment of a judgment, order, or decree upon the motion – then ~~requires~~ the party, in compliance with Rules 3(c) and 6(b)(1)(B), ~~to amend a previously filed notice of appeal. A party intending to challenge an altered or amended judgment, order, or decree~~ must file a notice of appeal or amended notice of appeal. The notice or amended notice[15] must be filed within the time prescribed by Rule 4 – excluding Rules 4(a)(4) and 4(b) – measured from the entry of the order disposing of the motion.

(iii) No additional fee is required to file an amended notice.

(B) The r~~R~~ecord on a~~A~~ppeal.

(i) Within 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~~ 8009 – 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

[15] Professor Kimble's style comments would substitute "It" for "The notice or amended notice." The Committee may wish to consider whether the longer formulation is clearer.

circuit clerk.

(ii) An appellee who believes that other parts of the record are necessary must, within 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.

(iii) The record on appeal consists of:

• the redesignated record as provided above;

• the proceedings in the district court or bankruptcy appellate panel; and

• a certified copy of the docket entries prepared by the clerk under Rule 3(d).

(C) ~~Forwarding~~ Transmitting[16] the rRecord.

(i) When the record is complete, the district clerk or bankruptcy appellate panel clerk must number the documents constituting the record and ~~send~~ promptly transmit ~~them promptly to the circuit clerk together with a list of the documents correspondingly numbered and reasonably identified~~ to the circuit clerk either the record or notice of how to access it electronically. ~~Unless directed to do so by a party or the circuit clerk~~ If the record is transmitted in paper form, the clerk will not send ~~to the court of appeals~~ documents of unusual bulk or weight, physical exhibits other than documents, or other parts of the record designated for omission by local rule of the court of appeals, unless directed to do so by a party

[16] The proposed amendments use the term "transmit" to accord with the proposed Part VIII amendments and to acknowledge the likelihood of electronic transmission. Professor Kimble argues that "transmit" should not be used in place of "forward" or "send."

or the circuit clerk. If ~~the exhibits are~~ unusually bulky or heavy exhibits are to be sent in paper form, a party must arrange with the clerks in advance for their transportation and receipt.[17]

(ii) All parties must do whatever else is necessary to enable the clerk to assemble and forward the record. When the transmission takes place in paper form, t~~T~~he court of appeals may provide by rule or order that a certified copy of the docket entries be ~~sent~~ transmitted in place of the redesignated record~~, b~~. B~~b~~ut any party may request at any time during the pendency of the appeal that the redesignated record be sent.

(D) Filing the r~~R~~ecord. Upon receiving the record – or a certified copy of the docket entries sent in place of the redesignated record – the circuit clerk must ~~file it and immediately notify all parties of the filing date~~ note its receipt on the docket. The date noted on the docket serves as its filing date for purposes of [these Rules] [Rules 28.1(f), 30(b)(1), 31(a)(1), and 44]. The circuit clerk must immediately[18] notify all parties of the filing date.

(c) Direct Review by Permission Under 28 U.S.C. § 158(d)(2).

(1) Applicability of Other Rules. These rules apply to a direct appeal by

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[17] Professor Kimble asks why the duty to arrange for transportation of bulky exhibits should fall on a party in instances when the transportation occurs at the request of the clerk. This is a feature of the existing rule.

[18] Professor Kimble notes that in Rule 6(b)(2)(C) the term "promptly" is used, whereas in Rule 6(b)(2)(D) the term "immediately" is used. These terms are carried over from the existing rule; the difference in terminology is probably justified by the fact that there may be more steps for the district or BAP clerk to complete before transmitting the record than there are before the circuit clerk notifies the parties of the record's filing date.

permission under 28 U.S.C. § 158(d)(2), but with these qualifications:

(A) Rules 3-4, 5(a)(3), 6(a), 6(b), 8(a), 8(c), 9-12, 13-20, 22-23, and 24(b) do not apply;

(B) as used in any applicable rule, "district court" or "district clerk" includes – to the extent appropriate – a bankruptcy court or bankruptcy appellate panel or its clerk; and

(C) the reference to "Rules 11 and 12(c)" in Rule 5(d)(3) must be read as a reference to Rules 6(c)(2)(B) and (C).

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

(A) **The Record on Appeal.** Bankruptcy Rule 8009 governs the record on appeal.

(B) **Transmitting the Record.** Bankruptcy Rule 8010 governs completing and transmitting the record.

(C) **Stays Pending Appeal.** Bankruptcy Rule 8007 governs stays pending appeal.

(D) **Duties of the Circuit Clerk.** Upon receiving the record, the circuit clerk must note its receipt on the docket. The date noted on the docket serves as the filing date of the record for purposes of [these Rules] [Rules 28.1(f), 30(b)(1), 31(a)(1), and 44]. The circuit clerk must immediately notify all parties of the filing date.

(E) **Filing a Representation Statement**. Unless the court of appeals

designates another time, within 14 days after entry of the order granting permission to appeal, the attorney who sought permission to appeal must file a statement with the circuit clerk naming the parties that the attorney represents on appeal.

Committee Note

Subdivision (b)(1). Subdivision (b)(1) is updated to reflect the renumbering of 28 U.S.C. § 158(d) as 28 U.S.C. § 158(d)(1). Subdivision (b)(1)(A) is updated to reflect the renumbering of Rule 12(b) as Rule 12(c). New subdivision (b)(1)(D) provides that references in Rule 12.1 to the "district court" include – as appropriate – a bankruptcy court or bankruptcy appellate panel.

Subdivision (b)(2). Subdivision (b)(2)(A)(i) is amended to refer to Bankruptcy Rule 8023 (in accordance with the renumbering of Part VIII of the Bankruptcy Rules).

Subdivision (b)(2)(A)(ii) is amended to address problems that stemmed from the adoption — during the 1998 restyling project — of language referring to challenges to "an altered or amended judgment, order, or decree." Current Rule 6(b)(2)(A)(ii) states that "[a] party intending to challenge an altered or amended judgment, order, or decree must file a notice of appeal or amended notice of appeal …." Before the 1998 restyling, the comparable subdivision of Rule 6 instead read "[a] party intending to challenge an alteration or amendment of the judgment, order, or decree shall file an amended notice of appeal …." The 1998 restyling made a similar change in Rule 4(a)(4). One court has explained that the 1998 amendment introduced ambiguity into that 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). Though the *Sorensen* court was writing of Rule 4(a)(4), a similar concern arises with respect to Rule 6(b)(2)(A)(ii). Rule 4(a)(4) was amended in 2009 to remove the ambiguity identified by the *Sorensen* court. The current amendment follows suit by removing Rule 6(b)(2)(A)(ii)'s reference to challenging "an altered or amended judgment, order, or decree," and referring instead to challenging "the alteration or amendment of a judgment, order, or decree."

Subdivision (b)(2)(B)(i) is amended to refer to Rule 8009 (in accordance with the renumbering of Part VIII of the Bankruptcy Rules).

Due to the shift to electronic filing, in some appeals the record will no longer be transmitted in paper form. Subdivisions (b)(2)(C) and (b)(2)(D) are amended to reflect the fact that the record sometimes will be transmitted electronically.

Subdivision (c). New subdivision (c) is added to govern permissive direct appeals from the bankruptcy court to the court of appeals under 28 U.S.C. § 158(d)(2). For further provisions governing such direct appeals, see Bankruptcy Rule 8006.

Subdivision (c)(1). Subdivision (c)(1) provides for the general applicability of the Federal Rules of Appellate Procedure, with specified exceptions, to appeals covered by subdivision (c) and makes necessary word adjustments.

Subdivision (c)(2). Subdivision (c)(2)(A) provides that the record on appeal is governed by Bankruptcy Rule 8009. Subdivision (c)(2)(B) provides that the transmission of the record is governed by Bankruptcy Rule 8010. Subdivision (c)(2)(C) provides that stays pending appeal are governed by Bankruptcy Rule 8007.

Subdivision (c)(2)(D) sets the duties of the circuit clerk upon receipt of the record. Because the record may be transmitted in electronic form, subdivision (c)(2)(D) does not direct the clerk to "file" the record. Rather, it directs the clerk to note the date of receipt on the docket and to notify the parties of that date, which shall serve as the date of filing the record for purposes of provisions in these Rules that calculate time from that filing date.

Subdivision (c)(2)(E) is modeled on Rule 12(b), with appropriate adjustments.

Encl.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

PART VIII. BANKRUPTCY APPEALS

Rule

Rule 8001. Scope of Part VIII Rules; Definitions

(a) GENERAL SCOPE. These Part VIII rules govern the procedure in United States district courts and bankruptcy appellate panels for appeals taken from judgments, orders, and decrees of bankruptcy ~~judges~~ courts. They also govern ~~the~~ certain procedures involving ~~for certification of~~ appeals ~~directly~~ to courts of appeals under 28 U.S.C. § 158(d)~~(2)~~.

(b) PROCEDURE IN OTHER COURTS. When these rules provide for filing a document in a bankruptcy court or a court of appeals, the procedure ~~shall~~ must comply with the practice of the court in which the document is filed.

(c) "BAP." As used in these Part VIII rules, "BAP" means a bankruptcy appellate panel established by the judicial council of a circuit and authorized to hear appeals from the bankruptcy court for the district in which an appeal is taken under 28 U.S.C. § 158 ~~is taken~~.

(d) "APPELLATE COURT." As used in these Part VIII rules, "appellate court" means either the district court or the BAP – whichever is the court in which the bankruptcy appeal is pending or to which the appeal will be taken.

(e) "TRANSMIT." As used in these Part VIII rules, "transmit" means to send electronically unless the governing rules

of the court permit or require mailing or other means of delivery of the document in question.

COMMITTEE NOTE

These Part VIII rules apply to appeals under 28 U.S.C. § 158(a) from bankruptcy courts to district courts and BAPs. As provided in subdivision (d) of this rule, the term "appellate court" is used in Part VIII to refer to the court – district court or BAP – to which a bankruptcy appeal is taken.

Subsequent appeals to courts of appeals are governed by the Federal Rules of Appellate Procedure. ~~Five~~Seven of the Part VIII rules do, however, relate to appeals to courts of appeals. Rule 8004(e) provides that an authorization by the court of appeals of a direct appeal of a bankruptcy court's interlocutory judgment, order, or decree constitutes a grant of leave to appeal. Rule 8006 governs the procedure for certification under 28 U.S.C. § 158(d)(2) of a direct appeal from a judgment, order, or decree of a bankruptcy ~~judge~~ court to a court of appeals. Rule 8007 deals with stays pending a direct appeal to a court of appeals. Rule 8008 authorizes a bankruptcy court to issue an indicative ruling while an appeal is pending in a court of appeals. Rules 8009 and 8010 govern the record on appeal in a direct appeal allowed under 28 U.S.C. § 158(d)(2). And Rule 8026 governs the granting of a stay of an appellate court judgment pending an appeal to the court of appeals.

These rules take account of the evolving technology in the federal courts for the electronic filing, storage, and transmission of documents. The term "transmit" is used to encompass the electronic conveyance of information. Unless applicable ~~these or local~~ rules or orders require or permit another means of sending a particular document, a provision in the Part VIII rules to transmit a document requires it to be sent electronically.

Rule 8002. Time for Filing Notice of Appeal

(a) FOURTEEN-DAY PERIOD.

(1) Except as provided in Rule 8002 (b) and (c), the notice of appeal required by Rule 8003 or 8004 ~~shall~~ must be filed with the bankruptcy clerk within 14 days after entry of the judgment, order, or decree being appealed.

(2) If one party files a timely notice of appeal, any other party may file a notice of appeal with the bankruptcy clerk within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise allowed by this ~~this R~~rule ~~8002~~, whichever period ends later.

(3) A notice of appeal filed after a bankruptcy court announces a decision or order, but before entry of the judgment, order, or decree, is ~~shall be~~ treated as filed after entry of the judgment, order, or decree and on the date of entry.

(4) If a notice of appeal is mistakenly filed with the appellate court or the court of appeals, the clerk of that court ~~shall~~ must indicate on the notice the date on which it was received and transmit it to the bankruptcy clerk. The notice of appeal is ~~deemed~~ then considered filed ~~with~~ in the bankruptcy ~~clerk~~ court on the date so indicated.

(b) EFFECT OF MOTION ON TIME FOR APPEAL.

(1) If a party timely files in the bankruptcy court any of the following motions, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion~~, or the entry of any judgment, order, or decree altered or amended upon such motion, whichever is later~~:

(A) to amend or make additional findings under Rule 7052, whether or not granting the motion would alter the judgment;

(B) to alter or amend the judgment under Rule 9023;

(C) for a new trial under Rule 9023; or

(D) for relief under Rule 9024 if the motion is filed no later than 14 days after entry of the judgment.

(2)(A) If a party files a notice of appeal after the court announces or enters a judgment, order, or decree – but before it disposes of any motion listed in Rule 8002(b)(1) – the notice becomes effective ~~to appeal a judgment, order, or decree, in whole or in part,~~ when the order disposing of the last such remaining motion is entered~~, or when any judgment, order, or decree altered or amended upon such motion is entered, whichever is later~~.

(B) A party intending to challenge on appeal an order disposing of any motion listed in Rule 8002(b)(1), or the

alteration or amendment of a judgment, order, or decree upon such a motion, must ~~shall~~ file a notice of appeal or an amended notice of appeal. The notice of appeal or amended notice of appeal ~~shall~~ must be filed in compliance with Rule 8003 or 8004 and within the time prescribed by this ~~this R~~rule ~~8002~~, measured from the entry of the order disposing of the last such remaining motion~~, or the entry of any judgment, order, or decree altered or amended upon such motion, whichever is later~~.

(3) No additional fee is required to file an amended notice of appeal.

(c) APPEAL BY AN INMATE CONFINED IN AN INSTITUTION. ~~The provisions of Rule 4(c)(1) and (c)(2) F.R. App. P. apply to an appeal taken by an inmate from a judgment, order, or decree of a bankruptcy judge to an appellate court. The reference in Rule 4(c)(2) F.R. App. P. to "the 14-day period provided in Rule 4(a)(3)" shall be read as a reference to the 14-day period in Rule 8002(a)(2), and the term "district court" in Rule 4(c)(2) F.R. App. P. 4(c)(2) means "bankruptcy court."~~

(1) If an inmate confined in an institution files a notice of appeal from a judgment, order, or decree of a bankruptcy court to an appellate court, 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.

(2) If an inmate files under ~~this~~ Rule 8002(c) the first notice of appeal from a judgment, order, or decree of a bankruptcy court to an appellate court, the 14-day period provided in Rule 8002(a)(2) for another party to file a notice of appeal runs from the date when the bankruptcy court dockets the first notice.

(d) EXTENSION OF TIME FOR APPEAL.

(1) The bankruptcy court may extend the time for filing a notice of appeal by a party unless the judgment, order, or decree appealed from:

(A) grants relief from an automatic stay under § 362, § 922, § 1201, or § 1301 of the Code;

(B) authorizes the sale or lease of property or the use of cash collateral under § 363 of the Code;

(C) authorizes the obtaining of credit under § 364 of the Code;

(D) authorizes the assumption or

assignment of an executory contract or unexpired lease under § 365 of the Code;

(E) approves a disclosure statement under § 1125 of the Code; or

(F) confirms a plan under § 943, § 1129, § 1225, or § 1325 of the Code.

(2) The bankruptcy court ~~A request to~~ may extend the time to file ~~for filing~~ a notice of appeal if:

(A) a motion for extension of time is filed with the bankruptcy clerk within the time prescribed by this rule; or

(B) a motion is filed with the bankruptcy clerk no later than 21 days after the time prescribed by this rule expires and is accompanied by a demonstration of excusable neglect; but

(C) no extension of time for filing a notice of appeal may exceed 21 days after the time otherwise prescribed by this rule, or 14 days after the date the order granting the motion is entered, whichever is later. ~~shall be made by motion filed with the bankruptcy clerk before the time for filing a notice of appeal has expired, but such a motion filed no later than 21 days after the expiration of the time for filing a notice of appeal may be granted~~

~~upon a showing of excusable neglect. An extension of time for filing a notice of appeal may not exceed 21 days after the time otherwise prescribed by this Rule 8002, or 14 days after the date the order granting the motion is entered, whichever is later.~~

COMMITTEE NOTE

This rule is derived from former Rule 8002 and F.R. App. P. 4(a) and (c). With the exception of subdivision (c), the changes to the former rule are stylistic. The rule retains the former rule's 14-day time period for filing a notice of appeal, as opposed to the longer periods permitted for appeals in civil cases under F.R. App. P. 4(a).

Subdivision (a) continues to allow any other party to file a notice of appeal within 14 days after the first notice of appeal is filed, or thereafter to the extent otherwise authorized by this rule. Subdivision (a) also retains provisions of the former rule that prescribe the date of filing of the notice of appeal if the appellant files it prematurely or in the wrong court.

Subdivision (b), like former Rule 8002(b) and F.R. App. P. 4(a), tolls the time for filing a notice of appeal when certain post-judgment motions are filed, and it provides the effective date of a notice of appeal that is filed before the court disposes of all of the specified motions. As under the former rule, a party that wants to appeal the court's disposition of such a motion or the alteration or amendment of a judgment, order, or decree in response to such a motion must file a notice of appeal or, if it has already filed one, an amended notice of appeal.

Although Rule 8003(a)(3)(C) requires a notice of appeal to be accompanied by the required fee, no additional fee is required for the filing of an amended notice of appeal ~~under subdivision (b) of this rule~~.

Subdivision (c) ~~incorporates~~ mirrors the provisions of F.R. App. P. 4(c)(1) and (2), which specify timing rules for a notice of appeal filed by an inmate confined in an institution. ~~The inmate's filing of a notice of appeal is timely if it is deposited in the institution's internal mail system on or before the last date for filing. If the institution has a special system for legalmail, it must be used. When the inmate is the first party to file a notice of appeal, the 14-day period for any other party to file a notice of appeal runs from the bankruptcy court's docketing of the inmate's notice.~~

Subdivision (d) continues to allow the court to grant an extension of time to file a notice of appeal, except with respect to certain specified judgments, orders, and decrees.

Rule 8003. Appeal as of Right – How Taken; Docketing of Appeal

(a) FILING THE NOTICE OF APPEAL.

(1) ~~Except as provided by Rule 8002(c), a~~An appeal from a judgment, order, or decree of a bankruptcy ~~judge~~ court to a district court or a BAP as permitted by 28 U.S.C. § 158(a)(1) or (a)(2) may be taken only by filing a notice of appeal with the bankruptcy clerk within the time allowed by Rule 8002.

(2) An appellant's failure to take any step other than timely filing a notice of appeal does not affect the validity of the appeal, but is ground for such action as the appellate court deems appropriate, including dismissal of the appeal.

(3) The notice of appeal ~~shall~~ must:

(A) conform substantially to the appropriate Official Form;

(B) ~~attach~~ be accompanied by the judgment, order, or decree, or part thereof, being appealed; and

(C) be accompanied by the prescribed fee.

(4) If requested by the bankruptcy clerk, each appellant ~~shall~~ must promptly file the number of copies of the notice of appeal that the bankruptcy clerk needs for compliance with Rule 8003(c).

(b) JOINT OR CONSOLIDATED APPEALS.

(1) When two or more parties are entitled to appeal from a judgment, order, or decree of a bankruptcy ~~judge~~ court and their interests make joinder practicable, they may file a joint notice of appeal. They may then proceed on appeal as a single appellant.

(2) When parties have separately filed timely notices of appeal, the appellate court may join or consolidate the appeals ~~may be joined or consolidated by the appellate court~~.

(c) SERVING THE NOTICE OF APPEAL.

(1) The bankruptcy clerk must ~~shall~~ serve ~~the~~ notice of the filing of a notice of appeal by transmitting it to counsel of record for each party to the appeal – ~~other than~~ excluding the appellant – or, if a party is ~~not represented by counsel~~ proceeding pro se, to the pro se party's ~~at its~~ last known address.

(2) The bankruptcy clerk's failure to serve notice does not affect the validity of the appeal.

(3) The bankruptcy clerk ~~shall~~ must give to each party served notice of the date of the filing of the notice of appeal and ~~shall~~ must note on the docket the names of the parties served and the date and method of the ~~transmission~~ service.

(4) The bankruptcy clerk ~~shall~~ must promptly transmit the notice of appeal to the United States trustee, but

failure to transmit notice to the United States trustee does not affect the validity of the appeal.

(d) TRANSMITTING THE NOTICE OF APPEAL TO THE BAP OR DISTRICT COURT; DOCKETING THE APPEAL.

(1) The bankruptcy clerk ~~shall~~ must promptly transmit the notice of appeal to the BAP clerk if a BAP has been established for appeals from that district and the appellant has not elected to have the appeal heard by the district court. Otherwise, the bankruptcy clerk ~~shall~~ must promptly transmit the notice of appeal to the district clerk.

(2) Upon receiving the notice of appeal, the clerk of the appellate court ~~shall~~ must docket the appeal under the title of the bankruptcy court action with the appellant identified – adding the appellant's name if necessary ~~– and promptly give notice of the date on which the appeal was docketed to all parties to the appealed judgment, order, or decree~~.

COMMITTEE NOTE

This rule is derived in part from former Rule 8001(a) and F.R. App. P. 3. It ~~makes~~ encompasses stylistic changes to the former provision governing appeals as of right. In addition it addresses joint and consolidated appeals and incorporates and modifies provisions of former Rule 8004 regarding service of the notice of appeal. The rule changes the timing of the docketing of an appeal in the district court or BAP.

Subdivision (a) incorporates much of the content of former Rule 8001(a) regarding the taking of an appeal as of right under 28 U.S.C.

§ 158(a)(1) or (2). The rule now requires that the judgment, order, or decree being appealed be attached to the notice of appeal.

Subdivision (b), which is an adaptation of F.R. App. P. 3(b), permits the filing of a joint notice of appeal by multiple appellants that have sufficiently similar interests that their joinder is practicable. It also provides for the appellate court's consolidation of appeals taken separately by two or more parties.

Subdivision (c) is derived from former Rule 8004 and F.R. App. P. 3(d). By using the term "transmitting," it modifies the former rule's requirement that service of the notice of appeal be accomplished by mailing and allows for service by electronic transmission ~~[~~to counsel~~]~~ by the bankruptcy clerk.

Subdivision (d) modifies the provision of former Rule 8007(b), which delayed the docketing of an appeal by the appellate court until the record was complete and transmitted by the bankruptcy clerk. The new provision, adapted from F.R. App. P. 3(d) and 12(a), requires the bankruptcy clerk to promptly transmit the notice of appeal to the clerk of the appellate court. Upon receipt of the notice of appeal, the clerk of the appellate court must docket the appeal. Under this procedure, motions filed in the appellate court prior to completion and transmission of the record can generally be placed on the docket of an already pending appeal.

Rule 8004. Appeal by Leave – How Taken; Docketing of Appeal

(a) NOTICE OF APPEAL AND MOTION FOR LEAVE TO APPEAL.

(1) To request leave to appeal an interlocutory judgment, order, or decree of a bankruptcy court as permitted by 28 U.S.C. § 158(a)(3), the party must file a notice of appeal and a motion for leave to appeal with the bankruptcy clerk.

(2) The notice must be filed in the form prescribed by Rule 8003(a) and within the time provided in Rule 8002.

(3) The motion for leave to appeal must be prepared in accordance with Rule 8004(b) and, unless served electronically using the court's transmission equipment, with proof of service in accordance with Rule 8011(d).

~~An appeal from an interlocutory judgment, order, or decree of a bankruptcy judge as permitted by 28 U.S.C. § 158(a)(3) may be taken only by filing with the bankruptcy clerk a notice of appeal of the judgment, order, or decree – as prescribed by Rule 8003(a) and within the time allowed by Rule 8002 – accompanied by a motion for leave to appeal prepared in accordance with Rule 8004(b) and, unless served electronically using the court's transmission equipment, with proof of service in accordance with Rule 8011(d).~~

(b) CONTENT OF MOTION; RESPONSE.

(1) A motion for leave to appeal under 28 U.S.C. § 158(a)(3) ~~shall contain~~ must include the following:

(A) ~~a statement of~~ the facts necessary to understand the questions presented;

(B) ~~a statement of those~~ the questions themselves ~~and the relief sought~~;

(C) the relief sought;

(D~~C~~) ~~a statement of~~ the reasons why leave to appeal should be granted; and

(E~~D~~) an attachment of the interlocutory judgment, order, or decree from which appeal is sought, and any related opinions or memorand~~aum~~.

(2) ~~Within 14 days after the motion is served, a~~ A party may file with the clerk of the appellate court a response in opposition or a cross-motion ~~or a response~~ within 14 days after the motion is served.

(c) TRANSMITTING THE NOTICE OF APPEAL AND MOTION; DOCKETING THE APPEAL; DETERMINING THE MOTION.

(1) The bankruptcy clerk ~~shall~~ must promptly transmit the notice of appeal and the motion for leave to appeal, together with any statement of election under Rule 8005, to the

clerk of the appellate court.

(2) Upon receiving the notice of appeal and motion for leave to appeal, the clerk of the appellate court ~~shall~~ must docket the appeal under the title of the bankruptcy court action with the movant-appellant identified – adding the movant-appellant's name if necessary ~~— and promptly give notice of the date on which the appeal was docketed to all parties to the interlocutory judgment, order, or decree from which appeal is sought~~.

(3) The motion and any response or cross-motion are submitted without oral argument unless the appellate court orders otherwise. If the motion for leave to appeal is denied, the appellate court ~~shall~~ must dismiss the appeal.

(d) FAILURE TO FILE A MOTION. If an appellant does not file a ~~required~~ motion for leave to appeal an interlocutory judgment, order, or decree, but ~~does~~ timely files a notice of appeal, the appellate court may:

- direct the appellant to file ~~that~~ a motion for leave to appeal ~~be filed~~; or
- treat the notice of appeal as a motion for leave to appeal and either grant or deny leave.

If the court directs that a motion for leave to appeal be filed, the

appellant ~~shall~~ must file the motion within 14 days after the order directing the filing is entered, unless the order provides otherwise.

(e) DIRECT APPEAL TO COURT OF APPEALS. If leave to appeal an interlocutory judgment, order, or decree is required under 28 U.S.C. § 158(a)(3) and has not been granted by the district court or the BAP, an authorization by the court of appeals of a direct appeal under 28 U.S.C. § 158(d)(2) satisfies the requirement for leave to appeal.

COMMITTEE NOTE

This rule is derived from former Rules 8001(b) and 8003 and F.R. App. P. 5. It retains the practice for interlocutory bankruptcy appeals of requiring a notice of appeal to be filed along with a motion for leave to appeal. Like current Rule 8003, it alters the timing of the docketing of the appeal in the appellate court.

Subdivision (a) requires a party seeking leave to appeal under 28 U.S.C. § 158(a)(3) to file with the bankruptcy clerk both a notice of appeal and a motion for leave to appeal.

Subdivision (b) prescribes the contents of the motion, retaining the requirements of former Rule 8003(a). It also continues to allow another party to file a cross-motion or response to the appellant's motion. Because of the prompt docketing of the appeal under the current rule, the cross-motion or response must be filed in the appellate court, rather than in the bankruptcy court as the former rule required.

Subdivision (c) requires the bankruptcy clerk to transmit promptly the notice of appeal and the motion for leave to appeal to the appellate court. Upon receipt of the notice and the motion, the clerk of the appellate court must docket the appeal. Unless the appellate court orders otherwise, no oral argument will be held on the motion.

Subdivision (d) retains the provisions of former Rule 8003(c) that state the appellant's options if the appellant timely files a notice of

appeal but fails to file a motion for leave to appeal. The court can either direct that a motion be filed or treat the notice of appeal as the motion and either grant or deny leave.

Subdivision (e), like former Rule 8003(d), treats the authorization of a direct appeal by the court of appeals as a grant of leave to appeal under 28 U.S.C. § 158(a)(3) if the district court or BAP has not already granted leave to appeal. Thus a separate order granting leave to appeal is not required. If the court of appeals grants permission to appeal, the record must be assembled and transmitted in accordance with Rules 8009 and 8010.

Rule 8005. Election to Have Appeal Heard by District Court Instead of BAP

(a) FILING OF THE STATEMENT OF ELECTION. To elect under 28 U.S.C. § 158(c)(1) to have an appeal heard by the district court, a party must:

(1) submit a statement of election that conforms substantially to the appropriate Official Form; and

(2) file the statement within the time prescribed by 28 U.S.C. § 158(c)(1). ~~An election under 28 U.S.C. § 158(c)(1) to have an appeal heard by the district court may be made only by a statement of election that conforms substantially to the appropriate Official Form and is filed within the time prescribed by 28 U.S.C. § 158(c)(1).~~

(b) TRANSFER OF THE APPEAL. Upon receiving an appellant's timely statement of election, the bankruptcy clerk ~~shall~~ must transmit all documents related to the appeal to the district court. Upon receiving a timely statement of election by a party other than the appellant, the BAP clerk ~~shall~~ must promptly transfer the appeal and any pending motions to the district court.

(c) DETERMINING THE VALIDITY OF AN ELECTION. No later than 14 days after the statement of election is filed, a party seeking a determination of the validity of an election ~~shall~~ must file a motion in the court in which the appeal is

then pending.

(d) APPEAL BY LEAVE – TIMING OF ELECTION. If an appellant moves for leave to appeal under Rule 8004 and fails to file a separate notice of appeal concurrently with the filing of its motion, the motion ~~shall~~ must be treated as if it were a notice of appeal for purposes of determining the timeliness of the filing of a statement of election.

COMMITTEE NOTE

This rule is derived from former Rule 8001(e), and it implements 28 U.S.C. § 158(c)(1).

As was required by the former rule, subdivision (a) requires an appellant that elects to have its appeal heard by a district court, rather than the BAP established in its circuit, to file with the bankruptcy clerk a statement of election when it files its notice of appeal. The statement must conform substantially to Official Form __. If a BAP has been established for appeals from the bankruptcy court and the appellant does not file a timely statement of election, any other party that elects to have the appeal heard by the district court must file a statement of election with the BAP clerk no later than 30 days after service of the notice of appeal.

Subdivision (b) requires the bankruptcy clerk to transmit all appeal documents to the district clerk if the appellant files a timely statement of election. If the appellant does not make that election, the bankruptcy clerk must transmit the appeal documents to the BAP clerk, and upon a timely election by any other party, the BAP clerk must promptly transfer the appeal to the district court.

Subdivision (c) provides a new procedure for the resolution of disputes regarding the validity of an election. A motion challenging the validity of an election must be filed no later than 14 days after the statement of election is filed. Nothing in this rule prevents a court from determining the validity of an election on its own motion.

Subdivision (d) provides that, in the case of an appeal by leave, if

the appellant files a motion for leave to appeal but fails to file a notice of appeal, the filing and service of the motion will be treated for timing purposes under this rule as the filing and service of the notice of appeal.

Rule 8006. Certification of Direct Appeal to Court of Appeals

(a) EFFECTIVE DATE OF CERTIFICATION.

Certification of a judgment, order, or decree of a bankruptcy ~~judge~~ court for direct review in a court of appeals under 28 U.S.C. § 158(d)(2) is effective when the following events have occurred:

(~~i~~1) the certification has been filed;

(~~ii~~2) a timely appeal has been taken from the judgment, order, or decree in accordance with Rule 8003 or 8004; and

(~~iii~~3) the notice of appeal has become effective under Rule 8002.

(b) FILING OF CERTIFICATION. ~~A~~The certification ~~that a circumstance specified in~~ required by 28 U.S.C. § 158(d)(2)(A)~~(i)-(iii) exists shall~~ must be filed with the clerk of the court in which a matter is pending. For purposes of this rule, a matter is pending in the bankruptcy court for 30 days after the ~~filing~~ effective date of the first notice of appeal from the judgment, order, or decree for which direct review in the court of appeals is sought~~, or the entry of the order disposing of the last remaining motion specified in Rule 8002(b), whichever is later~~. A matter is pending in the appellate court thereafter.

(c) JOINT CERTIFICATION BY ALL APPELLANTS

AND APPELLEES. A joint certification by all the appellants and appellees ~~that a circumstance specified in~~ under 28 U.S.C. § 158(d)(2)(A)~~(i)-(iii) exists shall~~ must be made by executing the appropriate Official Form and filing it with the clerk of the court in which the matter is pending. The parties may supplement the certification ~~may be supplemented by~~ with a short statement of the basis for the certification, which may include the information listed in Rule 8006(f)(3).

(d) COURT THAT MAY MAKE CERTIFICATION.

(1) Only the bankruptcy court may make a certification on request of parties or on its own motion while the matter is pending before it as provided in Rule 8006(b).

(2) Only the district court or the BAP may make a certification on request of parties or on its own motion while the matter is pending before it as provided in Rule 8006(b).

(e) CERTIFICATION ON THE COURT'S OWN MOTION.

(1) A certification on the court's own motion ~~that a circumstance specified in~~ under 28 U.S.C. § 158(d)(2)(A)~~(i)-(iii) exists shall~~ must be set forth in a separate document. The clerk of the certifying court must serve~~d~~ this document on the parties in the manner required for service of a notice of appeal under Rule

8003(c)(1). The certification ~~shall~~ must be accompanied by an opinion or memorandum that contains the information required by Rule 8006(f)(3)(A)-(D).

(2) Within 14 days after the court's certification, a party may file with the clerk of the certifying court a short supplemental statement regarding the merits of certification.

(f) CERTIFICATION BY THE COURT ON REQUEST.

(1) A request by a party for certification that a circumstance specified in 28 U.S.C. § 158(d)(2)(A)(i)-(iii) exists, or a request by a majority of the appellants and a majority of the appellees, ~~shall~~ must be filed with the clerk of the court in which the matter is pending within the time specified by 28 U.S.C. § 158(d)(2)(E).

(2) A request for certification ~~shall~~ must be served in the manner required for service of a notice of appeal under Rule 8003(c)(1).

(3) A request for certification ~~shall~~ must include the following:

(A) the facts necessary to understand the question presented;

(B) the question itself;

(C) the relief sought;

(D) the reasons why the appeal should be allowed and is authorized by statute and rule, including why a circumstance specified in 28 U.S.C. § 158(d)(2)(A)(i)-(iii) exists; and

(E) a~~n attached~~ copy of the judgment, order, or decree that is the subject of the requested certification and any related opinion or memorandum.

(4) A party may file a response to a request for certification within 14 days after the request is served, or such other time as the court in which the matter is pending may ~~fix~~ allow. A party may file a cross-request for certification within 14 days after ~~notice of~~ the request is served, or within 60 days after the entry of the judgment, order, or decree, whichever occurs first.

(5) The request, cross-request, and any response are not governed by Rule 9014 and are submitted without oral argument unless the court in which the matter is pending otherwise directs.

(6) A certification of an appeal under 28 U.S.C. § 158(d)(2) in response to a request ~~shall~~ must be made in a separate document served on the parties in the manner required for service of a notice of appeal under Rule 8003(c)(1).

(g) PROCEEDING IN THE COURT OF APPEALS

FOLLOWING CERTIFICATION. A request for permission to take a direct appeal to the court of appeals under 28 U.S.C. § 158(d)(2) ~~shall~~ must be filed with the circuit clerk within 30 days after the date the certification becomes effective under subdivision (a).

COMMITTEE NOTE

This rule is derived from former Rule 8001(f), and it provides the procedures for the certification of a direct appeal of a judgment, order, or decree of a bankruptcy ~~judge~~ court to the court of appeals under 28 U.S.C. § 158(d)(2). Once a case has been certified in the bankruptcy court or the appellate court for direct appeal and a request for permission to appeal has been timely filed, the Federal Rules of Appellate Procedure govern ~~any~~ further proceedings in the court of appeals.

Subdivision (a), like the former rule, requires that an appeal must be properly taken – now under Rule 8003 or 8004 – before a certification for direct review in the court of appeals takes effect. This rule requires the timely filing of a notice of appeal under Rule 8002 and takes into account the delayed effectiveness of a notice of appeal filed before all motions specified under Rule 8002(b) have been resolved by the bankruptcy judge.

Subdivision (b) provides that a certification must be filed in the court in which the matter is pending, as determined by this subdivision. This provision modifies the former rule. Because of the prompt docketing of appeals in the appellate court under Rules 8003 and 8004, a matter is deemed – for purposes of this rule only – to remain pending in the bankruptcy court for 30 days after the filing of the notice of appeal from the judgment, order, or decree being appealed, or the disposition of the last remaining motion specified in Rule 8002(b), whichever is later. This provision will in appropriate cases give the bankruptcy judge, who will be familiar with the matter being appealed, an opportunity to decide whether certification ~~of~~ for direct review is appropriate. Similarly, subdivision (d) provides that, when certification is made by the court, only the court in which the matter is then pending according to (b) may make the certification.

Section 158(d)(2) provides three different ways in which an appeal

may be certified for direct review. Implementing these options, the rule provides in subdivision (c) for the joint certification by all appellants and appellees, in subdivision (e) for the bankruptcy or appellate court's certification on its own motion, and in subdivision (f) for the bankruptcy or appellate court's certification on request of a party or of a majority of appellants and a majority of appellees.

Subdivision (g) requires that, once a certification for direct review has been made, a request ~~of~~ to the court of appeals for permission to take a direct appeal to that court must be filed with the circuit clerk no later than 30 days after the effective date of the certification. Rule 6(c) of the Federal Rules of Appellate Procedure, which incorporates all of F.R. App. P. 5 except subdivision (a)(3), prescribes the procedure for requesting the permission of the court of appeals, and it governs ~~any~~ proceedings that take place thereafter in that court.

Rule 8007. Stay Pending Appeal; Bonds; Suspension of Proceedings

(a) INITIAL MOTION IN THE BANKRUPTCY COURT; TIME TO FILE.

(1) A party ~~shall~~ must ordinarily move first in the bankruptcy court for the following relief:

(A) a stay of a judgment, order, or decree of ~~a~~ the bankruptcy ~~judge~~ court pending appeal;

(B) approval of a supersedeas bond;

(C) an order suspending, modifying, restoring, or granting an injunction while an appeal is pending; or

(D) the suspension or continuation of proceedings in a case or other relief permitted by Rule 8007(e).

~~12~~ (2) A motion for a type of relief specified in ~~(1)~~ Rule 8007(a)(1) may be made in the bankruptcy court either before or after the filing of a notice of appeal of the judgment, order, or decree appealed from.

(b) MOTION IN THE APPELLATE COURT OR THE COURT OF APPEALS IN A DIRECT APPEAL; CONDITIONS ON RELIEF.

(1) A motion for a type of relief specified in Rule 8007(a)(1), or to vacate or modify an order of the bankruptcy court granting such relief, may be made in the appellate court or in the

court of appeals in a direct appeal to that court.

(2) ~~When the motion is made in the appellate court,~~ ~~t~~ The motion ~~shall~~ must:

(A) show that it would be impracticable to move first in the bankruptcy court if the moving party has not sought relief in the first instance in the bankruptcy court; or

(B) state ~~that~~ the bankruptcy court's ruling ~~denied the motion or failed to afford the relief requested~~ and ~~state~~ any reasons given by the bankruptcy court for its ~~action or inaction~~ ruling.

(3) ~~If the motion is made in the appellate court, it shall~~ The motion must also include:

(A) the reasons for granting the relief requested and the pertinent facts;

(B) originals or copies of affidavits or other sworn statements supporting facts subject to dispute; and

(C) relevant parts of the record.

(4) ~~If the motion is made in the appellate court,~~ T~~t~~he movant ~~shall~~ must give reasonable notice of the motion to all parties.

(c) FILING OF BOND OR OTHER SECURITY. The appellate court may condition relief under this rule on the filing of

a bond or other appropriate security with the bankruptcy court.

(d) REQUIREMENT OF BOND FOR TRUSTEE OR THE UNITED STATES. When a trustee appeals, a bond or other appropriate security may be required. When an appeal is taken by the United States, its officer, or its agency or by direction of any department of the federal government, a bond or other security ~~shall~~ is not ~~be~~ required.

(e) CONTINUATION OF PROCEEDINGS IN THE BANKRUPTCY COURT. Notwithstanding Rule 7062 and subject to the authority of the appellate court or court of appeals, the bankruptcy court may:

(1) suspend or order the continuation of other proceedings in the case; or

(2) make any other appropriate orders during the pendency of an appeal on terms that protect the rights of all parties in interest.

COMMITTEE NOTE

This rule is derived from former Rule 8005 and F.R. App. P. 8. ~~The changes from the former rule are primarily stylistic.~~ It now applies to direct appeals in courts of appeals as well as to appeals in district courts and BAPs.

Subdivision (a), like the former rule, requires a party ordinarily to seek relief pending an appeal in the bankruptcy court. Subdivision (a)(1) expands the list of relief enumerated in F.R. App. P. 8(a)(1) to reflect bankruptcy practice. It includes the suspension or continuation of other proceedings in the bankruptcy case, as authorized by subdivision (e).

Subdivision (a)(2) clarifies that a motion for a stay pending appeal, approval of a supersedeas bond, or any other relief specified in paragraph (1) may be made in the bankruptcy court before or after the filing of a notice of appeal.

Subdivision (b) ~~continues to~~ authorizes a party to seek the relief specified in (a)(1), or the vacation or modification of the granting of such relief, by means of a motion filed in the appellate court or the court of appeals. Accordingly, a notice of appeal need not be filed with respect to a bankruptcy court's order granting or denying such a motion. The motion for relief in the appellate court or court of appeals must state why it was impracticable to seek relief initially in the bankruptcy court, if a motion was not filed there, or why the bankruptcy court denied the relief sought.

Subdivisions (c) and (d) retain the provisions of the former rule that permit the appellate court (and now the court of appeals) to condition the granting of relief on the posting of a bond by the appellant, except when that party is a federal government entity. Rule 9025 governs proceedings against sureties.

Rule 8008. Indicative Rulings

(a) RELIEF PENDING APPEAL. If a party files a timely motion in the bankruptcy court for relief that the bankruptcy court lacks authority to grant because of an appeal that has been docketed and is pending, the bankruptcy court may:

(1) defer consideration of the motion;

(2) deny the motion; or

(3) state that the court would grant the motion if the court in which the appeal is pending remands for that purpose, or state that the motion raises a substantial issue.

(b) NOTICE TO COURT IN WHICH THE APPEAL IS PENDING. If the bankruptcy court states that it would grant the motion, or that the motion raises a substantial issue, the movant ~~shall~~ must promptly notify the clerk of the court in which the appeal is pending.

(c) REMAND AFTER INDICATIVE RULING. If the bankruptcy court states that it would grant the motion or that the motion raises a substantial issue and the appeal is pending in an appellate court, the appellate court may remand for further proceedings, but it retains jurisdiction unless it expressly dismisses the appeal. If the appellate court remands but retains jurisdiction, the parties ~~shall~~ must promptly notify the clerk of that court when

the bankruptcy court has decided the motion on remand.

COMMITTEE NOTE

This rule is an adaptation of F.R. Civ. P. 62.1 and F.R. App. P. 12.1. It provides a procedure for the issuance of an indicative ruling when a bankruptcy court determines that, because of a pending appeal, the court lacks jurisdiction to grant a request for relief that the court concludes is meritorious or raises a substantial issue. The rule, however, does not attempt to define the circumstances in which an appeal limits or defeats the bankruptcy court's authority to act in the face of a pending appeal. (Rule 8002(b) identifies motions that, if filed within the relevant time limit, suspend the effect of a notice of appeal filed before the last such motion is resolved. In these circumstances, the bankruptcy court has authority to resolve the motion without resorting to the indicative ruling procedure.)

Subdivision (b) requires the movant to notify the court in which an appeal is pending if the bankruptcy court states that it would grant the motion or that it raises a substantial issue. This provision applies to appeals pending in the district court, the BAP, or the court of appeals ~~under 28 U.S.C. § 158(d)(2)~~.

Federal Rules of Appellate Procedure 6~~(c)~~ and 12.1 govern the procedure in the court of appeals following notification of the bankruptcy court's indicative ruling.

Subdivision (c) of this rule governs the procedure in the district court or BAP upon notification that the bankruptcy court has issued an indicative ruling. The appellate court may remand to the bankruptcy court for a ruling on the motion for relief. The appellate court may also remand all proceedings, thereby terminating the initial appeal, if it expressly states that it is dismissing the appeal. It should do so, however, only when the appellant has stated clearly its intention to abandon the appeal. Otherwise, the appellate court may remand for the purpose of ruling on the motion, while retaining jurisdiction to proceed with the appeal after the bankruptcy court rules, provided that the appeal is not then moot and any party wishes to proceed.

Rule 8009. Record and Issues on Appeal; Sealed Documents

(a) DESIGNATION AND COMPOSITION OF RECORD ON APPEAL; STATEMENT OF ISSUES ON APPEAL.

(1) *Appellant's Duties.* Within 14 days after filing a notice of appeal as prescribed by Rule 8003(a); entry of an order granting leave to appeal; or entry of an order disposing of the last remaining motion of a kind listed in Rule 8002(b)(1); ~~or entry of an altered or amended judgment, order, or decree;~~ whichever is last, the appellant ~~shall~~ must file with the bankruptcy clerk and serve on the appellee a designation of the items to be included in the record on appeal and a statement of the issues to be presented. A designation and statement served prematurely ~~shall~~ must be treated as served on the first day on which filing is timely under this paragraph.

(2) *Appellee's and Cross-Appellant's Duties.* Within 14 days after service of the appellant's designation and statement, the appellee may file and serve on the appellant a designation of additional items to be included in the record on appeal and, if the appellee has filed a cross-appeal, the appellee as cross-appellant ~~shall~~ must file and serve a statement of the issues to be presented on the cross-appeal and a designation of additional items to be included in the record.

(3) *Cross-Appellee's Duties*. Within 14 days after service of the cross-appellant's designation and statement, a cross-appellee may file and serve on the cross-appellant a designation of additional items to be included in the record.

(4) *Record on Appeal*. Subject to Rule 8009(d) and (e), the record on appeal ~~shall~~ must include the following:

- items designated by the parties as provided by paragraphs (1)-(3);
- the notice of appeal;
- the judgment, order, or decree being appealed;
- any order granting leave to appeal;
- any certification under 28 U.S.C. § 158(d)(2);
- any opinion, findings of fact, and conclusions of law of the court relating to the subject of the appeal, including transcripts of all oral rulings;
- any transcript ordered as prescribed by Rule 8009(b); and
- any statement required by Rule 8009(c).

Notwithstanding the parties' designations, the appellate court may order the inclusion of additional items from the record as part of the record on appeal.

(5) *Copies for the Bankruptcy Clerk*. If paper

copies are needed, a party filing a designation of items to be included in the record ~~shall~~ must provide to the bankruptcy clerk a copy of any designated items that the bankruptcy clerk requests. If the party fails to provide the copy, the bankruptcy clerk ~~shall~~ must prepare the copy at the party's expense.

(b) TRANSCRIPT OF PROCEEDINGS.

(1) *Appellant's Duty*. Within the time period prescribed by Rule 8009(a)(1), the appellant ~~shall~~ must:

(A) order in writing from the reporter a transcript of any parts of the proceedings not already on file that the appellant considers necessary for the appeal, and file the order with the bankruptcy clerk; or

(B) file with the bankruptcy clerk a certificate stating that the appellant is not ordering a transcript.

(2) *Cross-Appellant's Duty*. Within 14 days after the appellant files with the bankruptcy clerk a copy of the transcript order or a certificate stating that appellant is not ordering a transcript, the appellee as cross-appellant ~~shall~~ must:

(A) order in writing from the reporter a transcript of any parts of the proceedings not ordered by appellant and not already on file that the cross-appellant considers necessary for the appeal, and file a copy of the order with the bankruptcy

clerk; or

(B) file with the bankruptcy clerk a certificate stating that the cross-appellant is not ordering a transcript.

(3) *Appellee's or Cross-Appellee's Right to Order*. Within 14 days after the appellant or cross-appellant files with the bankruptcy clerk a copy of a transcript order or certificate stating that a transcript will not be ordered, the appellee or cross-appellee may order in writing from the reporter a transcript of any parts of the proceedings not already ordered or on file that the appellee or cross-appellee considers necessary for the appeal. The order ~~shall~~ must be filed with the bankruptcy clerk.

(4) *Payment*. At the time of ordering, a party ~~shall~~ must make satisfactory arrangements with the reporter for paying the cost of the transcript.

(5) *Unsupported Finding or Conclusion.* If ~~an~~ the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant ~~shall~~ must include in the record a transcript of all testimony and copies of all exhibits relevant to that finding or conclusion.

(c) STATEMENT OF THE EVIDENCE WHEN A

TRANSCRIPT IS UNAVAILABLE. Within the time period prescribed by Rule 8009(a)(1), the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection, if a transcript of ~~the~~ a hearing or trial is unavailable. The statement ~~shall~~ must be served on the appellee, who may serve objections or proposed amendments within 14 days after being served. The statement and any objections or proposed amendments ~~shall~~ must then be submitted to the bankruptcy court for settlement and approval. As settled and approved, the statement ~~shall~~ must be included by the bankruptcy clerk in the record on appeal.

(d) AGREED STATEMENT AS THE RECORD ON APPEAL. Instead of the record on appeal as defined in (a), the parties may prepare, sign, and submit to the bankruptcy court a statement of the case showing how the issues presented by the appeal arose and were decided by the bankruptcy judge. The statement ~~shall~~ must set forth only those facts averred and proved or sought to be proved that are essential to the court's resolution of the issues. If the statement is truthful, it, together with any additions that the bankruptcy court may consider necessary to a full presentation of the issues on appeal, ~~shall~~ must be approved by the bankruptcy court and certified to the appellate court as the

record on appeal. The bankruptcy clerk ~~shall~~ must then transmit it to the clerk of the appellate court within the time provided by Rule 8010~~(b)(1)~~. A copy of the agreed statement may be filed instead of the appendix required by Rule 8018(b).

(e) CORRECTION OR MODIFICATION OF THE RECORD.

(1) If any ~~dispute~~ difference arises about whether the record truly discloses what occurred in the bankruptcy court, the ~~dispute shall~~ difference must be submitted to and settled by the bankruptcy judge and the record conformed accordingly. If an item has been improperly designated as part of the record on appeal, a party may move to strike the improperly designated item.

(2) If anything material to either party is omitted from or misstated in the record by error or accident, the omission or misstatement may be corrected, and a supplemental record may be certified and transmitted:

(A) on stipulation of the parties;

(B) by the bankruptcy court before or after the record has been forwarded; or

(C) by the appellate court.

(3) All other questions as to the form and content of the record ~~shall~~ must be presented to the appellate court.

(f) SEALED DOCUMENTS. A document placed under seal by the bankruptcy court may be designated as part of the record on appeal. In designating a sealed document, a party ~~shall~~must identify it without revealing confidential or secret information. The bankruptcy clerk ~~shall~~must not transmit a sealed document to the clerk of the appellate court as part of the transmission of the record. Instead, a party seeking to present a sealed document to the appellate court as part of the record on appeal ~~shall~~must file a motion with the appellate court to accept the document under seal. If the motion is granted, the movant ~~shall~~must notify the bankruptcy court of the ruling, and the bankruptcy clerk ~~shall~~must promptly transmit the sealed document to the clerk of the appellate court.

(g) OTHER. All parties to an appeal ~~shall~~must take any other action necessary to enable the bankruptcy clerk to assemble and transmit the record.

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(h) DIRECT APPEALS TO COURT OF APPEALS. Rule~~s~~ 8009 and ~~-~~8010 apply to appeals taken directly to the court of appeals under 28 U.S.C. § 158(d)(2). A reference in Rules 8009 and 8010 to the "appellate court" includes the court of appeals when it has authorized a direct appeal under 28 U.S.C. § 158(d)(2). In direct appeals to the court of appeals, the reference in Rule

8009(d) to Rule 8018(b) means F.R. App. P. ~~Appellate Rule~~ 30.

COMMITTEE NOTE

This rule is derived from former Rule 8006 and F.R. App. P. 10 and 11(a). It retains the practice of former Rule 8006 of requiring the parties to designate items to be included in the record on appeal. In this respect the bankruptcy rule differs from the appellate rule. Among other things, F.R. App. P. 10(a) provides that the record on appeal consists of all the documents and exhibits filed in the case. This requirement would often be unworkable in a bankruptcy context because thousands of items might have been filed in the overall bankruptcy case.

Subdivision (a) provides the time period for the appellant's filing of a designation of items to be included in the record on appeal and a statement of the issues to be presented. It then provides for the designation of additional items by the appellee, cross-appellant, and cross-appellee, as well as for the cross-appellant's statement of the issues to be presented in its appeal. Subdivision (a)(4) prescribes the content of the record on appeal. Ordinarily, the bankruptcy clerk will not need to have paper copies of the designated items because the clerk will either transmit them to the appellate court electronically or otherwise make them available electronically. If the bankruptcy clerk requires a paper copy of some or all of the items designated as part of the record, the clerk may request the parties to provide the necessary copies, and the parties must comply with the request.

Subdivision (b) governs the process for ordering a complete or partial transcript of the bankruptcy court proceedings. In situations in which a transcript is unavailable, subdivision (c) allows for the parties' preparation of a statement of the evidence or proceedings, which must be approved by the bankruptcy court.

Subdivision (d) adopts the practice of F.R. App. P. 10(d) of permitting the parties to agree on a statement of the case in place of the record on appeal. The statement must show how the issues ~~raised~~ on appeal arose and were decided in the bankruptcy court. It must be approved by the bankruptcy judge in order to be certified as the record on appeal.

Subdivision (e), modeled on F.R. App. P. 10(e), provides a procedure for correcting ~~a~~the record on appeal if an item is improperly designated, omitted, or misstated.

Subdivision (f) is a new provision that governs the handling of any

document that remains sealed by the bankruptcy court and that a party wants to include in the record on appeal. The party must request the appellate court to accept the document under seal, and that motion must be granted before the bankruptcy clerk may transmit the sealed document to the clerk of the appellate court.

Subdivision (g), which requires the parties' cooperation with the bankruptcy clerk in assembling and transmitting the record, retains the requirement of former Rule 8006, which was adapted from F.R. App. P. 11(a).

Subdivision (h) is new. It makes the provisions of this rule and Rule 8010 applicable to appeals taken directly to a court of appeals under 28 U.S.C. § 158(d)(2). See F.R. App. P. 6(c)(2)(A) and (B).

Rule 8010. Completion and Transmission of the Record

(a) DUTIES OF REPORTER TO PREPARE AND FILE TRANSCRIPT. The reporter ~~shall~~must prepare and file a transcript as follows:

(1) Upon receiving ~~a request~~ an order for a transcript, the reporter ~~shall~~must file in the appellate court an acknowledgment of the request, the date it was received, and the date on which the reporter expects to have the transcript completed.

(2) Upon completing the transcript, the reporter ~~shall~~must file it with the bankruptcy clerk and notify the clerk of the appellate court of the filing.

(3) If the transcript cannot be completed within 30 days of receipt of the ~~request~~ order, the reporter ~~shall~~must seek an extension of time from the clerk of the appellate court. The clerk must enter the action taken on the docket and notify the parties. ~~The action of that clerk shall be entered on the docket, and the parties shall be notified.~~

(4) If the reporter does not file the transcript within the time allowed, the clerk of the appellate court ~~shall~~must notify the bankruptcy judge.

(b) DUTY OF BANKRUPTCY CLERK TO TRANSMIT

RECORD.

(1) Subject to Rules 8009(f) and 8010(b)(5), when the record is complete for purposes of appeal, the bankruptcy clerk shallmust transmit to the clerk of the appellate court either the record or a notice of the availability of the record and the means of accessing it electronically.

(2) If there are multiple appeals from a judgment or order, the bankruptcy clerk shallmust transmit a single record.

(3) Upon receiving the transmission of the record or notice of the availability of the record, the clerk of the appellate court shallmust enter its receipt on the docket and give prompt notice to all parties to the appeal.

(4) If the appellate court directs that paper copies of the record be furnished, the clerk of that court shallmust notify the appellant and, if the appellant fails to provide the copies, the bankruptcy clerk shallmust prepare the copies at the appellant's expense.

(5) Subject to Rule 8010(c), if a motion for leave to appeal has been filed with the bankruptcy clerk under Rule 8004, the bankruptcy clerk shallmust prepare and transmit the record only after the appellate court grants leave to appeal.

(c) RECORD FOR PRELIMINARY MOTION IN

APPELLATE COURT. If, prior to the transmission of the record as prescribed by (b), a party moves in the appellate court for any of the following relief:

- leave to appeal;
- dismissal;
- a stay pending appeal;
- approval of a supersedeas bond, or additional security on a bond or undertaking on appeal; or
- any other intermediate order –

the bankruptcy clerk, at the request of any party to the appeal, ~~shall~~must transmit to the clerk of the appellate court any parts of the record designated by a party to the appeal or a notice of the availability of those parts and the means of accessing them electronically.

COMMITTEE NOTE

This rule is derived from former Rule 8007 and F.R. App. P 11.

Subdivision (a) retains the procedure of former Rule 8007(a) regarding the reporter's duty to prepare and file a transcript if one is requested by a party. It clarifies that, while the reporter must file the completed transcript with the bankruptcy clerk, it is the clerk of the appellate court who must receive the reporter's acknowledgment of the request for a transcript and statement of the expected completion date and who must grant an extension of time beyond 30 days for completion of the transcript. In courts that record courtroom proceedings electronically, the person who transcribes the recording of a proceeding is a reporter for purposes of this rule.

Subdivision (b) requires the bankruptcy clerk to transmit the record to the clerk of the appellate court when the record is complete and, in the case of appeals under 28 U.S.C. § 158(a)(3), leave to appeal has been granted. This transmission will be made electronically, either by sending the record itself or sending notice of how the record can be accessed electronically. The appellate court may, however, require that a paper copy of some or all of the record be furnished, in which case the bankruptcy clerk will direct the appellant to provide the copies or will make the copies at the appellant's expense.

In a change from former Rule 8007(b), subdivision (b) of this rule no longer directs the clerk of the appellate court to docket the appeal upon receipt of the record from the bankruptcy clerk. Instead, under Rules 8003(d) and 8004(c), the clerk of the appellate court dockets the appeal upon receipt of the notice of appeal or, in the case of appeals under 28 U.S.C. § 158(a)(3), the notice of appeal and the motion for leave to appeal. Those documents are to be sent promptly to the appellate court by the bankruptcy clerk. Accordingly, by the time the clerk of the appellate court receives the record, the appeal will already be docketed in that court.

Subdivision (c) is derived from former Rule 8007(c) and F.R. App. P. 11(g) . It provides for the transmission of parts of the record designated by the parties for consideration by the appellate court in ruling on specified preliminary motions filed prior to the preparation and transmission of the record on appeal.

Rule 8009(h) makes this rule applicable to direct appeals to the court of appeals under 28 U.S.C. § 158(d)(2). It also provides that, for purposes of this rule and Rule 8009,"appellate court" includes the court of appeals when it has authorized a direct appeal under § 158(d)(2).

Rule 8011. Filing and Service; Signature

(a) FILING.

(1) *Filing with the Clerk.* A document required or permitted to be filed in the appellate court ~~shall~~must be filed with the clerk of that court.

(2) *Filing: Method and Timeliness.*

(A) *In general*. Filing may be accomplished by transmission to the clerk of the appellate court~~,~~. ~~but, e~~Except as provided in (B)(ii), (B)(iii), and (C), filing is not timely unless the clerk receives the document within the time fixed for filing.

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

(i) transmitted to the clerk of the appellate court in accordance with applicable electronic transmission procedures for the filing of documents in that court;

(ii) mailed to the clerk of the appellate court by first-class mail – or other class of mail that is at least as expeditious – postage prepaid, if the court's procedures permit or require a brief or appendix to be filed by mailing; or

(iii) dispatched to a third-party commercial carrier for delivery within three days to the clerk of the

appellate court, if the court's procedures permit or require a brief or appendix to be filed by ~~delivery to the clerk~~ commercial carrier.

(C) *Inmate filing*. A document 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. ~~Rule 25(a)(2)(C) F.R. App. P. applies to an appeal taken by an inmate from a judgment, order, or decree of a bankruptcy judge to an appellate court.~~

(D) *Electronic filing*. The appellate court may by local rule permit or require documents to be filed, signed, or verified by electronic means that are consistent with any technical standards that the Judicial Conference of the United States establishes. A local rule requiring filing by electronic means ~~shall~~must allow reasonable exceptions, including for individuals who are not represented by counsel.

(E) *Copies*. If a document is filed electronically in the appellate court, no paper copy is required. If a

document is filed by mail or delivery ~~in~~ to the ~~district~~ appellate court, ~~an original and one copy of the document shall~~ no additional copies are required ~~be filed. If a document is filed by mail or delivery in the BAP, an original and three copies shall be filed.~~ The ~~district court or BAP~~ appellate court may, however, require by local rule or order in a particular case the filing or furnishing of a specified number of paper copies ~~of a document filed electronically or a different number of copies than required by this subparagraph~~.

(3) *Filing a Motion with a Judge*. In appeals to the BAP, if a motion requests relief that may be granted by a single judge, any judge of that court may permit the motion to be filed with ~~the~~ that judge ~~if authorized by local rule~~. The judge ~~shall~~must note the filing date on the motion and transmit it to the BAP clerk.

(4) *Clerk's ~~Acceptance~~ Refusal of Documents*. The clerk of the appellate court ~~shall~~must not refuse to accept for filing any document transmitted for that purpose solely because it is not presented in proper form as required by these rules or by any local rule or practice. ~~The appellate court may, by order, direct the correction of any deficiency in any document that does not conform to the requirements of these rules or applicable local rule, and may prescribe such other relief as the court deems appropriate.~~

(5) *Privacy Protection*. Rule 9037 applies to an appeal to the appellate court taken from a judgment, order, or decree of a bankruptcy judge.

(b) SERVICE OF DOCUMENTS REQUIRED. Copies of all documents filed by any party and not required by these Part VIII rules to be served by the clerk of the appellate court ~~shall~~must, at or before the time of filing, be served on all other parties to the appeal by the party making the filing or a person acting for that party. Service on a party represented by counsel ~~shall~~must be made on counsel.

(c) MANNER OF SERVICE.

(1) Service must be made electronically if feasible and permitted by local procedure. If not, service may be made by any of the following methods:

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

(B) mail; or

(C) third-party commercial carrier for delivery within three days~~; or~~.

~~(D) electronic means, if the party being served consents in writing, or as otherwise permitted or required by applicable local procedure.~~

(2) ~~If authorized by local rule, a party may use the appellate court's transmission equipment to make the electronic service under Rule 8011(c)(1)(D).~~

~~(3)~~ When it is reasonable, considering such factors as the immediacy of the relief sought, distance, and cost, service on a party ~~shall~~must be by a manner at least as expeditious as the manner used to file the document with the appellate court. ~~Service by electronic means shall be used when feasible and otherwise permitted.~~

(~~3~~4) Service by mail or by commercial carrier is complete on mailing or delivery to the carrier. Service by electronic means is complete on transmission, unless the party making service receives notice that the document was not transmitted successfully to the party attempted to be served.

(d) PROOF OF SERVICE.

(1) Documents presented for filing ~~shall~~must contain either:

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

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

(i) the date and manner of service;

(ii) the names of the persons served; and

(iii) for each person served, the mail or electronic address, facsimile number, or the address of the place of delivery, as appropriate for the manner of service.

(2) The clerk of the appellate court may permit documents to be filed without acknowledgment or proof of service at the time of filing, but ~~shall~~must require the acknowledgment or proof of service to be filed promptly thereafter.

(3) When a brief or appendix is filed by mailing, delivery, or electronic transmission in accordance with Rule 8011(a)(2)(B), the proof of service ~~shall~~must also state the date and manner by which the document was filed.

(e) SIGNATURE. If filed electronically, every motion, response, reply, brief, or submission authorized by these Part VIII rules ~~shall~~must include the electronic signature of the person filing the document or, if the person is represented, the electronic signature of counsel. The electronic signature ~~shall~~must be provided by electronic means that are consistent with any technical standards that the Judicial Conference of the United States establishes. If filed in paper form, every motion, response, reply, brief, or submission authorized by these rules ~~shall~~must be signed

by the person filing the document or, if the person is represented, by counsel.

COMMITTEE NOTE

This rule is derived from former Rule 8008 and F.R. App. P. 25. It adopts some of the additional details of the appellate rule, and it provides greater recognition of the possibility of electronic filing and service.

Subdivision (a) governs the filing of documents in the appellate court. Consistent with other provisions of these Part VIII rules, subdivision (a)(2) requires electronic filing of documents, including briefs and appendices, unless the appellate court's procedures permit or require ~~filing by mail or personal~~ other methods of delivery to the court. An electronic filing is timely if it is received by the clerk of the appellate court within the time fixed for filing. No paper copies need be submitted when documents are filed electronically, unless the appellate court requires them.

Subdivision (a)(4) provides that the clerk of the appellate court may not refuse to accept a document for filing solely because its form does not comply with these rules or any local rule or practice. The appellate court may, however, direct the correction of any deficiency in any document that does not conform to the requirements of these rules or applicable local rule, and may prescribe such other relief as the court deems appropriate.

Subdivision (a)(5) clarifies that Rule 9037, which requires redaction of certain personally identifying information, applies to documents filed in the appellate court.

Subdivisions (b) and (c) address the service of documents in the appellate court. Except for documents that the clerk of the appellate court must serve, a party ~~who~~ that makes a filing must serve copies of the document on all other parties to the appeal. Service on represented parties must be made on counsel. The methods of service are listed in subdivision (c). Electronic service is required when feasible and authorized ~~upon a party who has consented to that type of service in writing or when permitted or required~~ by the appellate court.

Subdivision (d) retains the former rule's provisions regarding proof of service of a document filed in the appellate court. In addition it provides that, when service is made electronically, a certificate of service must state

the mail or electronic address or facsimile number to which service was made.

Subdivision (e) is a new provision that requires an electronic signature of counsel or an unrepresented filer for documents that are filed electronically in the appellate court. The method of providing an electronic signature may be specified by a local court rule that is consistent with any standards established by the Judicial Conference of the United States. Paper copies of documents filed in the appellate court must bear an actual signature of counsel or the filer. By requiring a signature, subdivision (e) ensures that a readily identifiable attorney or party takes responsibility for every document that is filed.

Rule 8012. Corporate Disclosure Statement

(a) WHO ~~SHALL~~MUST FILE. Any nongovernmental corporate party to ~~an appeal shall~~ a proceeding in the appellate court must file ~~in the appellate court~~ a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation.

(b) TIME FOR FILING; SUPPLEMENTAL FILING. A party ~~shall~~must file the statement prescribed by subdivision (a) with its principal brief or upon filing a motion, response, petition, or answer in the appellate court, whichever occurs first, unless a local rule requires earlier filing. Even if the statement has already been filed, the party's principal brief ~~shall~~must include a statement before the table of contents. A party ~~shall~~must supplement its statement whenever the information that ~~shall~~must be disclosed under subdivision (a) changes.

COMMITTEE NOTE

This rule is derived from F.R. App. P. 26.1. It requires the filing of corporate disclosure statements and supplemental statements in order to assist appellate court judges in determining whether they have interests that should cause recusal. If filed separately from a brief, motion, response, petition, or answer, the statement must be filed and served in accordance with Rule 8011. Under Rule 8015(a)(7)(B)(iii), the corporate disclosure statement is not included in calculating applicable word-count limitations.

Rule 8013. Motions; Intervention

(a) CONTENTS OF MOTION; RESPONSE; REPLY.

(1) *Application for Relief.* A request for an order or other relief~~, including an extraordinary writ, shall~~ must be made by filing with the clerk of the appellate court a motion for that order or relief, with proof of service on all other parties to the appeal.

(2) *Contents of a Motion.*

(A) *Grounds and relief sought.* A motion ~~shall~~must state with particularity, in a single document, the grounds for the motion~~, and~~ the ~~order or~~ relief sought, and the legal argument necessary to support it.

(B) *Motion to expedite appeal.* A motion to expedite the consideration of an appeal ~~shall~~must explain why expedition is warranted and what circumstances justify the appellate court considering the appeal ahead of other matters. If a motion to expedite is granted, the appellate court may accelerate the transmission of the record, the deadline for filing briefs and other documents, oral argument, and resolution of the appeal. Under appropriate circumstances, a motion to expedite the consideration of an appeal may be filed as an emergency motion under Rule 8013(d).

(C) *Accompanying documents.*

(i) Any affidavit~~, declaration, brief,~~ or other document necessary to support a motion ~~shall~~must be served and filed with the motion.

(ii) An affidavit ~~or declaration~~ ~~shall~~must contain only factual information, not legal argument.

(iii) A motion seeking substantive relief from a judgment, order, or decree of a bankruptcy court ~~shall~~must include a copy of the bankruptcy court's order, and any accompanying opinion, as a separate exhibit.

(D) *Documents not required.* Neither a notice of motion nor a proposed order is required.

(3) *Response and Reply; Time to File*. Unless the appellate court shortens or extends the time to file, any party to the appeal may file a response to the motion within seven days after service of the motion. The movant may file a reply to a response within seven days after service of the response. A reply ~~shall~~must be limited to matters addressed by the response.

(b) DETERMINATION OF A MOTION FOR A PROCEDURAL ORDER. Notwithstanding Rule 8013(a)(3), the appellate court may act on a motion for a procedural order, including a motion under Rule 9006(b) or (c), at any time without

awaiting a response. Any party affected by such action may move for reconsideration, vacation, or modification of the action within seven days after service of the procedural order.

(c) ORAL ARGUMENT. A motion will be decided without oral argument unless the appellate court orders otherwise.

(d) EMERGENCY MOTION.

(1) Whenever a movant requests expedited action on a motion on the ground that, to avoid irreparable harm, relief is needed in less time than would normally be required for the appellate court to receive and consider a response, the word "Emergency" ~~shall~~must precede the title of the motion.

(2) The emergency motion ~~shall~~must

(A) be accompanied by an affidavit ~~or declaration~~ setting forth the nature of the emergency;

(B) state whether all grounds advanced in support of it were submitted to the bankruptcy ~~judge~~ court and, if any grounds relied on were not submitted, why the motion should not be remanded for reconsideration by the bankruptcy ~~judge~~ court;

(C) include, when known, the email addresses, office addresses, and telephone numbers of moving and opposing counsel; and

(D) be served as prescribed by Rule 8011.

(3) Before filing an emergency motion, the movant ~~shall~~must make every practicable effort to notify opposing counsel in time for counsel to respond to the motion. The affidavit ~~or declaration~~ accompanying the emergency motion ~~shall~~must also state when and how opposing counsel was notified, or, if opposing counsel was not notified, why it was impracticable to do so.

(e) POWER OF A SINGLE BAP JUDGE TO ENTERTAIN A MOTION.

(1) A single judge of a BAP may grant or deny any request for relief that under these rules may properly be sought by motion, except that a single judge may not dismiss or otherwise decide an appeal, deny a motion for leave to appeal, or deny a motion for a stay pending appeal if denial would result in mootness of the appeal.

(2) The BAP may review the action of a single judge, either on its own motion or on the motion of a party.

(f) FORM~~AT~~ OF DOCUMENTS; PAGE LIMITS; NUMBER OF COPIES.

(1) *Format of Paper Document*. Rule~~s~~ 27(d)(1)(A)-(E) ~~and 32(a)(1)-(6)~~ F.R. App. P. applies~~y~~ in the

appellate court to a paper version of a motion, response, or reply, ~~or brief~~ that is permitted or required to be filed.

(2) *Format of Electronically Filed Document*. A motion, response, or reply~~, or brief~~ filed electronically ~~shall~~must comply with the requirements made applicable to a paper copy under (1) regarding covers, line spacing, margins, typeface, and type styles. It ~~shall~~must also comply with the length requirements under (3).

(3) *Page Limits*. ~~Unless the appellate court permits or directs otherwise~~, ~~the following page limits apply:~~

~~(A)~~ A~~a~~ motion or a response to a motion ~~shall~~must not exceed~~10~~ 20 pages, exclusive of the corporate disclosure statement and accompanying documents authorized by Rule 8013(a)(2)(C), unless the appellate court permits or directs otherwise.~~;~~

~~(B) a~~ A reply to a response ~~shall~~must not exceed ~~5~~10 pages~~;~~.

~~(C) a brief in support of a motion or in support of a response to a motion shall not exceed 20 pages, exclusive of accompanying documents authorized by Rule 8013(a)(2)(C); and~~

~~(D) a brief in support of a reply shall not exceed 10 pages.~~

(4) *Copies*. Copies ~~shall~~must be provided as required by Rule 8011(a)(2)(E).

(g) INTERVENTION. Unless a statute provides another method, a~~person who wants~~ seeking to intervene in an appeal pending in the appellate court ~~shall~~must file a motion for leave to intervene with the clerk of the appellate court and serve a copy on all parties to the appeal. The motion, or other notice of intervention authorized by statute, ~~shall~~must be filed within 30 days after the appeal is docketed~~ and shall~~. The motion must contain a concise statement of the movant's interest and ground for intervention; whether the movant sought to intervene in the bankruptcy court, and if not, the reasons for not doing so; and why participation as an amicus curiae would not adequately protect the movant's interests.

COMMITTEE NOTE

Rule 8013 is derived from current Rule 8011 and F.R. App. P. 15(d)~~,~~ and 27~~, and 32(a)~~. It adopts many of the provisions of the appellate rules that specify the form and page limits of motions and ~~accompanying~~ related documents, while also adapting those requirements for the context of electronic filing. In addition, it prescribes the procedure for seeking to intervene in the appellate court.

Subdivision (a) retains much of the content of former Rule 8011(a) regarding the contents of a motion, response, and reply. It also specifies the documents that may accompany a motion. Unlike the former rule, ~~F.R. App. P. 27, which bars the filing of briefs supporting or in response to a motion~~, subdivision (a) does not allow separate briefs. ~~continues the bankruptcy appellate practice of permitting briefs in support of a motion, a response to a motion, and a reply~~ It adopts the practice of F.R. App. P. 27(a)(2) and requires the moving party to include the legal arguments supporting a motion with the motion itself in a single document.

Subdivision (a)(2)(B) clarifies procedures for a motion to expedite the consideration of an appeal. This motion seeks to expedite the time for the disposition of the appeal as a whole, whereas an emergency motion – which is addressed by subdivision (d) – typically involves an urgent request for relief short of disposing of the entire appeal (for example, an emergency request for a stay pending appeal to prevent imminent mootness). In appropriate cases – such as when there is an urgent need to resolve the appeal quickly to prevent harm to a party – a motion to expedite the consideration of an appeal may be filed as an emergency motion.

Subdivision (b) retains the substance of former Rule 8011(b). It authorizes the appellate court to act on a motion for a procedural order without awaiting a response to the motion. It specifies that a party seeking reconsideration, vacation, or modification of the order must file such a motion within seven days after service of the order.

Subdivision (c) continues the practice of former Rule 8011(c) and F.R. App. P. 27(e) of dispensing with oral argument of motions in the appellate court unless the court orders otherwise.

Subdivision (d), which carries forward the content of former rule 8011(d), governs emergency motions that the appellate court may rule on without awaiting a response when necessary to prevent irreparable harm. A party seeking expedited action on a motion in the appellate court must explain the nature of the emergency, whether all grounds in support of the

motion were first presented to the bankruptcy court, and, if not, why a remand for reconsideration should not be ordered. The moving party must also explain the steps taken to notify opposing counsel in advance of filing the emergency motion and, if counsel was not notified, why it was impracticable to do so.

