United States Senate
Committee on the Judiciary

Questionnaire for Judicial Nominees

Attachments to Question 12.b.

Amy Coney Barrett
Nominee to be Associate Justice
of the Supreme Court of the United States

POLICY ON EQUAL EMPLOYMENT OPPORTUNITY, DISCRIMINATION, HARASSMENT, AND EMPLOYMENT DISPUTE RESOLUTION FOR THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

I. Policy Statement

The courts of the Seventh Circuit are committed to providing rights and protections to all court employees. Equal employment opportunity is provided to all persons regardless of their race, color, national origin, age (at least 40 years of age at the time of the alleged discrimination), religion, sex, sexual orientation, gender identity or expression, veteran status, disability, or genetic information. The courts of the Seventh Circuit will promote equal opportunity through a program encompassing all facets of personnel management, including recruitment, hiring, promotion, and advancement. Discrimination against, and harassment of, court employees will not be tolerated. Retaliation against employees for good-faith efforts to assert rights and protections under this Policy also will not be tolerated.

II. Scope of Coverage

This Policy applies to all courts and court units within the Seventh Circuit, including District Courts, Bankruptcy Courts and Clerks of the District and Bankruptcy Courts, as well as United States Probation Offices and Federal Public Defenders. The procedural rights to pursue formal dispute resolution under this Policy, however, do not apply to contract employees, externs, interns, Federal Community Defenders and their employees, applicants for federal defender, magistrate judge, or bankruptcy judge positions, applicants for law clerk, paralegal, or judicial assistant positions, private attorneys who apply to represent indigent defendants under the Criminal Justice Act, or volunteer mediators.

This Policy is not intended to duplicate or supersede the provisions for resolving complaints of judges' misconduct or disability under 28 U.S.C. §§ 351–362. Alleged judicial misconduct must be addressed through a judicial misconduct complaint.

III. Definitions

For purposes of this Policy—

A. The term "employing office" includes all offices of the United States Court of Appeals, including the office of circuit executive, federal public defenders, clerk of court, staff attorney, settlement attorney, circuit librarian, and any offices that might be created in the future. The Court of Appeals is the employing office of a circuit judge's chambers staff. The term "employing office" also includes the

District Courts and Bankruptcy Courts within the Seventh Circuit, the offices of the clerks of the District and Bankruptcy Courts, and the United States Probation Offices within the Seventh Circuit. District and Bankruptcy Courts are the employing offices of District and Bankruptcy Judges' chambers staff, respectively.

B. The term "court" refers to the Court of Appeals, District Court, and/or Bankruptcy Court, and the employing office that would be responsible for redressing, correcting, or abating the alleged violations. In the case of disputes involving Federal Public Defenders, the term "court" refers to the Court of Appeals.

C. The term "disability" means—

a physical or mental impairment that substantially limits one or more of the major life activities of an employee,

a record of such an impairment, or

being regarded as having such an impairment.

(For extended text see 42 U.S.C. § 12102(2)).

IV. Equal Employment Opportunity and Anti-Discrimination Rights

Discrimination against employees based on race, color, national origin, age (at least 40 years of age at the time of the alleged discrimination), religion, sex, sexual orientation, gender identity or expression, veteran status, disability, or genetic information is prohibited.

Court unit executives must ensure that, consistent with the Guide to Judiciary Policy, vacancies are publicly announced to attract candidates who represent the make-up of persons available in the qualified labor market and that all hiring decisions are based solely on job-related factors. Reasonable efforts should be made to see that the skills, abilities, and potential of each employee are identified and developed, and that all employees are given equal opportunities for promotions by being offered, when the work of the court permits, and within the limits of available resources, cross-training, reassignments, special assignments, and outside job-related training.

Recruitment — Each employing office will make reasonable efforts in the recruitment process to obtain a pool of qualified applicants who reflect the make-up of all such persons in the relevant labor market and will publicize all vacancies.

Hiring — Each employing office will make its hiring strictly upon an evaluation of a person's qualifications and ability to perform the duties of the position satisfactorily.

Promotion — Each employing office will promote employees according to their

experience, training, and demonstrated ability to perform duties of a higher level.

Advancement — Each employing office will seek, insofar as reasonably practicable, to improve the skills and abilities of its employees through cross-training, job restructuring, assignments, details, and outside training.

V. What is Discrimination?

Discrimination is generally defined as a materially adverse action affecting the terms and conditions of employment that is taken because of an individual's race, color, national origin, age, religion, sex, sexual orientation, gender identity or expression, veteran status, disability, or genetic information.

VI. What is Harassment?

Harassment is a form of discrimination. It is generally defined as unwelcome conduct that is based on race, color, national origin, age, religion, sex, sexual orientation, gender identity or expression, veteran status, disability, or genetic information, that is subjectively and objectively offensive and has the purpose or effect of unreasonably interfering with an individual's work and creating an abusive, hostile, or intimidating work environment.

Sexual harassment is a form of discrimination based on sex. It may include unwelcome sexual advances or other nonconsensual conduct of a sexual nature, when (1) submission to or rejection of such conduct is used as a basis or threatened basis for employment decisions, or (2) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance and creating an abusive, hostile, or intimidating work environment.

Sexually harassing behavior includes physical, verbal, and nonverbal behavior. Examples of inappropriate sexual behavior include, but are not limited to:

- unwanted sexual advances;
- inappropriate touching or other physical contact;
- promotion, retention or other employment actions (positive or negative) affected by an individual's submission to or rejection of unwelcome sexual advances;
- favoritism based on submission (consensual or nonconsensual) to sexual overtures;
- repeated sexual jokes, flirtations, advances or propositions, or discussions of sexual activity (whether in conversation or through electronic or other means);
- abuse of a sexual nature or suggestive insulting, obscene comments or gestures; and
- display of sexually suggestive objects or pictures.

This Policy also expressly prohibits behavior that harasses or discriminates against court employees on the basis of any factor protected by law. Forms of such harassment or discrimination can include physical, verbal, and nonverbal behavior that harasses, disrupts, or interferes with work performance or in any way creates or contributes to an intimidating, hostile, or offensive work environment. Examples of such harassment or discrimination include, but are not limited to:

- Epithets, threats, slurs, or off-color jokes; and
- Drawings, cartoons, or behavior that is insulting, derogatory, or ridiculing of persons based on their legally protected status.

This Policy is intended to provide means for addressing unwelcome conduct regardless of whether it meets the legal standard for severe or pervasive conduct. Further, regardless of its form or motive, bullying, arbitrary harassment, or inappropriate conduct that fails to treat colleagues with respect undermines the court's ability to do its job for the public and should not be tolerated.

VII. Employment Dispute Resolution Coordinator

The Chief Judge of each court in the circuit shall designate an individual to serve as the court's EEO/EDR Coordinator. The duties of the court's EEO/EDR Coordinator include:

- providing information to the judges and employees of the court regarding the rights and protections afforded under this Policy;

- advising the Chief Judge of the Seventh Circuit on designating EEO/EDR counselors—employees who agree to serve in that role and to receive specialized training in counseling other employees and in the procedures established by this Policy, including the formal EDR procedures—within each court and employing office within the Seventh Circuit.

The Chief Judge of the Seventh Circuit shall designate an individual to serve as the Circuit EEO/EDR Coordinator. The duties of the Circuit EEO/EDR Coordinator include:

- providing information to the judges and employees of the courts within the Seventh Circuit regarding the rights and protections afforded under this Policy;

- advising the Chief Judge of the Seventh Circuit on designating EEO/EDR counselors—employees who agree to serve in that role and to receive specialized training in counseling other employees and in the procedures established by this Policy, including the formal EDR

procedures—within each court and employing office within the Seventh Circuit;[1]

- disseminating information to employees regarding the identity of designated EEO/EDR counselors and how to contact one of them if necessary;

- coordinating and organizing the procedures to establish and maintain official files of the court pertaining to reports and requests for dispute resolution and other matters initiated and processed under this Policy;

- coordinating relevant training for employees and judges;

- collecting, analyzing, and consolidating statistical data and other information pertaining to the court's processes under this Policy;

- recording any resolution reached on matters initiated under this Policy; and

- compiling and submitting an annual report on the implementation of its EEO/EDR Policy to the Administrative Office for inclusion in the Director's Annual Report to the Judicial Conference.

VIII. Options for Resolution

If you believe that you have been subjected to discrimination or harassment, you have a number of options. You should select the route you feel most appropriate for your circumstances, which may include a request for advice, an informal report of wrongful conduct, or a request for formal dispute resolution.

Requests for Advice: You may, as an initial matter, contact the Circuit EEO/EDR Coordinator or a designated EEO/EDR counselor to request advice about your situation. Any request for advice shall be kept confidential, but the counselor shall provide an explanation of the informal and formal options for pursuing the matter under this Policy.

Informal Reports of Wrongful Conduct: You also may report wrongful job-related conduct to the court's Circuit EEO/EDR Coordinator or a designated EEO/EDR counselor. A judge may be the subject of a request for advice or a report of wrongful conduct.

[1] A current list of designated EEO/EDR counselors within the circuit shall be readily available to employees within the Seventh Circuit. Designations shall be made by the Chief Judge of the Circuit, after consulting with Chief Judges of the District Courts, with the goal that an employee who wishes to request advice or to make a report of wrongful job-related conduct may be able to choose to communicate with an individual who is or is not in the same court unit or location, and with a person whom the employee can trust to understand and empathize with those involved.

If the request for advice or report of wrongful conduct indicates wrongful conduct by a judicial officer, the person receiving the information shall promptly notify the Chief Judge of the Seventh Circuit (either directly or through the Circuit EEO/EDR Coordinator) so that the Chief Judge of the Seventh Circuit may take any appropriate action, including informal measures, pursuant to the provisions of 28 U.S.C. §§ 351–362 and Volume 2, Part E of the Guide to Judiciary Policy.

The Circuit EEO/EDR Coordinator or designated EEO/EDR counselor shall ensure that all reports of wrongful conduct not involving judicial officers are investigated by the appropriate persons, and efforts should be made to resolve the issue through meaningful discussion and mediation. The informal nature of the process is intended to provide as much flexibility as possible in reaching an appropriate resolution of the report. The Circuit EEO/EDR Coordinator or designated EEO/EDR counselor shall keep informal investigations not involving judicial officers as confidential as possible under this Policy.

Formal Dispute Resolution: You also may initiate a more formal dispute resolution process, which may involve a formal hearing, by submitting a written request pursuant to the procedures set forth below in Section XI.

Other Options: If you prefer to address the situation without assistance, you can communicate either orally or in writing with the person whose behavior is of concern. Your communication should clearly identify the conduct that is of concern and indicate that it was unwelcome and offensive and should cease. Such a communication often will cause the unwelcome behavior to stop, particularly where the person may not be aware that the conduct is unwelcome or offensive.

Regardless of how you choose to address your concerns, the court may be required, or may otherwise deem it appropriate, to commence its own investigation and to take further action.

IX. Responsibility to Report Wrongful Conduct

Discriminatory, harassing, retaliatory or other inappropriate behavior covered by this Policy often can occur without witnesses. What one person may regard as offensive, another may not. For the court to implement this Policy effectively, it is critical that all employees respond to and report discrimination, retaliation, and inappropriate sexual and other behavior covered by this Policy. If you believe that you have been subjected to discrimination, harassment, retaliation, or inappropriate sexual or other behavior, you are encouraged to ask the offender to stop engaging in the objectionable behavior. In addition (or instead, if such informal requests are ineffective or impractical under the circumstances), you should report such conduct to the Circuit EEO/EDR Coordinator or a designated EEO/EDR counselor.

If the individual committing the alleged discrimination or harassment works for an outside

agency such as the United States Marshals Service (including Court Security Officers), United States Attorney's Office, General Services Administration, or local law enforcement, the appropriate Chief Judge or court unit executive should confidentially report the allegation to the head of the agency and request an internal investigation to be followed by a final report of the outcome of the investigation to the appropriate Chief Judge or court unit executive within a reasonable time.

If you have reason to believe that another colleague has been subjected to or has engaged in discrimination, retaliation or inappropriate sexual or other behavior, you are encouraged to ask the offender to stop engaging in the objectionable behavior. In addition (or instead, if such informal requests are ineffective or impractical under the circumstances), the court encourages you to report discrimination or other inappropriate behavior promptly and before the behavior has become severe or pervasive. Prompt reporting could prevent the behavior from escalating and allows the court to respond rapidly and to take appropriate action to minimize harm to individuals involved and to minimize the disruption to our work environment. The appropriate court will investigate promptly a report of discrimination or inappropriate sexual or other behavior. Reports and investigations will be handled in a confidential manner, consistent with the need to investigate and take corrective action.

Supervisors who learn of objectionable behavior have an obligation to take effective remedial action.

X. Confidentiality

The courts of the Seventh Circuit will strive to protect, to the greatest extent possible, the confidentiality of persons reporting discrimination, harassment, or retaliation, and of those accused of such conduct. Complete confidentiality cannot be guaranteed, however, where it would conflict with the courts' obligation to investigate meaningfully or to take corrective action. Even when some disclosure of information or sources is necessary, it will be limited to the extent possible. The courts will, to the extent permitted by law and consistent with their responsibilities to the public, keep confidential all records of reports of wrongful conduct, requests for formal dispute resolution, responses, and investigations. To the extent a report addresses wrongful conduct by a judicial officer, confidentiality will be governed by 28 U.S.C. §§ 351–362 and Volume 2, Part E of the Guide to Judiciary Policy.

If you believe you might have been subjected to discrimination or harassment and want to discuss the matter in a more confidential setting or clarify your feelings about whether and how you wish to proceed, you may want to consult a social worker, therapist, or clergy member who may be permitted by law to assure greater confidentiality. Employees may contact the Employee Assistance Program (1-800-222-0364) for confidential assistance and, if desired, referral to other resources. Discussions with the Employee Assistance Program are confidential and are not considered notice to the appropriate court.

XI. Formal Dispute Resolution Procedures

A. Request for Formal Dispute Resolution

If an employee who reports wrongful conduct informally feels that the issue of discrimination, harassment, or retaliation has not been resolved by the informal process, the employee may request a hearing before the Chief Judge of the appropriate court. The request shall be in writing, identify all individuals involved, describe the discrimination, harassment, or retaliation at issue, and identify the relief or remedy being sought.

To the extent feasible, an individual invoking the formal dispute resolution procedures of this Policy may use a reasonable amount of official time to address the issue, so long as it does not unduly interfere with the performance of his or her court duties.

The formal request for a hearing and any other documents shall be reviewed by the Chief Judge or by another judge of the court designated by the Chief Judge. In the event the Chief Judge recuses or is unavailable to serve, the reviewing official shall be designated by the most senior active judge. The matter shall be designated "In the Matter of [Employing Office]" and given an appropriate number for purposes of record-keeping.

B. Investigation and Hearing

The judge assigned to resolve the matter shall determine what investigation is necessary, including the individuals to be contacted and documents to be gathered. Once the investigation is complete, a hearing shall be held to resolve the matter, unless the judge determines that no material factual dispute exists. In general, the presiding judge shall determine the time, place, and manner of conducting the hearing. However, the following specific provisions shall apply to hearings conducted under this Section:

- the hearing shall be commenced no later than 60 days after the filing of the request;

- the requesting person and the head of the office from which relief is sought must receive written notice of the hearing; such notice shall also be provided to the individual(s) alleged to have violated rights protected by this Policy;

- at the hearing, the requesting party will have the right to representation, to present evidence on his or her behalf and to cross-examine witnesses, and the employing office will have the rights to present evidence on its behalf and to cross-examine witnesses;

- a verbatim record of the hearing must be kept and shall be the sole official record of the proceeding;

- in reaching a decision, the Chief Judge or designated judge shall be guided by the judicial and administrative decisions under the relevant statutes;

- remedies may be provided as set forth in this Policy where the hearing officer finds that the requesting party has established by a preponderance of the evidence that a substantive right protected by this Policy has been violated;

- the final decision of the Chief Judge or designated judge must be issued in writing not later than 30 days after the conclusion of the hearing, and any necessary orders shall be signed by the judicial officer issuing the final decision;

- all parties and any aggrieved individuals shall have the right to written notice of any action taken as a result of a hearing; and

- any person or party involved in the review process shall not disclose, in whole or in part, any information or records obtained through or prepared specifically for, the review process, except as necessary to consult with the parties or their representatives, and then only with notice to all parties. A written record of such contacts must be kept and made available for review by the affected person(s).

The Chief Judge or designee may extend any of the deadlines set forth in this Policy for good cause. All extensions of time granted will be made in writing and become part of the record.

A final decision of the Chief Judge or designee is subject to review by a three-judge panel for recommendation to the entire Circuit Council. Such a panel shall be chosen from among Circuit Council members who are not part of the court involved in the matter. A decision by the Circuit Council is final.

C. Prohibition Against Retaliation

Persons who in good faith request formal dispute resolution under this Policy have the right to be free from retaliation, coercion, or interference because of filing such a request. Likewise, any person who participates in good faith in the filing or processing of a request, such as a mediator, witness, representative, or co-worker, is entitled to freedom from retaliation. Any alleged retaliation shall be handled in the same manner as a report of discrimination or harassment under this Policy.

D. Right to Representation

Every person requesting formal dispute resolution under this Policy and every person accused of wrongful conduct shall have the right to be represented by a person of his or her choice if such person is available and consents to be a representative. A court employee may accept the responsibilities of representation if it will not unduly interfere with his or her court duties or constitute a conflict of interest, as determined by the representative's appointing officer. Persons requesting formal dispute resolution may employ counsel at their own expense but do not have the right to counsel appointed at government expense.

E. Disqualification or Recusal

Whenever a person invoking the formal dispute resolution procedures of this Policy or an employing office or person whose conduct is the subject of such a request files a timely and sufficient written statement that the judge before whom the matter is pending has a personal bias or prejudice for or against any interested party, the matter shall not proceed until the presiding judge has had an opportunity to consider the statement and to decide whether disqualification is appropriate.

The written statement shall state the facts and the reasons for the belief that bias or prejudice exists and shall be provided to the appropriate Chief Judge, the person to be disqualified, the employing office, and the Circuit EEO/EDR Coordinator within 14 days after a judge is assigned to hear the matter.

F. Disciplinary and Remedial Actions

Potential disciplinary and remedial consequences for conduct determined to constitute harassment or discrimination under this Policy include but are not limited to the following:

- an apology to the victim;
- required counseling or training;
- oral or written reprimand;

- loss of salary or benefit; and
- suspension, probation, demotion, or termination.

Other remedies for violations of substantive rights under this Policy may include:

- placement of an employee in a position previously denied;
- placement in a comparable alternative position;
- reinstatement to a position from which previously removed;
- prospective promotion to a position;
- priority consideration for a future promotion or position;
- back pay and associated benefits, including attorney's fees, where the statutory criteria of the Back Pay Act, 5 U.S.C. § 5596, are satisfied;
- records modification and/or expungement;
- "equitable" relief, such as temporary stays of adverse actions;
- granting of family and medical leave; and
- accommodation of disabilities through the purchase of specialized equipment or the restructuring of duties and work hours.

Remedies that are *not* available include:

- payment of attorney's fees (except as authorized under the Back Pay Act);
- compensatory damages;
- punitive damages; and
- overtime pay.

G. Records

At the conclusion of formal and informal proceedings under this Policy, all papers, files, transcripts, audio or visual recordings, and reports will be filed with the court's EEO/EDR Coordinator. No papers, files, transcripts, audio or visual recordings, or reports relating to a dispute will be filed in any employee's personnel folder, except as necessary to implement official personnel action.

XII. Family and Medical Leave

Title II of the Family and Medical Leave Act of 1993, 5 U.S.C. §§ 6381 *et seq*., applies to court employees in the manner prescribed in Volume 12, Chapter 9, Section 920.20.35 of the *Guide to Judiciary Policies and Procedures.*

XIII. Worker Adjustment and Retraining Notification Rights

No "employing office closing" or "mass layoff" (as defined below) may occur until the end of a 60-day period after the employing office serves written notice of such prospective closing or layoff to employees who will be affected. This provision shall not apply to an employing office closing or mass layoff that results from the absence of appropriated funds.

The term "employing office closing" means the permanent or temporary shutdown of a single site of employment if the shutdown results in an employment loss at the single site of employment during any 30-day period for 50 or more employees excluding any part-time employees.

The term "mass layoff" means a reduction in force which—

- is not the result of an employing office closing, and

- results in an employment loss at the single site of employment during any 30-day period for (1) at least 33 percent of the employees (excluding any part-time employees), and (2) at least 50 employees (excluding any part-time employees); or at least 500 employees (excluding any part-time employees).

For extended text see 29 U.S.C. § 2101.

XIV. Employment and Reemployment Rights of Members of the Uniformed Services

The court shall not discriminate against an eligible employee or deny an eligible employee reemployment rights or benefits under the Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. § 4301 *et seq*.

XV. Occupational Safety and Health Protections

Each employing office shall provide to its employees a place of employment which is free from recognized hazards that cause or are likely to cause death or serious physical harm to employees. Requests for formal dispute resolution that seek a remedy that is within the jurisdiction of the General Services Administration ("GSA") or the United States Postal Service ("USPS") to provide are not cognizable under this Policy. Such requests should be filed directly with GSA or the USPS as appropriate.

XVI. Polygraph Tests

No employee shall be required to take a polygraph test.

XVII. Whistleblower Protection

Any judge or employee with authority over personnel shall not take or threaten to take an adverse employment action against an employee who reasonably and in good faith discloses information to the appropriate federal law enforcement authority, a supervisor or managerial official of the employing office, a judicial officer of the court, or the Administrative Office of the United States Courts, about a violation of law, rule or regulation or other conduct which constitutes gross mismanagement or gross waste of funds or constitutes substantial and specific danger to public health or safety. This section applies only if such disclosure of information

- is not specifically prohibited by law,
- does not reveal case-sensitive information, sealed material, or the deliberative processes of the federal judiciary (as outlined in the *Guide to Judiciary Policy,* Vol. 20, Ch. 8), and
- does not reveal information that would endanger the security of any federal judicial officer.

An "adverse employment action" means a termination, demotion, transfer, or reassignment; loss of pay, benefits, or awards; or any other employment action that is materially adverse to the employee's job status, compensation, terms, or responsibilities, or the employee's working conditions.

XVIII. Preparation of Annual Report

The EEO/EDR Coordinator for each court will prepare an annual report for the year ending September 30, consolidating the data and statements. The report will include tables to be provided by the Administrative Office of the United States Courts consolidating the

information provided by each employing office. The report also will describe instances where significant achievements were made in providing equal employment opportunities, will identify areas where improvements are needed, and will identify factors inhibiting achievement of equal employment opportunity objectives. In addition, the annual report will indicate:

- The number of formal requests for dispute resolution initiated;

- The types of formal requests for dispute resolution initiated according to race, color, national origin, age, religion, sex, sexual orientation, gender identity or expression, veteran status, disability, or genetic information;

- The number of formal requests for dispute resolution resolved formally without a hearing; and

- The number of formal requests for dispute resolution resolved formally with a hearing.

The above information will not identify the names of the parties involved but will identify whether or not a judge was the subject of the matter. Upon approval of the court, this report will be submitted by the Chief Judge to the Administrative Office of the United States Courts by November 30 of each year. A copy of the report will remain in the court and will be made available to the public upon request.

Adopted - (May 1, 2018)

Notice of Adoption of Modifications to Circuit Rule 10 and Rescission of Circuit Rule 11

On March 23, 2018, this court issued notice that it proposed modifications to Circuit Rule 10 and the rescission of Circuit Rule 11. The court has carefully considered the comments received.

The court hereby provides notice of the adoption of the modifications to Circuit Rule 10 and the rescission of Circuit Rule 11. The adoption of the modifications to Circuit Rule 10 and the rescission of Circuit Rule 11 shall be effective immediately.

Added: Seventh Circuit Operating Procedure 11:

11. Video-Recording Policy

(a) Procedure.

(1) *Requests for Video-Recording; Timing.* A request for video-recording must be submitted to the Clerk of the Court not later than one week before oral argument. The Clerk will refer requests to the assigned panel for decision.

(2) *Notice to Parties; Opportunity to Object.* On receipt of a request for video-recording of oral argument, the Clerk of Court shall forward a copy of the request to the parties for their comment or objection. Comments or objections must be submitted not later than two business days before oral argument.

(3) *Discretion of the Panel.* The assigned panel may authorize video-recording in its sole discretion. The panel will normally deny the request if one member objects.

(4) *Restrictions*. The court's video-recording system will record the judges and counsel at the podium, but no others. In particular, the system will not record counsel table, the gallery, or other people in the courtroom.

(5) *Other Photography and Video-Recording Prohibited*. This policy is exclusive. All other photography and video-recording of oral argument remains prohibited.

(6) *Authority of the presiding judge*. The presiding judge may waive the time limits listed in this policy and authorize the Clerk to accept a late request for video-recording or a late comment or objection from a party. The presiding judge may direct the cessation of video-recording at any time during oral argument.

(7) *Release of Video Recording.* The Clerk shall release the video recording to the public as directed by the assigned panel.

- Operating Procedures
- Pattern Jury Instructions

Technical Amendment to Federal Rule of Appellate Procedure Rule 4: Subdivision (a)(4)(B)(iii). House document 115-35 details: http://www.uscourts.gov/sites/default/files/house_document_115-35_appellate_rules_0.pdf. See also: News

- **details of Circuit Rule changes effective December 01, 2016**
- **details of Federal Rules of Appellate Procedure changes effective December 01, 2016**

- **Federal Rules of Appellate Procedure [effective Dec. 1, 2019]**

  and

  Circuit Rules of the United States Court of Appeals for the Seventh Circuit

- **Rules of Practice and Procedure (U.S. Courts.gov)**
- **Practitioner's Handbook for Appeals to the United States Court of Appeals for the Seventh Circuit**
- **United States Court of Appeals for the Seventh Circuit Operating Procedures**
- **Confidential Court Materials**
- **Judicial Conduct and Disability**
- **Federal Rule Changes**
- **Circuit Rule Changes**
- **Standards for Professional Conduct Within the Seventh Federal Judicial Circuit**
- **The Plan of the United States Court of Appeals for the Seventh Circuit To Supplement the Plans of the Several United States District Courts within the Seventh Circuit**

Resolutions of the Bar of the Supreme Court of the United States In Gratitude and Appreciation for the Life, Work, and Service of Justice Antonin Scalia

November 4, 2016

Today the bar of this Court convenes to pay respect to a towering figure in American law—a Justice of conviction, character, and courage; a treasured colleague; an irreplaceable mentor; and a man devoted to his country, its Constitution, and this Court. In his nearly 30-year tenure on this Court, Antonin Scalia displayed a forceful intellect, a remarkable wit, and an inimitable writing style. His ideas helped to shape the way we think about law. And for those blessed to know him, his compassion, humanity, and commitment to his family, friends, and faith will remain an inspiration.

