Minutes of Fall 2011 Meeting of
Advisory Committee on Appellate Rules
October 13 and 14, 2011
Atlanta, Georgia

I. Introductions

Judge Jeffrey S. Sutton called the meeting of the Advisory Committee on Appellate Rules to order on Thursday, October 13, 2011, at 8:30 a.m. at the Ritz-Carlton Hotel in Atlanta, Georgia. The following Advisory Committee members were present: Judge Michael A. Chagares, Judge Robert Michael Dow, Jr., Justice Allison H. Eid, Judge Peter T. Fay, Professor Amy Coney Barrett, Mr. Kevin C. Newsom, 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 former Committee members Judge Kermit E. Bye, Mr. James F. Bennett, and Ms. Maureen E. Mahoney; Mr. Dean C. Colson, liaison from the Standing Committee; Professor Daniel R. Coquillette, Reporter for the Standing Committee; Mr. Peter G. McCabe, Secretary to the Standing Committee; Mr. Jonathan C. Rose, Rules Committee Officer in the Administrative Office ("AO"); Benjamin Robinson, deputy in the Rules Committee Support Office; Mr. Leonard Green, liaison from the appellate clerks; and Ms. Marie Leary from the Federal Judicial Center ("FJC"). Also attending the meeting's opening session were Dean Robert Schapiro and Professor Richard D. Freer of Emory Law School.

Judge Sutton welcomed the meeting participants. He introduced two of the Committee's new members, Judge Chagares and Mr. Newsom. He observed that Judge Chagares was replacing Judge Bye, and that Judge Chagares's chambers were formerly those of another Appellate Rules Committee Chair, Justice Alito. Judge Sutton noted that Mr. Newsom had clerked for Judge O'Scannlain and for Justice Souter, that he had served as Alabama's Solicitor General, and that he chairs the appellate litigation group at Bradley Arant Boult Cummings in Birmingham, Alabama. Judge Sutton reported that the third new member of the Committee – Neal Katyal, former Acting Solicitor General of the United States – was unable to attend the meeting. Judge Sutton also welcomed Mr. Rose and Mr. Robinson and noted that they both came to the AO from Jones Day, where Mr. Rose was a partner and Mr. Robinson an associate. Professor Coquillette observed that Mr. Rose and Mr. Robinson are doing a wonderful job in their new positions. Judge Sutton thanked the three departing Committee members – Judge Bye, Mr. Bennett, and Ms. Mahoney – for their superb service to the Committee. Judge Bye stated what a pleasure it had been to work with the Committee. During the meeting, Judge Sutton thanked Mr. McCabe, Mr. Rose, Mr. Robinson, and the AO staff for their preparations for and participation in the meeting.

Dean Schapiro welcomed the Committee to Atlanta and introduced Professor Freer, whom Judge Sutton had invited to address the Committee on the topic of rulemaking. Professor Freer presented an assessment and critique of the rulemaking process, with a focus on the Civil Rules. Professor Freer asserted that there have been two big problems with the rulemaking process over the past 15 to 20 years: first, that the rulemakers have been too active, and second, that some of the rules amendments were directed toward nonexistent problems. During the roughly three-quarters of a century of federal rulemaking under the Rules Enabling Act there have been more than 30 sets of amendments – 14 of which took effect within the last 15 years. The increased frequency of rule amendments creates fatigue among judges, practitioners, and academics, with the result that people no longer pay attention to pending rule amendments and when amendments take effect there is no "buy-in" among those who must read and apply the Rules.

Professor Freer gave two examples of the public's lack of engagement with the rulemaking process. One was a case in which the court was unaware that the 2000 amendment to Civil Rule 26(b)(1) had changed the presumptive scope of discovery from nonprivileged matter relevant to "the subject matter" of the action to nonprivileged matter relevant to any party's "claim or defense." In fact, Professor Freer stated, a recent study has suggested that this change in Rule 26(b)(1) has had no actual impact. Another example was the 2007 restyling of the Civil Rules; Professor Freer reported that when he had mentioned the upcoming restyling to practitioners, none of them knew about it. The Civil Rules, Professor Freer asserted, are not read by lay people; they are read by lawyers who are familiar with the pre-restyling language. Professor Freer pointed out that changes in well-established terminology impose costs. For instance, changing the term "directed verdict" in Civil Rule 50 to "judgment as a matter of law" means that Civil Rule 50's language now differs from the language in many cognate state procedure rules. The restyling of the Civil Rules has required law firms to revise many standard forms, and has required new editions of many treatises and casebooks.

Professor Freer suggested that the rulemaking process is dominated by a small group of people who set the rulemaking agenda. One cannot, he suggested, impose changes from the top; rather, buy-in is needed from those who use the Rules. Rule amendments, Professor Freer concluded, should be like faculty meetings: rare and purposeful. A participant asked Professor Freer for his thoughts on the reasons for the increase in rulemaking activity. He responded that he does not have an explanation for the increase, but he suggested that perhaps members of the Rules Committees feel that they should work on rules changes every year. Professor Freer argued that the rulemakers' activities used to be more focused; for example, in the 1966 amendments to the Civil Rules the rulemakers overhauled party joinder.

An attorney member noted that it is expensive for firms to buy the new editions of treatises and rule books; this member also agreed that there are a lot of differences between federal and state procedural rules that do not make much sense. Professor Freer observed that states are less likely to have the resources to engage in continual updates to their rules. He posited that the Rules Committees' focus on issues such as restyling had distracted the

committees from focusing on larger issues. He stated that the Rules Committees had done a good job with the Civil Rules amendments relating to electronic discovery but he argued that they had not done as well in responding to concerns about pleading.

Professor Coquillette observed that Professor Freer is a valued coauthor of the Moore's Federal Practice treatise. Professor Coquillette pointed out that from the perspective of the Rules Committees, three factors have contributed to the frequency of rule amendments. First, the Committees often must respond to legislative initiatives to change the Rules. Second, the Supreme Court has taken an active role, in recent decisions, in interpreting the Rules. Third, changes in technology have required changes in the Rules – for example, with respect to electronic filing and electronic discovery.