Subdivision (e), like former Rule 8011(e) and similar to F.R. App. P. 27(c), authorizes a single BAP judge to rule on certain motions. This authority, however, does not extend to issuing rulings that would dispose of the appeal. For that reason the rule now prohibits a single BAP judge from denying a motion for a stay pending appeal when the effect of that ruling would be to require dismissal of the appeal as moot. A ruling by a single judge is subject to review by the BAP.

Subdivision (f) incorporates by reference the formatting and appearance requirements of F.R. App. P. 27(d)(1) ~~and 32(a)~~. When paper copies of the listed documents are filed, they must comply with the specified requirements of the Federal Rules of Appellate Procedure regarding reproduction, covers, binding, appearance, and format. When these documents are filed electronically, they must comply with the relevant requirements of the appellate rules regarding covers and format. Subdivision (f) also specifies page limits for motions, responses, and replies ~~and related documents~~, which was a matter not addressed by former Rule 8011.

Subdivision (g) clarifies the procedures for seeking to intervene in a case that has been appealed. It is based on ~~adopts the provisions of~~ F.R. App. P. 15(d). The former Part VIII rules did not address intervention.

Rule 8014. Briefs

(a) APPELLANT'S BRIEF. The appellant's brief ~~shall~~must contain under appropriate headings and in the order here indicated:

(1) a corporate disclosure statement, if required by Rule 8012;

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

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

(4) a jurisdictional statement, including:

(A) the basis for the bankruptcy court's subject matter jurisdiction, with citations to applicable statutory provisions and a brief discussion of the relevant facts establishing jurisdiction;

(B) the basis for the appellate court's jurisdiction, with citations to applicable statutory provisions and a brief discussion of the relevant facts establishing jurisdiction;

(C) the filing dates establishing the timeliness of the appeal; and

(D) an assertion that the appeal is from a final judgment, order, or decree, or information establishing the appellate court's jurisdiction on another basis;

(5) a statement of the issues presented and, for each issue, the applicable standard of appellate review;

(6) a concise statement of the case~~, which shall contain a brief discussion of the nature of the case and~~ setting out the facts relevant to the issues presented on appeal and identifying the rulings presented for review, ~~including the course of the proceedings and the disposition in the bankruptcy court,~~ with appropriate references to the record;

(7) an argument, which may be preceded by a summary, and which ~~shall~~must contain the appellant's contentions with respect to the issues presented, and the reasons supporting those contentions ~~therefor~~, with citations to the authorities~~,~~ ~~statutes,~~ and parts of the record relied on;

(8) a short conclusion stating the precise relief sought; and

(9) the certificate of compliance, if required by Rule 8015(a)(7) or (b).

(b) APPELLEE'S BRIEF. The appellee's brief ~~shall~~must conform to the requirements of Rule 8014 (a)(1)-(7) and (9),

except that none of the following need appear unless the appellee is dissatisfied with the appellant's statement:

(1) the jurisdictional statement;

(2) the statement of the issues and the applicable standard of appellate review for each issue; and

(3) the statement of the case.

(c) REPLY BRIEF. The appellant may file a brief in reply to the appellee's brief. A reply brief ~~shall~~must contain a table of contents, with page references, and a table of authorities listing cases alphabetically arranged, statutes, and other authorities, with references to the pages of the reply brief where they are cited.

~~(d) NO FURTHER BRIEFS. Unless the appellate court permits, no further briefs shall be filed.~~

~~(e) REFERENCES TO PARTIES. In briefs and at oral argument, counsel should minimize use of the terms "appellant" and "appellee." To make briefs clear, counsel should use the parties' actual names or the designations used in the bankruptcy court, such as "the debtor" or "the trustee."~~

~~(f) REFERENCES TO THE RECORD. References to the parts of the record contained in the appendix filed with the appellant's brief shall be to pages of the appendix.~~

~~(g)~~ STATUTES, RULES, REGULATIONS, OR SIMILAR AUTHORITY. If determination of the issues presented requires reference to the Code or other statutes, rules, regulations, or similar authority, relevant parts thereof ~~shall~~must be set out in the brief or in an addendum.

(~~eh~~) BRIEFS IN A CASE INVOLVING MULTIPLE APPELLANTS OR APPELLEES. In a case involving more than one appellant or appellee, including consolidated cases, any number of appellants or appellees may join in a brief, and any party may adopt by reference a part of another's brief. Parties may also join in reply briefs.

(~~fi~~) SUBMISSION OF SUPPLEMENTAL AUTHORITIES. If pertinent and significant authorities come to a party's attention after the party's brief has been filed, or after oral argument but before a decision, the party may promptly advise the clerk of the appellate court by a signed submission setting forth the citations. The submission, which ~~shall~~must also be transmitted to the other parties to the appeal, ~~shall~~must state the reasons for the supplemental citations, referring either to the pertinent page of a brief or to a point argued orally. The body of the submission ~~shall~~must not exceed 350 words. Any response ~~shall~~must be made

within seven days unless otherwise ordered by the court~~promptly~~

and ~~shall~~must be similarly limited.

COMMITTEE NOTE

Rule 8014 is derived from former Rule 8010(a) and (b) and F.R. App. P. 28. Adopting much of the content of Rule 28, it provides greater detail regarding appellate briefs than former Rule 8010 contained.

Subdivision (a) prescribes the content and structure of the appellant's brief. It largely follows former Rule 8010(a)(1), but, in order to ensure national uniformity, it eliminates the provision of authority for an appellate court to alter these requirements. Implementing Rule 8012, subdivision (a)(1) directs the placement of a corporate disclosure statement, when required to be filed, at the beginning of an appellant's brief. Subdivision (a)(9) is also new. It implements the requirement under Rule 8015(a)(7) and (b) for the filing of a certificate of compliance with the limit on the number of words or lines allowed to be in a brief.

Subdivisions (b) carries forward the provisions of former Rule 8010(a)(2).

Subdivisions (c) is ~~and (d) are~~ derived from F.R. App. P. 28(c). ~~They~~ It explicitly authorizes an appellant to file a reply brief, which filing will generally complete the parties' briefing process.

~~Subdivisions (e) and (f) are derived from F.R. App. P. 28 (d) and (e). Because Rule 8018, unlike F.R. App. P. 30(c), does not authorize a deferred filing of the appendix, subdivision (f) of this rule does not include provisions concerning references to the record when the appendix is prepared after the briefs are filed.~~

Subdivision (d~~g~~) is similar to former Rule 8010(b), but it is reworded to reflect the likelihood that briefs will generally be filed electronically rather than in paper form.

Subdivision (e) is new. It adopts the provisions of F.R. App. P. 28 (i), which allow multiple parties to join in a brief and any party to adopt by reference portions of another party's brief.

Subdivision (f~~h~~) largely adopts the procedures of F.R. App. P 28(j) with respect to the filing of supplemental authorities with the appellate

court after a brief has been filed or after oral argument. The supplemental submission must comply with the signature requirements of Rule 8011(e).

Rule 8015. Form of Briefs, Appendices, and Other Papers.

(a) PAPER COPIES OF BRIEFS. If a paper copy of a brief may or must be filed, the following requirements apply:

(1) *Reproduction*.

(A) A brief may be reproduced by any process that yields a clear black image on light paper. The paper ~~shall~~must be opaque and unglazed. Only one side of the paper may be used.

(B) Text ~~shall~~must be reproduced with a clarity that equals or exceeds the output of a laser printer.

(C) Photographs, illustrations, and tables may be reproduced by any method that results in a good copy of the original. A glossy finish is acceptable if the original is glossy.

(2) *Cover*. ~~Except for filings by unrepresented parties, the cover of the appellant's brief shall be blue; the appellee's, red; an intervenor's or amicus curiae's, green; any reply brief, gray; and any supplemental brief, tan.~~ The front cover of a brief ~~shall~~must contain:

(A) the number of the case centered at the top;

(B) the name of the court;

(C) the title of the case as prescribed by Rule 8003(d)(2) or 8004(c)(2);

(D) the nature of the proceeding and the name of the court below;

(E) the title of the brief, identifying the party or parties for whom the brief is filed; and

(F) the name, office address, telephone number, and email address of counsel representing the party for whom the brief is filed.

(3) *Binding*. The brief ~~shall~~must be bound in any manner that is secure, does not obscure the text, permits the brief to lie reasonably flat when open, and is easy to scan.

(4) *Paper Size, Line Spacing, and Margins*. The brief ~~shall~~must be on 8½ by 11 inch paper. The text ~~shall~~must be double-spaced, but quotations more than two lines long may be indented and single-spaced. Headings and footnotes may be single-spaced. Margins ~~shall~~must be at least one inch on all four sides. Page numbers may be placed in the margins, but no text may appear there.

(5) *Typeface*. Either a proportionally spaced or monospaced face may be used.

(A) A proportionally spaced face ~~shall~~must include serifs, but sans-serif type may be used in headings and captions. A proportionally spaced face ~~shall~~must be 14-point or larger.

(B) A monospaced face may not contain more than 10½ characters per inch.

(6) *Type Styles*. A brief ~~shall~~must be set in plain, roman style, although italics or boldface may be used for emphasis. Case names ~~shall~~must be italicized or underlined.

(7) *Length*.

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(A) *Page limitation*. A principal brief ~~of the appellant or appellee shall~~must not exceed 30 pages, or a reply brief 15 pages, unless it complies with (B) and (C).

(B) *Type-volume limitation*.

(i) A principal brief of the appellant or appellee is acceptable if:

- it contains no more than 14,000 words; or
- it uses a monospaced face and contains no more than 1,300 lines of text.

(ii) A reply brief is acceptable if it contains no more than half of the type volume specified in (i).

(iii) Headings, footnotes, and quotations count toward the word and line limitations. The corporate disclosure statement, table of contents, table of citations, statement with respect to oral argument, any addendum containing statutes, rules, or regulations, and any certificates of counsel do not count toward the limitation.

(C) *Certificate of Compliance*.

(i) A brief submitted under Rule 8015(a)(7)(B) ~~shall~~must include a certificate signed by the attorney, or an unrepresented party, that the brief complies with the type-volume limitation. The person preparing the certificate may rely on the word or line count of the word-processing system used to prepare the brief. The certificate ~~shall~~must state either:

- the number of words in the brief; or
- the number of lines of monospaced type in the brief.

(ii) A certificate of compliance that conforms substantially to the appropriate Official Form ~~shall~~must be regarded as sufficient to meet the requirements of (i).

(b) ELECTRONICALLY FILED BRIEFS. A brief that is filed electronically ~~shall~~must comply with (a), other than (a)(1)

and (a)(3), the color requirements of (a)(2), and the paper requirement of (a)(4).

(c) PAPER COPIES OF APPENDICES. If a paper copy of an appendix may or must be filed, it ~~shall~~must comply with Rule 8015~~4~~(a)(1), (2), (3), and (4), with the following exceptions:

(1) The cover of a separately bound appendix ~~shall~~must be white.

(2) An appendix may include a legible photocopy of any document found in the record or of a printed decision.

(3) When necessary to facilitate inclusion of odd-sized documents such as technical drawings, an appendix may be a size other than 8½ by 11 inches, and need not lie reasonably flat when opened.

(d) ELECTRONICALLY FILED APPENDICES. An appendix that is filed electronically ~~shall~~must comply with Rule 8015~~4~~(a)(2) and (4), other than ~~the color requirements of (a)(2) and~~ the paper requirement of (a)(4).

(e) OTHER DOCUMENTS.

(1) Motion. The form of a motion, response, or reply is governed by Rule 8013(f).

(2) Paper Copies of Other Documents. If a paper copy of any other document may or must be filed, other than a

submission under Rule 8014(i), it ~~shall~~must comply with Rule 8015(a), with the following exceptions:

(A) A cover is not necessary if the caption and signature page of the paper together contain the information required by Rule 8015(a)(2). If a cover is used, it ~~shall~~must be white.

(B) Rule 8015(a)(7) does not apply.

(3) Other Documents that Are Electronically Filed. Any other document that is filed electronically, other than a submission under Rule 8014(i), ~~shall~~must comply with the appearance requirements under (2).

(f) LOCAL VARIATION. Every appellate court ~~shall~~must accept documents that comply with the applicable requirements of this rule. By local rule or order in a particular case, an appellate court may accept documents that do not meet all of the requirements of this rule.

COMMITTEE NOTE

This rule is derived primarily from Fed. R. App. P. 32. Former Rule 8010(c) prescribed page limits for principal briefs and reply briefs. Those limits are now addressed by subdivision (a)(7) of this rule. In addition, the rule incorporates the considerable detail of Appellate Rule 32 regarding the appearance and format of briefs, appendices, and other documents, along with new provisions that apply when those documents are filed electronically.

Subdivision (a) prescribes the form requirements for briefs that are filed in paper form. It incorporates Fed. R. App. P. 32(a) in all respects except the following: Rule 8015(a)(2) does not prescribe the colors of brief covers; (a)(2)(F) requires the cover of a brief to include counsel's email address; (a)(3) requires that a brief be bound in a way that facilitates scanning of the document; and cross-references to the appropriate bankruptcy rule are substituted for references to other Federal Rules of Appellate Procedure.

Subdivision (a)(7) decreases the page limits that were permitted by former Rule 8010(c) – from 50 to 30 pages for a principal brief and from 25 to 15 for a reply brief – to achieve consistency with Fed. R. App. P. 32(a)(7). It also permits the limits on the length of a brief to be measured by a word or line count, as an alternative to a page limit. By adopting the same limits on brief length that are imposed by the Federal Rules of Appellate Procedure, the amendment seeks to prevent a party whose case is eventually appealed to the court of appeals from having to substantially reduce the length of its brief at that appellate level.

Subdivision (b) adapts for briefs that are electronically filed subdivision (a)'s form requirements. With the use of electronic filing, the method of reproduction, ~~color of covers,~~ method of binding, and use of paper become irrelevant. Information required on the cover, formatting requirements, and limits on brief length remain the same, however.

Subdivisions (c) and (d) prescribe the form requirements for appendices. Subdivision (c), applicable to appendices in paper form, is derived from Fed. R. App. P. 32(b), and subdivision (d) adapts those requirements for appendices that are electronically filed.

Subdivision (e), which is based on Fed. R. App. P. 32(c), addresses the form required for documents – in paper form or electronically filed – that are not otherwise covered by these rules.

Subdivision (f), like Fed. R. App. P. 32(e), is intended to provide assurance to lawyers and parties that compliance with the form requirements of this rule will allow a brief or other document to be accepted by any appellate court. A court may, however, by local rule or by order in a particular case choose to accepts briefs and documents that do not comply with all of this rule's requirements.

Under Rule 8011(e), all briefs and other submissions must be signed by the party filing the document or, if represented, by counsel. If the

document is filed electronically, an electronic signature must be provided in accordance with Rule 8011(e).

Rule 8016. Cross-Appeals

(a) APPLICABILITY. This rule applies to a case in which a cross-appeal is filed. Rules 8014(a)-(d), 8015(a)(2), 8015(a)(7)(A)-(B), and 8018(a) do not apply to such a case, except as otherwise provided in this rule.

(b) DESIGNATION OF APPELLANT. The party who files a notice of appeal first is the appellant for purposes of this rule and Rules 8018(b) and 8019. If notices are filed on the same day, the plaintiff, petitioner, applicant, or movant in the proceeding below is the appellant. These designations may be modified by the parties' agreement or by court order.

(c) BRIEFS. In a case involving a cross-appeal:

(1) *Appellant's Principal Brief*. The appellant ~~shall~~must file a principal brief in the appeal. That brief ~~shall~~must comply with Rule 8014(a).

(2) *Appellee's Principal and Response Brief*. The appellee ~~shall~~must file a principal brief in the cross-appeal and ~~shall~~must, in the same brief, respond to the principal brief in the appeal. That brief ~~shall~~must comply with Rule 8014(a), except that the brief need not include a statement of the case ~~or a statement of the facts~~ unless the appellee is dissatisfied with the appellant's statement.

(3) *Appellant's Response and Reply Brief*. The appellant ~~shall~~must file a brief that responds to the principal brief in the cross-appeal and may, in the same brief, reply to the response in the appeal. That brief ~~shall~~must comply with Rule 8014(a)(2)-(7) and (9), except that none of the following need appear unless the appellant is dissatisfied with the appellee's statement in the cross-appeal:

(A) the jurisdictional statement;

(B) the statement of the issues and the applicable standard of appellate review for each issue; and

(C) the statement of the case.

(4) *Appellee's Reply Brief*. The appellee may file a brief in reply to the response in the cross-appeal. That brief ~~shall~~must comply with Rule 8014(a)(2)-(3) and (9) and ~~shall~~must be limited to the issues presented by the cross-appeal.

~~(5) No Further Briefs. Unless the appellate court permits, no further briefs shall be filed in a case involving a cross-appeal.~~

(d) COVER. ~~If a paper copy may or must be filed, except for filings by unrepresented parties, the cover of the appellant's principal brief shall be blue; the appellee's principal and response brief, red; the appellant's response and reply brief, yellow;~~

~~theappellee's reply brief, gray; an intervenor's or amicus curiae's brief, green; and any supplemental brief, tan.~~ The front cover of a brief ~~shall~~must contain the information required by Rule 8015(a)(2).

(e) LENGTH.

(1) *Page Limitation*. Unless it complies with (2) and (3), the appellant's principal brief ~~shall~~must not exceed 30 pages; the appellee's principal and response brief, 35 pages; the appellant's response and reply brief, 30 pages; 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; or

(ii) it uses a monospaced face and contains no more than 1,500 lines of text.

(C) The appellee's reply brief is acceptable if it contains no more than half of the type volume specified in (A).

(3) *Certificate of Compliance*. A brief submitted either electronically or in paper form under (2) ~~shall~~must comply with Rule 8015(a)(7)(C).

(f) TIME TO SERVE AND FILE A BRIEF. Briefs ~~shall~~must be served and filed as follows:

(1) The appellant ~~shall~~must serve and file its principal brief within 30 days after the docketing of the notice of transmission of the record or notice of availability of the record pursuant to Rule 8010(b)(3).

(2) The appellee ~~shall~~must serve and file its principal and response brief within 30 days after service of the appellant's principal brief.

(3) The appellant ~~shall~~must serve and file its response and reply brief within 30 days after service of the appellee's principal and response brief.

(4) The appellee ~~shall~~must file its reply brief within 14 days after service of the appellant's response and reply brief, or

seven days before scheduled argument, whichever is earlier, unless the appellate court, for good cause, allows a later filing.

(5) If an appellant or appellee fails to file a principal brief within the time provided by this rule, or within an extended time authorized by the appellate court, the appeal or cross-appeal may be dismissed. An appellee who fails to file a responsive brief will not be heard at oral argument on the appeal, and an appellant who fails to file a responsive brief will not be heard at oral argument on the cross-appeal unless the appellate court grants permission.

COMMITTEE NOTE

This rule is modeled on F.R. App. P. 28.1. It governs the timing, content, length, filing, and service of briefs in bankruptcy cases in which there is a cross-appeal. The former Part VIII rules did not separately address the topic of cross-appeals.

Subdivision (b) prescribes which party is designated the appellant when there is a cross-appeal. Generally, the first to file a notice of appeal will be the appellant.

Subdivision (c) specifies the briefs that are permitted to be filed by the appellant and the appellee. Because of the dual role of the parties to the appeal and cross-appeal, each party is permitted to file a principal brief and a response to the opposing party's brief, as well as a reply brief. For the appellee, the principal brief in the cross-appeal and the response in the appeal are combined into a single brief. The appellant, on the other hand, initially files a principal brief in the appeal and later files a response to the appellee's principal brief in the cross-appeal, along with a reply brief in the appeal. The final brief that may be filed is the appellee's reply brief in the cross-appeal.

Subdivision (d) ~~adopts the provisions of F.R. App. P. 28.1(d) for covers of briefs that are filed in paper form in cases in which there is a cross-appeal~~ prescribes the information that must be provided in the cover of a brief.

Subdivision (e), which prescribes page limits for briefs, is ~~adopted~~ adapted from F.R. App. P. 28.1(e). It applies to briefs that are filed electronically, as well as those filed in paper form. Like Rule 8015(a)(7), it imposes limits measured either by number of pages or number of words or lines of text.

Subdivision (f) governs the time for filing briefs in cases in which there is a cross-appeal. It adopts the provisions of F.R. App. P. 28.1(f). It further authorizes the dismissal of an appeal or cross-appeal if the appellant or cross-appellant fails to timely file a principal brief, and it denies oral argument to a party who fails to file a responsive brief~~,~~ unless the appellate court orders otherwise.

Rule 8017. Brief of an Amicus Curiae

(a) WHEN PERMITTED. The United States or its officers or agencies~~y~~, or a State, Territory, or 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. On its own motion, and with notice to all parties to an appeal, the appellate court may request a brief by an amicus curiae.

(b) MOTION FOR LEAVE TO FILE. The motion ~~shall~~must be accompanied by the proposed brief and state:

(1) the movant's interest; and

(2) the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the appeal.

(c) CONTENT AND FORM. An amicus brief ~~shall~~must comply with Rule 8015. In addition to the requirements of Rule 8015, the cover of an amicus brief ~~that may or must be filed in paper form shall~~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 ~~shall~~must include a disclosure statement like that required by Rule 8012. An amicus

brief need not comply with Rule 8014, but ~~shall~~must include the following:

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

(2) a table of authorities listing 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) unless the amicus curiae is one listed in the first sentence of Rule 8017(a), a statement that indicates:

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

(B) whether a party or a party's counsel contributed money that was intended to fund preparation or submission of the brief; and

(C) the name of any person other than the amicus curiae, its members, or its counsel who contributed money that was intended to fund preparation or submission of the brief;

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

(6) a certificate of compliance, if required by Rule 8015(a)(7)(C) or~~,~~ 8015(b)~~, or 8016(e)(3)~~.

(d) LENGTH. Except by the court's permission, an amicus brief ~~shall~~must be no more than one-half the maximum length authorized by these rules for a party's principal brief. If the court grants a party permission to file a longer brief, that extension does not affect the length of an amicus brief.

(e) TIME FOR FILING. An amicus curiae ~~shall~~must file its brief, accompanied by a motion for filing when necessary, no later than seven days after the principal brief of the party being supported is ~~-~~filed. If an amicus curiae does not support either party, it ~~shall~~must file its ~~-~~brief no later than seven days after the appellant's principal brief is filed. A court may grant leave for later filing, specifying the time within which an opposing party may answer.

(f) REPLY BRIEF. Except by the court's permission, an amicus curiae ~~shall~~may not file a reply brief.

(g) ORAL ARGUMENT. Except by the court's permission, an amicus curiae ~~shall~~may not participate in oral argument.

(h) SUBMISSION OF SUPPLEMENTAL AUTHORITIES. If pertinent and significant authorities come to

the attention of an amicus curiae after its brief has been filed, or after oral argument but before a decision, the amicus curiae may promptly advise the clerk of the appellate court by a signed submission setting forth the citations. The submission, which ~~shall~~must also be transmitted to the other parties to the appeal, ~~shall~~must state the reasons for the supplemental citations, referring either to the pertinent page of a brief or to a point argued orally. The body of the submission ~~shall~~must not exceed 350 words. Any response ~~shall~~must be made ~~promptly~~ within seven days unless otherwise ordered by the court and ~~shall~~must be similarly limited.

COMMITTEE NOTE

This rule is derived from F.R. App. P. 29. The former Part VIII rules did not address the participation by an amicus curiae in a bankruptcy appeal.

Subdivision (a) adopts the provisions of F.R. App. P. 29(a). In addition, it authorizes the court on its own motion – with notice to the parties – to request the filing of a brief by an amicus curiae.

Subdivisions (b)-(g) adopt F.R. App. P. 29(b)-(g).

Subdivision (h) provides authority for an amicus curiae to submit supplemental citations, just as Rule 8014(i) authorizes a party to do.

Rule 8018. Serving and Filing Briefs; Appendices

(a) TIME TO SERVE AND FILE A BRIEF. Unless the appellate court by order excuses the filing of briefs or specifies different time limits:

(1) The appellant ~~shall~~must serve and file a brief within 30 days after the docketing of the notice of transmission of the record or notice of availability of the record pursuant to Rule 8010(b)(3).

(2) The appellee ~~shall~~must serve and file a brief within 30 days after service of the appellant's brief.

(3) The appellant may serve and file a reply brief within 14 days after service of the appellee's brief, or ~~three~~ seven days before scheduled argument, whichever is earlier, unless the appellate court, for good cause, allows a later filing.

(4) If an appellant fails to file a brief within the time provided by this rule, or within an extended time authorized by the appellate court, the appeal may be dismissed. An appellee who fails to file a brief will not be heard at oral argument unless the appellate court grants permission.

(5) If the appellate court has a mediation procedure applicable to bankruptcy appeals, the clerk of the appellate court ~~shall~~must notify the parties promptly after docketing the appeal

what effect the mediation procedure has on the time for filing briefs in the appeal and the requirements of the mediation procedure.

(b) DUTY TO SERVE AND FILE APPENDIX TO BRIEF

(1) Subject to Rules 8009(d) and 8018(e), the appellant or cross-appellant ~~shall~~must serve and file with its principal brief excerpts of the record as an appendix, which ~~shall~~must include the following:

(A) the relevant entries in the bankruptcy docket;

(B) the complaint and answer or other equivalent filings;

(C) the judgment, order, or decree from which the appeal is taken;

(D) any other orders, pleadings, jury instructions, findings, conclusions, or opinions relevant to the appeal;

(E) the notice of appeal; and

(F) any relevant transcript or portion thereof.

(2) The appellee or cross-appellee may also serve and file with its brief an appendix that contains material required to be included by the appellant or cross-appellant, or relevant to the appeal or cross-appeal, but omitted by appellant or cross-appellant.

(c) FORMAT OF APPENDIX. The appendix ~~shall~~must begin with a table of contents identifying the page at which each part begins. The relevant docket entries ~~shall~~must follow the table of contents. Other parts of the record ~~shall~~must follow chronologically. When pages from the transcript of proceedings are placed in the appendix, the transcript page numbers ~~shall~~must be shown in brackets immediately before the included pages. Omissions in the text of documents or of the transcript ~~shall~~must be indicated by asterisks. Immaterial formal matters, such as captions, subscriptions, acknowledgments, and the like, ~~shall~~must be omitted.

(d) APPENDIX EXHIBITS. Exhibits designated for inclusion in the appendix may be reproduced in a separate volume or volumes, suitably indexed.

(e) APPEAL ON THE ORIGINAL RECORD WITHOUT AN APPENDIX. The appellate court may, either by rule for all cases or classes of cases or by order in a particular case, dispense

with the appendix and permit an appeal to proceed on the original record, with the submission of any relevant parts of the record that the appellate court orders the parties to file.

COMMITTEE NOTE

This rule is derived from former Rule 8009 and F. R. App. P. 30 and 31. Like former Rule 8009, it addresses the timing of serving and filing briefs and appendices, as well as the content and format of appendices. It retains the bankruptcy practice of permitting the appellee to file its own appendix, rather than requiring the appellant to include in the appendix it files matters designated by the appellee.

Subdivision (a) prescribes the time for serving and filing briefs, other than in a case in which there are cross-appeals. When cross-appeals are taken, Rule 8016(f) governs the time for serving and filing briefs. Subdivision (a) of this rule retains the provision of former Rule 8009 that allows the appellate court to dispense with briefing or to provide different time periods than the ones specified by this rule. It increases some of the time periods for filing briefs from the periods prescribed by the former rule, while still retaining shorter time periods than some provided by F.R. App. P. 31(a). The time for filing the appellant's brief is expanded from 14 to 30 days after the docketing of the notice of the transmission of the record or notice of the availability of the record. That triggering event is equivalent to the docketing of the appeal under former Rule 8007. Appellate Rule 31(a)(1), by contrast, provides the appellant 40 days after the record is filed to file its brief. The shorter time period for bankruptcy appeals reflects the frequent need for greater expedition in the resolution of bankruptcy appeals, while still providing the appellant a more realistic time period to prepare its brief than the former rule provided.

Subdivision (a)(2) similarly expands the time period for filing the appellee's brief from 14 to 30 days after the service of the appellant's brief. This period is the same as the period provided by F.R. App. 31(a)(1).

Subdivision (a)(3) retains the 14-day time period for filing a reply brief that the former rule prescribed, but it qualifies that period to ensure that the final brief is filed at least seven days before oral argument.

Subdivision (a)(4) is new. Based on F.R. App. P. 31(c), it provides for actions that may be taken – dismissal of the appeal or denial of

participation in oral argument – if the appellant or appellee fails to file its brief.

Subdivision (a)(5) is also new. If an appellate court has a mediation procedure that is applicable to bankruptcy appeals, the clerk of the appellate court must advise the parties – promptly after the docketing of the appeal – that such a procedure applies, what its requirements are, and how the procedure affects that timing of the filing of briefs in the appeal.

Subdivisions (b) and (c) govern the content and format of the appendix to a brief. Subdivision (b) is similar to former Rule 8009(b), and subdivision (c) is derived from F.R. App. P. 30(d).

Subdivision (d), which addresses the inclusion of exhibits in the appendix, is derived from F.R. App. P. 30(e).

Rule 8011 governs the methods of filing and serving briefs and appendices. It prescribes the number of copies of paper documents that must be filed and authorizes the appellate court to require the submission of paper copies of documents that are filed electronically.

Rule 8019. Oral Argument

(a) PARTY'S STATEMENT. Any party may file, or an appellate court may require, a statement explaining why oral argument should, or need not, be ~~allowed~~ permitted.

(b) PRESUMPTION OF ORAL ARGUMENT AND EXCEPTIONS. Oral argument ~~shall~~must be allowed in every case unless the district judge or all of the BAP judges assigned to hear the appeal ~~appellate court~~ determine~~s~~, after examination of the briefs and record, that oral argument is unnecessary for any of the following reasons:

(1) the appeal is frivolous;

(2) the dispositive issue or issues have been authoritatively decided; or

(3) the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.

(c) NOTICE OF ARGUMENT; POSTPONEMENT. The appellate court ~~shall~~must advise all parties of the date, time, and place for oral argument, and the time allowed for each side. A motion to postpone the argument or to allow longer argument ~~shall~~must be filed reasonably in advance of the hearing date.

(d) ORDER AND CONTENTS OF ARGUMENT. The appellant opens and concludes the argument. Counsel ~~shall~~must not read at length from briefs, the record, or authorities.

(e) CROSS-APPEALS AND SEPARATE APPEALS. If there is a cross-appeal, Rule 8016(b) determines which party is the appellant and which is the appellee for the purposes of oral argument. Unless the appellate court directs otherwise, a cross-appeal or separate appeal ~~shall~~must be argued when the initial appeal is argued. Separate parties should avoid duplicative argument.

(f) NONAPPEARANCE OF A PARTY. If the appellee fails to appear for argument, the appellate court may hear appellant's argument. If the appellant fails to appear for argument, the appellate court may hear the appellee's argument. If neither party appears, the case will be decided on the briefs, unless the appellate court orders otherwise.

(g) SUBMISSION ON BRIEFS. The parties may agree to submit a case for decision on the briefs, but the appellate court may direct that the case be argued.

(h) USE OF PHYSICAL EXHIBITS AT ARGUMENT; REMOVAL. Counsel intending to use physical exhibits other than documents at the argument ~~shall~~must arrange to place them in the

courtroom on the day of the argument before the court convenes. After the argument, counsel ~~shall~~must remove the exhibits from the courtroom, unless the appellate court directs otherwise. The clerk may destroy or dispose of the exhibits if counsel does not reclaim them within a reasonable time after the clerk gives notice to remove them.

COMMITTEE NOTE

This rule generally retains the provisions of former Rule 8012 and adds much of the additional detail of F.R. App. P. 34. By incorporating the more detailed provisions of the appellate rule, Rule 8019 promotes national uniformity regarding oral argument in bankruptcy appeals.

Subdivision (a), like F.R. App. P. 34(a)(1), now allows a party to submit a statement explaining why there is no need for oral argument. Former Rule 8012 authorized only statements about why oral argument should be allowed. Subdivision (a) also now allows an appellate court to require the parties to submit a statement regarding the need for oral argument.

Subdivision (b) retains the reasons set forth in former Rule 8012 for the appellate court to conclude that oral argument is not needed.

The remainder of this rule adopts the provisions of F.R. App. P. 34(b)-(g), with one exception. Rather than requiring the appellate court to hear appellant's argument if the appellee does not appear, subdivision (e) authorizes the appellate court to go forward with the argument in the appellee's absence. Should the court decide, however, to postpone the oral argument in that situation, it would be authorized to do so.

Rule 8020. ~~Disposition of Appeal;~~ Weight Accorded Bankruptcy Judge's Findings of Fact and Conclusions of Law

~~(a) DISPOSITION OF APPEAL. The appellate court may affirm, modify, vacate, or reverse a bankruptcy judge's judgment, order, or decree, or remand with instructions for further proceedings.~~

~~(b) ACCORDED WEIGHT.~~ Findings of fact, whether based on oral or documentary evidence, ~~shall~~must not be set aside unless clearly erroneous, and due regard ~~shall~~must be given to the opportunity of the bankruptcy judge to assess the credibility of the witnesses. Questions of law are subject to de novo review. A matter committed to the discretion of the bankruptcy judge is reviewed for abuse of discretion unless the bankruptcy judge applied an incorrect standard of law. ~~Any matter may be reviewed for clear error.~~

COMMITTEE NOTE

This rule is derived from former Rule 8013. It specifies ~~the possible actions that the appellate court may take in ruling on an appeal and~~ the appropriate standards of appellate review. It does not apply to ~~the~~ a district court's review of a bankruptcy judge's proposed findings of fact and conclusions of law in a non-core matter under 28 U.S.C. § 157(c)(1). Proposed findings of fact and conclusions of law as to which a party has timely and specifically objected are subject to the provisions of Rule 9033 and the review that it prescribes.

Rule 8021. Frivolous Appeals and Other Misconduct ~~Damages and Costs for Frivolous Appeal~~

(a) FRIVOLOUS APPEALS. If the appellate court determines that an appeal from a judgment, order, or decree of a bankruptcy ~~judge~~ court 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. ~~The relief authorized by this rule does not limit any other relief or power available to the appellate court.~~

(b) OTHER MISCONDUCT. An appellate court may discipline an attorney or party appearing before it for other misconduct, including failure to comply with a court order. First, however, the court must afford the attorney or party reasonable notice, opportunity to show cause to the contrary, and, if requested, a hearing.

COMMITTEE NOTE

This rule is derived from F.R. App. P. 38 and 46(c). ~~The second sentence is added to clarify that the authority conferred by this rule does not affect the appellate court's exercise of any inherent or other authority over the conduct of parties or counsel.~~ Authorization for sanctions for conduct other than taking frivolous appeals is extended to parties as well as their counsel.

Rule 8022. Costs

(a) AGAINST WHOM ASSESSED. The following rules apply unless the law provides or the appellate court orders otherwise:

(1) if an appeal is dismissed ~~other than as provided in Rule 8024~~, costs are taxed against the appellant, unless the parties agree otherwise;

(2) if a judgment, order, or decree is affirmed, costs are taxed against the appellant;

(3) if a judgment, order, or decree is reversed, costs are taxed against the appellee;

(4) if a judgment, order, or decree is affirmed or reversed in part, modified, or vacated, costs are taxed only as the court orders.

(b) COSTS FOR AND AGAINST THE UNITED STATES. Costs for or against the United States, its agency, or officer may be assessed under (a) only if authorized by law.

(c) COSTS TAXABLE ON APPEAL. The bankruptcy clerk ~~shall~~must tax the following costs in favor of the party entitled to costs under this rule:

(1) costs incurred in the production of any required copies of a brief, appendix, exhibit, or the record;

(2) costs incurred in the preparation and transmission of the record;

(3) the cost of the reporter's transcript if necessary for the determination of the appeal;

(4) premiums paid for supersedeas bonds or other bonds to preserve rights pending appeal; and

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

(d) RATES. Each appellate court ~~shall~~must, by local rule, fix the maximum rate for taxing the cost of producing any required copies of a brief, appendix, exhibit, or the record. The rate ~~shall~~must not exceed that generally charged for such work in the area where the office of the clerk of the appellate court is located and should encourage economical methods of copying.

(e) BILL OF COSTS; OBJECTIONS. A party who wants costs taxed ~~shall~~must, within 14 days after entry of judgment on appeal, file with the clerk of the appellate court, with proof of service, an itemized and verified bill of costs. Objections ~~shall~~must be filed within 14 days after service of the bill of costs, unless the court extends the time. The clerk of the appellate court ~~shall~~must prepare and certify an itemized statement of costs.

COMMITTEE NOTE

This rule is derived from former Rule 8014 and F.R. App. P. 39. It retains the former rule's authorization for taxing appellate costs against the losing party and its specification of the costs that may be taxed. Taxable costs do not include attorney's fees. The rule also incorporates some of the additional details regarding the taxing of costs contained in F.R. App. P. 39. Consistent with former Rule 8014, all costs are taxed by the clerk of the bankruptcy court. Subdivision (b) is added to clarify that additional authority is required for the taxation of costs by or against federal governmental parties.

Rule 8023. Motion for Rehearing.

(a) TIME TO FILE; CONTENTS; ANSWER; ACTION BY THE APPELLATE COURT.

(1) *Time*. Unless the time is shortened or extended by order or local rule, any motion for rehearing by the appellate court ~~shall~~must be filed within 14 days after entry of judgment on appeal.

(2) *Contents*. The motion ~~shall~~must state with particularity each point of law or fact that the movant believes the appellate court has overlooked or misapprehended and ~~shall~~must argue in support of the motion. Oral argument is not permitted.

(3) *Answer*. Unless the appellate court requests, no answer to a motion for rehearing is permitted. But ordinarily, rehearing will not be granted in the absence of such a request.

(4) *Action by the Appellate Court*. If a motion for rehearing is granted, the appellate court may do any of the following:

(A) make a final disposition of the appeal without reargument;

(B) restore the case to the calendar for reargument or resubmission; or

(C) issue any other appropriate order.

(b) FORM OF MOTION; LENGTH. The motion ~~shall~~must comply in form with Rule 8015(a)(1)-(6) and 8015(b). Copies ~~shall~~must be served and filed as provided by Rule 8011. Unless the appellate court by local rule or order provides otherwise, a motion for rehearing ~~shall~~must not exceed 15 pages.

COMMITTEE NOTE

This rule is derived from former Rule 8015 and F.R. App. P. 40. It deletes the provision of former Rule 8015 regarding the time for appeal to the court of appeals because the matter is addressed by F.R. App. P. 6(b)(2)(A)(i).

Rule 8024. Voluntary Dismissal

~~(a) DISMISSAL IN THE BANKRUPTCY COURT. If an appeal has not been docketed in the appellate court, the appeal may be dismissed by the bankruptcy court on the filing of a stipulation for dismissal signed by all the parties, or on motion and notice by the appellant.~~

~~(b) DISMISSAL IN THE APPELLATE COURT.~~ If ~~an appeal has been docketed in the appellate court, and~~ the parties to ~~the~~ an appeal sign and file with the clerk of the appellate court an agreement that the appeal be dismissed and pay any court costs or fees that may be due, the clerk of the appellate court ~~shall~~must enter an order dismissing the appeal. An appeal may also be dismissed on the appellant's motion on terms and conditions fixed by the appellate court.

COMMITTEE NOTE

This rule is derived from former Rule 8001(c), which was adapted from F.R. App. P. 42. Unlike the former rule, this rule does not address dismissals by the bankruptcy court prior to the docketing of the appeal. Under Rules 8003(d) and 8004(c), docketing occurs upon the appellate court clerk's receipt of the notice of appeal, so it is unlikely that a voluntary dismissal will be sought between the time the notice of appeal is filed and the appeal is docketed.

The rule~~It~~ retains the requirement of the former rule that the clerk of the appellate court must dismiss an appeal upon the parties' agreement that the appeal be dismissed and their payment of any required costs or fees. The ~~bankruptcy and~~ appellate court~~s~~ continue~~s~~ to have discretion to dismiss an appeal ~~under the circumstances specified in the rule~~ on an appellant's

motion. Nothing in the rule prohibits an appellate court from dismissing an appeal for other reasons authorized by law, such as the failure to prosecute an appeal.

Rule 8025. Duties of Clerk on Disposition of Appeal

(a) ENTRY OF JUDGMENT ON APPEAL. ~~Unless the appellate court by local rule provides otherwise, t~~The clerk of the appellate court ~~shall~~must prepare, sign, and enter ~~the~~ judgment following receipt of the opinion of the appellate court or, if there is no opinion, following the instruction of the appellate court. The notation of a judgment in the docket constitutes entry of judgment.

(b) NOTICE OF AN ORDER OR JUDGMENT; RETURN OF RECORD. Immediately upon the entry of a judgment or order, the clerk of the appellate court ~~shall~~must transmit a notice of the entry to each party to the appeal, to the United States trustee, and to the bankruptcy clerk, together with a copy of any opinion respecting the judgment or order, and ~~shall~~must make a note of the transmission in the docket. If any original documents were transmitted as the record on appeal, they ~~shall~~must be returned to the bankruptcy clerk on disposition of the appeal.

COMMITTEE NOTE

This rule is derived from former Rule 8016, which was adapted from F.R. App. P. 36 and 45 (c) and (d). The rule is reworded to reflect that often the record will not be physically transmitted to the appellate court and thus there will be no documents to return to the bankruptcy clerk. Other changes to the former rule are stylistic.

Rule 8026. Stay of Appellate Court Judgment

(a) AUTOMATIC STAY OF JUDGMENT ON APPEAL. Unless the appellate court orders otherwise, its judgment is stayed for 14 days after entry of the judgment.

(b) STAY PENDING APPEAL TO THE COURT OF APPEALS.

(1) On motion and notice to the parties to the appeal, the appellate court may stay its judgment pending an appeal to the court of appeals.

(2) The stay ~~shall~~must not extend beyond 30 days after the entry of the judgment of the appellate court unless the period is extended for cause shown.

(3) If before the expiration of a stay entered pursuant to this subdivision there is an appeal to the court of appeals by the party who obtained the stay, the stay continues until final disposition by the court of appeals.

(4) A bond or other security may be required as a condition of the grant or continuation of a stay of the judgment.

(5) A bond or other security may be required if a trustee obtains a stay, but a bond or security may not be required if a stay is obtained by the United States or its officer or agency or at

the direction of any department of the Government of the United States.

(c) AUTOMATIC STAY OF ORDER, JUDGMENT, OR DECREE OF BANKRUPTCY COURT. If the appellate court enters a judgment affirming an order, judgment, or decree of the bankruptcy court, a stay of the appellate court's judgment automatically stays the bankruptcy court's order, judgment, or decree for the duration and to the extent of the stay~~, unless otherwise ordered~~.

(d) POWER OF COURT OF APPEALS NOT LIMITED. This rule does not limit the power of a court of appeals or any of its judges to do the following:

(1) stay a judgment pending appeal;

(2) stay proceedings during the pendency of an appeal;

(3) suspend, modify, restore, vacate, or grant a stay or an injunction during the pendency of an appeal; or

(4) make any order appropriate to preserve the status quo or the effectiveness of any judgment to be entered.

COMMITTEE NOTE

This rule is derived from former Rule 8017. Most of the changes to the former rule are stylistic. Subdivision (c) is new. It provides ~~generally~~ for the automatic stay of a bankruptcy court order, judgment,

or decree that is affirmed on appeal ~~if~~ to the extent that and for as long as the appellate court judgment is stayed~~, even if the bankruptcy court's ruling itself was not stayed~~.

Rule 8027. Rules by Courts of Appeals and District Courts; Procedure When There is No Controlling Law

(a) LOCAL RULES BY COURTS OF APPEALS AND DISTRICT COURTS.

(1) ~~Courts of appeals for circuits~~ Circuit councils that have authorized a BAP pursuant to 28 U.S.C. § 158(b) ~~and district courts~~ may make and amend rules governing practice and procedure for appeals from judgments, orders, or decrees of bankruptcy ~~judges~~ courts to the BAP ~~or district court~~. District courts may make and amend rules governing practice and procedure for appeals from judgments, orders, or decrees of bankruptcy courts to the district court. Local rules ~~shall~~must be consistent with, but not duplicative of, Acts of Congress and these Part VIII rules.

(2) Local rules ~~shall~~must conform to any uniform numbering system prescribed by the Judicial Conference of the United States. ~~Rule 83 F.R.Civ.P. and Rule 47 F.R.App. P. respectively govern the procedure for making and amending rules to govern appeals in district courts and BAPs.~~

(3) A local rule imposing a requirement of form ~~shall~~must not be enforced in a way that causes a party to lose any right because of a nonwillful failure to comply.

(b) PROCEDURE WHEN THERE IS NO CONTROLLING LAW.

(1) A district judge or BAP may regulate practice in any manner consistent with federal law, these Rules, the Official Forms, and local rules ~~of the circuit council or the district court~~.

(2) No sanction or other disadvantage ~~shall~~must be imposed for noncompliance with any requirement not in federal law, applicable federal rules, the Official Forms, or ~~the~~ local rules ~~of the circuit council or district court~~ unless the alleged violator has been furnished in the particular case with actual notice of the requirement.

COMMITTEE NOTE

This rule is derived from former Rule 8018. Unlike the former rule, this rule does not specify the procedure that circuit councils and district courts must follow in adopting local rules for bankruptcy appeals. They may follow their general rulemaking procedures. The other changes to the former rule are primarily stylistic.

~~Subdivision (a)(2) recognizes the authority given courts of appeals under F.R. App. P. 47 to promulgate local rules. Some courts of appeals have delegated rule-making authority to the BAP within the circuit to make and amend local rules governing practice and procedure before the BAP. **[Is this correct?]**~~

Rule 8028. Suspension of Rules in Part VIII

In the interest of expediting decision or for other cause in a particular case, the appellate court may suspend the requirements or provisions of the rules in Part VIII, except Rules 8001, 8002, 8003, 8004, 8005, 8006, 8007, 8012, 8020, 8021, 8025, 8026, 8027, and 8028.

COMMITTEE NOTE

This rule is derived from former Rule 8019 and F.R. App. P. 2. In order to promote uniformity of practice and compliance with statutory authority, the rule includes a more extensive list of requirements that may not be suspended than either the former rule or the Rules of Appellate Procedure provide. Rules that may not be suspended are those governing the following:

- scope of the rules and definitions;
- time for filing a notice of appeal;
- taking an appeal as of right;
- taking an appeal by leave;
- election to have appeal heard by district court instead of BAP;
- certification of direct appeal to court of appeals;
- stay pending appeal;
- corporate disclosure statement;
- ~~disposition of appeals and~~ weight to be accorded bankruptcy judge's findings of fact and conclusions of law;
- sanctions for frivolous appeals and other misconduct;
- clerk's duties on disposition of appeal;
- stay of appellate court's judgment;
- local rules; and
- suspension of Part VIII rules.

TAB 5-A

MEMORANDUM

DATE: September 21, 2011

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 08-AP-D

This item arises from the observation that under Appellate Rule 4(a)(4)(B) the time to appeal from an amended judgment runs from the entry of the order disposing of the last remaining tolling motion. In some scenarios, a time lag between entry of the order and entry of the judgment can raise questions concerning the re-started appeal time (the "order-judgment gap"). At the Appellate Rules Committee's fall 2010 meeting, the Committee discussed a possible solution that would peg the re-starting of appeal time to the "later of" the entry of the order disposing of the last remaining tolling motion or the entry of any resulting judgment. Difficulties with that proposal led the Committee to seek other options. In spring 2011, Richard Taranto suggested addressing the problem from another angle, by recommending to the Civil Rules Committee that Civil Rule 58(a)'s separate document requirement be extended to encompass orders disposing of tolling motions (the "separate document approach"). The Appellate Rules Committee held a preliminary discussion of this idea at the spring 2011 meeting.

Part I of this memo summarizes the origin of this agenda item. Part II reviews approaches that the Committee considered prior to the suggestion of the separate document approach. Part III.A summarizes the separate document approach. Part III.B. discusses the history of the separate document requirement and notes the issue of district court noncompliance with that requirement. Part III.C. distils the arguments, raised to date, concerning the possible benefits and costs of the separate document approach. Part IV concludes.

I. The order-judgment gap

As Peder Batalden pointed out in the suggestion that gave rise to this agenda item, there may be some instances when more than 30 days elapse between the entry of an order disposing of a postjudgment motion and the entry of any amended judgment pursuant to that order. One situation in which Mr. Batalden's concern may arise involves remittitur. Suppose that the district court conditionally grants a new trial unless the plaintiff agrees to accept a reduced award within 40 days from the date of entry of the court's order. Suppose further that as of Day 30 the plaintiff has not decided whether to accept the reduced award. If the plaintiff decides not to accept the reduced award, the case is headed to a new trial; thus, until the plaintiff makes a decision on this issue (or the 40-day time period runs out) there would seem to be no final judgment. In this scenario, the defendant's options appear to be:

(1) file the notice of appeal by Day 30 (and then withdraw the notice of appeal if

the plaintiff rejects the reduced award);[1]

(2) point out the timing problem to the district court and seek an extension of time to file the notice of appeal under Rule 4(a)(5); or

(3) wait to file the notice of appeal until the judgment has become final by virtue of the plaintiff's acceptance of the reduced award.

The risks and benefits of Option 3 depend in part on whether a separate document is required for the order "disposing of" – in this instance, conditionally granting – the new trial motion. If a separate document is required and has not been provided, then the litigant can select Option (3) without concern, because the time to take an appeal from the order has not yet commenced to run. However, if a separate document is not required, Option (3) seems riskier. Granted, even if a separate document is not required a strong argument can be made that choosing Option (3) results in a timely notice: It would make little sense to penalize a litigant for waiting to appeal until there exists an appealable final judgment. But Rule 4(a)(4) might be read to require a contrary result, because it provides that "the time to file an appeal runs for all parties from the entry of the order disposing of the last ... remaining [tolling] motion."[2]

To assess whether a separate document is required for the order "disposing of" the new trial motion we must examine Appellate Rule 4(a)(7) and Civil Rule 58(a). Appellate Rule 4(a)(7) is designed to incorporate, for purposes of Rule 4(a), the separate-document rules found in Civil Rule 58(a). Under Rule 4(a)(7)(A),

[a] judgment or order is entered for purposes of this Rule 4(a):

(i) if [Civil Rule] 58(a) does not require a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a); or

(ii) if [Civil Rule] 58(a) requires a separate document, when the judgment or order is entered in the civil docket ... and when the earlier of these events occurs: ● the judgment or order is set forth on a separate document, or ● 150 days have

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[1] If the plaintiff accepts the reduced award and the judgment is amended to reflect the reduced award, it should not be necessary for the defendant to amend the notice of appeal unless the defendant intends to challenge something about the amendment of the judgment – such as the remittitur amount. Cautious practitioners, though, are likely to amend the notice of appeal in any event just to be on the safe side.

[2] One could also argue that the order granting remittitur does not finally "dispose of" the new trial motion until the plaintiff decides whether to accept the reduced amount; but a court could well reject that argument.

run from entry of the judgment or order in the civil docket ...."

The key question, then, is whether Civil Rule 58(a) requires a separate document. Rule 58(a) (in what we may call "clause 1") provides that "Every judgment and amended judgment must be set out in a separate document," but it also provides (in what we may call "clause 2") that "a separate document is not required for an order disposing of" any of a list of motions; the list includes all the motions that have tolling effect under Appellate Rule 4(a)(4)(A).[3] On the one hand, it might be argued that a separate document is required in our hypothetical when the court conditionally grants the new trial motion, because if the plaintiff accepts the reduced award that will result in an amendment of the original judgment. But on the other hand, it might be argued that no separate document is required for the *order* (as opposed to the amended judgment), for two reasons:

First, the Seventh Circuit has addressed this problem by reading Civil Rule 58(a)'s reference to orders "disposing of" tolling motions to mean orders *denying* postjudgment motions.[4] In the Seventh Circuit, and any circuit that might come to follow it, it would seem that, in our hypothetical, clause 2 of Rule 58(a) does not apply because the order is not one that *denies* a postjudgment motion. However, it is not clear that other circuits will follow the approach taken in *Wausau* and *Kunz*,[5] and therefore some uncertainty on this issue is likely to

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[3] Civil Rule 58(a)'s list of motions is somewhat broader than Appellate Rule 4(a)(4)(A)'s list of tolling motions, but that discrepancy is not material to the issues discussed in this memo.

[4] *See Employers Ins. of Wausau v. Titan Intern., Inc.*, 400 F.3d 486, 489 (7th Cir. 2005) ("The only way to reconcile the requirement that an amended judgment be set forth in a separate document with the exception to that requirement for an order disposing of a Rule 59(e) motion is by reading 'disposing of a motion' as 'denying a motion.'"); *Kunz v. DeFelice*, 538 F.3d 667, 673 (7th Cir. 2008) (following *Wausau*).

[5] As discussed elsewhere in the agenda materials, a recent petition for certiorari asserted that the Sixth Circuit runs the re-started appeal time not from entry of the order disposing of the last remaining tolling motion but from entry of the resulting judgment. *See* Petition for Writ of Certiorari at 25-26, *Extreme Networks, Inc. v. Enterasys Networks, Inc.* (No. 10-1199) (citing *Stern v. Shouldice*, 706 F.2d 742 (6th Cir. 1983)). As I explain in the memorandum discussing this and other FRAP-related certiorari petitions, I believe that the petitioner in *Extreme Networks* misread *Stern* and that *Stern* provides no basis for concluding that the Sixth Circuit agrees with the Seventh Circuit's approach under the current Rules.

In earlier briefing (in the Federal Circuit), Enterasys had relied on *Southern Union Co. v. Southwest Gas Corp.*, 415 F.3d 1001 (9th Cir.), *opinion amended on other grounds on denial of reh'g*, 423 F.3d 1117 (9th Cir. 2005). *See* Response and Reply Brief of Defendant-Appellant Enterasys Networks, Inc. at 47, *Extreme Networks, Inc. v. Enterasys Networks, Inc.*, 395 F. App'x 709 (Fed. Cir. 2010) (unpublished opinion). Although Enterasys contended that the

remain.

Second, it might also be argued that (1) the order is not currently appealable and therefore (2) the order does not currently constitute a judgment within the terms of Civil Rule 54(a), which would mean that (3) Civil Rule 58(a)'s separate document requirement (which is cast in terms of "judgments") does not apply. The order would not be immediately appealable

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Southern Union court's approach was comparable to the Seventh Circuit's approach in *Wausau* and *Kunz*, I am not convinced of that. I discuss *Southern Union* in footnote 6 below. Here it suffices to say that the *Southern Union* court rightly concluded that it would be perverse to read Appellate Rule 4(a)(4) to set an earlier time (for appealing a final judgment) than the deadline that would have applied if no JNOV, new trial or remittitur motions had been filed. The *Southern Union* court did not suggest that it was relying on the notion that a separate document was required for the order denying the defendant's JNOV, new trial, and remittitur motions. Rather, it seems to have relied on the idea that the district court never reached a final decision on the form of judgment to be entered on the underlying jury verdict until *after* it entered the order deciding the defendant's motions. Although the concerns voiced by the *Southern Union* court are similar in spirit to concerns that might be voiced about the order-judgment gap that is the focus of this memo, I do not think that *Southern Union* sheds any direct light on how to read the term "disposing of" in Civil Rule 58(a).

LeBoon v. Lancaster Jewish Community Center Ass'n, 503 F.3d 217 (3d Cir. 2007) – also cited by Enterasys to the Federal Circuit – cites *Wausau* but is distinguishable from it. In *LeBoon*, the trial court granted the defendant's summary judgment motion in December 2004, but then vacated that order after the plaintiff moved for reconsideration. In February 2005 it entered an order that was materially similar to the December 2004 order; the plaintiff again moved for reconsideration and the trial court denied the motion. The plaintiff filed her notice of appeal from the grant of summary judgment more than 30 days after the February 2005 order, but the court of appeals held the appeal timely because it ruled that a separate document was required for the February 2005 order (and no such separate document had been provided). *See id*. at 222-24. Although the *LeBoon* court cited *Wausau* for the general proposition that a separate document may be required after a postjudgment motion, *see LeBoon*, 503 F.3d at 223-24 (describing *Wausau* as ruling that "when a post-judgment motion is granted, and therefore produces an amended judgment, the amended judgment must be set forth on a separate document"), the *LeBoon* court appeared to rest its own timeliness determination more on the notion that the situation it confronted did not truly involve a run-of-the-mill determination of a postjudgment motion: "Although at first blush the February 17 Order could be understood as merely ruling on LeBoon's Rule 59 motion for reconsideration, it is clear that in fact its primary function was to dispose of the cross-motions for summary judgment, which were again pending because the earlier order ruling on them had been vacated. Thus the February 17 Order was subject to the separate-order rule." *LeBoon*, 503 F.3d at 223. *Wausau*'s rationale – that "disposing of" in Civil Rule 58 means "denying" – would not have assisted the appellant in *LeBoon*, since the February 2005 order in effect *did* deny her reconsideration motion.

because the outcome depends on a contingency that has not yet occurred – namely, the plaintiff's decision whether to accept the reduced award. (An appealable judgment would result only when the plaintiff accepts the reduced award, or – if the plaintiff does not accept – after the new trial.) This, of course, illustrates the incongruous result that could be produced by a literal reading of Appellate Rules 4(a)(7) and 4(a)(4)(B)(ii): the reason a separate document is not required, in this view, is that the order is not currently appealable – yet the fact that the order is not currently appealable also means that, under Rule 4(a)(7)(A)(i), the order is deemed entered when it is entered in the civil docket, and that, under Rule 4(a)(4)(B)(ii), the time to appeal from the order or from the resulting alteration or amendment of the judgment runs from that date of entry.

In sum, the order-judgment gap gives rise to an incongruity in Rule 4.[6] The question

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[6] Similar wording also appears in Rule 6(b)(2)(A) (addressing the effect of a rehearing motion under Bankruptcy Rule 8015).

A different incongruity arose in the odd case of *Southern Union Co. v. Southwest Gas Corp.*, 415 F.3d 1001 (9th Cir.), *opinion amended on other grounds on denial of reh'g*, 423 F.3d 1117 (9th Cir. 2005). The jury reached a verdict in December 2002. *See* Civil Docket, Dkt. No. 2198, *Southern Union Co. v. Southwest Gas Corp.*, No. 2:99-cv-01294-ROS (D. Ariz.). In January 2003 the defendant moved alternatively for JNOV, a new trial, or remittitur. *See Southern Union Co.*, 415 F.3d at 1003. Later in January the district court issued a ruling on a proposed form of judgment and ordered the plaintiff to "prepare a new form of judgment and provide [it] to all of the defendants, former defendants, and potential non-parties at fault." Civil Docket, Dkt. # 2225. Although the plaintiff accordingly lodged a new proposed form of judgment, *see id.* Dkt. # 2227, the court never entered the judgment. Instead, it apparently focused its attention on the defendant's pending motions. In June 2003, it denied the JNOV motion and took the other two motions under advisement. *See id.* Dkt. # 2247. On July 28, 2003, it entered an order denying the two remaining motions; the order stated that a written opinion would follow. *See Southern Union Co.*, 415 F.3d at 1003. The written opinion was dated July 31 and was docketed August 1. *See id.* In mid-August, the court entered a "final judgment" against the defendant. *See* Civil Docket, Dkt. # 2259. On August 29, 2003, the defendant filed a notice of appeal from the judgment. *See id.* Dkt. # 2267.

The court of appeals held the appeal timely, but not before noting its view that Appellate Rule 4(a)(4), read literally, seemed to render the appeal untimely: "Read literally, the rule applies. The district court on July 28, 2003 entered its order disposing of Irvin's motion for a new trial. The appeal period expired August 27, 2003." *Southern Union*, 415 F.3d at 1004. The court rejected this idea: "We do not believe that the rule was intended to work in this way. On July 28, 2003, final judgment including the damages had not yet been entered. What would Irvin have appealed? In *Alice in Wonderland*, the rule is 'Sentence first – Verdict afterwards.' We could read our rule to mean Appeal first, Judgment afterwards. But we are not in Wonderland." *Id.* The court's analysis seems apt. The district court's January ruling on the proposed form of judgment does not seem to have been a final determination of all the issues in the case, because

does persist, though, how frequently this incongruity actually causes problems in practice. The Committee's discussions have produced some examples, but it is not clear that the problem arises often. As a Committee member pointed out at the fall 2010 meeting, in a number of instances where there might at first glance appear to be a time lag between entry of an order disposing of a tolling motion and entry of an amended judgment, the order in question arguably does not actually "dispose of" the motion.[7]

II. Approaches previously considered for addressing the order-judgment gap

The difficulties discussed in Part I arise from the fact that Appellate Rules 4(a)(4)(A), (B)(i) and (B)(ii) all peg timing questions to the entry of *the order disposing of* the last remaining tolling motion, and they do not take account of the possibility that time may elapse between that order and any ensuing amendment or alteration of the judgment. It initially seemed that the best way to address that problem (assuming that a rules amendment is warranted) would be to amend those provisions to refer to that possibility.[8] However, drafting appropriate

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the court directed the plaintiff to circulate a new proposed form of judgment. That being so, in the absence of the defendant's motions (for JNOV, new trial, and remittitur) the appeal time would not have begun to run until the district court ruled on the plaintiff's new proposed form of judgment (an event that does not seem to have occurred until the entry of judgment in mid-August). Under those circumstances, reading Rule 4(a)(4)(A) to move the appeal deadline *earlier* than it otherwise would have been would be perverse. Happily, I know of no court that has adopted such a reading.

[7] The relevant passage in the minutes reads as follows:

> Suppose, for example, that a party moves for a new trial on the ground that the district court improperly excluded the testimony of the party's expert without holding a *Daubert* hearing, and the judge agrees to hold the *Daubert* hearing in order to determine whether the testimony was properly excluded and states that if it turns out that the testimony should have been admitted then a new trial will be granted. The member suggested that such an order would not really be an order *disposing of* the motion for a new trial because the grant of the new trial in that situation is conditional. Another example is a motion for additional findings under Civil Rule 52(b); the court could grant the motion for additional findings without immediately making the additional findings. Until the court makes the additional findings, it may be unclear whether an amended judgment will result. The member suggested that such an order, standing alone, has not truly disposed of the motion.

[8] Mr. Batalden suggested an approach that differs from those noted in the text of this memo. Under his approach, Rule 4(a)(4)(B)(ii) would be amended to read: "A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A)~~, or a judgment's alteration or amendment upon such a motion,~~ must file a notice of appeal, or an amended notice of appeal

language has proven difficult.

The central proposal reflected in the agenda materials for the Fall 2010 meeting was to amend Rule 4(a)(4) so that the relevant re-starting date for appeal time (when a motion has tolled the appeal time) would be:

> the latest of entry of the order disposing of the last such remaining motion or, if a motion's disposition results in alteration or amendment of the judgment, entry of any altered or amended judgment.

That language would appear in Rule 4(a)(4)(A) and similar language would appear in Rules 4(a)(4)(B)(i) and (ii). The proposed Committee Note would read as follows:

> Rule 4(a)(4)(A) currently provides that if a timely motion of certain listed types is filed, the time to appeal runs for all parties from the entry of the order disposing of the last such remaining motion. Subdivisions (a)(4)(B)(i) and (ii) also contain timing provisions that depend on the date of entry of the order disposing of the last such remaining motion. These three subdivisions are amended to make clear that if one of those tolling motions results in the alteration or amendment of the judgment, the relevant date is the latest of the entry of the order disposing of the last remaining tolling motion or the entry of any altered or amended judgment. To illustrate: Suppose that Defendant timely moves for judgment as a matter of law under Civil Rule 50(b) and wins an amended judgment. Plaintiff then timely moves for a new trial; the motion is denied. Denial of Plaintiff's motion is the "latest of" the described events. [As a second illustration: In a different case, two defendants each move for judgment under Civil Rule 50(b). The court grants Jones's motion and enters judgment for Jones, without directing entry of a final judgment pursuant to Civil Rule 54(b). Later, it grants Brown's motion, and enters judgment that plaintiff take nothing. This is the "latest of" the described events.]

– 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." This change would remove the requirement that the notice of appeal challenging the judgment's alteration or amendment be filed within 30 days from entry of the order disposing of the motion. But in the scenario described in Part I of this memo, this change would not remove the incongruity concerning the timing of a notice of appeal challenging the order itself; Rule 4(a)(4)(B)(ii) would still purport to direct that such a notice of appeal be filed within 30 days after entry of the order, even if there is not yet a final and appealable judgment on that 30th day. Moreover, the proposed change might be undesirable in that it would remove from the Rule text which currently serves to remind would-be appellants of the need to file a notice of appeal that encompasses the amendment or alteration of the judgment (if the appellant wishes to challenge that alteration or amendment).

This proposal elicited style suggestions from Professor Kimble. Among his suggested changes[9] was to re-word the language to read:

> the latest of entry of the order disposing of the last such remaining motion or entry of any altered or amended judgment resulting from such a motion.

The proposal also elicited substantive concerns from Committee members. During the Committee's fall 2010 discussion, it was suggested that the proposed language – either as initially drafted or as re-styled by Professor Kimble – might give would-be appellants a false belief that the re-starting date for their appeal time extended past the entry of an order disposing of the last remaining tolling motion, because the would-be appellant expected that order to be followed by the entry of an amended judgment. If no such amended judgment did follow, the litigant's appeal rights could be lost.[10]

The Committee proceeded to discuss possible alternatives. One suggestion was to say "provides for" rather than "results in," thus:

> the latest of entry of the order disposing of the last such remaining motion or, if a motion's disposition **provides for** alteration or amendment of the judgment, entry of any altered or amended judgment.

It was not clear, however, that this would provide the necessary clarity to guard against the possible confusion noted by the Committee. A different suggestion was to say, simply, "alters," thus:

> the latest of entry of the order disposing of the last such remaining motion or, if a motion's disposition **alters** the judgment, entry of any altered or amended judgment.

But this phrasing might not accomplish the desired effect in all instances. When a order grants a new trial unless the plaintiff accepts a reduced award within X days, would courts conclude that that order itself alters the judgment?

A different tack was also suggested – one that would peg appeal time to entry of a "newly

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[9] Others were noted in my spring 2011 memo to the Committee concerning this agenda item.

[10] Rule 13(a), concerning review of Tax Court decisions, contains the following provision: "If, under Tax Court rules, a party makes a timely motion to vacate or revise the Tax Court's decision, the time to file a notice of appeal runs from the entry of the order disposing of the motion **or from the entry of a new decision**, whichever is later." It might be worthwhile to investigate whether this language has produced confusion among Tax Court litigants.

entered" judgment rather than an "altered or amended" judgment. For instance, such a provision might read:

> the latest of entry of the order disposing of the last such remaining motion or entry of any **newly entered judgment** [resulting from] [following the disposition of] such a motion.

This provision would permit a district judge to rescue the appeal of a litigant who had mistakenly relied upon the prospect of an amended judgment that never materialized. In such instances, the court could re-enter the original judgment and thus re-start the appeal time. Such an approach would grant the district court a power to re-start appeal time (by re-entering the judgment without alteration) that the district court does not possess outside this context. Ordinarily, a district court cannot re-start appeal time simply by re-entering the same judgment without change; depending on the details of drafting, such a provision for a "newly entered" judgment would alter that long-standing doctrine in all cases where a tolling motion is filed. This approach also would leave the litigant at the mercy of the district court, because the decision to re-enter the same judgment would presumably rest within the district court's discretion.

The Committee also discussed the possibility of including a warning in the Committee Note to deter litigants from relying on the assumption that an amended judgment will follow the entry of an order concerning a tolling motion. The Note could, for example, advise litigants that to the extent they have any doubt as to whether there will in future be an amended judgment, they should assume that there will not be such an amendment and they should assume that the earlier possible starting point for appeal time under the proposed Rule 4(a)(4) – namely, entry of the order disposing of the last remaining tolling motion – is the relevant starting point. Committee members did not, however, seem to find sufficient comfort in the prospect of such Note language. Not all litigants will consult the Committee Notes when reading the Rules.

After the fall 2010 meeting, some participants in the discussion considered a different possible use of the Committee Note. The Note could include language clarifying the meaning of "disposing of". For instance, it could adopt the views suggested by Professor Cooper in an exchange after the meeting: "an order 'granting' a motion for additional or amended findings, under Rule 52, without yet making the findings, does not 'dispose of' the motion. The same is true of an order stating that a motion is 'granted' and that an opinion will follow; such a motion is not 'disposed of' until the court says exactly how it is granting it." Two issues would arise if such Note language were adopted. One issue concerns the existence of parallel language in Civil Rule 58; that rule, too, refers to "an order disposing of" certain listed motions. Thus, the inclusion of Note language for Appellate Rule 4 would seem likely to work best if Civil Rule 58 is also amended so as to support the inclusion of parallel Note language for Civil Rule 58. A second issue is whether the problems that have troubled Committee members can be satisfactorily resolved through Note language; though many courts will be willing to look to a Committee Note, not all will do so. Perhaps it would be possible to include language in the Rule that would ground reliance on the Note's explanation. Instead of using merely the words "disposing of," the Rule could refer to "completely disposing of," "fully disposing of," or

"finally disposing of." But to preserve the parallel in terminology between Appellate Rule 4(a)(4) and Civil Rule 58(a), the new term would need to be inserted in Civil Rule 58(a) – and as Professor Cooper has noted, there is little apparent reason to adopt such a term in the latter Rule.

III. The separate document approach

In spring 2011, Richard Taranto proposed a different way to solve the problem of the order-judgment gap. The core of the proposal is that Civil Rule 58(a) be amended to require a separate document for the disposition of any tolling motions (which would be called resetting motions).[11] Part III.A. briefly summarizes the proposal. Part III.B. offers context by surveying the history of the separate document requirement. Part III.C. surveys the possible benefits and costs of the separate document approach.

A. The separate document proposal

As Richard explained in his March 24, 2011, memo, the aim of the amendments would be "to give a comparable clarity (through formality) to the dispositions of the resetting motions as is present for finality-triggering actions preceding those motions." To accomplish this aim, Civil Rule 58(a) could be amended as follows:[12]

> (a) Separate Document. Every judgment and amended judgment must be set out in a separate document~~, but a separate document is not required for an order disposing of a motion:~~
>
> ~~(1) for judgment under Rule 50(b);~~
>
> ~~(2) to amend or make additional findings under Rule 52(b);~~
>
> ~~(3) for attorney's fees under Rule 54;~~
>
> ~~(4) for a new trial, or to alter or amend the judgment, under Rule 59; or~~
>
> ~~(5) for relief under Rule 60~~. If a party timely files any of the motions enumerated in Fed. R. App. P. 4(a)(4)(A), a new judgment set out in a separate document must be entered after the disposition of the last of such motions for the disposition of such motions to be final, subject to Fed. R. App. P. 4(a)(7)(B).

[11] This terminology reflects the fact that the relevant motions, when timely filed, reset the appeal-time clock to 0.

[12] A few different wordings have been suggested. The example in the text is one illustration.

Appellate Rule 4(a)(4) could be amended to run the re-started appeal time from "entry of the judgment following disposition of the last" remaining resetting motion.

The proposed amendments would invoke 28 U.S.C. § 2072(c)'s grant of authority to define when a district court's ruling is final for purposes of appeal under 28 U.S.C. § 1291. Under the rules as amended, the judgment in a case where timely resetting motions have been made would not be final for appeal purposes until the entry of the required separate document after the disposition of all resetting motions. But an appellant could waive the separate-document requirement and appeal an otherwise-final judgment after disposition of all resetting motions but prior to the provision of the separate document.

The amendments might avoid the need to define the term "disposing of" (a question with which the Committee had wrestled earlier, as noted in Part II above). The amendments would also streamline Civil Rule 58 and Appellate Rule 4(a), because there would be no need to address separately the situations in which no separate document is currently required.

B. The separate document requirement and the 2002 amendments

In considering the proposed separate document approach, it may be useful to consider the discussions that led to the 2002 amendments to Civil Rule 58 and Appellate Rule 4(a) – i.e., the amendments that produced the salient features of the current rules. Those amendments exempted orders disposing of tolling motions from the separate document requirement and they also capped the length of time for appealing a judgment that should have been (but was not) entered on a separate document. The discussions leading to these amendments reveal two facts that may be relevant to the current discussion. First, Appellate Rules Committee members discussed the order-judgment gap (and possible amendments to Appellate Rule 4(a)(4)(A) and (B) designed to address that gap) during the earliest portion of the deliberations that led up to the 2002 amendments, but members eventually concluded that it was not worthwhile to amend Rule 4(a)(4), and thereafter they focused their attention on amending Rule 4(a)(7). Second, those deliberations focused at some length on the lack of compliance with the separate-document requirement.

A reading of the Appellate Rules Committee's minutes indicates that the matter first came to the Committee's attention around spring 1998. Judge Garwood (then the Committee's chair) had asked Luther Munford (then a Committee member) to research "the application of FRAP 4(a)(7) to orders that grant or deny those post-judgment motions listed in FRAP 4(a)(4)(A)." Minutes of the Spring 1998 Meeting of the Advisory Committee on Appellate Rules, April 16, 1998. Mr. Munford identified three questions concerning such motions:

> **1. The "Applicability" Question**: Does FRCP 58 apply to the "order" referred to in FRAP 4(a)(4)(A) – that is, to "the order disposing of the last such remaining motion"?
> ....
> According to Mr. Munford, the circuits have split badly on the "applicability"

question ....

2. The "Prematurity" Question: If FRCP 58 applies to the "order" referred to in FRAP 4(a)(4)(A) – that is, if the time to bring an appeal in a civil case does not begin to run until an order granting or denying post-judgment relief is entered in compliance with FRCP 58 – what happens if a party brings an appeal *before* such an order is entered?
....

According to Mr. Munford, the circuits have also split on the "prematurity" question ....

3. The "Timing" Question: Mr. Munford briefly mentioned one other complication:

Suppose that, in a diversity case arising out of an automobile accident, the jury returns a verdict for the plaintiff, and the district court enters judgment accordingly. The defendant then files a timely motion to amend the judgment under FRCP 59. On June 1, the district court issues an order granting the motion, and instructs the clerk to amend the judgment. On June 3, the judgment is actually amended. When did the time for appeal begin to run? On June 1 or on June 3? Does it matter whether the June 1 order was entered in compliance with FRCP 58?

Mr. Munford did not describe any case law on this question, but said the Committee should address this question if the Committee amends FRAP 4 to address the "applicability" and "prematurity" questions.

Id.