On March 11, 1936, five months after this Court heard its first case in this building, Antonin Scalia was born in Trenton, New Jersey. His mother, Catherine Panaro, was the oldest of seven and born to parents who immigrated to the United States from Italy in 1904. His father, Salvatore Eugene Scalia, came to this country from Sicily in 1920 at age 17. Both became teachers—S. Eugene a professor of Romance Languages at Brooklyn College and Catherine an elementary school teacher.

Antonin—Nino to family and friends—was his parents' only child and the only child of his generation on either side of the large family. He grew up in Trenton and later in the diverse Elmhurst neighborhood of Queens in New York City, where his parents made "an education project" out of him. Antonin's curiosity and love of argument surfaced early. One aunt recalled that, "[w]hen [Antonin] wanted to do something" an adult had put off-limits, "you had to give him a very, very good argument about why he could not do it."[1] Through their example and, one suspects, occasional direction, Scalia's parents fostered his religious faith and character. He also inherited from them a lifelong love of music—especially opera—and the ability to play the piano, which he learned from his father.

After an uncharacteristically subpar showing on an entrance examination for his preferred high school—missing a grammar question of all things—Scalia attended Xavier High School in Manhattan.

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[1] JOAN BISKUPIC, AMERICAN ORIGINAL: THE LIFE AND CONSTITUTION OF SUPREME COURT JUSTICE ANTONIN SCALIA 18, 20 (2009).

"One door closes, another door opens," as he would say. Faith was foremost at the Jesuit school at that point and military discipline a close second. Scalia graduated first in his class, collecting an array of awards along the way. He was a stand-out debater—even appearing on local television—and played the French horn for the marching band and starred in several school plays, including the title role in *Macbeth*. From a teacher at Xavier, Scalia learned what he often referred to as the "Shakespeare Principle": "When you read Shakespeare, Shakespeare's not on trial. You are."

Scalia continued the pursuit of a Jesuit education by attending Georgetown University, where he studied history and government and once again graduated first in his class. He and a teammate rose to national prominence in competitive debate, and he continued to perform on stage. Georgetown also made a mark on the Justice's faith. The "last lesson" he learned in college, imparted by a professor during his oral examinations, was "not to separate your religious life from your intellectual life." Scalia took that lesson to heart. In his commencement speech, he challenged his classmates to be courageous and to "carry and advance into all sections of our society this distinctively human life, of reason learned and faith believed." "If we will not lead," Scalia asked, "who will?"[2]

After Georgetown, Scalia attended Harvard Law School, where he relished debating cases with professors in the classroom and with classmates through his work as an editor of the Law Review. But however rich the academic environment, the signal event of his Harvard years occurred outside the classroom, when he met Maureen McCarthy, an undergraduate student from Radcliffe College, on a blind date. The two had much in common—sharp intellects and quick wits. Perhaps most importantly, Maureen recalled, they had shared convictions on "all the important things," including their Catholic faith. In Antonin's telling, Maureen was drawn by the Sheldon Fellowship he had won at Harvard to travel around Europe after graduation. Whatever the proximate cause, the marriage took

[2] *Id.* at 25; Jacob Gershman, *'If We Really Love the Truth'—Excerpts from Scalia's 1957 Graduation Speech*, WALL ST. J. (Feb. 16, 2016), http://on.wsj.com/1mFO4mb.

place in September 1960 and was a blessing and a source of strength to both. Their 55-year union produced nine children and dozens of grandchildren. Antonin joked that the "secret" to their marriage's longevity was that "Maureen made it very clear early on that if we split up, [he] would get the children."[3] For her part, Maureen explained that she "would have been bored" with someone "wishy washy."[4]

Upon returning from their European travels, the Scalias moved to Cleveland, Ohio, where Antonin joined Jones, Day, Cockley & Reavis. During his six years there, his work covered a range of fields, from antitrust and real estate to labor law, contracts, and tax. Although Scalia enjoyed the practice of law and was well regarded at the firm, he had long aimed to follow his parents' path by becoming a teacher.

In 1967, Scalia accepted a post at the University of Virginia School of Law, where he taught contracts and comparative law. The focus of his scholarship, if not always his teaching, would become administrative law.[5] In the classroom he was energetic and engaging, posing inventive and often entertaining hypotheticals. He enjoyed encouraging students to consider legal problems from the standpoint of a layperson, asking classes, "What would Joe Sixpack say about this?" He often concluded the semester by quoting a line from Robert Bolt's *A Man for All Seasons*, which to Scalia was a "beautiful expression of the importance of the law." In the passage,

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[3] CNN Transcripts, *Piers Morgan Tonight: Interview with Antonin Scalia*, CNN.com (transcript of July 18, 2012 cable-television broadcast), http://www.cnn.com/TRANSCRIPTS/1207/18/pmt.01.html.

[4] Lesley Stahl, *60 Minutes: Interview with Antonin Scalia, Part 2*, at 5:38-5:48, CBS NEWS (recording of April 27, 2008 interview), http://www.cbsnews.com/videos/justice-scalia-on-60-minutes-part-2.

[5] *See, e.g.*, Antonin Scalia, *Sovereign Immunity and Nonstatutory Review of Federal Administrative Action: Some Conclusions from the Public-Lands Cases*, 68 MICH. L. REV. 867 (1970); Antonin Scalia & Frank Goodman, *Procedural Aspects of the Consumer Product Safety Act*, 20 UCLA L. REV. 899 (1973); Antonin Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345 (1978); Antonin Scalia, *The ALJ Fiasco—A Reprise*, 47 U. CHI. L. REV. 57 (1979).

Sir Thomas More boldly declares: "Whoever hunts for me, Roper, God or Devil, will find me hiding in the thickets of the law! And I'll hide my daughter with me! Not hoist her up to the mainmast of your seagoing principles! They put about too nimbly!"[6]

Several years into teaching, Scalia was appointed to the first of several Executive Branch positions. In 1971, he became the general counsel of the newly created Office of Telecommunications Policy, where he addressed legal and policy issues arising in the still-nascent cable industry. The following year, Scalia was asked to chair the Administrative Conference of the United States, a body composed of officials from various agencies, academics, and other experts in the field to study problems of administrative law and procedure and to recommend solutions to Congress or agencies. Scalia enjoyed the Conference's work, and was gratified when the Conference was revived in 2010 after a multi-year hiatus.

In 1974, Scalia became the Assistant Attorney General for the Office of Legal Counsel in the Department of Justice. Then-Deputy Attorney General Laurence Silberman explained that, in choosing a new head of OLC in the aftermath of Watergate, the Ford Administration "wanted a brilliant lawyer with steel nerves."[7] Scalia fit the bill. Confirmed just weeks after President Ford took office, Scalia confronted a litany of difficult constitutional and other issues, starting with the legal ownership of President Nixon's papers. The work entailed long hours. As Maureen recounted, Scalia "slept in the White House, and I don't mean the Lincoln bedroom."[8] But even through those trying and exhilarating professional days, family and faith remained priorities.

In 1977, Scalia returned to academia, joining the University of Chicago faculty, where he remained, aside from a visit to Stanford, until 1982. In Chicago, Scalia continued to focus on administrative law and became head of the American Bar Association's Section of

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[6] BISKUPIC, *supra* note 1, at 66–67, 76.

[7] *Justice Scalia Memorial Service*, at 15:45-15:49, C-SPAN (Mar. 1, 2016), https://www.c-span.org/video/?405460-1/memorial-service-supreme-court-justice-antonin-scaila&start=939.

[8] BISKUPIC, *supra* note 1, at 53.

Administrative Law in 1981. He was particularly pleased with the amicus brief he wrote for the ABA in *INS v. Chadha*,[9] the landmark separation-of-powers case striking down a one-house legislative veto.

When President Reagan took office in 1981, he looked for a new Solicitor General, and before long Scalia and Rex Lee emerged as finalists. Scalia was crestfallen when he did not receive the appointment. The President had other ideas, however, nominating him to the U.S. Court of Appeals for the D.C. Circuit in 1982. In his four years on that court, Scalia encountered a range of constitutional and statutory questions. While there, he wrote what he considered one of the best openings in all of his opinions: "This case, involving legal requirements for the content and labeling of meat products such as frankfurters, affords a rare opportunity to explore simultaneously both parts of Bismarck's aphorism that 'No man should see how laws or sausages are made.'"[10]

When Chief Justice Burger announced his retirement in 1986, President Reagan nominated Justice Rehnquist to fill Burger's seat and tapped Scalia to fill Rehnquist's seat. At his confirmation hearing, Scalia was asked to explain the "success of the Constitution." While the Bill of Rights is "very important," he responded, its provisions standing alone "do not do anything." Other countries, even those with authoritarian regimes, have "at least as good guarantees of personal freedom." Instead, Scalia explained, "[w]hat makes it work, what assures that those words are not just hollow promises, is the structure of government that the original Constitution established, the checks and balances among the three branches."[11] When Senator Metzenbaum in jest criticized Scalia's "bad judgment in whipping" the Senator on the tennis court, Scalia confessed that "[i]t was a case of [his] integrity overcoming [his] judgment."[12] Scalia

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[9] 462 U.S. 919 (1983).

[10] Cmty. Nutrition Inst. v. Block, 749 F.2d 50, 51 (D.C. Cir. 1984).

[11] *Nomination of Judge Antonin Scalia, to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 99th Cong. 32 (1986) (statement of Antonin Scalia).

[12] *Id.* at 13.

was confirmed 98-0 on September 17, 1986, the 199th anniversary of the Constitution's signing in Philadelphia.

Over the next three decades, Justice Scalia left his mark on the law in numerous ways, too many to recount in full here. His steadfast commitment to the idea that external legal principles rather than internal policy preferences should govern judicial decisionmaking made him deeply respectful of the Constitution's allocation of powers and vigilant in respecting legal texts. That commitment showed up first, and most often, in his views on statutory interpretation. Justice Scalia pressed the elementary proposition that, when interpreting a statutory text, judges must try to discern and enforce the meaning of words enacted by Congress to express its policies. In his view, courts should never rewrite a discernible statutory text to conform to a law's unenacted legislative purposes. This position challenged the practice of first divining and then enforcing the "spirit" rather than the "letter" of a law, an approach embodied by the *Holy Trinity* decision.[13] With characteristic energy, Justice Scalia contested that practice. The legislative process is opaque, path-dependent, and prone to "backroom deals" that do not make their way into the public eye. An awkwardly worded statute that falls short of its apparent policy aspirations thus might not be the product of legislative misstatement, but might instead be "the result of compromise among various interest groups, resulting in a decision to go so far and no farther."[14] Hence, when judges rewrote a clear statute to conform its terms to what they perceived to be the law's underlying purposes, they risked upsetting whatever "legislative compromise [may have] enabled the law to be enacted" in the first place.[15] *Holy Trinity* was never the same after Justice Scalia joined the Court.

During his career, the Court moved a good way (though not as far as he would have liked) toward his rigorous emphasis on the en-

[13] Holy Trinity Church v. United States, 143 U.S. 457, 459 (1892).
[14] E. Associated Coal Corp. v. United Mine Workers of Am., 531 U.S. 57, 68–69 (2000) (Scalia, J., concurring in the judgment).
[15] Artuz v. Bennett, 531 U.S. 4, 10 (2000).

acted text.[16] The Court's citation of dictionaries has risen to levels previously unseen in the U.S. Reports.[17] After a post-New Deal judicial trend away from the use of semantic canons, they now play a visible, sometimes pivotal, role in the Court's determinations of statutory meaning.[18] And the Court became skeptical of *implied* statutory rights of action.[19] This new textualism[20] had an undeniable impact on the way the Court does business.

Perhaps most pronounced has been the Court's embrace of the idea, championed by Justice Scalia, that extrinsic indicia of statutory intention, such as legislative reports or floor statements, may not override a clear statutory text. In an opinion for the Court early in his tenure, Justice Scalia wrote that "[t]he best evidence of [a statute's] purpose is the statutory text adopted by both Houses of Congress and submitted to the President."[21] He added that where such a text is "unambiguous," the Court "do[es] not permit it to be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process."[22]

Before 1986, the Court frequently used legislative history in an effort to discern legislative intent. Often, the Court would treat the views of a statute's sponsor or a drafting committee as if they represented the intentions of Congress as a whole.[23] So strong was the

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[16] *See* Philip P. Frickey, *Revisiting the Revival of Theory in Statutory Interpretation: A Lecture in Honor of Irving Younger*, 84 MINN. L. REV. 199, 205 (1999).

[17] *See, e.g.*, Jeffrey L. Kirchmeier & Samuel A. Thumma, *Scaling the Lexicon Fortress: The United States Supreme Court's Use of Dictionaries in the Twenty-First Century*, 94 MARQ. L. REV. 77, 86 (2010).

[18] *See, e.g.*, McDonnell v. United States, 136 S. Ct. 2355, 2368–69 (2016) (*noscitur a sociis*); Bruesewitz v. Wyeth LLC, 562 U.S. 223, 233 (2011) (*expressio unius*).

[19] *See, e.g.*, Alexander v. Sandoval, 532 U.S. 275 (2001).

[20] *See* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990).

[21] W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 98 (1991).

[22] *Id.* at 98–99.

[23] *See, e.g.*, N. Haven Bd. of Educ. v. Bell, 456 U.S. 512, 526–27 (1982); Steadman v. SEC, 450 U.S. 91, 101 (1981); J.W. Bateson Co. v. United States *ex rel.* Bd. of Trs. of the Nat'l Automatic Sprinkler Indus. Pension Fund, 434 U.S. 586, 591 (1978).

acceptance of legislative history that a Burger Court opinion, in an unguarded moment, declared that because "[t]he legislative history . . . is ambiguous[,] . . . we must look primarily to the statutes themselves to find the legislative intent."[24]

Justice Scalia criticized the use of legislative history as a tool of construction every chance he got, all but affixing a badge of shame on it. In vivid prose informed by practical experience in government, he questioned whether rank-and-file legislators necessarily read, much less agreed with, floor statements or even the committee reports that had become a staple of interpretive practice. When the Court interpreted the Civil Rights Attorney's Fees Award Act by parsing lower court cases that the committee reports had cited, Justice Scalia wrote: "As anyone familiar with modern-day drafting of congressional committee reports is well aware, the references to the cases were inserted, at best by a committee staff member on his or her own initiative, and at worst by a committee staff member at the suggestion of a lawyer-lobbyist; and the purpose of those references was not primarily to inform the Members of Congress what the bill meant . . . , but rather to influence judicial construction."[25]

Ultimately, Justice Scalia's principal concern was less the accuracy of legislative reports than their legitimacy. The Constitution conditions Congress's power to legislate on a bill's passage by two Houses and either the assent of the President or the override of a presidential veto by two-thirds of each house.[26] According to Justice Scalia, even if most Members of Congress would want and expect the courts to treat legislative history as an authoritative indication of a statute's intended meaning, "the very first provision of the Constitution" precludes that arrangement by vesting "'[a]ll legislative Powers'" in *Congress* itself.[27] If legislative committees or bill spon-

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[24] Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 412 n.29 (1971).

[25] Blanchard v. Bergeron, 489 U.S. 87, 98–99 (1989) (Scalia, J., concurring in part and concurring in the judgment).

[26] U.S. CONST. art. I, § 7.

[27] Bank One Chi., N.A. v. Midwest Bank & Tr. Co., 516 U.S. 264, 280 (1996) (Scalia, J., concurring in part and concurring in the judgment) (quoting U.S. CONST. art. I, § 1).

sors could make pronouncements that specified the entire body's intended policies, then Members of Congress could make an end-run around the bicameralism and presentment requirements themselves. In Justice Scalia's words: "We are governed by laws, not by the intentions of legislators. . . . 'The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself.'"[28]

It is fair to say that the connection between statutory text and judicial interpretations of it has tightened substantially since Justice Scalia joined the Court. The Court has restored the primacy of statutory text and routinely declines to "resort to legislative history to cloud a statutory text that is clear," as Justice Ginsburg wrote for the Court.[29] Today, the Court instead "presume[s] that a legislature says in a statute what it means and means in a statute what it says there."[30] That is no small legacy.

Just as Justice Scalia believed that courts should do their best to honor a statute's text, he thought the same should be true for the Constitution. And if it was essential to respect the language of the Constitution, it followed that its meaning should be fixed unless and until the People followed the process for ratifying amendments to the charter. As he saw it, the words of the Constitution, like all legal texts and documents, bear the same meaning today as they did when adopted, neither diminished nor augmented—though of course capable of application to new technologies and other features of modern society.[31]

He grounded this principle of interpretation in part in respect for democracy. To recognize constitutional rights that he could not locate in the Constitution, he believed, "prohibit[s] . . . acts of self-

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[28] Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring in the judgment) (emphasis omitted) (quoting Aldridge v. Williams, 44 U.S. (3 How.) 9, 24 (1844)).

[29] Ratzlaf v. United States, 510 U.S. 135, 147–48 (1994).

[30] Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253–54 (1992). *See also* Alabama v. North Carolina, 560 U.S. 330, 351–52 (2010).

[31] Kyllo v. United States, 533 U.S. 27 (2001).

governance that 'We the people' never, ever, voted to outlaw."[32] "This practice of constitutional revision by an unelected committee of nine," he argued, "robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves."[33] He thus voted against recognition of new rights that he believed lacked a foundation in the Constitution's original meaning—in areas ranging from abortion[34] and same-sex marriage[35] to punitive-damage caps[36] and retroactive taxation.[37]

Any other approach, he worried, placed at risk the guarantees of liberty actually enshrined in the Constitution. Just as he resisted imposing new restrictions on democratic self-government that the People did not vote to impose, he insisted on unyielding enforcement of those restrictions that the People *did* vote to impose.[38] An essential responsibility of the Court, he thought, was "to *preserve* our society's values" and "to prevent backsliding" from the limits prescribed by the Constitution.[39] That approach prompted him to dissent from decisions that he believed cut back on the original meaning of constitutional guarantees such as the Elections Clause,[40] the Ex Post Facto Clause,[41] the Fourth Amendment,[42] the Jury Clause,[43] and the

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[32] ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 88 (2012).
[33] Obergefell v. Hodges, 135 S. Ct. 2584, 2627 (2015) (Scalia, J., dissenting).
[34] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 979 (1992) (Scalia, J., dissenting).
[35] *Obergefell*, 135 S. Ct. at 2626 (Scalia, J., dissenting).
[36] BMW of N. Am. v. Gore, 517 U.S. 559, 598 (1996) (Scalia, J., dissenting).
[37] United States v. Carlton, 512 U.S. 26, 39 (1994) (Scalia, J., concurring in the judgment).
[38] *See* Texas v. Johnson, 491 U.S. 397 (1989).
[39] United States v. Virginia, 518 U.S. 515, 568 (1996) (Scalia, J., dissenting).
[40] Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2694 (2015) (Scalia, J., dissenting).
[41] Rogers v. Tennessee, 532 U.S. 451, 467 (2001) (Scalia, J., dissenting).
[42] Cty. of Riverside v. McLaughlin, 500 U.S. 44, 59 (1991) (Scalia, J., dissenting).
[43] Almendarez-Torres v. United States, 523 U.S. 224, 248 (1998) (Scalia, J., dissenting).

Seventh Amendment.[44] His judicial philosophy also led him to recognize constitutional limitations upon the Government's use of new technology where necessary to "assure[] preservation" of the same "degree" of liberty "that existed when the [Bill of Rights] was adopted."[45] That imperative prompted his opinions for the Court holding that the Fourth Amendment restricts the Government's power to use thermal scanners to inspect houses,[46] and that the Confrontation Clause protects a criminal defendant's right to confront forensic analysts.[47]

Where the constitutional text did not answer the question at hand, history came to the fore, not for its own sake, but to shed light on the original public meaning of the text. It is doubtful that any justice has done more for the cause of legal history or placed more light on once-obscure legal texts. His opinions are replete with references to Coke's Institutes and Blackstone's Commentaries, to Johnson's Dictionary and Publius' Federalist, and to statutes enacted by early Congresses and constitutions adopted by the original States. His lead opinion in *Harmelin v. Michigan*[48] canvassed everything from Lord Chief Justice Jeffreys' remarks during the Bloody Assizes to Patrick Henry's remarks during the Virginia ratification convention before concluding that disproportionality alone does not render a punishment cruel and unusual under the Eighth Amendment. And in *Hamdi v. Rumsfeld*,[49] he concluded in dissent that, in the absence of a suspension of the privilege of the writ of habeas corpus, the President lacked power to detain American citizens without charge as enemy combatants—though only after a reconnaissance of the Habeas Corpus Act of 1679, English treason prosecutions, and previous English and American statutes suspending the privilege.

He summed up his approach to text and tradition this way:

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[44] Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 448 (1996) (Scalia, J., dissenting).
[45] Kyllo v. United States, 533 U.S. 27, 34 (2001).
[46] *Id.*
[47] Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009).
[48] 501 U.S. 957 (1991).
[49] 542 U.S. 507, 554 (2004) (Scalia, J., dissenting).

> "[A] venerable and accepted tradition is not to be laid on the examining table and scrutinized for its conformity to some abstract principle . . . devised by this Court. To the contrary, such traditions are themselves the stuff out of which the Court's principles are to be formed. They are, in these uncertain areas, the very points of reference by which the legitimacy or illegitimacy of other practices are to be figured out. When it appears that the latest 'rule,' or 'three-part test,' or 'balancing test' devised by the Court has placed us on a collision course with such a landmark practice, it is the former that must be recalculated by us, and not the latter that must be abandoned by our citizens."[50]

That meant that in Establishment Clause cases, to use one example, he voted to uphold prayer at public-school graduations,[51] accommodation of religious beliefs,[52] and public displays of religious monuments[53] because they enjoyed the validation of tradition—regardless of whether they comported with judge-devised metrics such as the *Lemon* test.

By the end of Justice Scalia's tenure, a focus on the original public meaning of the Constitution's text had become, if not orthodoxy, a thoroughly respectable and commonplace approach to constitutional interpretation. Two decisions—*District of Columbia v. Heller*[54] and *Crawford v. Washington*[55]—illustrate the point. In *Heller*, the Court held that the Second Amendment protects an individual right to keep and bear arms for self-defense. Justice Scalia's opinion for the Court showcases his meticulous approach to uncovering how the Constitution was understood by "ordinary citizens in the

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[50] Rutan v. Republican Party of Ill., 497 U.S. 62, 95–96 (1990) (Scalia, J., dissenting).
[51] Lee v. Weisman, 505 U.S. 577, 631 (1992) (Scalia, J., dissenting).
[52] Board of Ed. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 732 (1994).
[53] McCreary Cty. v. Am. Civil Liberties Union of Ky., 545 U.S. 844, 885 (2005) (Scalia, J., dissenting).
[54] 554 U.S. 570 (2008).
[55] 541 U.S. 36 (2004).

founding generation"[56]—starting with an analysis of the words of the Second Amendment, continuing with an examination of analogous provisions in early state constitutions, and turning to an analysis of how the Second Amendment was interpreted through the eighteenth and nineteenth centuries. This focus on text and history was hardly limited to the Justice's opinion for the Court. Justice Stevens' dissent emphasized the debates surrounding the ratification of the Constitution and the drafting history of the Second Amendment, while Justice Breyer's dissent stressed the prevalence of gun laws in colonial towns.

Crawford is of a piece. His 7-2 decision for the Court interpreted the Sixth Amendment's Confrontation Clause and turned on the public understanding of the guarantee at the time of ratification rather than on the Framers' broader interest in promoting the reliability of evidence in a criminal case. In a series of cases exemplified by *Ohio v. Roberts*,[57] the Court had employed a balancing test designed to identify reliable evidence. *Crawford* memorably dispatched the *Roberts* balancing test and the elevation of the Framers' broader interest in reliable evidence over the textual guarantee of confrontation. "By replacing categorical constitutional guarantees with open-ended balancing tests," Justice Scalia reasoned, "we do violence to [the Framers'] design."[58] And while Justice Scalia happily conceded that "the Clause's ultimate goal is reliable evidence," he was quick to remind that the Framers embraced a particular means to that end. The Clause "commands not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination."[59] "Dispensing with confrontation because the evidence is obviously reliable," he trenchantly concluded, "is akin to dispensing with jury trial because the defendant is obviously guilty. That is not what the Sixth Amendment prescribes."[60] He was proud of both decisions.

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[56] *Id.* at 576–77.
[57] 448 U.S. 56 (1980).
[58] *Crawford*, 541 U.S. at 67–68.
[59] *Id.* at 61.
[60] *Id.* at 62.

Justice Scalia may be best known for his views about the proper methodology for statutory and constitutional interpretation. But his first love was an area of substantive law—constitutional structure—which shaped his answers to the underlying questions that appear in every case: Who decides? And how? Even his methods of statutory and constitutional interpretation were informed by these considerations. He eschewed the use of legislative history, for example, because it empowered the judiciary at the expense of Congress and because committee reports did not comply with the constitutional requirements of bicameralism and presentment. And he criticized judicial amendments of a living Constitution because they aggrandized the power of judges and disregarded the Constitution's explicit means of amendment, all at the expense of the People and their representatives.

Throughout his tenure, Justice Scalia sought to honor the Constitution's structure—its distinct horizontal and vertical lines of power—realizing that they were as essential to the preservation of individual liberty as the provisions of the Bill of Rights. He appreciated that men and women were not "angels,"[61] and that electing (or appointing) them to government posts did not make it otherwise. By assigning three distinct kinds of government power (legislative, executive, and judicial) to three distinct branches of government, he believed, the Constitution prevented the concentration of government power in the same hands—considered by the Founders to be the epitome of tyranny.[62]

In his iconic dissent in *Morrison v. Olson*,[63] written early in his tenure, Justice Scalia put these principles to work. He objected that Congress's attempt to restrict the President's ability to remove an independent counsel—an officer who exercised executive power—violated Article II, which vests the executive power in the President and obligates him to take care that the laws be faithfully executed. As he saw it, the Constitution vested all—not some—of the executive power in the President. For Justice Scalia, this made *Morrison*

[61] THE FEDERALIST NO. 51 (James Madison).
[62] *See* THE FEDERALIST No. 47 (James Madison).
[63] 487 U.S. 654 (1988).

an easy case: "Frequently an issue of this sort will come before the Court clad, so to speak, in sheep's clothing: the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident, and must be discerned by a careful and perceptive analysis. But this wolf comes as a wolf."[64]

Justice Scalia was no less vigilant in preventing legislative incursions on the judicial power, exemplified by his opinion for the Court in *Plaut v. Spendthrift Farm, Inc.*,[65] rejecting an attempt by Congress to reopen final judgments of Article III courts. As Scalia explained, the Article III judicial power gave federal courts the power to decide cases with finality, and the statute in question trespassed on that assignment. "The Framers of the Constitution," he reasoned, built separation of powers into the structure because they had "lived among the ruins of a system of intermingled legislative and judicial powers," and they established "high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict."[66]

At the same time Justice Scalia thought it essential that the Court stand sentinel over efforts by one branch to assume power allocated to another branch, he was insistent that the judiciary not use its final say over the meaning of federal law to aggrandize power the Constitution never gave it. Throughout his career, he rejected attempts to expand the judicial power beyond the limits embedded in Article III. Witness *Lujan v. Defenders of Wildlife*,[67] where Justice Scalia wrote that "the Constitution's central mechanism of separation of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts." The requirement of standing, he explained, helped to identify those disputes properly—and improperly—resolved through the judicial process. Absent a claim that alleged a particularized, imminent injury of the kind redressable by courts, Justice Scalia concluded that the federal courts had no warrant to referee the dispute.