Judge Sutton asked Professor Freer whether he would prefer a system in which each set of Rules were revised only every five years. Professor Freer responded that such a system would be beneficial; whether the interval were five years or three years, such a system would provide users of the Rules with some predictability. An appellate judge member asked Professor Freer for his views on local rules. Professor Freer observed that local rules are very important in everyday practice; commentators often discuss the issue of disuniformity arising from local rules, but he stated that he does not have a sense of whether that is a serious problem. Another appellate judge member voiced the view that there should be no local rules, and that federal practice should be entirely uniform throughout the country. An attorney member asked whether the time lag between a rule amendment's initial introduction and its effective date risks rendering rule amendments obsolete before they even take effect. Professor Freer added that part of the time lag is due to the layers of public participation built into the rulemaking process, and he argued that this is ironic given that many interested parties do not participate in that process. An attorney participant voiced doubt that reducing the frequency of rule amendments would increase participation by lawyers.

An attorney member asked whether the restyling of the Rules had made the Rules more accessible to new lawyers. Professor Freer conceded that it had, but argued that older lawyers had invested a lot of effort in becoming familiar with the pre-restyling version of the Rules. A member noted that law students may find the restyled Rules more accessible, but they will still need to contend with the pre-restyling version of the Rules when they research older cases. Professor Coquillette noted that the Bankruptcy Rules have not yet been restyled, and that many litigants in bankruptcy court are pro se.

Judge Sutton asked Professor Freer whether he feels that it would be useful to amend a Rule where the Rule's text does not currently reflect actual practice. For example, Appellate Rule 4(a)(2)'s text provides little guidance as to the circumstances when a premature notice of appeal will relate forward. Is it helpful to the bench and bar for the Rules to codify what the courts are doing in caselaw? Professor Freer responded that it would be useful to amend the Rule to reflect current practice, particularly if a majority view can be identified.

Judge Sutton thanked Professor Freer for his thought-provoking presentation. It is always important, he noted, to keep in mind the costs as well as the benefits of amending the Rules.

II. Approval of Minutes of April 2011 Meeting

A motion was made and seconded to approve the minutes of the Committee's April 2011 meeting. The motion passed by voice vote without dissent.

III. Report on June 2011 Meeting of Standing Committee

Judge Sutton summarized relevant events at the Standing Committee's June 2011 meeting. The Standing Committee approved for publication proposed amendments to Rules 28 and 28.1 concerning the statement of the case, and proposed amendments to Form 4 concerning applications to appeal in forma pauperis. Those proposals, along with previously-approved proposals to amend Rules 13, 14, and 24, are currently out for public comment. Judge Sutton noted that the Standing Committee has created a Forms Subcommittee to coordinate the efforts of the Advisory Committees to review their forms and the process for amending them.

Judge Sutton reported that the proposed amendments to Appellate Rules 4 and 40 (which 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) are currently on track to take effect on December 1, 2011 (absent contrary action by Congress). 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, legislation has been introduced that will make the same clarifying change to Section 2107. Such a change is very important in order to avoid creating a trap for unsophisticated litigants. The goal is for the amendment to Section 2107 to take effect simultaneously with the amendments to Rules 4 and 40.

IV. Action Items

A. For publication

1. Item No. 09-AP-C (FRAP 6 / direct bankruptcy appeals) and Item No. 08-AP-L (FRAP 6(b)(2)(A) / *Sorensen* issue)

Judge Sutton invited Professor Barrett to introduce these items, which relate to proposals to amend the Appellate Rules' treatment of appeals in bankruptcy matters. Professor Barrett observed that the context for these items is the Bankruptcy Rules Committee's project to amend Part VIII of the Bankruptcy Rules (dealing with appellate procedure in bankruptcy). She reminded members that the two Committees had held a joint meeting in spring 2011 to discuss the Part VIII project and related proposals concerning Appellate Rule 6. During summer 2011, Professor Barrett attended (and the Reporter participated telephonically in) a meeting to further discuss these issues.

Professor Barrett provided an overview of the proposals to amend Appellate Rule 6. Rule 6(a) addresses appeals from a district court exercising original jurisdiction in a bankruptcy case. Rule 6(b) governs appeals from a district court or a bankruptcy appellate panel (BAP) exercising appellate jurisdiction in a bankruptcy case. Rule 6 does not currently address the procedure for taking a permissive appeal directly from the bankruptcy court to the court of appeals under 28 U.S.C. § 158(d)(2). Since Section 158(d)(2)'s enactment in 2005, direct appeals under that provision have been governed by interim statutory provisions that referenced Appellate Rule 5. The proposed amendments would add a new subdivision (c) to Rule 6 that would govern such direct appeals. The proposals would also make several amendments to Rule 6(b)'s treatment of appeals from district courts or BAPs exercising appellate jurisdiction.

The Reporter observed that Rule 6's title would be amended to reflect an expanded breadth of application. Various portions of the Rule's text would be restyled. Cross-references to statutory and rules provisions would be updated. Under Rules 6(b) and 6(c), Rule 12.1's indicative-ruling procedure would apply to appeals in bankruptcy cases, with references to the "district court" read to include a bankruptcy court or BAP.

Rule 6(b)(2) would be revised to remove an ambiguity that had resulted from the 1998 restyling: Instead of referring to challenges to "an altered or amended judgment, order, or decree," the Rule would refer to challenges to "the alteration or amendment of a judgment, order, or decree." (The 2009 amendments to Rule 4(a)(4) removed a similar ambiguity from that Rule.) The amended provision would read: "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 the party, in compliance with Rules 3(c) and 6(b)(1)(B), must file a notice of appeal or amended notice of appeal. The notice or amended notice 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." In the second of these sentences, Professor Kimble has suggested replacing "The notice or amended notice" with "It." The Reporter stated that she disagrees with this suggestion; the longer option is clearer, and given the importance of this filing requirement, clarity is key. Mr. Letter stated that "The notice or amended notice" is clearer; two appellate judge members and an attorney participant expressed agreement with this view.