At the Committee's next meeting, it considered a proposal that would have addressed the first two questions by amending Rule 4(a)(7) and would have addressed the third question by amending Rule 4(a)(4)(A) to read: "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 or the entry of the judgment altered or amended in response to such a motion, whichever comes later: ...." Minutes of the Fall 1998 Meeting of the Advisory Committee on Appellate Rules, October 15 & 16, 1998. (The proposal also included similar changes to Rules 4(a)(4)(B)(i) and (ii). *See id.*) The Committee approved the proposal for publication. *See id.*

However, at the Committee's spring 1999 meeting, Judge Garwood asked the Committee to consider a revised proposal in which the treatment of Rule 4(a)(7) was altered to address additional concerns that had surfaced. *See* Minutes of Spring 1999 Meeting of Advisory Committee on Appellate Rules, April 15 & 16, 1999. The Committee decided to revise Rule

4(a)(7) to include a 150-day cap that would apply when a required separate document was not provided and to "provide that the time to appeal all orders that dispose of the motions listed in Rule 4(a)(4)(A) – that is, both orders that grant those motions and orders that deny those motions – would begin to run when the order is entered on the docket in compliance with FRCP 79(a). Entry on a separate document in compliance with FRCP 58 would not be required." *Id*.

At the fall 1999 Committee meeting, the discussion of the proposal continued. For the most part, the discussion focused on Rule 4(a)(7), but the proposed Committee Note that was the basis for discussion also included the following paragraph:

> One additional point of clarification: When a court orders that a judgment be entered (or that a judgment be altered or amended), Fed. R. Civ. P. 54(a) and 58, read literally, would seem to require that *both* the order *and* the judgment be set forth on separate documents. Because the parties can waive entry of the judgment on a separate document (as discussed below), an order for judgment (or an order to alter or amend a judgment) would seem to be "an[] order from which an appeal lies," and thus Fed. R. Civ. P. 54(a) and 58 would seem to require that such an order – as well as any subsequently entered judgment (or altered or amended judgment) – be set forth on a separate document. However, the Advisory Committee is not aware of any case that so holds. Rather, all courts seem to assume that when an order directs that a judgment (or altered or amended judgment) be entered, only the judgment (or altered or amended judgment) needs to be set forth on a separate document. At that point, both the order and the judgment (or altered or amended judgment) should be treated as entered for purposes of Rule 4(a)(7).

Minutes of Fall 1999 Meeting of Advisory Committee on Appellate Rules, October 21 & 22, 1999. The Committee decided to remove that part of the Note after the following discussion:

> In the past, the Committee has considered amending not only FRAP 4(a)(7), but also FRAP 4(a)(4)(A), 4(a)(4)(B)(i), and FRAP 4(a)(4)(B)(ii). These amendments were intended to address a theoretical concern that had been raised by former Committee member Luther Munford. The Reporter said that, upon reflection, he had decided that amending these provisions was unnecessary. The Reporter said that the explanation for his conclusion was fully set forth in his research memo. Basically, though, Mr. Munford's concerns were grounded upon the assumption that when a court enters an order for judgment (or an order for an amended judgment), *both* the order *and* the judgment (or amended judgment) must be set forth on separate documents. The Reporter said that he had read over 500 published and unpublished opinions related to the separate document requirement, and he was not aware of a single case that so held. Rather, courts seem to require only that the judgment (or amended judgment) be set forth on a separate document – and when the judgment (or amended judgment) is so set forth, courts treat the order for judgment (or order for amended judgment) as "entered." Given

that, Mr. Munford's theoretical concern is unlikely to arise in practice.

> Judge Garwood said that he had asked the Reporter to include a paragraph in the Committee Note that was designed to encourage courts to continue on this path and thus to minimize the chances that Mr. Munford's concern would materialize in real life. That paragraph appears as the third full paragraph on page 3 of the draft Committee Note. Several members expressed the view that the paragraph should be removed. They argued that, without a full explanation of the very complicated problem that concerned Mr. Munford, the paragraph was more confusing than helpful. One member disagreed, arguing that the explanation was helpful.

Id.

At the spring 2000 Committee meeting, the Reporter summed up the goals of the proposed Rule 4(a)(7) amendment as follows:

> [T]he amendment to Rule 4(a)(7) was intended to address four issues: (1) the widespread confusion over the extent to which orders that dispose of post-judgment motions must be entered on separate documents; (2) the "time bomb" problem — that is, the fact that every circuit except the First holds that when a judgment is required to be set forth on a separate document but is not, the time to appeal the judgment never begins to run; (3) the circuit split over whether the consent of all parties is necessary to waive the separate document requirement; and (4) the *Townsend* problem.[13]

Minutes of Spring 2000 Meeting of Advisory Committee on Appellate Rules, April 13, 2000, at 18. The Reporter noted that the Standing Committee had asked the Civil Rules Committee and the Appellate Rules Committee to address these issues through coordinated amendments to Civil Rule 58 and Appellate Rule 4(a). *See id.* at 18 & 20. A revised Rule 4(a)(7) proposal that would dovetail with proposed amendments to Civil Rule 58 was approved at the spring 2000 meeting. *See id.* at 21.

After the comment period, the Committee took up the proposed amendment to Rule 4(a)(7) at its spring 2001 meeting. The debate centered largely on whether the cap period (which had been shortened from the originally proposed 150 days to 60 days) should be re-extended to 150 days. The Committee's discussion of that question included reflections on the degree and causes of noncompliance with the separate document requirement:

> A member asked whether the widespread non-compliance with the

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[13] What the minutes refer to as the "*Townsend* problem" was another facet of the problems relating to waiver of the separate document requirement.

> separate document requirement — the non-compliance that creates the "time bombs" that the 60-day cap is meant to "defuse" — is attributable more to district court clerks or district court judges. If the former, he said, it may be that better education could solve the time bomb problem. Several members said that the problem is attributable more to judges than to clerks; a member described how different judges take different positions on whether an order granting a FRCP 12(b)(6) motion is appealable and therefore required to be set forth on a separate document. Judge Murtha said that his impression is that many district court judges simply aren't aware of the separate document requirement; he pointed out that, in all of the training that new district court judges receive, no one mentions the separate document requirement. A member reminded the Committee that, for over 30 years now, the appellate courts had been warning district courts to comply with the separate document requirement, and yet non-compliance remains widespread.

Minutes of Spring 2001 Meeting of Advisory Committee on Appellate Rules, April 11, 2001, at 7. The cap was extended to 150 days, and the proposed amendments (with some revisions) were given final approval. *See id.* at 9. Ultimately, the Civil Rule 58 and Appellate Rule 4(a) amendments took effect on December 1, 2002.

The 2002 amendments have to some degree succeeded in ameliorating the problems that flow from district court noncompliance with the separate document requirement: The amendments made clear that the separate document does not apply to orders disposing of tolling motions, and the amendments capped the time for appeal when a required separate document is not provided. Nonetheless, there are periodic reminders that district courts find it difficult to comply with those requirements.[14]

For example, Item No. 07-AP-H on the Committee's study agenda concerns issues raised

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[14] A recent example can be found in *Specialized Seating, Inc. v. Greenwich Industries, LP*, 616 F.3d 722 (7th Cir. 2010), in which the court of appeals complained that the appeal

> was ... delayed by the district court's failure to enter a proper judgment, a common problem in the Northern District of Illinois. *See, e.g., Rush University Medical Center v. Leavitt*, 535 F.3d 735 (7th Cir. 2008). The judge stated that Specialized is entitled to a declaratory judgment that the registration is invalid because of both fraud and functionality. A declaratory judgment must be set out on a separate document containing its terms. Fed.R.Civ.P. 58(a). The judgment in this case does not do that. The parties, and perhaps the district judge, seem to have assumed that, if the judge's opinion names the winner, no one need bother with the step of producing a concise declaration in a separate document.

Id. at 725-26.

by *Warren v. American Bankers Insurance of Florida*, 507 F.3d 1239 (10th Cir. 2007), as to the operation of the separate document rule. In response to the Committee's discussion of *Warren*, Judge Hartz prompted the Tenth Circuit to review practices within the circuit, and the Circuit Clerk had raised with the district clerks within the circuit the importance of compliance with the separate document requirement. At the Committee's fall 2008 meeting Judge Hartz reported that "[t]he outreach to the Tenth Circuit's district clerks produced a marked increase in compliance," but he also cautioned "that the problem of noncompliance may be more widespread than the Committee realizes, since the problem is a hidden one." Minutes of Fall 2008 Meeting of Advisory Committee on Appellate Rules, November 13 and 14, 2008, at 5. At that meeting, Judge Ellis "reported that, after reading the agenda book materials, he made inquiries within his district. He learned that failure to comply with the separate document requirement is common, particularly in connection with the entry of summary judgment." *Id*.

C. Possible benefits and costs of the separate document approach

Amending Civil Rule 58 to require a separate document for orders deciding tolling motions would provide several benefits.[15] If a separate document is provided for those orders, the formality of the separate document will help alert litigants that the district court has decided all the outstanding motions and is done with the case. In a case where the disposition of a tolling motion leads to amendment of the judgment, it is likely that the first document to meet the separate document requirement after disposition of all postjudgment motions would be the entry of the amended judgment itself – thus removing the problem of the order-judgment gap. Extending the separate-document requirement to dispositions of tolling motions would remove the significance that currently attaches to the definition of "disposing" in Civil Rule 58(a). And at an abstract conceptual level, extending the separate document requirement to those dispositions might make compliance for district judges simpler because they would know that they must always provide a separate document when finishing with a case – whether the "finishing" in question consists of entering the initial judgment or of disposing of all tolling motions.

One significant cost of extending the separate document requirement would arise from the district courts' likely noncompliance with the requirement. As Part III.B noted, the 2002 amendments put in place the 150-day cap precisely because of the problems caused by what was perceived as widespread noncompliance with the pre-2002 separate document requirement. And caselaw since 2002 has not provided any reason to think that compliance has improved (though the field for compliance has narrowed due to the 2002 amendments' exclusion of tolling-motion dispositions from the separate document requirement).

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[15] A participant in the Committee's spring meeting also suggested that such an extension of the separate document requirement could make it easier to enforce the judgment. I am not entirely sure why this would be the case, given that any amended judgment must be set forth on a separate document under current Civil Rule 58(a).

Courts may also have more difficulty complying with the separate-document requirement with respect to tolling-motion dispositions than with respect to the underlying judgment. In some cases multiple tolling motions may be filed, and the district judge will have to pause when deciding each such motion to reflect on whether that motion is the one whose disposition requires a separate document. Although participants in the Committee's discussions have suggested that the CM/ECF system could be programmed to prompt the district judge to enter the separate document, it might be difficult to devise a program that would do so accurately in a case of any complexity. The creators of such a CM/ECF program would have to address a number of problems, including the following:

- How would one design a computer program that would accurately discern which motions count as a motion enumerated in Appellate Rule 4(a)(4)(A)?

    - Professor Cooper has pointed out the difficulty of creating a program that would get this terminological question right: "'[M]otion to reconsider' is not a Rule 59 term; people use it all the time, so it could be programmed in. Programming to reach more creative variations on Rule 59(e) may be difficult. And [the programmers] would have to decide whether to bring in all Rule 60 motions, or instead to attempt to reach only those Rule 60 motions filed within the time allowed by Rule 59."

    - It would unduly distend this memo if I were to survey all the possible complications that could arise when determining whether a motion fits within the Rule 4(a)(4)(A) list. Here is one example, taken from *Yost v. Stout*, 607 F.3d 1239 (10th Cir. 2010), and described by Professor Cooper during the Civil / Appellate Subcommittee's email deliberations: "The district judge entered judgment for the defendants on one claim and for the plaintiff on all others. Acting sua sponte, the judgment ordered the parties to bear their own costs and attorney fees. The plaintiff made a timely motion to alter or amend the judgment. The motion said that as prevailing party he should be awarded fees, and that the court should not have acted on its own without allowing the time provided by Rule 54(d) to move for fees. A proposed Rule 54(d) motion was attached. The district court ruled that the motion was not a Rule 59(e) motion, but a Rule 54(d) motion, and granted it. The court of appeals ruled that the plaintiff's appeal, filed after the fee award, was not timely as to the judgment on the merits against the one claim the plaintiff lost. The district court was right – the motion was not really a Rule 59(e) motion at all. And a Rule 54(d) motion resets appeal time only if the court extends the time to appeal under Rule 58."

- How would one design a program that would accurately discern which motions (otherwise specified in Appellate Rule 4(a)(4))(A)) were "timely"?

- How would one design a program that would accurately sort out the timeliness and tolling effect of serial motions in complex cases, for example cases in which a portion of

the case is carved off for immediate appeal under Civil Rule 54(b)?

- In an earlier email to the Civil / Appellate Subcommittee, Professor Cooper provided an interesting example of the problems that could arise: In *Ysais v. Richardson*, 603 F.3d 1175 (10th Cir. 2010), "the plaintiff sued several defendants. The court entered a final Rule 54(b) judgment as to all but one. The plaintiff filed a timely motion 'for reconsideration.' That was denied, restarting the appeal time clock. Two days later the court entered a final judgment dismissing the only remaining defendant. The plaintiff then filed a second motion seeking reconsideration – it addressed both the order denying his first motion to reconsider the Rule 54(b) judgment and also the judgment dismissing the final defendant. This single motion reset the time to appeal the judgment dismissing the sole remaining defendant, but – as a successive motion – did not reset the time to appeal the earlier Rule 54(b) judgment. The plaintiff filed a notice of appeal that was (1) untimely as to the Rule 54(b) judgment because the second motion to reconsider did not extend the time; (2) timely as to denial of the second motion to reconsider, but only to provide review of denial of that motion [a hopeless cause]; and (3) premature as to the judgment dismissing the final defendant, but it ripened when the motion to reconsider was denied. It would be easy to lose track of the obligation to enter judgment on a separate document even in this relatively straightforward setting."

Perhaps a district judge confronted with a complex scenario would err on the side of providing a separate document whenever he or she issued a disposition that might require a separate document. Such an approach would avoid the risk that omission of a required separate document would delay the start of the appeal time period – but it could also sow confusion among the lawyers as to whether any given separate document accurately signaled the restarting of the appeal time period (or whether they could safely await a further separate document after disposition of any remaining motions).

When one considers the possible difficulties of discerning which motions in a given case fit the description in the proposed Civil Rule 58(a) language described in Part III.A. ("timely ... motions enumerated in Fed. R. App. P. 4(a)(4)(A)"), one might be tempted to consider a different way of extending the separate document requirement – namely, by deleting the latter part of existing Civil Rule 58(a) so that it would read simply "Every judgment and amended judgment must be set out in a separate document." Such a temptation would be perilous. In essence, such an amendment would render Civil Rule 58's treatment of the separate document similar to the approach taken in the pre-2002 version of Civil Rule 58, when the Rule read in relevant part: "Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a)." Under the pre-2002 Rules, a court analyzing whether to provide a separate document for an order disposing of a post-judgment motion would have to determine whether that order was appealable. (If the order was appealable, then under Civil Rule 54(a) it was a "judgment," and Civil Rule 58 presumably required a separate document.) As was well documented in the memoranda accompanying the

deliberations that led up to the 2002 amendments, the answer (to the question whether the order was appealable) varied depending on the type of motion, the type of disposition, and the circuit in which the court sat. Reverting to language akin to Civil Rule 58's pre-2002 language would return litigants and lawyers to this morass, and would thereby vitiate one of the achievements of the 2002 amendments.

IV. Conclusion

The deliberations of the Appellate Rules Committee – and of the Civil / Appellate Subcommittee – have shown that eliminating the problem of the order-judgment gap is a challenging task. One possible avenue for eliminating that problem would entail an extension of the separate document requirement. The experience that led to the 2002 amendments to Civil Rule 58 and Appellate Rule 4(a)(4) suggests that extending the separate document requirement would entail costs that should be weighed against any benefits that would accrue from addressing the order-judgment gap.

TAB 5-B

MEMORANDUM

DATE: September 21, 2011

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 09-AP-B

This item concerns a proposal that Appellate Rule 29 be amended to treat federally recognized Native American tribes the same as states for purposes of amicus filings. The Committee discussed this proposal at four meetings in 2009 and 2010 and has been gathering additional information since then. This memo summarizes the discussions to date.

Item No. 09-AP-B initially arose from a comment submitted by Daniel Rey-Bear concerning the then-pending amendment to Appellate Rule 1. Rule 1(b), which took effect December 1, 2010, defines the term "state," for purposes of the Appellate Rules, to include the District of Columbia and any United States commonwealth or territory. Mr. Rey-Bear, commenting on the proposed Rule 1(b), suggested that federally recognized Indian tribes be included within the Rule's definition of "state."

At its April 2009 meeting, the Committee decided to place the question of amicus filings by Native American tribes on the agenda as a new item and to ask Mr. Letter to make initial inquiries among relevant federal government entities concerning both Rule 29(a)'s provision for filing without party consent or court leave and the then-pending addition to Rule 29(c) of a provision concerning disclosure of amicus-brief authorship and funding.[1]

In November 2009, the Committee discussed the new agenda item and determined that the focus, going forward, should be on Rule 29's amicus-filing provisions rather than on the possibility of globally defining "state" to include Native American tribes.[2] Participants expressed interest in considering whether to extend parity of treatment (for amicus filings) to municipal governments as well as tribal governments. Dean McAllister undertook to research the history of the U.S. Supreme Court's amicus rule, with a view to determining why Native American tribes are not treated the same as states by that rule. Ms. Leary agreed to study amicus filings in the courts of appeals to determine whether and how often Native American tribes are denied leave to file amicus briefs.

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[1] As you know, new Rule 29(c)(5) took effect December 1, 2010.

[2] A global definition would have affected not only Rule 29 but also Rules 22, 26, 44, and 46.

At its April 2010 meeting, the Committee had the benefit of research by both Dean McAllister and Ms. Leary. Dean McAllister reported that the Supreme Court's amicus-filing rule can be traced back to a rule adopted in 1939. Since 1939, the Supreme Court's rule has always permitted amicus filings, without Court leave or party consent, by federal, state, and local governments. Neither Native American tribes nor foreign governments have been included in that provision, and Dean McAllister was not able to find any evidence that the question of treating tribes the same as federal, state, or local governments had been raised in connection with the Supreme Court's rule. Dean McAllister suggested that the omission of Native American tribes from the Supreme Court's 1939 amicus rule may have been an accident of history. He observed that Appellate Rule 29(a) is even less inclusive than Supreme Court Rule 37.4: The latter, but not the former, allows municipalities to file amicus briefs without party consent or court leave.

Ms. Leary reported the results of her research concerning tribal amicus filings in federal court. Ms. Leary and her colleagues at the FJC searched the CM/ECF database of the courts of appeals; the search was limited to the time span after the relevant courts of appeals had gone "live" in CM/ECF.[3] Ms. Leary reported that relatively few Native American tribal amicus briefs are filed with the consent of the parties; most such filings occur by court leave rather than party consent. Ms. Leary found 180 motions filed by Native American tribes seeking court permission to file an amicus brief. Of those, 157 were granted, 11 were denied, and 12 were not ruled on. A table compiled by Ms. Leary showed that this pattern – a relatively high percentage of motions granted and a relatively small percentage of motions denied – was consistent within each circuit as well as across the ten circuits. Most of the activity occurred in the Eighth, Ninth, and Tenth Circuits (which encompass the reservations of a large number of tribes). Of the eleven motions that were denied, two were denied as untimely, one was denied as moot, and one was denied because the filer was the plaintiff in another case scheduled for argument before the same panel on the same day; no reasons were stated for the denial of the other seven motions.[4]

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[3] The earliest circuit went live in 2006, ten circuits had gone live by 2009, and all but the Federal Circuit had gone live as of March 2010. This limited the length of time for which court of appeals records could be searched; Ms. Leary's search excluded the Second and Eleventh Circuits (which went live in January 2010) as well as the Federal Circuit, and the average length of time since the other circuits went live was only two and a half years.

[4] In addition to searching the records of the courts of appeals, the Committee had asked Ms. Leary to search the records of four federal district courts: the Eastern District of California, the District of Minnesota, the Eastern District of Oklahoma, and the Eastern District of Wisconsin. Ms. Leary's search of those districts found no relevant motions in the latter three districts. In the Eastern District of California, Ms. Leary found five motions - three that were granted and two that were not ruled on. She then expanded her search to encompass all districts within the Ninth Circuit. That expanded search yielded 49 motions by Native American tribes seeking permission to file an amicus brief, of which 42 were granted, four were denied, and three were not ruled on.

Also at the April 2010 meeting, I recounted the results of my search for tribal-court amicus-filing provisions.[5] I focused this inquiry on 23 tribes with large populations and/or busy court systems. My research assistant searched the Internet for relevant provisions in the law of these 23 tribes. She found only six relevant tribal-law provisions: two rules that require court permission for amicus filings, two rules that require either court permission or party consent, and two rules that address amicus filings but do not make clear the standards for such filings. She did not find any rules that address whether governments other than the tribe in question are exempt from the general amicus-filing requirements.[6] As a point of comparison, I also looked at state-court amicus-filing provisions, and found that many state-court rules require court permission for amicus filings. Some state-court rules require either court permission or party consent. A handful of state-court rules appear to permit amicus filings without either court permission or party consent. Sixteen states have a court rule that exempts certain types of government entities from applicable amicus-filing requirements; of those exemptions, sixteen treat the relevant state specially, six treat municipalities specially, four treat the United States specially, and two or three treat other states specially.[7]

Members suggested, at the April 2010 meeting, that it would be useful to know the Supreme Court's views on the question of tribal amicus filings. In addition, Judge Sutton undertook to write to the Chief Judges of the Eighth, Ninth and Tenth Circuits to share with them Ms. Leary's research and to ask for their views on the question of whether a provision on this topic should be adopted either in the Appellate Rules or in local circuit rules.

At the October 2010 meeting, the Committee discussed the preliminary results of these further inquiries. Judge Sutton's letters to the Chief Judges of the Eighth, Ninth, and Tenth Circuits had asked each Chief Judge for input on two questions - first, how the circuit reacted to the issue in general, and second, whether the circuit would consider amending its local rules to

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[5] At the fall 2009 meeting, it had been suggested that it might be useful to investigate whether tribal court systems have rules concerning amicus filings and, if so, how those rules treat amicus filings by government litigants.

[6] The absence of such findings is not surprising: In the light of the U.S. Supreme Court's decisions narrowing the reach of tribal-court subject matter jurisdiction, tribal courts are less likely to hear cases that directly implicate the interests of another government than are either federal courts or state courts.

[7] Though only a small number of state provisions explicitly authorize special treatment for filings by the federal government in state courts, it is possible that such filings are already separately authorized by 28 U.S.C. § 517. That statute provides that "[t]he Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States." Though this statute has rarely been cited by state courts, it could be argued to authorize amicus filings by the federal government in state court proceedings.

permit tribes to file amicus briefs without party consent or court permission. By October 2010, one circuit had responded with answers to these questions: Chief Judge Riley reported that the letter's distribution to three relevant Eighth Circuit committees elicited only three responses – two that supported amending either the Appellate Rules or the circuit's local rules, and one that supported only amending the latter if appropriate. Also at the October 2010 meeting, Dean McAllister reported that he had discussed tribal amicus participation with Supreme Court Deputy Clerk Chris Vasil, who had conferred with the Clerk of the Court, William K. Suter; neither recalled any requests to include tribal amici in the Supreme Court's rule.

At the Standing Committee's January 2011 meeting, Judge Sutton updated the Standing Committee concerning the Appellate Rules Committee's discussion of this issue. Participants in the ensuing discussion voiced divergent views concerning the merits of the proposal.

In March 2011, we received a copy of a letter from Molly Dwyer, the Ninth Circuit Clerk, concerning the Ninth Circuit's response to Judge Sutton's inquiry. The letter reports that the Ninth Circuit "supports [a rule] change and is inclined to support a national rather than a local rule." The letter also relays some drafting suggestions concerning a possible national rule.

In case they might be useful for Committee members in refreshing their recollection of the discussions to date, I enclose the following items:

- Mr. Rey-Bear's March 13, 2009 and October 5, 2009 letters.
- An October 2009 resolution by the National Congress of American Indians in support of a rule amendment.
- Marie Leary's March 22, 2010, memo summarizing her findings concerning amicus filings in selected federal courts.
- A May 26, 2010, resolution by the Coalition of Bar Associations of Color in support of a rule change.
- Judge Sutton's August 25, 2010, letter to the Chief Judges of the Eighth, Ninth, and Tenth Circuits.
- Chief Judge Riley's September 29, 2010, letter to Judge Rosenthal in response to Judge Sutton's inquiry.
- Ninth Circuit Clerk Molly Dwyer's letter (dated September 30, 2010, and received March 18, 2011), in response to Judge Sutton's inquiry.
- An April 25, 2011, email from Mr. Rey-Bear.

If you would find it useful to review any additional materials concerning this agenda item – such as my prior memoranda or Dean McAllister's memorandum (the gist of which was subsequently published, *see* Stephen R. McAllister, *The Supreme Court's Treatment of Sovereigns as Amici Curiae*, 13 Green Bag 2d 289 (2010)) – please let me know and I will be glad to provide copies.

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October 5, 2009

VIA EMAIL AND FIRST-CLASS MAIL

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Rules_Comments@ao.uscourts.gov
Washington, D.C. 20544

Re: Proposed Amendment to Appellate Rule 1 Regarding Indian Tribes (Docket No. 08–AP-007)

Dear Mr. McCabe:

This letter follows up on my letter of March 13, 2009 (enclosed here), which proposed that new Federal Rule of Appellate Procedure 1(b), which will define the term "state" for purposes of the Appellate Rules, be revised to include federally recognized Indian tribes.

Per a telephone discussion on May 29, 2009 with Professor Catherine Struve, the Reporter for the Advisory Committee on Appellate Rules, I understand that my proposal may be put on the discussion agenda for the Committee's fall meeting. And from the Judiciary's Federal Rulemaking website and the Rules Committee Support Office, I understand that the Committee's next meeting is scheduled for November 5-6, 2009. Given that, I write this letter to reaffirm my proposal and to request that it be considered at the Committee's upcoming meeting. This letter also addresses three points regarding my proposal noted in Professor Struve's memo of March 27, 2009 to the Committee, which addressed comments on the proposed Rule 1(b) in advance of the Committee's April 2009 meeting. The first two of these matters were discussed with Professor Struve on May 29, 2009.

First, Professor Struve's memo on page 4 states the following:

> Mr. Rey-Bear's opening comments point out that Native American tribes are sovereign governments and that they should be treated with the dignity accorded to other sovereigns. This point is correct, but it does not in itself establish that Indian tribes should be included in the definition of "state" for purposes of the Appellate Rules. Foreign nations are also sovereigns, and they are not included within the definition of "state." Thus, it seems to me, excluding tribes from the definition of "state" carries no necessary implication of disrespect to tribes as sovereigns.

Unlike foreign sovereigns, which by definition are foreign to the federal system of government in the United States, Indian tribes are "domestic dependant nations," *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831), which are "physically within the territory of the United States and subject to ultimate federal control," *United States v. Wheeler*, 435 U.S. 313, 322 (1978). Indian tribes therefore constitute one of the distinct classes of governments that comprise the United States, along with the fifty states, the District of Columbia, and the various United States commonwealths and territories. Given this, there is a substantial reason for distinguishing Indian tribes from foreign nations, and including the former but not the latter with the definition of "state" in proposed Rule 1(b). Otherwise, Indian tribes will remain the only domestic sovereign in the United States not accorded equal status under the Rules, and Indian tribes will not even be accorded the same status as Guam, American Samoa, the U.S. Virgin Islands, Puerto Rico, and the Northern Mariana Islands, which are not even independent sovereigns with inherent powers like Indian tribes and states, *see Wheeler*, 435 U.S. at 321-23. Excluding Indian tribes from Rule 1(b) unduly disrespects their domestic sovereign status.

Second, Professor Struve's memo on page 5 notes that my prior letter did not address application of Rule 1(b) to Rule 26(a), regarding time computation, which is scheduled to be amended effective December 1, 2009. The amended version of Rule 26 that has been forwarded to Congress and will become effective later this year provides generally that in any time period calculation "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." Rule 26(a)(1)(C); Rule 26(a)(2)(C). Rule 26 then defines "legal holiday" to include federal holidays and "any other day declared a holiday by the state where either of the following is located: the district court that rendered the challenged judgment or order, or the circuit clerk's principal office." Rule 26(a)(6)(C).

Revision of Rule 1(b) to include federally recognized Indian tribes would not have any affect on this application of Rule 26 because there is no known federally established Indian reservation where a circuit court's principal office or a federal district court is located. For reference, compare the listings of locations of circuit clerks' principal offices and federal district courts, organized by circuit, available at http://www.uscourts.gov/courtlinks/, with maps of all federally recognized Indian reservations in the United States, organized by state, available at http://www.nationalatlas.gov/printable/fedlands.html#list.

Finally, as noted on page 3 of my prior letter and on page 3 of Professor Struve's memo, the main reason for my proposing inclusion of Indian tribes in the definition of "state" in Rule 1 is the additional burdens otherwise placed on Indian tribes regarding amicus curiae filings, especially under the revised version of Rule 29. Just since the submission of my comments, my firm has filed another appellate amicus brief that reiterates my concern on this

point. *See* Navajo Nation's and Pueblo of Laguna's *Amicus Curiae* Brief Supporting the Jicarilla Apache Nation and Opposing Mandamus Petition, *In re United States of America*, No. 2009-M908 (Fed. Cir. Aug. 13, 2009). I accordingly hope that the Committee with consider this comment and revise Rule 1 so that Indian tribes will be treated like all other sovereign and territorial governments in the United States and not be subject to additional disclosure and filing requirements under revised Rule 29.

Thank for your you attention to this matter.

Very truly yours,

NORDHAUS LAW FIRM, LLP

Daniel I.S.J. Rey-Bear
Board Certified Specialist
Federal Indian Law

Enclosure: Letter from Daniel I.S.J. Rey-Bear, Nordhaus Law Firm LLP, to Peter G. McCabe, Secretary, Committee on Rules of Practice and Procedure (March 13, 2009).

cc (w/encl.): Prof. Catherine Struve, Reporter, Advisory Committee on Appellate Rules

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March 13, 2009

VIA EMAIL AND FIRST-CLASS MAIL

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Rules_Comments@ao.uscourts.gov
Washington, D.C. 20544

Re: Proposed Federal Rule of Appellate Procedure 1(b)

Dear Mr. McCabe:

This letter provides a comment on the proposed revision of the Federal Rules of Appellate Procedure, as stated in the July 29, 2008 revised Report of the Advisory Committee on Appellate Rules. While I recognize that the comment period for this rulemaking ended on February 17, 2009, I only learned of this proposed amendment since then, and so submit my comments now. I hope that the Committee will consider this comment. In particular, I am submitting this comment to propose that new Rule 1(b), which will define the term "state" for purposes of the Appellate Rules, be revised to include federally recognized Indian tribes. As explained below, federal law broadly and consistently recognizes that Indian tribes are sovereigns like states, Indian tribes should be treated at least the same as territories, which are already included in the proposed Rule, and Indian tribes should be expressly included in the definition of "state" under the Appellate Rules.

Federal Law Recognizes that Indian Tribes are Sovereigns like States.

The commerce clause of the Unites States Constitution recognizes Indian tribes as sovereign entities alongside the states. U.S. Const. art. I, § 8, cl. 3. And each branch of the federal government likewise recognizes that Indian tribes are sovereign governments. For example, the U.S. Supreme Court has consistently recognized that Indian tribes are "domestic dependent nations," *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831), with "retained sovereignty," *United States v. Wheeler*, 435 U.S. 313, 328 (1978), and the "capacity of a separate sovereign." *United States v. Lara*, 541 U.S. 193, 210 (2004). Moreover, Indian tribal sovereignty is inherent and pre-constitutional, it inheres in Indian tribes themselves, and it does not flow from the United States Constitution or from any delegation of federal authority. *Wheeler*, 435 U.S. at 322-23; *Talton v. Mayes*, 163 U.S. 376, 380-84 (1896); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 581 (1832).

Congress also recognizes tribes as sovereign governments. Numerous examples abound in Title 25 of the United States Code, which wholly concerns Indians, including the recognition of tribal powers of self-government in the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303. Congress also has recognized the status of tribal governments more generally, such as the requirement that "[e]ach agency . . . develop an effective process to permit elected officers of State, local, and *tribal governments* . . . to provide meaningful and timely input in the development of regulatory proposals containing significant Federal intergovernmental mandates." 2 U.S.C. § 1534(a) (emphasis added).

The executive branch also recognizes that Indian tribes constitute sovereign governments. For example, Executive Order 13175 entirely mandates "Consultation and Coordination with Indian Tribal *Governments*." 65 Fed. Reg. 67,249 (Nov. 6, 2000) (emphasis added). And Executive Order 13,336 specifically reaffirmed "the unique political and legal relationship of the Federal Government with tribal governments" and that '[t]his Administration is committed to continuing to work with these Federally recognized tribal governments on a government-to-government basis . . . ." 69 Fed. Reg. 25,295 (May 5, 2004). Altogether, these judicial decisions, congressional enactments, and executive policy pronouncements support classification of federally recognized Indian tribes as "states" along with the District of Columbia, federal territories, commonwealths, and possessions.

Indian Tribes Should be Treated at Least the Same as Territories.

The current proposed revision to Appellate Rule 1(b) defines "state" to include "the District of Columbia and any United States commonwealth or territory." Whether a given political entity "comes within a given congressional act applicable in terms to a 'territory' depends upon the character and aim of the act." *People of Puerto Rico v. Shell Co. (Puerto Rico), Ltd.*, 302 U.S. 253, 258 (1937). Thus, for a congressional enactment, it is not enough that Congress did not consider the situation at issue; rather, courts must determine whether Congress would have varied the statutory language if Congress had foreseen it. *Id.* at 257. Courts addressing this issue accordingly must go beyond the statutory words themselves and consider "the context, the purposes of the law, and the circumstances under which the words were employed." *Id.* at 258. Moreover, "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985).

Under this analysis, both federal and state courts have found tribes to qualify as "territories" under various statutes. *See, e.g., United States ex rel. Mackey v. Coxe*, 59 U.S. 100, 103-04 (1855) (finding Cherokee Nation to be a territory under federal statute governing recognition of estate administrators); *National Labor Relations Board v. Pueblo of San Juan*,

276 F.3d 1186, 1198 (10th Cir. 2002) (en banc) (treating Indian tribes as states and territories under the National Labor Relations Act); *Tracy v. Superior Court of Maricopa County*, 810 P.2d 1030, 1035-46 (Ariz. 1991) (holding that tribes qualify as territories under the Uniform Act to Secure the Attendance of Witnesses); *Jim v. CIT Financial Services Corp.*, 533 P.2d 751, 752 (N.M. 1975) (holding that tribes constitute territories under the federal full faith and credit statute). Indian tribes therefore should be accorded the same status under proposed Appellate Rule 1(b).

Indeed, the Supreme Court has expressly recognized that Indian tribes have a greater status than territories. *Wheeler*, 435 U.S. at 321-23. Specifically, while Indian tribes retain "'inherent powers of a limited sovereign which has never been extinguished[,]" territorial governments are "'entirely the creation of Congress'" and not "an independent political community like a State, but . . . 'an agency of the federal government.'" *Id.* at 321, 322. This distinction readily supports inclusion of Indian tribes within the definition of "state" alongside "territories" under the Appellate Rules.

Indian Tribes Should Be Included in the Definition of "State" under the Appellate Rules.

Each of the references to "state" in the Appellate Rules properly should encompass Indian tribes. As noted in the Advisory Committee report, these references include Appellate Rules 22, 29, 44, and 46. First, Rule 22 concerns federal "habeas corpus proceeding[s] in which the detention complained of arises from process issued by a state court[.]" Fed. R. App. P. 22(b)(1). This certainly should encompass Indian tribes, since the Indian Civil Rights Act expressly recognizes that "[t]he privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe." 25 U.S.C. § 1303.

Next, Rule 29 provides that "a State, Territory, Commonwealth, or the District of Columbia may file an amicus-curiae brief without the consent of the parties or leave of the court." Fed. R. App. P. 29(a). The failure to expressly include Indian tribes within the scope of this rule is the main reason for my submission of this comment. Like states, Indian tribes often find the need to submit amicus briefs in important cases affecting their sovereign interests. *See, e.g., Amoco Production Co. v. Watson,* 410 F.3d 722 (D.C. Cir. 2005) (Jicarilla Apache Nation and Southern Ute Indian Tribe, amici curiae); *Independent Petroleum Assoc. of America v. Dewitt,* 279 F.3d 1036 (D.C. Cir. 2002) (same); *South Dakota v. United States Dep't of the Interior*, 69 F.3d 878 (8th Cir. 1995), *cert. granted, vacated, & remanded*, 519 U.S. 919 (1996) (Jicarilla Apache Nation, Pueblo of Laguna, and Pueblo of Santa Ana, amici curiae). Unfortunately, because Indian tribes are not expressly included within the terms of Rule 29(a), they must seek consent of parties and obtain leave of the court out of an abundance

of caution, even as they assert that they properly should qualify under the Rule. Imposition of these additional requirements is unwarranted given the sovereign governmental status of Indian tribes. Instead, the classification of Indian tribes along with other governments under the Appellate Rules is especially warranted given the further disclosure requirements that the proposed revision to Rule 29 will impose on nongovernmental amicus briefs.

Next, Rule 44 provides for notice to the court clerk and certification to a state attorney general if a party questions the constitutionality of a state statute in a proceeding in which the state or its agency, officer, or employee is not a party in an official capacity. Fed. R. App. P. 44(b). It would be very appropriate and valuable for Indian tribes to be included in the notice and certification provided for in this Rule since the Supreme Court has recognized that federal constitutional proscriptions do not apply to Indian tribes, *Talton*, 163 U.S. at 384; *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 & n.7 (1978), and expressly held that analogous claims against Indian tribes under the Indian Civil Rights Act are barred by their sovereign immunity from suit, except for habeas corpus claims as referenced above, *Martinez*, 436 U.S. at 59. Existing Supreme Court authority and the sovereign governmental status of Indian tribes warrants according them the same level of process in this regard as the proposed rule revision would provide to the District of Columbia and federal territories, commonwealths, and possessions.

Finally, Rule 46 provides as follows:

> 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).

Fed. R. App. P. 46(a)(1). Indian tribes should be included within the scope of this Rule because the Supreme Court has recognized that "[t]ribal courts play a vital role in tribal self-government . . . and the Federal Government has consistently encouraged their development." *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14-15 (1987); *see also* Indian Tribal Justice Act, 25 U.S.C. §§ 3601-31; Indian Tribal Justice Technical & Legal Assistance Act, 25 U.S.C. §§ 3651-81; Sandra Day O'Connor, *Lessons from the Third Sovereign*, 33 Tulsa L.J. 1 (1997).

In particular, more than 140 Indian tribes currently have tribal courts, which often are structured similar to state courts. Cohen's Handbook of Federal Indian Law (Nell Jessup Newton ed. 2005), § 4.04[3]c][iv], at 265, 270. These tribal courts typically provide for

admission to practice by attorneys based in large part on documented prior admission and good standing before the highest court or the bar of a state or the District of Columbia. *See, e.g.,* Blackfeet Tribal Law & Order Code § 9-10; Cherokee Nation Supreme Court Rule 132; Hopi Indian Tribe Law & Order Code § 1.9.3.2; Jicarilla Apache Nation Code § 2-9-7(A); Nez Perce Tribal Code § 1-1-36(b); Winnebago Tribal Code § 1-402(1). Accordingly, an attorney admitted to practice before the highest court of an Indian tribe is almost necessarily already admitted to practice before the highest court of a state. Therefore, given the status of Indian tribes relevant to territories as discussed above, tribally licensed attorneys should be entitled to the same eligibility as attorneys who are admitted to practice solely in a territory, such as Guam, the Northern Mariana Islands, or the Virgin Islands.

In conclusion, numerous considerations support inclusion of federally recognized Indian tribes within the definition of a "state" in the proposed revision of Appellate Rule 1(b).

Thank for your you attention to this matter.

Very truly yours,

NORDHAUS LAW FIRM, LLP

Daniel I.S.J. Rey-Bear
Board Certified Specialist
Federal Indian Law

cc: John Dossett, National Congress of American Indians
Richard Guest, Native American Rights Fund
Governor John Antonio, Pueblo of Laguna
Governor Bruce Sanchez, Pueblo of Santa Ana
Governor Ruben A. Romero, Pueblo of Taos

The National Congress of American Indians
Resolution #PSP-09-060

TITLE: Support for Amendment of the Federal Rules of Appellate Procedure to Treat Indian Tribes in the Same Manner as States and Territories

NCAI HEADQUARTERS
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WHEREAS, we, the members of the National Congress of American Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants the inherent sovereign rights of our Indian nations, rights secured under Indian treaties and agreements with the United States, and all other rights and benefits to which we are entitled under the laws and Constitution of the United States, to enlighten the public toward a better understanding of the Indian people, to preserve Indian cultural values, and otherwise promote the health, safety and welfare of the Indian people, do hereby establish and submit the following resolution; and

WHEREAS, the National Congress of American Indians (NCAI) was established in 1944 and is the oldest and largest national organization of American Indian and Alaska Native tribal governments; and

WHEREAS, the United States Constitution, U.S. Supreme Court decisions, and hundreds of treaties, federal statutes, and regulations all acknowledge the inherent sovereignty of Indian tribes and recognize that Indian Tribes are distinct, domestic, sovereign governments; and

WHEREAS, Indian Tribes have a greater status than territories of the United States, because Indian Tribes retain inherent sovereignty which has never been extinguished; and

WHEREAS, Indian Tribes, like states, may be subject to federal habeas corpus proceedings, may have declared holidays, may find the need to submit amicus curiae briefs in cases affecting their sovereign interests and should not be subject to burdensome requirements or disclosures for such filings, may have their laws challenged in federal court proceedings without being named as parties, and may have courts where qualified attorneys may be admitted to practice; and

WHEREAS, the Federal Rules of Appellate Procedure currently recognizes all the foregoing rights and privileges for states and territories, but not for Indian Tribes, and there is no material difference between the status, circumstances, or positions of Tribes and states and territories for all matters addressed in the Federal Rules of Appellate Procedure; and

WHEREAS, comments have been submitted on March 13, 2009 (Docket No. 08BAP-007) and October 11, 2009, to the Advisory Committee on Appellate Rules and the Committee on Rules of Practice and Procedure of the Administrative Office of the United States Courts, recommending that the Federal Rules of Appellate Procedure be amended to address the foregoing inequitable situation; and

WHEREAS, failure to recognize Indian Tribes as sovereign domestic governments for purposes of the Federal Rules of Appellate Procedure constitutes arbitrary, inequitable, and discriminatory treatment of Indian Tribes in comparison to states and territories.

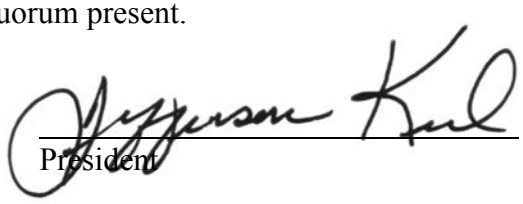
NOW THEREFORE BE IT RESOLVED, that the NCAI does hereby call on the Committee on Rules of Practice and Procedure of the Administrative Office of the United States Courts to include language in the Federal Rules of Appellate Procedure to treat Indian Tribes as sovereign governments, in the same manner as states and territories; and

BE IT FURTHER RESOLVED, that the NCAI supports the comments previously submitted to the Committee on Rules of Practice and Procedure of the Administrative Office of the United States Courts calling for the amendment of the Federal Rules of Appellate Procedure to treat Indian Tribes in the same manner as states and territories; and

BE IT FINALLY RESOLVED, that this resolution shall be the policy of NCAI until it is withdrawn or modified by subsequent resolution.

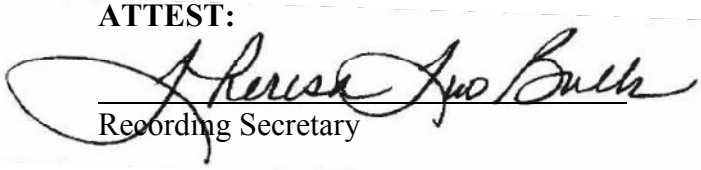
CERTIFICATION

The foregoing resolution was adopted by the General Assembly at the 2009 Annual Session of the National Congress of American Indians, held at the Palm Springs Convention Center in Palm Springs, California on October 11-16, 2009, with a quorum present.



President

ATTEST:



Recording Secretary

Federal Judicial Center
Research Division
FTS/202 502 4069

memorandum

DATE: March 22, 2010
TO: Members of the Advisory Committee on Appellate Rules
FROM: Marie Leary
Federal Judicial Center
SUBJECT: Follow-up to Committee's Request re: *Amicus* Filings by Native American Tribes

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At the Fall 2009 meeting in Seattle, this Committee discussed a suggestion that the Appellate Rules define the term "state" to include federally recognized Native American tribes. After deciding that further consideration of the proposal should be on a rule-by-rule basis, the Committee requested the Federal Judicial Center to study *amicus* filings in the courts of appeals as well as in several selected districts to determine whether and how often Native American tribes seek leave to file *amicus* briefs and how often such requests are denied.

The Center's research, ideally, will assist the Committee's deliberations concerning whether federally recognized Native American tribes should be treated the same as states for purposes of *amicus curiae ("amicus")* filings under Federal Rule of Appellate Procedure 29. At its last meeting, the Committee heard one view, as expressed by Mr. Daniel Rey Bear, that tribes should not be required to seek party consent or leave of court as currently required by FRAP 29(a) to file an *amicus* brief. Further, Mr. Rey Bear noted that tribes should not be included within the proposed new authorship and funding disclosure requirement of new Rule 29(c), slated to take effect on December 1, 2010, pending approval by the Supreme Court and provided that Congress takes no action to the contrary.

Amicus Filings in the Appellate Courts

Federal Rule of Appellate Procedure 29 controls the content, format, and timing of *amicus* filings in the U.S. Courts of Appeals. Except for the United States, states, territories and the District of Columbia, any party wanting to file an *amicus* brief in the appellate courts must either obtain the consent of all the parties, or permission from the court if consent can not be obtained. FRAP 29(b) requires parties submitting a motion for

leave to file to simultaneously file the proposed brief and to state their interest in the case and explain why the brief is relevant to the disposition in that particular case. The United States, states, territories, and the District of Columbia can file *amicus* briefs at their discretion without party consent, without prior court approval, and without a motion explaining why the brief should be allowed. Native American tribes that can not obtain party consent must submit a motion for leave to file along with the proposed brief. Before the proposed *amicus* brief can be filed, the court must explicitly grant the motion. Inherent in this procedure is the possibility that, unlike the United States, states, territories and the District of Columbia, not all *amicus* briefs that Native American tribes submit for filing in the appellate courts are filed because courts can deny the motion. The Committee seeks to learn how often *amicus* motions filed by Native American tribes are in fact denied in the appellate courts.

Identifying amicus filings by Native American tribes in the courts of appeal

In order to determine whether and how often Native American tribes are denied leave to file *amicus* briefs, the Center conducted a search of the CM/ECF database of the courts of appeals to locate the relevant docket entries. The courts of appeals have gone live with their CM/ECF systems relatively recently with most circuits having gone live only two years ago.[1] The Center searches of the CM/ECF data therefore were limited as to how far back in time the records could be searched. As of March 2010, all circuits are live with their CM/ECF systems, except for the Federal Circuit. The Second and Eleventh Circuits went live with their CM/ECF databases on January 4, 2010. They were not included in the Center's searches because they would not have a substantial number of searchable records.

A search of the CM/ECF database in each of the ten live circuits was conducted using the search terms ("amicus" OR "amici") AND ("tribe" OR "Indian" OR "Native American") going as far back in time as possible in each circuit (i.e., to the exact date when the CM/ECF system went live in the respective circuits). Table 1, below, depicts the results of this search. Keep in mind that the time period searchable was relatively short in the ten live circuits, with an overall average of 2.5 years across the circuits.

At the outset, the data show that relatively few Native American *amicus* briefs are filed with the consent of the parties. A clear majority (85%) of such briefs resulted from motions granted by judges under FRAP 29(a), rather than by consent of the parties.

[1] The Eighth Circuit was the earliest to go live in 2006, the Fourth, Sixth, and Tenth Circuits went live in 2007, the First, Third, Seventh, Ninth and DC Circuits went live in 2008, and the Fifth Circuit went live in 2009. Except for the Seventh Circuit, all cases filed in a court after its "live date" along with any pending cases that had activity after the "live date" are included in its database. The Seventh Circuit's database includes only cases filed after its "live date".

During the search period, a total of 180 motions were filed under FRAP 29 by Native American tribes[2] seeking court approval: 157 (86%) of the motions were granted and *amicus* briefs were filed; 11 (7%) of the motions were denied; and 12 (7%) of the motions were not ruled on including one motion still pending final resolution[3].This trend of relatively high percentages of motions granted versus relatively small percentages of motions denied is consistent within each circuit as well as across the ten circuits that were searchable.

Focusing on the 11 motions denied: no reasons were provided for 7 of the denials[4], 2 were denied as untimely[5], 1 was denied as moot[6], and 1 was denied because the *amicus* Native American tribe was the plaintiff in another case scheduled for oral argument on the same day before the same panel as the case in question[7]. The activity clustered in the Eighth, Ninth, and Tenth Circuits as might be expected based on the number of Native American tribes within those circuits.

[2] Mr. Rey-Bear's proposal would limit eligibility for exemption from FRAP 29(a)'s requirements for filing *amicus* briefs to those tribes granted federal recognition. As of August 11, 2009, 564 tribes are listed in the Federal Register as *Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs*. It has not been verified that the Native American tribes submitting the motions for permission to file *amicus* briefs identified in this search are or are not on this list of federally recognized Indian tribes.

[3] Except for the one motion still pending, the other 11 were not ruled on before the case proceeded to submission or ruling on the issue the proposed brief addressed. In other words, those eleven non-rulings may be viewed, in effect, as denials.

[4] Lummi Indian Tribe v. Whatcom County, 91-cv-35622 (9th Cir. July 10, 1991) (Per order filed 11/29/93, "The motions have been considered and denied.")(2 motions denied); Waste Action Project v. Dawn Mining Corp., 96-cv-36055 (9th Cir. Oct. 11, 1996) (Per order filed 1/21/98: "Spokane Tribe of Indians' Motion for leave to appear *amicus* is denied."); Tulalip Tribes v. Suquamish Indian Tribes, 06-cv-35185 (9th Cir. Mar. 6, 2006) (Per order filed 10/25/07: "Nisqually Indian Tribe motion to become *amicus curiae* is denied. Tulalip Tribe's motion for leave to file *amicus curiae* letter in support of the Lummi Indian Nation pursuant to Rule 29 is denied.")(2 motions denied); Cherokee Nation v. Thompson, 01-cv-7106 (10th Cir. Aug. 13, 2001) (Per order filed 1/22/03: "denying motion for leave to become *amicus* filed by Ramah Navajo Chapter et al."); We Coal Traf Leag. v. STB, 96-rev-1373 (D.C. Cir. Sept. 30, 1996) (Per curiam order filed 12/10/97: "denying non-party motion to allow *amicus* filed by Reno Sparks Indian [Colony].").

[5] Bugenig v. Hoopa Valley Tribe, 99-cv-15654 (9th Cir. Apr. 8, 1999)(Per order filed 2/15/01: "The Confederated Tribes of the Colville Reservation's motion for leave to file an *amicus* brief is denied as untimely."); Gros Ventre Tribe v. U.S., 04-cv-36167 (9th Cir. Dec. 30, 2004)(Per order filed 3/8/07: "The motion of *amicus curiae* Kickapoo Tribe in Kansas for leave to file letter in support for appellants combined petition for rehearing *en banc* is denied as untimely under FRAP 29.").

[6] New Mexico v. Jicarilla-Santa Ana, 01-cv-2011 (10th Cir. Jan. 11, 2001)(Per order filed 9/18/01: denying motion by Mescalero Apache Tribe for leave to file an *amicus* response to appellant's motion to remand as moot since the court denied appellant's motion to remand the case.)

[7] Rincon Band of v. Schwarzenegger, 06-cv-55259 (9th Cir. Feb. 24, 2006).

Table 1. Motions Filed by Native American Tribes for Permission to File *Amicus* Briefs under FRAP 29(a) in Ten Courts of Appeals

Circuit	Motions[8] for Permission to File *Amicus* Briefs by Native American Tribes						Number of *Amicus* Briefs filed by Native American Tribes with consent of the parties	Date Circuit Went Live With CM/ECF[9]
	Total Number Granted in the Circuit (% of total number of motions in the circuit)		Total Number Denied in the Circuit (% of total number of motions in the circuit)		Total Number Not Ruled on[10] in the Circuit (% of total number of motions in the circuit)			
First	**5**	(100%)	**0**	(0%)	**0**	(0%)	**2**	03/31/2008
Third	**0**	(0%)	**0**	(0%)	**0**	(0%)	**0**	02/04/2008
Fourth	**0**	(0%)	**0**	(0%)	**0**	(0%)	**0**	11/13/2007
Fifth	**4**	(100%)	**0**	(0%)	**0**	(0%)	**1**	02/172009
Sixth	**2**	(100%)	**0**	(0%)	**0**	(0%)	**0**	08/20/2007
Seventh	**0**	(0%)	**0**	(%)	**0**	(0%)	**0**	3/21/2008
Eighth	**22**	(100%)	**0**	(0%)	**0**	(0%)	**6**	12/18/2006
Ninth	**79**[11]	(81%)	**8**	(8%)	**11**	(11%)	**11**	03/03/2008
Tenth	**34**	(92%)	**2**	(5%)	**1**	(3%)	**8**	09/04/2007
District of Columbia	**11**	(92%)	**1**	(8%)	**0**	(0%)	**3**	03/17/2008
TOTALS	**157**	(87%)	**11**	(6%)	**12**	(7%)	**31**	----

[8] Because the goal of our search was to identify the outcome of all *amicus* motions filed by Indian tribes, the number of motions granted, denied or not ruled on is greater than the number of cases searched because several cases included more than one motion.

[9] The CM/ECF database search for each circuit included all cases that were filed in a circuit after the date on which the circuit's CM/ECF database went live up to February 18, 2010. Except for the Seventh Circuit Court of Appeals, the search included any pending cases that had activity after the "live date".

[10] This column includes motions filed by Indian Tribes for permission to file *amicus* briefs for which there was no entry in the docket showing that the motion was ruled on or that the *amicus* brief was filed by the moving party before argument was held in the case, including one motion in the Tenth Circuit still pending resolution. See HRI, Inc. v. EPA, 07-agpet-9506 (10th Cir. Feb. 16, 2007).

[11] This number includes one motion that the court declared to be "denied" because the court considered the motion to be unnecessary since it was unopposed. The motion is considered to be granted in substance because the court deemed the *amicus* brief filed. Roberts v. Hagener, 07-cv-35197 (9th Cir. Mar. 13, 2007).

Amicus Filings in Selected District Courts

Despite the absence of any formal provision in the federal rules of civil and criminal procedure governing *amicus* filings in the district courts, district courts do allow the submission of *amicus* briefs in civil and criminal proceedings. In order to determine whether and how often Native American tribes are denied permission to file *amicus* briefs in the district courts, the Committee asked the Federal Judicial Center to expand its search to include four districts: California Eastern (9th Circuit), the District of Minnesota (8th Circuit), Oklahoma Eastern (10th Circuit), and Wisconsin Eastern (7th Circuit).

Most district courts went live with their CM/ECF systems before the appellate courts. The CM/ECF database for almost all districts includes all cases filed in the court after its "live date" in addition to any cases converted from the court's legacy case management system. The pool of searchable cases in the district courts was therefore larger than that of the appellate courts. A search was run in the CM/ECF database in these four selected districts with the identical search terms used in the appellate search. The search was limited to cases filed within the most recent ten year period (i.e., January 1, 2000 up to January 1, 2010)[12]. The four-district search found that in three of the districts there were no motions filed by Native American tribes seeking permission to file an *amicus* brief during the search period just described. In the Eastern District of California, three motions were granted and two cases were not ruled on.

The search was then extended to include all of the districts in the Ninth Circuit since this circuit had the highest number of *amicus* motions filed by Native American tribes at the appellate court level. Table 2 below shows the results of the search of the CM/ECF data of the four selected districts as well as of the additional Ninth Circuit districts. This search yielded 49 motions by Native American Tribes seeking permission to file an *amicus* brief: 42 motions (86%) were granted, 4 motions (8%) were denied, and 3 motions (6%) were not ruled on.[13] The grant rate (86%) for all of the districts in the Ninth Circuit is identical to that of the courts of appeal.

[12] California Eastern went live with CM/ECF in 2005, Minnesota went live in 2004, Oklahoma Eastern in 2006, and Wisconsin Eastern went live in 2002.

[13] Except for one motion in a case voluntarily dismissed, two motions were not ruled on before the case proceeded to submission or ruling on the issue the proposed brief addressed. In other words, those two non-rulings may be viewed, in effect, as denials.

Table 2. Motions filed by Native American Tribes for Permission to File *Amicus* Briefs in Selected District Courts

District	Motions for Permission to File *Amicus* Briefs by Native American Tribes						Date District Went Live With CM/ECF[14]
	Total Number Granted in District (% of total number of motions in the district)		Total Number Denied in District (% of total number of motions in the district)		Total Number Not Ruled On in District[15] (% of total number of motions in the district)		
Arizona	**4**	(100%)	**0**	(0%)	**0**	(0%)	07/05/2005
California Central	**1**	(50%)	**1**	(50%)	**0**	(0%)	01/05/2004 (civil) 04/03/2006 (criminal)
California Eastern	**3**	(60%)	**0**	(0%)	**2**	(40%)	01/03/2005
California Northern	**6**	(100%)	**0**	(0%)	**0**	(0%)	11/07/2005
California Southern	**3**	(75%)	**1**	(25%)	**0**	(0%)	09/05/2006
Idaho	**2**	(50%)	**1**	(25%)	**1**	(25%)	12/20/2004
Minnesota	**0**	(0%)	**0**	(0%)	**0**	(0%)	02/17/2004
Montana	**2**	(100%)	**0**	(0%)	**0**	(0%)	11/07/2005
Nevada	**1**	(100%)	**0**	(0%)	**0**	(0%)	11/07/2005
Oklahoma Eastern	**0**	(0%)	**0**	(0%)	**0**	(0%)	02/21/2004
Oregon	**7**	(100%)	**0**	(0%)	**0**	(0%)	03/01/2004
Washington Eastern	**0**	(0%)	**0**	(0%)	**0**	(0%)	10/12/2004
Washington Western	**13**	(93%)	**1**	(7%)	**0**	(0%)	06/23/2003
Wisconsin Eastern	**0**	(0%)	**0**	(0%)	**0**	(0%)	11/18/2002
TOTALS	**42**	(86%)	**4**	(8%)	**3**	(6%)	----

[14] The CM/ECF database search for each district included all cases filed in the district after the date on which the district's CM/ECF database went live up to February 18, 2010. The search included any cases converted from the district's legacy case management system before the "live date" that were filed between January 1, 2000 and January 1, 2010.

[15] This column includes motions filed by Indian Tribes for permission to file *amicus* briefs for which there was no entry in the docket showing that the motion was ruled on or that the *amicus* brief was filed by the moving party before argument was held in the case, including one motion in the District of Idaho not ruled on because the case was voluntarily dismissed. *See* Wise v. Broncho, 00-cv-341 (D. Idaho June 20, 2000).

Looking closely at one of the motions in which permission to file was granted and the full text of the actual motion was available, it is interesting to note that the *amicus* Native American Tribe brought its motion for leave to file "pursuant to Federal Rule of Appellate Procedure 29(a)" after the defendant consented but the plaintiff denied consent.[16] The *amicus* party stressed that its participation as *amicus curiae* would "serve the public interest and assist the Court by ensuring a comprehensive presentation of the relevant issues."[17]

Likewise, in an order granting the Tribe's proposed *amicus* brief, the court cited another case that applied the procedures for filing an *amicus* brief under Federal Rule of Appellate Procedure 29(a) to *amicus* participation in their court.[18] Noting that the plaintiff consented but the defendants refused the filing of the Tribe's *amicus* brief, the court granted the Native American Tribe's motion because the Tribe submitted its brief in the traditional role of "friend of the court" to assist the court by providing information regarding the maters before it.[19] Although two cases are not representative of practice across the district courts, this examination suggests that any changes to FRAP 29(a) may affect procedures and analysis of *amicus* motions in some district courts.

The courts provided reasoning for denying the *amicus* motions in three of the four denials identified in the district court search described herein. Reminding the parties that the decision to appoint an *amicus* rests within the broad discretion of the trial court, the District Court denied a tribe's motion because the movant sought to advocate a particular position already represented in the case—a purpose inconsistent with that of an *amicus curiae* in providing guidance to the court on a question of law.[20] The Southern District of California adopted by Standing Order the reasoning in *Voices For Choices v. Illinois Bell Telephone Co*., 339 F.3d 542 (7th Cir. 2003) as its standard for deciding whether to permit the filing of *amicus curiae* briefs.[21] Denying the Native American tribe's *amicus* motion, the District Court was not persuaded that the *amicus's* contribution to the briefing of the issues would be anything other than cumulative in that its perspectives were adequately represented by the plaintiff and the other *amicus curiae* party who was granted permission to file.[22]

Finally, the U.S. District Court for the Western District of Washington denied the Nooksack Indian Tribe's motion for leave to participate as *amicus curiae* because the Tribe did not indicate whether it would be assisting the court on motions regarding

[16] United States v. Lowry 2, 05-cr-399, Motion for Leave To File An *Amicus Curiae* Brief in Support of Defendant-Appellant (E.D. Cal. May 9, 2006).
[17] *Id.* at 3.
[18] United States v. Gonzales, 07-cr-5656, Makah Tribe's Motion For Leave To File *Amicus* Brief 4 (W.D. Wash. Jan. 29, 2008)(citing Correll v. United States, 2007 WL 4209424, *2 n.2 (W.D. Wash. Nov. 26, 2007)).
[19] *Id.* at 4.
[20] Kootenai Tribe of Idaho v. Glickman, 01-cv-10 Order 3 (D. Idaho Sept. 19, 2003) (citing Hoptowit v. Ray, 682 F.2d 1237, 1260 (9th Cir. 1982).
[21] San Pasqual Band of Mission Indians v. California, 06-cv-988 Order 2 (S.D. Cal. Jan. 9, 2007).
[22] *Id.*

complex issues of law or whether it intended to advocate a point of view on behalf of the plaintiff.[23]

Conclusion

The information presented here regarding *amicus* efforts by Native American tribes in the courts of appeals is based on a data from a relatively short time frame and from a limited number of circuits. Some caution is urged regarding conclusions about the outcomes of future *amicus curiae* petitions filed under FRAP 29(a) by Native American tribes in the appellate courts. The results of our analysis indicate that a high number of petitions by Native American Tribes for leave to file *amicus* were granted by the ten courts of appeals that have sufficient CM/ECF data to allow a search. Likewise, we found that the overwhelming majority of *amicus* motions by Native American tribes brought in the fourteen district courts were also granted.

It appears that at least some petitions are analyzed by district courts adopting the rationale of appellate court decisions and procedures pursuant to FRAP 29. While the Committee may consider alternative rationales for including Native Americans in the definition of states for purposes of FRAP 29, the results of the Center's limited research alone may not provide a strong enough basis on which to resolve the question facing the Committee. The question may then become one of whether application of the FRAP 29(a) process to Native American petitions serves a useful purpose. On the one hand, the rate of implicit and explicit denial of the *amicus* petitions brought by Native American tribes in the appellate courts, (6% explicit—with 4% decided without statement of reasons—and 6% implicit or not decided) is relatively low and suggests that there may be little added benefit from a screening process. On the other hand the relatively high grant rate (86%) suggests that Native Americans have generally been able to use the *amicus* process to present their views even though Rule 29(a)'s procedures add an extra step.

[23] United States v. Washington, 01-cv-47 Minute Order 1 (W.D. Wash. March 3, 2002).

RESOLUTION SUPPORTING AN AMENDMENT OF THE FEDERAL RULES OF APPELLATE PROCEDURE TO TREAT INDIAN TRIBES IN THE SAME MANNER AS STATES AND TERRITORIES

WHEREAS the Coalition of Bar Associations of Color (CBAC), organized in 1993, is a coalition created to act as a collective voice for issues of common concern to its member organizations; and

WHEREAS the member organizations of the Coalition of Bar Associations of Color are the Hispanic National Bar Association (HNBA), National Asian Pacific American Bar Association (NAPABA), the National Bar Association (NBA), and the National Native American Bar Association (NNABA); and

WHEREAS, the United States Constitution, United States Supreme Court decisions, and hundreds of treaties, federal statutes, and regulations all acknowledge the inherent sovereignty of Indian tribes and recognize that Indian Tribes are distinct, domestic, sovereign governments; and

WHEREAS, Indian Tribes retain inherent sovereignty which has never been extinguished; and

WHEREAS, Indian Tribes, like states, may be subject to federal habeas corpus proceedings, may have declared holidays, may have their laws challenged in federal court proceedings without being named as parties, may have courts where qualified attorneys may be admitted to practice, and may find the need to submit amicus curiae briefs in cases affecting their sovereign interests and should not be subject to burdensome requirements or disclosures for such filings; and

WHEREAS, the Federal Rules of Appellate Procedure currently recognize the right of states and territories to all file amicus curie briefs without filing a motion for leave, but Indian Tribes are not afforded the same right;

WHEREAS there is no material difference between the status, circumstances, or positions of Tribes and states and territories for all matters addressed in the Federal Rules of Appellate Procedure; and

WHEREAS, failure to recognize Indian Tribes as sovereign domestic governments for purposes of the Federal Rules of Appellate Procedure constitutes arbitrary, inequitable, and discriminatory treatment of Indian Tribes in comparison to states and territories.

THEREFORE BE IT RESOLVED, that the Coalition of Bar Associations of Color urges the Committee on Rules of Practice and Procedure of the Administrative Office of the United States Courts to include language in the Federal Rules of Appellate Procedure to treat Indian Tribes as sovereign governments, in the same manner as states and territories.

CERTIFICATION

WE, the duly-elected Presidents of the Hispanic National Bar Association (HNBA), National Asian Pacific American Bar Association (NAPABA), National Bar Association (NBA), and National Native American Bar Association (NNABA), hereby certify that the foregoing Resolution was duly enacted by a duly-noticed meeting of the Board of Directors.

NNABA

President, Hispanic National Bar Association	Date 5/26/10
President, National Bar Association	Date 5/26/10
President, National Native American Bar Association	Date 26 MAY 2010
President, National Asian Pacific American Bar Association	Date 5-26-10

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

LEE H. ROSENTHAL
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

JEFFREY S. SUTTON
APPELLATE RULES

LAURA TAYLOR SWAIN
BANKRUPTCY RULES

MARK R. KRAVITZ
CIVIL RULES

RICHARD C. TALLMAN
CRIMINAL RULES

ROBERT L. HINKLE
EVIDENCE RULES

August 25, 2010

The Honorable William Jay Riley
Chief Judge
United States Court of Appeals
for the Eighth Circuit
Roman L. Hruska United States Courthouse
111 South 18th Plaza, Suite 4303
Omaha, Nebraska 68102

Dear Chief Judge Riley:

In my capacity as the Chair of the Advisory Committee on the Federal Rules of Appellate Procedure, I write to ask for your input about a pending proposal concerning the filing of amicus curiae briefs in the courts of appeals.

Under FRAP 29(a), "[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. Otherwise, the entity must obtain the permission of all parties in the case or, failing that, seek permission from the court to file the amicus brief. The proposal under consideration is whether to extend the favorable treatment given to the United States and the States to Indian Tribes.

At least two questions arise in connection with the proposal. One is whether to change the rules simply as a matter of dignity—that the Tribes, as quasi-sovereigns, deserve the same treatment as the National Government and the States with respect to the filing of amicus briefs. The other is whether the current rule is creating any hardship. In considering the latter point, we looked at the Tribes' experiences—the number of requests made to file amicus briefs, the courts in which the requests were filed and the extent to which they were successful. The attached memo lays out the statistics.

As you will see, most of the relevant motions were filed in the Eighth, Ninth and Tenth Circuits. This reality prompted us to wonder two things: (1) how in general your circuit reacts to the proposal; and (2) whether it is worth amending your local rules to allow the Tribes to file amicus briefs without the permission of the parties or the court. As to the second point, we see nothing in the rule that would prohibit such a local rule and it might eliminate the need to amend the national rule.

I will follow up this letter with a phone call to see if you have reactions to these questions or any other thoughts about the matter. In the interim, thank you for your consideration.

Sincerely,

Jeffrey S. Sutton

JSS:jmf
Enclosure

cc: Catherine T. Struve, Reporter
Committee on Appellate Rules

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
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August 25, 2010

The Honorable Alex Kozinski
Chief Judge
United States Court of Appeals
for the Ninth Circuit
Richard H. Chambers Court
of Appeals Building
125 South Grand Avenue, Room 200
Pasadena, California 91105-1621

Dear Chief Judge Kozinski:

In my capacity as the Chair of the Advisory Committee on the Federal Rules of Appellate Procedure, I write to ask for your input about a pending proposal concerning the filing of amicus curiae briefs in the courts of appeals.

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cc: Catherine T. Struve, Reporter
Committee on Appellate Rules

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August 25, 2010

The Honorable Mary Beck Briscoe
Chief Judge
United States Court of Appeals
for the Tenth Circuit
645 Massachusetts Street
Room 400
Lawrence, Kansas 66044-0906

Dear Chief Judge Briscoe:

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Sincerely,

Jeffrey S. Sutton

JSS:jmf
Enclosure

cc: Catherine T. Struve, Reporter
Committee on Appellate Rules

Chambers of
WILLIAM JAY RILEY
Chief Judge
United States Court of Appeals
Eighth Circuit

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September 29, 2010

Lee H. Rosenthal
Chair
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Washington, D.C. 20544

Dear Mr. Rosenthal:

I distributed your communication on the proposed change to FRAP 29(a) to our Tribal Court Committee, to our Rules Committee, and to the District Court Committee. I only received three responses: two favoring the proposed amendments to FRAP 29(a) and/or amending our local rules; and one preferring to amend our local rule only, if appropriate.

Thus, the response was underwhelming.

Sincerely,

William Jay Riley
Chief Judge

WJR/kms

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
James R. Browning U.S. Courthouse
95 Seventh Street
Post Office Box 193939
San Francisco, California 94119-3939

Molly C. Dwyer
Clerk of Court

(415) 355-8295
Fax: (415) 355-8565

September 30, 2010

Honorable Jeffery S. Sutton, Chair
Advisory Committee for the Federal Rule of Appellate Procedure
United States Court of Appeals
Joseph P. Kinneary United States Courthouse
85 Marconi Boulevard, Room 260
Columbus, OH 43215

Dear Judge Sutton:

Your Committee has asked for this court's view on whether Native American Tribes should be permitted to file amicus briefs without consent of the parties or leave of court under Fed. R. App. P. 29 (authorizing "[t]he United States or its officer or agency, or a State, Territory, Commonwealth, or the District of Columbia" to file amicus briefs).

According to the information you provided, this court receives the majority of amicus requests from Native American Tribes and grants nearly all of them. At its recent meeting, this court considered whether to support a rule change and if so, whether at the national or local level. The court supports the change and is inclined to support a national rather than a local rule.

One concern raised was that the revised rule clarify what is meant by Native American Tribes (e.g., Tribes that are recognized by the United States Bureau of Indian Affairs, as listed periodically in the Federal Register Notices). Related to this was some question about the mechanics of such a rule, for example, is it enough to ask the parties to certify that they are members of a registered Tribe or is

something more necessary? On balance, however, the rule change seems worthwhile given that this court regularly allows these briefs.

One final suggestion, if you haven't already done so, is that your Committee solicit the views of the Tribes before proceeding.

If you have any further questions, please don't hesitate to contact me.

Regards,

Molly C. Dwyer

Catherine T Struve

From: Daniel I.S.J. Rey-Bear [DRey-Bear@NordhausLaw.com]
Sent: Monday, April 25, 2011 1:17 PM
To: Catherine T Struve
Subject: FRAP 29 & Indian tribes

Professor Struve,

Any news on the proposal to amend the FRAP to treat tribes like states for purposes of amicus brief filings, from either the April 2011 meeting of the Advisory Committee on Appellate Rules, Judge Sutton's presentation on this to the January 2011 Standing Committee meeting, or otherwise?

For whatever it may be worth, I discussed this matter briefly last week with the Supreme Court Clerk. Specifically, I was at the United States Supreme Court last Wednesday, April 20, for oral argument in *United States v. Jicarilla Apache Nation*, No. 10-382, a case in which my firm filed an amicus brief on behalf of the Navajo Nation and the Pueblo of Laguna, as we had done twice before the Federal Circuit (before the panel and on rehearing). During the pre-argument attorney briefing, Supreme Court Clerk William Suter solicited feedback or other comments for the Clerk's office. I noted the pending proposal to amend the FRAP to treat tribes like states for purposes of amicus briefs and thanked him for his office's comments on Supreme Court perspective on the issue. He said that he thought that the proposal was going to become final this December, and I noted that it is actually still pending and not finalized. He noted that whatever is decided regarding the FRAP on this issue will be followed by the Supreme Court for its rules, since he believes that the FRAP and the Supreme Court Rules should be consistent.

Regarding the December 2010 meeting minutes for the Advisory Committee on Appellate Rules, please note that I do not believe that tribal amicus filings are restricted to a few circuits. Given this, I think that this matter should be addressed in the appellate rules, not ad hoc in local rules. Also, while there have not been prior formal requests to amend Supreme Court Rule 37 to address tribal amici, I do not believe it would be appropriate to defer action on revision of the Appellate Rules pending Supreme Court taking the lead, especially in light of the Supreme Court Clerk's comment last week. Also, as noted in my letters regarding this matter, and as recognized in some of the comments in the December committee meeting minutes, the issue largely concerns according tribes proper dignity in light of their recognized sovereignty, particularly in light of additional amicus disclosure requirements that took effect in December. Given this, tribes' success rate at securing amicus participation is not probative. Finally, while the suggestion for tribal consultation is laudable, that should not be a basis for delaying considering of this matter, even though Indian tribes have objected in other contexts that merely being afforded the opportunity to participate in public comment periods like any other member of the public does not constitute meaningful consultation.

I hope that this is helpful. Please let me know if you have any questions, comments, or updating information. Thank you.

Dan Rey-Bear
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TAB 5-C

MEMORANDUM

DATE: September 21, 2011

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 10-AP-A

At the Committee's spring 2011 meeting, the Committee discussed the possibility of amending Appellate Rule 4(a)(2) to address the relation forward of premature notices of appeal. Members discussed the fact that developments in the caselaw appear to have ameliorated some of the circuit splits concerning the circumstances under which relation forward will occur. However, members also noted that at least one clear circuit split remains: the Eighth Circuit, unlike some nine other circuits that have addressed the question, forbids relation forward when a notice of appeal is filed after entry of judgment as to fewer than all parties.

Members also reviewed four sketches, provided in the spring 2011 agenda materials, that were designed to offer alternatives for possible amendments to Rule 4(a)(2). There appeared to be no support for the second or third of the sketches, which would have addressed fewer than all of the existing circuit splits concerning relation forward. Some interest was voiced in the first and fourth sketches, which would attempt to address all of those splits – in the case of the first sketch, by forbidding relation forward unless the decision or order would have been appealable if entered at the time it was announced, and in the case of the fourth sketch, by permitting relation forward in the contexts where the majority view in the caselaw currently permits it.