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[64] *Id.* at 699 (Scalia, J., dissenting).
[65] 514 U.S. 211 (1995).
[66] *Id.* at 219, 239.
[67] 504 U.S. 555, 559–60 (1992).

Justice Scalia likewise regarded the Constitution's vertical separation of powers—federalism—as a core feature of the Constitution's structure that needed to be preserved. He honored the States' "residuary and inviolable sovereignty"[68] under the Constitution by joining the Court's decisions recognizing limits on Congress's power to regulate interstate commerce[69] and upholding the States' sovereign immunity from suit.[70] Perhaps his most notable federalism opinion came in *Printz v. United States*,[71] in which the Court held that the Constitution prohibited Congress from commandeering state executive officials to enforce federal law. Permitting Congress to impress state executive officers into federal service, he reasoned, would threaten the States' separate sphere of constitutional authority by "immeasurably" augmenting the power of the federal government at the expense of the States and eventually individual liberty.[72] "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch," he explained, "a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."[73]

In view of Justice Scalia's appreciation of separation-of-powers principles and his scholarship as a professor, it should come as no surprise that the Court's administrative-law docket engaged him. His opinions touched many areas of administrative law, including the scope and limitations of *Chevron* deference.[74] He was a tireless defender of the proposition that judicial deference to agency interpretations should not depend on a case-by-case determination of whether Congress would want the Court to defer based on multiple

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[68] Printz v. United States, 521 U.S. 898, 918–19 (quoting THE FEDERALIST No. 39 (James Madison)).
[69] *See* United States v. Morrison, 529 U.S. 598 (2000); United States v. Lopez, 514 U.S. 549 (1995).
[70] *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).
[71] 521 U.S. 898 (1997).
[72] *Printz*, 521 U.S. at 922.
[73] *Id.* at 921 (quoting Gregory v. Ashcroft, 501 U.S. 452, 458 (1991)).
[74] Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

unranked and unweighted factors.[75] At the same time, he made clear that *Chevron* does not permit courts reflexively to credit whatever reading of a statute an agency tenders and thus does not permit courts to abdicate their *Marbury* function to interpret the law.[76] His decisions underscore that, if an agency's interpretation is inconsistent with Congress's clear direction, courts need not—indeed cannot—disregard Congress's commands.[77] As he acknowledged early in his tenure, his commitment to giving primacy to the statutory text necessarily meant that *Chevron* deference will matter less often, and will affect fewer case outcomes, than if he "permit[ted] the apparent meaning of the statute to be impeached by legislative history" or other sources outside the text Congress enacted.[78] *Chevron*, he explained, does not compel courts to defer merely because a statute contains some ambiguity; the mere "presence of some uncertainty does not expand *Chevron* deference to cover virtually any interpretation" the agency advances.[79] "It does not matter," Justice Scalia memorably observed, "whether the word 'yellow' is ambiguous when the agency has interpreted it to mean 'purple.'"[80]

One other area of substantive law deserves mention. When people think of transformative criminal law opinions, *Mapp v. Ohio*,[81] *Miranda v. Arizona*,[82] and decisions restricting capital punishment come to mind. But to Justice Scalia, many of those Warren Court landmarks transformed the pre-existing law precisely because they had no basis in the Constitution. He thus led the charge to limit

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[75] United States v. Mead Corp., 533 U.S. 218, 241 (2001) (Scalia, J., dissenting).
[76] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).
[77] *See, e.g.*, Michigan v. EPA, 135 S. Ct. 2699, 2704–12 (2015); Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2434–49 (2014); Cuomo v. Clearing House Ass'n, 557 U.S. 519, 525 (2009); Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 481–86 (2001).
[78] Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 38 DUKE L.J. 511, 521 (1989).
[79] Clearing House, 557 U.S. at 525.
[80] United States v. Home Concrete & Supply, LLC, 132 S. Ct. 1836, 1846 n.1 (2012) (Scalia, J., concurring in part and concurring in judgment).
[81] 367 U.S. 643 (1961).
[82] 384 U.S. 436 (1966).

the reach of *Mapp*[83] and critiqued *Miranda*[84] and many death-penalty decisions.[85]

That is not to say he resisted the rights of criminal defendants. He just preferred to enforce a different set of rights—those protections that, in his view, were properly grounded in the Constitution's text and history. He became an uncompromising defender of those rights. Take the breathtaking impact of his commitment to the Sixth Amendment's trial by jury. When Justice Scalia dissented in *Almendarez-Torres v. United States*[86] to point out that laws that create new statutory maximum sentences on the basis of judicial factual findings violate the jury guarantee, he launched a wholesale shift in the Court's view of sentencing laws. A majority of the Court ultimately came around to his viewpoint through three system-changing decisions, one of which (*Blakely*) he wrote, all of which he joined.[87] Sentencing laws in the state and federal courts have shifted markedly ever since.

Justice Scalia led a similar transformation of the Sixth Amendment's Confrontation Clause.[88] That shift also began with a vigorous dissent (joined by Justices Brennan, Marshall, and Stevens), in which he maintained that the Court had "subordinat[ed]" the Constitution's textual demand that the defendant had a right "to be confronted with the witnesses against him" to "currently favored public

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[83] *See, e.g.*, Hudson v. Michigan, 547 U.S. 586 (2006) (limiting the reach of the exclusionary rule).

[84] *See, e.g.*, Dickerson v. United States, 530 U.S. 428, 448 (2000) (Scalia, J., dissenting) (arguing that "*Miranda* was objectionable for innumerable reasons").

[85] *See, e.g.*, Atkins v. Virginia, 536 U.S. 304, 337–38 (2002) (Scalia, J., dissenting) (criticizing "death-is-different jurisprudence" that "find[s] no support in the text or history of the Eighth Amendment"); Glossip v. Gross, 135 S. Ct. 2726, 2747 (2015) (Scalia, J., concurring) (responding to the suggestion that the Eighth Amendment might preclude the death penalty, and arguing that "[i]t is impossible to hold unconstitutional that which the Constitution explicitly *contemplates*").

[86] 523 U.S. 224, 248 (1998) (Scalia, J., dissenting).

[87] *See* Apprendi v. New Jersey, 530 U.S. 466 (2000); Blakely v. Washington, 542 U.S. 296 (2004); United States v. Booker, 543 U.S. 220 (2005).

[88] U.S. CONST. amend. VI.

policy" when it allowed a child witness to testify by one-way closed circuit television.[89] In *Crawford*, the Justice persuaded six colleagues to join his opinion for the Court insisting that out-of-court testimonial statements by witnesses are barred unless the defendant had a prior opportunity to examine the witness and the witness is currently unavailable.[90] This, too, led to a sea change in the handling of criminal cases.

Justice Scalia also was a stalwart defender of the Constitution's prohibition against vague criminal laws.[91] Consider his treatment of the residual clause of the Armed Career Criminal Act, which triggers higher penalties for those who commit violent felonies. The clause raised vexing questions about what crimes were included in its scope, prompting Justice Scalia to urge the Court to invalidate the Clause as vague: "We face a Congress that puts forth an ever-increasing volume of laws in general, and of criminal laws in particular. It should be no surprise that as the volume increases, so do the number of imprecise laws. And no surprise that our indulgence of imprecisions that violate the Constitution encourages imprecisions that violate the Constitution."[92] While he initially raised these concerns in dissent, here too he persuaded a majority to see his point of view. In *Johnson v. United States*,[93] he wrote the opinion striking down the clause as unconstitutionally vague. The rule of law is indeed a law of rules,[94] as thousands of criminal defendants have come to appreciate.[95]

Justice Scalia not only took seriously the Constitution's many criminal procedure protections. He also respected venerable canons of statutory construction that protected liberty. Exhibit A is the rule of lenity, which had no greater advocate on the Court than Justice

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[89] Maryland v. Craig, 497 U.S. 836, 860–61 (1990) (Scalia, J., dissenting).
[90] *Crawford*, 541 U.S. at 53–54.
[91] *See, e.g.*, Skilling v. United States, 561 U.S. 358, 415 (2010) (Scalia, J., concurring in part and concurring in the judgment).
[92] Sykes v. United States, 564 U.S. 1, 35 (2011) (Scalia, J., dissenting).
[93] 135 S. Ct. 2551 (2015).
[94] Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).
[95] Welch v. United States, 136 S. Ct. 1257 (2016) (making *Johnson* retroactive).

Scalia.[96] That Justice Scalia, whose first stint in public service came in a Republican administration promising law-and-order judges, ended up where he did on so many matters of criminal law shows that he worked to follow his principles where they led him.

No account of Justice Scalia's contribution to this Court would be complete without mentioning his remarkably clear and vivid writing—qualities praised in the last three Justices to occupy his seat: Justices Jackson, Harlan, and Rehnquist. Scalia's writing stands out for its lucidity, poignant wit, and succinctness—and the inventive, memorable images sprinkled throughout.

The images were memorable precisely because they captured the substance of the legal point the Justice was making. Surely there was a separation-of-powers problem with the creation of "a sort of junior-varsity Congress,"[97] or a deep flaw in a dormant Commerce Clause test that asked judges to divine "whether a particular line is longer than a particular rock is heavy."[98] By the same token, who could argue with his observation that Congress "does not . . . hide elephants in mouseholes,"[99] or his injunction that no government has the "authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury Rules"?[100] The Justice could cut to the heart of a matter and signal that a colorful opinion was coming just by reframing the question presented: "It ha[s] been rendered the solemn duty of the Supreme Court of the United States . . . to decide What Is Golf."[101] Other opinions would

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[96] *See*, *e.g.*, Burrage v. United States, 134 S. Ct. 881 (2014); United States v. Santos, 553 U.S. 507 (2008); Holloway v. United States, 526 U.S. 1, 20 (1999) (Scalia, J., dissenting); United States v. O'Hagan, 521 U.S. 642, 679 (1997) (Scalia, J., concurring in part and dissenting in part); Smith v. United States, 508 U.S. 223, 246–47 (1993) (Scalia, J., dissenting); United States v. R.L.C., 503 U.S. 291, 307 (1992) (Scalia, J., concurring in part and concurring in the judgment).

[97] Mistretta v. United States, 488 U.S. 361, 427 (1989) (Scalia, J., dissenting).

[98] Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 897 (1988) (Scalia, J., concurring in the judgment).

[99] *Whitman*, 531 U.S. at 468.

[100] R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992).

[101] PGA Tour, Inc. v. Martin, 532 U.S. 661, 700 (2001) (Scalia, J., dissenting).

send the reader scurrying to the dictionary, though not to Webster's Third.[102] Think of his criticism of large-scale state-run DNA databases: "Perhaps the construction of such a genetic panopticon is wise"—he wanted you to look it up—but he "doubt[ed] that the proud men who wrote the charter of our liberties would have been so eager to open their mouths for royal inspection."[103]

In other cases, his sometimes playful language was aimed at the serious business of moving the Court's jurisprudence in his preferred direction. Has the *Lemon* test every fully recovered from Justice Scalia's critique in *Lamb's Chapel v. Center Moriches Union Free School District*?

> Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District. Its most recent burial, only last Term, was, to be sure, not fully six feet under . . . . Over the years, however, no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's heart . . . , and a sixth has joined an opinion doing so.
>
> The secret of the *Lemon* test's survival, I think, is that it is so easy to kill. It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will. When we wish to strike down a practice it forbids, we invoke it; when we wish to uphold a practice it forbids, we ignore it entirely. Sometimes, we take a middle course, calling its three prongs "no more than helpful signposts." Such a docile and useful monster is

[102] MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 225–28 (1994).

[103] Maryland v. King, 133 S. Ct. 1958, 1989 (2013) (Scalia, J., dissenting).

> worth keeping around, at least in a somnolent state; one never knows when one might need him.[104]

The lively wit, off-the-beaten-path imagery, and rigorous analysis that mark his opinions are all the more impressive given their quantity. By any measure, including the *Harvard Law Review's* opinion count, his output was prodigious. Over 30 years, Justice Scalia authored 870 opinions, including 281 majority (or plurality) opinions. Many of Justice Scalia's most memorable contributions appear in separate writings. While a number of his 274 dissents are well and widely known, concurring opinions occupied an even larger share of his work. Over three decades, Justice Scalia authored 315 concurrences—the second most of any Justice who joined the Court since the *Harvard Law Review* began tabulating opinions by author in 1949.

Justice Scalia appreciated that vibrant debate today can lay the foundation for persuading readers tomorrow—himself included. More than once he acknowledged that new and better arguments had persuaded him to alter views he had expressed in prior cases.[105] And when an oversight in an earlier case was called to his attention, he confessed error, borrowing a page from Justice Jackson to explain: "I see no reason why I should be consciously wrong today because I was unconsciously wrong yesterday."[106] The North Star to Justice Scalia was getting the reasoning right—an admonition he never ceased to urge on others and never desisted to accept for himself.

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[104] 508 U.S. 384, 398–99 (1993) (Scalia, J., dissenting) (internal citations omitted).

[105] *See* Ring v. Arizona, 536 U.S. 584, 611 (2002) (Scalia, J., concurring) (explaining that, since *Walton v. Arizona*, 497 U.S. 639 (1990), he had "acquired new wisdom . . . or, to put it more critically, ha[d] discarded old ignorance"); Talk Am., Inc. v. Mich. Bell Tel. Co., 564 U.S. 50, 67–68 (2011) (Scalia, J., concurring) (acknowledging his prior acceptance of *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), including in his opinion for the Court in *Auer v. Robbins*, 519 U.S. 452 (1997), but expressing serious doubts about its validity).

[106] *See* Dart Cherokee Basin Operating Co. v. Owens, 135 S. Ct. 547, 561–62 (2014) (Scalia, J., dissenting) (quoting *Massachusetts* v. *United States*, 333 U.S. 611, 639–40 (1948) (Jackson, J., dissenting)).

While Justice Scalia's writing frequently leapt off the page, advocates before the Court often confronted his tenacity and wit long before he unsheathed his pen. Before 1986, oral argument in the Court was more disquisition than dialogue. Counsel could lead the Court on a leisurely stroll through the facts, the procedural history, and the argument—interrupted by questions only a handful of times. During then-Assistant Attorney General Scalia's only argument before the Supreme Court, in *Alfred Dunhill of London, Inc. v. Republic of Cuba*,[107] he faced a total of twelve questions from two justices; the other seven justices said not a word. Scalia won the case. But he took a different approach to the Court's argument sessions once he arrived on the other side of the bench. He peppered lawyers with questions, sometimes posing thirty or forty in a single argument. If he found an answer unsatisfactory, he pursued the point through short, often flinty-minded, follow-up inquiries. While his approach to oral argument was unique when he joined the Court, that is no longer so. Most members of the Court have embraced an engaged style of questioning, and the advocates appreciate it (most of the time).

Even after Justice Scalia left the academy to start his judicial career, he maintained his connection with the law schools—nearly all of them—by accepting scores of invitations over the years to speak with students and professors. In one sense, he never left teaching; his classroom just got bigger. He often thought of the audience of his opinions as today's and tomorrow's law students, and relished opportunities to talk to students about his theories of judging and about the many useful ways to use a law degree.

Justice Scalia's productivity and many contributions to the law could leave the misimpression that he left little time for anything else—that he was all work and no play. Only someone who did not know him could make that mistake. This son of Trenton and Queens became an avid hunter and fisherman, both of which allowed him to see and experience the Nation's breadth and diversity. He and Maureen looked forward to their annual visits to the Fifth Circuit, where he was the Circuit Justice, each year giving the "duck call

[107] 425 U.S. 682 (1976).

award" to district court judges reversed by the Fifth Circuit only to be vindicated by the Supreme Court. He relished meals with friends, colleagues, and law clerks, often at the late but much-beloved A.V. Ristorante, replete with anchovy pizza and an occasional glass of red wine. He was an ever-present mentor to his many law clerks, often traveling to their cities to speak at local events, always taking time to give career advice. He found a way despite his many other commitments to write several books.[108] He took time to indulge his love of music, even appearing with one of his "best buddies," Justice Ginsburg, in a local opera production.[109] And of course he was deeply devoted to his large and remarkably close family. Stories about family trips were a staple of Chambers conversations, including descriptions of summer trips to "Nag's End," the North Carolina beach house that Maureen named in honor of her own years of indefatigable advocacy. He loved to tell the story of his grandson, who, when told at a young age that his grandfather worked at the Supreme Court, exclaimed proudly, "Pop-Pop is the Court Jester." Through it all, the Justice did everything in his brim-filled life with unstinting vigor, curiosity, engagement, and a twinkle in his eye.

As Justice Scalia once observed, "[w]hen participating in programs such as this, consisting of brief memorial tributes, one sometimes fears that he will paint a portrait of his departed friend that others will not recognize—that perhaps he saw or thought he saw colorations of character or personality that others did not; rose where they saw pink, or violet where they saw purple." As was true of the colleague Justice Scalia was honoring then, "[t]hat is not a problem when one stands up to talk about" Antonin Scalia: "His colors were bright, and they neither changed nor were ever dissembled."[110] Car-

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[108] ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997); ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES (2008); SCALIA & GARNER, READING LAW, *supra* note 32.

[109] Statement of Justice Ruth Bader Ginsburg, Supreme Court of the United States (Feb. 15, 2016), https://www.supremecourt.gov/publicinfo/press/press releases/pr_02-14-16; *see also Piers Morgan*, *supra* note 5.

[110] Antonin Scalia, *Tribute to Emerson G. Spies*, 77 VA. L. REV. 427, 427 (1991).

rying on our tradition dating to the days of Chief Justice Marshall,[111] it is accordingly:

RESOLVED that we, the members of the Bar of the Supreme Court of the United States, express our deepest respect for the late Justice Antonin Scalia; our loss at his passing from this life; our admiration for his commitment to the Nation, its charter, and this Court; and our enduring gratitude for the example he set in his life both within and beyond the law; and we have further

RESOLVED that the Acting Solicitor General be asked to present these resolutions to the Court, and that the Attorney General be asked to move that they be inscribed upon the permanent records of the Court.

[111] 35 U.S. (10 Pet.) vii, viii (1836).

MEMORANDUM

TO: **Hon. Jeffrey S. Sutton, Chair**
Committee on Rules of Practice and Procedure

FROM: **Hon. Steven M. Colloton, Chair**
Advisory Committee on Appellate Rules

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

DATE: **May 18, 2016**

I. Introduction

The Advisory Committee on Appellate Rules met on April 5, 2016 in Denver, Colorado. At this meeting and in subsequent email votes, the Committee decided to propose four sets of amendments for publication. As discussed in Part II below, these amendments would:

(1) conform Appellate Rules 8(a)(1)(B), 8(a)(2)(E), 8(b), 11(g), and 39(e)(3) to the proposed revision of Civil Rule 62 by altering clauses that use the term "supersedeas bond";

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

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

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

Part III of this memorandum presents several information items. One item concerns whether Appellate Rules 26.1 and 29(c) should require litigants to make additional disclosures to aid judges in deciding whether to recuse themselves.

Detailed information about the Committee's activities can be found in the attached draft of the minutes of the April meeting and in the attached agenda. The Committee has scheduled its next meeting for October 13-14, 2016, in Washington, D.C. Judge Neil Gorsuch will preside as the new chair of the Advisory Committee.

II. Action Items – for Publication

The Appellate Rules Committee presents the following four action items for publication.

A. Rules 8(a)(1)(B), 8(a)(2)(E), 8(b), 11(g), 39(e)(3): Revising clauses that use the term "supersedeas bond" to conform with the proposed revision of Civil Rule 62(b) [Item 12-AP-D]

The Advisory Committee on Civil Rules is proposing amendments to Civil Rule 62, which concerns stays of judgments and proceedings to enforce judgments. Rule 62(b) currently says: "If an appeal is taken, the appellant may obtain a stay by supersedeas bond . . . ." The proposed amendments will eliminate the antiquated term "supersedeas" and allow an appellant to provide "a bond or other security." A letter of credit is one possible example of security other than a bond.

The Appellate Rules use the term "supersedeas bond" in Rules 8(a)(1)(B), 8(a)(2)(E), 8(b), 11(g), and 39(e)(3). These rules must be amended to conform to the revision of Civil Rule 62(b). Most of the required amendments merely change the term "supersedeas bond" to "bond or other security," with slight variations depending on the context. The proposed amendments to Rule 8(b) are a little more complicated. Rule 8(b) provides jurisdiction to enforce a supersedeas bond against the "surety" who issued the supersedeas bond. Because Rule 62(b) now authorizes both bonds and other forms of security, the term "surety" is now too limiting. For example, the issuer of a letter of credit is not a surety. The Committee proposes amending Rule 8(b) so that the terms encompass sureties and other security providers.

The Committee intends to conform the Appellate Rules to proposed Civil Rule 62 and does not intend any other change in meaning. The Committee has spelled out this objective in the Advisory Committee Notes.

Rule 8. Stay or Injunction Pending Appeal

(a) Motion for Stay.

(1) **Initial Motion in the District Court.** A party must ordinarily move first in the district court for the following relief:

* * *

(B) approval of a ~~supersedeas~~ bond or other security provided to obtain a stay of judgment; * * *

* * *

(2) **Motion in the Court of Appeals; Conditions on Relief.** A motion for the relief mentioned in Rule 8(a)(1) may be made to the court of appeals or to one of its judges.

* * *

(E) The court may condition relief on a party's filing a bond or other ~~appropriate~~ security in the district court.

(b) Proceeding Against a Surety or Other Security Provider. If a party gives security in the form of a bond, other security, ~~or~~ stipulation, or other undertaking with one or more sureties or other security providers, each ~~surety~~ provider submits to the jurisdiction of the district court and irrevocably appoints the district clerk as ~~the surety's~~ its agent on whom any papers affecting the ~~surety's~~ its liability on the bond or undertaking may be served. On motion, a ~~surety's~~ security provider's liability may be enforced in the district court without the necessity of an independent action. The motion and any notice that the district court prescribes may be served on the district clerk, who must promptly mail a copy to each surety whose address is known.

Committee Note

The amendments to subdivisions (a)(1)(B) and (b) conform this rule with the amendment of Federal Rule of Civil Procedure 62. Rule 62 formerly required a party to provide a "supersedeas bond" to obtain a stay of the judgment and proceedings to enforce the judgment. As amended, Rule 62(b)(2) allows a party to obtain a stay by providing a "bond or other security."

Rule 11. Forwarding the Record

* * *

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

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

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

Committee Note

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

Rule 39. Costs

* * *

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

(1) the preparation and transmission of the record;

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

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

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

Committee Note

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

B. Rule 29(a): Limitations on the Filing of Amicus Briefs by Party Consent [Item 14-AP-D]

Appellate Rule 29(a) specifies that an amicus curiae may file a brief with leave of the court or without leave of the court "if the brief states that all parties have consented to its filing." Several circuits have adopted local rules that forbid the filing of a brief by an amicus curiae when the filing could cause the recusal of one or more judges. For example, Second Circuit Local Rule 29.1(a) says: "The court ordinarily will deny leave to file an amicus brief when, by reason of a relationship between a judge assigned to hear the proceeding and the amicus curiae or its counsel, the filing of the brief might cause the recusal of the judge." The D.C., Fifth, and Ninth Circuits have similar local rules. These rules are inconsistent with Rule 29(a) because they do not allow the filing of amicus briefs based solely on consent of the parties.

The Advisory Committee presented a proposed amendment to Rule 29(a) in January 2016. Members of the Standing Committee made suggestions concerning the text and raised some policy questions that warranted further discussion. The Advisory Committee considered these matters at its April 2016 meeting and now submits a revised proposal for publication.

1. *Revised Proposal for Publication*

The Advisory Committee submits the following revised proposal for publication. The proposal differs from the January 2016 proposal in three ways. First, the proposed amendment no longer specifies that courts must act "by local rule." Courts may act by local rule, order, or any other means. Second, the revision modifies the text to clarify that local courts may both prohibit the filing of a brief that would cause recusal and also strike a brief after it has been filed if the potential for disqualification is discovered later in a screening process. Third, the rule contains two minor stylistic changes: deletion of a hyphen between "amicus curiae" and changing of the phrase "disqualification of a judge" to "a judge's disqualification."

Rule 29. Brief of an Amicus Curiae

(a) **When Permitted.** The United States or its officer or agency or a state may file an amicus curiae[1] brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing, except that a court of appeals may strike[2] or may prohibit[3] the filing of an amicus brief that would result in a judge's disqualification.[4]

* * *

Committee Note

The amendment authorizes orders or local rules, such as those previously adopted in some circuits, that prohibit the filing of an amicus brief by party consent if the brief would result in a judge's disqualification. The amendment does not alter or address the standards for when an amicus brief requires a judge's disqualification.[5]

2. *Four Additional Issues Raised at the January 2016 Standing Committee*

The Advisory Committee also considered four additional issues raised at the January 2016 Standing Committee meeting. First, a member of the Standing Committee asked whether Rule 29(a)

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[1] The Style Consultants proposed removing the hyphen between the words "amicus-curiae" in line 3. The words "amicus curiae" without a hyphen appear in the title of the Rule and in line 4. For consistency, they should all be the same.

[2] The word "strike" is new. At the January 2016 meeting, a member of the Standing Committee raised a question whether the power to "prohibit" a filing was sufficient if a court does not realize that a brief creates a recusal problem until after the brief has already been filed. The revised language would allow the court to "strike" the brief.

[3] The January 2016 version of this rule said ". . . may by local rule prohibit . . . ." A member of the Standing Committee proposed deleting the words "by local rule" in line 6 so that judges could act either by order in an individual case or by creating a local rule.

[4] The Style Consultants proposed replacing the words "disqualification of a judge" with "a judge's disqualification." Members of the Standing Committee supported this change.

[5] The Advisory Committee revised this note at its April 2016 meeting.

should announce a national rule instead of leaving the matter to local rules or court orders. The Committee decided that this is a matter appropriately left to the discretion of local circuits.