The Reporter pointed out that a number of the proposed changes to Rule 6(b)(2)(C) and (D) – and a number of aspects of proposed Rule 6(c) – are designed to reflect the ongoing shift to electronic filing. This shift is changing the way in which the record is assembled and transmitted to the court of appeals. The proposed amendments use the term "transmit" to denote both transmission of a paper record and transmission of an electronic record; they use the term "send" to denote transmission of a paper record. An appellate judge suggested that the proposals' use of the term "transmit" is clear when read in context. Professor Barrett pointed out that the Part VIII proposals also use the term "transmit." Mr. McCabe reported that the Bankruptcy Rules Committee had discussed this term at length during its fall 2011 meeting, and had decided to include a definition of "transmit" for the purposes of the Part VIII rules. An appellate judge member asked how the Civil Rules and the other Appellate Rules treat the topic of electronic

filing and transmission; this member also asked whether the proposed Part VIII rules will define "transmit."

An attorney member asked whether the language proposed for Rule 6 would encompass all the possible modes of furnishing the record; for example, he noted that a record could be sent in paper form, or could be transmitted as an electronic document, or could be made available in the form of a set of links to portions of the electronic record. Mr. Green observed that when the record is transmitted electronically this is usually accomplished by transmitting a list of the record's components, which can then be accessed by document number. In the Sixth Circuit, he reported, the court directly accesses any desired portions of the record. Mr. Green concluded that there are a variety of ways in which the record can be furnished to the court of appeals and that the various methods are changing over time. The attorney member suggested that the term "transmit" does not seem to encompass instances where the court below sends a list or index as opposed to the documents themselves; he proposed that better terms might be "furnish" or "provide." He noted that such a change in terminology could also affect any cross-references to the transmission of the record. A district judge member agreed that a broader term like "furnish" or "provide" seems preferable. Mr. Robinson observed that the Committee Note to the original adoption of Appellate Rule 11 uses the term "transmit." An attorney participant pointed out that the term "send" could be read to encompass electronic transmission, and that using "send" specifically to denote paper transmission would not be clear.

Judge Sutton noted that it will be important to discuss this issue with the Bankruptcy Rules Committee and to coordinate with that Committee in preparing proposals for consideration at the Committees' spring meetings. Professor Coquillette predicted that the Standing Committee will have a heavy agenda at the June 2012 meeting, and he suggested that it would be advisable to discuss the Appellate Rule 6 proposal at the Standing Committee's January 2012 meeting. Judge Sutton proposed that the Committee should try to settle on appropriate terminology for the Rule 6 draft in advance of the January 2012 Standing Committee meeting.

Mr. Green noted that these questions about electronic transmission relate to more general issues about the need to consider updating the Appellate Rules to address electronic filing. (The Committee discussed those broader issues later in the meeting.) The Committee briefly discussed other features of the Rule 6 proposal, including the treatment of stay requests and the treatment of materials that had been sealed in the lower court. Professor Barrett suggested that it would promote clarity to state in Rule 6(c)(2)(C) that Rule 8(b) (in addition to Bankruptcy Rule 8007) applies to requests for stays pending appeal.

The Committee determined by consensus to work further on the drafting of the Rule 6 proposal in advance of the January 2012 Standing Committee meeting.

V. Discussion Items

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

Judge Sutton invited Mr. Taranto to introduce Item No. 08-AP-D, which concerns Peder Batalden's suggestion that the Committee amend Appellate Rule 4(a)(4) to address potential problems arising from the possibility of a time lag between entry of the order disposing of a tolling motion and entry of any resulting amended judgment. Mr. Taranto began by suggesting that this is an issue that started small; then it got bigger; and now it seems that perhaps the balloon has burst. He noted that sometimes it is not clear whether an order has "disposed of" a postjudgment motion. Moreover, he noted, in some instances the time lag between entry of such an order and entry of a resulting amended judgment might be longer than the 30-day time limit for taking an appeal. The Committee considered various ways to address this issue, but found that each possibility carried a risk of creating other problems. Mr. Taranto recalled that he had suggested that the Committee consider proposing to the Civil Rules Committee that it broaden Civil Rule 58(a)'s separate document requirement. Mr. Taranto observed that a number of participants had expressed concern about such a proposal – notably the participants in the Appellate Rules Committee's joint discussion with the Bankruptcy Rules Committee, and also Professor Cooper. A central concern, Mr. Taranto noted, is that district courts already neglect to comply with the existing separate document requirement. Mr. Taranto closed his introductory remarks by wondering whether this item presented an example of the occasions that Professor Freer had posited, when rulemaking changes are not warranted.

Judge Sutton thanked Mr. Taranto for his work on this item, and noted that Ms. Mahoney had also participated in the efforts to find a solution. Judge Sutton observed that Mr. Batalden had identified a potential problem. It is not clear, however, how frequently this problem arises in practice. Any changes in the mechanics of Rule 4(a) are delicate in light of the fact that statutory appeal deadlines (such as those set in 28 U.S.C. § 2107) are jurisdictional. Improving the clarity of Rule 4 is an important goal, and the Committee tried diligently to find a way to address Mr. Batalden's concerns, but each possibility that the Committee discussed raised potential problems. Judge Sutton suggested that it was time for the Committee to determine what to do with this item.

An appellate judge participant stated that it would be worthwhile to explore the question further. An attorney participant suggested that, if this issue comes up in practice, courts are likely to interpret the term "disposing of" in Rule 4(a)(4) in a way that preserves appeal rights; it might be better, this participant posited, to leave the issue to the courts. An attorney member stated that, although he had not recently reviewed the prior options considered by the Committee, he recalled that each presented difficult issues; one should not, this member suggested, amend the Rule absent a real need to do so. A participant asked the Reporter what she thought; she responded that the concerns about district-court noncompliance with the separate document requirement seem well-founded, and she wondered whether the costs of amending Rule 4(a)(4) might outweigh the benefits.

A member moved that the Committee remove this item from its agenda until a case raising this problem is brought to the Committee's attention. The motion was seconded and

passed by voice vote without dissent. Judge Sutton undertook to write to Mr. Batalden and thank him for his helpful suggestion.