In the light of the discussion at the spring 2011 meeting, it seems useful to focus on the two options in which participants indicated an interest. Thus, Part II of this memo discusses those options. To set the stage, Part I briefly reviews the spectrum of contexts in which relation-forward issues arise.

I. Overview of caselaw concerning relation forward

As discussed in my March 2010, September 2010, and March 2011 memos, the Supreme Court's decision in *FirsTier Mortgage Co. v. Investors Mortgage Insurance Co.*, 498 U.S. 269 (1991), marked out a path for the application of Rule 4(a)(2), but the post-*FirsTier* caselaw

displays some inter-circuit variation. The main points of variation[1] concern the application of Rule 4(a)(2) (as interpreted by *FirsTier*) in a range of situations. Those situations fall at different points upon a spectrum: In some instances, many circuits are likely to recognize the premature notice as relating forward, while in other instances, many circuits are likely to recognize the premature notice as ineffective. In each instance, the salient question is whether a premature notice of appeal relates forward to the entry of the document that renders an appeal possible (i.e., either a Civil Rule 54(b) certification or a final judgment disposing of all claims with respect to all parties). Here is a capsule summary of the treatment of prematurity in a range of typical scenarios, roughly ordered from those that seem the easiest cases for recognizing relation forward to those that seem the easiest cases for denying relation forward:

- Decision announced, proposed findings yet to be submitted
    - This was the scenario in *FirsTier*, and the unanimous Court held that the notice of appeal related forward under Rule 4(a)(2). *FirsTier* presented few complications because the case involved a single plaintiff suing a single defendant, and the district court had announced its disposition of all the plaintiff's claims.
- Decision announced, contingent on a future event
    - A number of cases hold that a notice of appeal filed after the announcement of a contingent decision but before the expiration of the contingency period can relate forward to the time when the contingency has occurred. Cases cited in the 1979 Committee Note to Rule 4(a)(2) and cited with approval in *FirsTier* provide support for such a view.
    - In a prior memo, I observed that the Seventh Circuit had expressed a contrary view (as one of two alternative rationales for its ruling) in *Strasburg v. State Bar of Wisconsin*, 1 F.3d 468 (7th Cir. 1993), *overruled on other grounds by Otis v. City of Chicago*, 29 F.3d 1159 (7th Cir. 1994).[2] More recently (and without citing

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[1] Another concerns the"cumulative finality" doctrine, under which some courts have held that a notice of appeal filed after an order disposing of some claims or issues but before another order or orders disposing of the remaining claims or issues relates forward to effect an appeal after the disposition of all remaining claims or issues. This doctrine was first enunciated prior to the 1979 promulgation of Appellate Rule 4(a)(2), and there currently exists a division among the circuits concerning whether the cumulative finality doctrine – as a principle separate from Rule 4(a)(2) – survives the adoption of that Rule and the Supreme Court's decision in *FirsTier*.

[2] In *Strasburg*, the district court in mid-November issued an order dismissing the complaint but granting the plaintiffs a limited time to re-file the complaint and to serve certain defendants. The plaintiffs did not re-file the complaint within the deadline, but instead filed a

Strasburg), the Seventh Circuit applied the majority approach in *Roe v. Elyea*, 631 F.3d 843 (7th Cir. 2011).[3]

- Judgment as to fewer than all claims or parties, with belated certification under Civil Rule 54(b)

    - In this scenario, the notice of appeal is filed after the issuance of an order that would qualify for certification under Civil Rule 54(b), but no certification is provided until after the notice of appeal is filed. My preliminary search disclosed six or seven circuits that allow the notice of appeal to relate forward to the later certification and one circuit (the Eleventh) that has both a precedent that supports and a precedent that weighs against permitting relation forward in this context. Most recently, the Eleventh Circuit noted the conflicting lines of precedent and followed the precedent permitting relation forward.[4]

- Judgment as to fewer than all claims or parties, with later disposition of all remaining claims with respect to all parties

    - In this scenario, the district court enters judgment as to fewer than all claims or parties but does not certify the judgment under Civil Rule 54(b); a notice of

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notice of appeal. The district court then entered final judgment dismissing the complaint with prejudice. The court of appeals relied on two alternative theories to hold that the prior notice of appeal did not relate forward to the entry of final judgment. The first rationale was that "[t]he plaintiffs could not reasonably have thought that the result was settled: the order expressly conditioned the final disposition of the suit," *id.* at 472. The *Strasburg* court's second rationale was that "[e]ven if the plaintiffs' initial belief as to the appealability of the November 15 order was reasonable when they filed their notice of appeal, their refusal to refile became unreasonable when they were expressly informed by the district court on December 27 that the November 15 order was not a final judgment and that their notice of appeal was a 'nullity.'" *Id.*

[3] In *Roe*, the district court granted remittitur as to the punitive damages award to one of the plaintiffs; its February 18 order stated that the plaintiff "shall file a pleading within 14 days of the entry of this order stating whether [it] accepts or rejects the proposed remittitur of the jury's punitive damage award. Failure to file said pleading shall be deemed an acceptance of the remittitur." *Roe*, 631 F.3d at 853-54. The plaintiff did not file such a pleading; instead, on March 18 it filed a notice of appeal. On March 24, the district court "entered a further order confirming that Mr. Roe's Estate had failed to respond and was deemed to have accepted the remittitur." *Id.* at 854. The court of appeals held "that the Estate's mistaken belief about the automatic effectiveness of the conditional order was reasonable and that its error is correctable by this court under Rule 4(a)(2)." *Id.* at 856.

[4] *See National Ass'n of Boards of Pharmacy v. Board of Regents of the University System of Georgia*, 633 F.3d 1297, 1306 & n.19 (11th Cir. 2011).

appeal is filed; and then the district court finally disposes of all remaining claims in the action. As to this scenario, authority from nine circuits supports the view that the premature notice relates forward to the date of entry of the final judgment. One of those circuits – the Seventh – has issued precedential opinions that might be read to take varying views on this issue.[5] But as far as my preliminary searches disclose, only one circuit – the Eighth – has held unequivocally to the contrary in a precedential opinion.[6]

- Amount of damages or interest yet to be determined

  - There is some diversity of views among the circuits concerning situations where damages or interest questions remain to be determined at the time the notice of appeal is filed. Some of the variations are reconcilable on closer examination, while others are not.

  - When the notice of appeal is filed after liability is determined but before the amount of damages has been set, there is division concerning whether the notice

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[5] A recent Seventh Circuit decision, *Arrow Gear Co. v. Downers Grove Sanitary Dist.*, 629 F.3d 633 (7th Cir. 2010), accords with the majority view. The district court dismissed Arrow's claims against some but not all defendants, after which Arrow dismissed its claims against the remaining defendants without prejudice. On Arrow's appeal from the involuntary dismissal of its claims against the first group of defendants, the court of appeals pointed out to Arrow that the voluntary dismissal without prejudice did not produce a final and appealable judgment, but the court offered a solution: "So at argument we gave Arrow's lawyer the following choice: stand your ground and we'll dismiss the appeal, or convert your dismissal of the other two defendants to dismissal with prejudice, which will bar your refiling your claims against them. He quickly chose the second option, committing not to refile the suit against them, and so, because the final judgment in the district court is now definitive, we have jurisdiction of the appeal." *Id.* at 637.

[6] The Eighth Circuit recently adhered to this position in *Kramer v. Cash Link Systems*, 2011 WL 3802779 (8th Cir. Aug. 26, 2011). In *Kramer*, the district court entered judgment in favor of Defendant One but left pending the plaintiff's claims against Defendant Two. Defendant Two then filed for bankruptcy, which automatically stayed plaintiff's claims against Defendant Two. While plaintiff's appeal from the judgment in favor of Defendant One was pending, the bankruptcy court issued its final decree in Defendant Two's bankruptcy. The court of appeals dismissed the appeal from the judgment in favor of Defendant One, holding that there was no final judgment. The court reasoned that the bankruptcy decree had not discharged plaintiff's claims against Defendant Two, and that even if those claims *had* been terminated, neither the cumulative finality doctrine nor Appellate Rule 4(a)(2) would permit the plaintiff's prior notice of appeal to relate forward to the time when the claims against Defendant Two were finally resolved. *See id.* at *2.

of appeal can ripen once the amount of damages has been fixed. The Third and Ninth Circuits have held that it does not. The Eighth Circuit has taken the view that a notice of appeal filed after an award of sanctions but before the reduction of that award to a sum certain ripened once the court determined the amount of the sanctions award. And the Tenth Circuit has held that a notice related forward, in the context of an appeal by a defendant wishing only to challenge the prior liability determination and not the subsequent damages determination.

- The Eighth and Ninth Circuits have held that a notice of appeal filed after a liability determination but before the determination of pre-judgment interest did not relate forward. The Fourth Circuit has held, though, that a notice of appeal filed after the liability determination but before the determination of post-judgment interest did relate forward. Perhaps these contrasting views are reconcilable based on the notion that the calculation of post-judgment interest – though it may sometimes present difficult questions – ordinarily leaves less room for debate than might the calculation of pre-judgment interest.

- Magistrate judge's conclusions not yet reviewed by district court

  - Except when the parties have consented to trial before a magistrate judge, the magistrate judge is authorized only to make a report and recommendation concerning the disposition of a civil case; it is the district judge who renders the final disposition. It is therefore unsurprising that the Fifth and Ninth Circuits have held that a notice of appeal filed after a magistrate judge issues recommendations but before the district court determines whether to adopt those recommendations does not relate forward to the final judgment entered by the district court. The Second Circuit has held to the contrary, but this holding may be explained by the particular facts of the case.

- Various clearly interlocutory orders that would not qualify for certification under Civil Rule 54(b)

  - In this category one may list, for example, discovery orders and Rule 11 sanctions rulings. There should be little confusion in those contexts; Rule 4(a)(2)'s relation forward provision cannot save an appeal when the only notice of appeal is filed after the interlocutory order and prior to the announcement of the final judgment.

  - Admittedly, even in this relatively straightforward corner of the doctrine, there may be outliers.[7]

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[7] For example, as noted in my March 2010 memo, a Tenth Circuit panel held – citing *FirsTier* with little discussion – that a notice of appeal from a Rule 11 sanctions order ripened after entry of the final judgment. *See Dodd Ins. Services, Inc. v. Royal Ins. Co. of America*, 935

II. Possible amendments to Appellate Rule 4(a)(2)

This section discusses two possible approaches to amending Rule 4(a)(2). The first approach would significantly narrow the availability of relation forward (as compared with current law), while the second approach would instead incorporate into the Rule the majority approaches to some common relation-forward scenarios.

A. First approach: narrowing relation forward

Here is the first of the four options that the Committee discussed at the spring 2011 meeting:

Rule 4. Appeal as of Right – When Taken

(a) Appeal in a Civil Case.

* * *

(2) Filing Before Entry of Judgment. 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, if and only if the decision or order, as announced, would otherwise be appealable.

* * *

Such an amendment would leave intact the current majority approach to the following scenarios:

- ○ Decision announced, proposed findings yet to be submitted
  - This was the *FirsTier* fact pattern. The *FirsTier* Court specifically noted that "[h]ad the judge set forth the judgment immediately following the bench ruling, and had the clerk entered the judgment on the docket ..., there is no question that the bench ruling would have been 'final' under § 1291." *FirsTier*, 498 U.S. at 277. Thus, this fact pattern would meet the stringent test for relation forward under the amended Rule.

F.2d 1152, 1154 n.1 (10th Cir. 1991). And as noted in my March 2011 memo, the Tenth Circuit more recently issued another decision, *Hafed v. Federal Bureau of Prisons*, 635 F.3d 1172, 1180 (10th Cir. 2011), that might be read to apply relation forward to a notice of appeal from an interlocutory order.

- Magistrate judge's conclusions not yet reviewed by district court

  - Relation forward would not be available in this scenario.

- Various clearly interlocutory orders that would not qualify for certification under Civil Rule 54(b)

  - Relation forward would not be available in this scenario.

However, this amendment would eliminate relation forward in some scenarios where it is now generally permitted:

- Decision announced, contingent on a future event

  - Relation forward would not occur under the proposed amendment. This result would be contrary to the current majority view. Judging from the cases cited in the 1979 Committee Note to Rule 4(a)(2), this result would also be contrary to the intent of the drafters of original Rule 4(a)(2).

- Judgment as to fewer than all claims or parties, with belated certification under Civil Rule 54(b)

  - As noted in Part I, the majority approach currently permits relation forward in this scenario. As I read the proposed amendment, it would not permit relation forward.

- Judgment as to fewer than all claims or parties, with later disposition of all remaining claims with respect to all parties

  - The proposed amendment would abrogate the current majority approach in favor of the Eighth Circuit's approach.

- Amount of damages or interest yet to be determined

  - To the extent that current law permits relation forward in instances where the remaining damages or interest questions defeat finality, the proposed amendment would abrogate that approach.

As the *FirsTier* Court observed, the cases cited in the 1979 Committee Note to Rule 4(a)(2) "suggest that Rule 4(a)(2) was intended to protect the unskilled litigant who files a notice of appeal from a decision that he reasonably but mistakenly believes to be a final judgment, while failing to file a notice of appeal from the actual final judgment." *FirsTier*, 498 U.S. at 276. There is considerable value in this approach. Determining when a judgment is final for appeal purposes can be difficult. Under the amended approach, a litigant's justifiable confusion could

result in the loss of appeal rights. Moreover, an approach that strictly limits relation forward would most severely affect litigants who are pro se or whose counsel are unfamiliar with appellate practice.

On the other hand, the proposed amendment would provide a relatively clear rule and one that is nationally uniform.

B. Second approach: incorporating the majority view concerning common scenarios

Here is the fourth of the four options that the Committee discussed at the spring 2011 meeting:

Rule 4. Appeal as of Right – When Taken

(a) Appeal in a Civil Case.

* * *

(2) Filing Before Entry of Judgment. A notice of appeal filed after the court announces a decision or order – but before the entry of ~~the~~ an appealable judgment or order – is treated as filed on the date of and after the entry, including when a notice is filed

(A) after the district court announces a decision or order but before the parties submit proposed findings of fact;

(B) after a determination of liability but before a determination of damages, interest, etc.;

(C) after the district court announces a contingent decision or order, provided that the contingent event occurs; or

(D) after the district court announces a decision or order as to one or more, but not all, claims or parties but before the district court enters a final judgment under Federal Rule of Civil Procedure 54(b) or otherwise.

* * *

As one participant in the spring 2011 discussions suggested, if the enumerated list is meant to be non-exhaustive, then it is important to make that fact clear in the rule text. Changing "including" to "including but not limited to" would make this clear, though it seems likely to meet with a style objection. Another question that was not discussed at the spring 2011 meeting is whether the language proposed for this fourth option would broaden relation forward well beyond the scenarios in which the majority of circuits currently permit it. As initially drafted,

the amendment might seem to encompass notices of appeal filed after the announcement of any and all clearly interlocutory orders from which no appeal can be taken (apart from appeals under 28 U.S.C. § 1292(b)).

Here is one way in which the fourth option might be revised to meet those concerns:

Rule 4. Appeal as of Right – When Taken

(a) Appeal in a Civil Case.

* * *

(2) Filing Before Entry of Judgment. 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. Instances in which a notice of appeal relates forward under the first sentence of this provision include, but are not limited to, those in which a notice is filed

(A) after the district court announces a decision or order but before the parties submit proposed findings of fact;

(B) after a determination of liability but before a determination of damages, interest, etc.;

(C) after the district court announces a contingent decision or order but before the contingent event occurs; or

(D) after the district court announces a decision or order as to one or more, but not all, claims or parties but before the district court enters a final judgment under Federal Rule of Civil Procedure 54(b) or otherwise.

* * *

Amending Rule 4(a)(2) in this fashion would replace the lopsided circuit splits noted in Part I with a nationally uniform approach. And the amendment would do so in a way that does not narrow the availability of relation forward compared with current law. By explicitly noting in the Rule the contours of relation-forward doctrine, the amendment could aid practitioners (especially those unfamiliar with appellate practice). Admittedly, the rule would not cover every possible scenario in which relation-forward issues may arise; but it would be impracticable to try to cover every such scenario. One possible downside of this amendment might be that an explicit acknowledgment of the relation-forward doctrine might encourage imprecision in the timing of notices of appeal; but it is difficult to predict the magnitude of this effect.

III. Conclusion

As discussed at the spring 2011 meeting, some of the circuit splits concerning relation forward under Rule 4(a)(2) may be disappearing. But at least one clear split (albeit a lopsided one) remains. It may be worthwhile to consider amending Rule 4(a)(2) to provide uniformity and clarity. But while the former is readily attainable, the latter may be more challenging to achieve. And any changes to Rule 4 must be approached with caution, given the importance of the Rule.

TAB 5-D

MEMORANDUM

DATE: August 9, 2011 (revised August 27, 2011)

TO: Judge Robert Michael Dow, Jr.

FROM: Catherine T. Struve

RE: Item No. 10-AP-I

This memo reviews factors that may be relevant to the Appellate Rules Committee's consideration of options for addressing the question of redaction and sealing of appellate briefs. The question grows out of an inquiry by Paul Alan Levy of Public Citizen Litigation Group, who identifies a practice of unjustified sealing or redaction; Mr. Levy notes that often no one moves to unseal the briefs, and that even if such a motion is made and granted, the unsealing may come too late to inform the drafting efforts of would-be amici.

Part I of this memo briefly summarizes Mr. Levy's suggestion and the discussion at the Appellate Rules Committee's spring 2011 meeting. Part II sketches an overview of the Judicial Conference Committee projects and the existing rule- and statute-based sealing requirements that may bear on the question of sealing appellate briefs. Part III surveys relevant local circuit provisions. Part IV discusses options for drafting an Appellate Rule on the subject.

I. Genesis of this agenda item

The project arises from an inquiry by Paul Alan Levy, an attorney at Public Citizen Litigation Group:

> Has the advisory committee on appellate rules looked at the problem of redactions in appellate briefs (and Joint Appendices) that are based on consensual district court orders that allow either side to stamp discovery materials as confidential? Then the parties get up to the Court of Appeals and file heavily redacted papers without the slightest effort to justify the decision that concealment of particular items meets the high standard for non-disclosure of arguments, and factual materials, filed in support of dispositive proceedings.
>
> Two problems result -- in cases of great public importance, the ability of others to participate amicus curiae is reduced because even if the parties eventually unredact, that likely comes too late for meaningful briefing by amici in light of the actual record. And many cases no doubt slide by because nobody files a motion to unseal. It used to be we could count on the media bar to file these

motions, but the media are so pressed economically they p[ic]k their shots much more carefully. Methinks we need a better system.

The Appellate Rules Committee discussed Mr. Levy's suggestion at its April 2011 meeting.[1] Participants in the discussion noted the connections between this issue and the Civil Rules Committee's longstanding discussion of protective orders under Civil Rule 26(c). It was agreed that any action on Mr. Levy's suggestion would require coordination with both the Civil and Criminal Rules Committees. The approaches taken by the D.C. Circuit and Seventh Circuit were suggested as possible models for an Appellate Rule dealing with sealed or redacted briefs. Another alternative was also mentioned – namely, a requirement that the district court review any sealing orders at the time it closes a case.[2] Later in the meeting, during the joint discussion with the Bankruptcy Rules Committee, it was noted that the proposed draft of Part VIII of the Bankruptcy Rules (dealing largely with appeals from bankruptcy courts to district courts or Bankruptcy Appellate Panels (BAPs)) includes a proposed Rule 8009(f) that addresses sealing on appeal.[3] Participants in the joint discussion noted the importance of drafting any sealing rule so that it can accommodate future changes in the CM/ECF architecture.

II. Connections to other projects involving Judicial Conference committees and to specific statutory or rule-based frameworks for sealing information

As the Appellate Rules Committee has already noted, the question of sealing or redacting briefs on appeal connects to a number of recent or ongoing discussions by Judicial Conference committees. The question also implicates a number of existing rule- or statute-based frameworks for sealing information. This part surveys those inter-connected topics. The overview provided here illustrates the need for coordination of future efforts with other relevant

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[1] I enclose excerpts of the relevant portions of the draft minutes.

[2] Presumably such a requirement, if it were adopted, would be added to the Civil and/or Criminal Rules rather than to the Appellate Rules.

[3] In the March 2011 draft of the proposed Part VIII rules, proposed Rule 8009(f) reads as follows:

> SEALED DOCUMENTS. A document placed under seal by the bankruptcy court may be designated as part of the record on appeal. In designating a sealed document, a party shall identify it without revealing confidential or secret information. The bankruptcy clerk shall not transmit a sealed document to the clerk of the appellate court [*i.e.*, district court or BAP] as part of the transmission of the record. Instead, a party seeking to present a sealed document to the appellate court as part of the record on appeal shall file a motion with the appellate court to accept the document under seal. If the motion is granted, the movant shall notify the bankruptcy court of the ruling, and the bankruptcy clerk shall promptly transmit the sealed document to the clerk of the appellate court.

committees.

Part II.A summarizes the findings and recommendations of the Sealed Cases Subcommittee, which considered issues relating to entirely sealed cases. Part II.B discusses the national privacy rules (which took effect in 2007) and corresponding local circuit provisions. Part II.C discusses the recommendations of the Privacy Subcommittee that was convened to review the functioning of the privacy rules. Part II.D notes that CACM appears to endorse some but not all of the recent recommendations by the Sealed Case and Privacy Subcommittees. Part II.E turns to the Civil Rules Committee's consideration of protective orders under Civil Rule 26(c). Part II.F discusses features of criminal cases that may produce sealing issues, including grand jury proceedings; sealed indictments; plea or cooperation agreements; and cases involving juvenile defendants. Part II.G sketches a list of other areas in which a statutory provision may require sealing on appeal.

A. The Sealed Cases Subcommittee

The Sealed Cases Subcommittee was established to examine and make recommendations concerning the practice of sealing entire cases.[4] The Subcommittee's work was informed by an FJC study of sealed cases;[5] the study, like the Subcommittee's work generally, focused only on entirely sealed cases.[6] The FJC study indicated that sealing an entire case is relatively rare and that "the great majority of those sealed cases are sealed because a statute or rule requires it or for another valid reason."[7] However, the study also revealed "that some sealing orders that were proper when entered remain in place after the reason for sealing has expired, and that a small proportion of sealed cases were sealed on grounds that raised questions."[8]

Although the Subcommittee's focus on completely sealed cases means that its

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[4] The Subcommittee included a judge from each Rules Committee, a judge from the Committee on Court Administration and Case Management (CACM), and a Department of Justice (DOJ) representative.

[5] *See* TIM REAGAN & GEORGE CORT, FEDERAL JUDICIAL CENTER, SEALED CASES IN FEDERAL COURTS (2009). For an excellent general overview of common law and constitutional doctrines concerning the public's right of access to judicial records and proceedings, see ROBERT TIMOTHY REAGAN, SEALING COURT RECORDS AND PROCEEDINGS: A POCKET GUIDE 2-5 (Federal Judicial Center 2010).

[6] *See id*. at 1.

[7] Sealed Cases Subcommittee for the Judicial Conference Committee on Rules of Practice and Procedure, Report on Sealing Cases, Agenda E-19 (Appendix E), Rules 2-3 (2010), http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/jc09-2010/2010-09-Appendix-E.pdf.

[8] *Id*. at 3.

recommendations are not directly relevant to the question of redactions in appellate briefs, the recommendations are worth reproducing here because they provide a useful model for possible approaches to the latter question,[9] and because implementation of some of the recommendations might also provide an opportunity for improving the treatment of sealed or redacted appellate briefs:

> The Subcommittee recommends that CACM consider recommending that the JCUS adopt a policy statement concerning sealing. That policy statement would recognize that an entire case is properly sealed only when consistent with the following criteria:
>
> > 1. Sealing the entire case is required by statute or rule or justified by a showing of extraordinary circumstances and the absence of narrower feasible and effective alternatives, such as sealing discrete documents or redacting information, so that sealing an entire case is a last resort;
> >
> > 2. A judicial officer makes or promptly reviews the decision to seal a case; and
> >
> > 3. The seal is lifted when the reason for sealing has ended.
>
> The recommended steps to promote compliance with these criteria include the following:
>
> > 1. judicial education to ensure that judges are fully aware of the established criteria for proper sealing of entire cases (as opposed to sealing specific documents within a case), including the specific showing required, the need to consider available alternatives, and the need to memorialize the findings justifying sealing in the record;
> >
> > 2. judicial and clerks' office education to ensure that both judges and

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[9] Judge Hartz – the Subcommittee's Chair – provided helpful comments on Mr. Levy's suggestion. He noted that the Subcommittee dealt only with entirely sealed cases, not redaction or sealing of particular documents. But he observed that some of the Subcommittee's proposals – such as requiring judicial review of clerks' sealing decisions and sealing as little as necessary – would be relevant in the context of individual filings as well. He pointed out that in the court of appeals judges are usually not assigned to a case until the filing of the answering brief; and the assigned panel will be best equipped to evaluate redactions and resolve any redaction or sealing questions once it has fully reviewed the merits. As he summed it up, "[t]he trick is to get judges involved without creating too great a burden. Perhaps the standard should be that matters are unredacted or unsealed when submitted to the appellate court unless good cause is shown in a pleading to the court. "

clerks are aware that sealing an entire case must be a judicial decision, and that if a clerk or designee has sealed a case temporarily a judge will promptly review and decide whether the seal should continue;

3. study by CACM and other appropriate committees to identify clearer and more detailed standards for determining when a clerk or a judge's designee may seal a matter temporarily pending approval by a judicial officer and to establish procedures for ensuring prompt review by a judge;

4. judicial education to ensure that judges are aware of the need to limit the duration of sealing orders and the various ways to do so, such as by stating in the order a date when it will expire unless the party seeking the seal moves for its continued application and shows good cause, or stating in the order a date when the court will review the order to decide whether it should remain in place;

5. study by CACM and other appropriate committees into whether and how CM/ECF might be programmed to generate notices to courts or parties that a sealing order must be reviewed after a certain amount of time has passed;

6. study by CACM and other appropriate committees to determine whether and how CM/ECF might be programmed to generate periodic reports of sealed cases to facilitate more effective and efficient review; and

7. consideration by CACM or other appropriate committees of local administrative measures that courts could adopt to improve the handling of requests for sealing.[10]

B. Existing rules concerning privacy

In 2007, the national rules were amended to include privacy provisions in compliance with the E-Government Act of 2002.[11] As a result, the national rules currently provide a framework for redaction and sealing to the extent that filings contain information covered by the

[10] Sealed Cases Subcommittee Report, *supra* note 7, at 3-4.

[11] *See* E-Government Act of 2002, Pub. L. No. 107 347, § 205(c)(3), 116 Stat. 2899 (2002) (requiring the adoption of rules "to protect the privacy and security concerns relating to electronic filing of documents" in federal court).

rules' privacy provisions.[12] Appellate Rule 25(a)(5) serves to incorporate by reference the provisions of the privacy rule that applied in the proceeding below:

> 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.

The rules applicable below, in turn, provide a framework for both redaction and sealing. With specified exceptions,[13] they require parties to redact social security numbers, taxpayer IDs, birth dates, minors' names, financial account numbers, and (in criminal cases) home addresses.[14] As an alternative to redaction, parties can seek a court order permitting a sealed filing (subject to the court's prerogative to later unseal the filing or order a redacted filing).[15]

Ten circuits have adopted local provisions that relate to the privacy requirements now set out in the national rules.[16]

C. Recent report by the Privacy Subcommittee

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[12] There is one respect in which the privacy rules treat matters beyond the listed categories of information: The rules provide that "For good cause, the court may by order in a case: (1) require redaction of additional information; or (2) limit or prohibit a nonparty's remote electronic access to a document filed with the court." Civil Rule 5.2(e). See also Criminal Rule 49.1(e); Bankruptcy Rule 9037(d). But these provisions do not treat the question of the procedure for seeking to make a filing under seal or a redacted filing when the reasons for the redaction are reasons other than the specific privacy issues listed in the privacy rules.

[13] See Bankruptcy Rule 9037(b); Civil Rule 5.2(b); Criminal Rule 49.1(b).

[14] See Bankruptcy Rule 9037(a); Civil Rule 5.2(a); Criminal Rule 49.1(a).

[15] See Bankruptcy Rule 9037(c); Civil Rule 5.2(d); Criminal Rule 49.1(d).

[16] *See* D.C. Cir. App. IV ECF-9; D.C. Cir. Handbook II.C.5; 1st Cir. Notice of Adoption of Amendment to Local R. 30.0 (2009); 1st Cir. CM/ECF R. 12; 3d Cir. R. 113.12; 4th Cir. R. 25(c)(3)(C); 4th Cir. CM/ECF R. 12; 4th Cir. I.O.P. 34.3 (reminding counsel not to discuss private information during oral argument); 4th Cir. App. IV (providing for redaction of transcripts); 5th Cir. R. 25.2.13; 6th Cir. R. 25(g); 6th Cir. Guide to Electronic Filing 12; 8th Cir. R. 25A(h); 9th Cir. Advisory Committee Note to Rule 25-5; 10th Cir. R. 25.5; 10th Cir. General Orders IV & V; 11th Cir. R. 25-5 (defining "minor" and listing additional information – not specified in national privacy rules – that could also be redacted).

Once some time had passed after the adoption of the new privacy rules, the Privacy Subcommittee was reconstituted in order to review and report on the rules' operation. The Subcommittee included a member from each rules Advisory Committee as well as members from CACM.[17] The Subcommittee's work focused on four major topics: the privacy rules' implementation; possible changes to the privacy rules; privacy issues in criminal proceedings; and redactions in court transcripts. Among other efforts to gather relevant information, the Subcommittee held a day-long conference at Fordham Law School in April 2010.[18] The Subcommittee set forth its findings and recommendations in a December 2010 report:

> 1. The Privacy Rules are in place and are generally being implemented effectively by courts and parties.
>
> 2. To ensure continued effective implementation, every other year the FJC should undertake a random review of court filings for unredacted personal identifier information.
>
> 3. Also to ensure continued effective implementation of the Privacy Rules, the courts should continue to educate their own staffs and members of the bar about (a) redaction obligations under the Privacy Rules, (b) steps that can be taken to minimize the appearance of private identifier information in court filings and transcripts, and (c) the need to secure a court order under Fed. R. Civ. P. 5.2(e) or its counterparts before redacting any information beyond that specifically identified in the Privacy Rules.
>
> 4. The AO should monitor technological developments and make courts and litigants aware of software that would make it easier to search documents, transcripts, and court records for unredacted personal identifier information.
>
> 5. At present, no best practice can be identified to support a uniform national rule with respect to making plea and cooperation agreements publicly available. District courts should, however, be encouraged to continue discussing their different approaches, and the Standing Committee might request CACM to monitor these approaches to see if, at some future time, a best practice emerges warranting a uniform rule.

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[17] *See* Operation of the Federal Privacy Rules: A Report to the Judicial Conference Standing Committee on the Rules of Practice and Procedure by the Subcommittee on Privacy, December, 2010 ("Privacy Subcommittee Report"), available at www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST03-2011.pdf, at 2.

[18] The conference transcript was published in the Fordham Law Review. *See* Judicial Conference Privacy Subcommittee, *Conference on Privacy and Internet Access to Court Files*, 79 FORDHAM L. REV. 1 (2010).

6. To the extent district courts seal plea or cooperation agreements, consideration might be given, where appropriate, to a "sunset provision" providing for their expiration unless sealing is extended after further review and order of the court.

7. There is no need to amend the Privacy Rules either to expand or to contract the type of information subject to redaction.

8. The exemption for Social Security cases should be retained in its current form.

9. The exemption for immigration cases should be retained in its current form. Nevertheless, this exemption should be subject to future review in light of possible changes in technology and case volumes that could ease the burden of redaction. Such review should also consider whether the exemption might be narrowed to particular types of immigration cases.

The report discussed each of these areas in detail. Its discussion of the plea and cooperation agreement questions is of particular interest here. The report observed that access to such agreements varies by district, with four approaches identifiable:

- Full electronic access to plea and cooperation agreements, except when sealed on a case-by-case basis.

- No remote electronic access to plea or cooperation agreements, but with such agreements fully available at the courthouse unless sealed in an individual case.

- Full electronic access to plea agreements, but with a separate sealed document filed in every case indicating whether or not the defendant has entered into a cooperation agreement.

- No public access to plea or cooperation agreements either electronically or at the courthouse, because these documents are not made part of the case file.[19]

The report observed that no consensus has emerged concerning a single best practice for handling plea or cooperation agreements. But, as noted above, the report did offer a suggestion that any sealing order have a built-in sunset provision:

> [T]he rationale for limiting public access to such agreements – cooperator safety – does not necessarily support the permanent sealing of most cooperation agreements, much less plea agreements. Courts limiting access to such

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[19] Privacy Subcommittee Report, *supra* note 17, at 13.

agreements might consider whether it is appropriate to include a "sunset" provision that allows sealing orders within a time prescribed either automatically for every case or specifically in individual cases with further sealing dependent on a court determination of a continued need.[20]

D. CACM's recent consideration of privacy and sealing issues

The Judicial Conference Committee on Court Administration and Case Management (CACM) has reviewed the recent reports by the Privacy Subcommittee and the Sealed Cases Subcommittee, and has provided to the Rules Committees a draft of its report to the Judicial Conference concerning those topics. I enclose a copy of the draft report (it may, of course, have changed since the time it was circulated). The draft indicates that CACM endorses the idea of judicial education concerning privacy issues; expresses concern about the Privacy Subcommittee's proposal that courts consider including a sunset provision when ordering sealing of plea and cooperation agreements; endorses the Sealed Cases Subcommittee's proposals concerning the sealing of civil cases; and is referring to its own privacy subcommittee the question of sealing entire criminal cases.

E. The Civil Rules Committee's consideration of protective orders

The Civil Rules Committee has long had on its agenda an item relating to Civil Rule 26(c)'s treatment of protective orders. Periodically, bills are introduced in Congress that would restrict the use of protective orders with respect to discovery material and the enforcement of secrecy provisions in settlement agreements.[21] The Civil Rules Committee's discussions have been informed by a study performed by the Federal Judicial Center in the mid-1990s,[22] and more recently by Andrea Kuperman's comprehensive study of circuit caselaw governing protective

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[20] *Id.* at 15.

[21] *See, e.g.*, Sunshine in Litigation Act, H.R. 592, 112th Cong. (2011) (restricting the use of protective orders and the enforcement of certain secrecy provisions in settlements "[i]n any civil action in which the pleadings state facts that are relevant to the protection of public health or safety"); S. REP. NO. 112-045, at 2 (2011) (stating that S. 623, the "Sunshine in Litigation Act of 2011," would "require[] judges, in cases pleading facts relevant to public health and safety, to consider the public's interest in disclosure of health and safety information before issuing a protective order or an order to seal court records or a settlement agreement"); *id.* at 15 ("The Sunshine in Litigation Act was first introduced by Senator Kohl in the 103rd Congress ....").

[22] *See* ELIZABETH C. WIGGINS ET AL., FEDERAL JUDICIAL CENTER, PROTECTIVE ORDER ACTIVITY IN THREE FEDERAL JUDICIAL DISTRICTS: REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES (1996).

orders and sealing of court filings.[23] As Andrea observes, "[c]ourts differentiate the standard for sealing documents filed with the court, which usually is much more exacting than the showing required for entering a protective order limiting the dissemination of discovery materials. In analyzing requests to seal court documents, courts emphasize the presumption of public access to judicial records and often require compelling reasons in order to seal court documents."[24] The Civil Rules Committee's spring 2010 meeting included a discussion of the possible benefits and costs of considering proposed amendments to Civil Rule 26(c)'s treatment of protective orders. I enclose a copy of the relevant excerpt of the minutes, because it gives a very useful overview of the competing considerations that led the Committee to maintain this item on its agenda without, at the moment, moving forward on it.

F. Sealing on appeal in criminal matters

From the court of appeals decisions, available on Westlaw, that discuss sealing on appeal, it is evident that a large percentage of the appeals that involve sealed or redacted briefs are criminal matters. Several reasons can be inferred.[25] Appeals may require discussion of sealed

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[23] *See* Andrea Kuperman, Case Law on Entering Protective Orders, Entering Sealing Orders, and Modifying Protective Orders (updated July 2010), available at http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/Publications.aspx.

[24] *Id*. at 1.

[25] As revised effective March 2008, the Judicial Conference Policy on Privacy and Public Access to Electronic Case Files, available at www.uscourts.gov/RulesAndPolicies/JudiciaryPrivacyPolicy/March2008RevisedPolicy.aspx, provides:

> The following documents in a criminal case shall not be included in the public case file and should not be made available to the public at the courthouse or via remote electronic access:
>
> - unexecuted summonses or warrants of any kind (e.g., search warrants, arrest warrants);
> - pretrial bail or presentence investigation reports;
> - statements of reasons in the judgment of conviction;
> - juvenile records;
> - documents containing identifying information about jurors or potential jurors;
> - financial affidavits filed in seeking representation pursuant to the Criminal Justice Act;
> - ex parte requests for authorization of investigative, expert or other services pursuant to the Criminal Justice Act; and
> - sealed documents (e.g., motions for downward departure for substantial

plea or cooperation agreements. Sentencing appeals typically involve consideration of presentence reports. Specific sealing requirements may apply in particular types of criminal proceedings: grand jury proceedings; cases where the indictment is sealed; cases where the defendant is a juvenile; cases involving a child victim or witness; and cases involving classified information.

Criminal Rule 6(e)(6) provides that "[r]ecords, orders, and subpoenas relating to grand-jury proceedings must be kept under seal to the extent and as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury." Unsurprisingly, court of appeals decisions (available on Westlaw) that discuss sealing in connection with appeals relating to grand jury proceedings uniformly note that filings have been sealed in order to maintain the required secrecy.[26]

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assistance, plea agreements indicating cooperation or victim statements).

[26] See In Re Grand Jury Investigation, 352 F. App'x 805, 806 n.1 (4th Cir. 2009) ("The documents and briefs in this case have been filed under seal to protect the secrecy of the ongoing grand jury investigation."); In re Grand Jury Subpoena # 06-1, 274 F. App'x 306, 308 n.1 (4th Cir. 2008) ("All documents and briefs in this case have been filed under seal to protect the secrecy of the grand jury proceedings. We therefore refer to the parties by generic names to avoid disclosing their identities."); In re Grand Jury Investigation, 445 F.3d 266, 275 (3d Cir. 2006) ("We are hampered in articulating the basis for our conclusion by the need to keep the evidentiary support confidential because much of the relevant information that was before the District Court is sealed as it pertains to the ongoing investigation of the grand jury. Moreover, the parties' briefs have been sealed. We are therefore comfortable to discuss only such facts as the Assistant U.S. Attorney disclosed in his argument in open court before us."); In re Grand Jury Subpoena No.2002r02810(163), No.2005-01 to John Doe, 176 F. App'x 72, 73 n.1 (11th Cir. 2006) ("Because this appeal involves proceedings before a grand jury, and the briefs and record on appeal are under seal, we use a pseudonym to preserve anonymity."); In re Grand Jury Subpoena, 419 F.3d 329, 332 n.1 (5th Cir. 2005) ("Because this appeal involves stayed proceedings before a grand jury and the briefs and record on appeal are under seal, we employ pseudonyms."); In re Grand Jury Proceedings #5 Empanelled January 28, 2004, 401 F.3d 247, 249 n.1 (4th Cir. 2005) ("All documents and briefs in this case have been filed under seal to protect the secrecy of ongoing grand jury proceedings. Accordingly, we dispense with a recitation of the facts. We include any facts necessary to our analysis as appropriate."); John Doe Co. v. United States, 350 F.3d 299, 300 n.1 (2d Cir. 2003) ("This appeal arises out of an ongoing grand jury investigation. No indictments have been issued. All proceedings have been conducted in closed courtrooms, and the record and briefs are under seal. To preserve the secrecy of the grand jury proceedings, we use pseudonyms and discuss the facts circumspectly."); In re Keeper of Records (Grand Jury Subpoena Addressed to XYZ Corp.), 348 F.3d 16, 19 (1st Cir. 2003) ("Consistent with the secrecy that typically attaches to grand jury matters ... these appeals have gone forward under an order sealing the briefs, the parties' proffers, and other pertinent portions of the record. To preserve that confidentiality, we use fictitious names for all affected parties and

Criminal Rule 6(e)(4) provides that "[t]he magistrate judge to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. The clerk must then seal the indictment, and no person may disclose the indictment's existence except as necessary to issue or execute a warrant or summons." In a single-defendant case, it might be unlikely for an appeal to make its way to the court of appeals before any seal on the indictment has been lifted. But it is possible to imagine a multi-defendant case in which an appeal involving one defendant entails discussion of an indictment that has been sealed as to another defendant.[27]

Statutory confidentiality requirements apply in cases involving juvenile defendants, victims, or witnesses. Court filings "that disclose the name of or any other information concerning" a child under age 18 who is "a victim of a crime of physical abuse, sexual abuse, or exploitation; or ... a witness to a crime" against a third party "shall be filed under seal without necessity of obtaining a court order."[28] Records in juvenile delinquency proceedings are statutorily restricted.[29]

Obviously, classified information is subject to sealing in criminal proceedings as in civil

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furnish only such background facts as are necessary to provide ambiance."); In re Grand Jury Subpoena, 274 F.3d 563, 568 (1st Cir. 2001) (noting order sealing proceeding, briefs, and parties' proffers, and use of pseudonyms); In re Grand Jury Subpoena, 97 F.3d 1090, 1095 (8th Cir. 1996) ("We direct [the Office of Independent Counsel], working with our Clerk of Court, to substitute for our current sealed file a public file, redacted to exclude portions of the record that disclose substantive grand jury proceedings, supplemented by a filing under seal that contains all redacted portions of the briefs and record on appeal. After an unsealed public file has been created in this fashion, counsel for McDougal may challenge by motion OIC's decision as to the portions of our file which should remain under seal.").

[27] *See* REAGAN & CORT, *supra* note 5, at 18 ("In a multi-defendant case, it is possible to seal the prosecution against one defendant while the prosecution against another defendant is not sealed.").

[28] 18 U.S.C. §§ 3509(a)(2) & (d)(2). The statute requires the filer to provide the court with both a redacted and an unredacted copy. *See id*. § 3509(d)(2).

[29] *See* 18 U.S.C. § 5038(c) ("During the course of any juvenile delinquency proceeding, all information and records relating to the proceeding, which are obtained or prepared in the discharge of an official duty by an employee of the court or an employee of any other governmental agency, shall not be disclosed directly or indirectly to anyone other than the judge, counsel for the juvenile and the Government, or others entitled under this section to receive juvenile records.").

proceedings.[30] The FJC's study of completely sealed cases indicates that warrant, wiretap, and pen register applications are frequently sealed at the trial court level;[31] it is unclear how often those applications would produce appeals at a time when the record was still under seal.[32]

G. Other statutory sources of sealing requirements[33]

Some statutory sealing requirements plainly will apply to proceedings in the courts of appeals. Special statutory sealing requirements govern appeals to the D.C. Circuit from the

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[30] *See* Classified Information Procedures Act § 9(a), 18 U.S.C. App. 3 (2006) (providing that the Chief Justice "shall prescribe rules establishing procedures for the protection against unauthorized disclosure of any classified information in the custody of the United States district courts, courts of appeal, or Supreme Court"); Security Procedures Established Pursuant to Public Law 96-456, 94 Stat. 2025, By the Chief Justice of the United States for the Protection of Classified Information (Feb. 12, 1981), set forth as a note following 18 U.S.C. App. 3 § 9.

[31] *See* REAGAN & CORT, *supra* note 5, at 31.

[32] 18 U.S.C. § 3123(d)(1) provides that "[a]n order authorizing or approving the installation and use of a pen register or a trap and trace device shall direct that ... the order be sealed until otherwise ordered by the court." *See also* In re Sealing and Non-Disclosure of Pen/Trap/2703(d) Orders, 562 F. Supp.2d 876, 895 (S.D.Tex. 2008) ("As a rule, sealing and non-disclosure of electronic surveillance orders must be neither permanent nor, what amounts to the same thing, indefinite. Such restrictions on speech and public access are presumptively justified while the investigation is ongoing, but that justification has an expiration date.").

[33] The discussion in this section is greatly indebted to Andrea Kuperman (then Andrea Thomson)'s excellent December 10, 2007, memo on "Statutes Requiring or Permitting Sealing," available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Memorandum_on_Statutes_Requiring_or_Permitting_Sealing.pdf. Some statutes listed in the Thomson memo are omitted here because it seems clear that their sealing provisions would have no application on appeal (see for example 28 U.S.C. § 657(b), requiring rules to ensure that certain arbitration awards "shall not be made known to any judge who might be assigned to the case until the district court has entered final judgment in the action or the action has otherwise terminated"). Others are omitted because it seems clear that appeals involving their sealing provisions would not go to a federal circuit court of appeals (for example, provisions concerning the Foreign Intelligence Surveillance Court fall within this category).

The Thomson memo also lists statutes that authorize, rather than require, sealing orders. The relevance of such statutes may be worth considering as the project concerning sealed appellate briefs moves forward. For the moment, I omit discussion of these statutes because it seems most urgent to consider the implications of statutes that *require* sealing.

Alien Terrorist Removal Court.[34] Other such requirements govern appeals regarding discovery of classified information in civil actions involving claims of material support to terrorist organizations.[35] Disputes over national security letters may well make their way from the district court to the court of appeals, and the statutory sealing requirements seem equally applicable on appeal.[36] In appeals from the Court of International Trade to the Federal Circuit concerning antidumping duty disputes, statutory sealing applies to certain confidential foreign government records.[37] Where a court permits access to confidential cockpit and surface vehicle recordings

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[34] *See* 8 U.S.C. §§ 1533, 1535. *See also* D.C. Cir. R. 47.6 (addressing treatment of classified information in appeals from Alien Terrorist Removal Court).

[35] *See* 18 U.S.C.A. § 2339B(f)(1)(C).

[36] The recipient of a national security letter may petition in federal district court "for an order modifying or setting aside the request." 18 U.S.C. § 3511(a). 18 U.S.C. § 3511(d) provides:

> In all proceedings under this section, subject to any right to an open hearing in a contempt proceeding, the court must close any hearing to the extent necessary to prevent an unauthorized disclosure of a request for records, a report, or other information made to any person or entity under section 2709(b) of this title, section 626(a) or (b) or 627(a) of the Fair Credit Reporting Act, section 1114(a)(5)(A) of the Right to Financial Privacy Act, or section 802(a) of the National Security Act of 1947. Petitions, filings, records, orders, and subpoenas must also be kept under seal to the extent and as long as necessary to prevent the unauthorized disclosure of a request for records, a report, or other information made to any person or entity under section 2709(b) of this title, section 626(a) or (b) or 627(a) of the Fair Credit Reporting Act, section 1114(a)(5)(A) of the Right to Financial Privacy Act, or section 802(a) of the National Security Act of 1947.

The Second Circuit has narrowly construed and partially invalidated certain parts of Section 3511(b). *See* John Doe, Inc. v. Mukasey, 549 F.3d 861, 883 (2d Cir. 2008). However, questions of statutorily-required sealing survive *Doe*. *See, e.g.*, Doe v. Holder, 703 F. Supp.2d 313, 318 (S.D.N.Y. 2010) (ordering that the federal government defendants "are hereby permitted to enforce the nondisclosure provisions of 18 U.S.C. § 2709(c) and 18 U.S.C. § 3511(b) as applied to parties of the NSL Attachment with the exception of the disclosures authorized herein").

[37] *See* 19 U.S.C. § 1516a(a) (authorizing actions in Court of International Trade for review of certain countervailing duty and antidumping duty determinations); *id.* § 1516a(b)(2)(B) ("The confidential or privileged status accorded to any documents, comments, or information shall be preserved in any action under this section. Notwithstanding the preceding sentence, the court may examine, in camera, the confidential or privileged material, and may disclose such material under such terms and conditions as it may order."); 28 U.S.C. § 2635(b)(2) (providing that "any document, comment, or information that is accorded confidential

and transcripts in the possession of the National Transportation Safety Board, the applicable statute mandates the imposition of a protective order[38] and permits the recording's or transcript's use in a judicial proceeding only if the relevant matters are placed under seal.[39]

As to other statutory sealing requirements, it would be necessary to learn more about practice under the relevant statutory scheme in order to discern whether their sealing provisions would be relevant on appeal. Would an occasion for appeal in a qui tam case be likely to arise while the matter was still under statutorily-required seal?[40] When a statutory provision requires sealing of a district court order "until the person against whom the order is directed has an opportunity to contest such order,"[41] would that sealing ever persist long enough to be relevant

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or privileged status by the Government agency whose action is being contested" shall be transmitted under seal and that "[t]he confidential or privileged status of such material shall be preserved in the civil action, but the court may examine the confidential or privileged material in camera and may make such material available under such terms and conditions as the court may order"); Fed. Cir. R. 11(d) (exempting cases "arising under 19 U.S.C. § 1516a" from Rule 11(d)'s requirement that parties to an appeal "promptly review the record to determine whether protected portions need to remain protected on appeal"). *See also* 19 U.S.C. § 1677f(c)(2) (authorizing applications "to the United States Customs Court for an order directing the administering authority or the Commission to make ... available" certain business or proprietary information presented to it during a proceeding); 28 U.S.C. § 2635(c) (providing that in such actions "the administering authority or the Commission shall transmit under seal to the clerk of the Court of International Trade ... the confidential information involved" and that "[t]he confidential status of such information shall be preserved in the civil action, but the court may examine the confidential information in camera and may make such information available under a protective order consistent with [Section 1677f(c)(2)]"); *id*. § 2635(d) (setting similar confidentiality requirement "[i]n any other civil action in the Court of International Trade in which judicial review is to proceed upon the basis of the record made before an agency").

[38] *See* 49 U.S.C. § 1154(a)(4)(A).

[39] *See id*. § 1154(a)(4)(B).

[40] *See* 31 U.S.C. § 3730(b)(2) (providing that False Claims Act qui tam complaints "shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders"); *id*. § 3730(b)(3) ("The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2)."). *See also* REAGAN & CORT, *supra* note 5, at 30 (stating that due to the extension provision, "many False Claims Act cases remain sealed several years after filing while the government continues to investigate").

[41] *See* 15 U.S.C. § 1116(d)(1)(A) (providing that in certain cases concerning counterfeit marks "the court may, upon ex parte application, grant an order ... providing for the seizure of" certain goods, marks and records); *id*. § 1116(d)(8) ("An order under this subsection, together

on appeal?

III. Existing local circuit rules and practices

The enclosed spreadsheet sets out the text of local circuit provisions that relate to sealed filings in the courts of appeals.[42] Such provisions may address when a motion is required in order to justify sealing of appellate filings; may set various requirements designed to limit the extent of sealing; may address serving and filing or other logistical matters concerning sealed materials; may cover certain issues specific to criminal cases; and may address specialized matters that are likely to arise only rarely.

More than half the circuits have local provisions that either state or imply that materials sealed in the court below presumptively remain sealed on appeal.[43] But the Seventh Circuit

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with the supporting documents, shall be sealed until the person against whom the order is directed has an opportunity to contest such order, except that any person against whom such order is issued shall have access to such order and supporting documents after the seizure has been carried out.").

[42] The spreadsheet omits provisions that relate solely to attorney disciplinary or grievance proceedings or judicial conduct or disability proceedings.

[43] Circuits whose local provisions make this explicit are the D.C., First, Second, Fourth, Sixth, Ninth, and Federal Circuits. *See* D.C. Cir. R. 47.1(a); D.C. Cir. Handbook III.K; How to Appeal a Civil Case to the United States Court of Appeals for the Second Circuit: Documents under Seal, available at http://www.ca2.uscourts.gov/clerk/Forms_and_instructions/How_to_appeal/Civil_case/Documents_under_seal.htm (last visited Aug. 26, 2011); 4th Cir. R. 25(c)(1)(A); 6th Cir. R. 25(j); 6th Cir. I.O.P. 11(d); Committee Note to 9th Cir. R. 27-13; Fed. Cir. R. 11(c); and Fed. Cir. R. 17(e). *See also* 2d Cir. R. 25.1(a)(1)(E). Also, the Third Circuit's rules provide that certain materials in criminal cases presumptively remain sealed on appeal. *See* 3d Cir. Local App. R. 106.1(c)(1).

Circuits whose rules imply that matters sealed below are presumptively sealed on appeal are the First and Tenth Circuits. *See* 1st Cir. R. 11.0(c)(2) ("In order to seal in the court of appeals materials not already sealed in the district court or agency (e.g., a brief or unsealed portion of the record), a motion to seal must be filed in paper form in the court of appeals; parties cannot seal otherwise public documents merely by agreement or by labeling them 'sealed.'"); 10th Cir. R. 11.3(D); 10th Cir. R. 11.4. The First Circuit's rules are not entirely straightforward on this matter, because they require a motion if a party wishes to file a supplemental, sealed appendix. *See* 1st Cir. R. 30.0(g).

Third Local Appellate Rule 30.3(b) provides in part that "[r]ecords sealed in the district court and not unsealed by order of the court must be not be included in the paper appendix" – which might be taken to suggest a presumption of maintaining the lower court's seal on appeal.

takes a different approach – it provides a grace period during which matters sealed below remain sealed on appeal, but only to provide an opportunity for a motion to be made in the court of appeals to maintain the sealing on appeal.[44] The Third Circuit follows a similar delay-and-motion framework in civil appeals[45] and also – with respect to certain types of documents – in criminal appeals.[46] Even if the record below presumptively remains sealed on appeal, the filing of a sealed or redacted brief can pose distinct questions. Several circuits have provisions that state or imply that a motion is required in order to file a sealed or redacted brief,[47] and caselaw in

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However, as noted in footnotes 45 and 46 and the accompanying text, that suggestion would be misleading in the context of civil appeals and is only partially accurate in the context of criminal appeals.

[44] *See* 7th Cir. IOP 10. This provision makes an exception where sealing is required by statute or rule. *See id.* 10(a).

[45] *See* 3d Cir. L. App. R. 106.1(c)(2) & accompanying Committee Comment.

[46] *See* 3d Cir. Local Appellate R. 106.1(c)(1) (setting grace period and requiring motion for continued sealing in criminal appeals of "documents other than grand jury materials, presentence reports, statements of reasons for the sentence, or other documents required to be sealed by statute or rule").

[47] Circuits with provisions that clearly indicate a motion is required are the First, Second, Third, Sixth, and Seventh. *See* 1st Cir. R. 11.0(c)(2); *id.* R. 28.1; How to Appeal a Civil Case to the United States Court of Appeals for the Second Circuit: Documents under Seal, available at http://www.ca2.uscourts.gov/clerk/Forms_and_instructions/How_to_appeal/Civil_case/Documents_under_seal.htm (last visited Aug. 26, 2011) ("A party wishing to file a paper under seal with the Court of Appeals must make a written motion."); 3d Cir. Local App. R. 106.1(a) ("With the exception of matters relating to grand jury investigations, filing of documents under seal without prior court approval is discouraged. If a party believes a portion of a brief or other document merits treatment under seal, the party must file a motion setting forth with particularity the reasons why sealing is deemed necessary."); 6th Cir. R. 28(g); 7th Cir. IOP 10(a).

Circuits with provisions that suggest as much are the Fourth, Ninth, and Tenth. *See* 4th Cir. R. 25(c)(2) (observing that requests to seal record are ordinarily presented to lower court, but stating that "[a] motion to seal may be filed with the Court of Appeals when: ... (iii) additional material filed for the first time on appeal warrants sealing"); 9th Cir. R. 27-13(c) ("A motion to seal may be made on any grounds permitted by law. Any motion to file a brief, excerpts of record, or other material under seal shall be filed simultaneously with the relevant document, which may be filed provisionally under seal."); 10th Cir. General Order II.D (discussing mechanics for filing sealed motions, responses, or briefs and stating that "Parties seeking to submit a motion to seal materials simultaneously with the materials should use these events even if the motion is not submitted as sealed.").

other circuits evidences the fact that litigants have filed such motions.[48] A couple of circuits have provisions stating the principle – likely also a matter of practice in other circuits – that a motion is required to file under seal record materials that were not sealed below.[49]

Even where the presumption of continued sealing on appeal is express or implicit in the local provisions, the circuits also have adopted provisions that appear designed to control the extent of sealing in appellate filings. The D.C. and Federal Circuits direct the parties to review the record for parts that need not be sealed on appeal, to seek other litigants' agreement on that conclusion, and to present that agreement to the court below.[50] The D.C., Ninth, and Federal

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[48] *See*, *e.g.*, United States v. Bolden, No. 10–60587, 2011 WL 1758728, at *1 (5th Cir. May 6, 2011) (unpublished per curiam opinion) ("Bolden's motion to file his reply brief and record excerpts under seal is GRANTED."); United States v. Carlson, 613 F.3d 813, 821 (8th Cir. 2010) ("[W]e grant the pending motion to seal Appellee's brief."); United States v. Thomas, 332 F. App'x 216, 217 (5th Cir. Sept. 10, 2009) (unpublished opinion) ("The motion for leave to file the Anders brief under seal is GRANTED."); United States v. Vargas, 243 F. App'x 456, 458 (11th Cir. June 15, 2007) (unpublished opinion) ("we DENY Vargas's motion to seal his reply brief."); United States v. Mongelli, 2 F.3d 29, 30 n.1 (2d Cir. 1993) ("Appellants have requested that all papers in this appeal be sealed. The government asks for unsealing of its brief and the continued sealing of the appendices.... We unseal the government's brief but allow all other papers to be sealed....").

In discussing a litigant's failure to file such a motion, the Second Circuit in one recent case implied an understanding that a motion was called for:

> Peabody sought to file his brief and the parties' joint appendix under seal. However, Peabody has not submitted a motion seeking leave to file documents under seal in this Court, and we have not issued any order to that effect. Peabody may believe that he has authority to file documents under seal based upon the stipulated protective order entered by the District Court. To the extent that such an order has any bearing on proceedings in this Court, we will deem those documents unsealed to the extent we discuss their contents in this order."

Peabody v. Weider Publications, Inc., 260 F. App'x 380, 381 n.1 (2d Cir. Jan. 16, 2008) (unpublished opinion).

[49] *See* 4th Cir. R. 25(c)(2); 6th Cir. R. 30(f)(5).

[50] *See* D.C. Cir. R. 47.1(b); D.C. Cir. Handbook III.K; Fed. Cir. R. 11(d); Fed. Cir. R. 17(d). The Federal Circuit rules seek to give this directive teeth by requiring each party to file a certificate of compliance.

Circuit local rules include provisions addressing motions to unseal filings on appeal.[51] Provisions in three circuits set time periods after which continued sealing is subject to review;[52] apart from local rules provisions, cases can be found in which the court's merits opinion directs the parties to demonstrate a continued need for sealing.[53] The First and Third Circuits specify that sealing an entire brief is disfavored.[54] The Federal Circuit warns litigants to be prepared to justify any redactions at oral argument,[55] and recently sanctioned counsel for improper redactions.[56]

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[51] *See* D.C. Cir. R. 47.1(c); D.C. Cir. Handbook VIII.H; 9th Cir. R. 27-13(d); Fed. Cir. R. 11(e); Fed. Cir. R. 17(e).

[52] *See* D.C. Cir. R. 47.1(f)(1) (unless nature of materials obviously requires continued sealing, at the time of disposition of the appeal the parties will be ordered to show cause why sealed matter should not be unsealed); *id*. R. 47(f)(2) (propriety of sealing will be re-reviewed after 20 years); *id*. R. 47.1(f)(3) (court can reconsider sealing sua sponte at any time); D.C. Cir. Handbook XIII.A.5; 3d Cir. Local App. R. 106.1(c)(2) (default period of five years when materials are sealed in civil cases); *id*. Committee Comment ("The archiving center will not accept sealed documents, which presents storage problems for the court."); Fed. Cir. R. 27(m)(3) ("After 5 years following the end of all proceedings in the court, the parties may be directed to show cause why confidential motion papers (except those protected by statute) should not be made available to the public."); *id*. R. 28(d)(3) (same with respect to briefs); *id*. R. 30(h)(3) (same with respect to appendices). *See also* 4th Cir. R. 25(c)(2) (requiring a motion to seal to "state the period of time the party seeks to have the material maintained under seal").

[53] *See, e.g.*, United States v. Burns, No. 10–6083, 2011 WL 1366891, at *3 (10th Cir. Apr. 12, 2011) (unpublished opinion) ("The appellate briefs in this case will be unsealed 20 days from the date that this Order and Judgment is filed unless one of the parties moves to seal or redact one or more briefs, stating specific reasons necessitating sealing or redaction. Such a motion may be provisionally sealed."); Kontonotas v. Hygrosol Pharm. Corp., Nos. 10–1869, 10–2085, 2011 WL 1505264, at *4 n.5 (3d Cir. April 21, 2011) (unpublished opinion) ("The parties should specifically identify which parts of the record need to remain under seal, and why. If they fail to do so or absent a showing of good cause ... the Court will direct that the record be unsealed.").

[54] *See* 1st Cir. R. 11.0(c)(3) (suggesting that litigant ask to file supplemental sealed brief); 3d Cir. Local App. R. 106.1(a) (same).

[55] *See* Practice Note to Fed. Cir. R. 28; Practice Note to Fed. Cir. R. 34.

[56] *See* In re Violation of Rule 28(D), 635 F.3d 1352, 1354 (Fed. Cir. 2011) (sanctioning counsel "for the extensive use of improper confidentiality markings in the briefs ... contrary to Rule 28(d) of the Federal Circuit Rules"). The court noted "a strong presumption in favor of a common law right of public access to court proceedings," *id.* at 1356, and observed that under Civil Rule 26(c), the party seeking a protective order has the burden to show good cause, *see id.*

A number of local provisions deal with the mechanics of filing and service when materials are sealed on appeal. Such provisions may exempt sealed filings from electronic filing requirements[57] and/or they may provide that electronic filings of sealed documents are to be made separately using special procedures.[58] They may contemplate the filing of two sets of

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at 1357. The court found "[i]mplicit in [Federal Circuit Rule 28(d)] a requirement that the district court protective order comply with Rule 26 of the Federal Rules of Civil Procedure." *Id.* at 1358. The designations in the case at hand, the court held, were improper because they inappropriately included much of the legal argument:

> The marking as confidential of legal argument concerning the propriety of a decision by the court is generally inappropriate given the strong presumption of public access to court proceedings and records. Rule 26(c)(1)(G) is limited to commercial information that has competitive significance. The marking of legal argument as confidential under Rule 26(c)(1)(G) cannot be justified unless the argument discloses facts or figures of genuine competitive or commercial significance.

Id. at 1360. Finding the violation "severe," the court imposed a $ 1,000 sanction on counsel under Appellate Rule 46(c). *Id.* at 1361.

[57] See D.C. Cir. App. IV, ECF-8; D.C. Cir. Handbook III.K; 1st Cir. R. 11.0(c); 1st Cir. CM/ECF R. 1; *id.* R. 7; 2d Cir. R. 25.1(j); 3d Cir. Local App. R. 113.7 (motion to file under seal may be e-filed, but the sealed documents themselves may be filed in paper form); 4th Cir. R. 25(c)(3)(E) (appendix containing sealed material to be filed in paper form); *id.* R. 25(c)(3)(F) (service of sealed materials is non-electronic because only the court has electronic access to sealed materials); 4th Cir. CM/ECF R. 4 (service); 6th Cir. R. 25(b)(8); *id*. R. 25(j)(1) (motion and order regarding sealing may be e-filed); 6th Cir. Guide to Electronic Filing 3.2 & 7; 8th Cir. R. 25A(g) (paper filings for both sealed documents and motions to file under seal); 9th Cir. R. 25-5(b) (same); 9th Cir. R. 27-13(a) (same).

Fifth Circuit Rule 25.2.8 notes the question: "A Filing User may move to file documents under seal in electronic form if permitted by law, and as authorized in the court's electronic filing standards.... Documents ordered placed under seal may be filed traditionally in paper or electronically, as authorized by the court." *See also* 5th Cir. ECF Filing Standards, Part C(1).

[58] *See* 3d Cir. Local App. R. 30.3(b) & (c) (providing for separate electronic filing of sealed documents); 3d Cir. Local App. R. 113.7 Comment ("The court's electronic filing system is capable of accepting sealed documents electronically from filing users, either directly into a sealed case in which the attorney is a participant or as a sealed filing in an otherwise unsealed case."); 4th Cir. R. 25(c)(3)(E) (use of special entry when e-filing sealed briefs and other documents); 4th Cir. CM/ECF R. 7; Electronic Case Filing Procedures, Part (g), available at http://www.ca7.uscourts.gov/ecf/ECFprocedures.htm (last visited Aug. 26, 2011) (requiring motions to seal and proposed sealed documents to be filed electronically using special

briefs, redacted and unredacted.[59] They may also provide for the filing of a supplemental appendix containing sealed material.[60] The D.C. Circuit specifies that its drop box may not be used for sealed filings.[61]

Local provisions may also address other logistical questions that relate to sealing. Courts may require special markings to denote sealed documents;[62] may require an accompanying certificate;[63] and/or may require the litigant to highlight in a brief's statement of facts that portions of the record are sealed. Three circuits warn counsel not to disclose sealed material during oral argument.[64] Three circuits discuss public access to court filings.[65] Two circuits

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procedures); 10th Cir. General Order II.D.

[59] *See* D.C. Cir. R. 47.1(d) (addressing number of copies and noting that both sets must comply with length limits); D.C. Cir. Handbook IX.A.10; 4th Cir. R. 25(c)(3) (addressing number of copies); Fed. Cir. R. 27(m)(1) (motions); *id*. R. 28(d)(1) (briefs; addressing number of copies); *id*. R. 28 Practice Note (warning against improper redactions); *id*. R. 35(c) (petitions for rehearing; addressing number of copies).

[60] *See* D.C. Cir. R. 47.1(e); D.C. Cir. Handbook IX.B.7; 1st Cir. R. 11.0(d)(1); 1st Cir. R. 30.0(g) (requiring a motion when such an appendix is to be filed); 3d Cir. Local App. R. 30.3(b); *id*. R. 106.1(a); 4th Cir. R. 25(c)(3); 6th Cir. R. 30(f)(5); 10th Cir. R. 30.1(C)(4); Fed. Cir. R. 30(h)(1).

[61] *See* D.C. Cir. Handbook II.C.2.

[62] *See, e.g.*, 4th Cir. R. 25(c)(3)(D); 6th Cir. R. 25(j)(1); 6th Cir. Guide to Electronic Filing 7; 9th Cir. R. 27-13(b); Fed. Cir. R. 27(m)(1) (motions); *id.* Rule 28(d)(1) (briefs).

[63] *See* 4th Cir. R. 25(c)(1) (requiring certificate that, inter alia, identifies any relevant protective orders); 9th Cir. R. 27-13(b) (requiring separate "notification setting forth the reasons the sealing is required").

[64] *See* 1st Cir. R. 11.0(d)(2); Third Circuit Local Appellate Rule 106.1(a); Fourth Circuit IOP 34.3.

[65] *See* 3d Cir. Local App. R. 113.1 ("Public documents, except those filed under seal, may be viewed at the clerk's office."); 6th Cir. Guide to Electronic Filing 11.1 ("Access to all documents maintained electronically, except those filed under seal, is available to any person through the PACER system."); Fed. Cir. R. 27(m)(3) (confidential motion papers not available to public); *id.* Rule 28(d)(3) (same with respect to briefs); *id*. Rule 30(h)(3) (same with respect to appendices).

prohibit the use of hyperlinks to sealed documents.[66] Two circuits have provisions that address the effect on appellate costs of filing sealed materials.[67] Courts appear to vary with respect to the identity of the decisionmaker – clerk, single judge, or panel – who provisionally or finally determines questions of sealing.[68] The Federal Circuit has a provision addressing requests that it sit in camera and/or seal its record.[69]

The circuits' local provisions reflect the likelihood that a large proportion of sealing issues arises in criminal matters. Twelve circuits have provisions that address the sealing of the presentence report or other matters that relate to sentencing.[70] Three circuits have provisions that address sealing of grand jury materials.[71] The D.C. Circuit Handbook directs that *Anders* briefs be filed under seal.[72]

The Eleventh Circuit specifies a variety of possible remedies (including sealing or redaction) for filings that contain ad hominem invective or intrude on privacy interests or legally

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[66] *See* 1st Cir. CM/ECF Rule 13; 3d Cir. Local App. R. 28.3(c); *id*. R. 30.1(c); *id*. R. 113.13.

[67] *See* D.C. Cir. R. 39(d); Practice Note to Fed. Cir. R. 39; Fed. Cir. Form 23.

[68] *See* 3d Cir. IOP 10.5.2 (sealing and unsealing usually referred to single judge); 9th Cir. General Orders Appendix A: Disposition of Motions by the Clerk ("deputized court staff" are authorized "to grant an unopposed motion to file a document under seal when the document was maintained under seal below, the seal is required by law or filing under seal is necessary to preserve the provisions of a protective order entered below"; such orders "are subject to reconsideration pursuant to Circuit Rule 27-10").

[69] *See* Fed. Cir. R. 47.8.

[70] *See* D.C. Cir. R. 47.2(b)(5); 1st Cir. R. 28.0(c); Notice of Adoption of Amendment to [First Circuit] Local Rule 30.0 (2009); 1st Cir. CM/ECF R. 1; How to Appeal a Criminal Case to the United States Court of Appeals for the Second Circuit: Pre-sentence Investigation Report (PSR), available at http://www.ca2.uscourts.gov/clerk/Forms_and_instructions/How_to_appeal/Criminal_case/Presentence_investigation_report.htm (last visited Aug. 26, 2011); 3d Cir. Local App. R. 30.3(c); *id*. R. 106.1(a); *id*. R. 106.1(c)(1); 4th Cir. R. 30(b); 4th Cir. IOP 34.3; 5th Cir. R. 47.10.3; 6th Cir. IOP 11(b); 7th Cir. R. 10(f); 8th Cir. R. 25A(h); 9th Cir. R. 30-1.10; 10th Cir. R. 11.3(E); *id.* Rule 30.1(C)(4); 11th Cir. Electronic Records on Appeal Program Components (A)(3).

[71] *See* D.C. Cir. R. 47.1; D.C. Cir. Handbook IX.A.10, IX.B.7 & XIII.A.5; 3d Cir. Local App. R. 30.3(c); id. Rule 106.1; 9th Cir. Advisory Committee Note to Rule 3-5.

[72] D.C. Cir. Handbook VI.D.2.

protected interests.[73] The Seventh Circuit has a provision requiring pseudonymous litigants to disclose their true identity in a sealed filing.[74] Despite the rarity of appeals involving entirely sealed cases,[75] two circuits have provisions that refer to the practice.[76]

IV. Possibilities for addressing redaction and sealing on appeal

There are a number of factors that complicate the choices for drafting a rule concerning sealing or redaction of appellate briefs. In drafting such a rule, it seems advisable to take account of related projects involving other Judicial Conference committees. The rule should be drafted so as not to interfere with the operation of existing statute- or rule-based sealing requirements. In addition, the rule presumably should not seek to alter the substantive standards governing when sealing is appropriate, but instead should address procedures for the application of such standards. The rule might be drafted trans-substantively, but it might instead target only certain types of cases (e.g., only civil cases). The rule might track an existing model; the Seventh and D.C. Circuit models, for example, offer possible approaches. Presumably, the rule would cover only certain basic questions about sealing on appeal, leaving to local provisions the treatment of subsidiary logistical questions.

Part IV.A notes that it will be advisable to assess the need for a national rule on sealed appellate filings (and to consider the extent to which a rule change might be more appropriate in the appellate context than in the district court). Part IV.B observes that it is necessary to consider the scope of a proposed national rule and to assure that the rule fits with existing statute- and rule-based sealing requirements. Part IV.C sketches some of the principal approaches that a rule change might adopt. Part IV.D notes examples of additional matters that a national rule might address. Part IV.E closes by briefly considering possible alternatives to adoption of a national rule.

A. Assessing the need for a national rule

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[73] *See* 11th Cir. R. 25-6.

[74] *See* 7th Cir. R. 26.1(b).

[75] *See* REAGAN & CORT, *supra* note 5, at 28 ("Approximately 0.13% of the appeals filed in 2006 were sealed when we looked at them in 2008. When a district court case is sealed, the clerk's office for a court of appeals usually will automatically seal an appeal. Approximately two-thirds of the sealed appeals in our study involved grand jury matters, juvenile defendants, or cooperating defendants.").

[76] *See* 1st Cir. CM/ECF Rule 7 ("If an entire case is sealed, all documents in the case are considered sealed unless the court orders otherwise or, in the case of a court order, opinion, or judgment, the court releases the order, opinion or judgment for public dissemination."); Fed. Cir. Form 7 (Appeal Information Sheet that asks "Is this matter under seal?").

In considering Mr. Levy's suggestion, the Committee will presumably wish to examine the scope of the problem that he identifies. Though a thorough study would be labor-intensive, the caselaw supplies anecdotal support for the proposition that parties at least sometimes over-reach in seeking to seal or redact their appellate filings.[77]

The Civil Rules Committee's long-running discussion of protective orders under Civil Rule 26(c) sheds light on considerations that may be relevant in civil appeals. The Civil Rules Committee has noted that the courts require good cause in order to grant a protective order, and that they apply a more demanding test than good cause in order to seal documents filed with the court in support of or opposition to a request for a ruling on the merits. A view has emerged in the Civil Rules Committee's discussions that courts are generally applying these standards correctly, such that amendments to Rule 26(c) would mainly serve to codify best practices rather than to alter the applicable standards. Despite the recurrent introduction of bills to legislatively amend Rule 26(c), the Committee has thus far not proceeded with amendments to the rule.

Should the fact that the Civil Rules Committee is not at this point proposing to amend Civil Rule 26(c) weigh against the proposal to address sealed appellate filings in the Appellate Rules? Obviously, it will be important to consult the Civil Rules Committee for its thoughts on this question. One possible reason for considering amendments to the Appellate Rules (even though no amendment to Civil Rule 26(c) is under consideration) is that, in the context of appeals, the question of sealed merits-related filings moves from the periphery to center stage. Much of the discussion concerning Civil Rule 26(c) has centered on the application of protective orders to materials that are never filed with the court. Participants in the Civil Rules Committee discussions have noted that the standards concerning protective orders governing discovery materials generally (i.e., apart from court filings) should be applied with sensitivity to the need to encourage compliance with discovery obligations and with consciousness of the expenses involved in reviewing discovery material. By contrast, in the context of appeals, any redaction or sealing by definition occurs in the context of a filing that is submitted in support of, or opposition to, a request for judicial action – that is to say, in the context where a heightened showing of cause for secrecy is required.[78] Another factor that may distinguish appellate from trial-level proceedings is that amici are more likely to be interested in filing briefs on appeal than they are in filing briefs in the district court. One might argue, as well, that amicus participation

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[77] In addition to *In re Violation of Rule 28(D)*, 635 F.3d 1352, 1354 (Fed. Cir. 2011) (discussed in note 56, *supra*), see for example *Campbell v. PricewaterhouseCoopers, LLP*, 642 F.3d 820, 822 n.1 (9th Cir. 2011) ("We are mindful of PwC's interest in protecting its proprietary business information. However, the sealed documents contain extensive non-confidential information, despite the protective order's exhortation that '[w]here possible, only Confidential or Highly Confidential portions ... shall be lodged under seal.'").