Second, a member of the Standing Committee also asked whether Rule 29(a) should be simplified so that it allows filing of an amicus brief only by leave of court. The Committee believes that the United States or a State should be permitted to file without leave of court and thus does not favor adding a universal requirement to obtain leave of court.

Third, a consultant to the Standing Committee raised a policy objection to allowing a court to prohibit the filing of an amicus brief that would cause a judge's disqualification. The objection was that a court might block an amicus brief that raises an awkward but important issue about disqualification that the parties themselves do not wish to raise. In such situations, the parties may consent to having an amicus curiae raise the issue. The Advisory Committee considered this potential objection but concluded that local circuits should be permitted to conclude that the benefits of avoiding recusals in a three-judge panel or an en banc court outweigh the potential benefits of an amicus brief.

Fourth, the Style Consultants suggested a revision to the clause beginning with the word "except" in line 5. They proposed ending the second sentence with the word "filing" and creating a new sentence beginning with the word "But." At its April 2016 meeting, the Committee discussed the matter at length and rejected the proposed revision. The Committee believed that the proposed third sentence (beginning with "But") contradicted the categorical grant of permission in the proposed second sentence. *See Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 398-99 (2010) ("The Federal Rules regularly use 'may' to confer categorical permission, as do federal statutes that establish procedural entitlements.") (citations omitted). Another proposed alternative of breaking the section into subdivisions would add unnecessary complexity. The Committee thus decided to approve the original a version with the "except" clause. This formulation is consistent with existing Appellate Rules, e.g., Fed. R. App. P. 25(a)(5), 28(b), 28.1(a), (c)(2), (c)(3), (d), and other respected texts, e.g., U.S. Const. Art. I, § 6, cl.1, Art. III, § 3, cl. 2.

C. Form 4: Removal of Question Asking Petitioners Seeking to Proceed in forma Pauperis to Provide the Last Four Digits of their Social Security Numbers [Item 15-AP-E]

Litigants seeking permission to proceed in forma pauperis must complete Appellate Form 4. Question 12 of Appellate Form 4 currently asks litigants to provide the last four digits of their social security numbers. The clerk representative to the Advisory Committee has investigated the matter and reports that the general consensus of the clerks of court is that the last four digits of a social security number are not needed for any purpose and that the question could be eliminated. Given the potential security and privacy concerns associated with social security numbers, and the

lack of need for obtaining the last four-digits of social security numbers, the Committee proposes to amend Form 4 by deleting this question. The proposed deletion is as follows:

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

* * *

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

Your daytime phone number: (___) _____

Your age: _____ Your years of schooling: _____

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

D. Revision of Appellate Rule 25 to address Electronic Filing, Signatures, Service, and Proof of Service [Items 08-AP-A, 11-AP-C, 11-AP-D, 15-AP-A, 15-AP-D, 15-AP-H]

At its April 2016 meeting, the Appellate Rules Committee reviewed the Civil Rules Committee's progress on revising Civil Rule 5 to address electronic filing, signatures, service, and proof of service. The Committee then decided to propose revisions of Appellate Rule 25 that would follow the proposed revisions of Civil Rule 5 as closely as possible while maintaining the current structure of Appellate Rule 25.

The proposed revision of Appellate Rule 25 has four key features. First, proposed Rule 25(a)(2)(B)(i) addresses electronic filing by generally requiring a person represented by counsel to file papers electronically. This provision, however, allows everyone else to file papers nonelectronically and also provides for exceptions for good cause and by local rule. Second, proposed Rule 25(a)(2)(B)(iii) addresses electronic signatures by specifying that when a paper is filed electronically, the "user name and password of an attorney of record, together with the attorney's name on a signature block, serves as the attorney's signature." Third, proposed Rule 25(c)(2) addresses electronic service by saying that such service "may be made by sending it to a registered user by filing it with the court's electronic-filing system or by using other electronic means that the person consented to in writing." Fourth, proposed Rule 25(d)(1) is revised to make proof of service of process required only for papers that are not served electronically.

Appellate Rule 25. Filing and Service

(a) Filing.

(1) **Filing with the Clerk.** A paper[6] required or permitted to be filed in a court of appeals must be filed with the clerk.

(2) **Filing: Method and Timeliness**.[7]

(A) **Nonelectronic Filing**

~~(A)~~(i) **In general.** ~~Filing~~ For a paper not filed electronically,[8] filing may be accomplished by mail addressed to the clerk, but such filing is not timely unless the clerk receives the papers within the time fixed for filing.

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

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

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

~~(C)~~(iii) **Inmate filing.** A paper not filed electronically ~~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

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[6] The term "paper" includes electronically filed documents under Appellate Rule 25(a)(2)(B)(iv).

[7] Appellate Rules 25(a)(2)(A) & (B) follow the approach of proposed Civil Rule 5(d)(2) and (3), addressing nonelectronic filing and electronic filing in separate sections.

[8] This rule follows the approach of proposed Civil Rule 5(d)(2), which uses the term "paper not filed electronically."

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.

~~(D) **Electronic filing.** A court of appeals may by local rule permit or require papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes. A local rule may require filing by electronic means only if reasonable exceptions are allowed. A paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules.~~[9]

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

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

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

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

[9] The subject of Appellate Rule 25(a)(2)(D) will be addressed in Appellate Rule 25(a)(2)(B).

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

(iii) **Signing**. The user name and password of an attorney of record, together with the attorney's name on a signature block, serves as the attorney's signature.

(iv) **Same as Written Paper**. A paper filed electronically is a written paper for purposes of these rules.

(3) **Filing a Motion with a Judge.** If a motion requests relief that may be granted by a single judge, the judge may permit the motion to be filed with the judge; the judge must note the filing date on the motion and give it to the clerk.

(4) **Clerk's Refusal of Documents.** The clerk must not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or by any local rule or practice.

(5) **Privacy Protection.** An appeal in a case whose privacy protection was governed by Federal Rule of Bankruptcy Procedure 9037, Federal Rule of Civil Procedure 5.2, or Federal Rule of Criminal Procedure 49.1 is governed by the same rule on appeal. In all other proceedings, privacy protection is governed by Federal Rule of Civil Procedure 5.2, except that Federal Rule of Criminal Procedure 49.1 governs when an extraordinary writ is sought in a criminal case.

(b) Service of All Papers Required. Unless a rule requires service by the clerk, a party must, at or before the time of filing a paper, serve a copy

on the other parties to the appeal or review. Service on a party represented by counsel must be made on the party's counsel.

(c) Manner of Service.

(1) ~~Service~~ Nonelectronic service[10] may be any of the following:

(A) personal, including delivery to a responsible person at the office of counsel;

(B) by mail; or

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

~~(D) by electronic means, if the party being served consents in writing.~~[11]

(2) ~~If authorized by local rule, a party may use the court's transmission equipment to make electronic service under Rule 25(c)(1)(D)~~[12] Electronic service may be made by sending it to a registered user by filing it with the court's electronic-filing system or by using other electronic means that the person consented to in writing.[13]

(3) When reasonable considering such factors as the immediacy of the relief sought, distance, and cost, service on a party

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[10] Proposed Civil Rule 5(b)(2) addresses both electronic and non-electronic service. To retain the structure of the current Appellate Rule 25(c), the proposed revision addresses nonelectronic service in Rule 25(c)(1) and electronic service in Rule 25(c)(2).

[11] The proposed Appellate Rule 25(c)(2) makes the current Appellate Rule 25(c)(1)(D) unnecessary.

[12] The deleted clause is similar to the deleted clause in Civil Rule 5(b)(3).

[13] This sentence comes from proposed Civil Rule 5(b)(2)(E).

must be by a manner at least as expeditious as the manner used to file the paper with the court.

(4) Service by mail or by commercial carrier is complete on mailing or delivery to the carrier. Service by electronic means is complete on ~~transmission~~ filing, unless the party making service is notified that the paper was not received by the party served.[14]

(d) Proof of Service.

(1) A paper presented for filing other than through the court's electronic filing system[15] must contain either of the following:

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

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

(i) the date and manner of service;

(ii) the names of the persons served; and

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

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

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

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[14] This provision is similar to the last clause of Civil Rule 5(b)(2)(E).

[15] A paper filed through the court's electronic filing system does not need to include this information because the electronic filing system will automatically provide it.

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

Committee Note

The amendments conform Rule 25 to the amendments to Federal Rule of Civil Procedure 5 on electronic filing, signature, service, and proof of service. They establish, in Rule 25(a)(2)(B), a new national rule that generally makes electronic filing mandatory. The rule recognizes exceptions for persons proceeding without an attorney, exceptions for good cause, and variations established by local rule. The amendments establish national rules regarding the methods of signing and serving electronic documents in Rule 25(a)(2)(B)(iii) and 25(c)(2). The amendments dispense with the requirement of proof of service for electronic filings in Rule 25(d)(1).

III. Information Items

A. Disclosure Requirements under Rules 26.1 & 29(c) [Item 08-AP-R]

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

In recent meetings, the Committee has considered whether to amend Rules 26.1 and 29(c) to require additional disclosures. The primary impetus for the discussion is a collection of local rules that require litigants to make disclosures that go beyond what Appellate Rules 26.1 and 29(c) require. If some circuits have concluded that more disclosure is necessary to allow an informed decision on recusal or disqualification, then should the national rules require disclosure of this information in every circuit? In each instance, the Committee has sought to assess both the benefits of additional requirements and the burden on litigants.

The Committee has not developed a firm view on whether amendments are warranted. What follows are the Committee's most recent discussion drafts of Rules 26.1 and 29(c). The Committee welcomes any feedback from the Standing Committee on the merit of requiring additional disclosures in the federal rules.

Rule 26.1. ~~Corporate~~ Disclosure Statement

(a) Who Must File; What Must Be Disclosed. Any ~~nongovernmental corporate~~[16] party to a proceeding in a court of appeals must file a statement that lists:

(1) any parent[17] corporation, and any publicly held ~~corporation~~ entity,[18] ~~that owns 10% or more of its stock~~ that has a 10% or greater ownership interest in the party or states that there is no such corporation or entity;

(2) the names of all judges[19] in the matter[20] and in any related state matter;

(3) the names of all lawyers and legal organizations that have appeared or are expected to appear for the party in the matter; and

* * *

[16] At the April 2016 meeting, it was the sense of the Committee that this rule no longer should apply only to corporations because the proposed new disclosure requirements now extend to facts beyond corporate ownership.

[17] The Committee considered but rejected a suggestion that litigants must disclose not only parent corporations but also "affiliates." The Committee was unsure how to define affiliates and worried about the burden of such a disclosure requirement.

[18] The Committee is unsure whether Rule 26.1 should require litigants to identify publicly held entities other than corporations (e.g., limited liability partnerships, etc.). The Fourth Circuit requires litigants to disclose whether "10% or more of the stock of a party/amicus [is] owned by a publicly held corporation or *other publicly held entity*." U.S. Court of Appeals for the Fourth Circuit, Disclosure of Corporate Affiliations Form, http://www.ca4.uscourts.gov/docs/pdfs/discl.pdf?sfvrsn=10 (emphasis added).

[19] The October 2015 discussion draft said "trial judges."

[20] The Committee considered other possible words, such as "case" or "proceeding," but concluded that "matter" was best because it would cover appeals from matters before agencies.

(d) Organizational Victim in a Criminal Case. In a criminal case if an organization is a victim of [the alleged] criminal activity, the government must file a statement identifying the victim, unless the government shows good cause for not complying with this requirement.[21] If the organizational victim is a corporation or publicly held entity, the statement must also disclose the information required by Rule 26.1(a)(1) to the extent it can be obtained through due diligence.

(e) Bankruptcy Proceedings. In a bankruptcy proceeding, the debtor or the trustee of the bankruptcy estate—or the appellant if the debtor or trustee is not a party—must file a statement that lists:

(1) any debtor not named in the caption;

(2) the members of each committee of creditors;

(3) the parties to any adversary proceeding; and

(4) any active participants in a contested matter.

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

Committee Note

ALTERNATIVE A: Drawing on local rules, the amendment requires additional disclosures that may inform a judge's decision about whether recusal is warranted.

ALTERNATIVE B: Under federal law and ethical standards, judges must decide whether to recuse themselves from participating in cases for various reasons. Before this amendment, Rule 26(a) required corporations to disclose only "any parent corporation and any publicly held corporation that owns 10% or more of its stock." Local rules of court have attempted to help judges determine whether recusal is necessary by requiring the parties to make additional disclosures. The amendment to subdivision (a) follows the lead of these local rules by requiring the listed additional

[21] The bracketed phrase is based on a recent discussion draft of a proposed amendment to Criminal Rule 12.4. In the Appellate Rules version, the "good cause" exception appears at the end of the sentence rather than the start because of other words at the start of the sentence. No difference in meaning is intended.

disclosures. Subdivision (d) requires disclosure of organizational victims in criminal cases because a judge might have an interest in one of the victims. But the disclosure requirement is relaxed in situations in which disclosure would be overly burdensome to the government. For example, thousands of corporations might be the victims of a criminal antitrust violation, and the government may have great difficulty identifying all of them. Subdivision (e) is based on local rules and requires disclosures unique to bankruptcy cases. Subdivision (f) imposes disclosure requirements on a person who wants to intervene so that judges may decide whether they are disqualified from ruling on the intervention motion.

Rule 29. Brief of an Amicus Curiae

* * *

(c) **Contents and Form.** * * * An amicus brief need not comply with Rule 28, but must include the following:

(1) ~~if the amicus curiae is a corporation,~~ a disclosure statement with the information required of parties by Rule 26.1(a)(1), unless the amicus curaie is an individual or governmental unit;

* * *

(5) unless the amicus curiae is one listed in the first sentence of Rule 29(a), a statement that indicates whether:

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

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

(C) a person— other than the amicus curiae, its members, or its counsel— contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person; and

(D) a lawyer or legal organization authored the brief in whole or in part, and, if so, identifies each such lawyer or legal organization.

Committee Note

Subdivision (c)(1) conforms this rule with the amendment to Rule 26.1(a). Subdivision (c)(5)(D) expands the disclosure requirements to include disclosures about the lawyers and legal organizations who participated in writing an amicus brief because a judge also may need this information in order to decide whether recusal is required.

B. Miscellaneous Items

The Committee discussed five other agenda items at its April 2016 meeting. Item No.12-AP-F concerned proposed amendments to Civil Rule 23 to address class action settlement objectors. The Civil Committee's latest proposal would require a district court to approve any payment offered to a class action objector for withdrawing an objection. The proposal would not require amendment of the Appellate Rules. After considering the matter, the sense of the Committee was that an Appellate Rule is not warranted, and that the matter ultimately is a policy question for the Civil Rules Committee.

Item No. 16-AP-A was a proposal to extend the period of filing a notice of appeal in a criminal case from 14 days to 30 days. The Committee previously considered and rejected essentially the same proposal. Item No. 11-AP-E concerned a suggestion that Appellate Rule 4(b) be amended to accord criminal defendants the same 30-day appeal period that applies to government appeals in criminal cases. The Committee discussed Item No.11-AP-E at its Spring 2012 and Fall 2012 meetings and then voted to remove the item from the Agenda without taking action. After reviewing considerations on both sides, and the history of Item No. 11-AP-E, the Committee decided to take no action and to remove Item No. 16-AP-A from its agenda.

Item No. 12-AP-B concerned a proposal to add a parenthetical phrase to the instructions that accompany Question 4 on Appellate Form 4. The amended instruction would read as follows:

If you are a prisoner seeking to appeal a judgment in a civil action or proceeding (not including a decision in a habeas corpus proceeding or a proceeding under 28 U.S.C. § 2255), you must attach a statement certified by the appropriate institutional officer showing all receipts, expenditures, and balances during the last six months in your institutional accounts. If you have

multiple accounts, perhaps because you have been in multiple institutions,

attach one certified statement of each account.

The proposed parenthetical phrase is consistent with case law and may prevent some confusion. But after discussing the matter, the Committee decided not to amend the form because the current language already tracks the applicable statute on disclosure, 28 U.S.C. § 1915(a)(2),[22] and the burden imposed by mistaken filing of unnecessary account statements is not great. The Committee agreed to remove this item from its agenda.

Item No. 15-AP-F concerned recovery of the $500 docketing fee as a cost. Most circuits have interpreted Rule 39(e)(4) as implicitly making the docketing fee a cost that is taxable in the court of appeals. At least three circuits, however, require appellants to recover this fee in the district court. The sense of the Committee was that no amendment to Appellate Rule 39(e)(4) is necessary because the majority of courts are correctly interpreting the Rule. The Committee decided to remove this item from the agenda and asked the Chair to bring the matter to the attention of the chief judges of the circuits.

The Committee also considered a memorandum prepared by Mr. Derek Webb, who is a law clerk to Judge Sutton. The memorandum listed a number of possible circuit splits on issues arising under the Appellate Rules. Mr. Webb suggested three issues that might warrant inclusion on the Committee's agenda in the future: (1) whether delay by prison authorities in delivering the order from which a prisoner wishes to appeal should be counted in computing time for appeal under Rule 4; (2) whether the costs for which a bond may be required under Rule 7 include attorney's fees; and (3) whether "the court" in Rule 39(a)(4) refers to the appellate court or the district court. The Committee thought the incoming Chair and the Reporter could decide whether to include any of these matters on the discussion agenda for the October 2016 meeting.

Enclosures:

1. Draft Minutes from the April 5, 2016 Meeting of Appellate Rules Committee
2. Agenda Table for the Appellate Rules Committee
3. Text of Proposed Revisions for Publication

[22] Section 1915(a)(2) says: "A prisoner seeking to . . . appeal a judgment in a civil action or proceeding without prepayment of fees or security therefor . . . shall submit a certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the 6-month period immediately preceding the filing of the complaint or notice."

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TAB 3B

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PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE*

Rule 8. Stay or Injunction Pending Appeal

(a) Motion for Stay.

(1) **Initial Motion in the District Court.** A party must ordinarily move first in the district court for the following relief:

* * * * *

(B) approval of a ~~supersedeas~~bond or other security provided to obtain a stay of judgment; or

* * * * *

(2) **Motion in the Court of Appeals; Conditions on Relief.** A motion for the relief mentioned in Rule 8(a)(1) may be made to the court of appeals or to one of its judges.

* * * * *

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

(E) The court may condition relief on a party's filing a bond or other ~~appropriate~~security in the district court.

(b) Proceeding Against a Surety or Other Security Provider. If a party gives security in the form of a bond, other security, ~~or~~stipulation, or other undertaking with one or more sureties or other security providers, each ~~surety~~provider submits to the jurisdiction of the district court and irrevocably appoints the district clerk as ~~the surety's~~its agent on whom any papers affecting ~~the surety's~~its liability on the bond or undertaking may be served. On motion, a ~~surety's~~security provider's liability may be enforced in the district court without the necessity of an independent action. The motion and any notice that the district court prescribes may be served on the

district clerk, who must promptly mail a copy to each surety whose address is known.

* * * * *

Committee Note

The amendments to subdivisions (a)(1)(B) and (b) conform this rule with the amendment of Federal Rule of Civil Procedure 62. Rule 62 formerly required a party to provide a "supersedeas bond" to obtain a stay of the judgment and proceedings to enforce the judgment. As amended, Rule 62(b)(2) allows a party to obtain a stay by providing a "bond or other security."

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Rule 11. Forwarding the Record

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

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

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

Committee Note

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

Rule 25. Filing and Service

(a) Filing.

(1) **Filing with the Clerk.** A paper required or permitted to be filed in a court of appeals must be filed with the clerk.

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

(A) **Nonelectronic Filing**

~~(A)~~(i) **In general.** ~~Filing~~For a paper not filed electronically, filing may be accomplished by mail addressed to the clerk, but filing is not timely unless the clerk receives the papers within the time fixed for filing.

~~(B)~~(ii) **A brief or appendix.** A brief or appendix not filed electronically

is timely filed, however, if on or before the last day for filing, it is:

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

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

~~(C)~~(iii) **Inmate filing.** A paper ~~filed~~not filed electronically by an inmate confined in an institution is timely if deposited in the institution's internal mailing system on or before the last day

for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

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

~~A local rule may require filing by electronic means only if reasonable exceptions are allowed. A paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules.~~

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

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

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

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

(iii) **Signing**. The user name and password of an attorney of record, together with the attorney's name on a signature block, serves as the attorney's signature.

(iv) **Same as Written Paper**. A paper filed electronically is a written paper for purposes of these rules.

(3) **Filing a Motion with a Judge.** If a motion requests relief that may be granted by a single judge, the judge may permit the motion to be filed with the judge; the judge must note the filing date on the motion and give it to the clerk.

(4) **Clerk's Refusal of Documents.** The clerk must not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or by any local rule or practice.

(5) **Privacy Protection.** An appeal in a case whose privacy protection was governed by Federal Rule of Bankruptcy Procedure 9037, Federal Rule of

Civil Procedure 5.2, or Federal Rule of Criminal Procedure 49.1 is governed by the same rule on appeal. In all other proceedings, privacy protection is governed by Federal Rule of Civil Procedure 5.2, except that Federal Rule of Criminal Procedure 49.1 governs when an extraordinary writ is sought in a criminal case.

(b) Service of All Papers Required. Unless a rule requires service by the clerk, a party must, at or before the time of filing a paper, serve a copy on the other parties to the appeal or review. Service on a party represented by counsel must be made on the party's counsel.

(c) Manner of Service.

(1) ~~Service~~Nonelectronic service may be any of the following:

(A) personal, including delivery to a responsible person at the office of counsel;

(B) by mail; or

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

~~(D) by electronic means, if the party being served consents in writing.~~

(2) ~~If authorized by local rule, a party may use the court's transmission equipment to make electronic service under Rule 25(c)(1)(D)~~ Electronic service may be made by sending it to a registered user by filing it with the court's electronic-filing system or by using other electronic means that the person consented to in writing.

(3) When reasonable considering such factors as the immediacy of the relief sought, distance, and

cost, service on a party must be by a manner at least as expeditious as the manner used to file the paper with the court.

(4) Service by mail or by commercial carrier is complete on mailing or delivery to the carrier. Service by electronic means is complete on ~~transmission~~filing, unless the party making service is notified that the paper was not received by the party served.

(d) Proof of Service.

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

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

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

(i) the date and manner of service;

(ii) the names of the persons served; and

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

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

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

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

Committee Note

The amendments conform Rule 25 to the amendments to Federal Rule of Civil Procedure 5 on electronic filing, signature, service, and proof of service. They establish, in Rule 25(a)(2)(B), a new national rule that generally makes electronic filing mandatory. The rule recognizes exceptions for persons proceeding without an attorney, exceptions for good cause, and variations established by local rule. The amendments establish national rules regarding the methods of signing and serving electronic documents in Rule 25(a)(2)(B)(iii) and 25(c)(2). The amendments dispense with the requirement of proof of service for electronic filings in Rule 25(d)(1).

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Rule 29. Brief of an Amicus Curiae

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

* * * * *

Committee Note

The amendment authorizes orders or local rules, such as those previously adopted in some circuits, that prohibit the filing of an amicus brief by party consent if the brief would result in a judge's disqualification. The amendment does not alter or address the standards for when an amicus brief requires a judge's disqualification.

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Rule 39. Costs

* * * * *

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

(1) the preparation and transmission of the record;

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

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

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

Committee Note

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

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

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

* * * * *

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

Your daytime phone number: (___) _____

Your age: _____ Your years of schooling: _____

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

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TAB 3C

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Advisory Committee on Appellate Rules
Table of Agenda Items —April 2016

FRAP Item	Proposal	Source	Current Status
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 Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14 Draft approved 04/15 for submission to Standing Committee Approved by Standing Committee 06/15 Approved by Judicial Conference 09/15 Transmitted to the Supreme Court 10/15
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 Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14 Draft approved 04/15 for submission to Standing Committee Approved by Standing Committee 06/15 Approved by Judicial Conference 09/15 Transmitted to the Supreme Court 10/15
08-AP-A	Amend FRAP 3(d) concerning service of notices of appeal.	Hon. Mark R. Kravitz	Discussed and retained on agenda 11/08 Discussed and retained on agenda 10/15 Discussed and retained on agenda 04/16

FRAP Item	Proposal	Source	Current Status
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 Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14 Draft approved 04/15 for submission to Standing Committee Approved by Standing Committee 06/15 Approved by Judicial Conference 09/15 Transmitted to the Supreme Court 10/15
08-AP-R	Consider amending FRAP 26.1 (corporate disclosure) and the corresponding requirement in FRAP 29(c)	Hon. Frank H. Easterbrook	Discussed and retained on agenda 04/09 Discussed and retained on agenda 04/14 Discussed and retained on agenda 10/14 Discussed and retained on agenda 04/15 Discussed and retained on agenda 10/15 Discussed and retained on agenda 04/16
09-AP-B	Amend FRAP 1(b) to include federally recognized Indian tribes within the definition of "state"	Daniel I.S.J. Rey-Bear, Esq.	Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10 Discussed and retained on agenda 10/11 Discussed and retained on agenda 04/12; Committee will revisit in 2017
11-AP-C	Amend FRAP 3(d)(1) to take account of electronic filing	Harvey D. Ellis, Jr., Esq.	Discussed and retained on agenda 04/13 Discussed and retained on agenda 10/15 Discussed and retained on agenda 04/16
11-AP-D	Consider changes to FRAP in light of CM/ECF	Hon. Jeffrey S. Sutton	Discussed and retained on agenda 10/11 Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13 Discussed and retained on agenda 04/14 Discussed and retained on agenda 10/14 Discussed and retained on agenda 04/15 Discussed and retained on agenda 10/15 Draft approved 04/16 for submission to Standing Committee

FRAP Item	Proposal	Source	Current Status
12-AP-B	Consider amending FRAP Form 4's directive concerning institutional-account statements for IFP applicants	Peter Goldberger, Esq., on behalf of the National Association of Criminal Defense Lawyers (NACDL)	Discussed and retained on agenda 09/12 Discussed and retained on agenda 10/15 Draft approved 04/16 for submission to Standing Committee
12-AP-D	Consider the treatment of appeal bonds under Civil Rule 62 and Appellate Rule 8	Kevin C. Newsom, Esq.	Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/15 Discussed and retained on agenda 10/15 Draft approved 04/16 for submission to Standing Committee
12-AP-E	Consider treatment of length limits, including matters now governed by page limits	Professor Neal K. Katyal	Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14 Draft approved 04/15 for submission to Standing Committee Approved by Standing Committee 06/15 Approved by Judicial Conference 09/15 Transmitted to the Supreme Court 10/15
12-AP-F	Consider amending FRAP 42 to address class action appeals	Professors Brian T. Fitzpatrick and Brian Wolfman and Dean Alan B. Morrison	Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13 Discussed and retained on agenda 04/14 Discussed and retained on agenda 10/15 Discussed and retained on agenda 04/16
13-AP-B	Amend FRAP to address permissible length and timing of an amicus brief in support of a petition for rehearing and/or rehearing en banc	Roy T. Englert, Jr., Esq.	Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14 Draft approved 04/15 for submission to Standing Committee Approved by Standing Committee 06/15 Approved by Judicial Conference 09/15 Transmitted to the Supreme Court 10/15

FRAP Item	Proposal	Source	Current Status
13-AP-H	Consider possible amendments to FRAP 41 in light of Bell v. Thompson, 545 U.S. 794 (2005), and Ryan v. Schad, 133 S. Ct. 2548 (2013)	Hon. Steven M. Colloton	Discussed and retained on agenda 04/14 Discussed and retained on agenda 10/14 Discussed and retained on agenda 04/15 Draft approved 10/15 for submission to Standing Committee Approved by Standing Committee 01/16
14-AP-D	Consider possible changes to Rule 29's authorization of amicus filings based on party consent	Standing Committee	Awaiting initial discussion Draft approved 10/15 for submission to Standing Committee Discussed by Standing Committee 1/16 but not approved Draft approved 04/16 for submission to Standing Committee
15-AP-A	Consider adopting rule presumptively permitting pro se litigants to use CM/ECF	Robert M. Miller, Ph.D.	Awaiting initial discussion Discussed and retained on agenda 10/15 Draft approved 04/16 for submission to Standing Committee
15-AP-B	Technical amendment – update cross-reference to Rule 13 in Rule 26(a)(4)(C)	Reporter	Draft approved 04/15 for submission to Standing Committee Approved by Standing Committee 06/15 Approved by Judicial Conference 09/15 Transmitted to the Supreme Court 10/15
15-AP-C	Consider amendment to Rule 31(a)(1)'s deadline for reply briefs	Appellate Rules Committee	Awaiting initial discussion Draft approved 10/15 for submission to Standing Committee Approved by Standing Committee 01/16
15-AP-D	Amend FRAP 3(a)(1) (copies of notice of appeal) and 3(d)(1) (service of notice of appeal)	Paul Ramshaw, Esq.	Awaiting initial discussion Discussed and retained on agenda 10/15 Discussed and retained on agenda 04/16
15-AP-E	Amend the FRAP (and other sets of rules) to address concerns relating to social security numbers; sealing of affidavits on motions under 28 U.S.C. § 1915 or 18 U.S.C. § 3006A; provision of authorities to pro se litigants; and electronic filing by pro se litigants	Sai	Awaiting initial discussion Discussed and retained on agenda 10/15 Partially removed from Agenda and draft approved 10/16 for submission to Standing Committee
15-AP-H	Electronic filing by pro se litigants	Robert M. Miller, Ph.D.	Awaiting initial discussion Discussed and retained on agenda 10/15

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DRAFT Minutes of the Spring 2016 Meeting of the
Advisory Committee on Appellate Rules

April 5, 2016
Denver, Colorado

Attendance and Introductions

The Chair, Judge Steven M. Colloton, called the meeting of the Advisory Committee on Appellate Rules to order on Tuesday, at 9:00 a.m., at the Colorado Supreme Court in Denver, Colorado.