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

Judge Sutton invited Justice Eid to introduce this item, which concerns Daniel Rey-Bear's proposal that federally recognized Native American tribes be treated the same as states for purposes of amicus filings. Justice Eid described Mr. Rey-Bear's proposal and noted that the Committee had received resolutions in support of the proposal from the National Congress of American Indians and the Coalition of Bar Associations of Color. She reminded the Committee that it had asked Ms. Leary and the FJC to research the treatment of tribal amicus filings in the courts of appeals. Ms. Leary found that motions to make such filings are ordinarily granted, and that the filings are largely concentrated in the Eighth, Ninth, and Tenth Circuits. At the Committee's request, Judge Sutton wrote to the Chief Judges of those three circuits to ask for their circuits' views on the proposal to amend Appellate Rule 29 to treat tribes the same as states and also for their views on the possibility of adopting a local rule on the subject. Chief Judge Riley subsequently reported that he had circulated the inquiry to three relevant Eighth Circuit committees and had received only three responses, of which two favored either a national or a local rule amendment and one favored only a local rule amendment if appropriate. Circuit Clerk Molly Dwyer reported that the Ninth Circuit supported the proposal to amend Rule 29 and offered some drafting suggestions for such an amendment. The Reporter added that, since receiving those responses, the Committee had also received a response from Chief Judge Briscoe, who reported that the Tenth Circuit judges had considered Judge Sutton's inquiry and that a majority of the judges saw no need to amend Rule 29. Chief Judge Briscoe reported that the discussion was lively but that the majority view was clear that Native American tribes should not be treated differently from other litigants.

Justice Eid summarized the Committee's prior discussions, noting that those discussions had focused on the value of treating Native American tribes with dignity and also on the question of whether municipalities should also be accorded the right to file amicus briefs without party consent or court leave. Judge Sutton observed that there are strong arguments both for and against amending Rule 29. As to the dignity issue, he noted that tribes share qualities with both states and the federal government. He observed that, if anything, Supreme Court Rule 37.4 is harder to explain, from this perspective, because Rule 37.4 permits municipal governments, but not Native American tribes, to file amicus briefs without party consent or court leave. Often, he noted, when the Appellate Rules are amended the Supreme Court also amends its own rules in a similar fashion. One possible course of action would be to amend Rule 29 to treat both tribes and municipalities the same as states. Although one Committee member had earlier asked why those types of entities should be treated better – for purposes of amicus filings – than foreign governments are, one could argue that it is possible to draw the line at the United States' border. On the other side of the argument, Judge Sutton noted that the Eighth, Ninth, and Tenth Circuits have voiced a spectrum of views on this proposal – as have the members of the Standing Committee. There are no local rules in any circuit that currently take the approach that is

proposed for Rule 29.

Judge Sutton suggested that one possible course of action would be to write to the Chief Judges of all the circuits to share with them the Committee's discussions and research, and to state that although the Committee is not moving ahead with a national rule change at this point, it is open to each circuit to adopt a local rule authorizing Native American tribes to file amicus briefs without party consent or court leave. The letter could report that a number of Committee members favor such a rule but that the Committee is not prepared at this point to adopt it as an amendment to Rule 29. The responses to such a letter, he suggested, could help the Committee discern whether it makes sense to amend Rule 29. On the other hand, though a circuit could adopt a local rule permitting amicus filings as of right by Native American tribes, it does not appear that a circuit would have authority to adopt a local rule exempting Native American tribes from Rule 29(c)(5)'s authorship-and-funding disclosure requirement. Professor Coquillette cautioned against sending a letter that would encourage the proliferation of local rules.

Alternatively, Judge Sutton suggested, he could write to the Chief Judges of all the circuits to solicit their views concerning the proposal to amend Rule 29. A district judge member stated that it would be useful to do so. This member stated that he finds the dignity argument compelling, but that if there were resistance from the courts of appeals, that would give him pause. One participant suggested that although the dignity argument is appealing, not everyone is persuaded by it and the issue is one with political overtones. An attorney participant argued that it would be preferable for the Committee to follow the Supreme Court's lead concerning the question of tribal amicus filings. Mr. Letter stated that he supported the idea of soliciting the views of the rest of the circuits; he also reiterated the DOJ's position that Native American tribes should be consulted and he offered the DOJ's help in arranging that consultation. It was suggested that it would be helpful if the DOJ could explain in writing its views concerning consultation.

An attorney member asked whether anyone had asserted that Native American tribes have been deterred from proffering amicus briefs due to the requirement of seeking court leave to file them. Judge Sutton responded that such a concern does not seem to be the motivating factor in Mr. Rey-Bear's proposal. The attorney member also observed that the overall issue of tribal amicus filings includes not only Rule 29(a)'s provision concerning filing without court leave or party consent but also Rule 29(c)(5)'s requirement of the authorship-and-funding disclosure.

A committee member asked whether soliciting the views of the other circuits would provide the Committee with useful information; this member noted that the Committee is already aware that the Tenth Circuit strongly opposes amending Rule 29. Judge Sutton responded that if it turns out that there is a lopsided division in views among the circuits – for example, if no circuits other than the Tenth Circuit oppose amending Rule 29 – then some members might find that information to be relevant. A district judge member agreed and suggested that if that were to turn out to be the case, that information might even persuade the Tenth Circuit to reconsider its own view of the matter.

An appellate judge member offered a differing view, arguing that the Committee has the information it needs and that it should decide whether to amend Rule 29. This member argued in support of treating tribes the same as states for purposes of amicus filings; the member stated that such an approach would have no downside and that the rule amendment could also encompass municipalities and could be justified on the grounds that all large, important, sovereign entities should be treated similarly under Rule 29. The Reporter stated that although the extent of tribal government authority is much debated and has been altered in Supreme Court decisions since 1978, the doctrine is still clear that Native American tribes retain their sovereignty except to the extent that it has been removed by a federal treaty, by a federal statute, or by implication of the tribes' status as "domestic dependent nations." An attorney member observed that the term "state" is now defined by Appellate Rule 1(b) to include United States territories, which are not sovereign entities; under Rules 1(b) and 29(a), those non-sovereign entities are permitted to file amicus briefs without party consent or court leave. This member asked whether amending Rule 29(a) to treat tribes the same as states would be perceived as having broader implications for legal doctrines concerning tribal authority. A participant responded that the answer to that question is unclear. In any event, this participant observed, those who oppose treating tribes the same as states for purposes of Rule 29(a) may do so for reasons unrelated to their views of tribal sovereignty; such opponents may have a general aversion to amicus filings and may view the requirement of a motion for leave to file an amicus brief as a useful hurdle.