[78] *Cf.* Union Oil Co. of California v. Leavell, 220 F.3d 562, 568 (7th Cir. 2000) ("What happens in the halls of government is presumptively public business. Judges deliberate in private but issue public decisions after public arguments based on public records.").

at the appellate level – where the resulting decision may have precedential effect – may sometimes be more important than it is at the district court level.

B. General considerations: scope and relation to existing sealing requirements

Scope of proposed rule. An initial question is whether to draft a rule that covers all appellate proceedings or whether to focus the rule on a subset of those proceedings.

Mr. Levy did not suggest a specialized rule, but it is interesting to note that the example he cited was a civil case. Many instances of sealing on appeal appear to arise in criminal cases, but it is not clear whether it is common for would-be amici to seek access to sealed filings in criminal appeals. In addition, as Part II noted, there are distinctive sensitivities concerning sealing in criminal cases – for example, with respect to grand jury proceedings, or plea or cooperation agreements, or presentence reports. Although the national rules generally take a trans-substantive approach to procedure when possible, the Appellate Rules already distinguish between civil and criminal appeals in some respects (*e.g.*, Rule 4's treatment of appeal time periods).

On the other hand, with the exception of local provisions that treat specially grand jury proceedings or presentence reports or the like, the circuits' local provisions on sealed filings generally apply equally to both civil and criminal appeals. (A counter-example is the Third Circuit, which requires a motion for leave to make sealed filings in civil appeals but does not impose a similar requirement across the board in criminal appeals.)

If the proposed rule will require a motion for leave to file documents under seal in both civil and criminal cases, it is worth considering whether to exempt certain categories of appeal, or certain categories of documents, from the requirement of a motion. For example, it might make sense to exempt appeals involving grand jury proceedings from the motion requirement.

Existing statute- and rule-based sealing requirements. As noted in Part II, statutes and rules specify certain sealing or redaction requirements. Presumably, any national rule concerning sealing and redaction of appellate filings should be drafted so as to leave intact those pre-existing provisions. One possible model is the Seventh Circuit's IOP 10, which states in part:

> Except to the extent portions of the record are required to be sealed by statute (e.g., 18 U.S.C. § 3509(d)) or a rule of procedure (e.g., Fed. R. Crim. P. 6(e), Circuit Rule 26.1(b)), every document filed in or by this court (whether or not the document was sealed in the district court) is in the public record unless a judge of this court orders it to be sealed." Seventh Circuit IOP 10(a). A provision requiring a motion for leave to file a redacted brief might also be drafted to dovetail with the privacy rules – for example by specifying that redactions pursuant to Appellate Rule 25(a)(5) must be made as a matter of course and do not require a motion for leave.

C. Alternative models for a national rule on sealing appellate filings

The Seventh Circuit model (requiring a motion). As noted during the spring meeting, one possible way of addressing Mr. Levy's concern is to adopt in the Appellate Rules the approach taken by the Seventh Circuit (and by the Third Circuit with respect to civil appeals). Under this approach, an Appellate Rule could provide a grace period during which matters sealed below remain sealed on appeal, but could mandate that those matters are unsealed (to the extent they appear in the record on appeal) if no motion is made within the grace period to maintain the seal on appeal.

The D.C. and Federal Circuit model (duty of party review). Another possibility, as noted at the spring meeting, is to require the litigants – at the outset of the appeal – to review the record, mutually agree on whether some or all sealed portions can be unsealed, and present that agreement to the court or agency below. This is the approach taken by the D.C. and Federal Circuits. The provision could be bolstered by a requirement that the parties certify their compliance to the court of appeals.

Imposing a duty of district court review. Another option suggested at the spring meeting would be to suggest to the Civil and/or Criminal Rules Committees that district judges be required to review any sealing orders at the time they close a case. This would have the benefit of directing sealing decisions to the judge who knows the case best. On the other hand, as a way of addressing Mr. Levy's concern, this approach seems over-inclusive for two reasons: first, because it would impose a duty with respect to all cases, not just those in which there is an appeal; and second, because it would require the district court to review all aspects of the sealed record below, rather than only the portions cited or otherwise disclosed in appellate briefs or appendices. At the same time, this approach seems under-inclusive because it would only address appeals from final judgments, not interlocutory appeals.

Creating a framework for motions to unseal. A different approach would be to add to the Appellate Rules a provision that creates a framework for motions to unseal. Such a provision, by acknowledging the propriety of third-party motions to unseal appellate filings, could encourage such motions. And such a provision could remove uncertainty over the applicable procedure for such motions in circuits whose local provisions do not currently discuss them. However, such a provision would likely not address two of the difficulties cited by Mr. Levy – namely, the fact that third parties often lack the resources to make such motions, and the fact that even when such a motion is granted the unsealing comes too late for the amicus to take account of the newly-unsealed material in drafting the amicus brief. The latter problem might be addressed by providing for extensions of the briefing schedule when unsealing comes too late to permit adequate time for briefing by an amicus – but such extensions could undesirably slow down the briefing process.

Penalizing unwarranted redactions in appellate briefs. A different approach might rely on the threat of sanctions to deter lawyers from making unwarranted redactions in their briefs. Such sanctions would likely only be imposed in extreme cases; *In re Violation of Rule 28(D)*,

635 F.3d 1352 (Fed. Cir. 2011), provides an example. One advantage would be that sanctions could be addressed after the court of appeals has resolved the merits of the appeal – i.e., at a time when the merits panel has become familiar with the case. But whether this would suffice to address the general problem, and whether it would do so without causing other problems, is not clear.

D. Additional matters that a national rule might address

If a national rule were to address the topic of sealed appellate filings, it might be worthwhile to consider whether it should cover matters other than those directly relevant to Mr. Levy's concerns. Here are a couple of examples:

Designating the decisionmaker. It is not clear that courts take a uniform approach to the question of who should resolve questions concerning sealing of appellate filings. Some courts may delegate such decisions, in the first instance, to the clerk or to a staff attorney.[79] Assuming that clerks' or staff attorneys' decisions are reviewed by a judicial officer, there remains a further question concerning *which* judicial officer conducts that review. Some courts might prefer to refer sealing questions to the court below – at least if the questions arise early in the appellate process. Some courts might refer the question to a single appellate judge or to a motions panel. Other courts might prefer to impose a provisional seal and reserve the question for the merits panel.

It might be worth considering whether a national rule should address at least the first of these questions, by providing that sealing decisions by clerks or staff attorneys should be subject to review by a judicial officer. (The Sealed Cases Subcommittee's recommendations provide support for this approach.)

Limiting duration of sealing orders. Support can be found for the idea of including time limits in sealing orders. As noted in Part III, some local provisions already do so, although their time limits are long ones. The Sealed Cases Subcommittee and Privacy Subcommittee have expressed support for the idea of sunset provisions; on the other hand, CACM has expressed doubts as to their use in the context of sealing cooperation and plea agreements.

E. Alternatives to a rule amendment

It may be worthwhile to consider the extent to which concerns over sealed appellate filings could be addressed by actions short of a national rule amendment.

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[79] In their study of completely sealed cases, the FJC found that "[i]n general, sealing motions are decided by motions judges or merits panels, depending upon when the motion is filed. But one court authorized a staff attorney to decide a motion to seal." REAGAN & CORT, *supra* note 5, at 29.

Judicial and clerk education. The Sealed Cases Subcommittee has recommended the use of educational efforts to raise awareness of issues relating to completely sealed cases. It is possible that similar efforts could help courts to rein in excesses in sealing and redaction of appellate briefs.

CM/ECF architecture. Changes to the CM/ECF system might ameliorate some concerns regarding sealing. For example, as the Sealed Cases Subcommittee has suggested, CM/ECF might be modified to generate periodic reminders for the review of existing sealing orders.

V. Conclusion

The Committee will have a number of choices to make in considering a possible national rule on sealed appellate filings – concerning the rule's scope, its interaction with statutory and rule-based sealing requirements, its mechanism for restraining inappropriate sealing and redaction, and its treatment of other issues. In considering such a rule proposal, it will be important to consult with other Judicial Conference committees that have dealt or are dealing with related issues.

Encls.

MINUTES

CIVIL RULES ADVISORY COMMITTEE

MARCH 18-19, 2010

The Civil Rules Advisory Committee met in Atlanta, Georgia, at the Emory University School of Law on March 18 and 19, 2010. The meeting was attended by Judge Mark R. Kravitz, Chair; Judge Michael M. Baylson; Judge David G. Campbell; Judge Steven M. Colloton; Professor Steven S. Gensler; Judge Paul W. Grimm; Daniel C. Girard, Esq.; Peter D. Keisler, Esq.; Judge John G. Koeltl; Chief Justice Randall T. Shepard; Anton R. Valukas, Esq.; Chilton D. Varner, Esq.; Judge Vaughn R. Walker; and Hon. Tony West. Professor Edward H. Cooper was present as Reporter, and Professor Richard L. Marcus was present as Associate Reporter. Judge Lee H. Rosenthal, Chair, and Professor Daniel R. Coquillette, Reporter, represented the Standing Committee. Judge Eugene R. Wedoff attended as liaison from the Bankruptcy Rules Committee. Laura A. Briggs, Esq., was the court-clerk representative. Peter G. McCabe, John K. Rabiej, Jeffrey Barr, and Henry Wigglesworth represented the Administrative Office. Emery Lee and Thomas Willging represented the Federal Judicial Center. Ted Hirt, Esq., Department of Justice, was present. Andrea Kuperman, Rules Clerk for Judge Rosenthal, attended. Observers included Alfred W. Cortese, Jr., Esq.; Joseph Garrison, Esq. (National Employment Lawyers Association liaison); John Barkett, Esq. (ABA Litigation Section liaison); Ken Lazarus, Esq. (American Medical Association); Joseph Loveland, Esq.; Professor Robert A. Schapiro; John Vail, Esq. (American Association for Justice); and Emory Law School students.

Judge Kravitz opened the meeting with a general welcome to all present. He expressed deep appreciation to Emory for making their school available for the meeting, noting that the Committee enjoys meeting at law schools and the opportunity to interact with civil procedure teachers and students. He noted that Emory is a distinguished school, with a reputation for changing legal education and the profession. He also thanked Chilton Varner for helping to make the arrangements for the meeting.

Dean David F. Partlett and Associate Dean Gregory L. Riggs provided warm and gracious welcomes to Emory Law School. Dean Partlett observed that students seem to think that things like the Civil Rules appear from a mountain top; it is good for them to be able to observe the effort and talent brought to the work of rulemaking. Chilton Varner provided brief notes on the Law School's history. The school was founded with the purpose of establishing an institution that would vie with the best law schools in the country. It began with admissions requirements more demanding than the general standards of the time. It has continually fulfilled its commitment to achieving diversity, with high numbers of students from traditionally underrepresented minorities and with an even balance between men and women. It led the way in invalidating a Georgia law denying tax exemptions to private schools that integrate. It has continually moved upward in the much-watched US News & World Report rankings.

Judge Kravitz welcomed Judge Wedoff back, fully recovered from the injury that kept him from the October meeting. Judge Wedoff expressed his pleasure to be back. Judge Kravitz further noted that Judge Diamond was unable to attend, as was Judge Wood. He also reported that Chief Justice Shepard had recently received the Sixth Annual Dwight D. Opperman Award for Judicial Excellence. The citation noted many of Chief Justice Shepard's achievements, including chairing the National Conference of Chief Justices, serving the Indiana State Courts for more than 20 years, winning many awards for his work to achieve diversity in the profession and to advance professionalism, and recognition as an authority on judicial ethics. Judge Kravitz went on to comment on the extensive press coverage devoted to Anton Valukas's recent report as examiner in the bankruptcy proceedings for Lehman Brothers. The report concluded that the firm's failure was "more the consequence than the cause of our deteriorating economic climate." One securities litigator has called the report "porn for securities lawyers," so engrossed are they in exploring every facet of its 3,000 pages. "Repo 105 has entered our vocabulary."

worked out by negotiations in the shadow of an opaque rule. Simply wrong answers might be adopted for some questions. There is real reason for concern with the prospect that computer search programs might not prove able to direct innocent inquiries framed around Rule 36.1 to earlier interpretations of ancestral provisions in Rule 45.

The distinction between amending existing rules and drafting on a clean slate is uncertain. The Rule 36.1 sketch draws in large part on present Rule 45, and on the current proposals to amend or to explore. It deserves to carry forward as at least an exhibit in the materials for a miniconference, but it is not likely to carry further unless there is a strong upswelling of support.

Rule 26(c) Protective Orders

Continuing introductions of "Sunshine in Litigation Act" bills have prompted renewed attention to Rule 26(c). Similar bills prompted the Committee to study Rule 26(c) in depth and at length in the 1990s. A proposed amended Rule 26(c) was published for comment. A revised proposal was sent back by the Judicial Conference because it had not been republished after making extensive changes to reflect the public comments. The revised proposal was then published. After considering the comments offered at this second round, the Committee concluded that there was no need to pursue amendments. The rule seemed to be working well as it was. The Committee has not devoted much attention to Rule 26(c) since then.

Continuing Congressional attention provides reason to renew consideration of Rule 26(c). Judge Kravitz testified before Congress last year. Andrea Kuperman undertook a circuit-by-circuit study of current practices, looking to standards for initially entering protective orders, tests for filing under seal, and approaches to modifying or dissolving protective orders. This research suggests that there are few identifiable differences among the circuits. All recognize the need to adhere to a meaningful good-cause requirement in granting protective orders. All recognize flexible authority to dissolve or modify protective orders, although the Second Circuit adheres to a more demanding standard that has been expressly rejected by several circuits. All recognize that the tests for filing "judicial documents" under seal are far more demanding than the standards for entering protective discovery orders. This research is reassuring, and provides some ground for satisfaction with present Rule 26(c). Nonetheless, it is wise to explore possible revisions.

A draft Rule 26(c) has been prepared by the Committee Chair and Reporter. The draft was presented solely for discussion purposes. If the Committee decides to take up this topic, more rigorous drafting will be attempted. Specific suggestions from Committee members will play an important role in improved drafting.

Good reason may appear to do nothing. Not long after the Committee concluded its last thorough consideration of Rule 26(c), the Court of Appeals for the District of Columbia Circuit said this: "Rule 26(c) is highly flexible, having been designed to accommodate all relevant interests as they arise." United States v. Microsoft Corp., 165 F.3d 952, 959 (D.C.Cir.1999). That advice seems to hold good today. The purpose of placing this topic on the agenda is to determine whether it makes sense to take it up again. Courts are doing desirable things, but some of these good things do not have an obvious anchor in the rule. Expanded rule language might save time for bench and bar, and provide valuable reassurance. Some of the rule language seems antique. It expressly recognizes the need to protect trade secrets and other commercial information, but does not mention the personal privacy interests that underlie many protective

orders. Some updating and augmentation may be in order. And it will always be important to be alert to signs that practice might somehow be going astray.

The draft carries forward the "good cause" test established in present Rule 26(c). The text deliberately omits two topics that generated much discussion in the 1990s. The rule text might recognize the role of party stipulations, adopting some provision such as "for good cause shown by a party or by parties who submit a stipulated order." Party stipulations may show both that there is good cause for a protective order and that the order will facilitate the smooth flow of discovery without unnecessary contentiousness. But it is important to recognize that a stipulation does not eliminate the need for the court to determine that there is good cause for the order. There is no clear reason to believe that courts fail to understand these contending concerns or fail to act appropriately. It may be better to leave practice where it lies.

It also would be possible to add rule text that points to reasons for not entering a protective order. Concern is repeatedly expressed that protective orders may defeat public access to information needed to safeguard public health and safety. But, both in the 1990s and today, there has been no persuasive showing that protective orders in fact have had this effect. The Federal Judicial Center studied protective orders and showed that most enter to protect information that does not implicate the public health or safety. When the protected information may bear on public health or safety, alternative sources of information have always been available. The pleadings in the cases are one source that is routinely available. This concern does not yet seem real.

The draft rule text does make some changes in the traditional formula that looks to "annoyance, harassment, embarrassment, oppression, or undue burden or expense." Many protective orders enter to preserve personal privacy. In addition, Rule 26(g) recognizes other potential discovery dangers as an "improper purpose." Rule 26(c) might benefit from recognizing some of the same dangers, such as unnecessary delay, harassment, and needless increase in cost.

The draft also relegates to a footnote the question whether the rule should provide for disclosing information to state or federal agencies with relevant regulatory or enforcement authority. The footnote suggests that it may be better to leave it to the courts to continue working out the countervailing interests they have identified in this area.

Present Rule 26(c) text does not address another familiar problem. Particularly when large volumes of documents or electronically stored information are involved, protective orders often provide that a producing party may designate information as confidential. Another party may wish to challenge the designation. The draft illustrates one possible approach, assigning the burden of justifying protection to the party seeking protection.

Another familiar problem arises when a party seeks to file protected discovery information with the court. The standards for sealing court records are more demanding than the Rule 26(c) standards for entering a protective order. Sealing standards are much higher for records that are used as evidence at a hearing, trial, or on summary judgment. The draft provides that a party may file under seal information covered by a protective order and offered to support or oppose a motion on the merits or offered in evidence at a hearing or trial only if the protective order directs filing under seal or if the court grants a motion to file under seal. It does not attempt to restate the judicially developed tests for determining whether sealing is appropriate.

The draft also carries forward, with some changes, the 1990s drafts that provided for modifying or dissolving a protective order. The 1990s drafts allowed a nonparty to intervene to

seek modification or dissolution, and the Committee Note suggested that the standard for intervention should be more permissive than the tests for intervening on the merits. The present draft simply allows any person to seek modification or dissolution, reasoning that it is more efficient to consider the interests that may support relief all at once. Several factors are identified for consideration. One of them looks to "the reasons for entering the order, and any new information that bears on the order." This factor addresses in circumspect terms the need to distinguish between protective orders entered after thorough consideration of the interests implicated by a motion to modify or dissolve and orders entered after less thorough consideration. "New information" may include arguments that were not as fully presented as might have been. At the same time, reliance is identified as another factor bearing on modification or dissolution. Yet another factor reflects the common practice of modifying protective orders to facilitate discovery and litigation in related cases.

A number of interesting questions are not addressed by the draft. At least some courts believe there is no common-law right of access to discovery materials not filed with the court. This view ties to the amendment of Rule 5(d) that prohibits filing most discovery materials until they are used in the proceeding or the court orders filing. The rule might say something about access to unfiled materials.

Rule 29(b) provides that parties may stipulate that "procedures governing or limiting discovery be modified." Rather than seek a protective order from the court, the parties may stipulate to limited discovery and to restrictions on using discovery materials. It is also possible that parties may agree to exchange information voluntarily, entirely outside the formal discovery processes. It might prove difficult to address such agreements in Rule 26(c), but perhaps the topic deserves some attention.

This introduction was summarized as identifying issues that probably should be considered if Rule 26(c) is to be studied further. But the question remains whether there is any reason to take on Rule 26(c) while "things seem to be working out just fine."

The first question asked for a summary of the best reasons for taking up Rule 26(c). Responses suggested again the value of bringing well-established "best practices" into rule text, and the desire to modernize expression of some provisions. Rule 26(c) "was written in a paper world. Protecting privacy and access to information filed in court have become more important in the electronic era." Pressures grow both to protect the privacy of parties and other persons with discoverable information, and also to ensure public access. The right balance is difficult, and is likely to be different now than it was in 1938. Although courts are adjusting well, it may help to update the rule.

It was further suggested that various provisions could address the concerns reflected in the Sunshine in Litigation Act proposals. Some are in the draft, including challenges to designations of information as confidential, modification or dissolution of protective orders, and sealing of filed materials. But the best reason to act may be to bring best practices into the rule.

The "best practices" suggestion was countered by asking whether there is good reason to avoid an attempt to distill developed judicial practices into rule text. It is not possible to incorporate all of the case law. Litigants will argue that leaving some practices out of the rule reflects a judgment that they are not worthy of incorporation, and should be reconsidered.

The rejoinder was that the case law is pretty consistent. It provides a secure foundation for incorporation into rule text. It will be useful to provide explicitly for modification or dissolution. Recognition of the procedure for challenging designations of confidentiality will be

useful, even though a procedure is spelled out in "every protective order I've seen." The risk of doing more harm than good seems relatively low.

Another reason for taking on Rule 26(c) may be persisting concerns in Congress. But this preliminary inquiry satisfies much of that burden — there is no apparent reason to revise the conclusions reached in the 1990s. Courts do consider public health and safety. They do allow access to litigants in follow-on cases. They do modify or dissolve protective orders. They are careful about sealing judicial documents. The reasons for going ahead now are more the values already described — bringing established best practices into rule text expressed in contemporary language.

This suggestion was elaborated by noting that there is an important value in access to justice. That includes ensuring that the public in general has a chance to see what courts do. But it also includes providing ready access to the law for lawyers. Not all practitioners are familiar with case-law elaborations of Rule 26(c), and not all have the resources required to develop extensive knowledge. Capturing these values in rule text can be useful.

Another comment began with the suggestion that there is a "wink and nudge" aspect of real practice, as compared to rule text. Expressing practice in rule text could be useful. But there are offsetting values in leaving things where they stand. It has been noted that the Second Circuit takes a distinctive approach to modifying or dissolving a protective order, emphasizing the need to protect reliance in particular cases so that litigants will be encouraged to rely on protective orders to facilitate discovery in future cases. So it is well understood that umbrella protective orders are entered, but the practice is questioned by some. Adopting rule provisions that address party designations of confidentiality may seem to bless more practices than should be blessed.

Returning to the need for free access to judicial documents, it was observed that the draft provisions for modification or dissolution are open-ended. They do not interfere with the provision that a protective order for discovery does not automatically carry over to documents filed with the court. But it also was suggested that care should be taken in even referring to the possibility of sealing information offered as evidence at trial.

The pending proposal to revise Rule 56 was recalled. One of the major reasons for undertaking revision was that the rule text simply did not correspond to the practices that had developed over the years. In contrast, Rule 26(c) text is not inconsistent with current practice. The proposed changes are obvious. There is little reason to revise a rule only to incorporate obvious present practice.

An observer suggested that one of the most important concerns is that Rule 26(c) is now a very good thing for employment plaintiffs. If the Committee starts to tinker with it, interest groups will be stirred to press revisions that would distort the rule. Another observer agreed in somewhat different terms. There are some benefits in acting to improve Rule 26(c). But there are risks that once the topic is opened, the end result will make things worse. Sending a revised rule to Congress, for example, might provide an occasion for enacting the infeasible procedural incidents contemplated by the Sunshine in Litigation Act bills.

Discussion resumed the next morning. A committee member asked whether it is wise to pursue Rule 26(c) in depth if the Committee thinks the end result will be to recommend no changes. Judge Rosenthal noted that the Committee had done that already. Several years were devoted to Rule 26(c), culminating in a decision to withdraw after two rounds of public comment because there was no apparent need to revise established practices. At the same time, Judge

Kravitz is right in observing that the Committee should not feel obliged by political considerations to pursue a topic it thinks does not need attention.

It seems better not to take Rule 26(c) off the agenda in a final way just yet. At a minimum, the Committee should continue to monitor developing case law. Congress should understand that the Committee recognizes the importance of Rule 26(c) and continues to monitor it. If the Federal Judicial Center research staff can free up some time, it might be useful to update their study. And whether or not there is a further study, it might be desirable to have the judicial education arm of the Center prepare a pocket guide that helps judges and lawyers through the case law by summarizing best practices.

These proposals were supplemented by asking whether it would be useful to have an FJC survey of judges. The FJC prefers to survey judges only when there are compelling reasons. Judge time is a valuable resource that should not be lightly drawn on. When a survey seems justified, it seems better to do it by presenting a concrete proposal, not a general question whether there is some reason to revise a rule.

The 2010 conference may generate ideas that would support a useful survey, most likely aimed at lawyers. Until then, the prospect seems premature.

Further reason for carrying Rule 26(c) forward was found in the work of two Standing Committee subcommittees. One is examining privacy concerns, although without a direct focus on Rule 26(c). Another is examining the practice of sealing entire cases, as distinguished from sealing particular files or events. Exhaustive empirical investigation has shown that it is very rare to seal entire cases, but there may be reason to recommend that courts establish systems to ensure that sealing does not carry forward by default after the occasion for sealing has disappeared.

Forms

The October meeting considered the question whether the time has come to reconsider the Forms appended to the Rules. Rule 84 says the forms "suffice under these rules." For the most part, however, the Committee has paid attention to the Forms only when adding new forms to illustrate new rules provisions. Looking at the set as a whole, there are reasons to wonder why some topics are included, while others are omitted. Looking at particular forms raises questions whether they are useful. The pleading forms in particular seem questionable. The pleading forms were obviously important in 1938. The adoption of notice pleading, a concept not easily expressed in words, required that the Committee paint pictures in the guise of Forms to illustrate the meaning of Rule 8(a)(2). That need has long since been served. The current turmoil in pleading doctrine, moreover, suggests that the Forms may provide more distraction than illumination.

The benign neglect that has generally characterized the Committee's approach to the Forms is in part a consequence of the need to tend to matters that seem more important. There is reason to question whether the Committee should continue to bear primary responsibility for policing the forms. If responsibility were assigned elsewhere — for example, to the Administrative Office — it would be appropriate to reconsider Rule 84.

These concerns are detailed at some length in the Minutes for the October meeting. The Committee was particularly concerned that any effort to revise the Forms, or to abandon them, might seem to be taking sides in ongoing debates about pleading standards. The Committee

Circuit	Cite	Comments
DC	Rule 39(d)	Costs of Producing Separate Briefs and Appendices Where Record is Sealed. The costs under Circuit Rule 47.1 of preparing 2 sets of briefs, and/or 2 segments of appendices, may be assessed if such costs are otherwise allowable.
DC	Rule 47.1(a)	Case with Record Under Seal. Any portion of the record that was placed under seal in the district court or before an agency remains under seal in this court unless otherwise ordered. Parties and their counsel are responsible for assuring that materials under seal remain under seal and are not publicly disclosed.
DC	Rule 47.1(b)	Agreement to Unseal. In any case in which the record in the district court or before an agency is under seal in whole or in part and a notice of appeal or petition for review has been filed, each party must promptly review the record to determine whether any portions of the record under seal need to remain under seal on appeal. If a party determines that some portion should be unsealed, that party must seek an agreement on the unsealing. Such agreement must be presented promptly to the district court or agency for its consideration and issuance of an appropriate order.
DC	Rule 47.1(c)	Motion to Unseal. A party or any other interested person may move at any time to unseal any portion of the record in this court, including confidential briefs or appendices filed under this rule. On appeals from the district court, the motion will ordinarily be referred to the district court, and, if necessary, the record remanded for that purpose, but the court may, when the interests of justice require, decide that motion, and, if unsealing is ordered, remand the record for unsealing. Unless otherwise ordered, the pendency of a motion under this rule will not delay the filing of any brief under any scheduling order.
DC	Rule 47.1(d)	Briefs Containing Material Under Seal. (1) Two Sets of Briefs. If a party deems it necessary to refer in a brief to material under seal, 2 sets of briefs must be filed which are identical except for references to sealed materials. One set of briefs must bear the legend "Under Seal" on the cover, and each page containing sealed material must bear the legend "Under Seal" at the top of the page. The second set of briefs must bear the legend "Public Copy--Sealed Material Deleted" on the cover, and each page from which material under seal has been deleted must bear a legend stating "Material Under Seal Deleted" at the top of the page. The party must file the original and 6 copies of the sealed brief and the original and 14 copies of the public brief. Both sets of briefs must comply with the remainder of these rules, including Circuit Rule 32(a) on length of briefs. (2) Service. Each party must be served with 2 copies of the public brief and 2 copies of the brief under seal, if the party is entitled to receive the material under seal. See, e.g., Fed. R. Crim. P. 6(e). (3) Non-availability to the Public. Briefs filed with the court under seal are available only to authorized court personnel and will not be made available to the public.

DC	Rule 47.1(e)	Appendices Containing Matters Under Seal. (1) Sealed Supplement to the Appendix; Number of Copies. If a party deems it necessary to include material under seal in an appendix, the appendix must be filed in 2 segments. One segment must contain all sealed material and bear the legend "Supplement--Under Seal" on the cover, and each page of that supplement containing sealed material must bear the legend "Under Seal" at the top of the page. The second appendix segment must bear the legend "Public Appendix-- Sealed Material in Separate Supplement" on the cover; each page from which material under seal has been deleted must bear the legend "Material Under Seal Deleted" at the top of the page. The party must file 7 copies of the sealed supplement and 7 copies of the public appendix. (2) Service; Number of Copies. Each party must be served with one copy of the public appendix and one copy of the sealed supplement, if the party is entitled to receive the material under seal. See, e.g., Fed. R. Crim. P. 6(e). (3) Non-availability to the Public. Supplements to appendices filed with the court under seal are available only to authorized court personnel and will not be made available to the public.
DC	Rule 47.1(f)	Disposal of Sealed Records. (1) In any case in which all or part of the record of this court (including briefs and appendices) has been maintained under seal, the Clerk will, in conjunction with the issuance of the mandate (or the entry of the final order, in a case in which no mandate will issue), order the parties to show cause why the record (or sealed portions) should not be unsealed. If the parties agree to unsealing, the record will be unsealed by order of the court, issued by the Clerk. No order to show cause will be issued in cases where the nature of the materials themselves (e.g., grand jury materials) makes it clear that unsealing would be impermissible. If the parties do not agree to unsealing, the order to show cause, and any responses thereto, will be referred to the court for disposition. (2) Any record material not unsealed pursuant to this rule will be designated "Temporary Sealed Records," and transferred to the Federal Records Center under applicable regulations. The records will be returned to the court for reconsideration of unsealing after a period of 20 years. (3) The court may, on its own motion, issue an order to show cause and consider the unsealing of any records in the court's custody, at any time. (4) Counsel to an appeal involving sealed records must promptly notify the Court when it is no longer necessary to maintain the record or portions of the record under seal.
DC	Rule 47.2(b)(5)	[regarding sentencing appeals:] The filings will be placed in the public record. Parties should avoid matters that could compromise the confidentiality of the presentence report. Where inclusion of confidential matters is unavoidable, the party should move to have the submission placed under seal.

DC	Rule 47.6(a)(3)	[regarding appeals from Alien Terrorist Removal Court:] Submissions to be Filed Under Seal. Unless otherwise specified herein, all submissions filed in the court in an appeal from the Alien Terrorist Removal Court must be filed under seal. In addition, any submission containing or referring to classified information must so indicate in an appropriate legend on the face of the submission. The court and all parties to a removal proceeding must comply with all applicable statutory provisions for the protection of classified information, and with the "Security Procedures Established Pursuant to Pub. L. 96-456, 94 Stat. 2025, by the Chief Justice of the United States for the Protection of Classified Information."
DC	Rule 47.6(b)	[appeals from denial of removal application:] (2) Record. The United States must serve a copy of the notice of appeal on the Alien Terrorist Removal Court. Upon receipt of the notice, the Removal Court must transmit, under seal, the entire record of the application proceeding to the court of appeals. (3) Ex Parte Appeal. An appeal from the denial of a removal application must be conducted ex parte and under seal. No submissions, including the notice of appeal and the memorandum in support of the appeal, will be served on the alien.
DC	Rule 47.6(c)	(2) Record. The United States must serve a copy of the notice of appeal on the Alien Terrorist Removal Court. Upon receipt of the notice, the Removal Court must transmit the entire record of the removal proceeding to the court of appeals. Any portion of the record sealed in the Removal Court must be transmitted to and maintained by this court under seal. (3) Ex Parte Appeal. An appeal from a discovery determination will be conducted ex parte and under seal. No submissions, except the notice of appeal, will be served on the alien.
DC	Rule 47.6(d)	[appeals from determination after removal hearing:] (3) Record. The appellant (except in the case of an automatic appeal) must serve a copy of the notice of appeal on the Alien Terrorist Removal Court. Upon receipt of the notice, the Removal Court must transmit the entire record of the removal proceeding to the court of appeals. Any portion of the record sealed in the Removal Court must be transmitted to and maintained by this court under seal. In the case of an automatic appeal, the Removal Court must, upon the filing of the court's order after the removal hearing, transmit a certified copy of the order, together with the record of the removal proceedings, to the court of appeals. (4) Briefing. Within 10 days of the filing of the appellant's memorandum in support of the appeal, the appellee must file a responsive brief, not to exceed 20 pages in length. Appellant's reply, if any, is due 5 days after the date the response is filed, and may not exceed 10 pages in length. Briefs or memoranda must be filed under seal, to the extent necessary to comply with subsection (a)(3) of this rule.

DC	App. IV. Administrative Order Regarding Electronic Case Filing	ECF-8. Exceptions to Requirement of Electronic Filing And Service (A) A party proceeding pro se must file documents in paper form with the clerk and must be served with documents in paper form, unless the pro se party has been permitted to register as an ECF filer for that case. (B) A motion to file documents under seal, including any exhibits and attachments, and all documents containing material under seal may not be filed or served electronically unless the court orders otherwise. Matters under seal are governed by Circuit Rule 47.1.
DC	App. IV. Administrative Order Regarding Electronic Case Filing	ECF-9. Privacy Protection Unless the court orders otherwise, parties must refrain from including or must redact the following personal data identifiers from documents filed with the court to the extent required by FRAP 25(a)(5): • Social Security numbers. If an individual's Social Security number must be included, use the last four digits only. • Financial account numbers. If financial account numbers are relevant, use the last four digits only. • Names of minors. If the involvement of an individual known to be a minor must be mentioned, use the minor's initials only. • Dates of birth. If an individual's date of birth must be included, use the year only. • Home addresses. In criminal cases, if a home address must be included, use the city and state only. The filer bears sole responsibility for ensuring a document complies with these requirements. Guidance on redacting personal data identifiers is posted on the court's web site and must be followed.
DC	Handbook II.C.2	Any filing or brief (with the exception of emergency, confidential, or sealed documents) may be left, on the date due, in the Court of Appeals filing depository, located inside the Third Street entrance to the Courthouse, unless the Court has ordered that the filing be made at a time certain.
DC	Handbook II.C	5. Privacy Protection. Litigants must be aware of the federal rules and take all necessary precautions to protect the privacy of parties, witnesses, and others whose personal information appears in court filings. Sensitive personal data must be removed from documents filed with the Court and made available to the public -- whether electronically or on paper. All filers must comply with Federal Rule of Appellate Procedure 25(a)(5) and must follow the guidance on redacting personal data identifiers, which is posted on the Court's web site. In addition, ECF filers must comply with the requirements for privacy protection set out in the Administrative Order--ECF-9, effective June 8, 2009.

DC	Handbook III.K	K. Cases with Records Under Seal. (See D.C. Cir. Rule 47.1.) Any portion of the record that was placed under seal in the district court or before an agency remains under seal in this Court unless otherwise ordered. Parties and their counsel are responsible for assuring that materials under seal remain under seal and are not publicly disclosed. Matters under seal may not be filed in the Court of Appeals drop box. For privacy protections that govern all cases filed in this court, see supra Part II.C.5. In any case in which the record in the district court or before an agency is under seal in whole or in part, each party must review the record to determine whether any portions of the record under seal should remain under seal on appeal. If a party determines that some portion should be unsealed, that party must seek an agreement on the unsealing. Such agreement must be promptly presented to the district court or agency for its consideration and issuance of an appropriate order. See D.C. Cir. Rule 47.1(b); see also infra Parts VIII.H (discussing motions to unseal), IX.A.10 (discussing briefs containing material under seal), IX.B.7 (discussing appendices containing matters under seal). For procedures governing disposal of sealed records, see infra Part XIII.A.5. A motion to file documents under seal, including any exhibits and attachments, and all documents containing material under seal may not be filed or served electronically unless the Court orders otherwise.
DC	Handbook VI.D.2	Counsel must serve the appellant with the motion to withdraw. When filing a motion to withdraw because of lack of merit to the appeal in a criminal case, counsel also must submit to the Court and serve on the appellant, *but not on government counsel*, a confidential memorandum under seal setting forth the points the appellant wishes to assert, any other points counsel has considered, and the most effective arguments counsel can make on the appellant's behalf. The Court gives the appellant 30 days to respond to this memorandum; if the Court thereafter concludes there are no meritorious issues on appeal, it will grant counsel's motion to withdraw and ordinarily dismiss the appeal.
DC	Handbook VIII.H	Motions to Unseal. (See D.C. Cir. Rule 47.1.) Parties or other interested persons may move at any time to unseal any portion of the record in this Court, including confidential briefs or appendices filed under Circuit Rule 47.1. See D.C. Cir. Rule 47.1(c). If the case arises from the district court, the motion will ordinarily be referred to that court, and, if necessary, the record will be remanded for that purpose. This Court may, when the interests of justice require, decide such a motion itself. If unsealing is ordered by this Court, the record may be remanded to the district court for unsealing. Unless otherwise ordered, the filing of a motion to unseal any portion of the record does not delay the filing of any brief under any scheduling order.

DC	Handbook IX.A.10	10. Briefs Containing Material Under Seal. (See D.C. Cir. Rule 47.1(d).) If it is necessary to refer in a brief to material under seal, two sets of briefs must be filed. The briefs are to be identical except for references to sealed materials. One set of briefs must bear the legend "Under Seal" on the cover, and each page containing sealed material must bear the legend "Under Seal" at the top of the page. The second set of briefs must bear the legend "Public Copy--Sealed Material Deleted" on the cover, and each page from which material under seal has been deleted must bear a legend stating "Material Under Seal Deleted" at the top of the page. Seven copies of the sealed brief and 15 copies of the public brief must be filed, and 2 copies of the public brief and 2 copies of the brief under seal served on each party, if such party is entitled to receive the material under seal. See, e.g., Fed. R. Crim. P. 6(e). Both sets of briefs must comply with the remainder of the rules, including Federal Rule of Appellate Procedure 32(a)(7) and Circuit Rule 32(a), on the length of briefs. Litigants proceeding in forma pauperis must file 1 copy of the sealed brief and 1 copy of the public brief. Briefs filed with the Court under seal are available only to authorized court personnel and are not made available to the public.
DC	Handbook IX.B.7	Appendix Containing Matters Under Seal. (See D.C. Cir. Rule 47.1(e).) If it is necessary to include material under seal in an appendix, the appendix must be filed in two segments. One segment must contain all sealed material and must bear the legend "Supplement--Under Seal" on the cover, and each page of that segment containing sealed material must bear the legend "Under Seal" at the top of the page. The second appendix segment must bear the legend "Public Appendix--Material Under Seal in Separate Supplement" on the cover; each page from which material under seal has been deleted must bear the legend "Material Under Seal Deleted" at the top of the page. Seven copies of the sealed segment and 7 copies of the public segment of the appendix must be filed, and 1 copy of the public segment of the appendix and 1 copy of the sealed segment served on each party, if such party is entitled to receive the material under seal. See, e.g., Fed. R. Crim. P. 6(e). Segments of appendices filed with the Court under seal are available only to authorized court personnel and are not made available to the public.
DC	Handbook XIII.A.5	Disposal of Sealed Records. (See D.C. Cir. Rule 47.1(f).) In any case in which all or part of the record has been maintained under seal, the Clerk will order the parties to show cause why the record should not be unsealed, unless the nature of the materials themselves (e.g., grand jury material) makes it clear that unsealing would be impermissible. This order will be entered in conjunction with the issuance of the mandate. If the parties agree to unsealing, the record will be unsealed by Clerk's order. Otherwise, the matter will be referred to the Court for disposition. Counsel to an appeal involving sealed records must promptly notify the Court when it is no longer necessary to maintain the record or portions of the record under seal.

First	Rule 11.0(c)	Sealed Materials. (1) Materials Sealed by District Court or Agency Order. The court of appeals expects that ordinarily motions to seal all or part of a district court or agency record will be presented to, and resolved by, the lower court or agency. Motions, briefs, transcripts, and other materials which were filed with the district court or agency under seal and which constitute part of the record transmitted to the court of appeals shall be clearly labeled as sealed when transmitted to the court of appeals and will remain under seal until further order of court.
First	Rule 11.0(c)	(2) Motions to Seal in the Court of Appeals. In order to seal in the court of appeals materials not already sealed in the district court or agency (e.g., a brief or unsealed portion of the record), a motion to seal must be filed in paper form in the court of appeals; parties cannot seal otherwise public documents merely by agreement or by labeling them "sealed." A motion to seal, which should not itself be filed under seal, must explain the basis for sealing and specify the desired duration of the sealing order. If discussion of confidential material is necessary to support the motion to seal, that discussion shall be confined to an affidavit or declaration, which may be filed provisionally under seal. A motion to seal may be filed before the sealed material is submitted or, alternatively the item to be sealed (e.g., the brief) may be tendered with the motion and, upon request, will be accepted provisionally under seal, subject to the court's subsequent ruling on the motion. Material submitted by a party under seal, provisionally or otherwise must be stamped or labeled by the party on the cover "FILED UNDER SEAL." If the court of appeals denies the movant's motion to seal, any materials tendered under provisional seal will be returned to the movant. Motions to seal or sealed documents should never be filed electronically. See Administrative Order Regarding Case Management/Electronic Case Files System.
First	Rule 11.0(c)	(3) Limiting Sealed Filings. Rather than automatically requesting the sealing of an entire brief, motion, or other filing, litigants should consider whether argument relating to sealed materials may be contained in separate supplemental brief, motion, or filing, which may then be sealed in accordance with the procedures in subsection (2).
First	Rule 11.0(d)	References to Sealed Materials. (1) Records or materials sealed by district court, court of appeals, or agency order shall not be included in the regular appendix, but may be submitted in a separate, sealed supplemental volume of appendix. The sealed supplemental volume must be clearly and prominently labeled by the party on the cover "FILED UNDER SEAL." (2) In addressing material under seal in an unsealed brief or motion or oral argument counsel are expected not to disclose the substance of the sealed material and to apprise the court that the material in question is sealed. If the record contains sealed materials of a sensitive character, counsel would be well advised to alert the court to the existence of such materials and their location by a footnote appended to the "Statement of Facts" caption in the opening or answering brief.

First	Rule 28.0	(c) Sealed Items. Notwithstanding the above, sealed or non-public items-- including a presentence investigation report or statement of reasons in a judgment of criminal conviction--should not be included in a public addendum. Rather, where sealed items are to be included, they should be filed in a separate, sealed addendum.
First	Rule 28.1	Briefs filed with the court of appeals are a matter of public record. In order to have a brief sealed, counsel must file a specific and timely motion in compliance with Local Rule 11.0(c)(2) and (3) asking the court to seal a brief or supplemental brief. Counsel must also comply with Local Rule 11.0(d), when applicable.
First	Rule 30.0	(g) Inclusion of Sealed Material in Appendices. Appendices filed with the court of appeals are a matter of public record. If counsel conclude that it is necessary to include sealed material in appendix form, then, in order to maintain the confidentiality of materials filed in the district court or agency under seal, counsel must designate the sealed material for inclusion in a supplemental appendix to be filed separately from the regular appendix and must file a specific and timely motion in compliance with Local Rules 11.0(c)(2), 11.0(c)(3), and 11.0(d) asking the court to seal the supplemental appendix.
First	Notice of Adoption of Amendment to Local Rule 30.0 [2009]	Sealed or otherwise non-public items should not be included in a public appendix or addendum, but rather should be filed in a separate sealed volume. See Local Rules 11.0(d)(1), 28.0(c), 30(g). For example, a pre-sentence report in a criminal case should not be included in a public appendix or addendum. Where a judgment of criminal conviction is required to be included in the addendum, the statement of reasons should be filed in a separate, sealed volume. See Local Rule 28.0(c). Finally, counsel should comply with the privacy protection requirements of Fed. R. App. P. 25(a)(5) and should make appropriate redactions. For more information on redaction requirements see the Notice of Electronic Availability of Case Information on the First Circuit's website at www.ca1.uscourts.gov.
First	Administrative Order Regarding Case Management/Electronic Case Files System (CM/ECF) Rule 1	Scope of Electronic Filing Except as otherwise prescribed by local rule or order, all cases will be assigned to the court's electronic filing system. Upon motion and a showing of good cause, the court may exempt an attorney from the provisions of this Rule and authorize filing by means other than use of the electronic filing system. After January 1, 2010, all documents filed by counsel must be filed electronically using the electronic filing system unless counsel obtains an exemption, except for the following types of documents, which must be filed only in paper form: ... c. motions to seal; d. sealed, ex parte, or otherwise non-public documents, including for example, pre-sentence reports and statements of reasons in a judgment of criminal conviction; ...

First	Administrative Order Regarding Case Management/Electronic Case Files System (CM/ECF) Rule 7	Sealed Documents As required by Rule 1 of this Order, sealed documents and motions for permission to file a document under seal should be filed only in paper form. Sealed documents must be filed in compliance with 1st Cir. R. 11.0(c) and 1st Cir. R. 30.0(f). If an entire case is sealed, all documents in the case are considered sealed unless the court orders otherwise or, in the case of a court order, opinion, or judgment, the court releases the order, opinion or judgment for public dissemination.
First	Administrative Order Regarding Case Management/Electronic Case Files System (CM/ECF) Rule 12	Privacy Protections and Public Access Filers, whether filing electronically or in paper form, must refrain from including or must redact certain personal data identifiers from all documents filed with the court whenever such redaction is required by Fed. R. App. P. 25(a)(5). The responsibility for redacting these personal identifiers rests solely with counsel and the parties. The clerk will not review any document for compliance with this rule. Filers are advised that it is the experience of this court that failure to comply with redaction requirements is most apt to occur in attachments, addenda, or appendices, and, thus, special attention should be given to them.
First	Administrative Order Regarding Case Management/Electronic Case Files System (CM/ECF) Rule 13	Hyperlinks Electronically filed documents may contain hyperlinks except as stated herein. Hyperlinks may not be used to link to sealed or restricted documents. Hyperlinks to cited authority may not replace standard citation format. Complete citations must be included in the text of the document. A hyperlink, or any site to which it refers, will not be considered part of the record. Hyperlinks are simply convenient mechanisms for accessing material in a document. The court accepts no responsibility for the availability or functionality of any hyperlink, and does not endorse any product, organization, or content at any hyperlinked site, or at any site to which that site might be linked.
First	Ten Pointers for an Appeal ¶ 8(B)(3)	Documents that are transmitted to this court under seal, such as presentence reports, must not be included in an addendum or appendix. In addition, pursuant to a policy of the Judicial Conference of the United States, a statement of reasons in a criminal case is a non-public document. Briefs and appendices including such materials will be rejected as noncompliant. However, these materials may be filed in a separate volume clearly marked “SEALED.” See 1st Cir. R. 11.0 and 28.0. Sealed documents may not be filed electronically. See Administrative Order Regarding CM/ECF, Rules 1 and 7.

First	Notice to Counsel Regarding Contents of the Appendix	Sealed or otherwise non-public items should not be included in a public appendix or addendum, but rather should be filed in a separate sealed volume. See Local Rules 11.0(d)(1), 28.0(c), 30(g). For example, a pre-sentence report in a criminal case should not be included in a public appendix or addendum. Where a judgment of criminal conviction is required to be included in the addendum, the statement of reasons should be filed in a separate, sealed volume. See Local Rule 28.0(c). Finally, counsel should comply with the privacy protection requirements of Fed. R. App. P. 25(a)(5) and should make appropriate redactions. For more information on redaction requirements see the Notice of Electronic Availability of Case Information on the First Circuit's website at www.ca1.uscourts.gov.
First	Notice to Counsel and Pro Se Litigants	To avoid the need to seal the entire brief or appendix, counsel shall place sealed or confidential material in a separate, sealed volume of the brief or appendix. 1st Cir. R. 11.0. Sealed documents and motions for permission to file a document under seal should be filed only in paper form in compliance with 1st Cir. R. 11.0(c) and 1st Cir. R. 30.0(f). See Rules 1 and 7 of the Administrative Order Regarding CM/ECF.
Second	Rule 25.1(a)(1)	(E) Sealed Document. "Sealed document" means all or any portion of a document placed under seal by order of a district court or an agency or by order of this court upon the filing of a motion.
Second	Rule 25.1(j)	(2) Sealed Documents. A sealed document or a document that is the subject of a motion to seal is exempt from the electronic filing requirement and must be filed with the clerk in the manner the court determines.
Second	Web page: How to Appeal a Civil Case: Documents under seal	On rare occasions a document will be placed "under seal" so that it is not publicly available. A paper that has been sealed in the district court will remain under seal in the Court of Appeals if received as part of the record. A document that was not sealed in the district court will not be sealed in the Court of Appeals without a Court order. A party wishing to file a paper under seal with the Court of Appeals must make a written motion. An informal request to seal a document will not be entertained. All papers submitted to the Court pursuant to a sealing order must be submitted in a sealed envelope, marked SEALED, with a copy of the order placing the document under seal attached to the envelope. Parties must not file sealed documents electronically in CM/ECF.
Second	Web page: How to Use CM/ECF: Sealed documents	Currently the Second Circuit does not accept electronic filing of sealed documents. Parties must file paper copies with the Court. The case manager will make the appropriate docket entries but will not attach any sealed documents to the corresponding docketing event. Parties will receive Notices of Docketing Activity by email for sealed documents filed in public cases. Unless a case was sealed in the court or agency below, the Court will not seal any document in a case unless it grants a party's motion to do so. A motion to seal a case must be filed electronically in accordance with the procedures set forth in Filing a motion. If the Court has permitted a case or document to be sealed, *do not file the sealed documents through ECF.*

Second	Web page: How to Appeal an Agency Case: Documents under Seal	On rare occasions a document will be placed "under seal" so that it is not publicly available. A paper that has been sealed in the agency below will remain under seal in the Court of Appeals if received as part of the record. A document that was not sealed in the agency below will not be sealed in the Court of Appeals without a Court order. A party wishing to file a paper under seal with the Court of Appeals must make a written motion. An informal request to seal a document will not be entertained. All papers submitted to the Court pursuant to a sealing order must be submitted in a envelope, marked SEALED, with a copy of the order placing the document under seal attached to the envelope.
Second	Web page: How to Appeal a Criminal Case: Pre-sentence Investigation Report (PSR)	If the appeal involves any United States Sentencing Guidelines issues, the appellant must submit a copy of the PSR with the appellant's brief and appendix. To preserve the confidentiality of the information contained in the report, the copy of the PSR should be placed in a sealed envelope with the words "Pre-Sentence Investigation Report" written on the outside of the envelope. Also, the appellant must write on the envelope the short caption and docket number of the case in which the PSR is being filed. If the case involves multiple defendants, the appellant must indicate on the envelope which defendant is filing the PSR.
Second	Web page: How to Appeal a Criminal case: Documents under Seal	On rare occasions a document will be placed "under seal" so that it is not publicly available. A paper that has been sealed in the district court will remain under seal in the Court of Appeals if received as part of the record. A document that was not sealed in the district court will not be sealed in the Court of Appeals without a Court order. A party wishing to file a paper under seal with the Court of Appeals must make a written motion. An informal request to seal a document will not be entertained. All papers submitted to the Court pursuant to a sealing order must be submitted in a sealed envelope, marked SEALED, with a copy of the order placing the document under seal attached to the envelope.
Third	Local Appellate Rule 25.3	Certain personal identifiers must be excluded or redacted from all documents filed with the court as specified in L.A.R. Misc. 113.12 and Judicial Conference Policy.
Third	Local Appellate Rule 27.2	(c) Certain personal identifiers must be excluded or redacted from all documents filed with the court as specified in L.A.R. Misc. 113.12 and Judicial Conference Policy.
Third	Local Appellate Rule 28.3	(c) All assertions of fact in briefs must be supported by a specific reference to the record. All references to portions of the record contained in the appendix must be supported by a citation to the appendix, followed by a parenthetical description of the document referred to, unless otherwise apparent from context. Hyperlinks to the electronic appendix may be added to the brief. If hyperlinks are used, the brief must also contain immediately preceding the hyperlink a reference to the paper appendix page. Hyperlinks to testimony must be to a transcript. A motion must be filed and granted seeking permission to hyperlink to an audio or video file before such links may be included in the brief or appendix. Hyperlinks may not be used to link to sealed or restricted documents.

Third	Local Appellate Rule 30.1	(c) In addition to an electronic and paper appendix, hyperlinks to the appendix may be added to the brief. If hyperlinks are used, the brief must also contain immediately preceding the hyperlink a reference to the paper appendix page. Hyperlinks to testimony must be to a transcript. A motion must be filed and granted seeking permission to hyperlink to an audio or video file before such links may be included in the brief or appendix. Hyperlinks may not be used to link to sealed or restricted documents.
Third	Local Appellate Rule 30.3	(b) Records sealed in the district court and not unsealed by order of the court must be not be included in the paper appendix. Paper copies of sealed documents must be filed in a separate sealed envelope. When filed electronically, sealed documents must be filed as a separate docket entry as a sealed volume.
Third	Local Appellate Rule 30.3	(c) In an appeal challenging a criminal sentence, the appellant must file, at the time of filing the appendix, four copies of the Presentence Investigation Report and the statement of reasons for the sentence, in four sealed envelopes appropriately labeled. Grand jury materials protected by Fed. R. Crim. P. 6(c), presentence reports, statements of reasons for the sentence and any other similar material in a criminal case or a case collaterally attacking a conviction (cases under 28 U.S.C. §§ 2241, 2254, 2255) must be filed electronically and in paper as separate sealed volumes.
Third	Local Appellate Rule 32.1	(e) Certain personal identifiers must be excluded or redacted from all documents filed with the court as specified in L.A.R. Misc. 113.12 and Judicial Conference policy.
Third	Local Appellate Rule 32.2	(e) Certain personal identifiers must be excluded or redacted from all documents filed with the court as specified in L.A.R. Misc. 113.12 and Judicial Conference policy.
Third	Local Appellate Rule 32.3	(c) Certain personal identifiers must be excluded or redacted from all documents filed with the court as specified in L.A.R. Misc. 113.12 and Judicial Conference policy.
Third	Local Appellate Rule 35.2	(b) Certain personal identifiers must be excluded or redacted from all documents filed with the court as specified in L.A.R. Misc. 113.12 and Judicial Conference policy.
Third	Local Appellate Rule 40.1	(b) Certain personal identifiers must be excluded or redacted from all documents filed with the court as specified in L.A.R. Misc. 113.12 and Judicial Conference policy.

Third	Local Appellate Rule 106.1	(a) Generally. With the exception of matters relating to grand jury investigations, filing of documents under seal without prior court approval is discouraged. If a party believes a portion of a brief or other document merits treatment under seal, the party must file a motion setting forth with particularity the reasons why sealing is deemed necessary. Any other party may file objections, if any, within 7 days. A motion to seal must explain the basis for sealing and specify the desired duration of the sealing order. If discussion of confidential material is necessary to support the motion to seal, the motion may be filed provisionally under seal. Rather than automatically requesting the sealing of an entire brief, motion, or other filing, litigants should consider whether argument relating to sealed materials may be contained in a separate sealed supplemental brief, motion or filings. Sealed documents must not be included in a regular appendix, but may be submitted in a separate, sealed volume of the appendix. In addressing material under seal (except for the presentencing report) in an unsealed brief or motion or oral argument counsel are expected not to disclose the nature of the sealed material and to apprise the court that the material is sealed.
Third	Local Appellate Rule 106.1	(b) Grand Jury Matters. In matters relating to grand jury investigations, when there is inadequate time for a party to file a motion requesting permission to file documents under seal, the party may file briefs and other documents using initials or a John or Jane Doe designation to avoid disclosure of the identity of the applicant or the subject matter of the grand jury investigation. Promptly thereafter, the party must file a motion requesting permission to use such a designation. All responsive briefs and other documents must follow the same format until further order of the court.
Third	Local Appellate Rule 106.1	(c) Records Impounded in the District Court. (1) Criminal Cases and Cases Collaterally Attacking Convictions. Grand jury materials protected by Fed. R. Crim. P. 6(c), presentence reports, statements of reasons for the sentence and any other similar material in a criminal case or a case collaterally attacking a conviction (cases under 28 U.S.C. §§ 2241, 2254, 2255), which were filed with the district court under seal pursuant to statute, rule or an order of impoundment, and which constitute part of the record transmitted to this court, remain subject to the district court's impoundment order and will be placed under seal by the clerk of this court until further order of this court. In cases in which impounded documents other than grand jury materials, presentence reports, statements of reasons for the sentence, or other documents required to be sealed by statute or rule, are included in the record transmitted to this court under L.A.R. 11.2, the party seeking to have the document sealed must file a motion within 21 days of receiving notice of the docketing of the appeal in this court, explaining the basis for sealing and specifying the desired duration of the sealing order. If discussion of confidential material is necessary to support the motion to seal, the motion may be filed provisionally under seal.

Third	Local Appellate Rule 106.1	(c) … (2) Civil Cases. When the district court impounds part or all of the documents in a civil case, they will remain under seal in this court for 30 days after the filing of the notice of appeal to give counsel an opportunity to file a motion to continue the impoundment, setting forth the reasons therefor. A motion to continue impoundment must explain the basis for sealing and specify the desired duration of the sealing order. If the motion does not specify a date, the documents will be unsealed, without notice to the parties, five years after conclusion of the case. If discussion of confidential material is necessary to support the motion to seal, the motion may be filed provisionally under seal. If a motion to continue impoundment is filed, the documents will remain sealed until further order of this court.
Third	Local Appellate Rule 106.1	Committee Comments: Prior Court Rule 21.3 has no counterpart in FRAP and is therefore classified as Miscellaneous. The rule has been revised to place an affirmative obligation to file a motion on the party in a civil matter who wishes to continue the sealing of documents on appeal. The archiving center will not accept sealed documents, which presents storage problems for the court. The rule has been amended to require the parties to specify how long documents must be kept under seal after the case is closed. The rule was amended in 2008 to provide that unless otherwise specified, documents in civil cases would remain sealed only for five years.
Third	Local Appellate Rule 113.1	(d) By local rule or order of the court or clerk, electronic access to entire case files or portions thereof may be restricted to the parties and the court. Public documents, except those filed under seal, may be viewed at the clerk's office.
Third	Local Appellate Rule 113.7	(a) A motion to file documents under seal may be filed electronically unless prohibited by law, local rule, or court order. (b) If the court grants the motion, the order of the court authorizing the filing of documents under seal may be filed electronically unless prohibited by law. (c) With permission of the clerk, documents ordered placed under seal may be filed in paper form only. A paper copy of the authorizing order must be attached to the documents under seal and delivered to the clerk. (d) Ex parte motions, e.g. to file a document under seal, must be filed in paper form only.
Third	Local Appellate Rule 113.7	Comments: The court's electronic filing system is capable of accepting sealed documents electronically from filing users, either directly into a sealed case in which the attorney is a participant or as a sealed filing in an otherwise unsealed case. See L.A.R. Misc. 113.4, which addresses service of sealed documents filed electronically. See L.A.R. Misc. 113.12 for other provisions addressing privacy concerns arising from electronic filing. Attorneys must not include private and/or confidential information in their motions to file a document under seal and must fulfill their obligations under L.A.R. Misc. 113.12.

Third	Local Appellate Rule 113.12	(a) Parties, counsel, or other persons filing any document, whether electronically or in paper, must refrain from including, or must partially redact where inclusion is necessary, the following personal data identifiers from all documents filed with the court, including exhibits thereto, whether filed electronically or in paper, unless otherwise ordered by the court: (1) Social Security numbers. If an individual's Social Security number must be included, only the last four digits of that number should be used. (2) Names of minor children. If the involvement of a minor child must be mentioned, only the initials of that child should be used. (3) Dates of birth. If an individual's date of birth must be included, only the year should be used. (4) Financial account numbers. If financial account numbers are relevant, only the last four digits of these numbers should be used. (5) Home addresses. In criminal cases, if a home address must be included, only the city and state should be listed.
Third	Local Appellate Rule 113.12	(b) In compliance with the E-Government Act of 2002, a party wishing to file a document containing the personal data identifiers listed above may: (1) File an un-redacted version of the document under seal, or (2) File a reference list under seal. The reference list must contain the complete personal data identifier(s) and the redacted identifier(s) used in its(their) place in the filing. All references in the case to the redacted identifiers included in the reference list will be construed to refer to the corresponding complete personal data identifier. The reference list must be filed under seal, and may be amended as of right.
Third	Local Appellate Rule 113.12	(c) The un-redacted version of the document or the reference list must be retained by the court as part of the record. The court may, however, still require the party to file a redacted copy for the public file. (d) The responsibility for redacting these personal identifiers rests solely with the party, counsel, or other person filing the document. The clerk will not review each pleading for compliance with this rule.

Third	Local Appellate Rule 113.12	Comments: It is each filer's responsibility to redact information from documents submitted by the filer. Documents containing prohibited personal identifiers must be redacted by the parties so as not to include un-redacted Social Security numbers, financial account numbers, names of minor children, or dates of birth. In criminal cases, home addresses also must be redacted. Information should be provided in shortened form, rather than completely omitted, with Social Security numbers represented as XXX-XX-1234, financial account numbers reduced to the last four digits, names of minor children represented as initials, dates of birth represented by year, and home addresses listed only by city and state. Parties should consult the "Guidance for Implementation of the Judicial Conference Policy on Privacy and Public Access to Electronic Criminal Case Files." This Guidance explains the policy permitting remote public access to electronic criminal case file documents and sets forth redaction and sealing requirements for documents that are filed. The Guidance also lists documents for which public access should not be provided. A copy of the Guidance is available at the court's website. For further information on privacy issues, see the Judicial Conference policies on privacy and public access to documents filed in civil, criminal, and bankruptcy cases, as well as section 205(c) of the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2914, as amended by Pub. L. No. 108-281, 118 Stat. 889 (2004).
Third	Local Appellate Rule 113.13	(a) Electronically filed documents may contain the following types of hyperlinks: (1) Hyperlinks to other portions of the same document; and (2) Hyperlinks to a location on the Internet or PACER, e.g. the appendix, that contains a source document for a citation. If hyperlinks are used in the brief, counsel must also include immediately preceding the hyperlink a reference to the paper appendix page. Hyperlinks to testimony must be to a transcript. A motion must be filed and granted seeking permission to hyperlink to an audio or video file before such links may be included in the brief or appendix. Hyperlinks may not be used to link to sealed or restricted documents.
Third	IOP 10.5.2	Without limiting I.O.P. 10.5.1, this court as a matter of practice refers to a single judge, the following motions: ... (h) motions to unseal or seal.

Fourth	Rule 25(c)	(1) Certificates of Confidentiality. At the time of filing any appendix, brief, motion, or other document containing or otherwise disclosing materials held under seal by another court or agency, counsel or a pro se party shall file a certificate of confidentiality. (A) Record material held under seal by another court or agency remains subject to that seal on appeal unless modified or amended by the Court of Appeals. (B) A certificate of confidentiality must accompany any filing which contains or would otherwise disclose sealed materials. The certificate of confidentiality shall: (i) identify the sealed material; (ii) list the dates of the orders sealing the material or, if there is no order, the lower court or agency's general authority to treat the material as sealed; (iii) specify the terms of the protective order governing the information; and (iv) identify the appellate document that contains the sealed information.
Fourth	Rule 25(c)	(2) Motions to Seal. Motions to seal all or any part of the record are presented to and resolved by the lower court or agency in accordance with applicable law during the course of trial, hearing, or other proceedings below. (A) A motion to seal may be filed with the Court of Appeals when: (i) a change in circumstances occurs during the pendency of an appeal that warrants reconsideration of a sealing issue decided below; (ii) the need to seal all or part of the record on appeal arises in the first instance during the pendency of an appeal; or (iii) additional material filed for the first time on appeal warrants sealing. (B) Any motion to seal filed with the Court of Appeals shall: (i) identify with specificity the documents or portions thereof for which sealing is requested; (ii) state the reasons why sealing is necessary; (iii) explain why a less drastic alternative to sealing will not afford adequate protection; and (iv) state the period of time the party seeks to have the material maintained under seal and how the material is to be handled upon unsealing. (C) A motion to seal filed with the Court of Appeals will be placed on the public docket for at least 5 days before the Court rules on the motion, but the materials subject to a motion to seal will be held under seal pending the Court's disposition of the motion.

Fourth	Rule 25(c)	(3) Filing of Confidential and Sealed Material. (A) Appendices: When sealed material is included in the appendix, it must be segregated from other portions of the appendix and filed in a separate, sealed volume of the appendix. (B) Briefs, Motions, and Other Documents: When sealed material is included in a brief, motion, or any document other than an appendix, two versions of the document must be filed: (i) a complete version under seal in which the sealed material has been distinctively marked and (ii) a redacted version of the same document for the public file. (C) Personal Data Identifying Information: Personal data identifying information, such as an individual's social security number, an individual's tax identification number, a minor's name, a person's birth date, a financial account number, and (in a criminal case) a person's home address, shall be filed in accordance with section 205(c)(3) of the E-Government Act of 2002 and FRAP 25(a)(5). (D) Marking of Sealed and Ex Parte Material: The first page of any appendix, brief, motion, or other document tendered or filed under seal shall be conspicuously marked SEALED and all copies shall be placed in an envelope marked SEALED. If filed ex parte, the first page and the envelope shall also be marked EX PARTE.
Fourth	Rule 25(c)	(E) Method of Filing: (i) Appendices: Appendices are filed in paper form only, with sealed material placed in a separate, sealed volume, accompanied by a certificate of confidentiality or motion to seal. A Notice of paper filing and either a certificate of confidentiality or a motion to seal are filed in electronic form. (ii) Formal Briefs: The sealed and public versions of formal briefs are filed in both paper and electronic form. The sealed version is accompanied by a certificate of confidentiality or motion to seal, that is also filed in both paper and electronic form. The electronic sealed version of the brief is filed using the entry SEALED BRIEF FILED, which automatically restricts electronic access to the Court. The electronic public version of the brief is filed using the entry BRIEF FILED. (iii) Other Documents: Any other sealed document is filed electronically using the entry SEALED DOCUMENT FILED, which automatically restricts electronic access to the Court. A certificate of confidentiality or motion to seal is also filed electronically. If filed electronically, paper copies of the sealed document are not required unless requested by the Court.

Fourth	Rule 25(c)	(F) Number of Paper Copies Filed and Served: Sealed documents must be served in paper form because electronic access to sealed documents is restricted to the Court. (i) Appendices: Sealed volumes--File four and serve one on each party separately represented. Unsealed volumes--File six (five if counsel was appointed, four if party is proceeding in forma pauperis without appointed counsel) and serve one on each party separately represented. (ii) Formal Briefs: Sealed version--File four and serve one on each party separately represented. Public version--File eight (six if counsel was appointed, four if party is proceeding in forma pauperis without appointed counsel). (iii) Other Documents: Sealed version--File one (none if filed electronically) and serve one paper copy on each party separately represented. Public version--File one (none if filed electronically).
Fourth	Rule 25(c)	(G) Responsibility for Compliance: The responsibility for following the required procedures in filing confidential and sealed material rests solely with counsel and the parties. The clerk will not review each filing for compliance with this rule. (H) Public Access: Parties must remember that any personal information not otherwise protected by sealing or redaction may be made available over the internet. Counsel should notify clients of this fact so that an informed decision may be made on what information is to be included in a document filed with the Court.
Fourth	Rule 30(b)	In all criminal appeals seeking review of the application of the sentencing guidelines, appellant shall include the sentencing hearing transcript and presentence report in the appendix. The presentence report must be included in a separate sealed volume, stamped "SEALED" on the volume itself and on the envelope containing it, and be accompanied by a certificate stating that the volume contains sealed material.
Fourth	Proposed amendment to Rule 30(b) [effective 9/1/11]	(4)(c) … For sealed volumes of the appendix, four paper copies must be filed and one paper copy must be served on lead counsel for each party separately represented who is authorized to have access to the sealed volume and on any party not represented by counsel who is authorized to have access to the sealed volume.
Fourth	Rule 31(d)	Filing and service of sealed and redacted versions of briefs are governed by Local Rule 25(c)(3)(F). [NB: proposed amendment, effective 9/1/11, would delete this portion of Rule 31(d)]
Fourth	Proposed amendment to Rule 31(d) [effective 9/1/11]	Sealed Briefs: For sealed briefs, four paper copies of the sealed version must be filed and one paper copy must be served on lead counsel for each party separately represented who is authorized to have access to the sealed version and on any party not represented by counsel who is authorized to have access to the sealed version. Filing and service of the public version of the brief are governed by (1) and (2) above.

Fourth	Appendix V [CM/ECF], Rule 4	(b) If a document (such as a sealed document or paper filing) cannot be served electronically, the filer must serve the document conventionally in accordance with the Federal Rules of Appellate Procedure and the Court's local rules.
Fourth	Appendix V, Rule 7	(a) Sealed material must be filed in accordance with Local Rule 25(c), which requires prominently marking the material as SEALED and filing it with a certificate of confidentiality or a motion to seal. (b) Sealed material must be filed using a specific entry--SEALED BRIEF FILED or SEALED DOCUMENT FILED--that automatically limits electronic document access to the Court. Since electronic access to sealed documents is restricted to the Court, sealed documents must be served conventionally in accordance with the Federal Rules of Appellate Procedure and the Court's local rules.
Fourth	Appendix V, Rule 12	(a) Parties must refrain from including or redact the following personal data identifiers from documents filed with the Court whenever such redaction is required by FRAP 25(a)(5): (i) Social security numbers. If an individual's Social Security number must be included, only the last four digits of that number should be used. (ii) Names of minor children. If the involvement of a minor child must be mentioned, only the initials of that child should be used. (iii) Dates of birth. If an individual's date of birth must be included, only the year should be used. (iv) Financial account numbers. If financial account numbers are relevant, only the last four digits of these numbers should be used. (v) Home addresses. In criminal cases, if a home address must be included, only the city and state should be listed.
Fourth	Appendix V, Rule 12	(b) The responsibility for redacting these personal data identifiers rests solely with counsel and the parties. The clerk will not review each pleading for compliance with this rule. (c) In accordance with FRAP 25(a)(5) and Rule 5.2(c) of the Federal Rules of Civil Procedure, remote public access to electronic documents in immigration and social security cases is limited to the Court's orders and opinions. Remote electronic access to other documents in immigration and social security cases is available only to parties and attorneys in the case who have registered through CM/ECF.

Fourth	IOP 34.3	Effective with its May 2011 argument session, the Court will make audio files of oral arguments available on the Court's Internet site, without charge, two days after argument. Counsel are reminded that the following information should not be included in argument to the Court: (A) Personal data protected by Fed. R. App. P. 25(a)(5): (1) social security and taxpayer identification numbers; (2) dates of birth; (3) names of minor children; (4) financial account numbers; and (5) home addresses in criminal cases. (B) Criminal case information protected by the Judiciary's Privacy Policy for Electronic Case Files: (1) unexecuted summonses or warrants; (2) pretrial bail or presentence investigation reports; (3) statements of reasons in the judgment of conviction; (4) juvenile records; (5) identifying information about jurors or potential jurors; (6) financial affidavits filed under the Criminal Justice Act; (7) ex parte requests to authorize services under the Criminal Justice Act; and (8) sealed documents (e.g., motions for downward departure for substantial assistance, plea agreements indicating cooperation, or victim statements). Any motion to seal argument must be filed on the public docket at least five days before oral argument, in accordance with Local Rule 25(c)(2). Audio files of sealed arguments will not be released absent an order of the Court unsealing the argument.
Fourth	App. IV. Preparation of Appellate Transcript Guidelines, II.B.11	Appellant is required to review the transcript upon filing in the district court and provide the court reporter with a statement of the personal data identifiers, including the page number, line number, and text to be redacted, in accordance with the Judicial Conference Policy on Privacy and Public Access to Electronic Case Files.
Fourth	App. IV. Preparation of Appellate Transcript Guidelines, II.C.3	Appellee is required to review the transcript upon filing in the district court and provide the court reporter with a statement of the personal data identifiers, including the page number, line number, and text to be redacted, in accordance with the Judicial Conference Policy on Privacy and Public Access to Electronic Case Files.

Fourth	App. IV. Preparation of Appellate Transcript Guidelines, II.D.10	The court reporter must make any requested redactions to the transcript and file a redacted version of the transcript in the district court in accordance with the Judicial Conference Policy on Privacy and Public Access to Electronic Case Files. Notice of filing of the redacted version of the transcript must be sent to the court of appeals through CM/ECF.
Fifth	Rule 25.2.8	Sealed Documents. A Filing User may move to file documents under seal in electronic form if permitted by law, and as authorized in the court's electronic filing standards. The court's order authorizing or denying the electronic filing of documents under seal may be filed electronically. Documents ordered placed under seal may be filed traditionally in paper or electronically, as authorized by the court. If filed traditionally, a paper copy of the authorizing order must be attached to the documents under seal and delivered to the clerk.
Fifth	Rule 25.2.13	Public Access/Redaction of Personal Identifiers. Parties must refrain from including, or must partially redact where inclusion is necessary, certain personal data identifiers whether filed electronically or in paper form as prescribed in Fed. R. App. P. 25, Fed. R. Civ. P. 5.2(a), and Fed. R. Crim. P. 49.1. Responsibility for complying with the rules and redacting personal identifiers rests solely with counsel. The parties or their counsel may be required to certify compliance with these rules. The clerk will not review pleadings, and is not responsible for data redaction. Parties wishing to file a document containing the personal data identifiers referenced above may: file an un-redacted version of the document under seal, or file a reference list under seal. The list must contain the complete personal data identifier(s) and the redacted identifier(s) used in its (their) place in the filing. All references in the case to the redacted identifiers included in the reference list will be construed to refer to the corresponding complete personal data identifier. The reference list must be filed under seal, and may be amended as of right. The court will retain the un-redacted version of the document or the reference list as part of the record. The court may require the party to file a redacted copy for the public file.
Fifth	Rule 47.10.3	(c) Presentence Report. If a notice of appeal is filed as authorized by 18 U.S.C. § 3742(a) and (b) for review of a sentence, the clerk will transmit to this court the presentence report. The report is transmitted separately from other parts of the record on appeal and is labeled as a sealed record if sealed by the district court. (d) Presentence reports filed in this court as part of a record on appeal are treated as matters of public record except where the report, or a portion thereof was sealed by order of the district court. (e) Counsel wishing access to, or a copy of, sealed presentence reports, or portions of such reports, may request them from the clerk's office by such means as the clerk permits. Counsel must return the copy of the presentence report, without duplicating it. Counsel should avoid disclosure of confidential matters in their public filings.

Fifth	ECF Filing Standards, Part C(1)	Proposed sealed materials, or those already sealed, may be filed electronically by taking the actions prescribed for sealed items. Failure to follow these steps will result in public disclosure of sensitive material. ECF filers solely are responsible for ensuring that sealed materials are filed appropriately, see also 5TH CIR. R. 25.2.8.
Sixth	Rule 25	(b) Exceptions to Electronic Filing. The following documents shall not be filed electronically, but shall be filed in paper format: ... (8) Documents filed under seal;
Sixth	Rule 25	(g) Redaction of Certain Information Contained in Documents Filed with the Court. All documents filed with the court must comply with the privacy protection requirements set forth in Fed. R. App. P. 25(a)(5), regardless of whether a document is filed electronically or in paper. It is the responsibility of the filer to redact documents in the manner required by Fed. R. App. P. 25(a)(5).
Sixth	Rule 25	(j) Documents Filed Under Seal. (1) A motion to file documents under seal may be filed electronically unless prohibited by law, local rule, or court order. If the court grants the motion, the order authorizing the filing of documents under seal may be filed electronically unless prohibited by law. Documents ordered placed under seal must be filed in paper format in a sealed envelope. The face of the envelope containing such documents shall contain a conspicuous notation that it contains "DOCUMENTS UNDER SEAL," or substantially similar language, and shall have attached to it a paper copy of the order authorizing the filing of the documents under seal. (2) Documents filed under seal in the court from which an appeal is taken shall continue to be filed under seal on appeal to this court. Documents filed under seal shall be filed in paper format and shall comply with all filing requirements of the court that originally ordered or otherwise authorized the documents to be filed under seal.
Sixth	Rule 28	(g) Briefs as Public Record. Briefs filed with this court are a matter of public record. If counsel finds it necessary to refer in a brief to information that has been placed under seal, counsel should not assume that the brief itself also will be placed under seal. In order to have all or part of a brief sealed, counsel must file a specific and timely motion seeking such relief.