In addition to Judge Colloton, the following Advisory Committee members were present: Professor Amy Coney Barrett, Judge Michael A. Chagares, Justice Allison H. Eid, Gregory G. Katsas, Esq., Neal K. Katyal, Esq., Judge Brett M. Kavanaugh, Judge Stephen Joseph Murphy III, and Kevin C. Newsom, Esq. Gregory Garre, Esq. participated by telephone. Solicitor General Donald Verrilli was represented by Mr. H. Thomas Byron III, Appeals Counsel of the Appellate Staff of the Civil Division.

Reporter Gregory E. Maggs was present and kept these minutes. Also present were Judge Jeffrey S. Sutton, Chair of the Standing Committee on Rules of Practice and Procedure; Ms. Rebecca A. Womeldorf, Secretary of the Standing Committee on Rules of Practice and Procedure and Rules Committee Officer; Marie Leary, Esq., Research Associate, Appellate Rules Committee, Federal Judicial Center; Mr. Michael Ellis Gans, Clerk of Court Representative to the Advisory Committee on Appellate Rules; and Ms. Shelly Cox, Administrative Specialist in the Rules Committee Support Office of the Administrative Office. Mr. Derek Webb, law clerk to Judge Sutton, participated by telephone.

Judge Colloton began the meeting by introducing Chief Justice Nancy E. Rice of the Colorado Supreme Court. Chief Justice Rice welcomed the Committee to the courthouse and spoke of the history of the building. Judge Colloton also welcomed Judge Kavanaugh to his first meeting.

Approval of the Minutes of the October 2015 Meeting

A spelling error on page 11 of the draft minutes of the October 2015 Meeting was identified and corrected. The draft minutes were then approved.

Report on the January 2016 Meeting of the Standing Committee

Judge Colloton reported that the Standing Committee had approved two proposals from the Appellate Rules Committee for publication and public comment. One was Item 13-AP-H, which concerned proposed amendments to Rule 41(b) and (d) regarding the stays of a mandate. The other was Item 15-AP-C, which concerned proposed amendments to Rule 31(a)(1) and Rule 28.1(f)(4) to lengthen the time for filing a reply brief from 14 days to 21 days.

Judge Colloton said that a third proposal, Item No. 14-AP-D, which concerns amicus briefs filed by party consent under Appellate Rule 29(a), prompted suggestions from the Style Consultants and substantive comments from the Committee Members. Judge Colloton therefore decided to bring the item back for further discussion at today's Committee meeting.

Item No. 12-AP-D (Civil Rule 62: Bonds)

Mr. Newsom led the discussion of this item. He began by reporting the status of proposed revisions to Civil Rule 62 and addressed the discussion draft of this rule on page 70 of the Agenda Book. He explained that the revision to Rule 62 aims to accomplish three things: (1) to extend the automatic stay to 30 days; (2) to allow a party to provide security other than a bond; and (3) to require only one security for all stayed periods. He also explained that the Advisory Committee Note was edited to make it more concise.

Mr. Newsom then turned to the proposed conforming amendments to Appellate Rules 8, 11, and 39, addressing the discussion drafts of these rules on pages 61-64 of the Agenda Book. The Committee agreed with the general approach of the drafts and the policy decision to make Rule 8(b) apply to providers of security other than sureties. The Committee decided to amend the discussion draft in the following three ways:

(1) Rule 8(a)(1)(B) [lines 6-7]: The bracketed phrase "[provided to obtain the stay of a judgment or order of a district court pending appeal]" should be included but edited to say "provided to obtain the stay."

(2) Rule 8(a)(2)(E) [line 15]: The word "appropriate" should be deleted.

(3) Rule 8(b) [lines 16-20]: The wording of this section should be rephrased to say: "If a party gives security in any form, including a bond, other security, stipulation, or other undertaking, with one or more sureties or other security providers, each security provider submits . . . ." The subsequent references to "surety" in the provision should then be replaced with "security provider."

The Committee addressed the discussion draft of Rule 11(g) at length. It considered various possible amendments but ultimately did not alter the discussion draft. The Committee did not make any amendments to the discussion draft of Rule 39(e).

Mr. Newsom moved to approve the discussion draft as amended and to send it to the Standing Committee for publication. The motion was seconded and approved.

Item No.12-AP-F (Civil Rule 23: Class Action Settlement Objectors)

Judge Colloton introduced this item, which concerns class action settlement objections. Class members sometimes object to settlements not because they have good faith objections but instead because they want to receive payments to withdraw their objections so that the settlements can go forward. Judge Colloton explained that the Civil Rules Committee decided to address this matter through what it calls "the simple approach." Under this approach, Civil Rule 23(e)(5)(B) would be amended to provide that "no payment or other consideration" can be given to an objector in exchange for withdrawing an objection without the district court's approval. The simple approach would not require amending the Appellate Rules.

Judge Colloton asked the Committee to consider whether the proposed "simple approach" was a good solution to the problem of class action objections. He also asked the Committee to consider whether requiring a district court to approve consideration paid to an objector impermissibly interferes with an appellate court's jurisdiction.

Mr. Derek Webb spoke regarding his memorandum included in the Agenda Book at page 109. He informed the Committee that the Civil and Appellate rules allow a district court to continue to act in a variety of situations even though a notice of appeal has been filed.

Two judge members expressed agreement with the "simple approach" of the Civil Rules Committee. An attorney member expressed some concern about the policy behind the approach. He was not sure that the district court would always know the case better than the court of appeals. He offered the example of a case in which there was a proposed payment to withdraw an objection after oral argument in the court of appeals. He asked, "Should the district court really decide whether the payment should be made?" The attorney member, however, thought that such situations might be rare.

Judge Sutton saw some potential for conflict between the district court and court of appeals. He noted that nothing in the proposed revision of Civil Rule 23 would require or prevent the dismissal of an objection by a court of appeals. He suggested that another, possibly better, approach might have been to require a court of appeals to ask the district court for an indicative ruling under Appellate Rule 12.1 before deciding whether to dismiss an objection. He said that this option

remains open to the courts of appeals and suggested that the Advisory Committee Note could address this point.

Following further discussion, Judge Colloton summarized the apparent views of the Committee as follows: The Appellate Rules Committee prefers not to address the issue of class action objectors with an appellate rule, and whether the proposed revision of Civil Rule 23 is desirable is ultimately a policy question for the Civil Rules Committee.

Item No. 16-AP-A (Appellate Rule 4(b)(1) and Criminal Case Notice of Appeals)

The Reporter introduced this item, which concerns a proposal to amend Appellate Rule 4(b)(1)(A) to increase the period for filing a notice of appeal in a criminal case from 14 days to 30 days. The reporter explained that the Committee previously had considered and rejected essentially the same proposal when it addressed Item 11-AP-E. The Committee discussed Item 11-AP-E at its Spring 2012 and Fall 2012 meetings and then voted to remove the item from the Agenda without taking action.

A judge member said that limiting the period for filing a notice of appeal to 14 days was necessary for having prompt appeals. He also noted that the interests of lawyers may differ from clients; lawyers may want more time but clients may want speedier action. Expressing the view of the Department of Justice, Mr. Byron said no real need has been shown for the amendment. Other speakers emphasized that the Committee had previously considered and decided the matter.

Judge Colloton asked whether there should be further study. No member believed that further study was required. A motion to remove the item from the Committee's agenda was seconded and approved.

Item No. 14-AP-D (Appellate Rule 29(a) on Amicus Briefs Filed with Party Consent)

Judge Colloton introduced this item, which concerns amicus briefs filed by party consent. He reminded the Committee that it had proposed a modification of Appellate Rule 29(a) at its October 2016 meeting. He then explained that the Standing Committee was generally favorable to the proposal but identified issues that may require further consideration.

Judge Colloton began by discussing the policy issue of whether a court should be able to reject not only amicus briefs filed by party consent but also amicus briefs filed by the government. An attorney member said that the rules should continue to provide the government a right to file an amicus brief. Mr. Byron said that the Department of Justice's position was that the government should have a right to file an amicus brief.

Judge Colloton then addressed the discussion draft line-by-line. The sense of the Committee was to make the following revisions:

(1) line 3: strike the hyphen in "amicus-curiae"

(2) line 5: adopt the "except" clause rather than the separate "but" sentence proposed by the Style Consultants

(3) line 6: strike "by local rule"

(4) line 6: replace "prohibit" with "prohibit or strike"

At the suggestion of a judge member, the Committee also decided to replace the Advisory Committee Note for the proposed amendment to Appellate Rule 29(a) on page 140 of the Agenda Book with the following: "The amendment authorizes orders or local rules, such as those previously adopted in some circuits, that prohibit the filing of an amicus brief by party consent if the brief would result in a judge's disqualification. The amendment does not alter or address the standards for when an amicus brief requires a judge's disqualification."

The Committee approved a motion to submit the revised version of the Rule to the Standing Committee.

Item No. 08-AP-R (Appellate Rules 26.1 and 29(c) on Disclosures)

Judge Colloton introduced this item, which concerns Appellate Rules 26.1 and 29(c). These rules currently require corporate parties and amici curiae to file corporate disclosure statements. The purpose of these disclosure requirements is to assist judges in deciding whether they need to recuse themselves. Judge Colloton explained that some local rules go further. He explained that, in the memorandum included at page 159 of the Agenda Book, Professor Daniel Capra had tried to pull together suggestions for additional disclosure requirements without necessarily advocating for them. Judge Colloton said that the initial decisions for the Committee were (1) whether to include some or all of the proposed disclosures; (2) whether to conduct more study; or (3) whether to drop the matter.

A judge member asked the attorney members how burdensome they considered such disclosure requirements. An attorney members said that some disclosure requirements are very burdensome. The committee discussed the requirement of disclosing witnesses. Several members suggested that the cost was not worth the benefit. An attorney member also said that disclosing affiliates of corporations would be burdensome. He said that such disclosures are sometimes required in state courts.

Judge Sutton asked whether the list of required disclosures would carry with it a presumption that recusal was necessary when the listed information was disclosed. An attorney member asked whether the Advisory Committee Note could address this potential concern by saying that the additional disclosure requirements do not change the recusal standards.

Another attorney member asked how strong the need was for changing the current rules. Mr. Byron, speaking for the Justice Department, agreed that additional disclosure requirements would be burdensome and that it was not clear how beneficial they would be.

Judge Sutton said that the current rule requires disclosure of things that by statute automatically require disclosure. The proposed rule would go further. He also said that the proposal should not go to the Standing Committee for publication at this time because the Bankruptcy Rules Committee was still working on its own disclosure requirements.

Judge Colloton questioned the need for requiring parties to disclose the identity of judges, asking whether there were many judges who have to recuse themselves because of the identity of a judge during earlier proceedings in a case.

Several committee members expressed concern that disclosing the identity of all lawyers who had worked on a matter could be very burdensome, especially if there had been an administrative proceeding below. But a countervailing consideration was that judges still may have to recuse themselves based on the participation of a lawyer.

The Committee discussed the question whether clauses (a)(2), (a)(3), and (a)(4) should use the term "proceeding" or "case" or some other term. A judge member pointed out that some appeals come directly from agencies. Another judge member suggested that the word "matter" might be better. Another judge member suggested that perhaps local rules should address matters coming directly to the court of appeals from administrative proceedings.

Judge Colloton asked whether the draft of Rule 26.1(e) corresponded to any similar provision in the draft revision to the Bankruptcy Rules. The Committee decided that the reporter should coordinate with the Criminal Rules and Bankruptcy Rules Committees.

It was the sense of the committee that the following action should be taken with respect to the discussion drafts of Rule 26.1 and Rule 29(c) beginning on page 150 of the Agenda Book.

(1) The "except clause" in line 3 should be deleted so that Rule 26.1 applies to all parties.

(2) The term "affiliated" in line 5 should be deleted. A Fourth Circuit local rule requires disclosure of affiliates. But the term is complicated to define.

(3) The term “matter” rather than “case” or “proceeding” should be in lines 10, 12, and 14

(4) The “good cause”exception in lines 17 and 18 should be included. The formulation differs from the formulation in the criminal law rules. The exception has to be included at the end of the sentence because of everything else at the start of the sentence. The substance is the same.

(5) There was no objection to the proposed language in lines 31-32 regarding persons who want to intervene.

(6) The Advisory Committee note should make clear that the Committee is not trying to change the recusal requirements.

(7) The Committee had no objection to the proposed change to Rule 29(c)(5)(D).

The Committee determined that no amendment should be proposed at this time, and that the matter should be carried over for further consideration. The Chair may receive input from the Standing Committee at its June 2016 meeting.

Item 12-AP-B (Appellate Rules Form 4 and Institutional Account Statement)

This Item concerns a proposal to add the parenthetical phrase "(not including a decision in a habeas corpus proceeding or a proceeding under 28 U.S.C. § 2255)" to one of the questions in Appellate Form 4. The reporter introduced the time and summarized the arguments in Reporter Struve's memorandum for and against the adding the parenthetical phrase.

After a brief discussion, the Committee decided to take no action for two reasons. First, the language of the Form already tracks the applicable statute. Second, although the parenthetical phrase might prevent the filing of institutional account statements unnecessarily, the consequence was not very burdensome to either confinement institutions or prisoners. A motion to remove this item from the agenda was made, seconded, and approved.

Item No. 15-AP-E (Appellate Rules Form 4 and Social Security Numbers)

The reporter introduced this item, which included five proposals. The first proposal was to amend Appellate Form 4 to remove the question asking litigants seeking leave to proceed in forma pauperis to provide the last four digits of their social security numbers. The reporter presented this item. As discussed in the memorandum on page 215 of the Agenda Book, the clerks of the courts of appeals report that this information is no longer needed for any purpose. The Committee

discussed the matter briefly and decided that the question should be deleted. The Committee will send a proposal for publication to the Standing Committee.

The second proposal was to amend Appellate Rule 25(a)(5) to prohibit filings from containing any part of a social security number. The Committee decided to take no action on this matter because Appellate Rule 25(a)(5) incorporates the privacy standards from the Civil Rules. Any change should come from the Civil Rules.

The third proposal was to amend Appellate Rule 24(a)(1) to add a presumption that an affidavit filed in support of a motion for leave to proceed in forma pauperis would be sealed. The Committee previously had discussed this matter at its October 2015 meeting. Following a brief discussion, the sense of the Committee was that the proposal should be rejected.

The fourth proposal was that Appellate Rule 32.1(b) should be amended to require litigants to provide pro se applicants with unpublished opinions that are not available without cost from a publicly accessible database. An attorney member suggested that this proposal raised a substantive policy question about how much financial assistance should be given to pro se litigants and that this question was better addressed by Congress than by a Rules Committee. Another attorney member pointed out that the proposal concerned all pro se litigants, not just those seeking leave to proceed in forma pauperis. Some pro se litigants might be able to afford access to commercial databases. Another member of the Committee asked whether a court might order a party to provide unpublished opinions on an individual basis. The sense of the Committee was that the proposal should be rejected.

The fifth proposal was to amend Appellate Rule 25(d)(2)(D) to allow pro se litigants to file or serve documents electronically. A member suggested that the Committee should consider this proposal as part of its general consideration of electronic filing issues.

A motion was made to present the first matter (concerning social security numbers) to the Standing Committee for publication, to remove the second, third, and fourth matters from the agenda, and to fold the fifth matter into the rest of the other agenda items concerning electronic filing. The motion was seconded and approved.

Item No. 15-AP-F (Appellate Rule 39(e) and Recovery of Appellate Fees)

The reporter introduced this item, which the Committee discussed for the first time at the October 2015 Meeting. The item concerns the procedure by which an appellant who prevails on appeal may recover the $5 fee for filing a notice of appeal and the $500 fee for docketing an appeal. Rule 39(e)(4) says that the fee for filing a notice of appeal is taxable as a cost in the district court.

In most circuits, the $500 docketing fee is seen as a cost taxable in the court of appeals, but at least three circuits require appellants to recover this fee in the district court.

The Committee considered the question whether Rule 39 should be amended. The clerk representative said that the clerks in most circuits want to tax the whole thing in the court of appeals. Mr. Byron suggested the possibility of deleting (e)(4). A judge member said that he thought that the rule was correct as written.

Following further discussion the sense of the Committee was that the Chair should communicate with the chief judges of the various circuits about the problem, with the goal of finding a resolution without amending the rules. The motion to remove the item from the agenda was made, seconded, and approved.

Item Nos. 08-AP-A, 11-AP-C, 11-AP-D, 15-AP-A, 15-AP-D, 15-AP-H (Electronic Filing and Service)

These items concern electronic filing, signature, service, and proof of service. The reporter described the progress that the Civil Rules Committee had made on revising the Civil Rules to address these subjects. Several members of the Committee expressed agreement with the four major characteristics of the reform: First, parties represented by counsel must file electronically absent an exception, such as an exception for good cause. Second, use of the court's electronic filing system constitutes a signature. Third, parties will serve papers through the court's electronic filing system. Fourth, no proof of service is required for papers served through the electronic filing system.

The Committee concluded that the reporter should prepare a discussion draft of Appellate Rule 25 that would follow the most recent draft of Civil Rule 5. The reporter would then circulate the draft to the committee members by email. The goal is to present a proposed revision of Appellate Rule 25 to the Standing Committee in June.

The Committee also directed the reporter to determine whether other Appellate Rules would also require amendment to address electronic filing.

Memo on Circuit Splits

The Committee also considered a memorandum prepared by Mr. Webb. The memorandum listed a number of circuit splits on issues under the Appellate Rules. The Committee decided to study three of these issues for possible inclusion on its agenda in the future: (1) whether delay by prison authorities in delivering the order from which the prisoner wishes to appeal can be used in computing time for appeal under Rule 4(c); (2) whether the costs for which a bond may be required under Rule 7 can include attorney's fees; and (3) whether "the court" in Rule 39(a)(4) refers to the

appellate court or the district court. The Committee also agreed to study the other issues in the memorandum further.

Adjournment

Judge Colloton thanked Justice Eid for her 6 years of service on the Committee and for providing her input from the perspective of a state court. Judge Colloton also thanked Prof. Barrett for her service on the Committee and for hosting the meeting in Chicago. Judge Colloton noted that this was the last meeting for Judge Sutton at the Appellate Rules Committee. He also noted that this was the last meeting for Mr. Gans and himself. He noted that Mr. Gans has served for in clerk's office of the Eighth Circuit for 33 years. Judge Colloton thanked him for his insight and polling of his colleagues.

Judge Sutton announced that Judge Neil Gorsuch will be the new chair of this committee. Judge Sutton thanked Judge Colloton for his four years of service, care, and fair-mindedness. Judge Sutton also read comments from former reporter Cathie Struve who complimented and thanked Judge Colloton for his service as chair of the Committee.

The meeting adjourned.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

MEMORANDUM

TO: Hon. Jeffrey S. Sutton, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Steven M. Colloton, Chair
Advisory Committee on Appellate Rules

RE: Report of Advisory Committee on Appellate Rules

DATE: December 15, 2014

I. Introduction

The Advisory Committee on Appellate Rules met on October 20, 2014 in Washington, D.C. The Committee discussed four projects, removed one of those projects from its study agenda, and discussed (but did not add to its agenda) an additional proposal.

The Committee has scheduled its next meeting for April 23 and 24, 2015, in Philadelphia.

Part II of this report provides an overview of the Committee's projects. Detailed information about the Committee's activities can be found in the Reporter's draft of the minutes of the October meeting and in the Committee's study agenda, both of which are attached to this report.

II. Information Items

The Committee is considering whether to propose amending the Appellate Rules to require disclosures in addition to those currently required by Appellate Rules 26.1 and 29(c). A number of circuits have local provisions that require such additional disclosures, and the question is whether such disclosures elicit information that may affect a judge's analysis of his or her recusal obligations. Topics on which the Committee is focusing include disclosures in bankruptcy matters; disclosures concerning victims in criminal cases; disclosures by intervenors and amici; and disclosures by non-governmental, non-human entities other than corporations. The Committee is working in close coordination with the Committee on Codes of Conduct and will likely seek additional guidance from that Committee as the project progresses.

The Committee is also considering the possibility of amending Rule 41 to address whether a court of appeals has authority to stay its mandate following a denial of certiorari, and whether such a stay requires an order or can result from the court's inaction. Rule 41 provides in relevant part as follows:

> **Rule 41. Mandate: Contents; Issuance and Effective Date; Stay**
>
> * * *
>
> (b) WHEN ISSUED. The court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time.
>
> * * *
>
> (d) STAYING THE MANDATE.
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> * * *
>
> (2) *Pending Petition for Certiorari.*
>
> * * *
>
> (D) The court of appeals must issue the mandate immediately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed.

The Supreme Court twice has reserved judgment on whether Rule 41(d)(2)(D) requires a court of appeals to issue its mandate immediately after the Supreme Court files an order denying a petition for certiorari, or whether Rule 41(b) allows a court of appeals to "extend the time" for

issuing a mandate even after certiorari is denied. The Court also has noted an open question whether Rule 41(b) allows a court of appeals to "extend the time" for issuing its mandate by mere inaction, or whether an order is required.

A number of Committee members have expressed support for adopting language that would require that stays be effected "by order." As to the authority of the court of appeals to stay the mandate after denial of certiorari, the Supreme Court, in *Ryan v. Schad*, 133 S. Ct. 2548 (2013) (per curiam), and *Bell v. Thompson*, 545 U.S. 794 (2005), held that if such authority exists it can be exercised only in extraordinary circumstances. In *Calderon v. Thompson*, 523 U.S. 538 (1998), the Court opined that the courts of appeals are recognized to have an inherent power *to recall* their mandates, in extraordinary circumstances, subject to review for an abuse of discretion.

The Committee is considering whether to propose incorporating the extraordinary-circumstances requirement into Rule 41; whether to propose instead amending Rule 41 to ban stays of the mandate after the denial of certiorari; or whether to propose no amendment addressing the court's authority to stay the mandate after the denial of certiorari. The opinions concurring in and dissenting from the grant of rehearing en banc in *Henry v. Ryan*, 766 F.3d 1059 (9th Cir. 2014), illustrate the continuing salience of these issues.

The Committee, like the other advisory committees, has been considering the possibility of amendments that would take account of the shift to electronic filing and service. Committee members have expressed interest in adopting the first part of the template rule prepared by the Case Management / Electronic Case Filing ("CM/ECF") Subcommittee; such a rule would define "information in written form" to include electronic materials. Committee members have also expressed interest in considering the possibility of amending the Appellate Rules to mandate electronic filing and authorize electronic service, subject to an exception based on good cause and an additional exception based on local rules that permit or require paper filing or service. The Committee will also consider whether to amend Appellate Rule 25(d) so that it would no longer require a proof of service in instances when service was effected by means of the notice of docket activity generated by CM/ECF.

The Committee looks forward to working with the Civil Rules Committee on matters of mutual interest. The Civil / Appellate Subcommittee has been reconstituted and will consider two projects in the near future. One of those projects concerns the doctrine of "manufactured finality" i.e., the doctrine that addresses instances when a would-be appellant seeks to manufacture appellate jurisdiction over an appeal from the disposition of fewer than all the claims in an action by dismissing the remaining claims. The Subcommittee will also consider possible amendments to Civil Rule 62's treatment of supersedeas bonds. Meanwhile, the Committee anticipates that the mini-conferences currently being planned by the Civil Rules Committee's Rule 23 Subcommittee will provide an opportunity to gather further information concerning appeals by class action objectors.