An attorney member asked whether the Committee knows how frequently municipalities seek leave to file amicus briefs in the courts of appeals. A district judge member noted that a letter soliciting the views of the circuits concerning tribal amicus filings could also solicit their views concerning municipal amicus filings. Mr. Letter argued that, given the range of views expressed by the three circuits the Committee consulted to date, the Committee should not move forward without consulting the remaining circuits. The attorney member expressed support for asking the circuits about both tribal amicus filings and municipal amicus filings, in order to get a sense of how a rule change would affect the courts' functioning. An appellate judge member observed that such information would not change the assessment of the dignity argument. But the attorney member responded that this information would illuminate the likely impact of a rule change. Another attorney participant stated that it would be useful to learn the views of the other circuits. An appellate judge member stated that the inquiry to the circuits should ask about both tribal and municipal amicus filers.

An attorney member – turning to the question of the disclosure requirement – observed that as one moves along the spectrum from the federal government to other government entities the likelihood of ghostwritten briefs increases (though it is still low). States with well-developed appellate operations write their own amicus briefs, but that might not always be true of states with less-developed appellate litigation functions. When a brief is circulated among the members of the National Association of Attorneys General, those reviewing the brief want to know who wrote it. An appellate judge member agreed that states' practices vary. Another attorney member asked whether one could amend Rule 29(c)(5) to apply the authorship-and-

funding disclosure requirement to all amici, including government amici. Such an approach would differ from that taken in Supreme Court Rule 37.6, but, he argued, the practicalities of amicus briefs differ as between filings in the courts of appeals and filings in the Supreme Court. Mr. Letter noted that if the disclosure requirement extended to the United States' amicus filings, the United States' answers to all the questions would always be "No." A participant asked whether extending the disclosure requirement to the United States would raise separation of powers issues. An attorney participant asked whether such an amendment to Rule 29(c)(5) would run counter to the presumption that one should not amend a rule that is functioning well.

By consensus, the Committee resolved to return to this item at its spring 2012 meeting.

C. 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 reflect the treatment of premature notices of appeal. He noted that it would be hard to guess, from the current language of Rule 4(a)(2), the way that the caselaw treats the various situations in which a premature notice of appeal might be filed. The caselaw itself appears to be developing in a way that shows a convergence of approaches among the circuits. The exception is the treatment of instances when an order disposing of fewer than all claims or parties is followed by disposition as to all remaining claims or parties; the majority view allows relation forward in that circumstance but the Eighth Circuit takes the opposite view.

Judge Sutton noted three possible approaches that the Committee could take. It could amend Rule 4(a)(2) to codify the majority approach to common scenarios; this would provide information that the average litigant could not infer from current Rule 4(a)(2). Or the Committee could choose not to amend the rule and to allow the caselaw to continue to develop. Or the Committee could amend Rule 4(a)(2) to narrow the range of circumstances in which relation forward is permitted; although such an amendment could provide a bright line rule, it would overrule a good deal of precedent and could lead to the loss of appeal rights. Judge Sutton asked whether Committee members would support the latter approach; no members indicated support for it. He then asked whether the Committee was interested in amending the Rule to codify existing practices.

Mr. Letter suggested that it would be useful to provide clarity and to diminish the need to research the law. A district judge member asked whether it would be possible to amend the Committee Note to provide this clarification. Mr. McCabe explained that it is not an option to amend the Notes without amending the Rule text. Professor Coquillette recalled that Professor Capra had published (through the FJC) a pamphlet discussing aspects of the original Committee Notes to the Federal Rules of Evidence that warranted clarification (in some instances, because the rule discussed in the relevant Note was later altered by Congress). Professor Coquillette pointed out that there is a preference for not citing caselaw in Committee Notes because the cases might later be overruled.

Judge Sutton asked how often rules have been amended in order to codify existing practices. The Reporter noted the example of Civil Rule 62.1 and Appellate Rule 12.1, concerning indicative rulings. However, Professor Coquillette observed that such codification is not the norm. An attorney participant suggested that making the law more accessible provides a good reason for rulemaking. But an appellate judge member noted that, on the other hand, it might be argued that specifying in the rule the instances in which a premature notice of appeal relates forward might encourage imprecise practice concerning notices of appeal.

An attorney member asked whether it would be possible to amend Rule 4(a)(2) merely by substituting "an appealable" for "the," so that the Rule would read: "A notice of appeal filed after the court announces a decision or order – but before the entry of an appealable judgment or order – is treated as filed on the date of and after the entry." That amendment could be accompanied by an explanatory Committee Note. However, one problem with that language might be its potential breadth; it could be read to cover, for example, a notice of appeal filed after entry of a clearly interlocutory order and well before entry of final judgment.

An attorney participant turned the Committee's attention to another possible amendment illustrated in the materials. This proposal would leave the existing language of Rule 4(a)(2) as it stands and then add: "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" (followed by a list of instances in which relation forward is permitted under current law). The attorney pointed out that this proposal was incoherent because the examples in which current law permits relation forward do not actually fit within the language of Rule 4(a)(2)'s current text. An attorney member pointed out that this inconsistency would not arise if "an appealable" were substituted for "the" in the current text of Rule 4(a)(2). But the attorney participant responded that such a change could broaden the application of relation forward beyond that permitted by current doctrine.

An appellate judge member agreed with the concern – voiced earlier in the discussion – that such an amendment to Rule 4(a)(2) could unduly encourage parties to file notices of appeal early. This member suggested that it might be better not to amend the rule. He moved to remove this item from the Committee's agenda. The motion was seconded and passed by voice vote without opposition.