Sixth	Rule 30(f)	(5) Inclusion of Sealed Record Items. If in counsel's opinion it is necessary to include sealed items, a copy of the sealed item(s) must be placed in a separate sealed envelope and filed with the clerk. An appropriate notation on the cover of the envelope should specify the nature of the sealed enclosure. The balance of the appendix will be treated as part of the public record. The sealed item will not. Counsel is cautioned against attempting to use this procedure to hold out of public view items not previously sealed by order of either the district court or this court. That relief can be had only by way of a timely motion specifically requesting that relief.
Sixth	IOP 11(b)	(b) Pre-Sentence Reports. The circuit clerk will obtain the pre-sentence report and any objections thereto. The court will keep these materials confidential.
Sixth	IOP 11(d)	Sealed Records. Where a record has been transmitted to this Court which has been sealed, in whole or in part, by order or other direction of the district court, this Court will accord the record the same confidential treatment during the pendency of the appeal. The sealed item(s) will be unsealed and made a part of the public record only upon the order of the district court or this Court.
Sixth	Guide to Electronic Filing 3.2	All electronically filed documents must be in PDF form and must conform to all technical requirements established by the Judicial Conference or the court. Whenever possible, documents must be in Native PDF form and not created by scanning. The following documents are exempted from the electronic filing requirement and are to be filed in paper format: ... (8) Documents filed under seal; ...
Sixth	Guide to Electronic Filing 7	Documents Filed Under Seal 7.1. A motion to file documents under seal may be filed electronically unless prohibited by law, local rule, or court order. If the court grants the motion, the order authorizing the filing of documents under seal may be filed electronically unless prohibited by law. Documents ordered placed under seal must be filed in paper format in a sealed envelope. The face of the envelope containing such documents shall contain a conspicuous notation that it contains "DOCUMENTS UNDER SEAL," or substantially similar language, and shall have attached to it a paper copy of the order authorizing the filing of the documents under seal. 7.2. Documents filed under seal in the court from which an appeal is taken shall continue to be filed under seal on appeal to this court. Documents filed under seal shall be filed in paper format and shall comply with all filing requirements of the court that originally ordered or otherwise authorized the documents to be filed under seal.

Sixth	Guide to Electronic Filing 11.1	Access to all documents maintained electronically, except those filed under seal, is available to any person through the PACER system.
Sixth	Guide to Electronic Filing 12	In accordance with Fed. R. App. P. 25(a)(5), registered attorneys must redact all documents, including briefs, consistent with the privacy policy of the Judicial Conference of the United States. Required redactions include social security numbers and taxpayer identification numbers (the filer shall include only the last four digits of a social security or tax identification number), birth dates (use year of birth only), minors' names (initials may be used), and financial account numbers (except those identifying property allegedly subject to forfeiture in a forfeiture proceeding). It is the responsibility of the filer to redact pleadings appropriately. Pursuant to the privacy policy of the Judicial Conference and applicable statutory provisions, remote electronic access to immigration and social security dockets is limited to the attorneys in the case who are registered in ECF. In this regard, the clerk will restrict electronic public access in these cases to judges, court staff, and the parties and attorneys in the appeal or agency proceeding. The court will not restrict access to orders and opinions in these cases. Parties seeking to restrict access to orders and opinions must file a motion explaining why that relief is required in a given case.
Seventh	Rule 10	(f) Presentence Reports. The presentence report is part of the record on appeal in every criminal case. The district court should transmit this report under seal, unless it has already been placed in the public record in the district court. If the report is transmitted under seal, the report may not be included in the appendix to the brief or the separate appendix under Fed. R. App. P. 30 and Circuit Rule 30. Counsel of record may review the presentence report at the clerk's office but may not review the probation officer's written comments and any other portion submitted in camera to the trial judge.
Seventh	Rule 26.1	(b) Contents of Statement. The statement must disclose the names of all law firms whose partners or associates have appeared for the party or amicus in the case (including proceedings in the district court or before an administrative agency) or are expected to appear in this court. If any litigant is using a pseudonym, the statement must disclose the litigant's true name. A disclosure required by the preceding sentence will be kept under seal.
Seventh	IOP 10	(a) Requirement of Judicial Approval. Except to the extent portions of the record are required to be sealed by statute (e.g., 18 U.S.C. § 3509(d)) or a rule of procedure (e.g., Fed. R. Crim. P. 6(e), Circuit Rule 26.1(b)), every document filed in or by this court (whether or not the document was sealed in the district court) is in the public record unless a judge of this court orders it to be sealed. (b) Delay in Disclosure. Documents sealed in the district court will be maintained under seal in this court for 14 days, to afford time to request the approval required by section (a) of this procedure.

Seventh	Website: Electronic Case Filing Procedures	(g) Sealed Documents (1) A motion to file documents under seal must be filed electronically unless prohibited by law, local rule, or court order. (2) Proposed sealed materials must be filed electronically by following the directions provided with the electronic filing system. Failure to follow these directions will result in public disclosure of sensitive material. Attorney Filing Users are responsible for ensuring that sealed materials are filed appropriately. (3) If the court grants the motion, the order of the court authorizing the filing of documents under seal may be filed electronically unless prohibited by law. (4) Documents ordered placed under seal may be filed traditionally in paper or electronically, as authorized by the court. If filed traditionally, a paper copy of the authorizing order must be attached to the documents under seal and delivered to the Clerk.
Eighth	Rule 25A(g)	Sealed Documents. Sealed documents must only be filed in paper format. Motions for permission to file a document under seal must also be filed in paper format. The motion should state whether the filing party believes the motion to seal may be made publically available on PACER or should remain sealed.
Eighth	Rule 25A(h)	Privacy. In compliance with the privacy policies of the Judicial Conference of the United States and in order to address the privacy concerns created by Internet access to court documents, parties must refrain from including, or must partially redact where inclusion is necessary, the following personal data identifiers from all documents filed with the court: 1. Minors' names (use initials only); 2. Social Security numbers (use last four digits only); 3. Dates of birth (use year of birth only); 4. Financial account numbers (identify the type of account and institution and provide the last four digits of the account number); and 5. Home address information (use phrases such as the "4000 block of Elm"). 6. The Addendum to a criminal brief must not include the Statement of Reasons or other confidential sentencing materials. The filer bears sole responsibility for redacting documents.

Ninth	Rule 3-5	CIRCUIT ADVISORY COMMITTEE NOTE TO RULE 3-5 A recalcitrant witness summarily ordered confined pursuant to 28 U.S.C. § 1826(a) is entitled to have the appeal from the order of confinement decided within 30 days after the filing of the notice of appeal. In the interest of obtaining a rapid disposition of the appeal, the court impresses upon counsel that the record on appeal and briefs must be filed with the court as soon as possible after the notice of appeal is filed. The court will establish an expedited schedule for filing the record and briefs and will submit the appeal for decision on an expedited basis. If expedited treatment is sought for an interlocutory appeal, motions for expedition, summary affirmance or reversal, or dismissal may be filed pursuant to Circuit Rule 27-4. A party may file documents using a Doe designation or under seal to avoid disclosure of the identity of the applicant or the subject matter of the grand jury investigation. The party should file an accompanying motion to use such a designation.
Ninth	Rule 25-5(b)	Documents excluded from electronic filing requirement. ... (9) Documents to be maintained under seal and motions seeking leave to file a document under seal under Circuit Rule 27-13; ...
Ninth	Rule 25-5	CIRCUIT ADVISORY COMMITTEE NOTE TO RULE 25-5 The parties are reminded of their obligations under FRAP 25(a)(5) to redact personal identifiers.

Ninth	Rule 27-13	(a) Procedures. Sealed documents, notifications under subsection (b), and motions under subsection (c) of this rule must be filed in paper format. Cross Reference: • Circuit Rule 25-5. Electronic Filing, specifically, Circuit Rule 25- 5(b)(9), Documents excluded from electronic filing requirement (b) Filing Under Seal. If the filing of any specific document or part of a document under seal is required by statute or a protective order entered below, the filing party shall file the materials or affected parts under seal together with an unsealed and separately captioned notification setting forth the reasons the sealing is required. Notification as to the necessity to seal based on the entry of a protective order shall be accompanied by a copy of the order. Any document filed under seal shall have prominently indicated on its cover and first page the words "under seal." (c) Motions to Seal. A motion to seal may be made on any grounds permitted by law. Any motion to file a brief, excerpts of record, or other material under seal shall be filed simultaneously with the relevant document, which may be filed provisionally under seal. The motion shall indicate whether the party wishes to withhold from public disclosure any specific information, such as the names of the parties and shall state whether the motion itself as well as the referenced materials should be maintained under seal. The document will remain sealed on a provisional basis until the court rules on the motion. Unless otherwise requested in the motion or stated in the order, the seal will not preclude court staff from viewing sealed materials. (d) Motions to Unseal. A motion to unseal may be made on any grounds permitted by law. During the pendency of an appeal, any party may file a motion with this court requesting that matters filed under seal either in the district court or this court be unsealed. Any motion shall be served on all parties. CIRCUIT ADVISORY COMMITTEE NOTE TO RULE 27-13 Absent an order to the contrary, any portion of the district court or agency record that was sealed below shall remain under seal upon transmittal to this court.
Ninth	30-1.10	In all cases in which the presentence report is referenced in the brief, the party filing such brief must forward 4 paper copies of the presentence report and may forward 4 copies of any other relevant confidential sentencing documents under seal to the Clerk of the Court of Appeals. This filing shall be accomplished by mailing the 4 copies of the presentence report in a sealed envelope which reflects the title and number of the case and that 4 copies of the presentence report are enclosed. The copies of the presentence report shall accompany the excerpts of record. The presentence report shall remain under seal but be provided by the Clerk to the panel hearing the case

Ninth	General Orders Appendix A: Disposition of Motions by the Clerk	Pursuant to Circuit Rule 27-7, the Court has delegated the authority to decide the following motions to deputized court staff. Unless otherwise noted, a motion can be acted upon by a deputy clerk, staff attorney, circuit mediator or appellate commissioner. Orders are subject to reconsideration pursuant to Circuit Rule 27-10. ... (25) to grant an unopposed motion to file a document under seal when the document was maintained under seal below, the seal is required by law or filing under seal is necessary to preserve the provisions of a protective order entered below.
Tenth	Rule 11.3	(D) Sealed Materials. (1) When materials sealed by district court order are sent as part of the record, the district clerk must: (a) separate the sealed materials from other portions of the record; (b) enclose them in an envelope clearly marked "Sealed" if forwarded in hard copy or identify them as sealed in a separate electronic volume when transmitted; and (c) affix a copy of the sealing order to the outside of the envelope if the sealed material is not available electronically. (2) A party who needs to view a sealed document must file a motion giving the reasons why access is required. (E) Presentence investigation reports. Presentence reports are confidential. If a presentence report needs to be sent as part of the record on appeal, the district clerk must treat it like sealed material under (D).
Tenth	Rule 11.4	When the district court submits a record electronically, the various volumes shall be forwarded as separate pdf files. Pleadings must be bookmarked and sealed volumes shall be identified as such.
Tenth	Rule 25.5	All filers are required to follow the privacy and redaction requirements of Fed. R. App. P. 25(a)(5), as well as the applicable federal rules of civil procedure, criminal procedure, and the relevant bankruptcy rule. See Fed. R. Civ. P. 5.2; Fed. R. Crim. P. 49.1; Fed. R. Bankr. P. 9037. Required redactions include social security numbers and tax identification numbers (filers may disclose the last four digits of a social security or tax identification number), birth dates (use year of birth only), minors' names (initials may be used), and financial account numbers (except those identifying property allegedly subject to forfeiture in a forfeiture proceeding). It is the sole responsibility of the filer to redact pleadings appropriately.
Tenth	Rule 30.1(C)(4)	Sealed Documents. Copies of documents under seal in the district court, such as presentence reports, should be filed in a separate volume, under seal.

Tenth	NO. 95-01. IN RE: ELECTRONIC SUBMISSION OF DOCUMENTS AND CONVERSION TO ELECTRONIC CASE FILING GENERAL ORDER II.D	Sealed Materials. The ECF system includes events specifically intended for use in submitting sealed materials. Counsel and litigants may file a sealed motion, response or brief. Any failure to select the "Sealed Briefs and Motions" category in ECF will result in a public, rather than private, submission. Counsel and litigants are responsible for ensuring that sealed materials are filed using these events. Parties seeking to submit a motion to seal materials simultaneously with the materials should use these events even if the motion is not submitted as sealed.
Tenth	NO. 95-01. IN RE: ELECTRONIC SUBMISSION OF DOCUMENTS AND CONVERSION TO ELECTRONIC CASE FILING GENERAL ORDER IV	All filers are required to follow the privacy and redaction requirements of Fed. R. App. P. 25(a)(5), as well as applicable federal rules of civil procedure, criminal procedure and the relevant bankruptcy rule. See Fed. R. Civ. P. 5.2; Fed. R. Crim. P. 49.1; Fed. R. Bankr. P. 9037. Required redactions include social security numbers and taxpayer identification numbers (filers may disclose the last four digits of a social security or tax identification number), birth dates (use year of birth only), minors' names (initials may be used), and financial account numbers (except those identifying property allegedly subject to forfeiture in a forfeiture proceeding). It is the sole responsibility of the filer to redact pleadings appropriately.

Tenth	NO. 95-01. IN RE: ELECTRONIC SUBMISSION OF DOCUMENTS AND CONVERSION TO ELECTRONIC CASE FILING GENERAL ORDER V	B. Certification. In addition to a certificate of service, all ECF pleadings shall include certification that: (1) all required privacy redactions have been made …
Eleventh	ELECTRONIC RECORDS ON APPEAL PROGRAM COMPONENTS	(A) The appellant will be required to file expanded record excerpts that contain, in addition to the documents already required by 11th Cir. R. 30- 1, these things: ... 5) In an appeal from a criminal case in which any issue is raised involving the sentence, a copy of the transcript of the sentence proceeding, and a copy of the presentence investigation report and addenda (under seal in a separate envelope). ... In an appeal by an incarcerated pro se party, counsel for appellee must submit expanded record excerpts that include the specific portions of any record materials (except sealed materials) referred to in either appellant's or appellee's briefs or that are necessary to the resolution of an issue on appeal. ...

Eleventh	Rule 25-5	In order to promote electronic access to case files while also protecting personal privacy and other legitimate interests, parties shall refrain from including, or shall partially redact where inclusion is necessary, the following personal data identifiers from all pleadings filed with the court, including exhibits thereto, whether filed electronically or in paper, unless otherwise ordered by the court. a. Social Security numbers and Taxpayer Identification numbers. If an individual's social security number or taxpayer identification number must be included in a pleading, only the last four digits of that number should be used. b. Names of minor children. If the involvement of a minor child must be mentioned, only the initials of that child should be used. For purposes of this rule, a minor child is any person under the age of eighteen years, unless otherwise provided by statute or court order. c. Dates of birth. If an individual's date of birth must be included in a pleading, only the year should be used. d. Financial account numbers. If financial account numbers are relevant, only the last four digits of these numbers should be used. e. Home addresses. If a home address must be included, only the city and state should be used. [cont'd]
Eleventh	Rule 25-5	Subject to the exemptions from the redaction requirement contained in the Federal Rules of Civil, Criminal, and Bankruptcy Procedure, as made applicable to the courts of appeals through FRAP 25(a)(5), a party filing a document containing the personal data identifiers listed above shall file a redacted document for the public file and either: (1) a reference list under seal. The reference list shall contain the complete personal data identifier and the redacted identifier used in its place in the redacted filing. All references in the filing to the redacted identifiers included in the reference list will be construed to refer to the corresponding complete personal data identifiers. The reference list must be filed under seal, may be amended as of right, and shall be retained by the court as part of the record. A motion to file the reference list under seal is not required. Or (2) an unredacted document under seal, along with a motion to file the unredacted document under seal specifying the type of personal data identifier included in the document and why the party believes that including it in the document is necessary or relevant. If permitted to be filed, both the redacted and unredacted documents shall be retained by the court as part of the record. The responsibility for redacting these personal data identifiers rests solely with counsel and the parties. The clerk will not review each pleading for compliance with this rule. A person waives the protection of this rule as to the person's own information by filing it without redaction and not under seal. [cont'd]

Eleventh	Rule 25-5	Consistent with FRAP 25(a)(5), electronic public access is not provided to pleadings filed with the court in social security appeals and immigration appeals. Therefore, parties in social security appeals and immigration appeals are exempt from the requirements of this rule. In addition to the foregoing, a party should exercise caution when filing a document that contains any of the following information. A party filing a redacted document that contains any of the following information must comply with the rules for filing an unredacted document as described in numbered paragraph (2) above. • Personal identifying number, such as driver's license number; • medical records, treatment and diagnosis; • employment history; • individual financial information; • proprietary or trade secret information; • information regarding an individual's cooperation with the government; • national security information; • sensitive security information as described in 49 U.S.C. § 114(s).
Eleventh	Rule 25-6	(a) When any paper filed with the court, including motions and briefs, contains: (1) ad hominem or defamatory language; or (2) information the public disclosure of which would constitute a clearly unwarranted invasion of personal privacy; or (3) information the public disclosure of which would violate legally protected interests, the court on motion of a party or on its own motion, may without prior notice take appropriate action. (b) The appropriate action the court may take in the circumstances described above includes ordering that: the document be sealed; specified language or information be stricken from the document; the document be struck from the record; the clerk be directed to remove the document from electronic public access; that the party who filed the document explain why including the specified language or disclosing specified information in the document is relevant, necessary, and appropriate or file a redacted or replacement document. (c) When the court takes such action under this rule without prior notice, the party may, within 14 days from the date the court order is issued, file a motion to restore language, information, or a document without alteration, setting forth with particularity any reasons why the action taken by the court is unwarranted. The timely filing of a motion to restore language, information, or a document will postpone the due date for filing any redacted or replacement document until the court rules on the motion.
Eleventh	General Order 10	If the presentence investigation report has been maintained under seal in the district court, the report shall be filed under seal in this Court. Upon written application to the clerk of this court, however, counsel for the defendant and for the government may examine the presentence investigation report or obtain a copy thereof, provided that counsel agrees not to duplicate the report or disclose the contents thereof to any person other than to the members of their staffs who have a need to know such contents and to the defendant.

Eleventh	General Order 33	[discussing requirements for pilot program:] Briefly stated, the prerequisites are that the district court must be able to provide the Court of Appeals with virtually the entire record electronically, including unredacted transcripts and sealed documents.
Federal	Rule 11	(b) Access of Parties and Counsel to the Original Record. (1) Material Not Subject to a Protective Order; Inspection and Copying. When a notice of appeal is filed, the trial court clerk must permit a party or counsel for a party to inspect and copy the nonconfidential original papers, transcripts, and exhibits to prepare the appendix. This inspection and copying is subject to reasonable regulation by the trial court. (2) Material Subject to a Protective Order; Inspection and Copying. A party or counsel for a party must be permitted to inspect and copy material in the record governed by a protective order of the trial court in accordance with that order. If this court modifies or annuls the protective order, the access of a party or counsel is governed by the order of this court. (c) Preserving a Protective Order on Appeal. Any portion of the record that was subject to a protective order in the trial court remains subject to that order unless otherwise ordered. (d) Agreement by Parties to Modify a Protective Order; Certificate of Compliance. If any portion of the record in the trial court is subject to a protective order and a notice of appeal has been filed, each party must promptly review the record to determine whether protected portions need to remain protected on appeal. If a party determines that some portions no longer need to be protected, that party must seek an agreement with the other party. Any agreement that is reached must be promptly presented to the trial court, which may issue an appropriate order. Whether or not an agreement is reached, each party must file a certificate of compliance within 45 days of docketing stating it complied with this rule. This Federal Circuit Rule 11(d) does not apply in a case arising under 19 U.S.C. § 1516a. (e) Motion to Modify the Protective Order. A party may move at any time in this court to modify a protective order to remove protection from some material or to include another person within its terms. This court may decide the motion or may remand the case to the trial court. This court, sua sponte, may direct the parties to show cause why a protective order should not be modified.

Federal	Rule 17	(d) Access of Parties and Counsel to Original Record. (1) Material Not Subject to a Protective Order; Inspection and Copying. When a petition for review or notice of appeal is filed, the agency must permit a party or counsel for a party to inspect and copy the nonconfidential original papers, transcripts, and exhibits to prepare the appendix. This inspection and copying is subject to reasonable regulation by the agency. (2) Material Subject to a Protective Order; Inspection and Copying. A party or counsel for a party must be permitted to inspect and copy material contained in the record governed by a protective order of an agency in accordance with that order. If this court modifies or annuls the protective order, the access of a party or counsel is governed by the order of this court. (e) Preserving a Protective Order on Appeal. Any portion of the record that was subject to a protective order in an agency remains subject to that order unless otherwise ordered. (f) Agreement by Parties to Modify Protective Order; Certificate of Compliance. If any portion of the record in an agency is subject to a protective order and a petition for review or notice of appeal has been filed, each party must promptly review the record to determine whether protected portions need to remain protected on appeal. If a party determines that some portions no longer need to be protected, that party must seek an agreement with the other party. Any agreement that is reached must be promptly presented to the agency, which may issue an appropriate order. Whether or not an agreement is reached, each party must file a certificate of compliance within 45 days of docketing stating it complied with this rule. (g) Motion to Modify the Protective Order. A party may move at any time in this court to modify a protective order to remove protection from some material or to include another person within its terms. This court may decide the motion or may remand the case to the agency. This court, sua sponte, may direct the parties to show cause why a protective order should not be modified.

Federal	Rule 27	(m) Motion Papers Containing Material Subject to a Protective Order. (1) Two Sets of Motion Papers. If a party refers in motion papers to material subject to confidentiality mandated by statute or to a judicial or administrative protective order, two sets of motion papers must be filed. (A) Confidential set; labeling; number of copies. One set of motion papers, consisting of the original and three copies, must be labeled "confidential" and filed with the court. If confidentiality will end on a date certain or upon the happening of an event, this must be stated on the cover, e.g., "CONFIDENTIAL UNTIL [DATE]," or "CONFIDENTIAL DURING JUDICIAL REVIEW." Each page containing confidential material must enclose this material in brackets or indicate this material by highlighting. (B) Nonconfidential set; labeling; number of copies. The second set of motion papers, consisting of the original and three copies from which confidential matter has been deleted, must be labeled "nonconfidential" and filed with the court. Each page from which material subject to a protective order has been deleted must bear a legend so stating. The introductory paragraph of the nonconfidential motion or response must describe the general nature of the confidential material that has been deleted. (2) Service. Each party to the appeal must be served two copies of the nonconfidential motion papers and, when permitted by the applicable protective order, two copies of the confidential motion papers. (3) Availability to the Public. The confidential motion papers will be made available only to authorized court personnel and must not be made available to the public. After 5 years following the end of all proceedings in the court, the parties may be directed to show cause why confidential motion papers (except those protected by statute) should not be made available to the public.
Federal	Rule 28	(d) Brief Containing Material Subject to a Protective Order. (1) Two Sets of Briefs. If a party refers in a brief to material subject to confidentiality mandated by statute or to a judicial or administrative protective order, two sets of briefs must be filed. (A) Confidential set; labeling; number of copies. One set of briefs, consisting of the original and eleven copies, must be labeled "confidential" and filed with the court. If confidentiality will end on a date certain or upon the happening of an event, this must be stated on the cover, e.g., "CONFIDENTIAL UNTIL [DATE]," or "CONFIDENTIAL DURING JUDICIAL REVIEW." Each page containing confidential material must enclose this material in brackets or indicate this material by highlighting. (B) Nonconfidential set; labeling; number of copies. The second set of briefs, consisting of the original and four copies from which confidential matter has been deleted, must be labeled "nonconfidential" and filed with the court. Each page from which material subject to a protective order has been deleted must bear a legend so stating. The table of contents of a nonconfidential brief must describe the general nature of the confidential material that has been deleted. (2) Service. Each party to the appeal must be served two copies of the nonconfidential brief and, when permitted by the applicable protective order, two copies of the confidential brief. (3) Availability to the Public. The confidential briefs will be made available only to authorized court personnel and must not be made available to the public. After 5 years following the end of all proceedings in the court,

		the parties may be directed to show cause why confidential briefs (except those protected by statute) should not be made available to the public.
Federal	Rule 28	Practice Notes Informal Brief. The informal brief procedure is explained in the Guide for Pro Se Petitioners and Appellants. Multiple Parties. When there are multiple parties represented by the same counsel or counsel from the same firm, a combined brief must be filed on behalf of all the parties represented by that counsel or firm. Describing the General Nature of Confidential Material Deleted from the Nonconfidential Brief. The following example is acceptable: CONFIDENTIAL MATERIAL OMITTED The material omitted on page 42 describes the circumstances of an alleged lost sale; the material omitted in the first line of page 43 indicates the dollar amount of an alleged revenue loss; the material omitted on page 44 indicates the quantity of the party's inventory and its market share; the material omitted in the text on page 45 describes the distributor's experiences concerning the inventories and order lead times; and the material omitted in the footnote on page 45 describes non-price factors affecting customers' preferences between competing methods. Justification for Claim of Confidentiality. Unnecessarily designating material in the briefs and appendix as confidential may hinder the court's preparation and issuance of opinions. Counsel must be prepared to justify at oral argument any claim of confidentiality.

Federal	Rule 30	(h) Appendices Containing Material Subject to a Protective Order. (1) Two Sets of Appendices. If a party refers in appendices to material subject to confidentiality mandated by statute or to a judicial or administrative protective order, two sets of appendices must be filed. (A) Confidential set; labeling; number of copies. One set of appendices, consisting of 12 copies of the complete appendix, must be labeled "confidential" and filed with the court. If confidentiality will end on a date certain or upon the happening of an event, this must be stated on the cover, e.g., "CONFIDENTIAL UNTIL [DATE]," or "CONFIDENTIAL DURING JUDICIAL REVIEW." The confidential appendix must include at the beginning (i.e., in front of the judgment or order appealed from) pertinent excerpts of any statutes imposing confidentiality or the entirety of any judicial or administrative protective order. Each page containing confidential material must enclose this material in brackets or indicate this material by highlighting. (B) Nonconfidential set; labeling; number of copies. The second set of appendices, consisting of the original and four copies from which confidential matter has been deleted, must be labeled "nonconfidential" and filed with the court. Each page from which material subject to a protective order has been deleted must bear a legend so stating. The table of contents of a nonconfidential appendix must describe the general nature of the confidential material that has been deleted. (2) Service. Each party to the appeal must be served two copies of the nonconfidential appendices and, when permitted by the applicable protective order, two copies of the confidential appendices. (3) Availability to the Public. The confidential appendices will be made available only to authorized court personnel and must not be made available to the public. After 5 years following the end of all proceedings in the court, the parties may be directed to show cause why confidential appendices (except those protected by statute) should not be made available to the public.
Federal	Rule 31	(b) Number of Copies. Except for briefs containing material subject to a protective order (see Federal Circuit Rule 28(d)), 12 copies of each brief, including the original or a copy designated as the original, must be filed with the court and 2 copies must be served on the principal counsel for each party, intervenor, and amicus curiae separately represented.
Federal	Rule 34	Practice Notes ... Justification for Claim of Confidentiality. Unnecessarily designating material in the briefs and appendix as confidential may hinder the court's preparation and issuance of opinions. Counsel must be prepared to justify at oral argument any claim of confidentiality.

Federal	Rule 35(c)	(4) Number of Copies. If only nonconfidential copies are filed, an original and eighteen copies of a petition for hearing or rehearing en banc must be filed with the court. Two copies must be served on each party separately represented. If confidential and nonconfidential copies are filed, an original and eighteen copies of the confidential petition and original and three copies of the nonconfidential petition must be filed with the court. Two copies of the confidential petition and one copy of the nonconfidential petition must be served on each party separately represented.
Federal	Rule 39	[Practice Notes:] Allowable Costs. Costs may be billed for 16 copies of briefs and appendices, plus 2 copies for each additional party, plus any copies required or allowed, e.g., confidential briefs or appendices….
Federal	Rule 47.8	On motion showing that the interest of justice requires it, the court may sit in camera, seal its record, or both.
Federal	Form 7. Appeal Information Sheet	Is this matter under seal? ____ Yes ____ No
Federal	Form 23. Bill of Costs Instruction Sheet	… The additional costs of confidential briefs and appendices should be incorporated in the quantity billed, e.g., a 50-page brief that has 15 confidential pages will allow 65 original pages to be billed. …
Federal	IOP 3.5	Briefs and other materials marked Confidential or Protected Materials and no longer needed in chambers, will be returned to the clerk for supervised destruction after the mandate has issued.

Federal	IOP 4	1. All materials (e.g., briefs, appendices, motions, parts of the record) that are subject to a protective order (see Fed. Cir. R. 11 and 17) shall on receipt be supplied with a large sticker stamped "Confidential" and placed on the front and back of the materials. Protected materials shall be disposed of upon completion of the case according to procedures established by the clerk. 2. The senior staff attorney and senior technical assistant shall endeavor to limit circulation of protected materials on an as-needed basis. 3. The clerk shall designate persons on his or her staff authorized to process protected materials. 4. Protected materials in the clerk's office shall be stored in a secure area. 5. After the case is closed, the clerk will return any original protected materials to the trial tribunal, and will destroy extra copies not required for permanent files of the court. 6. A case involving protected materials may be heard in camera, on motion or on sua sponte order of the court. 7. Oral argument in camera ordinarily shall be scheduled in a regular courtroom as the last case of a session. Before calling the case, the presiding judge shall order the courtroom cleared of all unauthorized persons. Counsel are solely responsible for persons seated at counsel table. Court employees authorized access to the protective materials, and whose duties require attendance, may remain during the hearing. 8. Electronic recordings of in camera hearings shall be considered and treated as protected materials. 9. Public or press inquiries about protected materials or in camera hearings will be referred to the clerk. 10. All court personnel shall be sensitive to the confidential nature of protected material.

TAB 6-A

MEMORANDUM

DATE: September 21, 2011

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 11-AP-B

During the course of the Committee's discussions of Item No. 10-AP-B (concerning statements of the case and the facts), members expressed interest in considering other possible amendments to Rule 28. The Committee discussed the possibility of amending Rule 28 to provide for an introduction to the brief. It also discussed the possibility of moving the statement of issues (currently provided for in Rule 28(a)(5)) so that it would follow rather than precede the statement of the case. Rather than fold those questions into its discussion of the statement of the case, the Committee designated them as a new agenda item.

This memo discusses that new item. Part I notes that few existing court rules address the question of introductions, but also that practitioners report that the practice is relatively common. Part II.A discusses possible advantages of addressing introductions in Appellate Rule 28, while Part II.B surveys possible disadvantages. Part III discusses how such a change might be implemented in Rule 28, including the possible effects on other subparts of Rule 28 (such as Rule 28(a)(5)).

I. Existing court rules and current practices

Few rules currently address introductions in briefs. One local circuit rule (in the Eighth Circuit) is on point. There are no Supreme Court rules on point. Three states have relevant provisions. Despite the relative dearth of provisions addressing introductions, experienced appellate litigators appear to use them with some frequency.

A. Local circuit provisions

Marie Leary's 2004 study on local briefing requirements did not mention any local circuit provisions concerning introductions in briefs. *See* Marie Leary, Analysis of Briefing Requirements in the United States Courts of Appeals: Report to the Judicial Conference Advisory Committee on Appellate Rules (FJC 2004). Admittedly, this study targeted local circuit *requirements* that briefs contain matter not required by the Appellate Rules, *see id.* at 3, and thus might not have uncovered provisions that merely *permitted* introductions rather than requiring them. This summer I performed a rough word search of local circuit provisions, and

found no provisions concerning introductions in briefs.[1] I also reviewed all local circuit provisions that are grouped under Rule 28, on the theory that those provisions would be most likely to address the question of introductions. That search disclosed only one relevant provision.[2] Eighth Circuit Rule 28A(i)(1) provides:

> SUMMARY OF THE CASE. Each appellant must file a statement not to exceed 1 page providing a summary of the case, the reasons why oral argument should or should not be heard, and the amount of time (15, 20, or 30 minutes, or in an extraordinary case, more than 30 minutes) necessary to present the argument. The summary must be placed as the first item in the brief. If appellee deems appellant's statement incorrect or incomplete, appellee may include a responsive statement in appellee's brief.

B. Supreme Court rules

The Supreme Court's rule governing merits briefs does not mention introductions. Under the rule, an introduction (as such) cannot be the first item in the brief, because that place is reserved for the Questions Presented. *See* Supreme Court Rule 24.1(a); *see also* Supreme Court Rule 14.1(a) (governing petitions for certiorari). As was noted during earlier Committee discussions, some lawyers include a few sentences in the Questions Presented section that might serve the purpose of an introduction.

C. State provisions

Thanks to the comprehensive research and thoughtful analysis that Holly Sellers performed in advance of the Committee's spring meeting, we know that three states have provisions that address the question of introductions in briefs.[3] One state – Kentucky – requires

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[1] On August 25, 2011, I ran the following search in Westlaw's USC database: pr,ci,ti(circuit & appeals) & brief & (introduc! preface prefatory preamble). I did not count as relevant a "preamble" the sole purpose of which is to discuss whether oral argument is needed. *See* Fifth Circuit Rule 28.2.3 ("Counsel for appellant must include in a preamble to appellant's principal brief a short statement why oral argument would be helpful, or a statement that appellant waives oral argument. Appellee's counsel must likewise include in appellee's brief a statement why oral argument is or is not needed....").

[2] As stated in the preceding footnote, I am not listing provisions that require, early in the brief, a statement of reasons why oral argument should or should not be held. *See, e.g.*, Eleventh Circuit Rule 28-1(c). The Eighth Circuit provision (quoted in the text) is distinctive in that it requires not just a statement concerning oral argument but also a "summary of the case."

[3] *See* Memorandum from Holly Taylor Sellers to Peter G. McCabe, State Court Rules Governing Appellate Court Briefs (March 14, 2011) ("Sellers Memo"), at 14-15. The memo omits from this list the Illinois Supreme Court Rule that requires the appellant's brief to contain

an introduction; the other two states – New Jersey and Washington – permit one.

Kentucky's rules require that the first item in the appellant's brief be

> [a] brief "INTRODUCTION" indicating the nature of the case, and not exceeding two simple sentences, such as, "This is a murder case in which the defendant appeals from a judgment convicting him of 1st -degree manslaughter and sentencing him to 20 years in prison," or "This is a case in which an insurance company appeals from a judgment construing its policy as applicable, and a co-defendant's policy as not applicable, to the plaintiff's accident claim. Plaintiff also appeals against the co-defendant."

Kentucky Rules of Civil Procedure Rule 76.12(c)(i). The rules do not provide for an introduction in the appellee's brief. *See id.* Rule 76.12(d).

New Jersey Rule of Court 2:6-2(a)(6) provides: "[E]ach brief may include an optional preliminary statement for the purpose of providing a concise overview of the case. The preliminary statement shall not exceed three pages and may not include footnotes or, to the extent practicable, citations." Washington's appellate rules provide that the appellant's brief may contain "[a] concise introduction. This section is optional. The introduction need not contain citations to the record of [*sic*] authority." Washington Rules of Appellate Procedure 10.3(a)(3). The Washington rule does not explicitly address whether the appellee's brief can also contain an introduction, but it seems reasonable to read the rule to permit one. *See id.* Rule 10.3(b) ("The brief of respondent should conform to section (a) and answer the brief of appellant or petitioner....").

D. Current practice

Notwithstanding the absence of national and local provisions addressing introductions in briefs, experienced appellate lawyers appear to include introductions with some frequency.[4] The

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– between the statement of points and authorities and the statement of issues – "[a]n introductory paragraph stating (i) the nature of the action and of the judgment appealed from and whether the judgment is based upon the verdict of a jury, and (ii) whether any question is raised on the pleadings and, if so, the nature of the question." Illinois Supreme Court Rule 341(h)(2). I agree that this provision seems to require something closer to a statement of the case than to the type of introduction that is the focus of this memo. *See* Sellers Memo at 6.

[4] Two of the comments submitted by members of the ABA Council of Appellate Lawyers (in response to Judge Sutton's inquiry about the statement of the case) touched upon the question of introductions. One member wrote in part: "Personally, I have used the brief statement of the case in lieu of an introduction, and have never had more than one page." Appendix to ABA Council of Appellate Lawyers, Report Concerning Advisory Committee on

practice is common, for example, in the office of the United States Attorney for the Southern District of New York and in United States Attorneys' offices within the Ninth Circuit.

II. Arguments for and against addressing the topic of introductions in Appellate Rule 28

The Committee's discussions have revealed both advantages and disadvantages to revising Appellate Rule 28 to address the topic of introductions. Overarching themes include the importance of considering what judges would find useful; the need to preserve flexibility for lawyers; and the difficulty of crafting a rule that provides appropriate guidance for both skilled and unskilled advocates.

A. Possible advantages

To the extent that skilled practitioners already employ introductions, a national rule addressing introductions in briefs might simply codify existing practice (as Appellate Rule 12.1 and the cognate district-court rules have done for the practice of indicative rulings). By making clear that introductions are permitted, the rule would simplify practice for those who wish to use them. Introductions drafted by experienced lawyers can frame the issues. They can report the posture of the case, identify the issues on appeal, and cast those issues in the most favorable light for the party writing the brief. A participant in the Committee discussions described briefs by public interest groups such as Public Citizen and the ACLU that make very effective use of introductions. One commentator has suggested that "[a]n introduction can be an important and helpful part of a brief – as a prelude to a long brief, or to caution that certain arguments are conditioned on others, or to explain that different arguments lead to different relief."[5]

B. Possible disadvantages

Codifying existing practice would not only simplify things for practitioners who already use introductions – it could also broaden the use of introductions by alerting less experienced practitioners to the possibility of using them. Introductions drafted by unskilled lawyers might be unhelpful. Indeed, to the extent that such introductions veer into argument untethered to the appellate record, they could be undesirable. If the use of introductions becomes standard, brief drafters might have a difficult time boiling their argument down to the single point – or handful

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Appellate Rules Agenda Item No. 10-AP-B: Statement of the Case (April 2011), at 14. Another member wrote in part: "I also like that the statement of the case is an opportunity for counsel to present a thematic statement of what the case is about, an opportunity that doesn't exist in other pre-argument sections. (Of course, many lawyers alternatively insert an introduction before the jurisdictional statement.)" Appendix to ABA Council of Appellate Lawyers Report at 16.

[5] Letter from Peder K. Batalden to Peter G. McCabe (Jan. 27, 2011) ("Batalden Letter"), at 2.

of points – that really ought to go into an introduction, and might instead try to cover too many issues "up front."

Those questioning the need for a national rule concerning introductions have also wondered whether a local rule might be preferable. If the goal is to provide judges with the items that are helpful to them, and if only one circuit currently requires (and no other circuit explicitly permits) anything resembling an introduction,[6] perhaps a national rule is not needed.

III. Implementing a change to Appellate Rule 28

The Committee's discussions have pointed out several practical questions that would need to be addressed if Appellate Rule 28 were to be amended to address the topic of introductions. Those questions include the following:

- Permissive vs. mandatory.
  - No participants in the Committee's discussions thus far have voiced support for making introductions mandatory. Thus, the proposed rule presumably would permit, but not require, the inclusion of an introduction.
- Length.
  - Some concerns about the possible disadvantages of introductions might be addressed by imposing a length limit (say, one page) on the introduction. But some participants have described complex cases in which the introduction was as long as four pages. In any event, the introduction presumably would count toward the overall length limits set by Rule 32(a)(7).
- Contents.
  - In the light of the concerns expressed about the downsides of introductions drafted by inexperienced lawyers, either the rule text or the Note might address the contents of the introduction.
  - Peder Batalden has suggested "that the Committee revise Rule 28(a) to include a new subrule allowing a brief to include an introduction, and that the language from Rule 28(a)(6) concerning 'the nature of the case' be relocated to that new subrule." Batalden Letter, *supra* note 5, at 2.

[6] As of this writing, the Eighth Circuit is the only one to require something resembling an introduction. At the spring 2011 meeting, Douglas Letter noted the possibility that the Ninth Circuit might consider revising its local rules to permit (though not require) an introduction.

- Placement.

  - Because Rule 28(a) requires the listed items to appear "in the order indicated," in adding a provision concerning introductions it would be necessary to specify precisely where the introduction should go. One suggestion has been that the introduction could go directly before the statement of the case or could be part of the statement of the case. For a discussion of the related question of the placement of the statement of issues, see below.

  - Peder Batalden has suggested that "an introduction ought to be the first, not the third, substantive component of a brief (after statements of jurisdiction and the issues)." Batalden Letter, *supra* note 5, at 2. Similarly, Douglas Letter reported at the Spring 2011 meeting that the proposed local rule currently being considered by the Ninth Circuit contemplates that if the brief is to have an introduction, the introduction should be the first substantive item in the brief

- Effect on other provisions.

  - Statement of issues. Some participants have suggested that if the introduction were to be placed just before the statement of the case, then the statement of issues – currently required by Rule 28(a)(5) – should be placed after the statement of the case. The effect would be that the newly-authorized introduction would be the first substantial item in the brief (assuming that the jurisdictional statement required by Rule 28(a)(4) will generally be short).

    - Holly Sellers' survey of the approaches taken in state-court briefing rules demonstrates that the ordering adopted in current Appellate Rule 28(a) is not inevitable.[7]

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[7] The study summed up the state-court approaches as follows, using "I" to indicate the statement of the issues, "C" to indicate the statement of the case, and "F" to indicate the statement of facts:

• thirty-one states follow the same order as FRAP 28 [I-C-F];
• nine require the statement of the case, then the statement of facts, followed by the statement of the issues [C-F-I];
• seven require the statement of the case, then the statement of issues, followed by the statement of facts [C-I-F];
• one state requires a statement of facts followed by the statement of issues, with no mention of a statement of the case [F-I]; and
• the remaining two states contain provisions that cannot be analogized to FRAP for purposes of this categorization.

- Summary of argument. It has been suggested that permitting an introduction might prompt a re-evaluation of the necessity of a summary of argument (currently required by Rule 28(a)(8)). Rule 28(a)(8) requires "a summary of the argument, which must contain a succinct, clear, and accurate statement of the arguments made in the body of the brief, and which must not merely repeat the argument headings." It is possible that some introductions might largely duplicate this summary. But not all introductions will do so.

Sellers Memo, *supra* note 3, at 10.

TAB 6-B

MEMORANDUM

DATE: September 21, 2011

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 11-AP-D: possible Appellate Rules amendments relating to electronic filing

This memo discusses possible amendments to the Appellate Rules to take account of the shift to electronic filing and service. It seems useful to take up this topic, now that all circuits except the Eleventh and Federal Circuits accept electronic filings.[1] Moreover, the proposed amendments to Part VIII of the Bankruptcy Rules provide a potential model for the treatment of some of the issues raised by electronic filing and service.

In preparing this memo, I benefited from guidance by Leonard Green and his colleagues in other circuits. They compiled a list of Appellate Rules provisions on which to focus:

- **Rule 3(d)(1)** - Service by the district clerk of notice of filing of a notice of appeal to all counsel other than the appellant's.
- **Rule 5(c)** - Form of papers and number of copies of papers attendant to a petition for permission to appeal.
- **Rules 6(b)(2)(C) & (D)** - Forwarding and filing the record in bankruptcy appeals from the district court or bankruptcy appellate panel.
- **Rules 11(b)(2) & (c)** - District clerk's duty to forward the record on appeal; retaining the record temporarily in district court.
- **Rule 21** - Form of papers and number of copies of petitions for writs of mandamus and prohibition, and other extraordinary writs.
- **Rule 25** - Filing and manner of service generally.
- **Rule 27** - Form of papers, number of copies with respect to motions.
- **Rule 28(e)** - References to the record in briefs.
- **Rule 30** - The appendix.
- **Rule 31** - Serving and filing briefs.

They observed that for a number of these rules, it might suffice if the current requirements and proscriptions were kept in place, but were supplemented with some language to the effect that

individual circuits which permit or require certain filings to be electronic may promulgate local

[1] *See* Appellate ECF Local Information, available at http://www.pacer.gov/announcements/general/ea_filer_info.html (last visited Sept. 17, 2011).

rules prescribing particular technical requirements governing the manner of filing.

The remainder of this memo builds on the Clerks' guidance by focusing on eight aspects of appellate practice that could be affected by the shift to CM/ECF. Part I discusses provisions that require court clerks to serve certain documents on parties. Part II discusses provisions relating to electronic filing and service by parties. Part III considers the treatment of the record. Part IV notes a proposal concerning the use of audio recordings in lieu of transcripts. Part V discusses the appendix. Part VI turns to the format requirements for briefs and other papers. Part VII discusses requirements concerning paper copies of filings. Part VIII briefly notes provisions that refer to "original" documents.

I. Service by the clerk

A number of provisions in the Appellate Rules require service by the district clerk (or Tax Court clerk) or circuit clerk. *See* Rule 3(d) (district clerk to serve notice of filing of notice of appeal); Rule 6(b)(1) (Rule 3(d) applies to appeals from bankruptcy appellate panels and, in such appeals, "district court" includes "appellate panel"); Rule 13(a)(1) (Tax Court clerk to serve notice of filing of notice of appeal); Rule 15(c) (circuit clerk to serve copy of petition for review of agency decision on each respondent); Rule 21(b)(2) (if court of appeals orders response to mandamus petition, circuit clerk "must serve the order to respond on all persons directed to respond"); Rule 36(b) ("On the date when judgment is entered, the clerk must serve on all parties a copy of the opinion – or the judgment, if no opinion was written – and a notice of the date when the judgment was entered."); Rule 45(c) ("Upon the entry of an order or judgment, the circuit clerk must immediately serve a notice of entry on each party, with a copy of any opinion, and must note the date of service on the docket. Service on a party represented by counsel must be made on counsel."). *See also* Rule 6(b)(2)(D) (in bankruptcy appeals from mid-level appellate court, circuit clerk to "immediately notify all parties of the filing date" of the record); Rule 12(c) (similar requirement in non-bankruptcy appeals).

Some observers have suggested that it makes little sense to require the clerk to serve notice of an electronic filing on parties who are participating in CM/ECF. Thus, for example, in 2008 Judge Kravitz drew to the Committee's attention a comment by the Connecticut Bar Association Federal Practice Section's Local Rules Committee ("CBA Local Rules Committee") concerning Appellate Rule 3(d). The CBA Local Rules Committee pointed out that due to the advent of electronic filing, there is a "discrepancy between FRAP 3(d), which indicates that the District Court Clerk's office will handle service of notices of appeals and the reality that it does not serve civil notices of appeals."[2] More recently, Professor Steven Gensler relayed to the Committee a suggestion by an attorney, Harvey D. Ellis, Jr., that "FRAP 3(d)(1) could use an

[2] This suggestion was docketed as Item No. 08-AP-A.

amendment to allow a notice of electronic filing to suffice in a district with ECF procedures."[3]

When the Committee discussed this question in 2008, it seemed prudent to take a wait-and-see approach rather than amending Rule 3(d). At that time, not all the district courts which were on CM/ECF for filing permitted the notice of appeal to be filed electronically. Moreover, the appellate courts' transition to electronic filing was still in process. Three years later on, electronic filings are accepted by most district courts, at least some bankruptcy appellate panels, and all courts of appeals except the Eleventh and Federal Circuits. The Tax Court now requires most counseled parties to file electronically,[4] but the Tax Court's electronic filing system, eAccess, does not appear to be linked with PACER or the CM/ECF system,[5] and the Tax Court does not permit notices of appeal to be filed electronically.[6]

The prevalence of electronic filing does not mean that notices of appeal will always be filed electronically in the lower court. For one thing, a lower court that generally permits electronic filing may make an exception for notices of appeal.[7] For another, filers who are exempt from electronic filing (e.g., many pro se litigants) will file notices of appeal in paper form. And even when a notice of appeal is filed electronically in the lower court, the lower court's clerk presumably must serve paper copies of the notice of appeal on any litigants who are not on the CM/ECF system.[8]

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[3] This suggestion was docketed as Item No. 11-AP-C.

[4] See Tax Court Rule 26 ("The Court will accept for filing documents submitted, signed, or verified by electronic means that comply with procedures established by the Court."); United States Tax Court, eAccess, available at http://www.ustaxcourt.gov/electronic_access.htm (last visited Sept. 17, 2011) ("eFiling is mandatory for most parties represented by counsel (practitioners) in open cases in which the petition is filed on or after July 1, 2010.").

[5] PACER's list of CM/ECF courts (Individual Court PACER Sites, available at http://www.pacer.gov/psco/cgi-bin/links.pl, last visited Sept. 17, 2011) does not mention the Tax Court, and the Tax Court's eAccess site does not mention PACER or CM/ECF.

[6] *See* United States Tax Court, eAccess Guide for Petitioners and Practitioners 11, 18.

[7] For example, N.D. Cal. Order 45 provides: "Until such time as the United States Courts of Appeals for the Ninth Circuit and the Federal Circuit institute rules and procedures to accommodate Electronic Case Filing, notices of appeal to those courts shall be filed, and fees paid, in the traditional manner on paper rather than electronically. All further documents relating to the appeal shall be filed and served in the traditional manner as well. Appellant's counsel shall provide paper copies of the documents that constitute the record on appeal to the District Court Clerk's Office."

[8] Rule 3(d)(1)'s requirement that when a criminal defendant appeals "the clerk must also serve a copy of the notice of appeal on the defendant" is somewhat ambiguous: Does this require

Thus, any amendment (to the Appellate Rules that require service by a clerk) should take account of the likely persistence of paper filings and paper service by or on certain parties (such as inmates[9] or other pro se litigants). The provisions might usefully be amended to exempt the relevant clerk from the relevant service requirement as to parties who automatically receive notice of the relevant filing through the CM/ECF system. However, it would not seem to make sense to adopt this approach for Rule 15(c), which concerns notice of the filing of a petition for review of agency action. Unlike appeals from district court or bankruptcy appellate panel judgments, petitions for review of agency action are filed in the court of appeals itself, and one could not assume that the respondents would be registered in CM/ECF as of the date that the circuit clerk would be serving the copy of the petition.[10]

Assuming that Rules 3(d), 13(a)(1),[11] 21(b)(2), 36(b), and 45(c) are to be amended in this

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service on the attorney for a represented defendant, or on the defendant himself or herself? The 1966 Committee Note to Criminal Rule 37(a)(1) explained this requirement by stating that "The duty imposed on the clerk by the sixth sentence is expanded in the interest of providing a defendant with actual notice that his appeal has been taken and in the interest of orderly procedure generally." This might suggest that the defendant himself or herself is to be notified. On the other hand, when this provision was originally adopted in Criminal Rule 37(a)(1) the Rule also spoke of service of the notice on "all parties other than the appellant," perhaps suggesting that the drafters used "party" to refer to counsel in the case of represented parties. The notification provided by Rule 3(d)(1) may be particularly useful to a defendant who has availed himself or herself of the option – provided by Criminal Rule 32(j)(2) – to ask the clerk to prepare and file a notice of appeal on the defendant's behalf.

To the extent that Rule 3(d)(1) requires a criminal defendant-appellant to be personally served with the notice of appeal – even if represented – this would add another category of appeals in which paper service by the clerk would ordinarily be necessary.

[9] When an inmate confined in an institution files a notice of appeal under Rule 4(c), that filing will (for the foreseeable future) be in paper form. With respect to such inmate filings, Rule 3(d)(2) requires the clerk to alert counsel (and pro se parties) to the *date of docketing* of the notice; this is important because in such instances Rule 4(c) provides that certain periods that would run from the date of the inmate's filing are counted from the date of docketing rather than the date of filing. I am unsure whether parties who participate in CM/ECF would receive notice of the date of docketing through the CM/ECF electronic notification system, but if not, then Rule 3(d)(2)'s requirement would continue to be important even for participants in CM/ECF.

[10] Admittedly, the respondents will be agencies who are repeat players, so perhaps my assumption will not always hold true; but the likely pattern does seem significantly different in the context of agency review than elsewhere.

[11] As noted above, the Tax Court has its own electronic filing system and does not currently permit electronic filing of the notice of appeal. Thus, the desirability and nature of any

manner, it would make sense to consider whether any amendments are needed in the provisions that currently require litigants to furnish sufficient copies to be used by the clerk to comply with service requirements. *See* Rule 3(a)(1) ("[T]he appellant must furnish the clerk with enough copies of the notice to enable the clerk to comply with Rule 3(d)."); Rule 13(a)(1) (similar requirement). I see no need for any amendment to Rules 3(a)(1) and 13(a)(1). Those rules currently direct the litigant to provide "enough copies," and that phrase is flexible: If all parties are CM/ECF participants, then zero copies would be enough copies.

Another requirement that should probably be retained for the moment is Rule 3(d)(1)'s requirement that the district clerk notify the court of appeals of the filing of the notice of appeal and of any later district-court filings that may affect the progress of the appeal (e.g., motions that may suspend the effectiveness of the notice of appeal). I imagine that when CM/ECF is fully operational in all the courts of appeals, one benefit may be that such notifications become automatic. But until then, I would guess that the Rule's requirement will continue to be important. Like all the other issues discussed here, this is one as to which the guidance of the Clerks will be important.

II. Electronic filing and service

The Appellate Rules currently acknowledge the possibility of electronic filing and service. In the context of an overall review of the Rules' treatment of electronic filings, it makes sense to review Rule 25's provisions for electronic service and filing as well as Rule 26(c)'s treatment of the three-day rule.

Rule 25(a)(2)(D) authorizes each circuit to adopt a local rule permitting or requiring electronic filing, subject to the proviso that any electronic filing requirement include reasonable exceptions. Rule 25(a)(2)(D) also helpfully defines an electronically filed paper as a "written paper" for purposes of the Appellate Rules.[12]

Rule 25(c)(1) permits electronic service "if the party being served consents in writing." (I believe that such consent is ordinarily required as a condition of registration in CM/ECF.) Rule 25(c)(2) permits parties to use the court's transmission equipment to make electronic service if authorized by local rule.[13] Rule 25(c)(3) directs parties to serve other parties in "a

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amendments to Rule 13(a)(1) would require separate consideration.

[12] For rules referring to writings, see, e.g., Rule 11(f) ("written stipulation filed in the district court"); Rule 17(b)(2) ("parties may stipulate in writing that no record or certified list be filed"); Rule 27(a)(1) ("A motion must be in writing unless the court permits otherwise."); Rule 41(d)(2)(B) (notification to circuit clerk "in writing"); Rules 44(a) and (b) ("written notice to the circuit clerk").

[13] One question that is worth investigating is whether the circuits that use CM/ECF also permit service to be made through CM/ECF. As of 2009, the Second Circuit was not permitting

manner at least as expeditious as the manner used to file the paper with the court," when "reasonable" in light of relevant factors. Presumably, parties who are filing electronically should serve other parties electronically unless those parties are not registered in CM/ECF.[14] Rule 25(c)(4) provides that "[s]ervice by electronic means is complete on transmission, unless the party making service is notified that the paper was not received by the party served."

Rule 26(c) sets out the three-day rule: "When a party may or must act within a specified time after service, 3 days are added after the period would otherwise expire under Rule 26(a), unless the paper is delivered on the date of service stated in the proof of service." The three additional days apply not only to service by mail or commercial carrier, but also to electronic 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." Chief Judge Easterbrook has proposed abolishing the three-day rule;[15] he argues that the three-day rule is particularly incongruous as applied to electronic service. 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(d), Criminal Rule 45(c), and Bankruptcy Rule 9006(f). For more than a decade, there have been periodic 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, as did participants in the time-computation project. 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 electronic 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 when CM/ECF is mandatory for counsel, counsel no longer (as a practical matter) has 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) by maintaining the three-day rule for electronic service. However, the concern remains that counsel might strategically serve an opponent by electronic means on a Friday night in order to inconvenience the opponent. Thus, though some of the rationales for including electronic service in the three-day rule may have become less persuasive over time, the concern over possible strategic misuse of electronic filing persists.

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parties to effect service through CM/ECF; rather, electronic service had to be made by email.

[14] Even if a party is not registered in CM/ECF, if the party has consented in writing to electronic service, then service by email may be most appropriate when documents are filed electronically.

[15] This proposal is on the Committee's agenda as Item No. 08-AP-C.

III. Treatment of the record

One of the most significant changes that CM/ECF may bring to appellate practice is the treatment of the record. If the appellate judges and clerks can access the district court record by means of links in the electronic docket, then the need for a paper record may eventually dissipate.

The proposed Part VIII bankruptcy rules provide a model.[16] Proposed Bankruptcy Rule 8010 provides for the "transmission" of the record in order to underscore the default principle of electronic transmission.[17] As the draft Committee Note to Bankruptcy Rule 8010 explains:

> [Rule 8010(b)] requires the bankruptcy clerk to transmit the record to the clerk of the appellate court when the record is complete .... This transmission will be made electronically, either by sending the record itself or sending notice of how the record can be accessed electronically. The appellate court may, however, require that a paper copy of some or all of the record be furnished, in which case the bankruptcy clerk will direct the appellant to provide the copies or will make the copies at the appellant's expense.

The proposed amendments to Appellate Rule 6 that are presented elsewhere in the agenda book are designed to dovetail with the approach taken in the Part VIII rules. The proposed Rule 6 and Part VIII amendments illustrate an approach that could be generalized to the non-

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[16] Local circuit provisions provide additional models and should also be studied. *See, e.g.*, Third Circuit Local Appellate Rule 11.2 ("A certified copy of the docket entries in the district court must be transmitted to the clerk of this court in lieu of the entire record in all counseled appeals. In all pro se cases, all documents, including briefs filed in support of dispositive motions, that are not available in electronic form on PACER, must be certified and transmitted to the clerk of this court."); *id.* (providing for transmission of non-electronic documents in habeas cases); Fifth Circuit Rule 10.2 ("The district court must furnish the record on appeal to this court in paper form, and in electronic form whenever available. The paper and electronic records on appeal must be consecutively numbered and paginated. The paper record must be bound in a manner that facilitates reading."); Sixth Circuit Rule 10(c) ("As a general matter, the district court does not send non-electronic records to the court of appeals unless and until the circuit clerk requests them.... This sub-rule (c) applies to non-electronic exhibits that a party wishes to draw particular attention to by assuring that the court has actual possession of the exhibits or copies of them."); Sixth Circuit IOP 11(a).

[17] A number of the Appellate Rules use the term "send" or the term "forward." When electronic sharing of records between district and appellate courts becomes the norm, "transmit" may be a better fit than "send" or "forward." Professor Kimble has indicated, however, that there is a style objection to substituting "transmit" for "send." That issue is likely to play out in the context of the project to revise Part VIII of the Bankruptcy Rules.

bankruptcy context by means of similar amendments to Appellate Rules 11 and 12. However, it seems likely that a different approach to the record would be taken in certain contexts, such as appeals from the Tax Court[18] and petitions for review of agency action.

It would also make sense to review Rule 28(e)'s treatment of references to the record. It could be useful to require references that make it easy to find the relevant document on PACER, for example by referring to the document's docket number. It may also be worthwhile to consider whether to note the possibility of providing hyperlinks to relevant record documents.

IV. Treatment of the transcript

Digital audio recording has been an approved method of making the record of district court proceedings for more than a decade. Judge Michael Baylson has suggested that the Appellate Rules Committee consider the possibility of allowing the use of digital audio recordings in place of written transcripts for the purposes of the record on appeal.[19]

Under Rule 10(a), the record on appeal consists of "(1) the original papers and exhibits filed in the district court; (2) the transcript of proceedings, if any; and (3) a certified copy of the docket entries prepared by the district clerk." Rule 10(b)(1) provides that "[w]ithin 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: (A) order from the reporter a transcript of such parts of the proceedings not already on file as the appellant considers necessary, subject to a local rule of the court of appeals ... ; or (B) file a certificate stating that no transcript will be ordered." If the appellant orders less than the entire transcript, Rule 10(b)(3) permits the appellee to designate additional parts of the transcript.

Read literally, Appellate Rule 10(b) does not require all appellants to order a transcript. But in reality, the appellant's choices are more constrained, because the appellant must make sure that the record includes all the information that the court of appeals will need in order to assess the appellant's challenges to the relevant ruling(s) below. In some instances the appellant

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[18] Under Rule 13(d)(1), the provisions in Rules 10, 11, and 12 concerning the record also apply to appeals from the Tax Court. Unless the Tax Court's electronic filing system becomes linked to CM/ECF, it seems unlikely that a Tax Court record could be transmitted electronically to a court of appeals. Thus, if Rules 11 and 12 are amended to contemplate electronic transmission of the record, it may also be necessary to amend Rule 13 to provide separately for records on appeals from the Tax Court. *Cf.* Sixth Circuit Rule 13 cmt. ("Tax Court appeals will generally be handled the same as district court appeals. However, the Tax Court's electronic records are not easily transferable to the court of appeals. Therefore, as set out in 6 Cir. R. 30, in Tax Court appeals there will be appendices instead of an electronic record on appeal.").

[19] This suggestion appears on the Committee's docket as Item No. 08-AP-Q.

may be able to omit some or all of the transcript. But as one commentator advises, the prudent litigator will "[r]esolve all doubts in favor of inclusion. Aside from costs, there is no reason to exclude anything from the transmitted record that might be useful. For every appeal where the court of appeals complains about over-designation, there are ten where it refuses to consider an argument because appellant failed to include the record needed to support that point."[20] The Rule itself requires the appellant to order a transcript if the appellant is challenging factual findings: Rule 10(b)(2) provides that "[i]f the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant must include in the record a transcript of all evidence relevant to that finding or conclusion." Other types of challenges that will likely require at least portions of the transcript include challenges to jury selection, to evidentiary rulings, or to jury instructions. To put the matter more generally, the evaluation of a challenge to a trial ruling will frequently require the inclusion of the parts of the transcript that show an objection to the challenged ruling, the parts that reflect the ruling itself, and any parts that are relevant to a determination of whether the error (if any) was harmless.

Even when the court of appeals would ordinarily need to consult some or all of the transcript in order to evaluate the appellant's contentions, Rule 10 offers a few ways to avoid providing the transcript itself. Rule 10(d) permits the parties to agree upon "a statement of the case showing how the issues presented by the appeal arose and were decided in the district court." The statement, which is to focus on the matters "essential to the court's resolution of the issues," is reviewed and (if accurate) approved by the district court and is then "certified to the court of appeals as the record on appeal." In some relatively simple cases, Rule 10(d)'s agreed statement could provide a cost-effective way to create the record on appeal; but it appears from anecdotal evidence that this mechanism is relatively rarely used. Rule 10(c) provides a mechanism for reconstructing a statement of the trial-court proceedings "[i]f the transcript of a hearing or trial is unavailable." However, Rule 10(c)'s mechanism appears to be reserved for instances when the transcript is unavailable irrespective of cost;[21] a number of courts have taken the view that the mere fact that the preparation of the transcript would be prohibitively expensive does not justify recourse to Rule 10(c).

In short, under current practice many appellants cannot succeed on appeal unless they ensure that the record on appeal includes at least some portions of the transcript of the proceedings below. There will also sometimes be instances when the appellee needs to designate portions of the transcript that were not ordered by the appellant. The question raised by Judge

Baylson is whether litigants can avoid the costs of ordering the transcript by using the digital

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[20] Knibb, Fed. Ct. App. Manual § 28:1 (5th ed.).

[21] This would arise if the proceedings had for some reason not been recorded or if the recording were lost.

audio files instead.

The use of audio files in place of a transcript would permit the parties to avoid the cost of obtaining the transcript, but a number of judges and lawyers are likely to prefer using transcripts. The likely variation in preferences on this matter suggests that the use of audio files in lieu of transcripts may, in the near term, be more likely to take hold in district courts than in the courts of appeals.[22] Thus, the Committee may wish to maintain its wait-and-see approach with respect to audio files. In the interest of completeness, here are some considerations concerning the treatment of audio files under the current Rules.

There do not yet appear to exist any local circuit rules that address the use of audio files in lieu of transcripts. The Appellate Rules could be read to permit the adoption of local rules authorizing the use of audio files in lieu of the transcript for purposes of the record on appeal, at least in some cases. But there are several ways in which the existing procedures under the Appellate Rules would be a somewhat awkward fit in cases where audio files are used instead of the transcript.

Rule 10(a)'s definition of the record. An audio recording of the district court proceeding is not itself a "transcript" or a "paper"; nor would it seem to come within the ordinary meaning of "exhibit." But a court of appeals presumably could by local rule clarify that an audio recording of the district court proceeding could be included in the record on appeal.

Rule 10(b)(3)'s statement of issues and counter-designations. Rule 10(b)(1) does not require the appellant to order a transcript; but if the appellant does not order the transcript, Rule 10(b)(1)(B) requires the appellant to "file a certificate stating that no transcript will be ordered." A local rule could authorize the appellant to include in the certificate a statement that the appellant intends to rely on the audio recording rather than ordering a transcript. If the appellant were to do so, then Appellate Rule 10(b)(3) would require the appellant to file and serve on the appellee "a statement of the issues that the appellant intends to present on the appeal." Rule 10(b)(3) is obviously intended to enable the appellee to determine what portions, if any, of the transcript it wishes to order. But if the appellee, too, is comfortable with the idea of relying on the audio recording rather than ordering a transcript, then the parties could simply include all the audio files as part of the record, rather than engaging in the process of designations and counter-designations contemplated by Rule 10(b).

Rule 10(b)(2)'s requirement of "a transcript." In cases where the appellant wishes to challenge factual findings, Rule 10(b)(2), read literally, would seem to require a "transcript"

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[22] At the district court level, variation among judges' preferences would not prevent the use of audio files in lieu of transcripts, because any district judge who shares Judge Baylson's receptivity to the use of audio files can permit that use in his or her cases. At the court of appeals level, however, even if some judges are receptive to the use of audio files it seems likely that others on the same court will prefer to have a transcript.

rather than permitting the use of audio files: "If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant must include in the record a transcript of all evidence relevant to that finding or conclusion."

Rule 28(e)'s requirement of page citations. The importance of providing specific record citations is well known. If a system were adopted for using audio recordings in lieu of transcripts, it would be possible for the litigant to pinpoint the part of the audio file to which the litigant wishes to direct the court's attention by citing the relevant hour and minute. Such measures could comply with the spirit of Rules 28(a), 28(b) and 28(e). But they would fit awkwardly with the letter of Rule 28(e), which requires citations to the "page" of the appendix or of the document in the original record.

Rule 30's provisions concerning the appendix. Rule 30's provisions concerning the appendix clearly contemplate that the matter to be placed in the appendix will be in paginated form. However, the flexibility provided to the courts of appeals by Rule 30(f) has permitted a great deal of local variation, and it seems likely that the permissible variations could include the use of audio files as part of the original record.

V. Treatment of the appendix

At present, Rule 30 provides circuits with flexibility to put in place their preferred requirements concerning the appendix. Though those local circuit requirements vary, it seems likely that the general purpose of the appendix is similar across circuits – namely, to collect in one place the most salient portions of the record.

Even if the transition to electronic filing renders it appropriate to transmit the record in electronic form, my intuition is that some courts will continue to want the parties to distill that record into an appendix.[23] An appendix – even if filed electronically – provides conveniences that an electronic record would not. To access the electronic record, a judge or clerk would need internet access. An electronic copy of the appendix, by contrast, could be read even without internet access; and the appendix would also serve to highlight the parties' view of the most important portions of the record.[24]

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[23] *But see* Sixth Circuit Rule 30(a) (providing that in appeals in which "the court will have the electronic record of district court proceedings available, an appendix is not necessary and is not to be filed").

[24] Admittedly, there are other ways to highlight those portions. *See, e.g.*, Sixth Circuit Rule 30(b) ("In appeals from the district court where there is an electronic record in the district court, documents in the electronic record must not be included in an appendix. To facilitate the court's reference to the electronic record in such cases, each party must include in its principal brief a designation of relevant district court documents.").

It is thus unclear to me whether the transition to electronic filing warrants amendments to Rule 30. However, it is possible that a study of local circuit practices would reveal aspects of the Rule that could be altered in response to electronic filing.

VI. Format of briefs and other papers

Some of the Appellate Rules' detailed instructions concerning the format of briefs and other papers may be unnecessary for electronic filings. Requirements that seem unnecessary include those concerning the following:

- Opaque and unglazed paper. *See* Rule 27(d)(1)(A); Rule 32(a)(1)(A).
- Single-sided printing. *See* Rule 27(d)(1)(A); Rule 32(a)(1)(A).
- Color of covers. *See* Rule 27(d)(1)(B); Rule 28.1(d); Rule 32(a)(2); Rule 32(b)(1); Rule 32(c)(2)(A).
- Binding. *See* Rule 27(d)(1)(C); Rule 32(a)(3); Rule 32(b)(3).
- Paper size. *See* Rule 27(d)(1)(D); Rule 32(a)(4).
- Glossy reproductions of photographs. *See* Rule 32(a)(1)(C).

Although these requirements seem beside the point with respect to electronic filings, it is not clear that there is an urgent need to amend the rules to acknowledge these requirements' inapplicability to electronic filings. It is difficult to imagine a clerk's office rejecting an electronically filed paper (filed in conformance with local CM/ECF rules) for failure to comply with any of the requirements in the bullet point list above.[25]

VII. Required number of copies

Several provisions in the Appellate Rules require a litigant to provide a certain number of copies of a filing, presumably for the internal use of the court.[26] See Rule 5(c) (original and three copies of petition for permission to appeal or of answer to petition, "unless the court requires a different number by local rule or by order in a particular case"); Rule 21(d) (original and three copies of papers on petition for extraordinary writ, unless different number required by local rule or order in case); Rule 26.1(c) (same, with respect to corporate disclosure statement filed separately from brief); Rule 27(d)(3) (same, with respect to motion papers); Rule 31(b) ("Twenty-five copies of each brief must be filed with the clerk and 2 copies must be served on each unrepresented party and on counsel for each separately represented party. An unrepresented party proceeding in forma pauperis must file 4 legible copies with the clerk, and one copy must be served on each unrepresented party and on counsel for each separately represented party. The

[25] Rule 32(e) provides that "[b]y local rule or order in a particular case a court of appeals may accept documents that do not meet all of the form requirements of this rule."

[26] I omit from this discussion Rules 3(a)(1) and 13(a)(1), which require the provision of copies to be served on other litigants and which are discussed in Part I.

court may by local rule or by order in a particular case require the filing or service of a different number."); Rule 35(d) ("The number of copies to be filed [in connection with a petition for rehearing en banc] must be prescribed by local rule and may be altered by order in a particular case."); Rule 40(b) ("Copies [of a petition for panel rehearing] must be served and filed as Rule 31 prescribes."). Rule 25(e) provides generally that "[w]hen these rules require the filing or furnishing of a number of copies, a court may require a different number by local rule or by order in a particular case."

As judges become accustomed to using electronic copies of briefs and other papers, courts may decide to adopt local rules lowering the number of required paper copies. But that choice depends on the preferences of a particular circuit's judges. Under the Appellate Rules, each circuit is currently free to specify that it requires a different number of paper copies, or no paper copies. It does not seem to me that any change in the Appellate Rules on this topic is warranted at this time.

VIII. Original documents

Some Appellate Rules provisions refer to "original" documents. For example, Rule 10(a) provides that the record on appeal includes "the original papers and exhibits filed in the district court," and Rule 45(d) directs the circuit clerk not to "permit an original record or paper to be taken from the clerk's office." When applied to a case in which all papers were electronically filed, the reference to "originals" seems anachronistic. A few of those references may be worth updating in connection with other amendments relating to electronic filing.[27] In particular, if Rules 11 and 12 are amended to provide for electronic transmission of the record, it might make sense to amend Rule 10(a) to provide that the record includes the original filings or electronic versions thereof. And provisions that contemplate the appeal being heard on the "original record" might be amended to provide, as an alternative, that the appeal can be heard on the basis of the electronic record. *See* Rule 24(c) ("A party allowed to proceed on appeal in forma pauperis may request that the appeal be heard on the original record without reproducing any part."); Rule 30(f) ("The court may, either by rule for all cases or classes of cases or by order in a particular case, dispense with the appendix and permit an appeal to proceed on the original record with any copies of the record, or relevant parts, that the court may order the parties to file.").

[27] Other instances seem harmless, as where a rule provides for the use of "originals or copies." *See* Rule 8(a)(2)(B)(ii) (required contents of motion for stay include originals or copies of affidavits); Rule 18(a)(2)(B) (similar requirement regarding motion for stay pending review of agency determination). And in some instances the reference to originals continues to make sense. For example, on review of an agency determination Rule 17(b)(1) requires the agency to file "the original or a certified copy of the entire record or parts designated by the parties." And where multiple appeals are taken from a Tax Court decision, Rule 13(d)(2) allocates the "original record" to the "court named in the first notice of appeal filed."

IX. Conclusion

Not all of the topics discussed in this memo merit Rule amendments. In some instances, a practice may not yet be sufficiently widespread to warrant treatment in the Rules. In other instances, the existing Rules may be flexible enough to permit new practices relating to electronic service and filing. In drafting any amendments to the Rules, it will be important to provide the capacity to accommodate future technological advances.

TAB 7-A

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

MEMORANDUM

DATE: July 6, 2011

TO: Jocelyn Griffin

FROM: Lee H. Rosenthal
Jeffrey S. Sutton
Catherine T. Struve

RE: Fair Payment of Court Fees Act of 2011

This memo addresses the proposed "Fair Payment of Court Fees Act of 2011," which would amend Civil Rule 68 and Appellate Rule 39 in response to concerns raised about the taxation of costs in the case of *Snyder v. Phelps*, 580 F.3d 206 (4th Cir. 2009), *aff'd*, 131 S. Ct. 1207 (2011). The Judicial Conference's Committee on Rules of Practice and Procedure (the "Standing Rules Committee") and the Appellate Rules Advisory Committee (the "Advisory Committee") understand and share concerns raised about the taxation of costs in *Snyder*, and are already working on measures to address them. That work is well advanced. The issue in *Snyder*, which rarely arises, is being effectively addressed without the need for legislation, and the proposed legislation could cause unintended adverse consequences.