The Committee removed from its agenda an item relating to appeals from orders concerning attorney-client privilege. In the wake of the Supreme Court's decision in *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100 (2009), the Committee received a suggestion that it draft a rule that would authorize permissive interlocutory appeals from attorney-client privilege rulings. The Committee gave this proposal serious consideration and noted the difficulty that a litigant can face in seeking immediate appellate review of such rulings. However, members foresaw challenges in drafting appropriately tailored language. And some members questioned the need for rulemaking on this topic, particularly in light of the possibility of mandamus review.

The Committee discussed, but decided not to add to its agenda, a suggestion that the Appellate Rules be amended to state that Appellate Rule 29 furnishes the sole means by which a non-litigant may communicate with the court about a pending case. The suggestion arose after an incident in which such communications had been made directly to judges of a court of appeals. Participants in the Committee's discussion felt that there exist other, less formal means for channeling such communications to the clerk's office, and participants also questioned whether the conduct of non-party non-lawyers is an appropriate topic for treatment in the Appellate Rules.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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MEMORANDUM

TO: **Hon. Jeffrey S. Sutton, Chair**
Committee on Rules of Practice and Procedure

FROM: **Hon. Steven M. Colloton, Chair**
Advisory Committee on Appellate Rules

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

DATE: **May 8, 2014**

I. Introduction

The Advisory Committee on Appellate Rules met on April 28 and 29 in Newark, New Jersey. The Committee approved for publication five sets of proposed amendments, relating to (1) the inmate-filing provisions under Rules 4(c) and 25(a); (2) tolling motions under Rule 4(a)(4); (3) length limits for appellate filings; (4) amicus briefs in connection with rehearing; and (5) Rule 26(c)'s "three-day rule." The Committee discussed a number of other items and removed seven items from its study agenda.

Part II of this report discusses the proposals for which the Committee seeks approval for publication. Part III covers other matters.

The Committee has scheduled its next meeting for October 20, 2014, in Washington, DC.

Detailed information about the Committee's activities can be found in the Reporter's draft of the minutes of the April meeting and in the Committee's study agenda, both of which are attached to this report.

II. Action Items – for Publication

The Committee seeks approval for publication of five sets of proposed amendments as set forth in the following subsections.

A. Inmate filings: Rules 4(c)(1) and 25(a)(2)(C), Forms 1 and 5, and new Form 7

Under the Federal Rules of Appellate Procedure, documents are timely filed if they are received by the court on or before the due date. Rules 4(c)(1) and 25(a)(2)(C) offer an alternative way for inmates to establish timely filing of documents. If the requirements of the relevant rule are met, then the filing date is deemed to be the date the inmate deposited the document in the institution's mail system rather than the date the court received the document. *See generally Houston v. Lack*, 487 U.S. 266 (1988).

The Committee has studied the workings of the inmate-filing rules since 2007, in light of concerns expressed about conflicts in the case law, unintended consequences of the current language, and ambiguity in the current text. Must an inmate prepay postage to benefit from the rule? There are decisions saying that an inmate need not prepay postage if he uses a prison's system designed for legal mail, but must prepay postage if he does not use that system. Must an inmate file a declaration or notarized statement averring the date of filing to benefit from the rule? One court held, over a dissent from denial of rehearing en banc, that a document is untimely if there is no declaration or notarized statement, even when other evidence such as a postmark shows that the document was timely deposited in the prison mail system. When must an inmate submit a declaration designed to demonstrate timeliness? One circuit has published inconsistent decisions, holding in one case that the declaration must accompany the notice and in another that the declaration may be filed at a later date.

The Committee seeks approval to publish proposed amendments that are designed to clarify and improve the inmate-filing rules. The proposed amendments to Rules 4(c)(1) and 25(a)(2)(C) and Forms 1 and 5, and proposed new Form 7, are set out in the enclosure to this report.

The amendments to Rules 4(c)(1) and 25(a)(2)(C) would make clear that prepayment of postage is required for an inmate to benefit from the inmate-filing provisions, but that the use of an institution's legal mail system is not. The amendments clarify that a document is timely filed if it is accompanied by evidence—a declaration, notarized statement, or other evidence such as postmark and date stamp—showing that the document was deposited on or before the due date and that postage was prepaid. New Form 7 is a suggested form of declaration that would satisfy the Rule. Forms 1 and 5 (which are suggested forms of notices of appeal) are revised to include a reference alerting inmate filers to the existence of Form 7. The amendments also clarify that if sufficient evidence does not accompany the initial filing, then the court of appeals has discretion to permit the later filing of a declaration or notarized statement to establish timely deposit.

B. Tolling motions: Rule 4(a)(4)

The Committee seeks approval to publish the proposed amendment to Appellate Rule 4(a)(4) set out in the enclosure to this report. The amendment addresses a circuit split concerning whether a motion filed outside a non-extendable deadline under Civil Rules 50, 52, or 59 counts as "timely" under Rule 4(a)(4) if a court has mistakenly ordered an "extension" of the deadline for filing the motion.

Caselaw in the wake of *Bowles v. Russell*, 551 U.S. 205 (2007), holds that statutory appeal deadlines are jurisdictional but that nonstatutory appeal deadlines are nonjurisdictional claim-processing rules. The statutory appeal deadline for civil appeals is set by 28 U.S.C. § 2107. The statute does not mention so-called "tolling motions" filed in the district court that have the effect of extending the appeal deadline, but "§ 2107 was enacted against a doctrinal backdrop in which the role of tolling motions had long been clear." 16A Wright et al., Federal Practice & Procedure § 3950.4. At the time of enactment, "caselaw stated that certain postjudgment motions tolled the time for taking a civil appeal." *Id*. Commentators have presumed, therefore, that Congress incorporated the preexisting caselaw into § 2107, and that appeals filed within a recognized tolling period may be considered timely consistent with *Bowles*.

The federal rule on tolling motions, Appellate Rule 4(a)(4), provides that "[i]f a party timely files in the district court" certain post-judgment motions, "the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion." A number of circuits have ruled that the Civil Rules' deadlines for post-judgment motions are nonjurisdictional claim-processing rules. On this view, where a district court mistakenly "extends" the time for making such a motion, and no party objects to that extension, the district court has authority to decide the motion on its merits. But does the motion count as a "timely" one that, under Rule 4(a)(4), tolls the time to appeal? The Third, Seventh, Ninth, and Eleventh Circuits have issued post-*Bowles* rulings stating that such a motion does not toll the appeal time. *E.g.*, *Blue v. Int'l Bhd. of Elec. Workers Local Union 159*, 676 F.3d 579, 582-84 (7th Cir. 2012); *Lizardo v. United States*, 619 F.3d 273, 278-80 (3d Cir. 2010). Pre-*Bowles* caselaw from the Second Circuit accords with this position. The Sixth Circuit, however, has held to the contrary. *Nat'l Ecological Found. v. Alexander*, 496 F.3d 466, 476 (6th Cir. 2007).

The Committee feels it is important to clarify the meaning of "timely" in Rule 4(a)(4), because the conflict in authority arises from arguable ambiguity in the current Rule, and timely filing of a notice of appeal is a jurisdictional requirement. The Committee proposes to publish for comment an amendment to the Rule that would adopt the majority view—i.e., that postjudgment motions made outside the deadlines set by the Civil Rules are not "timely" under Rule 4(a)(4). The proposed amendment would work the least change in current law. And, as Judge Diane Wood noted for the court in *Blue*, 676 F.3d at 583, the majority approach tracks the spirit of the Court's decision in *Bowles*, which held that the Court has "no authority to create equitable exceptions to jurisdictional requirements." 551 U.S. at 214.

C. Length limits: Rules 5, 21, 27, 28.1, 32, 35, and 40, and Form 6

The Committee seeks approval to publish for comment amendments to Rules 5, 21, 27, 28.1, 32, 35, and 40, and Form 6, as set out in the enclosure to this report.

The genesis of this project was the suggestion that length limits set in terms of pages have been overtaken by advances in technology, and that use of page limits rather than type-volume limits invites gamesmanship by attorneys. The proposal would amend Rules 5, 21, 27, 35, and 40 to impose type-volume limits for documents prepared using a computer. For documents prepared without the aid of a computer, the proposed amendments would maintain the page limits currently set out in those rules.

A change from page limits to type-volume limits requires a conversion ratio from pages to words. The 1998 amendments transmuted the prior 50-page limit for briefs into a 14,000-word limit. This change appears to have been based on the assumption that one page was equivalent to 280 words (or 26 lines). While the estimate of 26 lines per page appears sound, research indicates that the estimate of 280 words per page is too high. A study of briefs filed under the pre-1998 rules shows that 250 words per page is closer to the mark. (See attached letter of D.C. Circuit Advisory Committee on Procedures, July 14, 1993.) The proposed amendments employ a conversion ratio of 250 words per page for Rules 5, 21, 27, 35, and 40. Although there was a division of opinion within the advisory committee about whether to alter the existing limits for briefs, the proposed amendments approved by the committee shorten Rule 32's word limits for briefs so as to reflect the pre-1998 page limits multiplied by 250 words per page. The proposals correspondingly shorten the word limits set by Rule 28.1 for cross-appeals. A court that desired to maintain the longer word limits could choose, of course, to accept longer briefs.

During consideration of the proposed shift to type-volume limits, the Committee also observed that the rules do not provide a uniform list of the items that can be excluded when computing a document's length. The proposed amendments would add a new Rule 32(f) setting forth such a list.

D. Amicus filings in connection with rehearing: Rule 29

The Committee seeks approval to publish for comment proposed amendments to Rule 29, as set out in the enclosure to this report. The amendments would re-number the existing Rule as Rule 29(a) and would add a new Rule 29(b) to set default rules for the treatment of amicus filings in connection with petitions for rehearing. The proposed amendment would not require any circuit to accept amicus briefs, but would establish guidelines for the filing of briefs when they are permitted.

Attorneys who file amicus briefs in connection with petitions for rehearing understandably seek clear guidance about the filing deadlines for, and permitted length of, such briefs. There is no

federal rule on the topic. *See Fry v. Exelon Corp. Cash Balance Pension Plan*, 576 F.3d 723, 725 (7th Cir. 2009) (Easterbrook, C.J., in chambers). Most circuits have no local rule on point, and attorneys have reported frustration with their inability to obtain accurate guidance.

The proposed amendments would establish default rules concerning timing and length of amicus briefs in connection with petitions for rehearing. In addition, they would incorporate (for the rehearing stage) most of the features of current Rule 29, including the authorization for certain governmental entities to file amicus briefs without party consent or court permission. A circuit could alter the default federal rules on timing, length, and other matters by local rule or by order in a case.

E. Amending the "three-day rule": Rule 26(c)

The Committee seeks approval to publish for comment the proposed amendment to Rule 26(c) that is set out in the enclosure to this report. The amendment would implement a recommendation by the Standing Committee's CM/ECF Subcommittee that the "three-day rule" in each set of national Rules be amended to exclude electronic service. The three-day rule adds three days to a given period if that period is measured after service and service is accomplished by certain methods. Now that electronic service is well-established, it no longer makes sense to include that method of service among the types of service that trigger application of the three-day rule.

The proposed amendment to Rule 26(c) accomplishes the same result as the proposed amendments to Civil Rule 6, Criminal Rule 45, and Bankruptcy Rule 9006, but does so using different wording in light of Appellate Rule 26(c)'s current structure. Under that structure, the applicability of the three-day rule depends on whether the paper in question is delivered on the date of service stated in the proof of service; if so, then the three-day rule is inapplicable. The change would thus be accomplished by amending the rule to state that a paper served electronically is deemed (for this purpose) to have been delivered on the date of service stated in the proof of service.

III. Information Items

The Committee is studying proposals to amend the Rules to address appeals by class-action objectors. The Committee has heard from proponents of two different approaches. The first proposal would amend Appellate Rule 42 to bar the dismissal of an objector appeal if the objector received anything of value in exchange for dismissing the appeal. The second proposal would authorize the requirement of a cost bond (and the later imposition of costs) reflecting the full costs of delay in implementation of the class settlement as a result of the appeal. The Committee has benefited from informative research by Marie Leary of the FJC, who has studied class-action-objector appeals in three circuits. The Committee intends to consider the matter further, in consultation with the Civil Rules Committee's Rule 23 Subcommittee.

The Committee is considering whether to clarify the operation of Appellate Rule 41,

concerning issuance of the mandate. Two recent cases – *Ryan v. Schad*, 133 S. Ct. 2548 (2013) (per curiam), and *Bell v. Thompson*, 545 U.S. 794 (2005), raise several issues concerning Rule 41. One issue is whether Rule 41 requires (or should require) a court of appeals to issue the mandate immediately after the filing of the Supreme Court's order denying the petition for writ of certiorari in a case. Another is whether a court of appeals may extend the time for the mandate to issue through mere inaction or must act by order. A third is whether Rule 41(d) should be amended to clarify whether a stay of the mandate continues through denial of a petition for rehearing by the Supreme Court.

The Committee is also considering whether the disclosure provisions in Appellate Rules 26.1 and 29 elicit all the information that a judge would wish to know in considering recusal or disqualification issues. Exploration of this topic likely would benefit from consultation with the Judicial Conference Committee on Codes of Conduct.

The Committee has received a suggestion to consider the appealability of orders concerning attorney-client privilege. This agenda item arises from the Court's observation in *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100 (2009), and *Swint v. Chambers County Commission*, 514 U.S. 35 (1995), that the rulemaking process is the preferred means for determining whether and when prejudgment orders should be immediately appealable. Recognizing that a project aimed at a global overhaul of interlocutory appeal jurisdiction would be unmanageable, the Committee intends to focus more narrowly on specific categories of appeals where a proponent urges an amendment to the rules.

The Committee removed seven items from its agenda. One of those items related to a proposal that Appellate Rules 3 and 6 be amended in light of the shift to electronic filing; although that proposal may eventually merit consideration as part of a broader package of e-filing-related amendments, the Committee decided to focus for the moment on matters prioritized by the CM/ECF Subcommittee, such as the three-day rule amendment noted in Part II.E of this memo. Two items related to the Appellate Rules' disclosure requirements, but raised particular issues that did not warrant continued study in connection with the Committee's ongoing consideration (noted above) of possible changes to those requirements. A fourth item concerned a suggestion by Justices Ginsburg, Scalia, and Breyer that the Rules Committees consider ways to expedite proceedings under the International Child Abduction Remedies Act. The Committee's consensus is that this issue is best addressed, in the first instance, by judicial education rather than by an attempt to establish docket priorities by court rule.

The Committee also removed from its agenda an item concerning audiorecordings of appellate arguments. Although Committee members point out the desirability of prompt online posting of such audiorecordings, this matter appears to fall within the primary jurisdiction of the Judicial Conference Committee on Court Administration and Case Management. The Committee considered, and removed from its agenda, a proposal to peg the due date for amicus briefs to the due date, rather than the filing date, of the brief of the party supported by the amicus. The Committee

reasoned that putative amici have ready access to electronic dockets in cases of interest, and that the proposed change would pose a significant risk of interfering with the parties' briefing schedule, given the default rule that the appellee's deadline runs from the date of service (not the due date) of the appellant's brief. The Committee also rejected a proposal to permit party consent to extend the amicus's filing deadline, out of concern that such a change was not needed and could meet with opposition by judges who wish to avoid delay in case processing. Finally, the Committee removed from its agenda an item relating to a proposal by Judge Jon O. Newman to amend Criminal Rule 52 concerning the standard of appellate review for sentencing errors. The Committee noted that the Criminal Rules Committee has appointed a subcommittee to study this proposal, and felt that the proposal to amend a Criminal Rule is within the jurisdiction of that Committee.

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MEMORANDUM

DATE: December 16, 2013

TO: Judge Jeffrey S. Sutton, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Judge Steven M. Colloton, Chair
Advisory Committee on Appellate Rules

RE: Report of Advisory Committee on Appellate Rules

I. Introduction

The Advisory Committee on Appellate Rules canceled its meeting scheduled for October 3-4, 2013, due to the lapse in appropriations. Thus, rather than report on actions taken by the Committee, I highlight in Part II of this Report some of the Committee's current projects on which it would welcome input from the Standing Committee.

The Committee's full study agenda is attached. The Committee's next meeting is scheduled for April 28-29, 2013.

II. Highlights of the Committee's current work

Parts II.A and II.B discuss two projects that address possible amendments to Rule 4's treatment of the deadlines for filing notices of appeal. Parts II.C and II.D discuss two projects concerning requirements for filings in the courts of appeals one concerning length limits, and one concerning amicus filings in connection with petitions for panel rehearing and/or rehearing en banc.

A. Rule 4(a)(4)

A lopsided circuit split has developed concerning whether a motion filed within a purported extension of a non-extendable deadline under Civil Rules 50, 52, or 59 counts as "timely" under Appellate Rule 4(a)(4), and the Committee is considering whether and how to amend the Rule to answer this question.

Caselaw in the wake of *Bowles v. Russell*, 551 U.S. 205 (2007), holds that statutory appeal deadlines are jurisdictional but that nonstatutory appeal deadlines are nonjurisdictional claim-processing rules. Rule 4(a)(4) provides that "[i]f a party timely files in the district court" certain post-judgment motions, "the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion." The statutory provision setting the deadlines for civil appeals 28 U.S.C. § 2107 does not mention such tolling motions.

A number of circuits have ruled that the Civil Rules' deadlines for post-judgment motions are nonjurisdictional claim-processing rules. In this view, where a district court purports to extend the time for making such a motion, and no party objects to that extension, the district court has authority to decide the motion on its merits. But does the motion count as a "timely" one that, under Appellate Rule 4(a)(4), tolls the time to appeal? The Third, Seventh, Ninth, and Eleventh Circuits have issued post-*Bowles* rulings stating that such a motion does not toll the appeal time, and pre-*Bowles* caselaw from the Second Circuit accords with this position. However, the Sixth Circuit has held to the contrary.

There is substantial support among Committee members for clarifying the meaning of "timely" in Rule 4(a)(4). This provision tolls a jurisdictional appeal period, and its meaning should be clear and uniform across the circuits. The first and most basic question in considering such an amendment is whether to implement the majority approach (i.e., that postjudgment motions made outside the deadlines set by the Civil Rules are never "timely" under Rule 4(a)(4)) or the minority approach (i.e., that a motion made without a timeliness objection within a purported extension of the relevant deadline can qualify as "timely" under Rule 4(a)(4)).

An amendment adopting the majority approach would work the least change in current law. It would also make the answer explicit in the Rule's text, and thus more accessible to pro se litigants and less-experienced lawyers. Such an amendment arguably tracks the spirit of the Court's decision in *Bowles*, which overruled the Court's prior decisions concerning the "unique circumstances" doctrine "to the extent they purport to authorize an exception to a jurisdictional rule." Of the initial trio of Supreme Court cases establishing the unique circumstances doctrine, two involved erroneous district court assurances concerning the timeliness of postjudgment motions that were in fact untimely; thus, interpreting "timely" in Rule 4(a)(4) to require compliance with the relevant Civil Rules deadline seems to accord with the *Bowles* Court's overruling of the unique circumstances doctrine with respect to jurisdictional appeal deadlines. Drafting such an amendment would be

relatively straightforward, and some Committee members have noted that such an amendment would help to clarify and simplify the computation of appeal deadlines. Here is a sketch of a possible new Rule 4(a)(4)(C) that would implement the majority view:

> (C) **Timely Defined.** For purposes of Rule 4(a)(4)(A), a motion is timely if it is made within the time allowed by the Federal Rules of Civil Procedure. A motion made after that time is not rendered timely for purposes of Rule 4(a)(4)(A) by:
>
> (i) a court order that exceeds the court's authority (if any) to extend the deadline for the motion under the Federal Rules of Civil Procedure, or
>
> (ii) another party's consent or failure to object.

A cross-reference to this new provision could be added in Rule 4(a)(4)(A) itself:

> (A) If a party ~~timely~~ files in the district court any of the following motions under the Federal Rules of Civil Procedure and the motion is timely as defined in Rule 4(a)(4)(C), the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

As noted above, an amendment adopting the minority approach could be seen as an effort to change one effect of the *Bowles* decision. Some Committee members have expressed hesitancy to attempt to countermand via a rule amendment a result that the Supreme Court adopted via decisional law. On the other hand, there have been past instances where a rule amendment was designed to change the result of a Supreme Court decision; one example is the 1993 amendment to Appellate Rule 3(c), which responded to *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988). And some Committee members have expressed support for an approach that would preserve appeal rights for litigants who delay filing a notice of appeal in reliance upon a court order purporting to extend a deadline for a postjudgment motion. Drafting such an amendment seems more challenging than drafting an amendment to implement the majority approach, in part because the amendment would need to make clear what sort of errors can be forgiven and what sort cannot. Here is a sketch of one possible alternative:

> **(C) Timely Defined.** For purposes of Rule 4(a)(4)(A), a motion is timely if it is:
>
> (i) made within the time allowed by the relevant Federal Rule of Civil Procedure; or
>
> (ii) made within the time designated for making the motion by a court order, if the court order is entered within the time limit prescribed by this

Rule 4(a) for filing a notice of appeal.

B. Rule 4(c)'s inmate-filing provision

This project concerns Rule 4(c)(1)'s inmate-filing provision for notices of appeal. The Committee is considering amendments to the Rule that might address, *inter alia*, whether an inmate must prepay postage in order to benefit from the inmate-filing rule; whether and when an inmate must provide a declaration attesting to the circumstances of the filing; whether the inmate must use a legal mail system when one exists in the relevant institution; and whether a represented inmate can benefit from the inmate-filing rule.

Appellate Rule 4(c)(1) provides:

> If an inmate confined in an institution files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

The original impetus for the Committee's study of this rule was Judge Diane Wood's suggestion that the Committee consider clarifying whether Rule 4(c)(1)'s inmate-filing rule requires prepayment of postage. The Seventh Circuit has held that when the institution has no legal mail system, the third sentence of Rule 4(c)(1) requires that postage be prepaid. *See United States v. Craig*, 368 F.3d 738, 740 (7th Cir. 2004). By contrast, the Seventh and Tenth Circuits have indicated that, if the institution has a legal mail system and the inmate uses that system, prepayment of postage is not required for timeliness. *See Ingram v. Jones*, 507 F.3d 640, 644 (7th Cir. 2007), and *United States v. Ceballos-Martinez*, 387 F.3d 1140, 1144 (10th Cir. 2004). The Committee has discussed the possibility of eliminating the postage-prepayment requirement, either for all inmates, or for inmate filers who certify that they are indigent, but has not reached a consensus in support of either of those approaches. Both Supreme Court Rule 29.2 and Rule 4(c) always have required inmates to prepay postage, and some Committee members are reluctant to eliminate that requirement. The Constitution requires the state or federal government to provide indigent inmates with stamps to mail certain legal documents to court, *Bounds v. Smith*, 430 U.S. 817, 824-25 (1977), so an inmate presumably would have a remedy if enforcement of the prepayment requirement interfered with the inmate's constitutional right of access to the courts.

The Committee also has discussed whether to amend the Rule to make clear that the declaration mentioned in the Rule suffices to show timely filing but is not required if timeliness can be shown by other evidence. Participants in the Committee's discussions have observed that it is

useful for the Rule to include a directive to the inmate to submit the declaration, because the declaration provides helpful information and preserves that information while recollections are fresh. But participants noted it may be better policy to allow an inmate to provide proof of timely deposit even if the inmate initially did not provide a declaration. One possible approach might be to permit the inmate to show good cause why the absence of the declaration should be excused. A "good cause" standard, however, could give rise to satellite litigation. Instead, one might add language that explicitly contemplates alternative means of showing timeliness: "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~~ that sets forth the date of deposit and states that first-class postage has been prepaid. Timely filing also may be shown by other [proof] [evidence] that the notice was timely deposited with first-class postage prepaid."

Committee members also have discussed the possibility of promulgating an official form that would walk an inmate through statements that would suffice to establish eligibility for the inmate-filing rule. These Committee members recognize that there is a trend away from reliance on official forms, as evidenced by the published proposals to abrogate Civil Rule 84 and almost all of the Official Forms that accompany the Civil Rules. But the Civil Rules proposal seems consistent with an approach that retains a few select forms as an official part of the Rules, and that selects those forms for retention on the basis of their salience to and entwinement with a particular mechanism set by a Rule. Forms may be especially useful to pro se litigants. And assisting pro se litigants in turn assists the Clerk's Office that must process their filings. Use of an official form could reduce the time needed for a clerk or a judge to review the filing.

Participants in the Committee's discussions have questioned the usefulness of the current Rule's requirement that "[i]f an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule." The 1998 Committee Note provided this rationale for the requirement: "Some institutions have special internal mail systems for handling legal mail; such systems often record the date of deposit of mail by an inmate, the date of delivery of mail to an inmate, etc. The Advisory Committee amends the rule to require an inmate to use the system designed for legal mail, if there is one, in order to receive the benefit of this subdivision."

Use of a mail system that logs the date of the inmate's deposit is desirable. But the Rule itself does not actually refer to a mail system that logs the date; it instead refers to "a system designed for legal mail." Given that inmates are unlikely to consult the 1998 Committee Note when applying Rule 4(c)(1), it might be desirable to revise the Rule to provide a functional definition. For example, the Rule could state: "If the institution has a mail system that will log the date when an inmate deposits a piece of mail with the institution for mailing, the inmate must use that system to receive the benefit of this rule." Another alternative is to delete this sentence altogether a change that would bring Rule 4(c)(1) into closer parallel with Supreme Court Rule 29.2.

C. Length limits

The Appellate Rules set length limits for briefs using a type-volume formula plus a safe harbor in the form of a (shorter) page limit. But the length limits for rehearing petitions and some other papers are set in pages, and the Committee is considering whether to propose changes in the Rules that set those length limits.

The Committee is focusing on two possible options. One would replace the page limits with a type-volume-plus-safe-harbor provision modeled on the Rules' length limits for briefs. Under that approach, the existing page limits in Rules 5, 21, 27, 35, and 40 would be shortened, and an alternative would be added in each rule that would approximate the existing page limits through the use of type-volume limits. The Committee would need to determine how much to shorten the page limits; the goal would be to provide a workable page limit for those who would find it difficult to compute a type-volume limit, without introducing an incentive for lawyers to circumvent the type-volume limits by using the page limits. One principal concern with this approach is that pro se filers and others who must file typewritten or handwritten pleadings would be allowed fewer pages than under the current rules.

The other option would retain the current page limits for papers prepared without the aid of a computer, but would set roughly equivalent type-volume limits for papers prepared on computers. The idea here is that attorneys who typically prepare pleadings by computer would have little incentive to shift to typewritten or handwritten pleadings in order to circumvent the type-volume limitation by using page limits. But an amendment that applies type-volume limitations to computer-aided papers would not disadvantage pro se filers. Research discovered at least one set of state rules that distinguishes between papers prepared by computer and papers prepared by other means. *See* Cal. Rules of Court Rule 8.204(c) ("(1) A brief produced on a computer must not exceed 14,000 words, including footnotes.… (2) A brief produced on a typewriter must not exceed 50 pages.").