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

Judge Sutton invited Judge Dow to introduce Item No. 10-AP-I, which concerns questions raised by sealing or redaction of appellate filings. Judge Dow observed that this item arose from a suggestion by Paul Alan Levy – an attorney at Public Citizen Litigation Group – that redaction of appellate briefs creates problems for would-be filers of amicus briefs. Sealing on appeal, Judge Dow noted, raises questions beyond those that concern amici. He noted a number of related but distinct issues, such as issues raised by protective orders in the district court that seal discovery materials, and issues concerning redactions pursuant to the recently-

adopted privacy rules. In contrast to questions relating to protective orders governing discovery, the question of sealing on appeal solely concerns materials filed with the court.

Judge Dow observed that there are a number of different possible approaches to sealing on appeal. One approach is that taken by the D.C. Circuit and Federal Circuit; these circuits 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. Some other circuits appear to operate on the assumption that materials that were sealed in the district court presumptively remain sealed on appeal. A third approach is that taken by the Seventh Circuit (and in some instances by the Third Circuit); this approach provides a grace period during which matters sealed below remain sealed on appeal, but mandates 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.

Judge Dow suggested several questions for the Committee to consider. An initial question is whether there should be a national rule governing sealing on appeal. A national rule, he observed, would create a uniform approach. He noted the underlying principle that court business should be public. An appeal, he pointed out, comes later in the court process and the original reason for sealing an item in the court below may have dissipated by the time of the appeal. Another question is who should review the question of sealing at the time of the appeal. One possibility is to put the onus on the parties to review the continued appropriateness of any sealing orders. Another possibility would be to place this burden on the lower court. One advantage of that approach is that the district judge is familiar with the record. But requiring the district judge to review sealing orders at the conclusion of every case would be overbroad, because not all judgments are appealed; a narrower approach would provide that the judge's duty to review any sealing orders would be triggered by the filing of a notice of appeal. A third possibility would be to adopt the Seventh Circuit approach and require the parties to an appeal to make a motion if they desire the sealing to continue on appeal.

Judge Dow pointed out that this set of issues is complex, and that a number of areas require further study – for instance, concerning the question of sealing in criminal appeals. He observed that it will be important to consider how the CM/ECF systems are working. For example, in the Seventh Circuit, the CM/ECF system has sealed functionality (so that the district judge assigned to the case can view sealed filings through CM/ECF). Courts are in different places on these questions.

The Reporter posited that the question of sealing on appeal is distinct from the question of protective orders concerning discovery materials under Civil Rule 26(c). In the latter context, many or all of the sealed materials may never be filed with the court; by contrast, sealing on appeal by definition concerns materials filed by a party in support of or in opposition to a request for action by the court. Judge Sutton, noting the variation among the circuits' approaches to sealing on appeal, suggested that the Committee discuss the significance of that variation. Professor Coquillette responded that one approach would be to wait for the Supreme Court to

resolve these questions; another approach would be to pursue uniformity through the promulgation of a national rule. Mr. McCabe pointed out the salience of the Judicial Conference Committee on Court Administration and Case Management ("CACM"). CACM's jurisdiction, he noted, encompasses questions of privacy and sealing. He observed that those planning the Next Generation of CM/ECF have approved two requirements for the next iteration of the CM/ECF system: First, the system must accommodate a sealed as well as a non-sealed level of filing; and second, there should be a system for "lodging" submissions with the court without actually filing them. An attorney participant asked how frequently non-parties make motions to unseal a sealed filing.

Judge Sutton suggested that it might be useful to form a working group to consider these issues further; the group could consider not only the possibility of a rule change but also alternatives to rulemaking. Mr. Letter agreed to work with Judge Dow and the Reporter on this topic. Judge Sutton invited any other member who is interested to participate in this effort. By consensus, the Committee retained this item on its study agenda.

VI. Additional Old Business and New Business

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

Judge Sutton invited the Reporter to introduce Item No. 11-AP-B, which concerns the possibility of amending Rule 28 to discuss the inclusion of introductions in briefs. The Reporter stated that this topic grows out of Committee discussions concerning the proposal – currently out for comment – that would amend Rule 28 to combine the statement of the case and of the facts. Some participants in those discussions had suggested that it would be useful for Rule 28 to alert lawyers to the possibility of including an introduction in their brief. Participants had also discussed a related idea 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 attempt to address these issues in the context of the proposal concerning the statement of the case, the Committee had added these questions to its agenda as a separate item.

Few rules currently address the question of introductions in briefs, though experienced appellate litigators often include them. Eighth Circuit Rule 28A(i)(1) requires appellants to include an up-to-one-page statement that includes a summary of the case and a statement of whether oral argument should be heard; appellees may include a responsive statement. Mr. Letter has mentioned to the Committee that the Ninth Circuit is considering adopting a local rule on introductions in briefs. Apart from that, there do not appear to be local circuit rules on point. The Supreme Court rules do not address introductions; the first item in a Supreme Court brief is the Questions Presented (in which experienced litigators may include a few sentences that serve the role of an introduction). Thanks to helpful research by Holly Sellers, the Committee is aware that three states have relevant provisions. Kentucky requires a very brief introduction (one or two sentences concerning the nature of the case). New Jersey permits a "preliminary statement" of up to three pages. Washington permits the inclusion of an introduction.

Amending Rule 28 to discuss introductions would codify current practice and might simplify the lawyer's task by making clear that an introduction is permissible. Promoting the inclusion of introductions would be helpful to the extent that those introductions are well-written. But such an amendment might also have costs. Not all introductions would be skilfully drafted. Some might include factual assertions that are not tied to the record. Some might try to present too many ideas "up front." Given those possible costs, perhaps this is something that should be dealt with, if at all, by local rule. If a national rule were to be drafted, it presumably would permit but not require an introduction. Other things that the rule might address could include the introduction's length (presumably the introduction would count toward the overall length limit for the brief); guidance concerning the introduction's contents; the introduction's placement in the brief (a necessary topic given that Rule 28(a) directs that the listed items appear in the order stated in the rule); and the respective roles of the introduction and the summary of argument.