The Advisory Committee took very seriously the concerns raised by the $16,510.80 cost award in the *Snyder* case. The work began by thorough research into the legal standards that currently apply to cost awards in the courts of appeals. In resolving the request for appellate costs that followed its decision in *Snyder*, the Fourth Circuit applied Appellate Rule 39(a)(3)'s default rule that "if a judgment is reversed, costs are taxed against the appellee." Rule 39 sets default rules for the allocation of appeal costs, but those default rules are displaced if "the law provides or the court

orders otherwise." FED. R. APP. P. 39(a). Because Rule 39(a) explicitly states that the court may "order[] otherwise," and does not specify on what basis such an order might issue, the rule confers discretion on the court of appeals to depart from the default rules in appropriate circumstances. The research into Rule 39 and the cases applying it make it clear that the court of appeals had the discretion to deny costs in *Snyder v. Phelps*.

The Appellate Rules Advisory Committee discussed *Snyder* and Rule 39 at its Fall 2010 meeting. The Committee decided that it was important to understand the actual practices in each court of appeals under Rule 39. The Committee asked the Federal Judicial Center to research the typical amount of appellate costs awarded under the Rule. The FJC study — authored by Marie Leary and titled *Comparative Study of the Taxation of Costs in the Circuit Courts of Appeals Under Rule 39 of the Federal Rules of Appellate Procedure* — was completed this spring and is available at http://www.fjc.gov/library/fjc_catalog.nsf.

The FJC study found that the circuits vary in how they implement Appellate Rule 39's directives on costs. In particular, the variations stem from differences among the circuits over factors such as the ceilings (for purposes of reimbursement) on the cost per page of copying and on the number of copies. (In *Snyder*, by far the bulk of the cost award — $ 16,060.80 — resulted from the costs of copying the briefs and voluminous appendices.) The study provides comparative data on cost awards across the circuits, both according to the size of average cost awards and according to what the study characterizes as "outlier" awards. The cost award in *Snyder* was such an outlier award.

After discussing the FJC study at its Spring 2011 meeting, the Advisory Committee sent the study to the chief judge of each circuit, to enable each circuit to review its cost-award practices. The circuits' reaction to the study has been swift and positive. For example, at the time of the cost award in *Snyder,* the Fourth Circuit's local practices set a maximum rate of $4.00 per page (for purposes of determining what can be reimbursed in cost awards for the cost of copying briefs and appendices). That maximum rate stood in stark contrast to the practice in most circuits, which set maximum rates of $0.10 per page to $0.15 per page. After reviewing the FJC study's comparative data, the judges of the Fourth Circuit have voted to amend that court's rules to lower the maximum reimbursable copying cost to $0.15 a page. The change is now out for public comment, and it appears likely to take effect by September 1, 2011. If that change had been in effect at the time of the *Snyder* litigation, the amount of copying costs that could have been awarded in that case would have been capped at a much lower number. If *Snyder* had been decided in the other courts of appeals with lower copying cost caps, the costs would have similarly been capped at a much lower number.

The FJC study also highlights the fact that the growing use of electronic filing will further decrease the size of cost awards. In the Sixth Circuit, attorneys are generally expected to file and serve appellate briefs electronically without providing any paper copies. As the FJC study's comparative data demonstrate, this innovation has significantly lowered the average appellate cost awards in the Sixth Circuit relative to other circuits. As other circuits in the future complete the

transition to electronic service and filing, we can expect the same downward shift in their average appellate cost awards.

In sum, the Appellate Rules Advisory Committee — aided by the FJC's comprehensive study — has carefully considered the unusual problem that surfaced in *Snyder*. Under existing Appellate Rule 39, the court of appeals would have had discretion to deny costs in *Snyder*. And in any circuit other than the Fourth, even if the court had awarded costs, the size of the award would have been much less dramatic due to caps on the amount of copying costs that can be recovered under local rules. The pending change to the Fourth Circuit's local rules would bring the Fourth Circuit into line with other circuits in this regard. Finally, the current shift toward electronic service and filing will eliminate the reimbursement of copying costs as an element under Rule 39. There is no need for legislation to address or prevent what occurred in *Snyder*.

In addition, the proposed legislation could lead to unanticipated results. Under current Rule 39, the courts of appeals possess discretion to deny costs to the prevailing party. The bill's requirement that the court consider whether the appeal established an important precedent would add a specific ingredient to the court of appeals' equitable analysis. Under existing case law, that ingredient is one that courts already have discretion to take into account under Rule 39(a). Requiring consideration of this factor may suggest that it is to be given greater weight or significance than others, which could lead to unclear or unfair results in cases that involve important private interests but not an issue important to the public. And in cases that do involve a public interest, the legislative directive could lead to unintended results. For example, under the bill, if the plaintiff, rather than the defendants, had prevailed on appeal in *Snyder v. Phelps*, the defendants would likely oppose an award of costs to the prevailing appellee on the ground that the decision set an important precedent. That could lead the judge to believe she had no discretion to require those protesting the funeral to pay fees to the grieving father.

In addition, the bill proposes amending Civil Rule 68. This is a relatively complicated rule and its operation was not at issue in the *Snyder* case. Amending it is not only unnecessary, it is likely to create a number of unintended results and problems.

The Rules Committees examine whether to amend rules under the procedure that Congress set out in the Rules Enabling Act, 28 U.S.C. §§ 2071–2077. The proposed legislation would circumvent the procedure that Congress set out in the Act. The procedure in the Rules Enabling Act has worked well for over 75 years to allow the careful review of possible problems in the justice system that can be remedied through procedural rules. It involves careful study and analysis by the judges, lawyers, and academic members of the committees who are immersed in the issues. The committees undertake review of relevant case law, conduct public hearings to obtain the views of the bench and the bar on proposed amendments, and when appropriate, obtain empirical data. Once the advisory committee has considered public comments, relevant case law, and empirical data, proposed amendments are presented to the Standing Rules Committee, the Judicial Conference, the Supreme Court, and then to Congress. This multi-layer review process ensures that rule changes are needed to respond to actual problems in the practice and protects against unintended adverse

consequences. The Rules Committees would oppose this bill on the additional ground that it would amend the Appellate and Civil Rules outside the Rules Enabling Act process.

In sum, we believe that the proposed legislation to amend the Appellate Rules and the Civil Rules is unnecessary to address the concerns at issue and could lead to unintended adverse consequences. We appreciate the opportunity to express our concerns and look forward to continuing to work together to improve the administration of justice in our federal courts.

TAB 7-B

MEMORANDUM

DATE: September 21, 2011

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Ongoing research concerning FRAP-related circuit splits

I enclose a memorandum from Matthew E. Boutte concerning the AO's periodic search for FRAP-related circuit splits. Mr. Boutte's memo helpfully suggests refinements to the search terms for that ongoing search, and identifies one additional circuit split relating to the Appellate Rules.

This cover memo briefly discusses that circuit split, which concerns the type of showing required to establish compliance with the inmate-filing provisions in Appellate Rules 4(c)(1) and 25(a)(1)(C). Rule 4(c)(1) states:

> 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.

Rule 25(a)(1)(C), which concerns inmate filings in the courts of appeals, contains substantially similar language.

The question identified by Mr. Boutte concerns what happens if an inmate seeks to rely on the inmate-filing rule but does not provide either of the documents specifically described in the Rule (a declaration or a notarized statement). The Committee has discussed this issue at least twice. The first instance is reflected in the minutes of the Committee's spring 2004 meeting:

> 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.
>
> The Committee briefly discussed this suggestion at its November 2003 meeting. The Committee tabled further discussion to give Mr. Letter an 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 and Lucero, JJ., dissenting from denial of rehearing en banc).

More recently, the Committee discussed the circuit split on this question in 2008 and

2009, when the Committee was also looking at a proposal by Judge Diane Wood that other aspects of Rule 4(c)(1) should be clarified.[1] No action was taken on this question at the time. The item relating to Judge Wood's proposal – No. 07-AP-I – remains on the Committee's study agenda.

The cases cited in Mr. Boutte's memo include three decided since April 2008 (when the Committee first discussed Item No. 07-AP-I). But those three cases concerned the application of the prison mailbox rule in contexts not governed by the Appellate Rules. *See Douglas v. Noelle*, 567 F.3d 1103, 1108-09 (9th Cir. 2009) (holding that an inmate's complaint was timely filed despite the lack of a declaration or notarized statement and reasoning that "a declaration or statement was unnecessary, for the prison's own records show that Douglas's complaint was sent to the district court by registered mail on November 30, 2004"); *Day v. Hall*, 528 F.3d 1315, 1318 (11th Cir. 2008) (applying prison mailbox rule to filing of state-court mandamus petition for purposes of determining tolling of habeas statute of limitations under AEDPA and using as the filing date the date that the inmate "allege[d] that he gave his petition for a writ of mandamus to prison officials"); *Brand v. Motley*, 526 F.3d 921, 925 (6th Cir. 2008) (applying prison mailbox rule to filing of complaint and employing "an assumption that, absent contrary evidence, a prisoner [delivered the complaint to prison officials] on the date he or she signed the complaint"). Additional research would be required in order to determine whether the caselaw that specifically concerns Appellate Rules 4(c)(1) and 25(a)(1)(C) has developed further since the Committee last considered the question.

I have not attempted a full survey of the law on this issue, but I will of course be glad to do so if the Committee would like.

Encl.

[1] Specifically, Judge Wood had suggested that the Committee consider clarifying the Rule's position concerning the prepayment of first-class postage. Questions relating to prepayment of postage include the following: Does the rule require prepayment of postage when the institution has no legal mail system? Does the rule require prepayment of postage when the institution has a legal mail system and the inmate uses that system? When the rule requires prepayment of postage, is that requirement jurisdictional?

To: Judge Sutton, Chair, Advisory Committee on Rules of Appellate Procedure
Professor Struve, Reporter, Advisory Committee on Rules of Appellate Procedure
Advisory Committee on Rules of Appellate Procedure

From: Matthew E. Boutte

Date: Thursday, June 30, 2011

Re: Circuit Splits Update

On August 19, 2010 Heather Williams submitted a memorandum on circuit splits involving the Federal Rules of Appellate Procedure to Judge Sutton at the request of the Standing Committee. In her memorandum, Ms. Williams detailed the search term she developed and discussed cases from January 1, 2010 through August 19, 2010 that (1) created a new rules-based split; (2) furthered an existing split; or (3) articulated the existence of a split.[1]

Having reviewed Ms. Williams' work, I concluded that some slight changes to the search term used were necessary to find all the splits. Part I of this memorandum will discuss these changes and why they were made.

Because the search term was adjusted, I have "doubled back" and conducted the search for cases between January 1, 2010 and June 30, 2011.[2] The search resulted in finding two cases involving splits, in addition to the cases that Ms. Williams previously found and discussed. *Ahmed v. Holder*, 380 F.App'x 67, 69-70 (2d Cir. 2010), discussed the circuit split over whether the two methods of activating the prison-mailbox rule in Rule 25(a)(1)(C) were exhaustive or illustrative, but did not decide the issue. *International Floor Crafts, Inc. v. Dziemit*, Nos. 09-1555, 09-1556, 09-2349, 2011 WL 1499857, (1st Cir. Apr. 21, 2011), discussed the circuit split over inclusion of attorneys' fees in Rule 7 bonds (the same issue the cases in Ms. Williams' memorandum discussed) and sided with the majority view that they may. These splits are discussed in Part II of this memorandum.

I have attached an Appendix that clearly lays out the revised search terms and the appropriate format in Westlaw and in Lexis.

I. CHANGES TO THE SEARCH PARAMETERS.

Two changes needed to be made to the search to make it more effective. First, the scope of the search needed to be broadened in order to capture discussions of splits that were not

[1] Ms. Williams also submitted a memorandum to Judge Sutton and Professor Struve on March 21, 2011 conducting the same search from August 19, 2010 through March 21, 2011. However, she did not find any new circuit splits arising under the Appellate Rules during this time period.

[2] As discussed below, the revised search parameters resulted in one previously undiscovered split between January 1, 2010 and March 21, 2011 being found, thus showing that the previous search was underinclusive and that "doubling back" with the revised search parameters was worthwhile.

caught by the former search parameters. Second, the list of search terms identifying the Appellate Rules needed to be slightly altered.

A. Broadening the Scope of the Search.

The former search used the connector "/s" to locate cases that discuss the Appellate Rules *within the same sentence* as discussion of a split, disagreement, or divide.[3] The scope of this search is too narrow. It is certainly conceivable that an opinion would discuss an Appellate Rule in one sentence and then discuss a circuit split regarding the rule in the next sentence without directly referring to the Federal Rules of Appellate Procedure or some variant thereof. Therefore use of the broader "/p", which searches for terms *within the same paragraph*, is the more appropriate connector. When the "/s" connector is replaced with the "/p" connector in the former Westlaw search[4] from January 1, 2010 through June 30, 2011, eighty-six results are obtained as opposed to eleven.[5]

B. Alteration of Abbreviations for the Federal Rules of Appellate Procedure.

The former search used the following parameters for discussion of the Appellate Rules:[6]

("appellate rule" "rule! of appellate procedure" "Fed. R. App." FRAP).

When Westlaw searches for a phrase within quotation marks that has spaces, it will only search for terms with the identical spacing. Therefore, a search for "Fed. R. App." would not return a case with the text "Fed.R.App." However, the reverse is not true. A search for "Fed.R.App." will return cases with the text "Fed.R.App.", "Fed. R.App.", "Fed.R. App.", or "Fed. R. App." Because various forms of spacing are used, "Fed.R.App." is the better search

[3] The connector "/s" would be used in Westlaw, while the connector "w/s" would be used in Lexis.
[4] These numbers, and all subsequent numbers, are based on a search in the All Federal Cases (ALLFEDS) database on Westlaw. If subsequent searches are conducted on Lexis, they are done in the Federal Court Cases, Combined database.
[5] This is not to say that all of these results are relevant. For example, many of the results are merely the court saying "We disagree." somewhere in a paragraph that discusses the Appellate Rules. To tailor the search more narrowly and avoid some of these irrelevant results, I found it useful to add a parameter to my search that excluded certain terms or words. For example, "% jurist!" excluded phrases such as "reasonable jurists could not disagree" that were commonly used in appellate opinions but (by definition) did not indicate any sort of circuit split.
[6] It should be noted that the search term laid out in Ms. Williams' memorandum is designed for use with Westlaw; if the search is conducted in Lexis, the word 'or' needs to be inserted between each term, i.e. ("appellate rule" or "rule! of appellate procedure" or "Fed. R. App." or FRAP). I will continue my discussion using the Westlaw format unless I specify otherwise.

term.[7] Indeed, if the search is run from January 1, 2010 to June 30, 2011 with "Fed.R.App." there are 166 results, but only eighty-six results if "Fed. R. App." is used.[8]

Similarly, when Westlaw searches for phrases with periods inserted between characters, it will also search for the same sequence of characters without the periods, but not vice versa. Therefore, a search for "F.R.A.P." will also yield results that contain "FRAP", but a search for "FRAP" will not yields results that contain "F.R.A.P." Therefore, "F.R.A.P." is the better search term. Indeed, if the search is run from January 1, 2010 to June 30, 2011 with "F.R.A.P." as the only search term for the Appellate Rules, there are three results, but only two results if "FRAP" is used as the only search term for the Appellate Rules.[9]

Lexis does differentiate between the acronym with periods and the acronym without periods; "FRAP" only returns results with "FRAP"; "F.R.A.P." only returns results with "F.R.A.P." Because both are used, both must be included in the list of terms referring to the Appellate Rules. If the search is run from January 1, 2010 to June 30, 2011 with "FRAP" as the only search term for the Appellate Rules, there are three results. If the same search is run with both "FRAP" and "F.R.A.P.", four results are returned.[10]

II. THE CIRCUIT SPLITS.

A. *Taylor v. Horizontal Distributors, Inc.* and *In re American Investors Life Insurance Co. Annuity Marketing and Sales Practices Litigation*.

Ms. Williams discussed the circuit split over Appellate Rule 7 addressed in *Taylor v. Horizontal Distributors, Inc.*, 2010 WL 334628 (D. Ariz. Jan. 22, 2010), and *In re American Investors Life Insurance Co. Annuity Marketing and Salves Practice Litigation*, 695 F. Supp. 2d 157 (E.D. Pa. 2010), in her August 19, 2010 memorandum.

B. *Ahmed v. Holder*.

In *Ahmed v. Holder*, a June 7, 2010 decision,[11] the Second Circuit discussed a circuit split over Appellate Rule 25(a)(2)(C).[12] 380 F.App'x 67, 69-70 (2d Cir. 2010). At issue was whether the two methods of activating the prison-mailbox rule (a declaration in compliance with 28 U.S.C. § 1746 or a notarized statement) listed in Rule 25(a)(2)(C) are exhaustive or illustrative.

[7] This discussion does not apply to searches done on Lexis. Searching for "Fed.R.App." and "Fed. R. App." will yield the same results.
[8] These numbers, and all subsequent numbers, are based on replacing the connector "/s" with "/p", as suggested above.
[9] Replacing all the Appellate Rule search terms with just "F.R.A.P." or "FRAP" was necessary to make this point because the one result that using "F.R.A.P." finds but "FRAP" does not also contains the words "Federal Rules of Appellate Procedure" in the paragraph.
[10] Using only "F.R.A.P." and "FRAP" was necessary for the same reasons as in n.9.
[11] Ms. Williams did not discover this case in her August 19, 2010 memorandum because the phrases "divided" and "Fed. R.App. P." occurred in the same paragraph but not the same sentence.
[12] The circuit split also applies to the nearly identical Appellate Rule 4(c)(1). *See Ahmed v. Holder*, 380 F.App'x 67, 69 n.2 (2d Cir. 2010).

Id. at 69. The court found four circuits that have held that the list is illustrative[13] and three that have held that it is exhaustive,[14] plus one more that had suggested the list was exhaustive in dicta.[15] *Id.*

An immigration judge had denied Ahmed, a citizen of Sudan, asylum and ordered his removal to Sudan and the Board of Immigration Appeals had affirmed the decision. *Id.* at 68. Ahmed filed appeals papers with prison officials before the filing deadline but only had "a contemporaneous document showing that he delivered his petition to a detention center staff member . . . . [and] bear[ing] the signature of the staff member who accepted the delivery." *Id.* at 69. The government did not contest the validity of the document or the date of the delivery of the papers. *Id.*

However, the court declined to decide this issue because it could reach a conclusion on other procedural grounds. Ahmed had waived his right to appeal the immigration judge's decision. *Id.* at 70. Therefore, the Board of Immigration Appeals never had jurisdiction. *Id.*

C. *International Floor Crafts, Inc. v. Dziemit*

In *International Floor Crafts, Inc. v. Dziemit*, Nos. 09-1555, 09-1556, 09-2349, 2011 WL 1499857, at *9-12 (1st Cir. Apr. 21, 2011), the First Circuit weighed in on the circuit split regarding Appellate Rule 7 that Ms. Williams discussed in her August 19, 2010 memorandum. The court sided with the majority view, holding "that a Rule 7 bond may include appellate attorneys' fees if the applicable statute underlying the litigation contains a fee-shifting provision that accounts for such fees in its definition of recoverable costs and the appellee is eligible to recover them." *Id.* at *10. *Compare Azizian v. Federated Dep't Stores, Inc.*, 499 F.3d 950, 953 (9th Cir. 2007) (holding that attorneys' fees may be included in a Rule 7 bond), *In re Cardizem CD Antitrust Litig.*, 391 F.3d 812, 818 (6th Cir. 2004) (same), *Pedraza v. United Guar. Corp.*, 313 F.3d 1323, 1332 (11th Cir. 2002) (same), *and Adsani v. Miller*, 139 F.3d 67, 73 (2d Cir. 1998) (same), *with Hirschensohn v. Lawyers Title Ins. Co.*, No. 96-7312, 1997 WL 307777, at *3 (3d Cir. June 10, 1997) (holding that attorneys' fees may not be included in a Rule 7 bond), *and In re American President Lines*, 779 F.2d 714, 719 (D.C. Cir. 1985) (same).

The court based its decision on a number of factors that it believed weigh in favor of including attorneys' fees in the cost of appeal. Rule 7 does not define the costs of appeal, but a number of fee shifting statutes have been recognized as including fees in recoverable costs, including at the appellate level. *Int'l Floor Crafts, Inc.*, 2011 WL 1499857, at *10. Indeed, the

[13] The First, *United States v. Correa-Torres*, 326 F.3d 18, 21-22 (1st Cir. 2003), Sixth, *Brand v. Motley*, 526 F.3d 921, 925 (6th Cir. 2008), Ninth, *Douglas v. Noelle*, 567 F.3d 1103, 1108-09 (9th Cir. 2009), and Eleventh, *Day v.* Hall, 528 F.3d 1315, 1318 (11th Cir. 2008), Circuits.
[14] The Seventh, *Ingram v. Jones*, 507 F.3d 640, 644-45 (7th Cir. 2007), Eighth, *Grady v. United States*, 269 F.3d 913, 918-19 (8th Cir. 2001), and Tenth, *United States v. Ceballos*-Martinez, 387 F.3d 1140, 1144 (10th Cir. 2004), Circuits.
[15] The Third Circuit. *Nara v. Frank*, 264 F.3d 310, 315 n.3 (3d Cir. 2001).

Supreme Court held in *Marek v. Chesney*, 471 U.S. 1 (1985), that "costs" in Federal Rule of Civil Procedure 68 includes attorneys' fees if a fee-shifting statute includes them. Second, the court understood Rule 39(e), on which circuits that have not allowed attorneys' fees to be included in a Rule 7 bond have based their decisions, to be illustrative, not exhaustive. *Int'l Floor Crafts, Inc.*, 2011 WL 1499857, at *11. Finally, the court distinguished the cases in which the D.C. and Third Circuits held that attorneys' fees may not be included in a Rule 7 bond: neither of the cases had involved a fee-shifting statute. *Id.* Therefore the court held, because the underlying statute permitted the recovery of attorneys' fees, the inclusion of the fees in the Rule 7 bond to be appropriate. *Id.* at *11-12.

APPENDIX

Westlaw

(divid! split disagree!) /p ("appellate rule" "rule! of appellate procedure" "fed.r.app." “f.r.a.p.”) & da(aft 1/1/2010 & bef 6/30/2011)

Notes:

- “fed.r.app.” will return results for “fed.r.app.”, “fed. r.app.”, “fed.r. app.”, and “fed. r. app.”
- “f.r.a.p.” will return for results for “f.r.a.p.” and “frap”
- the dates can be adjusted
- terms can be excluded from the search by adding a clause, such as one of the following, to the *end* of the search term
    - %jurist!
    - %(jurist! fee)
- other words or phrases can be added to the split search terms or the Appellate Rules search terms; adding *contra*, *diverg!*, *fissure*, or *break* to the split search terms may be useful

Lexis

(divid! or split or disagree!) w/P ("appellate rule" or "rule! of appellate procedure" or "fed.r.app." or frap or "f.r.a.p.") & date aft 1/1/2010 & date bef 6/30/2011

Notes:

- “fed.r.app.” will return results for “fed.r.app.”, “fed. r.app.”, “fed.r. app.”, and “fed. r. app.”
- “frap” and “f.r.a.p.” are distinct and must both be included
- the dates can be adjusted
- terms can be excluded from the search by adding a clause, such as one of the following, to the *end* of the search term
    - and not jurist!
    - and not (jurist! or fee)
- other words or phrases can be added to the split search terms or the Appellate Rules split terms; adding *contra*, *diverg!*, *fissure*, or *break* to the split search terms may be useful

MEMORANDUM

DATE: September 21, 2011

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Matters raised in recent petitions for certiorari

This memo provides an overview of recent certiorari petitions that raised questions relating to the Appellate Rules.[1] As might be expected, questions of appeal timing and appellate jurisdiction were common. But the petitions also presented issues concerning the use of summary appellate procedures, the size of an appellate bond, the standard for sanctions for a frivolous appeal, and the timing of issuance of the mandate.

Part I of this memo discusses questions of timing and appellate jurisdiction. Part I.A discusses issues of finality for appeal purposes. Part I.B turns to questions about the interpretation of a notice of appeal under Appellate Rule 3. Part I.C describes issues concerning the tolling of appeal time. Part I.D describes contentions that notices of appeal can serve as the substantial equivalent of the motions required under Appellate Rules 4(a)(5) and 4(a)(6). Part I.E briefly notes an issue relating to 28 U.S.C. § 2106. Part II discusses two challenges to summary appellate procedures: first, the practice of deciding an appeal's merits at the same time as the grant of permission to appeal, and second, the practice of referring a request for rehearing en banc (after a summary affirmance) to the panel rather than distributing it to all the active judges. Part III discusses two cases that concerned the timing of the issuance of the mandate. Part IV covers two other questions of appellate procedure – cost bonds under Appellate Rule 7 and sanctions under Appellate Rule 38. Part V summarizes other certiorari petitions that do not seem to me to warrant extended consideration by the Committee.

Because this is a long memo, here is a table of contents in order to facilitate quick reference to particular sections:

[1] To locate these petitions, I performed the following search in Westlaw's SCT-PETITION database: (("QUESTION PRESENTED" "QUESTIONS PRESENTED") /100 (FRAP "APPELLATE RULES" "APPELLATE PROCEDURE" "F.R.A.P." "FED.R.APP.P." "FED.R.APP.PROC.")) & da(aft 12/31/2009).

I. Timing and appellate jurisdiction

Some of the most intricate and important questions of appellate procedure concern the timing and scope of the notice of appeal. When does a judgment become final for purposes of appeal? What is encompassed within the scope of a notice of appeal? How do the tolling mechanisms in Appellate Rules 4(a)(4) and 6(b)(2)(A) work? What suffices as a motion under Appellate Rules 4(a)(5) or 4(a)(6)? Are there ways to mitigate the sometimes harsh effects of the principle that statutory appeal deadlines are jurisdictional? This section discusses recent certiorari petitions that implicate those questions.

A. Finality

Two certiorari petitions raised questions about when a judgment is final for appeal purposes. As the law currently stands, neither of these questions directly implicates the Appellate Rules.[2] However, the rulemakers do have statutory authority to define finality for appeal purposes,[3] so I describe these two petitions in case they are of interest to the Committee.

1. *APC Acquisition Corp.*

In *APC Acquisition Corp. v. Atlantech, Inc.*, 131 S. Ct. 602 (2010), the Court denied a petition for certiorari that raised the following Questions Presented:

> What factors should federal appellate courts consider when evaluating the finality of a purportedly ambiguous district court judgment?
>
> Does a federal appellate court have the legal authority to revisit the merits of a two-year old judgment when its appellate jurisdiction is based solely on the district court's denial of a motion to reopen the case?

Petition for Writ of Certiorari at i, *APC Acquisition Corp., Inc. v. Atlantech, Inc.* (No. 10-354).

The first of these questions is an interesting one. Although the cases cited by the petitioner do not, in my view, establish the existence of a circuit split, it seems likely that the caselaw encompasses varying approaches to the question of when a judgment that fails to address all claims with respect to all parties should nonetheless be treated as final (without a Civil Rule 54(b) certification).

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[2] Questions of finality do, of course, relate to various Appellate Rules mechanisms. For example, Appellate Rule 4(a)(2) governs the treatment of a premature notice of appeal. *See* Item No. 10-AP-A.

[3] *See* 28 U.S.C. § 2072(c).

The First Circuit did not publish its order and judgment in *Atlantech Inc. v. American Panel Corp.* – perhaps because the court felt that the complexity of the facts would give the case limited value as precedent. The description that follows is drawn from a published district court opinion (*Atlantech Inc. v. American Panel Corp.*, 679 F. Supp. 2d 150 (D. Mass. 2010)) and from docket information and filings that I obtained from PACER. It may be useful to start with a timeline of the relevant events:

- 2/21/2007: Atlantech sues APC Acquisition and other defendants.

- 3/24/2008: The district court:

    - Enters an Order (Docket # 114) that, inter alia, "allow[s]" Atlantech's motion for partial summary judgment "[w]ith respect to the contract assignment issue" and "allow[s]" Atlantech's "request for preliminary and permanent injunctive relief ... as follows" (specifying certain actions to be taken by APC).

    - Files a Memorandum (Docket # 115) that addresses "three cross-motions for summary judgment and Atlantech's request for preliminary and permanent injunctive relief." Memorandum at 1, *Atlantech Inc. v. American Panel Corp.*, March 24, 2008 (Civil Action No. 07-10342-JLT).

        - The Memorandum concludes: "For the foregoing reasons, Atlantech's Motion for Summary Judgment is ALLOWED; APC's Motion for Summary Judgment is DENIED; and Universal's Motion for Summary Judgment is ALLOWED. Also for the foregoing reasons, Atlantech's request for preliminary and permanent injunctive relief is ALLOWED as follows. APC must turn over the 1040-100 Data Warehouse Documents to Atlantech. With respect to the 1040-725 displays, APC must now either (1) provide service on the displays or (2) turn over the Data Warehouse Documents for these displays to Atlantech." *Id.* at 21-22 (footnotes omitted).

        - A footnote appended to these concluding paragraphs states: "In view of this court's decision on summary judgment and Atlantech's request for injunctive relief, this court need not reach Atlantech's claims for negligent misrepresentation and intentional interference. This includes APC's Motion for Summary Judgment and Universal's Motion for Summary Judgment with respect to these counts." *Id.* n. 87.

    - Enters a Judgment (Docket # 116) that states: "In accordance with the Court's MEMORANDUM and ORDER of MARCH 24, 2008, it is hereby ordered : JUDGMENT FOR PLAINTIFF ATLANTECH, INC. and for DEFENDANT UNIVERSAL AVIONICS SYSTEMS CORP."

- 3/27/2008: APC Acquisition files a notice of appeal. (The court of appeals dockets this appeal as No. 08-1492.)

- 5/1/2008: Atlantech moves to reopen the case, arguing that some of its claims remain to be tried.

- 5/7/2008: The district court denies Atlantech's motion to reopen.

- 10/27/2008: The court of appeals summarily affirms in APC Acquisition's appeal (No. 08-1492).

- 3/23/2009: Atlantech again moves to reopen the case and for clarification.

- 4/22/2009: The district court denies Atlantech's motion to reopen and for clarification.

- 5/21/2009: Atlantech files a notice of appeal from the 4/22/2009 order. (The court of appeals dockets this appeal as No. 09-1726.)

- 12/30/2009: The court of appeals files an order in No. 09-1726 remanding for clarification of the district court's 4/22/2009 order but retaining appellate jurisdiction. The order states:

    - "It is unclear to us why the court closed the case in the first place. The order, memorandum, and separate judgment of March 24, 2008, decided some claims (in part or whole) on the merits, bypassed others (apparently as moot), and awarded only injunctive relief on the contractual claims despite finding that Atlantech had suffered damages from one defendant's breach of contract. There was unfinished business at the time of the judgment and we should like to know why the court declined to conduct further proceedings. Until it clarifies its thinking, we take no view as to when the judgment became final – with the entry of the March 2008 judgment; the first denial of reopening; the second denial of reopening; or, as appellant maintains, never."

- 1/11/2010: The district court issues a Memorandum (reported at *Atlantech Inc. v. American Panel Corp.*, 679 F. Supp. 2d 150 (D. Mass. 2010)) in compliance with the court of appeals' remand order. The Memorandum explains that:

    - The district court considered Atlantech's first motion to reopen as a Civil Rule 60(b) motion and discerned no basis for granting it: "This court, in reviewing these arguments, did not discern any cognizable basis for relief from judgment under Rule 60(b). Rather, the court interpreted appellant/plaintiff's motion as an attempt to relitigate issues directly considered in this court's 22-page Memorandum that accompanied the March 2008 Order . . . . The proper procedure for any grievances arising from the Memorandum was an appeal. But,

Atlantech did not file a direct appeal of this court's March 2008 Order and Judgment. In failing to do so, Atlantech forfeited its right to challenge the correctness of this court's entry of judgment." *Id.* at 152.

- The district court considered Atlantech's second motion to reopen as a substantially similar Rule 60(b) motion and denied it for similar reasons. The district court believed that "by declining to file an appeal of either this court's March 2008 Order or the order denying the First Motion to Reopen, the appellant/plaintiff waived or forfeited its right to challenge the substance of that decision." *Id.* at 153.

- 2/10/2010: Atlantech files a notice of appeal from the district court's Jan. 11, 2010, memorandum and from the March 24, 2008 order, memorandum, and judgment. (The court of appeals dockets this appeal as No. 10-1180.)

- 5/19/2010: The court of appeals enters judgment in Nos. 09-1726 and 10-1180. It dismisses No. 10-1180 for lack of appellate jurisdiction. In No. 09-1726, it partially vacates the March 2008 judgment and vacates the April 2009 order.

The court of appeals explained its disposition of No. 09-1726 as follows:

> [W]e find that the Judgment was too ambiguous to be final when it was entered. Like the appellant in *Harris v. Rivera Cruz*, 20 F.3d 507 (1st Cir. 1994), Atlantech retained at the time of the Judgment a damage claim that had not been waived or settled or tried to a sum certain; and the Judgment itself neither purported to be final nor explicitly terminated the entire case. *Id*. at 509-11. The March 2008 Order specified that the motions for summary judgment were being allowed or denied only "[w]ith respect to the contract assignment issue." On these facts, the undocketed closure of the case did not resolve all doubts in favor of finality. This court's summary affirmance in Appeal No. 08-1492 does not alter the situation; the judgment appealed from included an injunction that conferred appellate jurisdiction regardless of finality.
>
> In our view, the Judgment did not become cumulatively final until April 22, 2009, when the district judge denied reopening a second time, leaving the case for dead. The first denial of reopening occurred while the injunction appeal was pending and could reasonably have been viewed as a decision not to go forward with damages until the appellate issues (such as assignment of liability) had been resolved. The lack of an explanation extended the ambiguity of the original Judgment, forestalling finality.
>
> In the interest of fairness, we treat Atlantech's appeal of the second denial of reopening as its timely appeal of the cumulatively final judgment. Our mandate in Appeal No. 08-1492 encompassed the grant of a permanent injunction with

> respect to the "1040"-series displays and the issues underlying that remedy. In light of the March 2008 Order, which otherwise limited itself to the contract assignment issue, we regard as open the other summary judgment issues that were pending before March 24, 2008. The district judge erred by spurning further proceedings.

Judgment at 1-2, May 19, 2010, *Atlantech Inc. v. American Panel Corp.* (Nos. 09-1726 & 10-1180).

In assessing this disposition, it makes sense to examine both the court of appeals' view that the judgment did not become final until the April 2009 order and the court of appeals' decision to read the May 21, 2009 notice of appeal as encompassing the "cumulatively final judgment."[4] I discuss the latter question (the court of appeals' reading of the notice of appeal) in Part I.B of this memo.

As to the first Question Presented, the petitioner asserted that the circuits are split concerning the appropriate method for determining whether a judgment is final for appeal purposes: "Certain circuits, like the First, actively mine district courts' judgments long after the fact, seeking ambiguities which might spring open the judgment and unfairly return litigants to the fray. Other circuits defer much more to district courts' informed determinations that judgment should enter." Petition at 22.

When a district court's purportedly final judgment addresses fewer than all the remaining claims in an action, determining whether the judgment is really final can be a complicated task. As one treatise summarizes the caselaw:

> Absent an express direction for entry of judgment, an order that disposes of less than all the claims—no matter with what firmness and apparent finality—is not appealable, and appeal time does not start to run.... [But] qualifications arise from the need to determine whether all claims have been decided. A pragmatic

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[4] The petitioner also challenged what it characterized as the court of appeals' willingness to permit Atlantech to challenge, on appeal from an order denying a Rule 60(b) motion, the underlying judgment that was the subject of the Rule 60(b) motion. *See* Petition at 19-21. If that is how the court of appeals had analyzed the matter, this would be noteworthy. *See Browder v. Director, Dept. of Corrections*, 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."). But the court of appeals did not suggest that it was permitting the appeal from the Rule 60(b) denial to bring up the merits of the March 2008 order for appellate review. Rather, in the court of appeals' view, there was no final, appealable judgment until April 2009, and the May 2009 notice of appeal encompassed all relevant aspects of the final judgment (including the March 2008 rulings) and was timely as measured from entry of the April 2009 order. Thus, this aspect of the certiorari petition seems misdirected.

> approach is often taken, finding that finality can be achieved without reliance on Rule 54(b) if it appears that the court intended to decide the entire action, or if the only claims not decided have been abandoned or are clearly mooted by the matters expressly decided.

15A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, FED. PRAC. & PROC. JURIS. § 3914.7, at 544-48 (2d ed. 1992 & Supp. 2011) (footnotes omitted).

As APC Acquisition's certiorari petition points out, some cases take care to read ambiguous judgments as non-final in order to avoid the forfeiture of appeal rights, so long as such a generous reading does not work unfairness to the appellee. *See, e.g.*, *Harris v. Rivera Cruz*, 20 F.3d 507, 512 (1st Cir. 1994) (finding that judgment was facially ambiguous, that extrinsic evidence did not eliminate the ambiguity, that finding finality "could unfairly forfeit the rights of a party," and that the other party was "not unfairly prejudiced by reading the judgment to leave standing any damage claim that Dimarco did not previously waive or settle"); *Burge v. Parish of St. Tammany*, 187 F.3d 452, 467 (5th Cir. 1999) (citing *Harris* with approval and holding that when "the record clearly indicates that the district court failed to adjudicate the rights and liabilities of all parties, an order cannot be presumed to be final irrespective of the district court's intent").

The cases cited by APC Acquisition for the proposition that other circuits would disapprove the approach taken by the First Circuit in *APC Acquisition* do not provide strong support for that proposition. APC Acquisition cites *Elliott v. White Mountain Apache Tribal Ct.*, 566 F.3d 842 (9th Cir. 2009), for the proposition that "the Court of Appeals for the Ninth Circuit has concluded that entry of a separate final judgment clearly shows the district court's intent 'that the order be the court's final act in the matter.'" Petition at 23. In actuality, *Elliott* sets forth a two-pronged test: "A ruling is final for purposes of § 1291 if it (1) is a full adjudication of the issues, and (2) clearly evidences the judge's intention that it be the court's final act in the matter." *Elliott*, 566 F.3d at 846 (quoting *Nat'l Distribution Agency v. Nationwide Mut. Ins. Co.*, 117 F.3d 432, 433 (9th Cir. 1997) (internal quotation marks omitted)). It is true that, as APC Acquisition states, the Seventh Circuit in *Paganis v. Blonstein*, 3 F.3d 1067, 1070 (7th Cir. 1993), found that the district court had dismissed the entire action (not merely the complaint) by means of an order that stated that "judgment by dismissal ... is entered in favor of defendants ... against plaintiffs." But the *Paganis* court distinguished a prior Seventh Circuit case in which the court of appeals found no finality in a document "preprinted 'IT IS ORDERED AND ADJUDGED', to which the court added: 'Insofar as the Court has determined that the defendant is protected by absolute privilege it is unnecessary to determine whether defendant was properly served or whether venue is proper.'" *Reytblatt v. Denton*, 812 F.2d 1042, 1043 (7th Cir. 1987). In *Reytblatt*, the court reasoned that this document "refers the court back to the opinion, it does not state how 'far' the court actually has determined X, it does not state the disposition of the motion, and it does not terminate the case. It contains neither an award of relief nor a declaration that the case is concluded." *Id.* at 1044. The *Paganis* court agreed that "this language is ambiguous and fails to alert anyone to the court's disposition of the case." *Paganis*, 3 F.3d at 1070. Accordingly, I am unpersuaded by APC Acquisition's assertion that the cases it cites establish "a sharp divergence

in the treatment of district courts' separate, final judgments by the First and Fifth Circuits and, on the other hand, by the Ninth and Seventh Circuits." Petition at 25.

That is not to say, however, that the caselaw concerning potentially ambiguous judgments speaks with one voice. I suspect that a full evaluation of this body of caselaw would disclose variation in courts' willingness to read an ambiguous judgment as final or non-final. I also suspect that it might be difficult to classify each circuit's approach to this question, given the highly fact-bound nature of the question. (In this respect, the courts' treatment of this question seems similar to the courts' treatment of the question whether a notice of appeal encompasses a particular ruling; courts take varying approaches to that question, and the analysis can be highly fact-dependent.) If the Committee is interested in further pursuing this question, I would be glad to analyze the caselaw in greater depth.

2. *Extreme Networks*

In *Extreme Networks, Inc. v. Enterasys Networks, Inc.*, 395 F. App'x 709 (Fed. Cir. 2010) (unpublished opinion), *cert. denied*, No. 10-1199, 2011 WL 1212232 (U.S. June 6, 2011), the certiorari petition listed two Questions Presented:

> 1. Whether an unqualified money judgment for a sum certain is final for purposes of appellate jurisdiction under 28 U.S.C. §§ 1291 and 1295.
>
> 2. Whether, when a postjudgment motion tolls the time to file a notice of appeal under Federal Rule of Appellate Procedure 4(a)(4)(A), the time to appeal runs from the date of an order granting the motion or from the date of a judgment's alteration or amendment upon such motion.

Petition for Writ of Certiorari at i, *Extreme Networks, Inc. v. Enterasys Networks, Inc*. (No. 10-1199). I will discuss the second of these questions in Part I.C.

As to the first of these questions, the petitioner contended that courts of appeals disagree concerning whether a money judgment that fails to address prejudgment interest is final for appeal purposes. *See id.* at 14-15. The Federal Circuit held in *Extreme Networks* that a judgment initially entered by the district court was not final "because it left unresolved prejudgment interest, even though the parties had previously notified the district court of their unresolved dispute over its calculation." *Extreme Networks*, 395 F. App'x at 712.

The petitioner in *Extreme Networks* asserted that the courts of appeals are split on the question of finality in such a situation: Some courts, the petitioner stated, take the position "that a money judgment silent on prejudgment interest is not final," while others "hold that a money judgment lacking prejudgment interest is nevertheless final and appealable, and can be corrected only by the timely filing of a Civil Rule 59(e) motion to amend the judgment." Petition at 14-15.

I have not attempted to plumb the depths of the caselaw on this question,[5] because the answer to this question does not directly affect the functioning of the Appellate Rules. Of course, if the Committee is interested in this question I will be glad to investigate it further.

B. Rule 3 and the interpretation of notices of appeal

Appellate Rule 3(c)(1)(B) requires the notice of appeal to "designate the judgment, order, or part thereof being appealed." The two cases discussed in this section of the memo illustrate the variation in courts' application of this requirement. *APC Acquisition* is an example of a generous reading, while *Schramm* is an example of a more stringent reading.

1. *APC Acquisition Corp.*

As noted in Part I.A.1, the dispute over appellate jurisdiction in *APC Acquisition* implicated a question concerning the scope of Atlantech's notice of appeal. Although Atlantech's May 2009 notice of appeal was not a model of clarity, the court of appeals' decision to treat that notice as encompassing the final judgment falls well within the contours of existing caselaw under Appellate Rule 3. Atlantech's May 2009 notice of appeal commenced by stating that Atlantech appealed "the denial of Atlantech's Motion to Reopen and for Clarification entered on April 22, 2009." It continued: "To the extent that the [April 2009 order] is based on the District Court's belief that it entered final judgment on all claims against all defendants in this action by its March 24, 2008 Order, Memorandum, and Judgment ... Atlantech appeals:"; this was followed by a numbered list of five items, three of which attacked specific aspects of the March 2008 order, memorandum and judgment and one of which listed

> [t]he District Court's denial of Atlantech's due process rights, including ... Atlantech's rights to have all claims resolved against all defendants, including those claims as to which the District Court bifurcated and reserved judgment but failed to address ...[,] Atlantech's rights to pursue damages, ... [and] Atlantech's right to a jury trial ... on all claims that the District Court did not resolve, including but not limited to Atlantech's tort claims, all claims against American Panel, Atlantech's claims for damages, and the claims on other aircraft displays.

This notice of appeal could definitely have been better drafted, but the court of appeals' decision to treat it as encompassing all relevant aspects of the cumulatively final judgment is understandable given the ambiguity of the sequence of events in the case. There are plenty of precedents for a generous reading of a notice of appeal (though, as noted in the section that

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[5] *Cf.* 15B CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, FED. PRAC. & PROC. JURIS. § 3915.2, at 273-74 & n.7 (2d ed. 1992 & Supp. 2011) (collecting cases and stating that "[t]he need to resolve a disputed and not routine question of interest ... defeats finality").

follows, there are also precedents for a more stringent approach).[6]

2. *Schramm*

The petition for certiorari in *Schramm v. LaHood*, 130 S. Ct. 2090 (2010), highlights the other end of the spectrum of approaches to the interpretation of notices of appeal under Appellate Rule 3.[7] The plaintiff's two consolidated cases were terminated in different orders dated, respectively, February (for Case One) and March (for Case Two). *See Schramm v. LaHood*, 318 F. App'x 337, 340-41 (6th Cir. 2009) (unpublished opinion). The appellant filed two notices of appeal – one in each case – but the notice filed in Case Two mistakenly designated the February order rather than the March order. *See id.* at 341. A few weeks later, the appellant filed a statement of issues and parties in the latter appeal that referred to the February order but also indicated the appellant's intent to challenge the March dismissal of Case Two. *See id.*; Petition for Writ of Certiorari at 7-8, *Schramm v. LaHood* (No. 09-440). The court of appeals sua sponte raised the question of appellate jurisdiction, *see Schramm*, 318 F. App'x at 341, and held that it lacked jurisdiction to review the March order because – looking only to the notice of appeal and not to later appellate filings – the appellant's intent to appeal the March dismissal of Case Two was not clear: "It matters not that Schramm's intent to appeal the March 25, 2008 order is obvious from his appellate briefs and that the Secretary was not

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[6] The caselaw can be summarized as follows:

> [E]ven where it could be argued that the appellant failed to comply with the established rules, courts may apply the principle that the notice of appeal should be liberally construed and may infer the appellant's intent to include the challenged order in the appeal in the light of surrounding circumstances. Some courts have forgiven mistakes in designating the judgment or ruling appealed from so long as the intent to appeal that judgment can be inferred and the appellee is not prejudiced. Other courts appear to take a more stringent approach, but caselaw appears to vary even within a given circuit.

16A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & CATHERINE T. STRUVE, FED. PRAC. & PROC. JURIS. § 3949.4, at 96-99 (4th ed. 2008 & Supp. 2011) ("FPP Vol. 16A") (footnotes omitted); *see also id.* at 131 ("[O]ne who files a notice of appeal that references only the court's denial of a postjudgment motion risks losing the right to seek review of the underlying judgment, but courts have often been willing to rescue such appellants by inferring that they meant to appeal from the underlying judgment as well.").

[7] In addition to this question concerning the proper interpretive approach to notices of appeal under Rule 3, the petitioner also proposed a second question – namely, "Whether the Court's decision in *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988), that Rule 3 of the Federal Rules of Appellate Procedure is jurisdictional, should be overruled?" Supplemental Brief for Petitioner at 11, *Schramm v. LaHood* (No. 09-440).

prejudiced by his mistake in identifying the wrong order. What matters is that Schramm's intent to appeal the March 25, 2008 order is not discernible from the notice of appeal itself." *Id.* at 343.

The approach taken in *Schramm* differs from that taken in some other circuits, which have been willing to forgive mistakes in designating the judgment or ruling appealed from so long as the intent to appeal that judgment can be gleaned from the surrounding circumstances and there is no prejudice to the appellee. *See, e.g.*, *Parkhill v. Minn. Mut. Life Ins. Co.*, 286 F.3d 1051, 1058 (8th Cir. 2002) ("When determining whether an appeal from a particular district court action is properly taken, we construe the notice of appeal liberally and permit review where the intent of the appeal is obvious and the adverse party incurs no prejudice."); *Moran Foods, Inc. v. Mid-Atlantic Market Development Co.*, 476 F.3d 436, 440 (7th Cir. 2007) ("'[I]nept' attempts to comply with Rule 3(c) are accepted as long as the appellee is not harmed.") (quoting *Foman v. Davis*, 371 U.S. 178, 181 (1962)); *KH Outdoor, LLC v. City of Trussville*, 465 F.3d 1256, 1260 (11th Cir. 2006) (relying on the focus of appellant's brief and on the lack of prejudice to the appellee); *Bogart v. Chapell*, 396 F.3d 548, 555 (4th Cir. 2005) ("Although we do not commend the careless formulation of Bogart's notice of appeal, we must conclude that Bogart's intent to appeal from the Rule 59(e) Order can be readily inferred from the discussion in her opening brief….").

C. Tolling

Two of the certiorari petitions illustrate complexities associated with tolling motions; but neither of these petitions, in my view, warrants action through the rulemaking process.

1. *Extreme Networks*

As noted in Part I.A, the second question presented in *Extreme Networks* concerns tolling. This issue relates directly to Item No. 08-AP-D (concerning possible revisions to Appellate Rule 4(a)(4)(B)). The petition in *Extreme Networks* contends that Rule 4(a)(4)'s

> plain text states that, upon the filing of certain postjudgment motions, "the time to file an appeal runs for all parties from the entry of the order *disposing* of the last such remaining motion." Fed. R. App. P. 4(a)(4)(A) (emphasis added). At least two circuits understand this to mean that regardless of whether a judgment is amended or altered upon such an order, the time to appeal runs from entry of the order disposing of the motion. But at least two other circuits have tortured Appellate Rule 4(a)(4)(A)'s text in order to conclude that appellate timeliness should be measured from the date of a subsequent amended judgment in cases where the district court amends or alters the judgment.

Petition at 15.

The petition cites decisions from the First and Second Circuits that run the appeal time

under Rule 4(a)(4)(A) from the entry of the order disposing of the last remaining tolling motion.[8] The petition correctly identifies the Seventh Circuit as a circuit that takes a different approach. As the Committee has previously noted in its consideration of Item No. 08-AP-D, the Seventh Circuit has read Civil Rule 58(a)'s reference to orders "disposing of" tolling motions to mean orders *denying* postjudgment motions[9] – with the result that when a district court grants a postjudgment motion Civil Rule 58 requires a separate document, such that if the grant results in the later entry of an amended judgment, Appellate Rule 4(a)(4)(A)'s reference to "entry" is likely to mean the later entry of the amended judgment (because that will often be the date of entry of the required separate document).

The petition also maintains that the Sixth Circuit runs the re-started appeal time not from entry of the order disposing of the last remaining tolling motion but from entry of the resulting judgment. For this proposition the petition cites *Stern v. Shouldice*, 706 F.2d 742 (6th Cir. 1983). *See* Petition at 25-26 ("*See Stern v. Shouldice*, 706 F.2d 742, 747 (6th Cir. 1983) (holding that the 30-day period to file a notice of appeal runs from the date of the entry of an amended judgment, rather than the order granting a Rule 59(e) motion to amend the judgment)."). At first glance, *Stern*'s facts do seem to make that case apposite: "Stern filed a motion for prejudgment interest, costs and attorney's fees. In an opinion rendered on January 15, 1981, the court denied defendants' motions and granted plaintiff's motion. The judgment for interest, costs and attorney's fees was entered February 12, 1981. Defendants filed their notice of appeal on March 6, 1981." *Stern*, 706 F.2d at 746. If *Stern* were decided today and the court of appeals held, on those facts, that the appeal was timely, the petition's reading of the court's analysis would be accurate. The petition's reading of *Stern* is anachronistic, however. At the time of the judgment and appeal in *Stern*, Civil Rule 58 could be read to require that the judgment be set out on a separate document even when the judgment in question was a disposition of a tolling motion; it was not until 2002 that Civil Rule 58 was amended to exempt tolling-motion dispositions from the separate document requirement. The timeliness of the appeal in *Stern* resulted from the fact that the separate document requirement was not fulfilled until February 12: " FRAP 4(a)(6) states that such a judgment is 'entered' when there is compliance with FRCP 58 and 79(a), i.e., a separate document is entered on the docket. In the present case, the assessment of pre-judgment interest, costs and attorney's fees was entered for purposes of FRAP 4(a)(6) on February 12, 1981." *Stern*, 706 F.2d at 746. Thus, I do not think *Stern* stands for the proposition for which the petitioner cites it; there is no reason to conclude that the Sixth Circuit has adopted the approach taken by the Seventh Circuit.

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[8] *See Bennett v. City of Holyoke*, 362 F.3d 1, 4 (1st Cir. 2004); *Cardillo by Cardillo v. United States*, 767 F.2d 33, 34 (2d Cir. 1985).

[9] *See Employers Ins. of Wausau v. Titan Int'l, Inc.*, 400 F.3d 486, 489 (7th Cir. 2005) ("The only way to reconcile the requirement that an amended judgment be set forth in a separate document with the exception to that requirement for an order disposing of a Rule 59(e) motion is by reading 'disposing of a motion' as 'denying a motion.'"); *Kunz v. DeFelice*, 538 F.3d 667, 673 (7th Cir. 2008) (following *Wausau*).

In short, the *Extreme Networks* petition does not alter our understanding of the functioning of Civil Rule 58(a) and Appellate Rule 4(a)(4).

2. *Busson-Sokolik*

In *Busson-Sokolik v. Milwaukee School of Engineering*, No. 10-1398, 2011 WL 1831575 (U.S. Jun 20, 2011), the Questions Presented were as follows:

> 1. Whether Federal Rule of Appellate Procedure 38 or Federal Rule of Bankruptcy Procedure 8020 permits monetary sanctions against attorneys or parties in uncalculated and unfettered amounts when bad faith and frivolousness are absent from an appeal?
>
> 2. Whether the time to file an appeal runs for all parties from entry of an order disposing of the last remaining motion in Federal Rules of Appellate Procedure 4(a)(4)(A)(iv) through 4(a)(4)(A)(vi) when a district court exercises jurisdiction in a bankruptcy appeal under Federal Rule of Appellate Procedure 6(b)?

Petition for Certiorari at i, *In re Busson-Sokolik* (No. 10-1398). I will discuss the first of these questions in Part IV.B. Here, I will focus on the petition's discussion of the effect of postjudgment motions on the time to appeal from district court or BAP to court of appeals with respect to core matters finally determined by the bankruptcy court.

Busson-Sokolik apparently involved an appeal governed by Appellate Rule 6(b).[10] In explaining the second Question Presented, the petitioner in *Busson-Sokolik* asserted that the Seventh Circuit had implicitly treated the petitioner's Civil Rule 59 and 60 motions (made in district court) as rehearing motions under Bankruptcy Rule 8015, with the result that the motions tolled the time to appeal and delayed the effectiveness of a previously-filed notice of appeal. *See* Petition at 15 (arguing that "there is no order, only indication, by the Seventh Circuit that it believes filing a notice of appeal in a court of appeals is premature before entry of an order on a FRCP 59 or 60 motion"). The petitioner asserted that courts of appeal vary in their willingness to treat motions styled as Civil Rule 59 or 60 motions as Bankruptcy Rule 8015 rehearing motions in the context of core bankruptcy matters that are appealed from bankruptcy court to a

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[10] The effect of postjudgment motions on the time to appeal to the court of appeals in a bankruptcy case depends on whether the appeal is governed by Appellate Rule 6(a) or Appellate Rule 6(b). Rule 6(a) "applies when the district court enters a final order or judgment upon consideration of a bankruptcy judge's proposed findings of fact and conclusions of law in a non-core proceeding pursuant to 28 U.S.C. § 157(c)(1) or when a district court withdraws a proceeding pursuant to 28 U.S.C. § 157(d)." 1989 Committee Note to Appellate Rule 6. Rule 6(b) "governs appeals that follow intermediate review of a bankruptcy judge's decision by a district court or a bankruptcy appellate panel," *id.* – i.e., appeals that concern core bankruptcy matters that were finally determined, in the first instance, by the bankruptcy court.

district court or BAP and thence to a court of appeals.

It is unclear why the petitioner thought that this question would result in a grant of certiorari, since the Seventh Circuit apparently resolved the question in a way that preserved the petitioner's appeal on the merits. However, the issue is worth considering in its own right. If litigants are indeed confused as to their postjudgment motion options in such litigation, then it is worth considering whether such confusion could lead to the loss of appellate rights.

None of the cases cited by the petitioner in *Busson-Sokolik* questions the premise that motions styled as Civil Rule 59 or 60 motions but filed within Bankruptcy Rule 8015's time limit should be treated as Bankruptcy Rule 8015 motions for purposes of considering the timeliness of an appeal to which Appellate Rule 6(b) applies. *See In re Bli Farms*, 465 F.3d 654, 656, 658 (6th Cir. 2006) (holding that a purported Civil Rule 60(b) motion filed more than three months after district court's order affirming bankruptcy court judgment "was a nullity" and that the notice of appeal filed within Appellate Rule 4(a)(1)'s time period measured from denial of the purported Rule 60(b) motion was untimely to appeal the underlying district court judgment)[11]; *English-Speaking Union v. Johnson*, 353 F.3d 1013, 1020 (D.C. Cir. 2004) ("[I]rrespective of how parties characterize their motions for reconsideration in bankruptcy appeals, a motion for reconsideration filed within Bankruptcy Rule 8015's [time] limit should be treated as an 8015-motion that postpones appellate review during its pendency."); *In re Butler, Inc.*, 2 F.3d 154, 155, 157 (5th Cir. 1993) (holding that a motion styled as a Civil Rule 59 motion was actually a timely Bankruptcy Rule 8015 motion and that the court of appeals lacked jurisdiction to proceed with the appeal while the motion was pending below); *In re Eichelberger*, 943 F.2d 536, 538 (5th Cir. 1991) (stating that "Bankruptcy Rule 8015 provides the sole mechanism for filing a motion for rehearing in a federal district court").[12]

Nor has my research uncovered any cases holding to the contrary.[13] *See In re ECC*

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[11] Because the motion in *Bli Farms* would have been untimely if filed as a Bankruptcy Rule 8015 motion, there was no occasion for the *Bli Farms* court to address whether such a motion, if timely, should be re-designated as a Bankruptcy Rule 8015 motion.

[12] *Eichelberger* is not directly relevant to the question at hand because the motion in that case was explicitly made under Bankruptcy Rule 8015 and the court had no occasion to address the consequences of mis-designating a motion as one under the Civil Rules.

[13] I looked only for cases decided on or after December 1, 1993, because the 1993 amendments to Appellate Rule 6(b) altered the significance for appellate purposes of motions under Bankruptcy Rule 8015. *See* 1993 Committee Note to Appellate Rule 6(b)(2)(i) ("The amendment accompanies concurrent changes to Rule 4(a)(4). Although Rule 6 never included language such as that being changed in Rule 4(a)(4), language that made a notice of appeal void if it was filed before, or during the pendency of, certain posttrial motions, courts have found that a notice of appeal is premature if it is filed before the court disposes of a motion for rehearing.... The Committee wants to achieve the same result here as in Rule 4, the elimination of a

Systems, Inc., 323 F. App'x 519, 520 (9th Cir. 2009) (unpublished opinion) ("The motion that ECC Systems filed in the district court, pursuant to Federal Rule of Civil Procedure 59(e), asking that court to reconsider its affirmance of the bankruptcy court's decision, properly may be treated as a motion for rehearing under Bankruptcy Rule 8015. We have held that the label that a party attaches to a post-judgment motion is not dispositive for purpose of tolling the time in which to file a notice of appeal."); *In re Kleibrink*, 262 F. App'x 623, 625 (5th Cir. 2008) (unpublished opinion) ("Although Kleibrink's motion for a new trial asks that the case be re-opened for the taking of new evidence, it also asserts that the court should amend its findings of fact and conclusions of law regarding the value of appellee's claim. Therefore, under *Butler*, we treat the motion as one governed by Rule 8015, notwithstanding its title."); *BCORP-HRT, LLC v. Lobb*, 66 F. App'x 164, 166 (10th Cir. 2003) (unpublished opinion) ("Though not styled as such, we construe each [request for reconsideration] as a motion for rehearing . . . under Rule 8015 of the Federal Rules of Bankruptcy Procedure."); *In re Trinity Bend Joint Venture*, No. 93-1454, 1994 WL 35591, at *1 (5th Cir. Jan. 26, 1994) (unpublished opinion) ("[D]espite its title, the Guarantors' motion was a motion for rehearing under Bankruptcy Rule 8015.").

The caselaw's apparent consensus on this point accords with the approach taken by many courts in non-bankruptcy matters, prior to 1993, with respect to Civil Rule 60(b) motions that were filed within the time limit for postjudgment motions under Civil Rules 50, 52, and 59:

> Prior to 1993, Rule 60 motions were not listed among the tolling motions in Rule 4(a) and, therefore, did not toll the running of the appeal period. But it was often hard to distinguish between a motion to alter or amend a judgment under Civil Rule 59(e), which did extend the time for appeal, and a motion for relief from the judgment under Civil Rule 60(b), which did not extend the time. Most courts properly refused to allow the caption on the motion papers to be decisive. Many courts had sensibly developed a bright-line rule: any motion to change the judgment made within ten days after entry of judgment—other than a motion under Rule 60(a) to correct a clerical error—would be treated as a Rule 59(e) motion, and therefore would extend the time for appeal, no matter how the motion was labeled.[14]

The 1993 amendments removed the need for this recharacterization, by adding Civil Rule 60 motions to Appellate Rule 4(a)(4)(A)'s list of motions that toll appeal time if made within the

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procedural trap.")

I ran the following search in Westlaw's CTA database: da(aft 11/30/1993) & (8015 /P ("RULE 50" "RULE 59" "RULE 52" "RULE 60" "PROCEDURE 50" "PROCEDURE 59" "PROCEDURE 52" "PROCEDURE 60")). I also Keycited the cases cited in the certiorari petition and examined any relevant appellate decisions in the Keycite results.

[14] FPP Vol. 16A, *supra* note 6, § 3950.4, at 325-27.

short time limit for postjudgment motions under Civil Rules 50, 52, and 59. But the pre-1993 precedents provide a model for the consensus view, in recent cases, concerning motions that should have been, but were not, styled as motions under Bankruptcy Rule 8015.

This issue does not, therefore, seem to me to warrant a rulemaking response.[15]

D. Notice as substantial equivalent of motion

Both Appellate Rule 4(a)(5) and Appellate Rule 4(a)(6) require the would-be appellant to make a motion within a set period of time. Two of the petitions highlight the perennial question of whether a document (e.g., a notice of appeal) that is not denominated as such a motion can be considered the substantial equivalent of such a motion.

1. Rule 4(a)(5): *United States ex rel. Haight v. Catholic Healthcare West*

In a prior memo concerning the sequelae of *Bowles v. Russell*, 551 U.S. 205 (2007), I noted the unfortunate result in *United States ex rel. Haight v. Catholic Healthcare West*, 602 F.3d 949 (9th Cir.), *cert. denied*, 131 S. Ct. 366 (2010). In *Haight*, the qui tam relators filed their notice of appeal later than 30 but within 60 days after entry of judgment. After that 60-day period had expired, the Supreme Court granted certiorari in *United States ex rel. Eisenstein v. City of New York*, 129 S. Ct. 2230 (2009) – the case in which, as the Committee knows, the Court held that the 30-day appeal period, rather than the 60-day appeal period, applies to qui tam cases in which the government has decided not to intervene, *see id.* at 2232. The *Haight* relators then (citing Appellate Rule 4(a)(5)) moved in the court of appeals for an order extending the time to file a notice of appeal. The court of appeals denied the motion, noting that Rule 4(a)(5) authorizes extensions only by the district court, and not by the court of appeals, and also that the relators' motion was filed outside the time limit set by Rule 4(a)(5)(A)(i) and 28 U.S.C. § 2107.

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[15] It may be the case that in some circuits litigants are unsure whether they can move for postjudgment relief under the Civil Rules' postjudgment motion provisions when seeking to challenge a district court's determination of an appeal from a final bankruptcy court judgment. *See, e.g.*, *Rothrock v. Turner*, 435 B.R. 70, 76 (D. Me. 2010) ("Mr. Rothrock moves for reconsideration under both Rule 59(e) and Bankruptcy Rule 8015. Although the First Circuit has not specifically addressed the correct procedural mechanism for reconsideration of district court bankruptcy appellate orders, it has upheld a district court decision that used Rule 8015."); *In re President Casinos, Inc.*, No. 4:08CV1976, 2010 WL 2342491, at *1 (E.D. Mo. June 7, 2010) ("Zegeer has moved for relief from judgment or to alter or amend judgment under Federal Rules of Civil Procedure Rules 59(e) and 60(b). However, this is not a proper way to seek review of my judgment affirming the order of the bankruptcy court."), *aff'd*, 409 F. App'x 31 (8th Cir. 2010) (unpublished opinion). But any such confusion seems likely to be addressed by further development in the caselaw; in any event, even if it would be worth considering whether to address such confusion, that would be a matter for the Bankruptcy Rules Committee rather than the Appellate Rules Committee.

See Haight, 602 F.3d at 954-56. The court also held that the relators' notice of appeal could not serve as the substantial equivalent of a timely Rule 4(a)(5) motion. *See id.* at 956. With reluctance, the court of appeals held that it lacked jurisdiction to hear the appeal because it was untimely under *Eisenstein* and because that defect was jurisdictional under *Bowles*. *See Haight*, 602 F.3d at 953 ("It is a serious understatement to call this result 'inequitable.'").

In their certiorari petition, the *Haight* relators stated the Question Presented as: "Whether for good cause or excusable neglect circuit courts may grant a 30-day jurisdictional extension of time to file a notice of appeal as authorized in Rule 4(a)(5) [and stated in Rule 26(b)]." Petition for Writ of Certiorari at i, *United States ex rel. Haight v. Catholic Healthcare West* (No. 10-267). The relators' contention that "courts commonly deem a notice of appeal filed with the district court within the 30-day extension period to constitute a motion for an extension," Petition at 13, seems inaccurate. The petition later provides a more accurate description when it states that its position reflects the law "[i]n the criminal context today, and in the civil context prior to 1979." *Id*. Although the petition states that "[c]ivil courts since the 1979 rule change continue to grapple with their equitable authority in this regard," *id*. n.3, the cases it cites either hold that a notice of appeal cannot be regarded as a Rule 4(a)(5) motion,[16] or else do not concern Rule 4(a)(5).[17] In fact, I have not found any cases – that are still good law – in any circuit that treat a notice of appeal as a Rule 4(a)(5) motion.

That is not to say that the issue does not warrant attention from the Committee. If the

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[16] *See Campos v. LeFevre*, 825 F.2d 671, 675-76 (2d Cir. 1987). The petition also cites an annotation: *Untimely notice of appeal as motion for extension of time to appeal under Rule 4(a)(5) of Federal Rules of Appellate Procedure*, 74 A.L.R. Fed. 775. Although I did not read all the cases cited in the annotation, I read any that the text of the annotation suggested might permit a notice of appeal to be treated as a Rule 4(a)(5) motion. I found only a handful of cases from the Second Circuit, all of which were overruled by *Campos*. *See, e.g.*, *Fearon v. Henderson*, 756 F.2d 267, 267 (2d Cir. 1985) (remanding "to the district court in order that it may determine whether to treat the notice of appeal as an application for extension of time pursuant to Rule 4(a)(5)"); *Griffin v. George B. Buck Consulting Actuaries, Inc.*, 573 F. Supp. 1134, 1136 (S.D.N.Y. 1983).

[17] *See Amalgamated Transit Union Local 1309, AFL-CIO v. Laidlaw Transit Services, Inc.*, 435 F.3d 1140, 1146-47 (9th Cir. 2006) (invoking Rule 2 to suspend the requirements of Rule 5 in order to avoid unfairness of applying to the case at hand the requirement of a petition for permission to appeal in a CAFA remand appeal, and "constru[ing] plaintiffs' timely notice of appeal and untimely petition for permission to appeal as together constituting one timely and proper petition for permission to appeal"); *Blausey v. United States Trustee*, 552 F.3d 1124, 1130-31 (9th Cir. 2009) (invoking Rule 2 to suspend Rule 5's requirements and construing a notice of appeal (filed with the bankruptcy court) as a petition for permission to appeal under the interim rules governing direct appeals from bankruptcy courts to courts of appeals under 28 U.S.C. § 158(d)(2)).

Committee were inclined to consider the question, an argument could well be made that the approach taken under Rule 4(a)(5) and Section 2107 has a harsh effect, especially on pro se appellants. *See, e.g.*, *Washington v. Bumgarner*, 882 F.2d 899, 902 (4th Cir. 1989) (Murnaghan, J., concurring "regretfully" in court's opinion dismissing appeal) ("In every case which occurs to me where a pro se prisoner inadvertently files his notice of appeal too late, but within the thirty day extension period in cases of excusable neglect, it seems to me that a request for a finding of excusable neglect was implicit.").[18] It is worth noting that the Rules take a quite different approach in criminal appeals: "Upon a finding of excusable neglect or good cause, the district court may – before or after the time has expired, with or without motion and notice – extend the time to file a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this Rule 4(b)." Appellate Rule 4(b)(4). But it is also worth noting that any change to the approach taken in civil cases might require an amendment not only to Rule 4(a)(5) but also to 28 U.S.C. § 2107.[19]

2. Rule 4(a)(6): *Venezia v. William Penn School District*

In *Venezia v. William Penn School Dist.*, 131 S. Ct. 144, *reh'g denied*, 131 S. Ct. 688 (2010), the pro se petitioner raised numerous challenges to the court of appeals' dismissal of her appeal for lack of jurisdiction.[20] The petition's primary contentions were that the court of

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[18] Though the petition overreaches in suggesting that *Amalgamated Transit* and *Blausey* (cited in note 17, *supra*) evidence a circuit split concerning Rule 4(a)(5), it is certainly true that those cases illustrate the courts' willingness in some other contexts to read filings generously in order to protect litigants from the consequences of understandable confusion, particularly at times when the relevant law is in a period of transition.

[19] Section 2107(c) states that "[t]he district court may, upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal, extend the time for appeal upon a showing of excusable neglect or good cause." The *Haight* petitioners' further argument – that the court should have extended the motion deadline under Rule 26(b) and Rule 2 – appears to overlook the statutory nature of the motion deadline.

[20] The petition stated the Questions Presented as follows:

> Does a court of appeals lack the authority to consider an appeal fried [sic] within the time limits prescribed by the Federal Rules of Appellate Procedure and Congressional statute, 28 U.S.C. §2107(c), in the absence of a separate motion for an extension of time when a notice of appeal has been timely filed?
>
> Does a court of appeals lack the authority to request a ruling from a lower court on the merits of the timeliness of an appeal, in the absence of a separate motion for an extension of time?
>
> Does a court of appeals have the authority to dismiss an appeal for untimeliness

appeals should have construed the petitioner's December 18, 2009 filing as a motion to reopen the time to appeal under Appellate Rule 4(a)(6) and that the court of appeals should not have permitted the appeal to be filed (and the docketing fee to be paid) if the appeal was untimely.[21] As to the first of these contentions, the factual background is somewhat murky. The petitioner's December 2009 filing clearly could not have constituted a valid motion to reopen the time to appeal from the district court's underlying 2006 dismissal of the petitioner's case, because the December 2009 filing was well outside the 180-day outer limit set by Appellate Rule 4(a)(6) and 28 U.S.C. § 2107. With respect to the district court's August 2009 order denying the petitioner's request to reopen the case, the docket reflects that "COPIES [were] E-MAILED TO PRO SE AND COUNSEL" in August 2009, but the petitioner states that she never received the email. Opposing counsel handed the petitioner a copy of the district court's order on December 9, 2009. For purposes of this discussion I will assume that the petitioner did not receive notice of entry of the August 2009 order under Civil Rule 77(d) until December 9, 2009. Under that assumption, the question would be whether the petitioner's December 18, 2009 filing[22] could be taken as a motion to reopen the time to appeal under Appellate Rule 4(a)(6). Assuming that the court of appeals was also working under the assumption that the petitioner first received notice of the August 2009 order on December 9, 2009, the court of appeals' order dismissing the appeal indicates a view that the December 18, 2009 filing could not serve as a motion to reopen the time to appeal: "Although Appellant asserts that she timely filed her notice of appeal for purposes of

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> when a timely filed notice of appeal is entered on the docket after the expiration of the time limit on which the Court then relies to subsequently dismiss the appeal, whereby depriving the Appellant, a priori, of any course of action?
>
> Can a court of appeals disregard its own local rules of appellate procedure and written court instructions, and arbitrarily docket, issue, fail to issue or fail to timely issue notices to appellants which regard the initial docketing of an appeal and/or the dismissal of an appeal for lack of jurisdiction?

Petition for Writ of Certiorari, *Venezia v. William Penn School District* (No. 09-1464).

[21] As to the petitioner's contention concerning the filing fee, the court of appeals' docket does not reflect a motion for the return of the filing fee after the appeal was dismissed for lack of jurisdiction. But even if the petitioner had made such a request, the court would presumably have denied it. *See Porter v. Dept. of Treasury*, 564 F.3d 176, 179 (3d Cir. 2009) ("It is of no consequence whether an appeal is voluntarily dismissed, dismissed due to a jurisdictional defect, or dismissed on the merits—appellants are not entitled to the return of their filing and docketing fees."). *See also, e.g., Thurman v. Gramley*, 97 F.3d 185, 187 (7th Cir. 1996) ("A solvent litigant must pay the filing and docketing fees for the privilege of initiating an appeal; dismissal on jurisdictional grounds does not lead the court to refund the appellant's money."), *overruled on other grounds by Walker v. O'Brien*, 216 F.3d 626 (7th Cir. 2000).

[22] The filing was denominated a "Petition to Appeal"; it indicated the petitioner's desire to appeal various court orders, including the district court's August 2009 order.

Federal Rule of Appellate Procedure 4(a)(6), that rule requires the filing of a motion to reopen the time to appeal *and the time to file such a motion has passed*. *See* Fed. R. App. P. 4(a)(6); *Poole v. Family Court of New Castle County*, 368 F.3d 263, 267-68 (3d Cir. 2004)." Order, Jan. 27, 2010, *Venezia v. William Penn School District* (No. 10-1060) (emphasis in original).

Viewed in this light, the *Venezia* decision followed the approach stated in *Poole*, in which the court of appeals refused to construe a notice of appeal as a Rule 4(a)(6) motion to reopen the time to appeal. *See Poole v. Family Court of New Castle County*, 368 F.3d 263, 269 (3d Cir. 2004). Two other circuits have taken what appears to be a more flexible approach than *Poole*. *See Sanders v. United States*, 113 F.3d 184, 187 (11th Cir. 1997) ("[W]hen a pro se appellant alleges that he did not receive notice of the entry of the judgment or order from which he seeks to appeal within twenty-one days of its entry, we must treat his notice as a Rule 4(a)(6) motion and remand to the district court for a determination of whether the appellant merits an extension under that rule."); *Ogden v. San Juan County*, 32 F.3d 452, 454 (10th Cir. 1994) ("By order dated October 13, 1993, this court dismissed [plaintiff's] appeal and remanded the matter to the district court, noting that the appeal was filed late but: '[T]he plaintiff contends in his notice of appeal that he did not receive notice of the district court's order dismissing the case. Because, by proffering an excuse, the plaintiff appeared to recognize he had a timeliness problem, we liberally construe the notice of appeal as a motion to reopen for appeal pursuant to Fed.R.App.P. 4(a)(6).'"). Even had the *Venezia* case been litigated in one of the circuits that takes a more flexible approach, it is not clear that the outcome would have differed; that fact (as well as the fact that the pro se petitioner cited neither *Sanders* nor *Ogden*) may help to explain why the Court denied certiorari.