The Committee's inquiries have also disclosed evidence suggesting that the 1998 amendments to Rule 32(a)(7), adopting a type-volume limitation of 14,000 words for a principal brief to replace the former 50-page limit, caused an increase in the permitted length of a brief. One participant observed that, prior to 1998, the D.C. Circuit had adopted a word limit and had chosen 12,500 words as the appropriate limit. The Committee's liaison to the Circuit Clerks researched this question further. Based on the average word count per page in 210 briefs filed by attorneys during the last four years in which old Rule 28(g) was in effect, the equivalent of 50 pages would have been 13,000 words. The clerk also used CM/ECF to research the word length of principal briefs filed in 2008 under the current type-volume limits. In a set of more than 1,000 briefs, only some 15 percent were more than 12,500 words. The Committee may consider whether the word count should be adjusted as part of the length-limit project.

D. Amicus briefs on rehearing

The second brief-related project concerns the possibility of addressing amicus filings in connection with petitions for panel rehearing and/or rehearing en banc. Matters that could be addressed by a proposed rule include length, timing, and other topics that Rule 29 addresses with respect to amicus filings at the merits-briefing stage.

A principal policy question is whether the federal rules should address this matter at all. Attorneys who file briefs in support of petitions for rehearing understandably seek clear guidance about the filing deadlines for, and permitted length of, such briefs. Most circuits have no local rule on the topic, and attorneys have reported frustration with their inability to obtain accurate guidance. From the perspective of the courts, however, the Committee has heard expressions of concern that a new appellate rule concerning amicus briefs at the rehearing stage may encourage a proliferation of filings at that stage. The Committee will consider these competing views in its evaluation.

A related question is whether any new rule on this subject should permit a circuit to opt out of any its provisions by local rule or by order in a case. The Committee is aware of the Rules Committees' general reluctance to encourage local rulemaking. But in this instance, there may well be reasons for local variation, given that rules concerning amicus filings need to mesh with the rules and practices concerning the parties' filings and with the court's internal practices in connection with rehearing petitions.

As to the particulars of a possible new rule, one issue is length. Appellate Rule 29(d) provides that amicus filings in connection with the merits briefing of an appeal are presumptively limited to half the permissible length of "a party's principal brief." Appellate Rules 35(b) and 40(b) presumptively limit a party's rehearing petition to 15 pages; thus, if one were to apply the same half-length approach to amicus filings in support of a rehearing petition, such filings would be limited to 7 ½ pages. The few existing local circuit provisions allow greater lengths, ranging roughly from 10 to 15 pages. The Committee's discussions may focus on whether to follow the half-length approach (which, rounding up, would produce a limit of 8 pages), or whether to choose a length limit within the 10- to 15-page range. The Committee may also discuss whether to specify length limits for amicus filings in opposition to a rehearing petition.

Another question is timing. Appellate Rule 29(e) provides that an amicus must file its brief and motion "no later than 7 days after the principal brief of the party being supported is filed." The Appellate Rules set a presumptive deadline (in most cases) of 14 days (after entry of judgment) for a party to file a petition for hearing and/or rehearing en banc. For amicus filings at the rehearing stage, questions arise whether the deadline should be the same as the party's deadline or a certain number of days later than the party's deadline. Using the later deadline would track Rule 29's approach and also would accord with three of the four local circuit rules on point. Some participants have suggested that amicus briefs will be more useful and less redundant if the amici have an

opportunity to review the party's brief before filing a brief in support. On the other hand, courts of appeals may dislike any rule that extends the time for resolving rehearing petitions, and a later deadline for amicus briefs could do so. *Cf. Fry v. Exelon Corp. Cash Balance Pension Plan*, 576 F.3d 723, 725 (7th Cir. 2009) (Easterbrook, Chief Judge, in chambers). If the Committee proceeds in this area, then it also would have to consider whether to address amicus filings in support of the party opposing rehearing and amicus filings that support neither party.

The Committee may also consider whether a proposed rule should address other questions concerning amicus filings in connection with rehearing. See for example the following provisions concerning merits briefs: Rules 29(a) (requirement of court leave or party consent, plus exceptions); 29(b) (content of motion for leave to file); 29(c) (requirements of disclosure and form); 29(g) (oral argument). Should a new rule on amicus filings incorporate, as default provisions, some or all of Rules 29(a) (c)? The Committee might, for example, consider subjecting later amicus filings to the disclosure requirements set by Rule 29(c). It may be less urgent to address matters of form than matters of disclosure; on the other hand, the application of Rule 32's form requirements to amicus filings in connection with rehearing could be relatively uncontroversial. A national rule could also set default rules addressing whether an amicus must obtain court permission in order to file a brief. One option would be to apply current Rule 29(a), thus allowing certain governmental amici to file without party consent or court leave and allowing any amicus to file without court leave if the parties consent. Another option would be to require all amici to obtain court leave in order to file a brief in connection with a rehearing petition.

The Committee would also need to consider where to place any such provisions. Placing the new provisions in Rule 29 would allow would-be amici to find all of the amicus-specific provisions in one rule, although some renumbering would be required. An alternative would be to add the new provisions to Rules 35 and 40, though that could cause some redundancy.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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MEMORANDUM

To: Honorable Jeffrey S. Sutton, Chair
Standing Committee on Rules of Practice and Procedure

From: Honorable Steven M. Colloton, Chair
Advisory Committee on Federal Rules of Appellate Procedure

Date: May 8, 2013

Re: Report of the Advisory Committee on Appellate Rules

I. Introduction

The Advisory Committee on Appellate Rules met on April 22 and 23, 2013, in Washington, DC. The Committee gave final approval to proposed amendments to Appellate Rule 6. The Committee removed nine items from its study agenda and discussed various other agenda items.

Part II of this Report discusses the proposed amendments to Rule 6, for which the Committee seeks final approval. Part III discusses other matters.

The Committee has scheduled its next meeting for October 3-4, 2013, at the Seton Hall Law School in Newark, NJ.

Detailed information about the Committee's activities can be found in the Reporter's draft of the minutes of the April meeting[1] and in the Committee's study agenda, both of which are attached to this report.

[1] The minutes have not yet been approved by the Committee.

II. Action Item for Final Approval: Proposed Amendments to Appellate Rule 6

As discussed in the report of the Bankruptcy Rules Committee, that Committee seeks final approval of proposed amendments to Part VIII of the Bankruptcy Rules – the rules that govern appeals from bankruptcy court to a district court or bankruptcy appellate panel ("BAP"). In tandem with that project, the Appellate Rules Committee seeks final approval of proposed amendments to Appellate Rule 6 (concerning appeals to the court of appeals in a bankruptcy case).

The proposed amendments to Appellate Rule 6 (which are set out in the enclosure to this report) would (1) update that Rule's cross-references to the Bankruptcy Part VIII Rules, (2) amend Rule 6(b)(2)(A)(ii) to remove an ambiguity dating from the 1998 restyling, (3) add a new Rule 6(c) to address permissive direct appeals from the bankruptcy court under 28 U.S.C. § 158(d)(2), and (4) revise Rule 6 to take account of the range of methods available now or in the future for dealing with the record on appeal.

The Appellate Rules do not expressly address permissive direct appeals from a bankruptcy court to a court of appeals under 28 U.S.C. § 158(d)(2). When Section 158(d)(2) was enacted 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, because BAPCPA established interim procedures for administering the new direct appeals mechanism. Some of those interim procedures were displaced by the 2008 addition of subdivision (f) in Bankruptcy Rule 8001. The Committee now considers it appropriate to specify how the Appellate Rules apply to direct appeals under Section 158(d)(2).

Proposed Appellate Rule 6(c) would treat the record on direct appeals differently than existing Rule 6(b) treats the record on bankruptcy appeals from a district court or BAP. Rule 6(b) contains a streamlined procedure for redesignating and forwarding the record on appeal, because in the appeals covered by Rule 6(b), the appellate record already will have been compiled for purposes of the appeal to the district court or the BAP. In a direct appeal, the record generally will be compiled from scratch. The closest model for the compilation and transmission of the bankruptcy court record is the set of rules chosen by the Bankruptcy Rules Part VIII project for appeals from the bankruptcy court to the district court or the BAP. Thus, proposed Rule 6(c) 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.

Both the Bankruptcy Rules Part VIII project and the project to revise Appellate Rule 6 have highlighted changes in the treatment of the record. The Appellate Rules were drafted on the assumption that the record on appeal would be available only in paper form. The proposed Part VIII Rules are drafted with a contrary presumption in mind: The default principle under those Rules is that the record will be made available in electronic form. In revising Rule 6(b) and in drafting new Rule 6(c), the Appellate Rules Committee adopted language that can accommodate the various ways in which the lower-court record could be made available to the

court of appeals – e.g., in paper form, in electronic files that can be sent to the court of appeals, or by means of electronic links. Such language seems advisable in the light of the shift to electronic filing; and such language seems particularly salient in the case of proposed Rule 6(c) because that Rule will incorporate by reference the Part VIII Rules that deal with the record on appeal.

A. Text of proposed amendments and Committee Note

The Committee recommends final approval of the proposed amendments to Rule 6 as set out in the enclosure to this report.

B. Changes made after publication and comment

The Committee received one comment on the proposed amendments to Rule 6, from Judge S. Martin Teel, Jr., a United States Bankruptcy Judge in the District of Columbia. Judge Teel's suggestions are described in the enclosure to this report. The Committee decided that the suggestions warrant further study, but that it was not advisable to implement them in the context of the current proposal. Instead, the Committee added Judge Teel's suggestions to its agenda for future consideration. The Committee made no change in the proposal as published.

III. Information Items

At its April 2013 meeting, the Committee reviewed, and removed from its agenda, a number of items that had lingered on the docket for some years. These items concerned the operation of Civil Rule 58(a)'s separate document requirement; the possibility of permitting 1.5-spaced or double-sided briefs; the use of audiorecordings in lieu of transcripts; appendices to petitions for permission to appeal; appellate costs; mandamus practice under the Crime Victims' Rights Act; and an inquiry from the Committee on Federal-State Jurisdiction concerning appellate review of remand orders. Each of these items is discussed in more detail in the minutes of the April meeting.

The Committee also discussed, and decided to remove from its agenda, an item that arose from *Chafin v. Chafin*, 133 S. Ct. 1017 (2013). The opinions in *Chafin* underscore the need for prompt disposition of proceedings under the International Child Abduction Remedies Act. The Committee felt, however, that this issue is best addressed by judicial education rather than by an attempt to establish docket priorities by court rule.

The Committee is considering two possible amendments to Rule 4's treatment of the deadlines for filing notices of appeal. One project arises from the circuits' differing interpretations of the term "timely" in Rule 4(a)(4) (which tolls the time to take a civil appeal "[i]f a party timely files" certain motions). A lopsided circuit split has developed concerning whether a motion filed within a purported extension of a non-extendable deadline under Civil Rules 50, 52, or 59 counts as "timely" under Rule 4(a)(4), and the Committee is considering

whether and how to amend the Rule to answer this question.

A second project concerns Rule 4(c)(1)'s inmate-filing provision for notices of appeal. The Committee is considering amendments to the Rule that might address, *inter alia*, whether an inmate must prepay postage in order to benefit from the inmate-filing rule; whether and when an inmate must provide a declaration attesting to the circumstances of the filing; whether the inmate must use a legal mail system when one exists in the relevant institution; and whether a represented inmate can benefit from the inmate-filing rule.

The Committee is considering two projects that would address requirements for filings in the courts of appeals. The first concerns length limits. The Rules set length limits for briefs using a type/volume formula plus a safe harbor in the form of a (shorter) page limit. But the length limits for rehearing petitions and some other papers are set in pages. The Committee is considering two possible options. One option would replace the page limits with a type/volume-plus-safe-harbor provision modeled on the Rules' length limits for briefs. The other option would set type/volume limits for briefs prepared on computers and would set an equivalent limit, denoted in pages, for briefs prepared without the aid of a computer. The Committee's deliberation also brought to light the potential that the 1998 amendments to Rule 32(a)(7), adopting a type/volume limitation of no more than 14,000 words for a principal brief, may have caused an increase in the length of the average appellate brief. The Committee may consider whether that word count should be adjusted as part of the length-limit project.

The second brief-related project concerns the possibility of addressing amicus filings in connection with petitions for panel rehearing and/or rehearing en banc. The proposal that is under consideration would not require a court of appeals to accept such filings, but would specify length and timing rules for those filings when a court chooses to permit them.

The Committee has on its docket two items concerning appellate jurisdiction that require coordination with other Advisory Committees. One item concerns the possibility of adopting a rule amendment to address the practice of "manufactured finality" – roughly speaking, the practice whereby an appellant seeks to render the ruling on its primary claim final and appealable by dismissing all other remaining claims. There is a conflict in authority about what procedure is sufficient to achieve finality, and this item was the subject of prior discussions in the Civil / Appellate Subcommittee. The Appellate Rules Committee reviewed the topic at its April meeting in an effort to reach a decision on how to proceed. A substantial majority of the committee favored an approach that would amend the Rules to make clear that a party can establish a final judgment only through Federal Rule of Civil Procedure 54(b) or by dismissing with prejudice all remaining claims and parties. This approach appears to be in accord with the majority of the circuits that have addressed dismissals without prejudice and dismissals with "conditional prejudice." The Committee resolved to ask the Civil Rules Committee to consider such a possible amendment.

The second appellate-jurisdiction item arises from the Court's observation in *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100 (2009), and *Swint v. Chambers County Commission*, 514 U.S. 35 (1995), that the rulemaking process is the preferred means for determining whether and when prejudgment orders should be immediately appealable. The committee will perform initial research aimed at determining whether it would be useful and practical to undertake a larger project that might specify by rule the universe of interlocutory orders that should be appealable. Alternatively, the committee may deem it appropriate to consider only the appealability of particular categories of orders that are brought to the committee's attention, such as the attorney-client privilege ruling at issue in *Mohawk Industries*.

Another project that will entail close coordination with the Civil Rules Committee concerns a proposal to amend the Rules to address appeals by class-action objectors. At the April meeting, the Committee heard from proponents of two different approaches. The first proposal would amend Appellate Rule 42 to bar the dismissal of an objector appeal if the objector received anything of value in exchange for dismissing the appeal. The second proposal would authorize the requirement of a cost bond (and the later imposition of costs) reflecting the full costs of delay in implementation of the class settlement as a result of the appeal. Members of the Civil Rules Committee's Rule 23 Subcommittee have agreed that the topic deserves consideration, although they initially expressed reservations about both of these approaches. The Committee intends to study the matter further over the summer and to consult again with the Rule 23 Subcommittee.

MEMORANDUM

DATE: December 5, 2012

TO: Judge Jeffrey S. Sutton, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Judge Steven M. Colloton, Chair
Advisory Committee on Appellate Rules

RE: Report of Advisory Committee on Appellate Rules

I. Introduction

The Advisory Committee on Appellate Rules met on September 27, 2012, in Philadelphia, Pennsylvania. The Committee saluted your work as chair, and wished you well in your new role as chair of the Standing Committee. You kindly invited me to attend the meeting, and I assumed the chair of the advisory committee on October 1, 2012.

At the September meeting, the Committee removed from its agenda three items (concerning sealed appellate filings, criminal appeal deadlines, and pinpoint citations in briefs), and discussed various other items. The Advisory Committee is not presenting any action items for the Standing Committee's January 2013 meeting.

The Committee has scheduled its next meeting for April 22 and 23, 2013, in Washington, DC. Detailed information about the Committee's activities can be found in the Reporter's draft of the minutes of the September meeting and in the Committee's study agenda, both of which are attached to this report.

II. Information Items

The Committee decided not to proceed with a proposed rule amendment concerning the sealing or redaction of appellate briefs. The circuits take varying approaches to sealing and redaction on appeal. In the D.C. and Federal Circuits, litigants are directed to review the record and determine whether any sealed portions should be unsealed at the time of the appeal. In some other circuits, matters sealed below are presumptively maintained under seal in the record on appeal. In the Seventh Circuit, by contrast, the opposite presumption applies: Unless sealing is directed by statute or rule, sealed items in the record on appeal are unsealed after a brief grace period unless a party seeks the excision of those items from the record or unless a party moves to seal those items on appeal.

The Seventh Circuit's approach arises from a strong presumption that judicial proceedings should be open and transparent. During the Committee's discussions, a number of participants expressed support for the Seventh Circuit's approach. But participants also noted that each circuit currently seems happy with its own approach to sealed filings. Ultimately, the Committee decided not to propose a rule amendment on the topic of sealing on appeal. Committee members, however, felt that each circuit might find it helpful to know how other circuits handle such questions. Shortly after the meeting, you wrote to the Chief Judge and Clerk of each circuit to summarize the concerns that have been raised about sealed filings, the various approaches to those filings in different circuits, and the rationale behind the Seventh Circuit's approach.

The Committee removed from its agenda a proposal that Appellate Rule 4(b) be amended to lengthen from 14 days to 30 days the time for a criminal defendant to file an appeal. The Rule allows 30 days for the government to file an appeal. The Committee considered a similar proposal in 2002-04 and decided that no change was warranted. Participants in the September 2012 discussion observed that there are institutional reasons why the government requires more time, and noted that the period between conviction and sentencing provides time for defense counsel to assess possible grounds for appealing the conviction. They also noted that the district court has discretion under Appellate Rule 4(b)(4) to extend the appeal time for good cause a standard that could be met, for example, if defense counsel needs additional time to assess possible grounds for appealing the sentence. In light of these considerations, members did not perceive a need to amend the Rule.

The Committee also removed from its agenda a proposal that Appellate Rule 28(e) be amended "to require a pinpoint citation to the appendix or record to support each statement of fact and procedural history anywhere in every brief," rather than "only in the statement of facts." Members noted that Rule 28 already does require specific citations in the argument section of a brief: Rule 28(a)(9)(A) requires that the argument contain "citations to the . . . parts of the record on which the appellant relies." After discussion, the Committee decided not to proceed with a proposed rule amendment on this topic.

Three existing items were retained on the agenda to await future developments. First, the Committee briefly considered whether the Appellate Rules should be amended in light of the shift to electronic filing and service. In particular, some participants viewed as anachronistic 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. But the discussion did not disclose any aspects of the Appellate Rules that urgently require revision. Committee members noted that it may make sense to wait until the Advisory Committees feel the time is ripe to address these questions jointly.

Second, the Committee revisited the topic of "manufactured finality," which concerns attempts to "manufacture" a final judgment in order to appeal the disposition of one or more claims by dismissing the remaining claims in a case without prejudice or conditionally. The Committee noted that the Supreme Court recently granted certiorari in *SEC v. Gabelli*, 653 F.3d 49 (2d Cir. 2011). In *Gabelli*, the Second Circuit's jurisdiction rested on that circuit's precedent holding that an appealable judgment results if a litigant who wishes to appeal the dismissal of its primary claim dismisses all remaining claims and commits not to reassert those claims if the judgment is affirmed, but reserves the right to reinstate the dismissed claims if the court of appeals reverses. The Committee decided to await the Court's decision in *Gabelli* before deciding what, if anything, to do with respect to the topic of manufactured finality.

Third, the Committee retained on its agenda a proposal to further amend the language of Form 4 (concerning applications to proceed *in forma pauperis*). Proposed amendments to Form 4 are currently before the Supreme Court; if the Court approves them and Congress takes no contrary action, those amendments will take effect December 1, 2013. There was no consensus that another amendment to Form 4 is warranted, but the Committee decided for now to retain the item on the agenda.

The Committee discussed two topics that call for consultation with the Civil Rules Committee. One concerns the treatment of appeal bonds in Civil Rule 62. A Committee member has suggested that it would be useful to clarify a number of aspects of practice under Civil Rule 62. In particular, he notes that Civil Rule 62(b) and Civil Rule 62(d) treat separately the period of time during which postjudgment motions are pending and the period of the appeal itself, and he suggests that it would be preferable to treat both those time periods under one unified framework. As any action on this topic probably would involve an amendment to Civil Rule 62, rather than to an Appellate Rule, it seems unlikely that the matter will proceed unless the Civil Rules Committee deems it worthy of attention.

The other topic concerns appeals by class action objectors. The Committee has received a proposal that Appellate Rule 42 be amended to add a provision that would bar the dismissal of an appeal from a judgment approving a class action settlement or fee award if there is any payment in exchange for the dismissal of the appeal. This proposal implicates themes that previously arose in the Civil Rules Committee's discussions leading up to the 2003 amendments to Civil Rule 23. The proposal to amend Appellate Rule 42, however, would go beyond the provisions of Civil Rule 23(e)(5). Here, too, close consultation with the Civil Rules Committee

will be necessary.

The Committee is considering whether to overhaul the treatment of length limits in the Appellate Rules. Appellate Rules 28.1(e) and 32(a)(7) set the length limits for briefs by means of a type-volume formula, with a (shorter) page limit as a safe harbor. But Rules 5, 21, 27, 35, and 40 still set length limits for other types of appellate filings in pages. Members have reported that the page limits invite manipulation of fonts and margins, and that such manipulation wastes time, disadvantages opponents, and makes filings harder to read. The Committee intends to consider whether the time has come to extend the type-volume approach to these other types of appellate filings.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
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EVIDENCE RULES

MEMORANDUM

DATE: December 7, 2011

TO: Judge Mark R. Kravitz, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Judge Jeffrey S. Sutton, Chair
Advisory Committee on Appellate Rules

RE: Report of Advisory Committee on Appellate Rules

I. Introduction

The Advisory Committee on Appellate Rules met on October 13 and 14, 2011, in Atlanta, Georgia. The Committee discussed a number of existing items, including a proposal to amend Appellate Rule 6 in tandem with proposed amendments to Part VIII of the Bankruptcy Rules. It considered the possibility of a future project to amend the Appellate Rules in the light of electronic filing. And it removed two items from its agenda.

This report does not present any action items for consideration at the Standing Committee's January meeting. In particular, the proposed amendment to Appellate Rule 6 is not yet ready to be presented for approval for publication; rather, the Committee's goal is to finalize that proposal at its April 2012 meeting. But the Committee would welcome the opportunity to obtain the Standing Committee's views on the Rule 6 proposal at the January meeting.

Accordingly, Part II of this report discusses that proposal. Part III describes the Committee's initial discussion of possible amendments to the Appellate Rules in the light of electronic filing. Part IV covers other matters.

The Committee has scheduled its next meeting for April 12 and 13, 2012, in Washington, DC.

Detailed information about the Committee's activities can be found in the Reporter's draft of the minutes of the October meeting[1] and in the Committee's study agenda, both of which are attached to this report.

II. The proposal to amend Appellate Rule 6

As discussed in the report of the Bankruptcy Rules Committee, that Committee is working on a proposal to amend Part VIII of the Bankruptcy Rules – the rules that govern appeals from bankruptcy court to a district court or bankruptcy appellate panel ("BAP"). In connection with that project, the Bankruptcy and Appellate Rules Committees have been working together on a proposal to amend Appellate Rule 6 in order to ensure that Rule 6 dovetails with the amended Part VIII Rules. The Appellate Rules Committee is indebted to the Bankruptcy Rules Committee for its expert input on the Rule 6 proposal. The proposed amendments to Rule 6 would update that Rule's cross-references to the Bankruptcy Part VIII Rules; would amend Rule 6(b)(2)(A)(ii) to remove an ambiguity dating from the 1998 restyling; would add a new Rule 6(c) to address permissive direct appeals from the bankruptcy court under 28 U.S.C. § 158(d)(2); and would revise Rule 6 to take account of the range of methods available now or in the future for dealing with the record on appeal.[2] The first and second of these changes are straightforward, and for that reason are not discussed in this report. The third and fourth of these changes pose drafting challenges; these changes are discussed in Parts II.A and II.B below. II.C sums up by considering whether, despite the challenges discussed in II.A and II.B, it is still worthwhile to proceed with the Rule 6 proposal during the current rulemaking cycle.

A. Proposed new Rule 6(c) concerning direct bankruptcy appeals

The Appellate Rules do not currently address in explicit terms the topic of permissive direct appeals from a bankruptcy court to a court of appeals under 28 U.S.C. § 158(d)(2). 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, because BAPCPA put in place interim procedures for administering the new direct appeals mechanism. Some of those interim procedures were subsequently displaced by the 2008 addition of subdivision (f) in

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[1] These minutes have not yet been approved by the Committee.

[2] A sketch of the proposed amendments to Appellate Rule 6 is enclosed with this report.

Bankruptcy Rule 8001. The Committee now considers it worthwhile to specify in more detail the way in which the Appellate Rules apply to direct appeals under Section 158(d)(2), and the Bankruptcy Rules Committee's Part VIII project provides an opportune context in which to obtain input and guidance on this question.

Proposed Appellate Rule 6(c) would treat the record on direct appeals differently than existing Rule 6(b) treats the record on bankruptcy appeals from a district court or BAP. Rule 6(b) contains a streamlined procedure for redesignating and forwarding the record on appeal, because in the appeals covered by Rule 6(b) 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, Rule 6(c) in the sketch enclosed with this report incorporates the relevant Part VIII rules by reference[3] while making some adjustments to account for the particularities of direct appeals to the court of appeals.

B. Methods for dealing with the record on appeal

Both the Bankruptcy Rules Part VIII project and the project to revise Appellate Rule 6 have highlighted changes in the treatment of the record. The Appellate Rules as they currently exist were drafted on the assumption that the record on appeal would be available only in paper form. Reflecting the fact that the bankruptcy courts were ahead of other federal courts in making the transition to electronic filing, the proposed Part VIII Rules are drafted with a contrary presumption in mind: The default principle under those Rules is that the record will be made available in electronic form. In revising Rule 6(b) and in drafting new Rule 6(c), the Appellate Rules Committee's goal is to adopt language that can accommodate the various ways in which the lower-court record could be made available to the court of appeals – e.g., in paper form; or in electronic files that can be sent to the court of appeals; or by means of electronic links.[4] It is this endeavor that has proven most challenging, and on which the Appellate Rules Committee would particularly welcome input from the Standing Committee.

A description of the Committee's consideration of these challenges can be found in the minutes of the October 2011 meeting. Since the time of that meeting, participants have continued to try to reach consensus on appropriate language. Instead of referring to "forwarding" the record, the enclosed sketch refers to "furnishing" or "providing" the record. That choice among terms is one of the questions the Committee has not yet resolved. An

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[3] The latest drafts of the relevant Bankruptcy Rules are included in Appendix B to the report of the Bankruptcy Rules Committee.