Judge Sutton suggested that a central question is whether Rule 28 should be amended to reflect current practice concerning introductions. An attorney participant suggested that such an amendment is unnecessary because the proposed amendments to Rules 28 and 28.1 that are currently out for comment give lawyers flexibility to include an introduction as part of the statement of the case. An attorney member agreed that this item is "a solution in search of a problem"; he currently includes introductions in his briefs. Mr. Letter disagreed, arguing that although experienced appellate lawyers include introductions, the rest of the bar may not be aware that they can do so under the current Rule. He noted that when he advises young lawyers to add an introduction in a brief, they often come back to him, after reading Rule 28, to ask whether it is permissible to do so.

Judge Sutton observed that if the currently published proposals are adopted, Rule 28(a)(6) 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))." The attorney participant suggested that it would be possible to amend this provision to mention "an optional introduction." But even without such a modification, she argued, the published language would permit the inclusion of an introduction as part of the statement of the case.

An attorney member asked how one would describe the appropriate contents of an introduction. Mr. Letter stated that an introduction can usefully state what the case is about and identify the basic arguments. The attorney member responded that it seems difficult to formulate just what an introduction should contain. An attorney participant suggested that it would be counter-productive to specify the contents of the introduction because flexibility is important; the best approach if one is mentioning an introduction, she argued, would be a simple reference to "an optional introduction." An appellate judge member asked whether mentioning an "optional introduction" would suggest by implication that no other optional components can be included in the brief. By way of comparison, it was noted that Rule 28(a)(10) currently requires "a short conclusion stating the precise relief sought." The attorney participant stated her understanding that this provision requires the brief to state what the appellant is asking the court of appeals to

do with the judgment below (reverse, vacate, or the like).

A member, noting that the proposal concerning the statement of the case is currently out for comment, asked whether it would be wise to amend Rule 28 twice in a row. Judge Sutton responded that if the Committee were to decide that the rule should discuss introductions, it would be possible to hold the currently published amendment and bundle it with the proposal concerning introductions. Mr. McCabe observed that the Committee Note of the currently published proposal could be revised after the comment period.

A member suggested that it did not make sense to amend Rule 28 to discuss introductions. Two attorney members agreed with this view, as did two other participants. A district judge member suggested that it could be useful to provide guidance concerning introductions in the Committee Note. Two appellate judge members agreed with this idea, as did two other participants (one of those participants reiterated her alternative suggestion that the rule text could be revised to refer to an "optional introduction"). Mr. Letter advocated adding a discussion of introductions either to the rule text or to the Committee Note in order to raise awareness concerning the possibility of including introductions; he argued that it would be better to address this topic in the rule text than in the Note. Professor Coquillette advised against including in the Committee Note something that should be addressed in the rule text. An appellate judge member stated that junior lawyers need guidance, and advocated addressing introductions either in the rule text or in the Note.

Judge Sutton suggested that – because it was time for the Committee to break for the day – Mr. Letter could formulate proposed language for a rule amendment that the Committee could then consider the next day. The following morning (after discussing the other matters noted below) the Committee resumed its discussion of this topic.

Mr. Letter offered some possible language to describe what should be included in the introduction. An appellate judge member asked whether an introduction differs from the summary of argument. Mr. Letter answered in the affirmative: An introduction says what the case is about and summarizes one or two key arguments. The Reporter asked whether one would ever omit the summary of argument because an introduction took its place. Mr. Letter suggested that judges' views on this point would differ. Another appellate judge member predicted that adding a new section to the brief would tend to make briefs longer (because, currently, not all briefs are as long as they could be under the length limits). And in the case of unsophisticated litigants, this member suggested, authorizing the inclusion of an introduction could dilute the usefulness of the summary of the argument. Mr. Letter predicted that, without a rule that mentions introductions, experienced litigators will continue to include them and inexperienced lawyers will continue not including them. An appellate judge member predicted that most judges would not wish to encourage the inclusion of another section in briefs, and that judges certainly would not wish to render the summary of argument optional. This member stated that it seems difficult to draft rule language that would explain the difference between the introduction and the summary of argument. The difference, he observed, is that the summary of argument is legalistic

and the introduction is not, but it is hard to know how to say that in a rule without confusing the reader. Mr. Letter observed that circuits could address the matter by local rule. He asked whether Assistant United States Attorneys in the Third Circuit include introductions. An appellate judge member stated that they usually do not.

By consensus, the Committee decided to keep this item on its agenda and discuss it again at the Spring 2012 meeting.

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)

Judge Sutton introduced this topic, which concerns a couple of specific proposals for amending Appellate Rule 3(d), as well as a broader proposal for reviewing all of the Appellate Rules' functioning, in the light of electronic filing and service. He observed that there will always be some litigants who submit paper filings; the question is when and how to amend the rules to address the growing prevalence of electronic filings. He invited Mr. Green to provide a further introduction to this topic.

Mr. Green noted that all but two circuits have moved to the electronic world. (The Eleventh Circuit will come online within a year or so; the Federal Circuit has yet to come online.) The systems in a number of circuits are mature. Local practices have developed side by side with the Appellate Rules. A key question concerns the treatment of the record and appendix. An attorney member asked whether the Sixth Circuit's CM/ECF system is coordinated with those of the district courts within the Sixth Circuit. Mr. Green reported that the systems are coordinated. The bankruptcy courts were the first to come online, then the district courts, and now the court of appeals. The courts are now at the stage of developing the Next Generation of CM/ECF. There are some areas where the Appellate Rules are silent concerning electronic filings. There is no urgent need to revise the Rules, but over the next couple of years it would make sense to consider amending them.

Judge Sutton asked whether any meeting participants were aware of Appellate Rules that urgently need revision in light of the shift to electronic filing. An appellate judge said that he was not aware of any such rules; the big advantage of the advent of electronic filing, he noted, is that the court is always open to receive such filings. Mr. Letter stated that although there is no urgent need for a rule amendment, it would make sense to consider whether to change Appellate Rule 26(c)'s "three-day rule" (which adds three days to a given period if that period is measured after service and service is accomplished electronically or by a non-electronic means that does not result in delivery on the date of service). Mr. Letter reported that lawyers constantly ask why the three-day rule encompasses electronic service. The problems with electronic service, he noted, are decreasing. Mr. Green agreed that including electronic service within the three-day rule seems like an anachronism.