E. 28 U.S.C. § 2106

My memo in the spring 2011 agenda book noted a certiorari petition that was pending before the Court in *United States* ex rel. *O'Connell v. Chapman University* (No. 10-810), in which the petitioner sought to narrow *Bowles* through the application of 28 U.S.C. § 2106. The qui tam relators in *O'Connell* argued, based on 28 U.S.C. § 2106, that the court of appeals could and should have vacated the judgment and remanded for the re-entry of a judgment from which they could take a timely appeal. *See* Petition for Writ of Certiorari at 5-6, *United States* ex rel. *O'Connell v. Chapman University* (No. 10-810). The respondent initially waived its right to file a response to the petition, but the Court requested a response. After receiving the response, the Court denied certiorari. *See United States* ex rel. *O'Connell v. Chapman University*, 131 S. Ct. 2442 (2011).

Although the denial of certiorari might signal a view that the petitioner's position lacked merit, it seems possible that the denial might instead signal a view that *O'Connell* was not the best vehicle for deciding the issue. The respondent contended that the petitioner's equitable-vacatur argument was neither raised nor passed upon below and that there is currently no circuit split on this question. *See* Respondent's Brief in Opposition at 5-6, *United States* ex rel. *O'Connell v. Chapman University* (No. 10-810).

It may be useful to monitor the caselaw to see whether litigants and courts return to the equitable-vacatur argument in future cases.

II. Summary appellate procedures

Faced with ever-increasing docket pressures, the courts of appeals have developed a number of mechanisms to expedite the processing of appeals. This section considers certiorari petitions that challenged two such mechanisms – first, the practice of deciding the merits of an appeal simultaneously with the grant of permission to appeal, and second, provisions that authorize a motions panel that granted summary affirmance to reject (on behalf of all active judges) a petition for rehearing en banc.

A. Simultaneous permission and merits decisions: *In re Text Messaging Antitrust Litigation*

In this case, the second Question Presented read as follows: "Whether the Seventh Circuit erred when, contrary to the Federal Rules of Civil Procedure and the accepted and usual course of judicial proceedings in the other circuits, it ruled on petitioners' interlocutory appeal without affording petitioners an opportunity to brief the merits." Petition for Writ of Certiorari at i, *In re Text Messaging Antitrust Litigation* (No. 10-1172).[23] As the petitioners explained:

> The petition – limited to 20 pages . . . , *see* Fed. R. App. P. 5(c) – did not argue the merits. Approximately four pages of the brief explained why the district court's opinion was contestable, *see* 28 U.S.C. § 1292(b) . . . . Plaintiffs opposed the motion. Defendants filed a motion for leave to file a proffered reply, which the court of appeals denied . . . . The Seventh Circuit granted defendants' petition for leave to appeal. In the same order, the court of appeals affirmed the decision of the district court without allowing defendants to brief the merits.

Id. at 12; *see also In re Text Messaging Antitrust Litig.*, 630 F.3d 622, 627 (7th Cir. 2010) ("[W]e grant the application for interlocutory appeal, and, since the merits of the appeal have been fully briefed in the parties' submissions and would not, we think, be illuminated by oral argument, we proceed to the merits."). The petitioners complained that this procedure deprived them of their opportunity to brief and argue the merits:

> Because interlocutory appeals pursuant to § 1292(b) present difficult and often important legal questions, only extraordinary circumstances would justify dispensing with merits briefing. The practice of all of the circuit courts – except

[23] In the interests of full disclosure, I should mention that I heard about this case earlier this year from a law school friend who was representing the petitioners. Of course, it also came to my attention in the ordinary course through my clipping search for Appellate-Rules-related certiorari petitions.

> the Seventh Circuit – supports that conclusion. Our research has uncovered a single case outside of the Seventh Circuit in which a court of appeals addressed the merits of an appeal pursuant to § 1292(b) based on the petition alone. The Seventh Circuit – at least certain judges on that court – dispenses with merits briefing in interlocutory appeals practically as a matter of routine.

Id. at 28.

Practices in the Seventh Circuit and other circuits. A review of the cases cited by the petitioners in the *Text Messaging* case reveals that in a number of cases the Seventh Circuit has indeed decided the merits in the same order that grants the petition for interlocutory review. The petitioners identified two other cases from the Fourth and Fifth Circuits in which the court of appeals decided the merits without providing a chance for merits briefing.[24] In addition, the Second Circuit has followed this approach at least once.[25]

Of the nine Seventh Circuit cases cited by the *Text Messaging* petitioners, three involved appeals under the Class Action Fairness Act provision concerning review of remand decisions (28 U.S.C. § 1453(c)(1)),[26] two other petitions were brought under Civil Rule 23(f),[27] and the remaining four petitions were brought under Section 1292(b).[28]

It is difficult to assess the frequency with which the practice occurs. The thirteen instances (over the course of roughly a decade) noted in this memo may well not be a complete list of the cases in which a court of appeals has decided the merits at the same time that it grants

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[24] *See Wallace v. Louisiana Citizens Property Ins. Corp.*, 444 F.3d 697 (5th Cir. 2006); *Lienhart v. Dryvit Systems, Inc.*, 255 F.3d 138 (4th Cir. 2001). I was unable to verify the nature of the briefing in *Lienhart* from the information available on Westlaw. *Wallace* was a case in which the petitioners sought interlocutory review under CAFA, but the court held that the appeal should instead proceed as an appeal from a final judgment under Section 1291.

[25] *See Estate of Pew v. Cardarelli*, 527 F.3d 25, 29 (2d Cir. 2008).

[26] *See First Bank v. DJL Properties, LLC*, 598 F.3d 915 (7th Cir. 2010); *In re Sprint Nextel Corp.*, 593 F.3d 669 (7th Cir. 2010); *Cunningham Charter Corp. v. Learjet, Inc.*, 592 F.3d 805 (7th Cir. 2010).

[27] *See Pella Corp. v. Saltzman*, 606 F.3d 391 (7th Cir. 2010); *Isaacs v. Sprint Corp.*, 261 F.3d 679 (7th Cir. 2001).

[28] *See E.E.O.C. v. Sidley Austin LLP*, 437 F.3d 695 (7th Cir. 2006); *E.E.O.C. v. Caterpillar, Inc.*, 409 F.3d 831 (7th Cir. 2005); *Reiser v. Residential Funding Corp.*, 380 F.3d 1027 (7th Cir. 2004); *In re High Fructose Corn Syrup Antitrust Litigation*, 361 F.3d 439 (7th Cir. 2004).

permission to appeal.[29] In addition, it is difficult to obtain figures concerning the frequency of interlocutory appeals. One study found that of the Civil Rule 23(f) petitions filed during a nearly eight-year period, 169 resulted in a grant of interlocutory review.[30] Another study (of published appellate opinions available on Lexis and issued during a three-year period in the late 1980s) found "135 published cases from certified and accepted section 1292(b) appeals."[31] If we were to use these figures to generate an extremely rough[32] numerator and denominator, we would arrive at a result suggesting that fewer than two percent of permissive interlocutory appeals result in simultaneous permission and merits decisions.[33] Of course, a detailed docket search could reveal that the rate is higher than that.

General desirability of permitting merits briefing prior to merits decision. It is understandable that one who succeeds in obtaining interlocutory review would wish to have a chance to brief the merits before the court decides the appeal. As the *Text Messaging* petitioners pointed out, petitions for permission to appeal are shorter than merits briefs (20 pages instead of 30). In addition, Rule 5 does not provide for a reply brief. And, as the petitioners noted, the petition's focus may differ from that of a merits brief, because a petition would naturally

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[29] A truly comprehensive search would require recourse to docket sheet information in a format more accessible than Westlaw's.

[30] *See* Barry Sullivan & Amy Kobelski Trueblood, *Rule 23(f): A Note on Law and Discretion in the Courts of Appeals*, 246 F.R.D. 277, 283-84, 286 n.43 (2008) (describing docket sheet search on Westlaw encompassing petitions filed "between December 1, 1998 and October 30, 2006," noting that "[o]f the 476 'decided' petitions, 36% were granted," and referring to "the 169 granted petitions").

[31] *See* Michael E. Solimine, *Revitalizing Interlocutory Appeals in the Federal Courts*, 58 Geo. Wash. L. Rev. 1165, 1196 (1990).

[32] The figures employed in the next footnote are extremely rough. As noted above, the figure of 13 simultaneous permission and merits decisions is likely to be an underestimate. But the figure of 135 grants of Section 1292(b) appeals is also likely to be an underestimate (because it was based on opinions available on Lexis as of 1990). Another factor that renders the denominator an underestimate is that it includes figures only for two sorts of permissive interlocutory appeals.

Moreover, the figures are rough because they concern differing time periods.

[33] For the numerator, we would take the 13 instances of simultaneous permission and merits decisions and divide by 10 (because those instances span the decade from 2001 to 2010). For the denominator, we would first take the 169 grants of Civil Rule 23(f) review and divide by 8 (because the Sullivan and Trueblood study spanned almost eight years), and we would then take the 135 grants of Section 1292(b) review and divide by 3 (because the Solimine study spanned three years); we would then add the resulting numbers (21.125 and 45).

This exercise would lead us to the following equation: 1.3 / (21.125 + 45) = .0197.

emphasize arguments designed to persuade the court to grant review rather than arguments geared solely to the merits of the appeal.[34]

It is also understandable that courts would seek to expedite the progress of permissive interlocutory appeals. In the case of CAFA remand appeals, their decisions of such appeals are subject to tight statutory deadlines.[35] And even apart from statutory deadlines, there is a general interest in dealing expeditiously with interlocutory appeals in order to avoid unduly delaying proceedings in the trial court.

Under Appellate Rule 2 (with exceptions not relevant here), the court of appeals "may – to expedite its decision or for other good cause – suspend any provision of [the Appellate Rules] in a particular case and order proceedings as it directs." Courts of appeals have relied on Rule 2 as authority for various mechanisms to expedite appellate decision, including decision on the merits along with disposition of a preliminary motion,[36] expedited processing of the record,[37] and

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[34] For example, persuading the court that "there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation," 28 U.S.C. § 1292(b), is different from persuading the court that a particular side of the argument should prevail.

[35] The CAFA framework sets a 60-day deadline for deciding such appeals. *See* 28 U.S.C. § 1453(c)(2); *see also id.* § 1453(c)(3) (providing for 10-day extension). The Second Circuit, in fact, relied partly on the existence of that deadline in choosing to decide the merits along with a petition for review. *See Estate of Pew v. Cardarelli*, 527 F.3d 25, 29 (2d Cir. 2008) (relying on the 60-day deadline as well as on the facts that "in order to decide whether we have appellate jurisdiction we must construe the same statutory language upon which the district court rested its remand order (and [that] the parties have already briefed their positions on that virtually identical statute)").

[36] In *United States v. Stemm*, 835 F.2d 732 (10th Cir. 1987) (en banc), the court relied upon Rule 2 as authority for what was then Tenth Circuit Rule 9.5.9, which permitted summary merits disposition of a criminal appeal in connection with the court's decision on a motion for release pending appeal. The court stressed, however, that such summary dispositions were usually not appropriate:

> Our rule is predicated upon the premise that there are those few cases in which the issues on bail and on the merits are so closely intertwined and so circumscribed that full consideration of the former dictates the outcome of the latter. In most cases, this will not be the result, however, and denial of bail will not affect consideration of the merits....
>
> Notwithstanding our conclusion that the concept of summary disposition is valid, we must nevertheless hold the panel's determination of the merits of this case was improper .... In this case, the panel neglected the strictures on its

the use of a compressed briefing schedule.[38] Sometimes, recourse to expedited procedures under Rule 2 is justified by a particular need for prompt appellate review[39] – for example where there is an urgent need to review denial of provisional relief below.[40] (Courts also use summary

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> authority and proceeded improvidently by reaching the merits of the appeal in the absence of a record on appeal.

Id. at 734. The Tenth Circuit local rules no longer appear to contain a provision, such as the prior Rule 9.5.9, that authorizes such summary dispositions in this context.

[37] *See Singleton v. Jackson Mun. Separate Sch. Dist.*, 419 F.2d 1211, 1222 (5th Cir. 1969) (ordering, in the event of future appeals in certain desegregation cases, that "the record be transmitted to this court within fifteen days after filing of the notice of appeal" and that briefing be expedited), *reversed on other grounds sub nom. Carter v. West Feliciana Parish School Board*, 396 U.S. 290 (1970).

[38] *See Henry v. Clarksdale Mun. Separate Sch. Dist.*, 433 F.2d 387, 388 (5th Cir. 1970) (noting the "court-imposed accelerated briefing schedule" in a school desegregation appeal decided "less than a short month" before start of school).

[39] The Seventh Circuit has stated that summary affirmance should be the exception rather than the rule:

> Summary disposition is appropriate in an emergency, when time is of the essence and the court cannot wait for full briefing and must decide a matter on motion papers alone.... Summary affirmance may also be in order when the arguments in the opening brief are incomprehensible or completely insubstantial.... Finally, summary affirmance may be appropriate when a recent appellate decision directly resolves the appeal.... Short of the foregoing (or substantially similar) situations, the government and other appellees should follow the usual process

United States v. Fortner, 455 F.3d 752, 754 (7th Cir. 2006).

[40] *See Environmental Def. Fund, Inc. v. Andrus*, 625 F.2d 861, 862 (9th Cir. 1980) (permitting appeal from denial of TRO on ground that "in the absence of review, the appellants would be effectively foreclosed from pursuing further interlocutory relief," and lifting "the normal requirements of appellate procedure" because "important public policy issues are involved and time is of the essence").

affirmance[41] when an appeal is frivolous;[42] but almost by definition, when a court grants a request for permissive interlocutory review it is acknowledging the existence of a nonfrivolous ground for that appeal.)

It thus seems that a court of appeals has authority to decide an appeal on the merits at the same time that it determines a preliminary matter (such as a request for permission to appeal). Such a mechanism seems easiest to justify when some or all of the following factors are present:

- There is a particular need for quick disposition of the merits.
- The briefing on the preliminary matter is closely entwined with the merits of the appeal, such that the parties have briefed the merits fully and the motions panel had to become familiar with the merits.[43]
- The merits do not require extensive consideration of the record,[44] or else the record has been provided to and reviewed by the court.[45]
- In deciding the merits, the court does not reach out to determine issues on which

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[41] Summary affirmance is distinguishable from the practice challenged by the *Text Messaging* petitioners, in that summary affirmance sometimes does not occur until after the court has received the appellant's principal merits brief.

[42] *See, e.g.*, *United States v. Monsalve*, 388 F.3d 71, 73 (2d Cir. 2004) ("We construe a motion to dismiss an appeal as a motion for summary affirmance if the appeal presents only frivolous issues."); *Joshua v. United States*, 17 F.3d 378, 380 (Fed. Cir. 1994) ("[S]ummary disposition is appropriate, inter alia, when the position of one party is so clearly correct as a matter of law that no substantial question regarding the outcome of the appeal exists."). The Keycite results for *Joshua* suggest that the Federal Circuit employs this rationale with some frequency.

[43] The reasons advanced for granting interlocutory review will overlap with the merits to varying degrees.

[44] This would be true of appeals reviewing decisions on motions under Civil Rule 12(b)(6) (such as the *Text Messaging* appeal), and also of appeals that hinge on a question of statutory interpretation, *see, e.g.*, *First Bank v. DJL Properties, LLC*, 598 F.3d 915, 918 (7th Cir. 2010) ("The word 'defendant' in § 1453(b) means what the word 'defendant' means elsewhere in Chapter 89 – and, as *Shamrock Oil* held, that word does not include a plaintiff who becomes a defendant on a counterclaim.").

[45] As noted above, see note [36], the summary affirmance in *Stemm* was held to be improper because the court of appeals had "reach[ed] the merits of the appeal in the absence of a record on appeal." *Stemm*, 835 F.2d at 734.

interlocutory review was not contemplated by the parties or the court below.[46]

- The parties were told in advance that the court might decide the merits along with the preliminary matter.[47]

- The parties were permitted to file supplemental briefs,[48] or the party against whom the merits decision is to be rendered had an opportunity to file a reply in further support of its position.[49]

It is not clear that the issue identified by the *Text Messaging* petitioners provides a reason to amend the Appellate Rules;[50] but it is possible that further empirical study could reveal the practice of simultaneous permission and merits decisions to be more widespread than the data discussed here suggest.

B. Petitions for rehearing en banc after summary affirmance: *Karls v. Goldman Sachs Group, Inc.*

In *Karls v. Goldman Sachs Group, Inc.*, 131 S. Ct. 180 (2010), the Court denied a certiorari petition by a *pro se* petitioner whose Questions Presented included one that challenged the Ninth Circuit's use of summary procedures in deciding his appeal. That question read in

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[46] In the context of interlocutory appeals under Section 1292(b), "appellate jurisdiction applies to the *order* certified to the court of appeals, and is not tied to the particular question formulated by the district court." *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205 (1996).

[47] *See, e.g.*, *Estate of Pew*, 527 F.3d at 27 ("Defendants filed the present petition pursuant to 28 U.S.C. § 1453(c), seeking permission to appeal the district court's remand order. We advised the parties that were we to grant defendants' motion for leave to appeal, we might also elect to decide the merits simultaneously.").

[48] In *Isaacs v. Sprint Corp.*, 261 F.3d 679 (7th Cir. 2001), there was no merits briefing as such. But the docket indicates that there was a lot of other briefing – including a supplemental petition, a response to that supplemental petition, and briefing (ordered by Court of Appeals) on a jurisdictional question. Though I have not reviewed those filings, they could have shed light on the questions at issue in the appeal (namely, the appropriateness of class certification).

[49] For example, in *E.E.O.C. v. Sidley Austin LLP*, 437 F.3d 695 (7th Cir. 2006), the docket sheet reveals that the petitioner successfully requested permission to file a reply in further support of its petition.

[50] It certainly provides a reason for advocates to consider carefully whether to seek interlocutory appeal and how to brief their request for permission to appeal – especially in the Seventh Circuit.

relevant part: "Is there a denial of 'due process of law' under U.S. Const. Art. V when ... the Ninth Circuit Court of Appeals' violates the Federal Rules of Appellate Procedure Rule 35 (the original three-judge panel illegally seized control of Petitioner's Petition for Rehearing En Banc, explicitly reconstrued it as a mere 'Motion' and then dismissed the 'Motion' without permitting the other Ninth Circuit judges to know anything about it) ...?" Petition for Writ of Certiorari at 1-2, *Karls v. Goldman Sachs Group, Inc.* (No. 09-1527).

Shortly after Karls appealed the district court's dismissal of his complaint, the court of appeals ordered him to show cause why the judgment below should not be summarily affirmed. *See* Order, Nov. 16, 2009, *Karls v. Goldman Sachs Group, Inc.*, No. 09-17438 (9th Cir.);[51] *see also* Ninth Circuit Rule 3-6(b) ("At any time prior to the completion of briefing in a civil appeal if the court determines ... that it is manifest that the questions on which the decision in the appeal depends are so insubstantial as not to justify further proceedings the court may, after affording the parties an opportunity to show cause, issue an appropriate dispositive order."). A few months later (after reviewing Karls' submission in response to the order to show cause), a three-judge panel issued an order summarily affirming on the ground that "the questions raised in this appeal are so insubstantial as not to require further argument." Order, Jan. 21, 2010, *Karls v. Goldman Sachs Group, Inc.*, No. 09-17438 (9th Cir.) (citing *United States v. Hooton*, 693 F.2d 857, 858 (9th Cir. 1982).[52] Karls evidently filed a petition for rehearing en banc.[53] The three-judge panel denied that petition, stating as follows:

> Appellant's petition for rehearing en banc is construed as a motion for reconsideration en banc of the court's January 21, 2010 order summarily affirming the district court's judgment. So construed, the motion is denied on behalf of the full court. See Ninth Circuit Rule 27-10(a)(1); Ninth Circuit General Orders 6-11. No motions for reconsideration, rehearing, clarification, stay of the mandate, or any other submissions shall be filed or entertained in this closed docket.

Order, March 17, 2010, *Karls v. Goldman Sachs Group, Inc.*, No. 09-17438 (9th Cir.).

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[51] There were actually three appeals from the dismissal of Karls's three cases. The discussion in the text references events in the lead appeal; from the brief in opposition to Karls' certiorari petition it appears that the disposition of the other two appeals followed a similar pattern.

[52] The cited passage in *Hooton* states that "[m]otions to affirm should be confined to appeals obviously controlled by precedent and cases in which the insubstantiality is manifest from the face of appellant's brief." *Hooton*, 693 F.2d at 858.

[53] The relevant docket entry describes the filing as Karls' "motion to reconsider Appellate Commissioner order of the Court."

Ninth Circuit Rule 27-10(b)[54] states in part:

> A timely motion for clarification or reconsideration of an order issued by a motions panel shall be decided by that panel. If the case subsequently has been assigned to a merits panel, the motions panel shall contact the merits panel before disposing of the motion. A party may file only one motion for clarification or reconsideration of a panel order. No answer to such a motion is permitted unless requested by the court, but ordinarily the court will not grant such a motion without requesting an answer. The rule applies to any motion seeking review of a motions panel order, either by the panel or en banc, and supersedes the time limits set forth in FRAP 40(a)(1) with respect to such motions.

Ninth Circuit General Order 6.11 provides:

> The Clerk shall enter the receipt or filing of a motion for rehearing en banc of a motion previously considered by a motions panel and transmit two copies of it to the appropriate motions attorney for processing. The Clerk shall retain the remaining copies until further direction by a judge or motions attorney. In cases involving judgments of death, the Clerk shall forward all motions for rehearing en banc to Associates. If the motion was decided by opinion, copies of the motion will be circulated to all active judges.
>
> The motion shall be referred by the motions attorney to the panel which entered the order in issue. The panel may follow the relevant procedures set forth in Chapter 5 in considering the motion for rehearing en banc, or may reject the suggestion on behalf of the court.

In essence, the practice followed in the Ninth Circuit appears to be that if an appeal meets the test for summary affirmance (in the Ninth Circuit, "appeals obviously controlled by precedent and cases in which the insubstantiality is manifest from the face of appellant's brief"), then the panel that summarily affirmed can, if it chooses, reject any petition for rehearing en banc without circulating it to the other active judges. (This would not be true if the summary affirmance were by opinion – but then again, the features that warrant summary affirmance would generally also guarantee that the summary affirmance would be by unpublished order.) This practice may be an understandable response to docket pressures, especially in the Ninth Circuit (where the docket is large and en banc activities – including dissents from denials of rehearing en banc – are relatively frequent), but it might surprise some commentators. The Tigar

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[54] Ninth Circuit Rule 27-10(a)(1) (which was cited by the panel in *Karls*) does not appear to be as directly on point. It states: "A party seeking further consideration of an order that disposes of the entire case on the merits, terminates a case, or otherwise concludes the proceedings in this court must comply with the time limits and other requirements of FRAP 40 and Circuit Rule 40-1."

treatise, for example, states that

> Federal Rule of Appellate Procedure 27(c) provides that dispositive motions must be decided by a panel of the court rather than by a single judge ....
>
> One question that has vexed advocates is what, if any, review may be obtained from an adverse decision by a panel of the court. If the decision disposes of the appeal or is the practical equivalent of a final judgment, then the rehearing provisions of Fed. R. App. P. 40 and the rehearing en banc provisions of Fed. R. App. P. 35 are triggered.

JANE B. TIGAR & MICHAEL E. TIGAR, FEDERAL APPEALS JURISDICTION AND PRACTICE § 8:5 (3d ed.). One might argue that the Ninth Circuit has adopted a reasonable approach. If an appeal is manifestly insubstantial, then why would a majority of the active judges ever vote to grant en banc review? On the other hand, the analysis differs with respect to the Ninth Circuit's other possible ground for summary affirmance: When an appeal is "obviously controlled by precedent," en banc review is the *only* avenue (other than Supreme Court review) for (occasionally necessary) reconsideration of that "controll[ing] precedent."

It is unsurprising that the Court did not regard the procedural question as cert-worthy in *Karls*, and Mr. Karls is surely incorrect in arguing that it was a denial of due process to refuse to circulate his en banc rehearing petition to all the active judges. On the other hand, as a policy matter it might be worth considering whether merits dispositions by motion panels should be subject to en banc review under the procedures normally employed for such petitions. I have not attempted to survey the practices in other circuits, because I thought it best to first ascertain whether the Committee is interested in investigating this question further.

III. Issuance of the mandate

Just as the filing of a notice of appeal transfers authority (over the matters encompassed in the appeal) from the district court to the court of appeals, the issuance of the court of appeals' mandate signals the moment when the court of appeals relinquishes authority over the appeal. Two recent certiorari petitions highlight the significance of the non-issuance of the mandate.

A. *Kawashima v. Holder*

In *Kawashima v. Holder*, 615 F.3d 1043 (9th Cir. 2010), *cert. granted in part,* 131 S. Ct. 2900 (2011), the parties' certiorari-stage filings focused principally on the immigration law question on which the Court ultimately granted certiorari (whether "Petitioners' convictions of filing, and aiding and abetting in filing, a false statement on a corporate tax return in violation of 26 U.S.C. §§ 7206(1) and (2) were aggravated felonies involving fraud and deceit under 8 U.S.C. § 1101(a)(43)(M)(i), and Petitioners were therefore removable"). *See* Petition for Writ of Certiorari at i, *Kawashima v. Holder* (No. 10-577); *Kawashima v. Holder*, 131 S. Ct. 2900 (2011) (granting certiorari as to first of two questions in petition). The second question – the one

on which certiorari was not granted – concerns a question of appellate procedure. Although I think the Court's decision not to review the second question makes sense, I describe the issue here in the interest of completeness.

The relevant facts include the following. An immigration judge ordered Mr. and Mrs. Kawashima removed due to their pleas of guilty to certain federal crimes. The Board of Immigration Appeals affirmed. The Kawashimas sought review in the Ninth Circuit. The Ninth Circuit proceeded to issue four decisions. In *Kawashima v. Gonzales*, 503 F.3d 997 (9th Cir. 2007) (*Kawashima I*), the court of appeals denied relief to Mr. Kawashima but granted relief to Mrs. Kawashima. But the court of appeals granted rehearing, with the result that *Kawashima I* was superseded by *Kawashima v. Mukasey*, 530 F.3d 1111 (9th Cir. 2008) (*Kawashima II*), which granted relief to both of the Kawashimas. The government petitioned for rehearing of *Kawashima II*; while that petition was pending, the Supreme Court granted certiorari in a different case on a question concerning the interpretation of 8 U.S.C. § 1101(a)(43)(M)(i), *see Nijhawan v. Mukasey*, 129 S. Ct. 988 (2009). The government asked the Ninth Circuit to stay its consideration of the rehearing petition in *Kawashima* pending the Supreme Court's decision in *Nijhawan*. In the wake of the *Nijhawan* decision, the Ninth Circuit (after obtaining supplemental briefing) withdrew its opinion in *Kawashima II* and issued a new opinion, *Kawashima v. Holder*, 593 F.3d 979 (9th Cir. 2010) (*Kawashima III*). *Kawashima III* held in light of *Nijhawan* that both Kawashimas had pleaded guilty to offenses that would qualify as grounds for removal if the amount of the loss was large enough, but that a remand was required as to Mrs. Kawashima so that the agency could consider what sorts of evidence the government could present to establish the amount of the government's loss; thus, the court denied relief to Mr. Kawashima but remanded to the agency as to Mrs. Kawashima. The court later substituted a revised opinion on denial of rehearing and rehearing en banc. *See Kawashima v. Holder*, 615 F.3d 1043 (9th Cir. 2010) (*Kawashima IV*).

The bulk of the Kawashimas' certiorari petition focused on their argument that their offenses do not provide a basis for removal. But the petitioners also argued that the court of appeals – having vacated Mrs. Kawashima's order of removal in 2007 on the ground that the record did not establish that Mrs. Kawashima had committed a removable offense and having adhered to that result in its 2008 decision – lacked authority in 2010 to remand Mrs. Kawashima's case to the agency to permit the government to submit additional evidence in support of its claim that she committed a removable offense. *See* Petition at 33-36. The court of appeals had addressed this argument in a footnote in *Kawashima IV*:

> In their supplemental brief to this court, petitioners assert that Mrs. Kawashima's case is no longer before us because after our first opinion in this case granted Mrs. Kawashima's petition for review, the government did not file a petition for rehearing. We are unpersuaded by this argument. Although it is true that the government did not ask us to reconsider our resolution of Mrs. Kawashima's case, we are entitled to do so as we have not yet issued our mandate in this case. As such, our decision remains subject to modification, either at the request of a party or sua sponte. *See Finberg v. Sullivan*, 658 F.2d 93, 96 n. 5 (3d Cir. 1980) (en

> banc). Thus, Mrs. Kawashima's case remains before us, and we are obligated to decide the merits of her petitions for review in light of *Nijhawan*.

Kawashima IV, 615 F.3d at 1055 n.7. The Kawashimas' certiorari petition contended nonetheless that a mandate should have issued, under Appellate Rule 41, after the court's 2007 decision as to Mrs. Kawashima, and that "[t]he Ninth Circuit's failure, or its clerk's failure, to issue the mandate in accordance with Rule 41, when the government declined to seek review or rehearing, brought finality to the litigation between the parties." Petition at 34. The petition distinguished *Finberg* as follows:

> Apart from the fact that [*Finberg* and a case that it cited] were rendered before the 1994 and 1998 amendments to Rule 41, in each of these cases, the mandate was stayed after a motion for a stay was made, so the parties could appeal or seek review. Thus, the judgments in *Finberg* and [the case on which it relied] were not final pending a decision by this Court and were subject to modification due to a change in the law in the interim.

Petition at 34-35.[55] In conclusion, the Kawashimas argued, "When the Ninth Circuit issued its opinion in Kawashima II, the Government had the option to petition for rehearing in Mrs. Kawashima's case, file a notice of appeal, or move to stay the mandate. The Government did none of these things and the mandate should have issued automatically according to Rule 41." *Id.* at 36.

The government's opposition brief points out the key missing fact in this analysis: According to the government (and undisputed by the Kawashimas, *see* Reply Brief for the Petitioners at 13, *Kawashima v. Holder* (No. 10-577)), the Kawashimas jointly filed a single petition for review in the court of appeals.[56] The government's brief succinctly explains the

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[55] The Kawashimas attached significance to the fact that the 1994 amendments to Rule 41 replaced the word "shall" with "must." *See* Petition at 33. But there is no indication in the 1994 Committee Note to Rule 41 that this word change was anything but stylistic. The stylistic nature of the change is evidenced by Standing Committee minutes from the meeting at which the 1994 amendment Rule 41 received final approval. *See* Committee on Rules of Practice and Procedure, Minutes of the Meeting of June 17-19, 1993, at 6 (reporting discussion of some of the proposed Appellate Rules amendments and stating that "[t]he committee further determined to make the change from 'shall' to 'must,' wherever appropriate, throughout all the proposed amendments to the rules, in accordance with the convention established by the Style Subcommittee.").

[56] It is not entirely clear what provision authorized the Kawashimas to file a joint petition. Appellate Rule 15(a)(1) provides that "[i]f their interests make joinder practicable, two or more persons may join in a petition to the same court to review the same order." But from the parties' description, the Kawashimas sought review of two separate agency orders – one

significance of that fact:

> Although the Board disposed of petitioners' appeal of the IJ's decision by separate orders pertaining to each petitioner, petitioners chose to file a single petition for review in the court of appeals, attaching both Board orders.... Petitioners never amended their petition or asked the court of appeals to sever their cases.
>
> Because there was thus only one "case" before the court of appeals, Rule 41(d)(1) of the Federal Rules of Appellate Procedure dictated that, when Akio Kawashima filed "a petition *** for rehearing en banc," that petition had the effect of "stay[ing] the mandate until disposition of the petition or motion." Fed. R. App. P. 41(d)(1). The same thing was true when the government later filed a timely petition for rehearing of the court's second decision issued in July 2008.
>
> None of the authorities petitioners cite (Pet. 35-36) suggests otherwise, because they each stand for the simple proposition that a case becomes final when a party fails to appeal or when the appeal is concluded. None of those cases involved a situation in which a party failed to pursue further review against one adversary but not against another.

Brief for the Respondent in Opposition at 16-17, *Kawashima v. Holder* (No. 10-577). In response, the Kawashimas briefly argued that their use of a single petition did not change their position that "when the Government declines to seek review, and the judgment is res judicata, the case cannot be resurrected. Disputes are between parties and when resolved, Court intervention is unjustified." Reply Brief at 13.

The Ninth Circuit docket provides support for the government's position. Judgment was entered at the time of the court's 2007 decision. However, the mandate never issued, presumably because Mr. Kawashima timely petitioned for panel rehearing and rehearing en banc. When the panel granted rehearing and issued a new opinion in 2008, it withdrew the 2007 opinion. Once again, the docket reflects the entry of judgment at the time of the 2008 decision,

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concerning each petitioner. *See* Opposition Brief at 5 ("Attached to the petition were the Board's two orders affirming the order of removal pertaining to each petitioner."). The discussion in the text of this memo proceeds on the assumption that any defect in the filing of the joint petition does not alter the court's analysis of the issuance of the mandate.

The Ninth Circuit proceedings did involve two separate petitions that were consolidated by the court, but not because Mr. and Mrs. Kawashima petitioned separately for review of the orders of removal. *See Kawashima IV*, 615 F.3d at 1052 ("The Kawashimas timely filed separate petitions for review of the BIA's affirmance of the IJ's removal order and the BIA's denial of their motion to reopen. We consolidated the petitions for review pursuant to 8 U.S.C. § 1252(b)(6).").

but also reflects that the mandate did not issue. In this instance, the reason the mandate did not issue presumably is that the government filed a timely petition for rehearing en banc.[57]

Appellate Rules 41, 40 and 35 provide no suggestion that the mandate in a multi-party appellate proceeding issues at different points in time with respect to different parties to the proceeding. Rule 41(b) defines when "[t]he court's mandate must issue" and Rule 41(d)(1) provides that timely filing of "a petition" for rehearing "stays the mandate until disposition of the petition ... , unless the court orders otherwise."[58] This suggests that a petition for rehearing presumptively stays the mandate as to all aspects of the disposition (including with respect to all parties). Such treatment is consistent with analogous mechanisms in the district court. Absent a

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[57] The court then ordered "Petitioners" to file a response to the government's petition. *See* Order, Sept. 17, 2008, *Kawashima v. Mukasey*, Nos. 04-74313 & 05-74408 (9th Cir.). Although the resulting response is not on Westlaw and I could not access it on PACER, the docket lists it as "Petitioners Akio Kawashima and Fusako Kawashima in 05-74408, 04-74313 response to Petition for Rehearing En Banc." Docket Entry No. 91, *Kawashima v. Holder*, No. 04-74313 (9th Cir.). After the court of appeals ordered supplemental briefing on the significance of *Nijhawan*, the docket reflects a filing (also unavailable to me on Westlaw and PACER) that it denominates "Supplemental brief for review. Submitted by Petitioners Akio Kawashima and Fusako Kawashima in 04-74313." Docket Entry No. 105.

Thus, if the docket accurately reflects the nature of the Kawashimas' filings, Mrs. Kawashima joined Mr. Kawashima in opposing the government's 2008 petition for rehearing en banc. That fact, if true, might suggest that Mrs. Kawashima was not relying on an assumption that the court of appeals' judgment as to her had already become final and unalterable. (It appears from the court of appeals' description in *Kawashima III* as though Mrs. Kawashima first raised her argument about a prior issuance of the mandate in the supplemental brief rather than in the earlier response to the government's petition. *See Kawashima III*, 593 F.3d at 986 n.8.) In one case where the court of appeals' mandate was required to issue unless it was ordered stayed by the court of appeals, the Supreme Court held that any such stay order would have constituted an abuse of discretion, and rested this conclusion partly on its finding that one of the parties had relied on the assumption that all proceedings in the court of appeals had concluded. *See Bell v. Thompson*, 545 U.S. 794, 804 (2005) ("[W]hen we denied rehearing on January 20, 2004, the Court of Appeals' second stay dissolved by operation of law. Tennessee, acting in reliance on the Court of Appeals' earlier orders and our denial of certiorari and rehearing, could assume that the mandate would – indeed must – issue. While it might have been prudent for the State to verify that the mandate had issued, it is understandable that it proceeded to schedule an execution date."). *Bell* is distinguishable from *Kawashima* because in *Kawashima* Rule 41(d)(1) provided for a stay of the mandate at the relevant times – but also because in *Kawashima* there appears to be evidence suggesting a lack of reliance.

[58] It seems possible that a court of appeals could direct that the mandate issue as to fewer than all parties. But that did not occur in this case.

Civil Rule 54(b) certification, disposition as to fewer than all claims or parties does not produce a final judgment as to any claims or parties. And after entry of a final judgment in the district court, timely filing of a motion under Civil Rules 50, 52, or 59 restarts the appeal time period "for all parties," Appellate Rule 4(a)(4)(A), whether or not those parties have any stake in the disposition of the tolling motion.

B. *Irey v. United States*

The certiorari-stage briefing in *United States v. Irey*, 612 F.3d 1160 (11th Cir. 2010) (en banc), *cert. denied sub nom. Irey v. United States*, 131 S. Ct. 1813 (2011), focused largely on the standard for reviewing a district court's sentencing determination. But the petitioner also raised a second Question Presented, which read as follows: "Whether the Eleventh Circuit exceeded its authority by delaying the issuance of the mandate without providing the parties with notice of its intention to do so and abused its discretion by failing to take any action for more than four months after the court issued its original panel decision." Petition for Writ of Certiorari at i, *Irey v. United States* (No. 10-727).

Initially, an Eleventh Circuit panel rejected the government's challenge to Irey's sentence. *See United States v. Irey*, 563 F.3d 1223 (11th Cir. 2009). The court of appeals' docket indicates that this opinion issued, and judgment was entered, on March 30, 2009. The government did not file a petition for rehearing. No further docket entries appear until August 12, 2009, when the court of appeals sua sponte granted rehearing en banc and vacated the panel opinion. *See United States v. Irey*, 579 F.3d 1207 (11th Cir. 2009). The en banc court of appeals subsequently vacated and remanded for resentencing. *See United States v. Irey*, 612 F.3d 1160, 1224-25 (11th Cir. 2010) (en banc) ("Because we have determined that a downward deviation from the guidelines range in this case is unreasonable, it follows that the only action on remand that will be consistent with this opinion is resentencing within the guidelines range, which necessarily means a sentence of 30 years.").

Appellate Rule 41(b) provides that "[t]he court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later,"[59] but also provides that "[t]he court may shorten or extend the time." No such order was explicitly issued in *Irey*, though the court's decision to withhold the mandate can be seen as an implicit decision to that effect. The petitioner argued that the court's failure to notify the parties of the withholding of the mandate deprived the court of the authority to order en banc review after the presumptive deadline for issuance of the mandate set by Rule 41(b), *see* Petition at 38-39 (relying upon *Bell v. Thompson*, 545 U.S. 794 (2005)), and that "[e]ven if the Eleventh Circuit had the authority to temporarily delay the issuance of its mandate without providing notice to the parties, the delay of more than four months that occurred in this case before the

[59] At the time of the events in question, Rule 41(b) referred to 7 *calendar* days; the 2009 amendments deleted "calendar" in light of the shift to days-are-days time counting.

court granted rehearing en banc constituted an abuse of discretion similar to the one committed by the circuit court in *Bell v. Thompson*," Petition at 42.

In *Bell*, the district court dismissed a death row prisoner's habeas petition.[60] The court of appeals affirmed, but granted a stay of the mandate pending the prisoner's certiorari petition. After the Supreme Court denied certiorari, the prisoner requested an extension of the stay from the court of appeals. The court of appeals ordered that "the mandate be stayed to allow appellant time to file a petition for rehearing from the denial of the writ of certiorari, and thereafter until the Supreme Court disposes of the case." The Supreme Court denied rehearing in January 2004. The parties apparently failed to notice that the court of appeals failed to issue its mandate after the disposition in the Supreme Court. But in June 2004, the court of appeals (having called for and examined the district court record) vacated and remanded for an evidentiary hearing. The Supreme Court granted certiorari and reversed, holding that "even assuming a court may withhold its mandate after the denial of certiorari in some cases, the Court of Appeals' decision to do so here was an abuse of discretion." *Bell*, 545 U.S. at 796. The Court stressed the more-than-five-month delay in issuing the mandate, and the facts that the court of appeals had failed to notify the parties that it had stayed its mandate and that the state had proceeded in its preparations for the prisoner's execution in reliance on its belief that the court of appeals was done with the case. *See id.* at 805-06. In addition, the Court reasoned that the court of appeals' action offended "finality and comity concerns" that are important in habeas cases. *Id.* at 812.

The government, in response to Irey's contentions, offered two reasons to distinguish *Bell*:

> Unlike in *Bell*, the court's delay in issuing its mandate in this case did not occur after this Court had denied certiorari, but while the case was still before the court of appeals. Thus, the only reasonable assumption by the parties was that the court had not issued its mandate because it was considering whether to exercise its authority to rehear the case en banc.... And unlike in *Bell*, where the parties and the state court expended "considerable time and resources" in litigating issues relating [to] the defendant's pending execution "on the mistaken assumption that the federal habeas proceedings had terminated,"... petitioner does not identify any prejudice he suffered from the delay in issuing the mandate in his case.

Brief for the United States in Opposition at 22, *Irey v. United States* (No. 10-727). The petitioner did not attempt to argue, in reply, that he had suffered prejudice from the delay in issuance of the mandate. *See* Reply to Brief of United States in Opposition to Petition for Writ of Certiorari at 13-14, *Irey v. United States* (No. 10-727).

Eleventh Circuit IOP 6 accompanying Appellate Rule 35 now states: "Any active

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[60] The text's summary of the proceedings in *Bell* is drawn from the Supreme Court's description. *See Bell*, 545 U.S. at 799-801.

Eleventh Circuit judge may request that the court be polled on whether rehearing en banc should be granted whether or not a petition for rehearing en banc has been filed by a party.... At the same time the judge may notify the clerk to withhold the mandate. If a petition for rehearing or a petition for rehearing en banc has not been filed by the date that mandate would otherwise issue, the Clerk will make an entry on the docket to advise the parties that a judge has notified the clerk to withhold the mandate. The identity of the judge will not be disclosed." The last two sentences in this IOP were added effective August 1, 2010.

Leaving aside the particular situation that arose in *Irey*, the Eleventh Circuit's revised IOP seems like a useful innovation. It is true that an alert litigant ought to be attentive to whether or not the court of appeals has issued the mandate after handing down a decision. But litigants – particularly those not well versed in appellate procedure – may overlook the need to keep track of that question. If the litigants receive a CM/ECF notice of a docket entry indicating that a judge has ordered the clerk to withhold the mandate, that will alert the litigant to the non-issuance of the mandate.

A quick survey of local circuit provisions reveals that most circuits do not address this topic.[61] The Ninth Circuit Advisory Committee Notes advise litigants to check with the Clerk if the mandate has not issued timely. *See* Ninth Circuit Advisory Committee Note to Rule 25-2 (advising litigant to tell Clerk if, inter alia, "the mandate has not issued within 28 days after the time to file a petition for rehearing has expired").

The Committee may not regard this as a subject for national rulemaking. Any issues concerning mandates withheld without notice to parties seem to arise only sporadically. Perhaps it might be useful to consider whether a feature could be added to the CM/ECF system that would prompt the Clerk's office to follow up in any instance where a mandate has not issued within the default time period set by Rule 41.

IV. Additional questions of appellate procedure

This section discusses two other certiorari petitions that warrant consideration (though they probably do not warrant action via rulemaking). One petition concerned the possibility of offsetting a bond that had been ordered under Appellate Rule 7, and the other petition concerned the standard for imposing costs on appeal under Bankruptcy Rule 8020 and Appellate Rule 38.

A. Rule 7 cost bonds

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[61] The petitioner's reply brief suggests that there may be relevant provisions in the Fifth and Federal Circuits. *See* Reply at 13 ("[T]he fact that the Eleventh Circuit has amended its rules to require a docket entry does not establish that this issue will not reoccur in other circuits. A review of the other circuit courts' local rules and internal operating procedures indicates that the First, Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth, and D.C. Circuits do not have a similar rule."). However, I was unable to locate them.

In *Mohamed v. Daud*, 130 S. Ct. 3471 (2010), the petitioners argued that the requirement of a $ 25,000 cost bond under Appellate Rule 7 was inappropriate because the low-income petitioners – who were objectors to a class settlement – would be entitled, in the event of affirmance of the settlement's approval, to funds from the defendants in excess of the $ 25,000 bond amount. *See* Petition for Writ of Certiorari at i, *Mohamed v. Daud* (No. 09-1260). In support of their argument that this bond requirement violated their Equal Protection rights, the petitioners cited *Lindsey v. Normet*, 405 U.S. 56 (1972), in which the Court struck down a state statute providing that a tenant who lost an eviction action could "appeal only if he obtains two sureties who will provide security for the payment to the plaintiff, if the defendant ultimately loses on appeal, of twice the rental value of the property from the time of commencement of the action to final judgment," *id.* at 63-64. The *Lindsey* Court emphasized that this provision was unnecessarily draconian: "While a State may properly take steps to insure that an appellant post adequate security before an appeal to preserve the property at issue, to guard a damage award already made, or to insure a landlord against loss of rent if the tenant remains in possession, the double-bond requirement here does not effectuate these purposes since it is unrelated to actual rent accrued or to specific damage sustained by the landlord." *Id.* at 77.

The bond requirement imposed in *Mohamed* seems readily distinguishable from the double-bond provision struck down in *Lindsey*. The magistrate judge explained her imposition of the bond as follows:

> The Court finds that a $25,000 cost bond is sufficient to cover the potential costs on appeal, including copying and producing briefs, records, and transcripts; translation services; and the supersedeas bond premium. In arriving at this number, the Court has considered the number of parties and issues involved, as well as similar amounts approved for other appeals of class action settlements, see In re Insurance Brokerage Antitrust Litigation, Civ. No. 04-5184, 2007 WL 1963063, at *5; In re Compact Disc Minimum Advertised Price Antitrust Litigation, No. MDL 1361, 2003 WL 22417252, at *2 (D. Me. Oct. 7, 2003); In re Diet Drugs Products Liability Litigation, No. MDL 1203, Civ. A. 99-20593, 2000 WL 1665134, at *5-6 (E.D. Pa. Nov. 6, 2000). The Court has also taken into account the limited financial means of the appellants, and notes that $25,000 divided by sixty-three is less than $400 a person. The absence of any objection by the appellants to the cost bond or the proposed amount was the Court's final consideration.

Order at 4, July 28, 2009, *Daoud v. Gold'n Plump Poultry, Inc.*, Civ. No. 06-4013 (JJG) (D. Minn.). It appears that the anticipated need for translation services increased the estimated costs on appeal;[62] taking this into account, the cost bond in *Daoud* does not seem all that surprising in the light of the findings in Marie Leary's study of Rule 7 cost bonds. *See* Marie Leary, *Federal*

[62] Apparently a number of class members, including named plaintiffs, did not speak English.

Judicial Center Exploratory Study of the Appellate Cost Bond Provisions of Rule 7 of the Federal Rules of Appellate Procedure 5 (April 2008) (reporting based on study of three district courts that "FRAP 7 bonds were more likely to be imposed in response to requests in class action litigation" and that "the average [bond amount] sought [by the movant] for seven certified class action appeals was $113,378").

In the light of these considerations, the only novel aspect of the petition in *Mohamed* was its suggestion that the courts erred in refusing to count settlement monies held by certain defendants in the class action as the functional equivalent of a bond for costs on appeal. In a two-party case, the petitioners' argument might have intuitive appeal (assuming that the amount of settlement monies to which the petitioners would be entitled was actually determinable). However, *Mohamed* illustrates that the appeal of the argument dissipates in the context of more complex litigation. A considerable portion of the bond presumably was designed to cover the costs that would be incurred by the named class representatives and their lawyers; and given this fact, it is understandable that the court would refuse to count monies held by *defendants* as the functional equivalent of a bond for the benefit of *plaintiff* class representatives. The idea of offsetting a bond requirement by monies held by an appellee is interesting, but seems likely to be best addressed by order in a particular case rather than by a national rule.

B. Rule 38 sanctions

The petition in *Busson-Sokolik* asserted that there is a circuit split concerning the test for awarding sanctions under both Bankruptcy Rule 8020 and Appellate Rule 38:

> Some circuits decide whether an appeal is frivolous using one step asking whether the merits, the arguments, of an appeal are frivolous. If the merits aren't the inquiry ends and no sanctions are awarded. If the merits are frivolous sanctions are awarded.
>
> Other circuits decide whether an appeal is frivolous using two steps, asking first whether the merits are frivolous. If the merits are not frivolous the inquiry ends and no sanctions are awarded. But if they are a second step of inquiry is required asking whether the offending party pursued the frivolous appeal in bad faith. Where bad faith is lacking sanctions are not awarded even where the merits are frivolous.
>
> Some individual circuits disagree amongst themselves as to whether the proper inquiry to award sanctions for a frivolous appeal includes the offending party's bad faith.

Petition for Certiorari at 11-12.

There is indeed some indeterminacy concerning the standard for sanctions under

Appellate Rule 38.[63] A partial explanation for the lack of clarity may be found in the fact that sanctions under Rule 38 are a matter of discretion; thus, for example, a court that construes Rule 38 to authorize sanctions whenever an appeal is objectively frivolous might nonetheless decline to award them if the court finds a lack of bad faith.[64] Moreover, an opinion on sanctions may not always indicate clearly whether an objective or subjective standard was used because the evidence relevant to both tests will often be the same.[65]

Without attempting a comprehensive survey of the circuits' Rule 38 caselaw at this point, it is possible to sketch a few points of reference. In the First, Third, Fifth, and Federal Circuits, sanctions can be awarded for an objectively frivolous appeal without a showing of bad faith.[66] Though it found "the issue ... not free of doubt," the Sixth Circuit has agreed.[67] The Eighth

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[63] It appears that the circuits have long taken varied approaches to appellate sanctions. *See* Robert J. Martineau & Patricia A. Davidson, *Frivolous Appeals in the Federal Courts: The Ways of the Circuits*, 34 Am. U. L. Rev. 603, 605 (1985) ("Courts have differed regarding such issues as the definition of a frivolous appeal, the relationship between the merits of an appeal, conduct on appeal, and the sanction, the necessity for showing bad faith, the procedures followed in imposing a sanction, and the type and appropriateness of the sanction.").

[64] *See, e.g.*, B *& H Med., L.L.C. v. ABP Admin., Inc.*, 526 F.3d 257, 270 (6th Cir. 2008) (bad faith is not a prerequisite for Rule 38 sanctions, but court "will *usually* impose Rule 38 ... sanctions only where there was some improper purpose, such as harassment or delay, behind the appeal") (quoting *Barney v. Holzer Clinic, Ltd.*, 110 F.3d 1207, 1212 (6th Cir. 1997)).

[65] *See* Robert J. Martineau, *Frivolous Appeals: The Uncertain Federal Response*, 1984 DUKE L.J. 845, 855 ("The two standards, subjective and objective, can easily be confused ... because typically there is no direct evidence of the intent of the appellant in taking the appeal.").

[66] *See Pimentel v. Jacobsen Fishing Co.*, 102 F.3d 638, 641 n.2 (1st Cir. 1996) ("[C]ounsel conveniently ignored longstanding First Circuit caselaw which holds, unequivocally, that Rule 38 sanctions may be imposed without a finding of bad faith."); *Kerchner v. Obama*, 612 F.3d 204, 209 (3d Cir. 2010) ("'This court employs an objective standard to determine whether or not an appeal is frivolous' which 'focuses on the merits of the appeal regardless of good or bad faith.'") (quoting *Hilmon Co. v. Hyatt Int'l*, 899 F.2d 250, 253 (3d Cir.1990) (internal quotation omitted)); *Coghlan v. Starkey*, 852 F.2d 806, 808 (5th Cir. 1988) ("[I]ll purpose is in no way a necessary element for imposition of sanctions under rule 38."); *In re Perry*, 918 F.2d 931, 934 (Fed. Cir. 1990) ("The standard under Rule 38 is an objective one and has nothing to do with the mental state of the person sanctioned.").

[67] *See Wilton Corp. v. Ashland Castings Corp.*, 188 F.3d 670, 677 (6th Cir. 1999) ("[A] finding of bad faith is not required before sanctions under Rule 38 may be imposed.").

Circuit appears to have agreed as well.[68] The Ninth Circuit, likewise, has stated that bad faith is not a requisite.[69] The Tenth Circuit applies an objective standard for Rule 38 sanctions against attorneys, though that standard appears to require more than mere negligence.[70] The Seventh Circuit has observed that it ordinarily imposes sanctions only where bad faith is present,[71] but in another case it stressed that bad faith, though relevant, is not a prerequisite.[72] Second Circuit caselaw, however, appears to divide between cases requiring both frivolity and bad faith and cases merely requiring objective frivolity.[73] Caselaw making clear the applicable standard in the

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[68] In *Newhouse v. McCormick & Co.*, 130 F.3d 302 (8th Cir. 1997), the court of appeals was "reluctant to declare" that the ADEA plaintiff (and cross-appellant) "filed the cross-appeal in bad faith," but the court had "little difficulty in finding Newhouse's persistent pressing of the cross-appeal in the face of timely controlling Supreme Court and Eighth Circuit case dispositive precedent to be frivolous under Federal Rule of Appellate Procedure 38" and the court awarded Rule 38 sanctions on that basis, *see id.* at 305.

[69] *See In re Becraft*, 885 F.2d 547, 549 (9th Cir. 1989) ("While a finding of bad faith is not necessary to impose sanctions under Fed.R.App.P. 38 ... , the fact that Becraft likely filed the petition for hearing absent a good faith belief of its justification contributes to our strong conviction that Becraft's conduct warrants the imposition of sanctions.").

[70] *See Braley v. Campbell*, 832 F.2d 1504, 1512 (10th Cir. 1987) (en banc) ("[T]he proper standard under either Rule 38 or § 1927 is that excess costs, expenses, or attorney's fees are imposable against an attorney personally for conduct that, viewed objectively, manifests either intentional or reckless disregard of the attorney's duties to the court.").

[71] *See, e.g.*, *Bowman v. City of Franklin*, 980 F.2d 1104, 1110 (7th Cir. 1992) ("In making the determination of whether sanctions are appropriate, '[t]ypically the courts have looked for some indication of the appellant's bad faith suggesting that the appeal was prosecuted with no reasonable expectation of altering the district court's judgment and for purposes of delay or harassment or out of sheer obstinacy.'") (quoting *Reid v. United States*, 715 F.2d 1148, 1155 (7th Cir. 1983)). The court's discussion of Rule 38 sanctions in *Jimenez v. Madison Area Technical College*, 321 F.3d 652 (7th Cir. 2003), is not to the contrary. It is true that the *Jimenez* court did not discuss bad faith in its explanation of the Rule 38 sanctions, *see id.* at 658, but earlier in the opinion it had discussed "the willful and malicious nature of [the appellant's] flagrant Rule 11 violation" in the court below (the ruling that was the subject of the appeal), *see id.* at 657.

[72] *See Hill v. Norfolk and Western Ry. Co.*, 814 F.2d 1192, 1202 (7th Cir. 1987) ("[P]roof of intentional or even negligent misconduct, while it would certainly provide an added reason for a sanction under Rule 38 or any other provision, is not a prerequisite to imposing sanctions under Rule 38.").

[73] *See In re 60 East 80th Street Equities, Inc.*, 218 F.3d 109, 119 (2d Cir. 2000) ("The applicable standard for imposition of Rule 38 sanctions in this Circuit is slightly unclear. In

Fourth, Eleventh, and D.C. Circuits proved difficult to find on an initial search.

In sum, there is some degree of inter- and intra-circuit variation concerning the standard for imposing Rule 38 sanctions, though the majority approach appears to be that an objectively frivolous appeal qualifies for such sanctions regardless of good or bad faith. But even under the majority approach, some courts will take bad faith (or its absence) into account in exercising their discretion.

V. Other petitions for certiorari

In this section, I discuss petitions for certiorari that do not seem to merit extended discussion. Part V.A discusses Appellate Rules-related issues that likely do not warrant a rulemaking response. Part V.B discusses petitions that purport to invoke the Appellate Rules but that do not actually raise any issues concerning those Rules. Part V.C discusses a petition that raises appellate procedure issues that fall outside the scope of the Appellate Rules.

A. Issues that likely do not warrant a rulemaking response

The petitions discussed in this subsection seem to me not to warrant a rulemaking response. In some instances that is because the petition might raise a significant issue but the issue is one that does not warrant national rulemaking. In other instances that is because the petitioner's contentions seem meritless. And in yet other instances that is because it is difficult to discern the nature of the concern raised by the petition.

1. *Static Control Components, Inc. v. Ahmadi*

In *Static Control Components, Inc. v. Ahmadi*, 358 F. App'x 416 (4th Cir. 2009) (unpublished opinion), *cert. denied*, 130 S. Ct. 3356, *reh'g denied*, 131 S. Ct. 33 (2010), the court of appeals dismissed the appeal because the notice of appeal was docketed by the district clerk one day after the deadline for filing the notice of appeal. The petition for certiorari cited a postal delivery record that, the petitioner contended, showed that the notice of appeal was delivered to the courthouse early in the afternoon of the last day for filing the notice of appeal. *See* Petition for Writ of Certiorari at 6, *Ahmadi v. Static Control Components, Inc.* (No. 09-1166). This assertion was not mentioned by the court of appeals in its order of dismissal, and I was unable to verify whether the petitioner asserted this contention below because some documents in the court of appeals' docket are sealed. If the petitioner had been able to establish, as a factual matter, that the notice was received by the district clerk on the last day of the appeal period, I would not have thought that a delay in docketing the appeal after its receipt would have

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several instances we have stated that Rule 38, like § 1927, requires a showing that the appeal is frivolous as well as 'a clear showing of bad faith.'... We have at other times also stated that a showing of bad faith is not required for an imposition of sanctions under Rule 38.") (quoting *In re Hartford Textile Corp.*, 659 F.2d 299, 305 (2d Cir.1981) (per curiam)).

rendered it untimely. *See, e.g.*, *Aldabe v. Aldabe*, 616 F.2d 1089, 1091 (9th Cir. 1980) ("The notice of appeal was received by the district court clerk on June 13, 1977, but not formally filed until June 28, 1977. Because an appellant has no control over delays between receipt and filing, a notice of appeal is timely filed if received by the district court within the applicable period specified in Rule 4."). In any event, the court of appeals' unpublished decision in *Static Control Components* creates no precedent on this question, which leads me to think that the case does not warrant a rulemaking response.

2. *Tibbetts v. Dittes*

The petitioner in *Tibbetts v. Dittes*, 131 S. Ct. 835 (2010), *reh'g denied*, 131 S. Ct. 1564 (2011), leveled multiple challenges at the procedures employed in connection with his appeal in the Second Circuit. Tibbett filed his appeal pro se, but later retained a lawyer who entered a notice of appearance in March 2002. In April 2002 the docket reflects that the court sent a "How to Appeal your civil case package" to Tibbett's attorney. Docket, *Tibbetts v. Dittes*, No. 01-7377-cv (2d Cir.). The next docket entry came in June 2003, when the appellees moved to dismiss the appeal for want of prosecution; Tibbett opposed the motion. The court of appeals then entered an "Order dismissing the appeal for failure to file Forms C and D pursuant to CAMP." In his certiorari petition, Tibbett's principal challenge to this sequence of events was that the court had not provided notice that dismissal could result if a lawyer retained to prosecute an appeal filed by a pro se litigant failed to file Forms C and D. (Tibbett states that pro se litigants were exempt from filing those forms. Currently, pro se appellants are exempt from filing Form C "because a case that involves a pro se party is not eligible for the pre-argument mediation process known as CAMP." *See* How to Appeal as a Pro Se Party to the United States Court of Appeals for the Second Circuit, available at http://www.ca2.uscourts.gov/clerk/Forms_and_instructions/How_to_appeal/How_to_appeal_as_a_pro_se_party.htm (last visited August 17, 2011).) According to Tibbett's petition, "[i]n 2007, the Second Circuit had 8,533 appeals (6,334 counseled appeals and 2,199 pro se appeals)," and in 116 appeals (presumably out of the 2,199), the pro se appellant obtained counsel after docketing of the appeal. Petition at 4, *Tibbetts v. Dittes* (No. 10-565) (citing "Statistic from the Second Circuit Executive Office"). The procedural treatment of "pro-se-to-counseled" appeals does present interesting questions; specifically, as Tibbetts points out, questions may arise concerning whether requirements that the pro se appellant was excused from fulfilling must be met by the appellant's new counsel even if those requirements would ordinarily have been met at an earlier point during the appeal process than the point at which counsel comes into the case. However, I am guessing that the disposition of Tibbetts' appeal may have been affected by the specifics of the appeal's procedural history – such as the fact that, according to the docket, Tibbetts' attorney made no filings in the case for more than a year after filing the notice of appearance. This case does not seem to me to present a basis for national rulemaking activity.

3. *Florance v. Bush* and *Ramer v. Commissioner*

In *Florance v. Bush*, 131 S. Ct. 1684 (2011), and *Ramer v. Commissioner*, 131 S. Ct. 1033 (2011), the petitioners questioned whether Appellate Rule 27(b) violates separation of

powers principles by authorizing a court of appeals to "authorize its clerk to act on specified types of procedural motions." Rule 27(b) plainly does not offend separation of powers principles. Although clerks of course lack Article III tenure, Rule 27(b)'s authorization is limited to "procedural motions" – that is to say, "motions which do not substantially affect the rights of the parties or the ultimate disposition of the appeal." 1967 Committee Note to Rules 27(a) and (b). Moreover, a party aggrieved by the clerk's disposition of such a motion "may file a motion to reconsider, vacate, or modify that action." Appellate Rule 27(b). Although Appellate Rule 27 does not explicitly state who will decide such a motion for reconsideration, I would expect that the practice is to submit those motions to a judge rather than to the clerk; that is the case in the two circuits in which the *Florance* and *Ramer* appeals were litigated. *See* Fifth Circuit Rule 27.1 ("The clerk's action is subject to review by a single judge upon a motion for reconsideration made within the 14 or 45 day period set by FED. R. APP. P. 40."); Eighth Circuit Rule 27A(a) ("If any party opposes the action requested in any of the above matters [*i.e.*, procedural matters that can be decided by the clerk] or seeks reconsideration of an order entered under this section, the clerk must submit the matter for a ruling by a judge of this court."). *See also, e.g.*, D.C. Circuit Rule 27(e)(2) ("The clerk will submit the motion for reconsideration to a panel or an individual judge of the court.").

4. *Brookens v. Solis*

In *Brookens v. Solis*, No. 09-85249, 2009 WL 5125192 (D.C. Cir. Dec. 9, 2009) (unpublished opinion), *reh'g en banc denied* (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 225 (2010), one of the Questions Presented concerns the court of appeals' use of summary affirmance: "Whether the U.S. Court of Appeals for the District of Columbia properly interpreted FRAP 34(a)(2), contrary to the view of the other circuits, that it is not required to review the record in summary disposition of cases under Title VII the Civil Rights Acts of 1964 and 1991?" Petition for Writ of Certiorari to the District of Columbia Circuit, *Brookens v. Solis* (No. 10-17). To some extent, Brookens' treatment of this issue appears to focus more on the district court's dismissal of his case without an opportunity for discovery than on the procedure employed in adjudicating his appeal.[74] But Brookens also argues that he was given an insufficient opportunity to present his arguments on appeal: "When the other circuits, except of the D.C. circuit applied FRAP 34 to dispense with oral argument, the parties were still provided the opportunity to provide briefs on the issues on appeal and an opportunity to present relevant portions of the trial court record." Petition at 6. It is true that Brookens did not have an opportunity to submit merits briefs; the court of appeals' docket indicates that he did submit a brief in opposition to the appellee's motion for summary affirmance. Summary procedures of

[74] *See* Petition at 4 ("The Circuit's record does not show any Answer to the Complaint. The Circuit record does not show and discovery implemented by the parties ...."); *see also id.* ("[U]nlike the other circuits, the D. C. Circuit does not provide for a decision, upon a review of the record which is required to include a de novo review in the district court and an opportunity for full discovery by the parties in the trial court.").

the sort that were employed in Brookens' appeal have been upheld in other cases.[75] It does not appear to me that Brookens' petition, in itself, provides the Committee with a reason to review the use of summary procedures in the courts of appeals, though such a review could be a worthwhile exercise.[76]

5. *Neely v. City of Riverdale*

In *Neely v. City of Riverdale*, 130 S. Ct. 3277 (2010), it appears that the petitioner asserted that a motion to reconsider the denial of a prior reconsideration motion should toll the time to appeal the underlying judgment.[77] If this was the petitioner's contention, it is unsurprising that the Court denied certiorari; such a contention has been repeatedly rejected by the courts of appeals. *See, e.g., Ysais v. Richardson*, 603 F.3d 1175, 1178 (10th Cir. 2010).[78]

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[75] *See, e.g.*, *Price v. Johnston*, 334 U.S. 266, 286 (1948) ("Oral argument on appeal is not an essential ingredient of due process."), *overruled on other grounds by McCleskey v. Zant*, 499 U.S. 467 (1991); *Groendyke Transport, Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969) (holding summary disposition on briefs without argument is appropriate, inter alia, when "the position of one of the parties is clearly right as a matter of law so that there can be no substantial question as to the outcome of the case"); *United States v. Monsalve*, 388 F.3d 71, 73 (2d Cir. 2004) ("We construe a motion to dismiss an appeal as a motion for summary affirmance if the appeal presents only frivolous issues.").

[76] In fact, Brookens' petition indicates that he could not find instances outside the D.C. Circuit within the last decade in which a Title VII appeal was summarily disposed of without merits briefing. *See* Petition at 6. Although this assertion probably reflects the limitation of the data available on Lexis, *see* Petition at 6 n.2 (indicating that the search was performed using "LexisOne Community Service"), and although a search of appellate dockets would likely indicate the use of summary affirmance in civil rights cases as in other types of cases, Brookens' petition does not establish that summary appellate procedures are used more frequently in civil rights cases than in other types of appeals.

[77] Oddly, the petition for certiorari in *Neely* does not appear on Westlaw. I base my description of the petitioner's contentions on the description in the respondents' brief. *See* Brief in Opposition, *Neely v. City of Riverdale* (No. 09-1082).

[78] The only nuances to this proposition have arisen in cases that presented unusual circumstances. *See Nobby Lobby, Inc. v. City of Dallas*, 970 F.2d 82, 85–86 (5th Cir. 1992) (second reconsideration motion that presented "at least one completely different ground for relief" tolled time to appeal preliminary injunction); *Jusino v. Zayas*, 875 F.2d 986, 989–990 (1st Cir. 1989) (after district court erroneously denied first motion as untimely and appellant sought reconsideration of the denial, district court impliedly vacated denial and denied first motion on merits; court of appeals then held that appeal time was tolled until entry of order denying reconsideration on merits).

6. *Gray v. General Electric Corp.*

The petition denied in *Gray v. General Electric Corp.*, 131 S. Ct. 474 (2010), does not seem to me to raise any questions that require action by the Committee. The two Questions Presented in this pro se petition were: "1) Did the District Court commit errors in the issue and reissue of the Certificate of Appealability that cannot be overlooked by any court because the errors denied Plaintiff his constitutional right to due process?" and "2) Did the Second Circuit err when it ruled that an appeal tolls from the date of the first issue of an order or Certificate of Appealability and not the last reissue?"

In *Gray*, the district court issued an order staying Gray's suit and compelling arbitration. Gray apparently sought leave to appeal from the court of appeals, which issued an order denying the petition and explaining that under the Federal Arbitration Act, the only avenue of immediate appeal was under 28 U.S.C. § 1292(b), and that there had been no certification by the district court under Section 1292(b). *See* Order, Oct. 20, 2009, *Gray v. General Electric Corp.*, No. 09-2726-mv (2d Cir.). The district court on December 2, 2009, provided the requisite certification by means of an electronic order in the docket, but apparently did not mention Section 1292(b) in the electronic order.[79] Gray filed his petition for permission to appeal more than 10 days thereafter. On January 13, 2010, the district court corrected the electronic entry concerning the certification so as to mention Section 1292(b). Gray's petition contended that he did not know there was a 10-day deadline for filing the petition for permission to appeal because the district court's initial electronic certification did not mention Section 1292(b); indeed, he contended that because the certification failed to mention Section 1292(b), this meant that Appellate Rule 5(a)(2) gave him 30 days to file the petition.[80] This argument is meritless. Under the text of Appellate Rule 5(a)(2), the salient question is whether "the statute or rule authorizing the appeal" specifies a deadline for the petition – not whether the district-court certification specifies the authorizing statute or the relevant deadline.[81] The petitioner's argument that this outcome violated his due process rights seems unpersuasive, particularly because the court of appeals' 2009 order had put the petitioner on notice that his only avenue for immediate appeal was Section 1292(b).

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[79] This points out a curious feature of electronic orders that are entered directly in the docket without an accompanying document: After the later alteration of this electronic order, there appears to be no way to verify from the docket itself what the docket entry originally said.

[80] *See* Petition at 5-6 ("Since no 'statute or rule' was cited as 'authorizing the appeal' in the Certificate of Appealability, until it was reissued on January 13, 2010, F.R.C.P. Rule 4(a) applied, which requires an appeal to be filed within 30 days after an order is issued by the Court.").

[81] *See* Appellate Rule 5(a)(2) ("The petition must be filed within the time specified by the statute or rule authorizing the appeal or, if no such time is specified, within the time provided by Rule 4(a) for filing a notice of appeal.").

Gray's second line of argument appears to have been that the district court's January modification of its December certification order constituted a re-certification of the appeal under Section 1292(b), and that the court of appeals erred in failing to regard that new certification as re-starting the deadline for petitioning for permission to appeal and in failing to regard Gray's December petition as timely under that re-started deadline. The problem with this argument is that the district court's January modification of the December order appears to have been a clarification of the December order rather than a re-issuance of the certification. The January 13 entry in the district court docket reads: "Docket Entry Correction re 20 MOTION, 22 Response, 21 Order on Motion for Certification of Appeal; correcting text to read 'Certification for Appeal pursuant to 28 USC Section 1292(b' (Inferrera, L.) (Entered: 01/13/2010)." Perhaps the court of appeals could have read this sequence of events more generously in this pro se plaintiff's case. But its decision not to do so does not appear to me to raise any issues that the Rules Committee should address.

7. *Moncier v. United States District Court*

In *Moncier v. United States District Court*, 130 S. Ct. 2428 (2010), the petitioner challenged, inter alia, the brevity of the opinion in which the court of appeals affirmed the order suspending him from the district court bar. *See* Petition for Writ of Certiorari at 31-32, *In re Moncier* (No. 09-1025). This challenge seems meritless. If a court can affirm without an opinion – *see* Appellate Rule 36(a)(2); *see also* Thomas E. Baker, *Intramural Reforms: How the U.S. Courts of Appeals Have Helped Themselves*, 22 Fla. St. U. L. Rev. 913, 927-28 (1995) (describing and criticizing the practice of deciding appeals without opinions) – then surely it can also affirm in a brief opinion that relies substantially on the opinion of the court below.

8. *McDonald v. Overnight Express, Inc.*

In *McDonald v. Overnight Express, Inc.*, 131 S. Ct. 2876 (2011), the petitioner cast the Question Presented as follows: "Whether Rule 4(a)(1)(A) of Federal Rules of Appellate Procedure permit an appellate court to foreclose an indigent party of the right and opportunity to be heard on appeal, after the district court allowed the Plaintiff to proceed in forma pauperis [IFP], but denied a written request for the appointment of counsel and the opportunity to be heard, when the district court had prior knowledge of Plaintiff's employment as an over the road driver and not having access to the U.S. Mail to timely respond to pleadings, nor the financial resources to meet with the attorneys of record in Minneapolis, MN?" Petition for Writ of Certiorari at i, *McDonald v. Overnite Express, Inc*. (No. 10-1069). Although this statement of the Question Presented suggested that the pro se petitioner's untimely filing resulted from his absence from home, another passage in the petition indicated that he miscalculated the appeal deadline. *See id.* at 7. In reviewing the petition and the brief in opposition, I did not see any matters that would warrant a rulemaking response.

B. Petitions that invoke the Appellate Rules but do not actually implicate them

In *Walsh v. Krantz*, 131 S. Ct. 801 (2010), *reh'g denied*, 131 S. Ct. 1063 (2011), one of

the questions presented in the petition mentioned an Appellate Rule. But the question did not in fact implicate any question of appellate procedure. *See* Petition for Writ of Certiorari at i-ii, *Walsh v. Krantz* (No. 10-455) (listing one of the questions presented as "[w]hether the federal district court can, in an act of speculative judicial activism, dream up his own conclusion, unsupported by any evidence or testimony, to throw the case out and award the defendants summary judgment. See FRAP 10(b)(2); Unsupported Finding or Conclusion").

In *Roos v. Roos*, 131 S. Ct. 1053, *reh'g denied*, 131 S. Ct. 1720 (2011), the petitioner argued that the lower court (a state court) had violated one of the Federal Rules of Appellate Procedure.

C. Appellate procedure issues outside the scope of the Appellate Rules

Because standing to appeal seems to me to be a topic outside the general scope of the Committee's work, I do not discuss in this memo the petition for certiorari that was denied in *Stine v. Yarnall*, No. 10-1212, 2011 WL 1322908 (U.S. June 6, 2011). *See* Petition for Writ of Certiorari at 6, *Stine v. Yarnall* (No. 10-1212) (arguing that a circuit split exists concerning whether a person aggrieved by a judgment in a bankruptcy proceeding must have actively participated in the relevant proceeding below in order to have standing to appeal).

VI. Conclusion

Questions concerning the Appellate Rules have surfaced with some frequency in recent certiorari petitions. The questions illustrate the prime importance of Appellate Rules 3 and 4 and the timing and scope of the notice of appeal. The questions also highlight issues relating to summary appellate procedures; the timing of the mandate; cost bonds under Appellate Rule 7; and sanctions under Appellate Rule 38. I will await the Committee's guidance as to whether further research on any of the questions discussed in this memo would be useful.

TAB 8

March 2012						
S	M	T	W	T	F	S
				1	2	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29	30	31

May 2012						
S	M	T	W	T	F	S
		1	2	3	4	5
6	7	8	9	10	11	12
13	14	15	16	17	18	19
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27	28	29	30	31		

June 2012						
S	M	T	W	T	F	S
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17	18	19	20	21	22	23
24	25	26	27	28	29	30

April 2012

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
1	**2**	**3**	**4**	**5**	**6** Good Friday	**7**
8 Easter Sunday	**9** Easter Monday	**10**	**11**	**12**	**13**	**14**
15	**16**	**17**	**18**	**19**	**20**	**21**
22	**23**	**24**	**25**	**26**	**27**	**28**
29	**30**					
						U.S. Federal Holidays are in Red.

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September 2012						
S	M	T	W	T	F	S
						1
2	3	4	5	6	7	8
9	10	11	12	13	14	15
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23 30	24	25	26	27	28	29

November 2012						
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25	26	27	28	29	30	

December 2012						
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23 30	24 31	25	26	27	28	29

October 2012

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
	1	2	3	4	5	6
7	8 Columbus Day Thanksgiving (Canada)	9	10	11	12	13
14	15	16	17	18	19	20
21	22	23	24	25	26	27
28	29	30	31 Halloween			
						U.S. Federal Holidays are in Red.

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