[4] Adopting such language seems generally advisable in the light of the shift to electronic filing; and such language seems particularly salient in the case of proposed Rule 6(c) because – as noted in Part II.A – that Rule will incorporate by reference the Part VIII Rules that deal with the record on appeal.

additional question is whether the text of the Rule should make explicit the range of methods that can constitute "furnishing" or "providing" or whether that level of detail should be left to the Committee Note. Bracketed sentences in proposed Rules 6(b)(2)(C) and 6(c)(2)(B) illustrate ways of addressing this issue in the text of the Rule.

C. Timing of the Rule 6 revision

As noted above, the proposed changes to Rule 6 would adjust that Rule to reflect the ongoing shift to electronic filing. The amended Rule 6 would then differ from the rest of the Appellate Rules (which have not yet been adjusted to take account of electronic filing), and the approach adopted for Rule 6 would have implications for future amendments to the other Appellate Rules. This raises the question whether it is worthwhile to proceed with the Rule 6 amendments without (yet) amending the rest of the Appellate Rules to address electronic filing.

If Rule 6 is revised to refer to "furnishing" or "providing" the record, Rule 6 will stand in contrast to other aspects of the Appellate Rules (which were drafted against a background assumption that the record would be compiled and sent in paper form). Broader terms such as "furnish" or "provide" may eventually become appropriate for use in the context of non-bankruptcy appeals. Part III below discusses the possibility of a broader project to review and revise the Appellate Rules in the light of electronic filing and service. In that broader project, the rules that speak of "retaining," "forwarding," "sending," and "filing" the record or other court documents would warrant review.

Even if the Committee later concludes that it is appropriate to adopt for the other Appellate Rules the new terminology selected for Rule 6, there will presumably be a time lag between the effective date of the Rule 6 revisions and the effective date of the broader electronic-filing-related revisions. That time lag would not be ideal, but it is not a reason to hold back the Rule 6 project. The Appellate Rules already provide a distinctive set of procedures for the treatment of the record in the context of bankruptcy appeals, so one additional difference in terminology does not seem likely to add a great deal more to the confusion that any generalist litigator would experience when encountering a bankruptcy appeal.

There is also a chance that the Committee will later conclude that the terminology adopted for Rule 6 is not suitable for non-bankruptcy appeals. Once again, though such an outcome would not be optimal, the risk does not seem to justify delaying the Rule 6 proposal. In fact, experience with an amended Rule 6 may help to inform the Committee's consideration of broader questions relating to the Appellate Rules' treatment of electronic filing. And the Part VIII project provides an opportunity to obtain comments from the bankruptcy appeals bar in the context of their review of the Part VIII project.

It will, of course, be very important to ensure that the language selected for Appellate Rule 6 will fit with the language employed in the revised Part VIII Rules. The two Committees will continue to work together toward this end. The Standing Committee's guidance on the questions raised here will be of great assistance in the drafting effort.

III. A possible project to amend the Appellate Rules in the light of electronic filing

At its October 2011 meeting, the Committee discussed the possibility of amending the Appellate Rules to take account of the shift to electronic filing and service. Now that almost all circuits accept electronic filings, it seems worthwhile to consider taking up such a project. 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.

There are a significant number of Appellate Rules that could be affected by such a project. As to some of those Rules, one approach might be to add language stating that circuits that permit or require certain filings to be electronic may promulgate local rules prescribing particular technical requirements governing the manner of filing. Of course, such amendments would implicate the usual policy choices concerning when and how to permit or encourage the promulgation of local rules.

In terms of topic areas that might form the focus of an electronic-filing project, several obvious examples come to mind. Provisions that require service by the clerk might no longer be necessary in cases where all parties participate in (and will receive notice through) CM/ECF. The project might also include review of Rule 25's provisions for electronic service and filing as well as Rule 26(c)'s treatment of the three-day rule. As noted in Part II above, one of the most significant changes that CM/ECF may bring to appellate practice concerns 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. In turn, changes in the handling of the record might – but will not necessarily – lead to changes in the nature of any appendix. And some of the Appellate Rules' detailed instructions concerning the format of briefs and other papers may be unnecessary for electronic filings.

Not all of these issues will necessitate 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.

Even this brief overview demonstrates that these issues are unlikely to be unique to the Appellate Rules Committee. The Committee believes that it would be beneficial to coordinate its efforts – on such a project – with those of the other Advisory Committees.

IV. Other information Items

At the October 2011 meeting, the Committee discussed the proposal to amend Rule 29(a) to treat federally recognized Native American tribes the same as states for purposes of amicus filings. Such an amendment would authorize tribes to file amicus briefs without party consent or court leave and (under the structure employed by the current Rule 29) would also exempt tribes from the authorship-and-funding disclosure requirement set by Rule 29(c)(5). The Committee noted that the Eighth, Ninth, and Tenth Circuits have expressed varying views on the desirability of adopting such a provision either in the Appellate Rules or in a local rule. Members also

discussed whether parity of treatment (under Rule 29) should be extended not only to Native American tribes but also to municipalities. Members indicated that it would be helpful to obtain the views of all the circuits on these questions; accordingly, I have written to the Chief Judge of each circuit to seek that input.

The Committee also discussed a proposal to address the sealing or redaction of briefs or record materials on appeal. Although the comment giving rise to this item focused on the difficulties that redacted briefs create for would-be amicus filers, the possible issues concerning sealing on appeal extend more broadly. These issues intersect with the treatment of similar issues in the district court, and with questions considered by other Judicial Conference committees. Thus, any rulemaking response to such questions would require coordination with all affected committees. The circuits currently take a range of approaches to sealing on appeal. The D.C. Circuit and Federal Circuits direct the litigants – at the outset of the appeal – to review the record, reach agreement on whether some or all sealed portions can be unsealed, and present that agreement to the district court. In some other circuits, materials that were sealed in the district court presumptively remain sealed on appeal. By contrast, the Seventh Circuit requires a timely motion to maintain sealing for purposes of appeal. In the light of the diversity of approaches among the circuits, one central question will be whether there is a need for a uniform national rule. An alternative to rulemaking might be an informational project that gathers and shares the current circuit approaches so that each circuit can evaluate its own approach in light of possible alternatives.

The Committee discussed a proposal to amend Rule 28 to authorize the inclusion of introductions in briefs. Members noted that experienced appellate lawyers often include introductions and that such introductions can be useful. Amending Rule 28 to mention the possibility would reflect existing practice and would make that practice more accessible to less sophisticated lawyers. But members also noted possible downsides, such as the possibility that some of the newly-encouraged introductions would be inartful and unhelpful. The Committee plans to discuss this proposal further at its spring meeting. At that point the Committee will also have the benefit of any comments submitted on the related proposal (currently out for comment) to amend Rule 28(a) to consolidate the statements of the case and of the facts.

The Committee removed from its agenda a proposal to amend 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. The Committee's consideration of this proposal was informed by the efforts of the Civil/Appellate Subcommittee, which worked hard to find a way to address this issue without creating unintended problems. In the end, each possible approach had costs that appeared to outweigh its benefits. Most recently, the Committee considered the possibility of recommending to the Civil Rules Committee that Civil Rule 58(a)'s separate document requirement be extended to encompass orders disposing of tolling motions. Serious concerns, however, were raised about such a proposal; in particular, a number of participants worried that the existing levels of district court noncompliance with the separate document requirement would worsen if the requirement were to be expanded. Members questioned the wisdom of amending the Rules to address this issue in the absence of evidence of actual problems caused by the current Rules.

The Committee also removed from its agenda a proposal to amend Rule 4(a)(2) – which concerns relation forward of premature notices of appeal – in response to issues raised by the petition in *CHF Industries, Inc. v. Park B. Smith, Inc.*, 130 S. Ct. 622 (2009). The caselaw on premature notices of appeal includes some circuit splits, but the most notable of those circuit splits are lopsided splits and most of those splits appear likely to resolve themselves without rulemaking action. It proved challenging to draft an amendment that would improve on the status quo, and some members were concerned that if Rule 4(a)(2) were amended to list the scenarios in which current law permits relation forward, it would encourage less careful practices among would-be appellants. Members believed that leaving the practice unspecified in the Rule would allow courts to continue to rescue appeals where relation forward is currently permitted but would not encourage litigants to rely on the availability of such rescues.

The Committee discussed briefly the fact that the Federal Judicial Center's report on appellate cost awards has generated positive changes in some local circuit practices. The Committee reviewed recent certiorari petitions concerning the Appellate Rules, but did not identify any new items that should be added to its agenda at this time.

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

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;

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

(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 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~~ [furnished] [provided] to the 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~~ [Furnishing] [Providing] the r~~R~~ecord.

(i) When the record is complete, the district clerk or bankruptcy appellate panel clerk must number the documents constituting the record and ~~send~~ promptly [furnish] [provide] them ~~them promptly to the circuit clerk together with a list of the documents correspondingly numbered and reasonably identified~~ to the circuit clerk. [For this purpose, a document may be [furnished] [provided] to the circuit clerk either by transferring it (or a copy of it) in paper or electronic form or by supplying the circuit clerk means of electronic

access to it.] [The court of appeals may adopt a local rule defining the acceptable methods for [furnishing] [providing] those documents to the circuit clerk.] ~~Unless directed to do so by a party or the circuit clerk~~ If the record is [furnished] [provided] 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 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.

(ii) All parties must do whatever else is necessary to enable the clerk to assemble and ~~forward~~ [furnish] [provide] the record. When the record is [furnished] [provided] 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 in place of the redesignated record~~, b~~. But any party may request at any time during the pendency of the appeal that the redesignated record be sent.

(D) Filing the r<u>R</u>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~~ <u>When the district clerk or bankruptcy appellate panel clerk has [furnished] [provided] the record, the circuit clerk must note that fact 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</u>.

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

<u>(1) Applicability of Other Rules.</u> <u>These rules apply to a direct appeal by permission under 28 U.S.C. § 158(d)(2), but with these qualifications:</u>

<u>(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;</u>

<u>(B) the last sentence in Rule 5(d)(3) does not apply; and</u>

<u>(C) as used in any applicable rule, "district court" or "district clerk" includes – to the extent</u>

appropriate – a bankruptcy court or bankruptcy appellate panel or its clerk.

(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) **[Furnishing] [Providing] the Record.** Bankruptcy Rule 8010 governs completing and [furnishing] [providing] the record. [But the court of appeals may adopt a local rule defining the acceptable methods for [furnishing] [providing] the record to the circuit clerk.]

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

(D) **Duties of the Circuit Clerk.** When the bankruptcy clerk has [furnished] [provided] the record, the circuit clerk must note that fact 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.

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DRAFT

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 skillfully 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

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

MEMORANDUM

DATE: May 2, 2011

TO: Honorable Lee H. Rosenthal, Chair, Standing Committee on Rules of Practice and Procedure

FROM: Honorable Jeffrey S. Sutton, Chair, Advisory Committee on Federal Rules of Appellate Procedure

RE: Report of the Appellate Rules Advisory Committee

I. Introduction

The Advisory Committee on Appellate Rules met on April 6 and 7, 2011, in San Francisco, California. The Committee approved for publication proposed amendments to Rules 28 and 28.1 and to Form 4, removed four items from its study agenda, and discussed a number of other items. On the second day of the meeting, the Committee met jointly with the Advisory Committee on Bankruptcy Rules.

Part II of this report discusses the proposals for which the Committee seeks publication for comment: proposed amendments to Rules 28 and 28.1 and Form 4. Part III covers other matters.

The Committee has scheduled its next meeting for October 13 and 14, 2011, in Atlanta, Georgia.

Detailed information about the Committee's activities can be found in the Reporter's draft of the minutes of the April meeting[1] and in the Committee's study agenda, both of which are attached to this report.

II. Action Items

The Committee is seeking approval to publish for comment proposed amendments to Rules 28 and 28.1 and Form 4. The proposed amendments to Rule 28(a) revise and combine existing Rules 28(a)(6) and 28(a)(7) into a single requirement that briefs contain a statement of the case and the facts (roughly emulating the approach taken in Supreme Court Rule 24.1(g)). Conforming amendments are proposed to Rules 28(b) and 28.1. The proposed amendments to Form 4 (concerning applications to proceed in forma pauperis ("IFP")) make some technical changes and remove the current Form's requirement of detailed information concerning the IFP applicant's expenditures for legal and other services in connection with the case.

A. Rule 28

The Committee recommends that the Standing Committee approve for publication the proposed amendments to Rule 28 as set out in the enclosure to this report. The proposed amendment would revise Rule 28(a) to remove the requirement of separate statements of the case and of the facts.

Current Rule 28(a)(6) requires "a statement of the case briefly indicating the nature of the case, the course of proceedings, and the disposition below." Current Rule 28(a)(7) requires that the brief include "a statement of facts." Rule 28(a) requires these items to appear "in the order indicated." These dual requirements have confused practitioners. It seems intuitively more sensible to permit the appellant to weave those two statements together and present the relevant events in chronological order. As a point of comparison, Supreme Court Rule 24 does not separate the two requirements; rather, Supreme Court Rule 24.1(g) requires "[a] concise statement of the case, setting out the facts material to the consideration of the questions presented, with appropriate references to the joint appendix, e.g., App. 12, or to the record, e.g., Record 12."

The proposed amendment to Rule 28(a) would consolidate subdivisions (a)(6) and (a)(7) into a new subdivision (a)(6) that provides for one "statement." The proposed new Rule 28(a)(6) would allow the lawyer to present the factual and procedural history chronologically, but would also provide flexibility to depart from chronological ordering. Conforming changes would be made by

[1] These minutes have not yet been approved by the Committee.

renumbering Rules 28(a)(8) through (11) as Rules 28(a)(7) through (10), and by revising Rule 28(b)'s discussion of the appellee's brief.

B. Rule 28.1

The Committee recommends that the Standing Committee approve for publication the proposed amendment to Rule 28.1 as set out in the enclosure to this report. The proposed amendment complements the amendment to Rule 28 by making conforming changes to Rule 28.1 (concerning cross-appeals).

C. Form 4

The Committee recommends that the Standing Committee approve for publication the proposed amendments to Form 4 as set out in the enclosure to this report. Appellate Rule 24 requires a party seeking to proceed IFP in the court of appeals to provide an affidavit that, inter alia, "shows in the detail prescribed by Form 4 ... the party's inability to pay or to give security for fees and costs." (Likewise, a party seeking to proceed IFP in the Supreme Court must use Form 4. *See* Supreme Court Rule 39.1.) The proposed amendments would substitute one revised question for two of the questions on the current Form 4: Question 10 – which requests the name of any attorney whom the litigant has paid (or will pay) for services in connection with the case, as well as the amount of such payments – and Question 11 – which inquires about payments for non-attorney services in connection with the case.

Questions 10 and 11 have been criticized by commentators and those questions seek information that seems unnecessary to the IFP determination. Some commentators have suggested that Questions 10 and 11 might in some circumstances seek disclosure of information protected by attorney-client privilege and/or work product immunity. Research by the Committee's reporter suggested that though the information solicited by Questions 10 and 11 is relatively unlikely to be subject to attorney-client privilege, it may sometimes constitute protected work product. The Committee also discussed the possibility that even if the information solicited by Questions 10 and 11 is not privileged or protected, its disclosure could as a practical matter disadvantage some IFP litigants. In any event, the function of Form 4 is to provide the information necessary to determine whether the applicant is unable "to pay or to give security for fees and costs," Fed. R. App. 24(a)(1)(A). Neither the Committee's own deliberations and research nor informal discussions with the Supreme Court Clerk's Office have disclosed any reason to think that it is necessary to obtain all of the information currently sought by Questions 10 and 11. Accordingly, the proposed amendment would replace Questions 10 and 11 with a new Question 10 that would read: "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 proposed amendments would also 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.

III. Information Items

The Committee's joint meeting with the Bankruptcy Rules Committee provided a beneficial opportunity for the two Committees to discuss the proposed revisions to Part VIII of the Bankruptcy Rules (dealing with bankruptcy appeals) and related revisions to Appellate Rule 6. The Committees plan to continue their collaboration on these matters.

The Committee has continued to work jointly with the Civil Rules Committee, through the Civil / Appellate Subcommittee. At its spring meeting, the Appellate Rules Committee discussed the Subcommittee's work on a proposal to amend Appellate Rule 4(a)(4) to adjust its treatment of the time to appeal after the disposition of a tolling motion, and also discussed the Subcommittee's work on a proposal to address the doctrine of "manufactured finality."

The Rule 4(a)(4) proposal arises from the observation that under 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 restarted appeal time. At its fall 2010 meeting, the Appellate Rules 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. The Committee now has before it a proposal to address the problem from another angle, by suggesting to the Civil Rules Committee that Civil Rule 58(a)'s separate document requirement be extended to encompass orders disposing of tolling motions. Further discussion in the Civil / Appellate Subcommittee and with the Civil Rules Committee will be needed in order to fully assess the costs and benefits of such a course. The main potential downside would appear to be the already troublesome degree of noncompliance with the existing separate document requirement.

The manufactured finality project concerns the doctrines that govern a litigant's attempt to "manufacture" a final judgment in order to take an appeal when the district court has disposed of fewer than all claims in an action. At the Appellate Rules Committee's spring meeting, members of the Civil / Appellate Subcommittee updated the Committee on the Subcommittee's discussions of this topic. There is consensus on the Subcommittee that a dismissal of the remaining claims with prejudice should produce finality for appeal purposes. As to dismissals of the remaining claims 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 yet reached consensus is how to treat conditional-prejudice dismissals – i.e., situations in which the would-be appellant dismisses the remaining claims subject to a right to reassert them if, and only if, the court's dismissal of the other claims is reversed or vacated on appeal. The Appellate Rules Committee decided to ask

the Subcommittee to try to formulate a concrete proposal on the topic of manufactured finality for consideration in the fall.

The Committee considered the Federal Judicial Center's report on the amount of appellate costs awarded under Appellate Rule 39. The Committee had asked the FJC to investigate this topic in response to concerns raised about the taxation of costs by the Fourth Circuit in the case of *Snyder v. Phelps*, 580 F.3d 206 (4th Cir. 2009), *aff'd*, 131 S. Ct. 1207 (2011). The FJC study found that circuits differ in their approach to printing costs, and that this variation produces significant differences in the size of possible cost awards. The Committee plans to share the FJC report with the Chief Judges and Clerks of each Circuit. The Committee also discussed its ongoing review of the caselaw interpreting Appellate Rule 4(a)(2), which addresses premature notices of appeal in civil cases. Recent caselaw developments have suggested that some existing circuit splits may be lessening. The Committee decided to continue work on a proposal to amend Rule 4(a)(2), while also monitoring the caselaw for further developments. The Committee took up a new agenda item relating to redactions in appellate briefs. An attorney with the Public Citizen Litigation Group has raised a concern that such redactions are often insufficiently justified and that they impede meaningful briefing by amici. The Committee plans to confer with the Civil Rules Committee concerning principles that should govern the treatment of sealed documents on appeal.

The Committee removed four items from its study agenda. One item related to concerns raised by Public.Resource.Org about the presence of alien registration numbers in federal appellate opinions. The Standing Committee's Privacy Subcommittee considered these concerns at length and concluded that alien registration numbers should not be added to the list of items for which the national Rules require redaction. In the light of this conclusion, the Appellate Rules Committee decided to remove this item from its agenda. Another item arose from *Vanderwerf v. Smithkline Beecham Corp.*, 603 F.3d 842 (10th Cir. 2010), which held that the withdrawal of a Civil Rule 59(e) motion deprived that motion of tolling effect and rendered the movant's appeal untimely. Members were chiefly concerned about the possible effects of this ruling on situations in which a non-movant has relied on the tolling effect of a post-judgment motion that is subsequently withdrawn. Because no decision has applied *Vanderwerf* to an appeal by a non-movant, the Committee concluded that the decision did not warrant further consideration at this time. A third item concerned a suggestion that the Appellate Rules be amended to address intervention on appeal. No consensus emerged in favor of amending the Rules to address this issue. The fourth item removed from the Committee's agenda arose from a suggestion that Appellate Rule 32(a)(7)(B)(iii) be amended to exempt from the type-volume limitation for briefs the statement of interest required of amici by Appellate Rule 29(c)(4).

At its fall 2011 meeting, the Committee expects to continue its consideration of a number of other projects, including a proposal to treat federally recognized Native American tribes the same as states for the purpose of amicus filings. Another project concerns possible rulemaking responses to the Court's decision in *Mohawk Industries, Inc. v. Carpenter*, 130 S. Ct. 599 (2009), which held that a district court's attorney-client privilege ruling did not qualify for an immediate appeal under the collateral order doctrine.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE**

RULE 28. BRIEFS

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

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

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

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

(4) a jurisdictional statement, including:

(A) the basis for the district court's or agency's subject-matter jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction;

(B) the basis for the court of appeals' jurisdiction, with citations to applicable statutory

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

provisions and stating relevant facts establishing jurisdiction;

(C) the filing dates establishing the timeliness of the appeal or petition for review; and

(D) an assertion that the appeal is from a final order or judgment that disposes of all parties' claims, or information establishing the court of appeals' jurisdiction on some other basis;

(5) a statement of the issues presented for review;

(6) a concise statement of the case ~~briefly indicating the nature of the case, the course of proceedings, and the disposition below;~~

~~(7) a statement of~~ 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));

~~(8)~~ (7) 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;

~~(9)~~ (8) the argument, which must contain:

(A) appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies; and

(B) for each issue, a concise statement of the applicable standard of review (which may appear in the discussion of the issue or under a separate heading placed before the discussion of the issues);

~~(10)~~ (9) a short conclusion stating the precise relief sought; and

~~(11)~~ (10) the certificate of compliance, if required by Rule 32(a)(7).

(b) Appellee's Brief. The appellee's brief must conform to the requirements of Rule 28(a)(1)-~~(9)~~ (8) and ~~(11)~~ (10), 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;

(3) the statement of the case;

~~(4) the statement of the facts;~~ and

~~(5)~~ (4) the statement of the standard of review.

* * *

Committee Note

Subdivision (a). Rule 28(a) is amended to remove the requirement of separate statements of the case and of the facts. Currently Rule 28(a)(6) provides that the statement of the case must "indicat[e] the nature of the case, the course of proceedings, and the disposition below," and it precedes Rule 28(a)(7)'s requirement that the brief include "a statement of facts." Experience has shown that these requirements have generated confusion and redundancy. Rule 28(a) is amended to consolidate subdivisions (a)(6) and (a)(7) into a new subdivision (a)(6) that provides for one "statement." This permits but does not require the lawyer to present the factual and procedural history chronologically. Conforming changes are made by renumbering Rules 28(a)(8) through (11) as Rules 28(a)(7) through (10).

Subdivision (b). Rule 28(b) is amended to accord with the amendment to Rule 28(a). Current Rules 28(b)(3) and (4) are consolidated into new Rule 28(b)(3), which refers to "the statement of the case." Rule 28(b)(5) becomes Rule 28(b)(4). And Rule 28(b)'s reference to certain subdivisions of Rule 28(a) is updated to reflect the renumbering of those subdivisions.

RULE 28.1. CROSS-APPEALS

* * *

(c) Briefs. In a case involving a cross-appeal:

(1) Appellant's Principal Brief. The appellant must file a principal brief in the appeal. That brief must comply with Rule 28(a).

(2) Appellee's Principal and Response Brief. The appellee must file a principal brief in the cross-appeal and must, in the same brief, respond to the principal brief in the appeal. That appellee's brief must comply

with Rule 28(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 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 must comply with Rule 28(a)(2)-~~(9)~~ (8) and ~~(11)~~ (10), 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;

(C) the statement of the case;

~~(D) the statement of the facts;~~ and

~~(E)~~ (D) the statement of the standard of review.

(4) Appellee's Reply Brief. The appellee may file a brief in reply to the response in the cross-appeal. That brief must comply with Rule 28(a)(2)-(3) and ~~(11)~~ (10)

and must be limited to the issues presented by the cross-appeal.

Committee Note

Subdivision (c). Subdivision (c) is amended to accord with the amendments to Rule 28(a). Rule 28(a) is amended to consolidate subdivisions (a)(6) and (a)(7) into a new subdivision (a)(6) that provides for one "statement of the case setting out the facts relevant to the issues submitted for review and identifying the rulings presented for review...." Rule 28.1(c) is amended to refer to that consolidated "statement of the case," and references to subdivisions of Rule 28(a) are revised to reflect the re-numbering of those subdivisions.

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

* * * * *

1. *For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.*

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Employment	$_____	$_____	$_____	$_____
Self-employment	$_____	$_____	$_____	$_____
Income from real property (such as rental income)	$_____	$_____	$_____	$_____
Interest and dividends	$_____	$_____	$_____	$_____
Gifts	$_____	$_____	$_____	$_____
Alimony	$_____	$_____	$_____	$_____
Child support	$_____	$_____	$_____	$_____
Retirement (such as social security, pensions, annuities, insurance)	$_____	$_____	$_____	$_____
Disability (such as social security, insurance payments)	$_____	$_____	$_____	$_____
Unemployment payments	$_____	$_____	$_____	$_____
Public-assistance (such as welfare)	$_____	$_____	$_____	$_____
Other (specify): _____	$_____	$_____	$_____	$_____

Total monthly income: $_____ $_____ $_____ $_____

2. *List your employment history <u>for the past two years</u>, most recent employer first. (Gross monthly pay is before taxes or other deductions.)*

Employer	Address	Dates of employment	Gross monthly pay
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

3. *List your spouse's employment history <u>for the past two years</u>, most recent employer first. (Gross monthly pay is before taxes or other deductions.)*

Employer	Address	Dates of employment	Gross monthly pay
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

4. *How much cash do you and your spouse have? $_____*

Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
_____	_____	$_____	$_____
_____	_____	$_____	$_____
_____	_____	$_____	$_____

If you are a prisoner <u>seeking to appeal a judgment in a civil action or proceeding</u>, you must attach a statement certified by the appropriate institutional officer showing all receipts, expenditures, and balances during the last six months in your institutional accounts. If you have

multiple accounts, perhaps because you have been in multiple institutions, attach one certified statement of each account.

* * * * *

~~*10. HHave you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form?* ☐ Yes ☐ No~~

~~If yes, how much? $_____~~

~~If yes, state the attorney's name, address, and telephone number:~~

~~_____~~

~~_____~~

~~_____~~

~~*11. HHave you paid – or will you be paying – anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?*~~

~~☐ Yes ☐ No~~

~~If yes, how much? $_____~~

~~If yes, state the person's name, address, and telephone number:~~

~~_____~~

~~_____~~

~~_____~~

10. *Have you spent – or will you be spending – any money for expenses or attorney fees in connection with this lawsuit?*

☐ Yes ☐ No

If yes, how much? $_____

~~12.~~ 11. *Provide any other information that will help explain why you cannot pay the docket fees for your appeal.*

~~13.~~ 12. *State the city and state of your legal residence.*

_____

Your daytime phone number: (____) _____

Your age: _____ Your years of schooling: _____

Last four digits of your social-security number: _____