Mr. Letter noted the possibility that a judge who receives an electronic brief might print it

in a format that yields page numbers that differ from those referred to in the briefs. Mr. Green observed that electronic briefs are always required to be filed in PDF format. Mr. Letter responded that PDF briefs can be manipulated to yield different fonts. An appellate judge member stated that he does not change the appearance of briefs in this manner. Mr. Letter asked whether it would make sense for cross-references in briefs to refer to something other than page numbers. An attorney member responded that numbering the paragraphs in a brief would be an unappealing prospect. Another member suggested that even if a judge prints a brief in another format, he or she could return to the originally-filed version when determining what to refer to in the course of an oral argument. Another appellate judge observed that he had not heard of this phenomenon causing problems.

Judge Sutton suggested that changes relating to electronic filing and service might be addressed over the next few years through a joint project with the other Advisory Committees. Professor Coquillette stated that he would raise this possibility with Judge Kravitz (the Chair of the Standing Committee). Mr. McCabe observed that questions like the proper definition of "transmit" present global issues. A member noted that on that particular question, the Committee's choice of wording for Appellate Rule 6 (in the context of the project to revise that Rule and Part VIII of the Bankruptcy Rules) could end up affecting the overall approach to terminology throughout the Appellate Rules. An appellate judge member asked whether those working on a joint project on electronic filing and service should include court employees who work with the relevant technology. Judge Sutton responded that if the Appellate Rules Committee forms a working group on this topic it could include not only Mr. Green but perhaps also another court employee with technical knowledge. Mr. McCabe noted that such a project would also involve CACM, and that the Next Generation of CM/ECF would presume the use of an all-electronic system. An attorney member agreed that it would be important to involve people with technical knowledge; he observed that in this fast-changing area the time lag between consideration and adoption of rule amendments would pose particular challenges.

VII. Other Information Items

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

Judge Sutton invited the Reporter to update the Committee concerning Item No. 10-AP-D. This item relates to the proposed "Fair Payment of Court Fees Act of 2011," which would have amended Civil Rule 68 and Appellate Rule 39 in response to concerns raised about the taxation of costs in *Snyder v. Phelps*, 580 F.3d 206 (4th Cir. 2009), *aff'd*, 131 S. Ct. 1207 (2011). The bill would have added a new subdivision (f) to Rule 39; that provision would require the court to order a waiver of appellate costs if the court determined that the interest of justice so required, and would define the "interest of justice" to include the establishment of constitutional or other precedent.

As the Committee has previously discussed, current Rule 39 already provides the courts of appeals with discretion to deny costs in a case such as *Snyder*. On the other hand, the circuits

have varied in their application of Rule 39's cost provisions. Pursuant to a request from the Committee, Ms. Leary and the FJC completed a very informative study of circuit practices concerning appellate costs. Ms. Leary found that the circuit practices vary due to differences with respect to factors such as the ceilings on the reimbursable cost per page of copying and the number of copies. In *Snyder*, the great bulk of the cost award was due to the cost of copying the briefs and extensive appendices.

At the Committee's request, Judge Sutton sent Ms. Leary's report to the Chief Judges of each circuit; and the circuits are responding to the study. Thus, for example, the Fourth Circuit has amended Fourth Circuit Rule 39(a) to lower the ceiling on reimbursable costs from $ 4.00 per page to 15 cents per page. Chief Judge Easterbrook has commented that there seems to be no need to amend the Seventh Circuit's local rules, but that the Appellate Rules should be amended to set the maximum reimbursement per page, to provide that only actual costs are reimbursable, and to clarify that reimbursement can be claimed only for the number of copies that are required by local rule. Chief Judge Lynch has disseminated the FJC study to the judges in the First Circuit for their review. In July 2011, the Rules Committees submitted a memo to argue that the proposed bill to amend Civil Rule 68 and Appellate Rule 39
would be unnecessary in light of, inter alia, the circuits' responses to the FJC study and the growing prevalence of electronic filing (which will decrease copying costs). The bill has not been reintroduced in the 112th Congress.

Judge Sutton thanked Ms. Leary for her informative and timely research, which was key to these positive developments.

B. FRAP-related circuit splits and certiorari petitions

Judge Sutton observed that the ongoing projects to review circuit splits and certiorari petitions relating to the Appellate Rules are designed to help the Committee investigate proactively how the Appellate Rules are functioning. He invited members to comment on these projects, and he invited the Reporter to highlight aspects of the memos concerning them.

The Reporter noted that the certiorari petitions had raised a number of interesting issues concerning appellate practice. For example, the petition in *In re Text Messaging Antitrust Litigation* (No. 10-1172), had challenged the practice of simultaneously granting permission to take a discretionary appeal and deciding the merits of that appeal. The petition for certiorari in *United States v. Irey*, 612 F.3d 1160 (11th Cir. 2010) (en banc), *cert. denied*, 131 S. Ct. 1813 (2011), presented a case in which the court of appeals' judgment was entered at the end of March; there was no petition for rehearing, but the mandate did not issue; and the court of appeals in mid-August granted rehearing en banc and vacated the panel opinion. The Eleventh Circuit has now adopted an internal operating procedure under which – if no rehearing petition has been filed by the time the mandate would otherwise issue – the clerk will make a docket entry to advise the parties when a judge has notified the clerk to withhold the mandate.

Judge Sutton asked whether Committee members wished to discuss any of the other cases addressed in the memos. An appellate judge member noted that he had been struck by the procedure employed by the court of appeals in *Karls v. Goldman Sachs Group, Inc.*, 131 S. Ct. 180 (2010). 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. The member noted that when an appeal is controlled by circuit precedent, rehearing en banc would be a particularly important avenue for the litigant seeking to overturn that precedent. A member suggested that the Ninth Circuit's use of this procedure may stem from the docket pressures in that circuit. Another member observed that this procedure ceded authority (over whether to vote to rehear a case en banc) to the judges on the panel.

VIII. Date and Location of Spring 2012 Meeting

Judge Sutton noted that the Committee's Spring 2012 meeting is scheduled for April 12 and 13 in Washington, D.C.

IX. Adjournment

The Committee adjourned at 9:40 a.m. on October 14, 2011.

Respectfully submitted,

Catherine T. Struve
Reporter